THE

ALL INDIA REPORTER

1953

[Vol. 40]

DONATED
BY
SHRI AMAR NATH AINA
(1910-1980)
Former Advocate General,
Jammu and Kashmir.

CALCUTTA SECTION

WITH COMPARATIVE TABLE FOR

89 & 90 CALCUTTA LAW JOURNAL

CITATION : A. I. R. (40) 1953 CALCUTTA

PUBLISHERS
THE ALL INDIA REPORTER. LTD.,
NAGPUR, M. P.
1953

Printed by L. MELA RAM, at the All India Reporter Press, Nagpur, and Published by D. V. CHITALEY, B.A., LL.B., Advocate, for the All India Reporter Ltd., at Congress Nagar, Nagpur.

(All Rights Reserved.)

CALCUTTA HIGH COURT

1953

CHIEF JUSTICE :

The Hon'ble Shri Phanibhusan Chakravartti, M.A., LL.B.

PUISNE JUDGES :

The Hon'ble Shri Gopendra Nath Das, M.A., LL.B.
" " Rama Prosad Mukerjee, M.A., LL.B.
" " Kamal Chunder Chunder, B.A. (Cal.) M.A. *(Oxon)*, I.C.S., Barrister-at-law.
" " Kulada Charan Das Gupta, M.A., I.C.S., Barrister-at-law.
" " Surajit Chandra Lahiri, M.A., LL.B.
" " Subodh Ranjan Das Gupta, Barrister-at-law.
" " Prasanta Bihari Mukharji, Barrister-at-law.
" " Amal Kumar Sarkar, Barrister-at-law.
" " Jyoti Prakash Mitter, M.A. *(Oxon)*, Barrister-at-law.
" " Braja Kanta Guha, B.A. (Cal.), I.C.S.
" " Himansu Kumar Bose, Barrister-at-law.
" " Ranadhir Singh Bachawat, Barrister-at-law.
" " Deep Narayan Sinha, Barrister-at-law.
" " Paresh Nath Mukerjee, M.A., LL.B.
" " Sailendra Nath Guha Ray, I.C.S.
" " Sisir Kumar Sen, M.A. (Punjab), I.C.S.
" " Renupada Mukherjee, M.A., LL.B.
" " Debabrata Mookerjee, M.A., LL.B.
" " Gopendra Nath Mitter, Barrister-at-law.

ADVOCATE-GENERAL :

Shri S. M. Bose, Barrister-at-law.

STANDING COUNSEL :

Shri S. Banerjee, Barrister-at-law.
" A. K. Sen, Barrister-at-law *(Junior)*.

GOVERNMENT PLEADERS :

Shri Hemendra Kumar Das, M.A., B.L. *(Senior)*.
" Jajneswar Majumdar, M.L. *(Asst.)*

REPORTERS :

Shri Monindra Nath Mukerji, B.L., Advocate, Calcutta.
" Subodh Chandra Basak, M.Sc., B.L., Advocate, Calcutta.
" Smriti Kumar Rai Chaudhury, B.L., Advocate, Calcutta.
" Nirmal Chandra Sen, Advocate.
" H. N. Ghosh, M.A., LL.B., Bar-at-law.
" S. K. Mukherjea, M.A. *(Oxon)*, B. Litt. *(Oxon)*, Bar-at-law.

EDITORIAL COMMITTEE :

DR. SIR M. V. JOSHI, KT., K.C.I.E., LL.D., Ex-law Member, C. P. Government, Nagpur.
SHRI V. V. CHITALEY, B.A., LL.B., Senior Advocate, Supreme Court of India, Bombay.

EDITORIAL STAFF :

SHRI S. APPU RAO, B.A., B.L., Advocate, (Madras), *Chief Editor*.
" D. V. CHITALEY, B.A., LL.B., Advocate, *Joint Editor*.
" V. S. BALKUNDI, B.A., LL.B., *Assistant Editor*.
" V. B. BAKHALE, M.A., LL.B., *Assistant Editor*.
" R. K. MANOHAR, B.A. LL.B., Advocate, Supreme Court of India, Nagpur.
" M. D. RAO, Advocate (Bombay).
" D. W. CHITALEY, B.A., LL.B., Pleader.

NOMINAL INDEX

Abanti Pramanik v. The State 626
Abdul Hamid v. The State of West Bengal 223
Abinash Chandra v. Shree Sree Iswar Dharamraj 194
Agrasen Stores v. Ramrichpal Jhunjhunwala 379
Ahmed Hossain v. Aswini Kumar 542
Ajayananda Paul v. Indian Homoeopathic Medical Association 116
Ajay Kumar v. Pramatha Kumar 772
✠Ajit Kumar v. Surendra Nath (FB) 733
Ajit Kumar Addy v. S. M. Maitra 653
Albion Jute Mills Co. Ltd. v. Jute and Gunny Brokers Ltd. 458
Amal Krishna v. Chandi Charan 145
Amarendra Chandra v. Narendra Kumar 114
Ambalal Purusottamdas and Co. v. Jawarlal Purusottam 758
Ananda Sankar v. Chief Secretary to the Government of West Bengal 129
Anil Kumar v. The State 408
Anil Kumar Samanta v. The State 476
Annada Prosad v. Manotosan Roy 503
Annapoorna Farming and Fishery Ltd. v. State of West Bengal 756
Anumati Sadhukhan v. Assistant Regional Controller, Procurement, Alipur 187
Arabinda Dey v. State 206
Ashutosh Banerjee v. Debjyoti Burman 227
Assam Bengal Cement Co. Ltd., Calcutta v. Commissioner of Income-tax, West Bengal, Calcutta 368
Atindra Nath v. G. F. Gillett 763
Atul Chandra Roy v. Sm. Charubala Dasi 466
Atulya Kumar v. The Director of Procurement and Supply 548
Badri Prasad v. The State 394
Badri Prosad v. State 28
Bamapati Bhattacharjya v. Sm. Laxshmi Bibi 780
Banarashi Lal v. The State 322
Bank of Calcutta Ltd. v. Dhirendra Nath Roy 325
Basanta Kumar v. Kenaram 593
Bata Shoe & Co. Ltd. v. Narayan Das Mullick 234
Bharat Chandra v. Gour Chandra 95
Bholanath Dhar v. Gour Gopal 777
Bhudarmull v. Uma Shankar Purushottamdas & Co. 618
Bhupat Rai and Co. v. Bhikhum Chand Sugan Chand 93
Bhupesh Chandra v. Dr. M. N. Bose 198
Bhutnath Das v. Satish Chandra 597
Bibhuti Bhusan v. Damodar Valley Corporation 581
Bibhuti Bhusan v. Shib Krishna 624
Bijoy Ranjan v. B. C. Das Gupta 289
Bilash Chandra v. Balmer Lawrie and Co. Ltd. 613
Bipra Charan v. Sm. Rupeswari Das 682
Birdhaj Roy v. The State 491
Birendra Nath v. Shibaram Aditya 282
Birendra Nath v. Union of India 595
Birla Jute Manufacturing Co. Ltd. v. Dulichand Pratapmull 450
Bishno Charan v. Birendra Krishna 261
Bishnupada Mondal v. Dwijabar Mondal 241
Brindaban Ghose v. Jiban Chandra 239
Brojendra Narayan, *In the Goods of* 606
Brojobala Dassi v. Shebaits of Sri Sri Saradia Durgamata Thakurani 285
Cacacie, Mrs. v. S. Sardar Ali 585
Calcutta Insurance Ltd. v. Commr. of Income-tax 59
Calcutta Motor Cycle Co. v. Union of India 1
Chairman, Budge Budge Municipality v. Mongru Mia (SB) 433
Champalal Lunia v. Sm. Gulab Devi 348
Chandubhai v. River Steam Navigation Co. Ltd. 547
Charusila Dassi v. Madan Theatres Ltd. 536
Chatterjee, A. N. v. Sampatmull Bothra 47
Chhatu Lal v. Panchanan 755
Chillu Kahar v. Burn & Co. Ltd. Howrah 516
Chitra Devi v. Badri Bisal 125
Chunder, P. C. v. Ram Asis Ram Nonia 336
Cohen R. Mrs. v. S. J. Ejekiel 284
Commr. of Income-tax, v. Administrator-General of Bengal 329
Commr. of Income-tax v. General Family Pension Fund 299
Commr. of Income-tax v. International Industries Ltd., Calcutta 127
Corporation of Calcutta v. Chandoolal 773
Corporation of Calcutta v Sailendra Nath 202
Corporation of Calcutta v. S. B. Trading Co. Ltd 506
Darpa Hari v. Samarendra Nath 632
Das Gupta, B. C. v. Bijoyranjan Rakshit 212
De P. P. & Co., *In re* 309
Debendra Nath v. Sm. Parul Bala 233
Dhajadhari Chatterjee v. Nitya Nanda Roy 102
Dhakuria Banking Corporation Ltd. v. Sm. Surabala Debi 610
Dhananjoy Mallick v. Annada Charan 715
Dharani Dhar v. Mrityunjoy Mukherjee 365
Dudhewalla & Co. Ltd. v. Govindram Rameswarlal 13
Dulal Chandra Chatterjee v Gosthabehari Mitre 259
Dulal Chandra Mondal v. State 238
Durjendra Krishna v. K. Shaw 147
Dwijendra Nath Singh v. Govinda Chandra 497
✠Edward Ezra v. The State 263
Fernandez v. State 219
Ganendra Kumar v. Narayan Chandra 562
Ganesh Jute Mills Ltd. v. Commercial Tax Officer 324
Ganeshmull Surana v. Nagraj Surana 294
Garibulla Mondal v. Ismail Mondal 337
Gellatly D. R. v. J. R. W. Cannon 409
✠Ghosh P. K. v. Mrs. K. Dutt 589
Gita Mitra Sm. v. S. P. Ghose 297
Gobordhan Dutta v. Promotha Nath 412
Gopal Mistri v. Madan Gopal 752
Gour Gopal Mukherjee v. Chief Secretary to the Govt. of West Bengal 81
Gouripada v. S. Banerjee 704
Gouri Sankar v. Anil Chandra 671
Great American Insurance Co. Ltd. v. Hindusthan Flashlight Mg. Co. Ltd. 474
Gulzarilal Kanoria and Co. v. Busi and Stephenson Ltd. 621
Hakir Mahamed v. Abdul Majid 588
Harinarayan v. Gobardhandas 140
Hari Narayan Das v. The State 496
Hemanta Kumar v, N. N. Sen Gupta 504
Hem Bala Dassi v. Sundar Shaw 627
Hind Estate Ltd. v. Ansar Ahmed 54
Hind Estate Ltd. v. Grant James Ltd. 20
Hridoy Krishna v. Mrinal Bala 782
Hrisikesh v. Brojendra Mohan 731
Hub Lal Shaw v. Prem Raj Lala 94
Hussain Sk. v. The State 383
Income-tax Officer, Companies District 1, Calcutta v. Calcutta Discount Co., Ltd. 721
India Hosiery Works v. Bharat Woollen Mills Ltd. 488
Indian Electric Works Ld. v. Bhabataran Sinha 390
Indian Spinning Mills Ltd. v. His Excellency Lt. General Madan Shamsher Jang Bahadur Rana 855

Indra Kumar v. Sundardas Thackersey & Bros 570
Ispahani M. K. Ltd. v. Commissioner of Excess Profits Tax 314
Jagdish Chandra v. Corporation of Calcutta 706
Jamini Khan v. Dhirendra Nath 762
Jatindra Nath v. Krishnadhan 34
Jatindra Nath v. Malai Ram 352
Jogai Chamarin v. Atul Krishna 770
Joneja, K. S. v. P. M. Das Gupta 361
✣Jugaldas Damodar Modi & Co. v. Pursottam Umedbhai & Co. 690
Jyoti Bhusan Das v. The State 457
Kalipada Jotedar v. Bimal Kumar 312
Kali Prosad v. Jagadish Pada 149
Kamala Bala v. Amulya Kumar 714
Kamala Sundari Dassi v. Nilmony Das 343
Kamarhatty Co. Ltd. v. Abdul Samad 74
Kanai Hizra v. Golap Hizra 197
Kanhaiyalal Jhanwar v. Pandit Shirali and Co. 526
Kartick Chandra v. The Corporation of Calcutta 87
Kashinath Das v Kalipada Das 12
Kazem Sardar v. The State 425
Kesoram Cotton Mills Ltd. v. Bal Govind 667
Khagendra Nath v. Junior Assessor Procurement P. S. Sonarpur 719
Khudiram v. The State 573
Ko-Ku-La Ltd., In the matter of 387
Krishna Chandra v. Panchu Ghosh 720
Krishna Lal v. Manindra Nath 231
Kshitish Kumar v. State of Bihar 639
Lalchand & Sons v. Corporation of Calcutta 428
Land Customs Inspector Central Preventive Circle v. Jagannath Bhandar 663
Lankeswar Haldar v. Ram Gopal Das 323
Latikabala Dasi v. Anil Behari Ghose 103
Mafazzal Hossain v. Mt. Ayesha Bibi 126
Mahalakshmi Debi v. Bama Charan Nandi 42
Maharajadhiraja Bahadur of Darbhanga v. Commissioner of Agricultural Income tax West Bengal 344
Mahomed Ali v. The State 681
Mahomed Safi v. Union of India 729
Major Soap Co. Ltd. v. Assistant Commissioner of Commercial Taxes, Calcutta 712
Makhanlal Dr. v. Ram Bhakat 485
Makhan Lall v. Sm. Sushama Rani 164
Makhanlal Roy v. Pramathanath Basu 50
Mandal Ghat Zemindary Syndicate Ltd. v. Gour Mohan 509
Mangru Meya v. Commissioners of the Budge Budge Municipality 333
Manicklal Mondal v. The State 341
Manindra Nath v. Anil Chandra 689
Manindra Nath v. Radhasyam 676
Manmull Jain v. N. C. Putatunda 363
Marzia Khatun Saheba v. Srimanta Kumar 315
Mehtab Chand v. Shriratan Mohta 367
Miah Maulvi v. Sashanko Mohan 600
Mohari Lall v. The Corporation of Calcutta 561
Monjur Mondal v. Ahammad Mondal 155
Monoranjan Roy v. Collector of Customs 753
Moran and Co. Ltd. v. Anderson Wright Ltd. 477
Mrityunjoy Chakravartti v. Provat Kumar Pal 153
Mulchand v. The State 492
Mulchand Bulakhidas v. Arya Bandhu Ltd. 424
Muralidhar Kulthia v. Sm. Tara Dye 349
Murulidhar Agarwalla v. Rupendra Mitter 321
Naba Kumar v. S Banerjee 96
Nagendra Bala Debi v. Provash Chandra 185
Nagendra Bhusan v. Mrs. M. Parker 465
Nalin Chandra v. Bejoy Ranjan 53
Nanda Dulal v. Bisseswar 177
Nand Kishore v. International Mercantile Corporation (India) Ltd. 415
Nani Lal De v. Tirthalal De 513
Narayan Chandra v. Ananda Bisni 508
Narayanprosad v. The Indian Iron & Steel Co. Ltd. 695
National Industries v. Sassoon Rice Mills Ltd. 381
National Iron and Steel Co. Ltd. v. Monorama Dassi 143
Nazir Hussain v. The State 79
Nihar Kumari Debi v. Commissioner of Police (FB) 179
Nilkantha v. Jitendra Nath 515
Nirmal Chakravarti v. Land Acquisition Collector, Alipur 257
Nirmal Chandra v. Gopal Chandra 150
Nisbikanta Das v. Jnanendra Nath 565
Nishikanta Ghosh v. The Corporation of Calcutta 401
Nitish Chandra v. Promode Kumar 18
Nityananda Ghose v. Rajpur Chhaya Bani Cinema Ltd. 208
Nityananda Roy v. Rashbehari Roy 456
Nrisingh Prosad v. Steel Products Ltd. 15
Nrisinha Kumar Sinha v. The Returning Officer for the Constituency of Barwan Khargram 98
Nur Mohammad v. Seraj 216
Official Trustee of West Bengal v. Monmothonath Sadhukhan 499
Panchanan Das v. Jagannath Prasad 201
Panchanan Maity v. State 798
Panchkori v. State of West Bengal 568
Panchu Gopal v. Corporation of Calcutta 410
Panchu Gopal v. Jogen Naskar 594
Pankaj Kumar v. Commr., Burdwan Division 587
Panmal v. Omraomal 244
Phanibhusan Mondal v. B. L. Ghose 579
Platts, A. E. v. State 108
Prafulla Nalini v. The State 560
Premlatika Sircar, Sm. v. Provash Ch. Sircar (SB) 242
Probhat Kumar v. Latika Debi 196
Probodh K. Sarkar v. Union of India 385
Pulin Behari v. Byomkesh Mitra 40
Pulin Behari v. Divisional Superintendent, Sealdah East Indian Rly. 45
Pulin Krishna Dutt v. Satyaranjan 599
Pulin Krishna Paul v. Sishupati Chakravarty 85
Punyendra Narayan v. Bhairabendra Narayan 710
Puran Chand v. Md. Latiff 566
Purna Chandra v Sarojendra Kumar 251
Radha Ballav Jiu Thakur v Shebaits of Sri Sri Iswar Lakshmi Janardan Thakur 398
Radha Nath v. The State 602
Radharani v. Sisir Kumar 524
Raj Bahadur v. Legal Remembrancer 522
Raj Kumar Shaw v. Dominion of India 235
Rajlakshmi Devi v. State 154
Ramani Mohan v. Jogesh Chandra Das 771
Ram Chandra v. Madhab Nayek 484
Ramchandra v. Sachindra Kumar 184
Ram Dayal v. Corporation of Calcutta 76
Ramesh Chandra v. Director General of Observatories 767
Ramesh Chandra v. State of West Bengal 188
Ramesh Chandra Nath v. Santi Chemical Works 407
Ramnath Narendranath v. Nanjee Shamjee & Co. 787
Ram Ratan v. Amulya Charan 232
Ramrichpal Jhunjhunwalla v. Jagadish Prosad Laloo Prosad 243
Ram Saran v. The State 406
Ramtaran Das v. Adhar Chandra Das 646
Ranjit Shaw v. Samarendrajit Shaw 797
Rebati Ranjan v. Umaprasanna 574
✣Rosetta Evelyn Attaullah, Mrs. v. Justin Attaullah (SB) 530
Sachindra Nath v. Lilabati Das 580
Sailabala Dasi v. Sarat Chandra 625
Sajjad Hossain v. Askari Mirza 791
Samarendra Nath v, Corporation of Calcutta 327
Samarendra Prosad v. University of Calcutta 172
Samir Kumar v. Someswar Mukherjee 783
Santa Bala v. Sashi Bhusan 332

Saralabala Devi, Sm. v. Shyam Prosad 765
Sarat Chandra v. Panchanan 471
Saranka Sekhar v. Charu Chandra 669
Satipada Chatterjee v. Annakali Debya 462
Satish Chandra, Dr. v. R. N. Bose 520
Satish Chandra v. State of West Bengal 392
Sattar v. Joint Chief Controller of Imports and Exports 591
✠Satya Charan v. Asutosh 657
Satya Charan v. Rudrananda Giri 716
Satyahari Choudhury v. The State 661
Satya Prasad v. Panchugopal 686
Satyaprasad v. Subodh Chandra 672
Sen Gupta, D. K. v. Ananta Lal 414
Sew Sankar Lal v. Bejoy Krishna 218
Shew Moni Shaw v. The State 634
Shib Chandra v. The State 475
Shew Sakti Oil Mills Ltd. v. Corporation of Calcutta 384
Soshi Kumar v. A. W. Hill 195
Sreedam Chandra v. Tencori Mukherjee 222
Sripati Duley v. State 10
✠State v. Abdul Rahaman 792
Subala Devi v. Corporation of Calcutta 357
Subal Chandra Kundu v. State of West Bengal 650
Subodh Bala v. State of West Bengal 702
Subodh Ranjan v. Major N. A. O'Callaghan 319
Suburban Bank Ltd., In the matter of 487
Sudhindra Nath v The State 339
Sudhir Kumar v. The State 226
Sukdeo Singh v. Corporation of Calcutta 41
✠Sukhendu Bikash v. Hare Krishna 636
Surendra Nath v. Dandiswami Jagannath Asram 687
Surendra Nath v. Tarasashi 800
Surendra Nath Sarkar v. Mahabir Roy 36
Suresh Chandra v. Himangshu Kumar Roy 316
Surja Kumar v. Manmatha Nath 200
Susamarani Debi v. Udai Chand 328
Taherbhoy Feedaally v. I. Ibraham 507
Talapatra, S. N. v. Bengal Bonded Ware House Association 598
Tarakdas Dutta v. Sarat Chandra 335
Tarapada v. Sailendra Nath 583
Taru Bala Roy v. The State 307
Tarulata Devi, Sm. v. Bibhuti Bhushan Roy 467
Tulsibala Rakhit v. N. N. Khosal 109
Tulsiram Shaw v. R. C. Pal Ltd. 160
Turu Majhi v. The State 397
Udaychand Mahatab v. Gopinath Reja 236
Udaycha d Mahatab v. Rammoy Hajra 123
Uma Kanta v. Renwick and Co. Ltd. 717
Umapati Choudhuri v. Subodh Chandra Choudhuri 377
Union of India v. Brajen Saha 366
Union of India v. Kishorilal Gupta & Bros 642
United Commercial Bank Ltd. v. Kartar Singh 37
United Commercial Press Ltd. v. Satyanarain Chamaria 136
Yusuf Cossim v. Maya Rani Sen Gupta 309
Yunus Shaikh v. The State 567
Zakaria, A. K. M. v. Choudhuri Golam Martuza 666

SUBJECT INDEX

Accounts—*See also* Evidence Act (1872), S. 101 to 103 244*e*

——Liability to account — Facts which must exist to impose obligation to account 244*a*

——Account—Meaning of 244*b*

——Liability to account and method of accounting 244*c*

——Suit for — Decree against legal representatives of deceased accounting party — Mode of accounting by legal representative — Burden of proof—Non-production of account books—Inference— (Evidence Act (1872), Ss. 101 to 103 and 114) 244*d*

Arbitration Act *(10 of 1940), S. 1* — Interpretation of Act 488*f*

——*Ss. 2 and 21*— One of considerations of agreement to refer dropping of pending criminal prosecution for non-compoundable offence — The whole agreement and reference is illegal and void — Fact that criminal prosecution would have failed is immaterial—(Contract Act (1872), S. 23) 415*c*

——*S. 2*—Arbitration agreement—(Contract Act (1872), Ss. 10, 62, 63) 642*e*

——*S. 2 (a)*—*See also* ibid, S. 17 621*b*

——*S. 2 (a)*—Arbitration agreement—Form of 458*c*

——*S. 2 (a)*—Arbitration agreement—Dispute 458*d*

——*Ss. 3, 11, 28 (1), 33 and Sch. I, Para 3* — Bengal Chamber of Commerce, Tribunal of Arbitration Rules, Rr. 5 (3), 6, 7 and 25—Effect of 787*a*

Arbitration Act *(contd.)*

——*S. 8* — Disagreement between arbitrators—Jurisdiction of umpire 385*a*

——*S. 8* — Powers of umpire — Umpire dying pending reference — Appointment of another umpire 385*b*

——*S. 8*—Scope — Appointment of arbitrator 385*c*

——*S. 8*—Application under section—Who can make—Application by receiver in his own name —(Civil P. C. (1908), O. 40, R. 1 (d)) 385*d*

——*S. 8 (1)* — Arbitration agreement neither specifying number of arbitrators, nor mode of appointment—Procedure to be followed 488*d*

——*S. 8 (1) (a)* — Appointment of arbitrator: Award Case No. 226 of 1951 (Cal), Dissent. from 488*c*

——*S. 11*—*See* ibid, S. 3 787*a*

——*S. 11 (2)*—Misconduct 474

——*S. 13* — Powers of arbitrators to determine validity of contract 618*b*

——*S. 14* — Separate submissions — Separate awards 621*a*

——*S. 14, sub-s. (1)* — Notice of filing award—Object of 646*c*

——*S. 14, sub-s. (2)* — Notice of filing award to all parties except one who had himself applied for direction on arbitrations to file award and

Arbitration Act *(contd.)*
two others who had already appeared in Court—Validity 646*a*
——*S. 14, sub-s. (2)*—Non-filing of khatas — If vitiates filing of award 646*b*
——*S. 14, sub-s. (2)*—One of the arbitrators not signing the award—Validity 646*e*
——*S. 16*—*See* ibid, S. 30 646*f*
——*Ss. 17, 30 and 2 (a)* — Question of law — Damages, basis of—Submission 621*b*
——*Ss. 17, 30 and 47* — Award in arbitration pending suit without order of reference — Validity and enforcibility—(Civil P. C. (1908), O. 23, R. 3) 690*c*
——*S. 20*—*See* Specific Relief Act (1877), S. 21 690*b*
——*S. 20 (1)*—Scope 488*a*
——*Ss. 20 (1) and 3* — Validity of arbitration agreement 488*b*
——*S. 20 (3)*—*See* ibid, S. 20 (1) 488*b*
——*S. 21*
See (1) ibid, S. 2 415*c*
(2) Contract Act (1872), S. 28 690*a*
(3) Specific Relief Act (1877), S. 21 690*b*
——*Ss. 23, 28 and 30* — Agreement to refer illegal consideration being illegal — Order of reference upon such agreement is also illegal—Subsequent proceedings in pursuance of order do not make legal what was illegal—Order for extension of time under S. 28 does not amount to fresh submission—Whole award thus is a nullity—Contract Act (1872), S. 23 415*d*
——*S. 28*—*See* ibid, S. 23 415*d*
——*S. 28 (1)*—*See* ibid, S. 3 787*a*
——*S. 28 (2)* — Bengal Chamber of Commerce, Tribunal of Arbitration, Rules, R. 7—Validity 787*b*
——*S. 30*—*See also* (1) ibid, S. 17 621*b*, 690*c*
(2) ibid, S. 23 415*d*
——*S. 30* — Procedure before arbitrator — His power to regulate—Irregularity 415*a*
——*S. 30* — Award challenged on ground that arbitrator was influenced by his conclusions in respect of dispute not subject-matter of suit—Charge has to be established from terms of award or some intrinsic evidence — Charge held not established 415*b*
——*S. 30*—Duty of Court 621*c*
——*S. 30*—Violations of certain legal principles 621*d*
——*S. 30*—Misconduct, what amounts to 646*d*
——*Ss. 30, 16*—"Is otherwise invalid"—Award not dividing movables with immovables—Validity 646*f*
——*S. 30*—"Is otherwise invalid" 646*g*
——*S. 30*—Jurisdiction 646*h*
—— *Ss. 30 and 33* — Jurisdiction to adjudicate award as invalid 690*e*
——*S. 33*
See (1) ibid, S. 3 787*a*
(2) ibid, S. 30 690*e*

Arbitration Act *(contd.)*
——*S. 34*
See also (1) Contract Act (1872), S. 23 450*c*
(2) Specific Relief Act (1877), S. 21 690*b*
——*S. 34*—"Matter agreed to be referred" 450*a*
——*S. 34*—"Matter agreed to be referred" — (West Bengal Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance (17 of 1950), S. 5 (2)) 450*b*
——*S. 34*—Stay—Court's discretion 450*d*
——*S. 34* — A decision as to validity of arbitration agreement 450*e*
——*S. 34* — Question of arbitrator's jurisdiction raised in suit—Other questions also raised—Proper procedure 450*f*
——*S. 34*—Questions to be decided under 477*a*
†——*S. 34* — 'Matter agreed to be referred' — Broker's denial that he is party to the contract 477*b*
——*S. 34* — Decision as to whether plaintiff is party to contract 477*c*
——*S. 47*—*See* ibid, S. 17 690*c*
——*S. 47, Proviso*—Scope 690*d*
——*Sch. I, Para. 3*—*See* ibid, S. 3 787*a*
——*Sch. I, Rule 1*—Scope 488*e*
Army Instructions (India) (1949), *No. 212*—Civilian paid from Defence Services Estimates—(Civil Services (Classification, Control and Appeal) Rules (1930), R. 55) — (Constitution of India, Art. 311 (2)) 763
Banking Companies Amendment Act *(20 of 1950), S. 45A* — *See* Companies Act (1913), S. 199 610
——*S. 45B*—*See* Companies Act (1913), S. 199 610
——*S. 45H*—*See* Companies Act (1913), S. 199 610
Bengal Agricultural Debtors Act *(7 of 1936)*—*See* under DEBT LAWS
Bengal Agricultural Income-tax Act *(4 of 1944), S. 2 (1)* — Income or capital receipts — Sale of certain specified varieties of forest trees every year by auction — Consideration always a lump sum—Sum, however, allowed to be paid in instalments in period of two and a half years within which trees sold were to be cut down and removed—Sums held were income and not capital receipts — Income-tax Act (1922), S. 4 (1) and (3) (vii) 344
Bengal Chamber of Commerce, Tribunal of Arbitration Rules, *R. 5 (3)* — *See* Arbitration Act (1940), S. 3 787*a*
——*R. 6* — *See* Arbitration Act (1940), S. 3 787*a*
——*R. 7* — *See* Arbitration Act (1940), S. 3 787*a*
——*R. 25* — *See* Arbitration Act (1940), S. 3 787*a*

(Bengal) Civil Services (Classification, Control and Appeal) Rules — *See* Government of India Act (1935), S. 240 (2) (3) 188*e*

——*R. 49*—*See* Constitution of India, Art. 311 (2) 767*c*

——*R. 55*

See also (1) Army Instructions (India) (1949), No. 212 763
(2) Constitution of India, Art. 311 (2) 767*c*

——*R. 55*—Departmental Enquiry—Inspection and production of documents — (Constitution of India, Art. 226.) 361

Bengal Embankment Act *(2 of 1882), S. 7 (1) and (1a)*—Neighbouring country 653*a*

——*S. 25*—Construction of 653*b*

Bengal Finance (Sales Tax) Act *(6 of 1941)*
See under SALES TAX

Bengal Finance Sales Tax West Bengal Amendment Ordinance *(10 of 1950)* — *See* Constitution of India, Art. 226 712*c*

Bengal Food Adulteration Act *(6 of 1919), S. 6*—Storing for sale 485*b*

——*Ss. 10 and 21*—Compulsory sale—(Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 424 and 488) 485*a*

——*S. 13*— (Cri. Ref. 43 and 44 of 1951 (Cal), *Dissented from*) 485*c*

——*S. 21* — *See* ibid, S. 10 485*a*

Bengal General Clauses Act *(1 of 1899), S. 8, Cls. (d) and (e)*—Repeal of penal statute pending trial—(General Clauses Act (1897), S. 6—(Municipalities — Calcutta Municipal Act (3 of 1923), S. 406) — (Municipalities — Calcutta Municipal Act (33 of 1951), S. 461) 401*d*

——*S. 26*—*See* Penal Code (1860), S. 40 41*c*

Bengal Money-lenders Act *(10 of 1940)* — *See* under DEBT LAWS.

Bengal Municipal Act *(15 of 1932)*—*See* under MUNICIPALITIES.

Bengal Municipal Election Rules — *See* under MUNICIPALITIES

Bengal Municipal Election Rules (1932)—*See* under MUNICIPALITIES.

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act *(9 of 1940)* — *See* under TENANCY LAWS.

Bengal Rationing Order (1943), *Cls. 3 (4), 10 (3)*—Cancellation of permit 650*a*

——*Cls. 3 (4), 10 (3)*—Validity 650*c*

—— *Cl. 10 (3)*— *See* ibid, Cl. 3 (4) 650*a,c*

——*Cl. 22*—Delegation of power 650*b*

Bengal Subordinate Services (Discipline and Appeal) Rules *(1936)*—Departmental proceedings under, are judicial or quasi-judicial — Writ of certiorari lies to quash proceedings — Alternative remedy is no bar — (Constitution of India, Art. 226) 316*a*

Bengal Suppression of Immoral Traffic Act *(6 of 1933), S. 13* — *See also* Constitution of India Art. 22 522*b*

——*Ss. 13, 14, 15 and 17*—Validity of — (Constitution of India, Art. 21) 522*c*

——*S. 14* — *See* ibid, S. 13 522*c*

——*S. 15*—*See* ibid, S. 13 522*c*

——*S. 17*— *See* ibid, S. 13 522*c*

——*S. 17 (2)*—"Her case", meaning of 522*d*

Bengal Tenancy Act *(8 of 1885)*
See under TENANCY LAWS

Bengal Village Self-Government Act *(5 of 1919), S. 17C*— Irregularity in elections 731*c*

——*S. 101*—Rules under — Rules 11 and 12—Non-compliance with Rules 731*a*

Calcutta Appellate Side Rules
See under HIGH COURT RULES AND ORDERS

Calcutta Civil Rules and Orders
See under HIGH COURT RULES AND ORDERS

Calcutta High Court Original Side Rules
See under HIGH COURT RULES AND ORDERS

Calcutta Municipal Act *(3 of 1923)*
See under MUNICIPALITIES.

Calcutta Municipal Act *(33 of 1951)*
See under MUNICIPALITIES

Calcutta Rent Ordinance *(5 of 1946)*
See under HOUSES AND RENTS

Calcutta Thika Tenancy Act *(2 of 1949)*
See under TENANCY LAWS

Calcutta Thika Tenancy (Amendment) Act *(6 of 1953)*
See under TENANCY LAWS

Calcutta Thika Tenancy (Amendment) Ordinance *(15 of 1952)*
See under TENANCY LAWS

Carriers Act *(3 of 1865), S. 8*—Liability under —(Contract Act, 1872, S. 183) 547

Central Civil Services (Revision of Pay) Rules *(1947)* — *See* Constitution of India, Art. 311 (1) 767*b*

Central Excise and Salt Act *(1 of 1944), S. 37* —Notification No. 8, D/- 10.3.51, effect of — (Land Customs Act (1924), S. 3 (1)) 663*c*

Certiorari — *See* under Constitution of India, Art. 226

Chandernagore (Adaptation of Laws) Order *(1950), S. 7* — Notifications No. 133 E. U. R. D/- 1.5.1950 and 25.11-1950—Effect— (French Civil P. C., Art. 158) 580

Chandernagore Application of Laws Order *(1950)*—*See* Constitution of India, Art. 226: 363

Civil Procedure Code *(5 of 1908)* — Preamble —*See* Interpretation of Statutes : 81*g*; 566*b*; 570*c* **(FB)**; 733*b,c,d,e & f*

——*S. 2 (2)* — *See also* Limitation Act (1908), Art. 179 13

——*S. 2 (2)* — Adjudication on court-fees — Order of dismissal of suit under S. 8B (3) (Bengal)

Civil P. C. *(contd.)*
Court-fees Act — (Court-fees Act (1870), S. 8B (3) (Bengal)) 42c
——*Ss. 2 (2), 96* — Right of appeal — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 6) 524a
——*Ss. 2 (2), 96 and 115* — Right of appeal— (Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 6) — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18) 412
——*S. 9*
See (1) Houses and Rents—W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 414a
(2) Industrial Disputes Act (1947), S. 29 613f
(3) Letters Patent (Cal.), Cl. 12 1b
(4) West Bengal Bargadars Act (2 of 1950), S. 7 720a
——*S. 11* — *See* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 782
——*S. 11*—*See* Tenancy Laws—Bengal Tenancy Act (8 of 1885), S. 105 328a
——*S. 11* — *Res judicata* against *pro forma* defendant 155
——*S. 11*—Matter if not in issue is not *res judicata* 669a
——*S. 11*—Constructive *res judicata*—Executive proceedings 765a
——*Ss. 11, 42 and O. 21, R. 28* —Decree transferred for execution to another Court—Objections to order raised but not decided by transferee Court—Principles of *res judicata* do not apply 765b
——*S. 20*—*See* INTERNATIONAL LAW—PRIVATE 366a
——*S. 20*— *See* Letters Patent (Cal.), Cl. 12 1b
——*Ss. 20 and 80* — Notice under S. 80 is part of cause of action—(Letters Patent (Cal.), Cl. 12) —(Railways Act (1890), S. 77) 235a
——*S. 35* — *See also* Industrial Disputes (Appellate Tribunal) Act (1950), S. 11 (7) 37
——*S. 35* — Partition suit — Question of title raised — Principle governing costs 164b
——*Ss. 39 and 42* — Transfer of decree—Order passed *ex parte*—No service of notice on judgment-debtor — Order of transfer is not binding on him — Order is a judicial and not ministerial act 765c
——*S. 39 (1) (b) and (c)* — *See* Companies Act (1913), S. 199 610
——*S. 42.*
See (1) ibid, S. 11 765b
(2) ibid, S. 39 765c
(3) Companies Act (1913), S. 199 610

Civil P. C. *(contd.)*
——*S. 51* — *See also* Companies Act (1913), S. 199 610
——*S. 51 and O. 21, R. 21*—Simultaneous execution 717b
——*S. 51 and O. 21, R. 31*—Power of Court to order conditional attachment 717c
——*S. 80.*
See (1) ibid, S. 20 235a
(2) ibid, O. 7, R. 11 (d) 222
——*S. 92*—'De facto' Trustees 716b
——*S. 96.*
See (1) ibid, S. 2 (2) 412; 524a
(2) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 17 (1) 407b
——*S. 100*—*See* Workmen's Compensation Act (1923), S. 10 667
——*S. 107* — *See* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32 (3) 126a
——*S. 109*—*See* Limitation Act (1908), Art. 179 13
——*S. 110.*
See (1) Constitution of India, Art. 133 (1) 509
(2) Constitution of India, Art. 133 (b) 282a,b
——*S. 115.*
See also (1) ibid, S. 2 (2) 412
(2) Letters Patent (Cal.) Cl. 15 636a,b
——*S. 115*—'May make such order in the case as it thinks fit' 34b
——*S. 115* — Dismissal of suit under S. 8B (3) (Bengal), Court-fees Act—Appeal against decree, embodying order, dismissed for non-payment of printing costs — Subsequent application in revision against order of lower Court, dismissing suit under S. 8B (3) (Bengal), Court-fees Act, is not incompetent by reason of dismissal of appeal — (Court-fees Act (1870), S. 8B, (Bengal)) 42a
——*S. 115* — Refusal to exercise jurisdiction — Debt Laws — Bengal Money-lenders Act (10 of 1940), S. 38 94c
——*S. 115 and O. 21, R. 97*—Mistake of law— (W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 13 (2)) 198b
——*S. 115* — Refusal to join proper party is material irregularity in exercise of jurisdiction 348b
——*S. 115* — Scope — Decision of a part of a case is also a decision of a case within S. 115 366b
——*S. 115*—'Exercised a jurisdiction not vested in it by law' 392
——*S. 115*—Laches in making application: 513a
——*S. 115 and O. 40, R. 1* — Personal liability of receiver to pay costs of revision 574h
——*S. 115* — Application under S 6, W. B. Act 62 of 1950 — Order directing tenant to deposit

Civil P. C. *(contd.)*
rent within 15 days and fixing date for further orders — Revision (Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) (Amending) Act (62 of 1950), S. 6) 771*b*
—*S. 144* — *See* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 13 (2) 598
—*S. 151*
See also (1) ibid, O. 39, R. 1 377*d*
(2) Evidence Act (1872), S. 115 125
(3) Houses and Rents—W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 771*a*
—*S. 151 and O. 21, Rr. 17 and 21* — Amendment of execution — (Limitation Act (1908), Art. 182) 676*c*
—*S. 152* — Applicability — (Land Acquisition Act (1894), S. 12) 257*c*
—*S. 152* — Clerical or arithmetical mistakes or accidental slips or omissions 257*d*
—*O. 1, R. 3 and O. 2, R. 3*— Multifariousness 185
—*O. 1, R. 8* — *See* Constitution of India, Art. 226 289*a*
—*O. 1, R. 10*
See also (1) ibid, O. 6, R. 17 381*b*
(2) Landlord and Tenant 398*b*
—*O. 1, R. 10*—Addition of necessary party — Obstruction to delivery of possession on ground of claimant being statutory tenant under S. 11 (3), West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948) 348*a*
—*O. 1, R. 10 (2); O. 6 R. 17* — Amendment of plaint by seeking to delete word "limited" affixed to defendant company so as to make suit one against firm — Case held one of misdescription of defendant — Such amendment held could be allowed 381*a*
—*O. 2, R. 3*—*See* ibid, O. 1, R. 3 185
—*O. 6, R. 2*—*See* Evidence Act (1872), S. 115 251*a*
—*O. 6, R. 17* — *See also* ibid, O. 1 R. 10 (2) 381*a*
—*O. 6, R. 17* — Amendment of written statement—Amendment should be necessary to determine "real controversy" — Consideration for amendment of plaint and written statement are not same — Awarding of cost against amending party does not necessarily avoid prejudice 15
—*O. 6, R. 17; O. 1, R. 10* — Delay — Ordinarily delay will defeat application for amendment, when question of limitation arises — There are, however, exceptions — Error of misdescription of defendant being deliberate, case held to be such a special case 381*b*
—*O. 7, R. 11*—*See also* Court-fees Act (1870), S. 7 755*a*
—*O. 7, R. 11* — Insufficiently stamped plaint — Dismissal of suit under S. 8B (3) (Bengal),

Civil P. C. *(contd.)*
Court-fees Act is not tantamount to rejection of plaint—(Court-fees Act (1870), S. 8B (3) (Bengal)) 42*b*
—*O. 7, R. 11 (d) and S. 80* — Rejection of plaint in limine on ground that S. 80 was not complied with — Plaint not disclosing whether S. 80 was attracted — Order is bad 222
—*O. 9, R. 13* — Minor described as major is not party to litigation — He is not "defendant" to suit — Application by him under O. 9, R. 13 is not maintainable. Observations in A. I. R. 1917 Cal. 844 held obiter 196
—*O. 14, R. 1*—Failure to raise issue 657*a*
—*O. 18, R. 18*
See (1) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S 9 177
(2) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32 (3) 126*a*
—*O. 20, R. 10* — *See* ibid, O. 21, R. 31 717*a*
—*O. 20, R. 12*—Suit for mesne profits without possession against trespasser on 'prima facie' proof of title — Maintainability 321*b*
—*O. 21, R. 16* — Where a decree has been transferred 666*b*
—*O. 21, R. 17* — *See* ibid, S. 151 676*c*
—*O. 21, R. 21.*
See (1) ibid, S. 51 717*b*
(2) ibid, S. 151 676*c*
—*O. 21, R. 22* — Notice of amendment of execution 676*b*
—*O. 21, R. 28* — *See* ibid, S. 11 765*b*
—*O. 21, R. 31* — *See also* ibid, S. 51 717*c*
—*O. 21, R. 31 and O. 20 R. 10* — Execution of decree for specific movable property, modes of 717*a*
—*O. 21, Rr. 35 and 97*—Decree-holder taking out writ for possession — Obstruction — Fresh writ — Fresh obstruction—Time under Art. 167 begins to run from second obstruction — (Limitation Act (1908), Art. 167): A. I. R. 1933 Bom. 457, *Held obiter and dissented from* 499
—*O. 21, Rr. 66 and 90*—Specification of property — (Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 162) 669*b*
—*O. 21, R. 89* — *See* Evidence Act (1872), S. 115 125
—*O. 21, R. 90*
—*See* (1) ibid, O. 21, R. 66 669*b*
(2) Evidence Act (1872), S. 115 125
—*O. 21, R. 97*
See also (1) ibid, S. 115 198*b*
(2) ibid, O. 21, R. 35 499
(3) Houses and Rents—W. B. Premises Rent Control Act (17 of 1950), S. 13 (2) 198*a*
—*O. 21, Rr. 97, 98, 99*—Application by landlord for possession of premises with police help—

Civil P. C. *(contd.)*
Objection by sub-tenant — Discretion of Court—Sub-tenant minor — Illegality of lease — Order directing police help will not be interfered with — (Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 13 (2) and 11 (3)) 218
——*O. 21, Rr. 97 and 100* — Decree for possession against tenant — Claim of sub-tenant under Rent Control Acts—Procedure 233
——*O. 21, R. 98* — *See* ibid, O. 21, R. 97 218
——*O. 21, R. 99* — *See* ibid, O. 21, R. 97 218
——*O. 21, R. 100*
See (1) ibid, O. 21, R. 97 233
(2) Houses and Rents—West Bengal Premisses Rent Control (Temporary Provisions) Act (17 of 1950), S. 13 (2) 598
——*O. 22, R. 3* — Death of karta—Application by next karta—Limitation Act (1908), Art. 181 294
——*O. 22, R. 4* — Suit against trespassers — Death of one of defendants 588*a*
——*O. 22, R. 9 (2)*—Sufficient cause—Meaning —Unreasonable delay — Effect 367
——*O. 22, R. 10* — Applicability 666*a*
——*O. 23, R. 1* — Withdrawal of suit 588*b*
——*O. 23, R. 3*
See (1) Arbitration Act (1940), S. 17: 690*c*
(2) Deed — Construction 676*e*
(3) Specific Relief Act (1877), S. 21 690*b*
——*O. 26, R. 9*—*See* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 177
——*O. 26, R. 10*
See (1) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 177
(2) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 31 126*c*
——*O. 34, R. 1* — Effect of non-joinder 682
——*O. 34, Rr. 14 and 15* — Applicability to enforcement of charge — (T. P. Act (1882), S. 100) 676*d*
——*O. 34, R. 15* — *See* ibid, O. 34, R. 14 676*d*
†——*O. 37*—It is not unconstitutional—(Constitution of India, Art. 14) 758*b*
——*O. 37, R. 2* — Applicability 758*d*
——*O. 39, R. 1* — *See also* Specific Relief Act (1877), S. 56 377*f*
——*O. 39, R. 1* — Scope of — Partition decree obtained in absence of necessary parties—Parties have good prima facie case for restraining decree-holders from giving effect to that decree 377*a*
——*O. 39, R. 1* — Injunction in respect of judicial proceedings — Prevention of multiplicity of proceedings is one of the purposes for which order of restraint can be passed 377*b*

Civil P. C. *(contd.)*
——*O. 39, R. 1 and S. 151* — Scope of O. 39, R. 1—(A. I. R. 1926 Mad. 258, *Dissented from*) — O. 39 is not exhaustive — Inherent jurisdiction can be exercised by Court 377*d*
——*O. 39, R. 1*—Scope and principles of—Delay is no excuse for not giving temporary injunction 377*e*
——*O. 39, R. 2*—"Or other injury of any kind" — (Specific Relief Act (1877), S. 56) — Widest interpretation to "injury" should be given 377*c*
——*O. 40, R. 1*
See also (1) ibid, S. 115 574*h*
(2) Companies Act (1913), S. 199 610
——*O. 40, R. 1*—Receiver's possession 574*a*
†——*O. 40, Rr. 1 and O. 43, R. 1 (s)* — Order fixing Receiver's salary—Appeal. AIR 1942 Nag 64, Dissented from 574*b*
——*O. 40, Rr. 1 and 2* — Remuneration of receiver 574*c*
——*O. 40, Rr. 1 and 2*—Right to salary till discharge 574*e*
——*O. 40, Rr. 1 and 2* — Question whether receiver's salary should be reduced—Determination of—(Master and servant) 574*f*
——*O. 40, Rr. 1 and 2* — Remuneration of receiver 574*g*
——*O. 40, R. 1*—Suits by or against receiver — Leave of Court 797
——*O. 40, R. 1 (d)*—*See* Arbitration Act (1940), S. 8 385*d*
——*O. 40, R. 2*—*See also* ibid, O. 40, R. 1 574*c, e, f, g*
†——*O. 40, R. 2*—Power to vary receiver's salary 574*d*
——*O. 40, R. 2*—Receiver's Commission 672*a*
——*O. 41, R. 1*—New plea involving question of fact 676*a*
——*O. 41, R. 25*—*See also* Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 47*a*
——*O. 41, R. 5*—Effect of stay order 467*a*
†——*O. 41, R. 5*—Order for stay is direction to Court below — Direction not communicated to that Court — Any order made by it in ignorance of direction is valid. 33 Cal 927, Dissented from. 467*b*
——*O. 41, R. 33*—Applicability — Interference in favour of single respondent 20*a*
——*O. 43, R. 1 (s)*—*See* ibid, O. 40, R. 1 574*b*
Civil Service Regulation and State Railway Establishment Code, *R. 11* — Though railway employee can be suspended or dismissed for any reason administration considers sufficient, punishment has to be in accordance with rules of service governing the matter 45*c*
——*R. 11 (a)*—Employee summoned by Criminal Court to answer criminal charge—On appearance such person granted bail to secure future attendance—It is not "arrest" — He cannot be suspended 45*a*

Civil Service Regulation and State Railway Establishment Code *(contd.)*
——*R. 11 (b)*—It applies to case of disciplinary or departmental proceedings against employee and not to case of criminal proceedings before Court of law 45*b*
Companies Act *(7 of 1913), Ss. 21 (1), 34* — Lien and pledge—Priority—(Contract Act (1872), S. 172) 526*c*
——*S. 34*
See (1) ibid, S. 21 (1) 526*c*
(2) Contract Act (1872), S. 172 526*a,b*
——*S. 79 (3)*—'Impracticable' means impracticable from a reasonable point of view 355
——*S. 153A*—*See* Constitution of India (1950), Art. 31 (2) 695*d*
——*S. 153B*—*See* Constitution of India (1950), Art. 31 (2) 695*d*
——*S. 163 (1) (i)*—Demand notice 387*a*
——*S. 163 (1) (i)*—Court's power to go behind judgment debt 387*b*
——*S. 163 (1) (i) and (ii)* — Proof to satisfaction of Court 387*c*
——*Ss. 179 and 237*—Prosecution of officers of bank—Direction by Company Judge is not always necessary 153*a*
——*S. 199* — Balance order on contributory — Enforcement—Appointment of receiver — Power to transfer case for execution—Exclusive jurisdiction of High Court—(Banking Companies Amendment Act (1950), Ss. 45H, 45A, 45B) — (Civil P. C. (1908), O. 40, R. 1, Ss. 42, 51 and 39 (1) (b) and (c)) 610
——*Ss. 211 and 216* — Company in voluntary liquidation — Stay of execution proceedings against, can be granted as a matter of course except in case of preferential creditor but Union of India or State Government is not preferential creditor 309
——*S. 216*—*See* ibid, S. 211 309
——*S. 230 (a)*—Taxes—(Income-tax Act (1922), S. 18A) 487*a*
——*S. 231*—Reopening of assessment — (Evidence Act (1872), Ss. 101 to 103) 487*b*
——*S. 237*—*See also* ibid, S. 179 153*a*
——*S. 237* — Scope — Not restricted only to offences punishable under Companies Act 153*b*
——*Sch. I, Table A, Reg. 18*—*See* Contract Act (1872), S. 172 526*a*
Constitution of India *(1950)*—Preamble 695*c*
——*Art. 1*—*See* Indian Independence Act (1947), S. 1 **(SB)** 530*a*
†* ——*Art. 5* — Acquisition of domicil after "British India" ceased to exist **(SB)** 530*b*
——*Art. 5* — Nationality how acquired **(SB)** 530*c*
——*Art. 5* — Nationality of resident of ceded territory **(SB)** 530*d*
†* ——*Art. 5* — Domicil and nationality of individual — (Succession Act (1925), S. 9) **(SB)** 530*e*
Constitution of India *(contd.)*
†* ——*Art. 5* — Acquisition of new domicil — (Succession Act (1925), S. 10)—(Domicil — Acquisition of) **(SB)** 530*f*
——*Art. 13*—*See also* Criminal Law Amendment Ordinance (29 of 1943), as amended by Ordinance (6 of 1946) (Central), S. 5 263*b*
——*Art. 13* — 'Void' is not synonymous with 'repealed': A I R 1951 Bom 138, Dissented from —(General Clauses Act (1897), S. 6) 263*d*
——*Art. 13 (1)*
See (1) Criminal Law Amendment Ordinance (29 of 1943) as amended by Ordinance 6 of 1946 (Central), S. 5 263*c*
(2) Sugar Temporary Excise Duty Act (1947), S. 3 508
——*Art. 14*
See also (1) ibid, Art. 19 (1), Cls. (c), (f), and (g) 695*e*
(2) Civil P. C. (1908), O. 37 758*b*
(3) Criminal Law Amendment Ordinance (29 of 1943) as amended by Ordinance (6 of 1946) (Central), S. 5 263*b*
(4) Criminal P. C. (1898) S. 269 (1) 394*b*
(5) Universities Act (1904), S. 25 783*b*
(6) West Bengal Bargadars Act (2 of 1950), S. 9 (2) 95
(7) West Bengal Foodgrains Intensive Procurement Order (1952) 548*n*
——*Art. 14* — Reasonable classification not barred 394*a*
——*Art. 14*—Principle of classification 394*c*
——*Art. 14* — Criminal P. C. (1898), S. 269—Notification under—No contravention 602*j*
——*Art. 14*—Discrimination 758*a*
——*Art. 19*
See also (1) Essential Supplies Temporary Powers Act (1946), S. 3 (2) (c) 548*c*; *f*
(2) Sugar Temporary Excise Duty Act (1947), S. 3 508
——*Arts. 19, 31*—Scope 548*d*
——*Arts. 19 (1) Cls. (c), (f) and (g) and 14* — Infringement of — (Iron and Steel Companies Amalgamation Ordinance (8 of 1952)— Iron and Steel Companies Amalgamation Act (79 of 1952)) 695*e*
——*Art. 19 (1) (f)* — *See* West Bengal Land Development and Planning Act (1948), S. 4 704*a*
——*Art. 19 (1) (f), (g)* — *See also* Essential Supplies (Temporary Powers) Act (1946), S. 3 (1) 548*e*
——*Art. 19 (1) (f), (g), (5) (6)* — Reasonable and in public interest — (West Bengal Foodgrains Intensive Procurement) Order (1952) 548*g*

Constitution of India *(contd.)*
——*Art. 19 (1) (g)* —*See also* Universities Act (1904), S. 25 783*b*
——*Art. 19 (1) (g)*—Unreasonable restriction 187*b*
——*Art. 19 (5)*
See (1) ibid, Art. 19 (1) (f) (g) 548*g*
(2) Essential Supplies (Temporary Powers) Act (1946), S. 3 (1) 548*e*
(3) West Bengal Land Development and Planning Act (1948), S. 4 704*a*
——*Art. 19 (6)*
See (1) ibid, Art. 19 (1) (f) (g) 548*g*
(2) Essential Supplies (Temporary Powers) Act (1946), S. 3 (1) 548*e*
——*Art. 20* — *See* Houses and Rents — West Bengal Premises (Temporary Provisions) Act (17 of 1950), S. 40 599
——*Art. 20 (1)*— Greater penalty not justified 561*c*
——*Art. 20 (2)* — 'Prosecution' and 'offence' — Meaning—Imposition of fine by Rent Controller — Subsequent prosecution on same facts before Criminal Court—Houses and Rents—West Bengal Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 — (Criminal P. C. (1898), Ss. 4 (1) (o) and 403) 85
——*Art. 20 (2)*—"Prosecution"—Meaning of 316*c*
——*Art. 21*—*See* Bengal Suppression of Immoral Traffic Act (6 of 1933), S. 13 522*c*
——*Art. 22*—"Arrest" does not include removal —(Bengal Suppression of Immoral Traffic Act (6 of 1933), S. 13) 522*b*
——*Art. 22 (5)*— "As soon as may be" — Supplementary grounds—Public Safety— Preventive Detention Act (1950), S. 7 129*a*
——*Art. 31*
See also (1) ibid, Art. 19 548*d*
(2) Essential Supplies Temporary Powers Act, S. 3 (2) (c) 548*c*
——*Art. 31*—Person who can complain — (Iron and Steel Companies Amalgamation Ordinance (8 of 1952) — (Iron and Steel Companies Amalgamation Act (79 of 1952)) 695*a*
——*Art. 31, Sch. 7 List I Entry 33 and Sch. 7 List II Entry 36*—Scope 695*b*
——*Art. 31 (1)*—*See* West Bengal Land Development and Planning Act (1948), S. 4 704*b*
——*Art. 31 (2)*—Article covers cases of both requisition and acquisition 223*a*
——*Art. 31 (2)* — Public purpose—Whether requisition is for public purpose, is justiciable in Court of law—(Houses and Rents—West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947), S. 3 (1)) 223*b*
——*Art. 31 (2)*— Public purpose — Requisition for employee of State Government, whether refugee or otherwise — (Houses and Rents — West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947), S. 3 (1)) 223*c*
——*Art. 31 (2)*—Compensation 548*h*
——*Art. 31 (2)*—Fixing of compensation 548*j*
——*Art. 31 (2), Sch. 7 List I Entries 33, 43, 44 and 52 and Sch. 7 List II Entry 36*—Powers of Union Legislature—(Iron and Steel Companies Amalgamation Ordinance (8 of 1952)) — (Iron and Steel Companies Amalgamation Act (79 of 1952)) — (Companies Act (1913), Ss. 153A and 153B) 695*d*
——*Art. 48*—*See* Municipalities—Bengal Municipal Act (15 of 1932), S. 370 (2) 333*a*
——*Art. 133* — *See* Limitation Act (1908), Art. 179 13
——*Art. 133 (b)* — Civil P. C., S. 110 — Substantial question of law — Question whether properties could be dealt with by way of settlement deed executed by the parties pending the litigation, with effect of arrangement being binding upon plaintiffs as reversioners 282*a*
——*Art. 133 (b)*—Civil P. C., S. 110— Substantial question of law—Mortgage executed to pay off earlier mortgage—Earlier mortgage not for legal necessity—Question whether later mortgage was justified by legal necessity 282*b*
——*Art. 133 (1)*—"Amount or value of subject-matter in appeal"—(Civil P. C. (1908), S. 110) 509
——*Arts. 141, 372* — Decision of Judicial Committee 524*b*
——*Art. 215* — *See also* Letters Patent (Cal), Cl. 15 627*a*
——*Art. 215* — Disobedience — Personal service of order when essential — (Contempt of Courts Act (1926), S. 1) 96
——*Art. 225*—*See also* ibid, Art. 329 (b) 98*a*
——*Arts. 225 and 226* — Scope — Nature and effect of jurisdiction under **(SB)** 433*e*
——*Art. 226*
See also (1) ibid, Art. 225 **(SB)** 433*e*
(2) ibid, Art. 329 (b) 98*a*
(3) Bengal Civil Service (Classifications, Control and Appeal) Rules, R. 55 361
(4) Bengal Subordinate Service (Discipline and Appeal) Rules, 1936 316*a*
(5) Import and Export Control Act (1947), S. 3 591*b*
(6) Industrial Disputes (Appellate Tribunal) Act (1950), S. 11 (7) 37
(7) Limitation Act (1908) Art. 151 **(SB)** 433*i*
(8) Municipalities—Bengal Municipal Act (15 of 1932), S. 492 **(SB)** 433*m*
(9) Representation of the People Act (1951), S. 170 98*d*;*e*

Constitution of India *(contd.)*
——*Art. 226*—'Quo warranto'—Offices of members of Managing Committee of school 114*a*
——*Art. 226*—Parties—'Quo warranto'—Object to get declaration that approval given to School Committee by University is invalid—University is necessary party 114*b*
——*Art. 226*—Habeas Corpus—Writ of — Successive applications 129*e*
——*Art. 226*—Habeas Corpus—Writ of—Applications under different circumstances 129*f*
——*Art. 226* — Mandamus proceedings — Questions of title to property and complicated questions of fact 172*b*
——*Art. 226* — Petitioners aggrieved by acts of Calcutta University Syndicate—Prerogative writs against Calcutta University 172*c*
——*Art. 226*—Parties to proceedings 172*d*
——*Art. 226*—Application not mentioning Art. 226 in cause title and asking for writ of mandamus **(FB)** 179*c*
——*Art. 226*—No existing grievance, no writ 187*a*
——*Art. 226*—Parties—Larger body made party — Component part need not be made party 212*a*
——*Art. 226*—Application against corporate body like State Medical Faculty by its name is legal—State Medical Faculty as such is a person against whom direction and order or writ can issue 212*b*
——*Art. 226*—Domestic Tribunal—State Medical Council—Jurisdiction to cancel examination of candidates found using unfair means — Must act in good faith and fairly — Mandamus, when can issue 212*c*
——*Art. 226*—Demand for justice and refusal—Candidates whose examinations were cancelled going individually in deputation to the Faculty—Denial by Head Assistant of Faculty that such demand was made—Denial held not by proper person — It should be either by Secretary to the State Medical Faculty or President of the Governing Body, both of whom were made parties 212*d*
——*Art. 226*—Unreasonable delay — No explanation—Petition not entertained 223*d*
——*Art. 226*—Another remedy open 257*a*
——*Art. 226*—Scope—Persons entitled to apply 257*b*
——*Art. 226*—Proper parties—(Constitution of India, Art. 367 (1))—(General Clauses Act, 1897, S. 3 (39))—(Civil P. C., O. 1, R. 8) 289*a*
——*Art. 226*—Mandamus 289*b*
——*Art. 226*—Certiorari 297*d*
——*Art. 226*—Existence of alternative remedy is not an absolute bar to exercise of jurisdiction under Art. 226—But it is a matter to be considered on the facts and circumstances of each case whether such remedy will be an adequate remedy 333*b*

Constitution of India *(contd.)*
——*Art. 226* — Jurisdiction of Calcutta High Court over Chandernagore—(Chandernagore (Application of Laws) Order, 1950) 363
†** ——*Art. 226*—Appeal—(Letters Patent (Cal), Cl. 15) **(SB)** 433*a*
——*Art. 226*—Scope—Jurisdiction of High Court **(SB)** 433*h*
——*Art. 226*—Scope—Nature of jurisdiction of High Court **(SB)** 433*g*
——*Art. 226*—Alternative remedy **(SB)** 433*k*
——*Art. 226* — "Directions, orders or writs" 520*b*
——*Art. 226*—Application in case where minor is incarcerated 522*a*
——*Art. 226*—New point 548*i*
——*Art. 226*—Scope 548*o*
——*Arts. 226, 311 (2)* — Damodar Valley Corporation Act (1948), Ss. 7, 60 (2) (b)—Dismissal of servant of Corporation — Issue of writ of certiorari 581*a*
——*Art. 226* — Issue of writ of mandamus 581*b*
——*Art. 226* — Existence of other effective remedy 581*c*
——*Art. 226*—Foundation for jurisdiction under —Existence of right—(Import and Export Control Act (1947), S. 3) 591*a*
——*Art. 226*—Mandamus—Condition precedent 653*c*
——*Art. 226*—Mandamus—Laches 653*d*
——*Art. 226* — Mandamus — Not to be issued if issue will prove infructuous 653*e*
——*Art. 226*—Efficacious and adequate statutory remedy available — (Sales Tax—Bengal Finance (Sales Tax) Act (6 of 1941), Ss. 15, 20, 21 and Rr. 71, 74)—(Bengal Ordinance (10 of 1950)) 712*c*
——*Art. 226*—Scope — Order under special Act — Revaluation of grounds — (Income-tax Act (1922), S. 34) 721*a*
——*Art. 226* — Scope — Other remedy open by way of appeal—(Government Premises (Eviction) Act (1950), Ss. 3 and 5) 729*d*
——*Art. 226*—Proceedings for prerogative writs —Extent of Court's powers 753*a*
——*Art. 226*—Prayers—Power of High Court to amend 753*b*
——*Art. 226* — Existence of alternative remedy —Effect 753*c*
——*Art. 226*—Demand of justice and failure 756*a*
——*Art. 226*—Disputed question of fact 756*e*
——*Art. 226*—Calcutta High Court's jurisdiction to issue writ against Director-General of Observatories, New Delhi, and Government of India 767*a*
——*Art. 227*
See also (1) ibid, Art. 329 (b) 98*a*
(2) Letters Patent (Cal), Cl. 15 636*b*

Constitution of India *(contd.)*
——*Art. 227* — Laches of applicant — Court would refuse to interfere if no special circumstances are shown to explain delay and position of parties has changed 40*b*
——*Art. 227* — Power of interference 636*c*
——*Art. 227* — Scope — Arbitrator committing error in applying Rule 720, Calcutta High Court Civil Rules and Orders — (High Court Rules and Orders — Calcutta Civil Rules and Orders, Rule 720) 702*b*
——*Art. 227* — Interference when election is unlawfully set aside 731*b*
——*Art. 228*—*See* Debt Laws — Bengal Money-Lenders Act (10 of 1940), S. 30 (1) (a) 195
——*Art. 245*
See (1) Essential Supplies Temporary Powers Act (1946) 548*a*
(2) Public Safety—Preventive Detention Act (1950) (as amended by Act (4 of 1951), S. 5 81*h*
——*Art. 299*—*See* ibid, Art. 311 (2) 319*a*
——*Art. 300* — *See* Letters Patent (Cal), Cl. 12 1*b*
——*Art. 311* — Suspension is not reduction in rank within meaning of Article — Article has no application to cases of suspension 45*d*
——*Art. 311 (1)* — *See also* Police Regulations, Bengal (1915), R. 15 316*b*
——*Art. 311 (1)*—Government servant appointed by Director General of Observatories — Notice of compulsory retirement given by Director-General —Competency—(Central Civil Services (Revision of Pay) Rules 1947)) 767*b*
——*Art. 311 (2)*
See also (1) ibid, Art. 226 581*a*
(2) Army Instructions (India) (1949), No. 212 763
——*Arts. 311 (2), 299*—Applicability of Art. 311 (2)—(Government of India Act, 1935, S. 175 (3)) 319*a*
——*Art. 311 (2)* — Dismissal or removal — (Compulsory retirement — Civil Services (Classification, Control and Appeal) Rules, Rr. 49 and 55) 767*c*
——*Art. 313* — *See* Police Regulations, Bengal (1915), R. 15 316*b*
——*Art. 327*—*See* Representation of the People Act (1951), S. 170 98*d*
——*Arts. 329 (b), 225, 226 and 227* — Proceedings disputing validity of election — Jurisdiction of High Court—Representation of the People Act (1951), Ss. 80, 81 and 100 98*a*
——*Art. 329 (b)*—Election—Meaning 98*b*
——*Art. 367 (1)* — *See* Constitution of India, Art. 226 289*a*
——*Art. 372*—*See* ibid, Art. 141 524*b*
——*Sch. 7, List 1, Entry 33.*
See (1) ibid, Art. 31 695*b*
(2) ibid, Art. 31 (2) 695*d*
——*Sch. 7, List 1, Entry 43* —*See* ibid, Art. 31 (2) 695*d*
Constitution of India *(contd.)*
——*Sch. 7, List 1, Entry 44*—*See* ibid, Art. 31 (2) 695*d*
——*Sch. 7, List 1, Entry 52*—*See* ibid Art. 31 (2) 695*d*
——*Sch. 7, List 2, Item 26*—*See* Raw Jute (Central Jute Board and Miscellaneous Provisions) Act (6 of 1951) 458*a*
——*Sch. 7, List 2, Entry 36*
See (1) ibid, Art. 31 695*b*
(2) ibid, Art. 31 (2) 695*d*
Contempt of Courts Act *(12 of 1926), S. 1* —
See also Constitution of India, Art. 215 96
—— *Ss. 1, 3*—Letter by party to proceedings to third party to bring pressure on other party — Held, tended to interfere with due course of justice and amounted to contempt of Court 53
—— *S. 3*—*See* ibid, S. 1 53
Contract Act *(9 of 1872), S. 2 (d)*—*See* International Law—Private 366*a*
——*S. 10* — *See* Arbitration Act (1940), S. 2 642*e*
——*S. 23.*
See also (1) Arbitration Act (1940), S. 2 415*c*
(2) Arbitration Act (1940), S. 23 415*d*
——*S. 23*—"Forbidden by law"—(West Bengal Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance (17 of 1950), S. 5 (2)) — (Arbitration Act (1940), S. 34) 450*c*
——*S. 23*—Contract relating to jute goods—Settlement contract — Nature and validity—(West Bengal Jute Goods Act (5 of 1950), S. 2) 618*a*
——*S. 28* — Agreement to refer matters in dispute in pending suit — (Arbitration Act (1940), S. 21) 690*a*
——*S. 39*—Scope and applicability 642*d*
——*S. 43*—Joint tortfeasors 513*b*
——*S. 62*
See also (1) ibid, S. 63 642*b*
(2) Arbitration Act (1940), S. 2 642*e*
——*S. 62*—Novation of contract, effect 642*a*
——*S. 63*—*See also* Arbitration Act (1940), S. 2 642*e*
—— *Ss. 63, 62* — Necessity for consideration 642*b*
——*S. 63*—Accord and satisfaction 642*c*
——*S. 172* — *See also* Companies Act (1913), S. 21 (1) 526*c*
——*S. 172*—Pledge of shares — Pledgee can fill in the blanks in transfer — (Companies Act (1913), S. 34, Sch. I, Table A, Reg. 18) 526*a*
——*S. 172*—Pledge of shares—Transfer of title is not necessary — Simple delivery of possession of script is enough — (Companies Act (1913), S. 34) 526*b*
—— *S. 188*—*See* Carriers Act (1865), S. 8 547

Co-sharer—Partition — Suit for — Property in possession of tenant — Maintainability of suit 36*b*

Court-fee — *See* Court-fees Act (1870), S. 7 (iv) (b) 36*a*

Court-fees Act *(7 of 1870), S. 7* — Relinquishment of claim—(Civil P. C. (1908), O. 7, R. 11) 755*a*

——*S. 7 (iv) (b), S. 7 (v) and Sch. II, Art. 17 (vi)*—Suit for partition — Property in possession of co-sharer as tenant from month to month — Court-fee 36*a*

——*Ss. 7 (iv) (c), (v) (a) and 8 (c) (Beng.)* —Suit for declaration of right to *pala* of worship and injunction—S. 7 (iv) (c) applies — Mode of valuation—Court's power to revise—(Suits Valuation Act (1887), S. 8) 34*a*

——*S. 7 (iv) (c), Sch. II, Art. 17 (6) and S. 7 (VIA) (Bengal)*—Applicability — Suit by plaintiff in possession for declaration of shares of parties — Plaint also containing prayer for declaring preliminary decree in previous suit fraudulent and invalid and restraining defendant permanently from executing decree—Court-fees payable 42*d*

——*S. 7 (iv) (c)*—Distributive Valuation 583*a*

——*S. 7 (iv) (c)* — Suit for avoiding deed of transfer 755*b*

——*S. 7 (iv) (c)* — Valuation of suits coming under cl. (c) 755*c*

——*S. 7 (iv) (c) (f)*—*See* ibid, S. 17 583*b*

——*S. 7 (v)*—*See* ibid, S. 7 (iv) (b) 36*a*

——*S. 7 (v) (a)* — *See also* ibid, S. 7 (iv) (c) 34*a*

——*S. 7 (v) (a) (Bengal)*—Net profits—Test 710

——*S. 7 (VIA) (Bengal)*—*See* ibid, S. 7 (iv) (c) 42*d*

——*S. 8 B (Bengal)* — *See* Civil P. C. (1908), S. 115 42*a*

——*S. 8 (c) (Beng.)*—*See* ibid, S. 7 (iv) (c) 34*a*

——*S. 8 B (3) (Bengal).*
See (1) Civil P. C. (1908), S. 2 (2) 42*c*
(2) Civil P. C. (1908), O. 7, R. 11 42*b*

——*Ss. 17, 7 (iv) (c) (f), Sch. 2, Art. 17 (vi)* —Suit for different reliefs 583*b*

——*Sch. 2, Art. 17 (vi)*
See (1) ibid, S. 7 (iv) (b) 36*a*
(2) ibid, S. 7 (iv) (c) 42*d*
(3) ibid, S. 17 583*b*

Criminal Law Amendment Ordinance *(29 of 1943), Ss. 3 and 4 (as amended by W. B. Ordinance, 1 of 1950)*—Special Tribunal—Necessity of notification for its constitution 263*a*

——*S. 4*— *See* ibid, S. 3 263*a*

*——*S. 5 (as amended by Ordinance, 6 of 1946 (Central))* — Validity — (Constitution of India, Arts. 13 and 14) 263*b*

——*S. 5 (as amended by Ordinance 6 of 1946 (Central))*— Continuance of proceedings pending at the date of Constitution — (Constitution of India, Art. 13 (1))—(General Clauses Act (1897), S. 6 (e)) 263*c*

Criminal Procedure Code *(5 of 1898), S. 4 (1) (o)*—*See* Constitution of India, Art. 20 (2) 85

——*S. 5* — *See* Houses and Rents—W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 47 414*b*

——S. 96—Issue of search warrant — Recording of reasons for belief not necessary 341

——*Ss. 107 and 112* — "In manner hereinafter provided" 109*a*

—— *S. 107*—Power to call for police enquiry and report 109*b*

——*S. 107* — "Is informed" — Information not complaint 109*c*

——*Ss. 107 and 112*—Police enquiry and notice —Distinction 109*d*

——*Ss. 107 and 192*—'Case'—Meaning of—Proceedings under S. 107 109*e*

——*S. 107*—"Sufficient ground for proceeding" 491

——*S. 112*—*See* ibid, S. 107 109*a*, *d*

——*S. 117 (3)* — Interim security — Order for, before recording evidence—Competency 238*a*

——*S. 122*—Sureties — Rejection of — Persons living at considerable distance from accused's residence 238*b*

——*Ss. 144 and 145* — Effect of prior order in proceedings under S. 144 on subsequent proceedings under S. 145 397*a*

——*S. 145*—*See also* ibid, S. 144 397*a*

——*S. 145*—Parties 397*b*

——*S. 145*—Likelihood of breach of peace: 397*c*

——*S. 145*—Failure to produce evidence—AIR 1919 Pat 37, Dissented from — (Evidence Act (1872), Ss. 101 to 103) 484

——*S. 145*—Order under S. 145 — Order is not bad merely because all interested persons are not made parties — Order is valid so far as parties actually before Magistrate are concerned 777*d*

——*S. 145 (4)* — Consideration of documentary evidence 777*c*

——*S. 154* – *See* ibid, S. 297 602*h*

——*S. 156* — *See* Prevention of Corruption Act (1947), S. 3, Proviso 226

——*S. 162*—Prejudice to accused 602*b*

——*S. 162*—Statement to police 602*c*

——*S. 192*—*See also* ibid, S. 107 109*e*

——*Ss. 192, 529* — Transfer under S. 192 by Magistrate not taking cognizance, bona fide but not erroneous—Subsequent proceedings by transferee Magistrate are without jurisdiction 573

† ——*Ss. 192 (1) and 559 (1)*—Transfer of case of which cognizance was taken by predecessor: 777*b*

——*Ss. 192 (2) and 529 (f)* — Magistrate not taking cognizance of case—Transfer by — Effect 109*f*

——*S. 195* — Complaint in respect of offence under S. 188, Penal Code 507

Criminal P. C. *(contd.)*
——*S. 198* — Case under S. 500, Penal Code — Petition of complaint 791
——*S. 202* — Scope — Petition under S. 500, Penal Code — Opportunity to complainant to prove that allegations made by accused were 'mala fide', should be given—(Penal Code (1860), Ss. 499 and 500)—(Criminal Trial—Practice and Procedure) 689*a*
——*S. 202*—"Inquiry"—Scope of 689*b*
——*S. 205* — Accused, a purdanashin lady — Exemption from personal appearance — Considerations 154
——*S. 208*—Complaint on its face in order—It is for accused to bring facts on record to show that it was not in order—That the accused is illiterate is no reason 76*c*
——*Ss. 210, 211, 212 and 537*—Non-compliance with Ss. 211 and 212 10
——*S. 211*—*See also* ibid, S. 210 10
——*Ss. 211, 212, 213, 215, 439 and 537*—Discretion to examine witnesses named in list under S. 211—Wrong exercise of — Order of commitment—Quashing of 12
——*Ss. 211, 212 and 213*—Procedure laid down in sections should be followed in order in which sections appear 626
*——*Ss. 211, 212 and 537* — Non-compliance with provisions of Ss. 211 and 212—Trial is not vitiated 792*a*
——*S. 212*
See (1) ibid, S. 210 10
(2) ibid, S. 211 12; 626; 792*a*
——*S. 213*—*See* ibid, S. 211 12; 626
——*S. 215*—*See also* ibid, S. 211 12
——*S. 215*—Time for quashing commitment 792*b*
——*Ss. 244, 256, 261 and 262* — Trial before Municipal Court for offence against Municipal Act — Accused pleading not guilty — Accused has every right to adduce evidence in defence — Accused cannot be denied this right — (Municipalities — Calcutta Municipal Act (3 of 1923), S. 386 (1) (c)) 41*b*
——*Ss. 247 and 403*—Acquittal under S. 247 is acquittal within S. 403 197*b*
——*S. 250 (1)*—"Call upon him to show cause" 594
——*Ss. 253, 436 and 439*—Further inquiry: 496
——*S. 256*—*See also* ibid, S. 244 41*b*
——*Ss. 256 and 537*—Effect of non-compliance with S. 256 475
——*S. 261*—*See* ibid, S. 244 41*b*
——*S. 262*—*See* ibid, 244 41*b*
——*S. 268* — *See* West Bengal Criminal Law Amendment Special Courts Act (21 of 1949) (as amended by West Bengal Act 12 of 1952), S. 4 681*b*
——*S. 269* — *See* Constitution of India, Art. 14 602*j*
——*S. 269 (1)*—Validity—Does not contravene Art. 14—(Constitution of India, Art. 14) 394*b*

Criminal P. C. *(contd.)*
——*S. 286*—Prosecution need not tender every witness examined in committing Court 602*d*
——*S. 288* — Procedure — Irregularity not amounting to illegality 602*g*
——*S. 297*—*See also* Penal Code (1860), S. 464 798
——*S. 297*—Evidence of witness admitted under S. 33—Duty of Judge to warn jury — Necessary direction — Failure amounts to non-direction — (Evidence Act (1872), S. 33) 206*e*
——*S. 297* — Jury relying on dying declaration —Omission by Judge to caution—Misdirection 383*a*
——*S. 297*—'Laying down the law by which the jury is to be guided'—Appreciation of evidence 425*a*
——*S. 297* — Misdirection — Omission to point out importance of discrepancy between F. I. R. and petition of complaint—Effect 425*b*
——*S. 297*—Misdirection—(Evidence Act (1872), S. 1) 602*a*
——*S. 297*—Explaining the law—(Evidence Act (1872), S. 144, Illus. (g)) 602*e*
——*Ss. 297 and 154*—Misdirection 602*h*
——*S. 297* — Explaining law of defence of property—(Penal Code (1860), Ss. 97, 99) 602*i*
——*S. 340*—*See* Municipalities—Calcutta Municipal Act (3 of 1923), S. 531 76*b*
——*S. 367* — *See* Evidence Act (1872), Ss. 101 to 103 634
——*Ss. 386 and 388* — Section 388 applies to case where sentence is not only fine but also imprisonment in default — Breach of S. 386 (1), Calcutta Municipal Act — S. 488 of the Act provides for fine only and not imprisonment — S. 388, Criminal P. C. does not apply — Proper procedure is one under S. 386, Criminal P. C — (Municipalities — Calcutta Municipal Act (3 of 1923), S. 386/488) 76*e*
——*S. 388*—*See* ibid, S. 386 76*e*
——*S. 403*
See also (1) ibid, S. 247 197*b*
(2) Constitution of India, Art. 20 (2) 85
(3) Municipalities—Calcutta Municipal Act (3 of 1923), Sec. 483 (2) 357*c*
——*S. 403*—Acquittal under S. 352, Penal Code —Trial on same facts under S. 323, Penal Code 197*a*
——*S. 423 (1) (b)*—"Order him to be re-tried" —Reasons 263*e*
——*S. 423 (1) (b)* — Partial retrial cannot be directed 263*f*
——*Ss. 435 and 439 (1)*—High Court's power to call for records 777*a*
——*S. 436*—*See* ibid, S. 253 496
——*S. 437*—'Improperly discharged 567
——*S. 439*
See also (1) ibid, S. 211 12
(2) ibid, S. 253 496

Criminal P. C. *(contd.)*
(3) Municipalities—Calcutta Municipal Act (3 of 1923), S. 363 410*a*
——*S. 439*—Interference by High Court—Trial Court's appraisement of evidence 560
——*S. 439 (1)*—*See* ibid, S. 435 777*a*
†——*S. 488 (3) and (5)*—Enforcement of order—Husband's failure to obtain cancellation of order—Maintainability of objection 343*a*
——*S. 488 (3)* — Enforcement of order—Sufficient cause—Enquiry as to—Necessity of 343*b*
——*S. 496* — "Proceedings before a Court" — (Words and Phrases) 661*a*
——*S. 510*—*See* Municipalities—Calcutta Municipal Act (3 of 1923), S. 3 (55) 561*a*
——*S. 522*—*See also* Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act (16 of 1951), S. 3 308*a*
——*S. 522*—Powers of Court of appeal or revision — Time limit fixed in cl. (1) does not apply and Court can order restoration even after one month from conviction : A I R 1947 Cal 390, Dissented from 308*b*
——*S. 522*—Scope 308*c*
——*S. 522*—"At any time within one month of conviction" 393
——*S. 529*—*See also* ibid, S. 192 573
——*S. 529*—"Erroneously in good faith 109*g*
——*S. 529*—"Merely"—Meaning of 109*h*
——*S. 529 (f)*—*See* ibid, S. 192 (2) 109*f*
——*S. 537*
See also (1) ibid, S. 210 10
(2) ibid, S. 211 12; 792*a*
(3) ibid, S. 256 475
——*S. 537*—Irregularity 602*f*
——*S. 539B* — Local inspection — Penal Code (1860), Ss. 96, 97 457
——*S. 559 (1)*—*See* ibid, S. 192 (1) 777*b*
Criminal Trial — *See* Evidence Act (1872), Ss. 101-103 401*c*
——Practice and Procedure — *See also* Criminal P. C. (1898), S. 202 689*a*
——Practice and Procedure — Delegated authority cannot be further delegated 689*c*
Damodar Valley Corporation Act *(14 of 1948), S. 7*—*See* Constitution of India, Art. 226 581*a*
——*S. 60 (2) (b)* — *See* Constitution of India, Art. 226 581*a*
Dangerous Drugs Act *(2 of 1930), S. 23*—*See* Evidence Act (1872), S. 25 219

DEBT LAWS

Bengal Agricultural Debtors' Act *(7 of 1936), S. 2 (d)*—Transaction of loan 232
——*S. 13 (3), First Proviso* — Applicability to final order passed by Board 337*c*
——*S. 37A* — Application by a co-sharer must be independent and on his own behalf 323
Debt Laws — Bengal Agricultural Debtors' Act *(contd.)*
——*Ss. 37A (8) and 45* — Proceeding under S. 37A — Applicability of Art. 181, Limitation Act—(Limitation Act (1908), S. 29 (2) and Art. 181) 50*a*
——*S. 44 (a)*—Limitations of review 337*a*
——*S. 44 (a)*—Application when to be made 337*b*
——*S. 45*—*See* ibid, S. 37A (8) 50*a*
Bengal Money-lenders Act *(10 of 1940), S. 30 (1) (a) and (b)*—Suit instituted before Constitution—Questions whether section is ultra vires — Transfer of records to High Court—(Constitution of India, Art. 228) 195
——*S. 34 (1) (a) (ii) and Form 15*—Notice — Time limit—(Limitation Act (1908), Art. 181)—Decision in Suit No. 2077 of 1939, Dissented from 562*a*
——*S. 34 (1) (a) (ii) and Form 15* — Specification of amount of interest 562*b*
——*S. 36* — Decree attached on subsequent reopening of decree—Attachment ceases 365
——*S. 38*—*See also* Civil P. C. (1908), S. 115 94*c*
——*S. 38*—Scope — Nature of declaration contemplated 94*a*
——*S. 38 (3)*—Order refusing to make a declaration under S. 38—No appeal 94*b*

Deed — Construction — Consent decree — (Civil P. C. (1908), O. 23, R. 3) 676*e*
Divorce Act *(4 of 1869), S. 2* — Husband's domicil alone is to be considered **(SB)** 530*g*
——*S. 2*—Change in domicil **(SB)** 530*i*
——*Ss. 3 (3) and (4)* — Jurisdiction — Both parties must reside or must have last resided **(SB)** 242
Dock Labourers Act *(19 of 1934), S. 2 (a)* — *See* Dock Labourers Regulation (1948), Regn. 44 108
——*S. 5 (3)* — *See* Dock Labourers Regulation (1948), Regn. 44 108
Dock Labourers Regulation *(1948), Regn. 2*—*See* ibid, Regn. 44 108
——*Regns. 44, 2, 55, and 54*—Hatch on boat not properly secured — Boat owned by company — Conviction and sentence of Manager qua Manager—Dock Labourers Act (1934), Ss. 2 (a) and 5 (3) 108
——*Regn. 54*—*See* ibid, Regn. 44 108
——*Regn. 55*—*See* ibid, S. 2 108
Domicil — *Acquisition of*—*See* Constitution of India, Art. 5 **(SB)** 530*f*
Easements Act *(5 of 1882), S. 52*—*See* Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 147
Essential Supplies (Temporary Powers) Act *(24 of 1946)*—Validity — (Constitution of India, Art. 245) 548*a*

Essential Supplies (Temporary Powers) Act *(contd.)*
——*S. 2*—Foodstuff 548*k*
——*Ss. 3 and 4*—Delegation and sub-delegation — Sections are not ultra vires — West Bengal Cotton Cloth and Yarn Control Order (1948), Cls. 13 and 14 — Notification under, are not invalid : A. I. R. 1952 Orissa 87, Dissented from 492*b*
——*S. 3 (1), (2)*—Scope 548*b*
——*S. 3 (1)*— Validity — Constitution of India, Art. 19 (1) (f) (g) (5) ; (6) 548*e*
——*S. 3 (1), (2) (j)* — Delivery of goods at destination 548*l*
——*S. 3 (1), (2) (c), (j)* — Notice in Form 'A' 548*m*
——*S. 3 (2)*—*See also* ibid, S. 3 (1) 548*b*
——*S. 3 (2) (c), (d), (f), (h), (i) and (j)* — Validity—(Constitution of India, Arts. 19, 31) 548*c*
——*S. 3 (2) (c), (d), (h), (i), (j)* are valid — (Constitution of India, Art. 19) 548*f*
——*S. 3 (2) (c), (j)*—*See* ibid, S. 3 (1) 548*m*
——*S. 3 (2) (j)*—*See* ibid, S. 3 (1) 548*l*
——*S. 4*—*See* ibid, S. 3 492*b*
——*Ss. 7 (2) proviso, 13A (as amended by Act 52 of 1950)*—Offence under S. 7 (2), proviso — Granting bail — Consideration under S. 13A 28*a*
——*S. 7 (2) (b), Proviso*—*See also* West Bengal Foodgrains Control Order 1951, para 10 and Explanation 476*b*
——*S. 7 (2) (b)* — Proviso and Explanation — "Maximum quantity so prescribed" — (West Bengal Foodgrains Control Order, 1951) 476*a*
Essential Supplies (Temporary Powers) Act, *S. 13A (1946 as amended by Act 52 of 1950)* — *See* ibid, S. 7 (2) Proviso 28*a*
Evidence Act *(1 of 1872), S. 1* — *See* Criminal P. C. (1898), S. 297 602*a*
——*S. 6*—*See* Penal Code (1860), S. 354 332
——*S. 9*—*See* Municipalities — Calcutta Municipal Act (3 of 1923), S. 127 428*b*
——*S. 13*—*See* Houses and Rents—West Bengal Premises Rent Control Temporary Provisions Act (17 of 1950), S. 9 671
——*S. 18*—*See also* ibid, S. 73 307
——*S. 18* — Admission has to be taken in its entirety **(SB)** 530*h*
——*S. 25*—"Police Officer"—Meaning of—Test of applicability of S. 25 — Confession made to preventive officer of customs — Admissibility in evidence—(Dangerous Drugs Act (1930), S. 23 —Sea Customs Act (1878), S. 169) 219
——*S. 32*—Dying declaration—Conviction based on—Soundness of 383*b*
——*S. 33* — *See also* Criminal P. C. (1898), S. 297 206*e*
——*S. 33*—Death of witness must be established 206*b*
——*S. 33* — Adverse party must have had right to cross examine witness 206*c*

Evidence Act *(contd.)*
——*S. 33*—Issues in case in which witness was examined and in case in which his evidence is sought to be admitted under S. 33 must be same —(Obiter, per Harries C. J.) 206*d*
——*S. 33*—Previous deposition must be in judicial proceeding—Proceedings without jurisdiction are not judicial proceedings—Deposition taken in such proceeding is not by person authorised 339*a*
——*Ss. 65 (a) and 66* — Original in possession of opposite party—Procedure 456*a*
——*S. 66*—*See* ibid, S. 65 (a) 456*a*
——*S. 67*—Carbon copies — Use for comparison 456*b*
——*Ss. 73, 18*—Proof by comparison—Identity of accused's signature—Admitted signature 307
——*S. 90*—Presumption under in case of will 471*a*
——*S. 90*—Computation of thirty years 471*b*
——*S. 90*—Extent of presumption in case of will —(Succession Act (1925), S. 59) 471*c*
——*S. 90*—Presumption under, is rebuttable 471*d*
——*Ss. 101 to 103*
See also (1) Accounts—Suit for 244*d*
(2) Companies Act (1913), S. 231 487*b*
(3) Criminal P. C. (1898), S. 145 484
(4) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 686*b*
(5) Municipalities—Calcutta Municipal Act (3 of 1923), S. 141 428*a*
(6) Succession Act (1925), S. 237 657*c*
——*Ss. 101 to 103* — Genuineness — Suit for accounts — Accounts produced by legal representative of deceased accounting party—Genuineness of accounts—Burden of proof—(Accounts) 244*c*
——*Ss. 101-103*—Criminal trial 401*c*
——*Ss. 101 to 103* — Criminal trial, burden of proof—(Criminal P. C. (1898), S. 367) 634
——*S. 105*—*See also* West Bengal Foodgrains (Movement Control) Order (1951), Para 3 (3) 408*b*
——*S. 105*—Onus to bring case within proviso —(Municipalities—Calcutta Municipal Act (33 of 1951), S. 461 Proviso) 401*b*
——*S. 114*
See also (1) Accounts—Suit for 244*d*
(2) Succession Act (1925), S. 63 (c) 462*b*
(3) Succession Act (1925), S. 237 657*c*
——*S. 114*—Document in possession of plaintiff's husband—Husband giving evidence but not asked to produce the document—Adverse inference can-

Evidence Act *(contd.)*
not be drawn against plaintiff—(Per Lahiri J.) 164*d*
—*S. 114* — Employer denying that certain workmen were working overtime — Book alleged to show overtime work not produced by employer —Inference 336*b*
—*S. 115* — *See also* Succession Act (1925), S. 263 103*e*
—*S. 115* — Estoppel by mistake — Decree-holder putting up his own property, by mistake, to sale in execution—(Civil P. C. (1908), S. 151, O. 21, Rr. 89 and 90) 125
—*S. 115*—Estoppel as cause of action 172*a*
—*S. 115*—Both parties proceeding on certain footing—They cannot subsequently change their case—(Civil P. C. (1908), O. 6, R. 2) 251*a*
—*S. 115* — Estoppel by pleading and conduct —(Houses and Rents West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 14 (4)) 409*b*
—*S. 115*—Estoppel against statute 458*e*
—*S. 133* —*See also* Penal Code (1860), S. 354 332
—*S. 133* — Case of rape on girl of 7 years depending on her evidence—Her evidence changing from time to time — Her evidence must be corroborated —(Penal Code, S. 376) 206*a*
—*S. 144, illus. (g)*—*See* Criminal P. C. (1898), S. 297 602*e*
—*S. 154*—Hostile witness—Testimony against party calling him 160*a*
—*S. 167*—Sufficient evidence on record, after eliminating inadmissible evidence, to determine guilt of accused — Still case sent back to trial Court for decision for ends of justice, since the trying Magistrate had advantage of seeing demeanour of witnesses 339*b*

Excess Profits Tax Act *(15 of 1940), S. 3 (3)* —*See* Income-tax Act (1922), S. 5 (2) 314
—*S. 13 (1)* — *See* Income-tax Act (1922), S. 5 (2) 314
—*S. 14*—*See* Income-tax Act (1922), S. 5 (2) 314

French Civil P. C., *Art. 158*—*See* Chandernagore (Adaptation of Laws) Order (1950), S. 7 580

General Clauses Act *(10 of 1897), S. 3 (39)*
See (1) Constitution of India, Art. 226 289*a*
(2) West Bengal Foodgrains Control Order, 1951, Para. 10 and Explanation 476*b*
—*S. 6*
See (1) Bengal General Clauses Act (1 of 1899), S. 8, Cls. (d) and (e) 401*d*
(2) Constitution of India, Art. 13 263*d*
—*S. 6 (e)*—*See* Criminal Law Amendment Ordinance (29 of 1943) as amended by Ordinance 6 of 1946 (Central), S. 5 263*c*

General Clauses Act *(contd.)*
—*S. 8*—*See* Letters Patent (Cal.), Cl. 15 **(SB)** 433*d*
—*S. 26* — Acts forming offences under two sections of enactment — Prosecution can prosecute under any of them 28*b*

Government of India Act *(1935) (26 Geo. V & 1 Edw. VIII C 2), S. 175 (3)* — *See also* Constitution of India, Art. 311 (2) 319*a*
—*S. 175 (3)*—Scope 319*b*
—*S. 240 (1)*—"Civil Post under the Crown" 188*b*
—*Ss. 240 (1) and (3) and 241 (2)*—Scope of —"Every person who holds under the Crown" meaning 188*d*
—*S. 240 (2) and (3)*—Dismissal includes discharge 188*c*
—*S. 240 (2) and (3)* — Non-compliance with section—Compliance with Civil Services Rules—Effect — (Civil Services (Classification, Control and Appeal) Rules) 188*e*
—*S. 240 (3)*
See (1) ibid, S. 240 (2) 188*c*; *e*
(2) Specific Relief Act (1877), S. 42 188*f*
—*S. 241 (2)*—*See* ibid, S. 240 (1) and (3) 188*d*

Government Premises (Eviction) Act *(27 of 1950), S. 2 (a)* — "Competent authority" — Appointment by designation 729*b*
—*S. 3* — *See also* Constitution of India, Art. 226 729*d*
— *S. 3* — Notice to quit — Satisfaction of competent authority 729*c*
— *S. 5*—*See* Constitution of India, Art. 226 729*d*

HIGH COURT RULES AND ORDERS

Calcutta Civil Rules and Orders, *R. 720*—*See* Constitution of India, Art. 227 702*b*
—*R. 720 (2) and (3)*—Scope 702*a*

Calcutta High Court Appellate Side Rules, *Chap. II, R. 8* **(SB)** 433*f*
—*Chap. 6 R. 33* as amended in 1948—"Ordinarily" meaning of 282*c*
—*Chap. 6, R. 33* — Necessity for further amendment 282*d*

Calcutta High Court (Original Side) Rules, *Chap. XX, R. 4*—Procedure—Notice of motion for contempt 627*b*
—*Chap 21, Rr. 9 to 11 (introduced in 1940)* —Applicability 672*c*
—*Chap. 21, R. 12 (introduced in 1940)*—Applicability—Receiver making appointment on his own initiative 672*d*
—*Chap. 35, R. 15* — Execution of personal bond of applicant by his authorised attorney—(Succession Act (1925), S. 291) — (Powers of Attorney Act (1882), S. 2) 606*b*
—*Chap. 35, R. 19* — Nomination of Gazetted officer outside jurisdiction of High Court 606*a*

High Court Rules and Orders—Calcutta High Court (Original Side) Rules *(contd.)*
——*(framed under Calcutta Official Receivers Act (7 of 1938)), Appendix 11, R. 3*—Income 672*b*

Hindu Law — Inheritance — *See also* Hindu Women's Rights to Property Act (1937), S. 2 200*b*
——Inheritance — Agricultural property—Right of unchaste widow to inherit 200*c*
——Maths—Succession to mohuntship 687*a*
——'Maths' — Succession to 'mohuntship' — Advertisement in newspapers 687*b*
——'Maths' — Succession to 'mohuntship' — Nomination of 'mandali' 687*c*
——Religious Endowment — Dedication—Creation of debuttar in favour of deity by valid and bona fide deed of Arpannama — Subsequent deed of cancellation can have no legal effect — Subsequent lapses on the part of the dedicator would not convert debuttar into a revocable one—Title created in favour of deity cannot be affected by acts of shebait 285*a*
——Religious Endowment—Dedication — There must be divesting of property 285*b*
——Religious Endowment—Dedication in favour of deities which are consecrated temporarily once a year for worship and then immersed in water —Endowment is legal 285*c*
——Religious Endowments—Classes of—Nature of endowments—Determination of 716*a*
——Succession — Dayabhaga School — Right of father over ancestral and self-acquired property—Son living separate — But no separation between them — His right to succeed to estate of father after his death is not affected 164*c*
——Will — Son guilty of patricide — Property devolves on next reversioner 103*b*
——Will — Construction — Limited estate — Words of enlargement—Bhogdakhal — Power of appointment not exercised — There is intestacy of death of widow 194

Hindu Women's Rights to Property Act *(18 of 1937), Ss. 2 and 3*—Non-agricultural property — Widow unchaste — Right to inherit — (Hindu Law—Inheritance) 200*b*
——*S. 3*—*See also* ibid, S. 2 200*b*
——*S. 3*—"Property" — Act does not apply to agricultural property 200*a*

HOUSES AND RENTS

Calcutta Rent Ordinance *(5 of 1946), S. 2 (5)* —"Building"—Whether land is vacant is question of fact 160*d*
——*S. 9*—*See* Houses and Rents—West Bengal Premises (Temporary Provisions) Act (17 of 1950), S. 40 599
West Bengal Premises Rent Control (Temporary Provisions) Act *(38 of 1948), S. 2 (2)*—*See* ibid, S. 12 (1) 146*b*

Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (1948) *(contd.)*
——*Ss. 12 (1) (c) and 2 (2)* — "Controller" in S. 12 (1) (c) does not include Chief Judge 116*b*
——*S. 12 (3)* — Chief Judge in appeal fixing increased rate of rent — Revision to High Court — Operation of order of Chief Judge stayed — High Court ultimately holding that it has no jurisdiction — Stay order held nullity — Tenant not making deposit of rent at increased rate according to order of Chief Judge — There is ipso facto determination of tenancy 116*a*
——*S. 28* — Rent Controller exercising function under Act does not act as Court 297*a*
——*S. 30* — Application for fixation of fair rent — Notice to landlady sent to residential address of her father and not to her ordinary place of residence — Landlady's father managing and administering property on her behalf and in her name — Notice sent to address given in application — Rent Controller held died did not contravene terms of S. 30 297*c*
——*S. 32*—*See* Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32 297*b*
——*S. 32* — *See* Houses and Rents—*See* ibid, S. 32 297*b*
West Bengal Premises Rent Control (Temporary Provisions) Act *(17 of 1950), S. 2 (ii), as amended by Act 62 of 1950* — Amendment of definition of "tenant" — Retrospective operation —Houses and Rents—West Bengal Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 2) 566*a*
——*S. 2 (8)* — Cinema premises — (Words and Phrases—Premises) 149*b*
——*Ss. 2 (8) and 9 (e)* — "Premises" means what forms subject-matter of one demise — One room let to two tenants in two portions—Subsequently room let to one tenant after removing partition—Basic rent cannot be fixed on basis of two premises 234
——*Ss. 2 (11) and 12 (1) (as amended by Act (62 of 1950))*—Re-claim of tenancy 585*a*
——*Ss. 3 (1), 7 (1) (c) and 17 (1)* — Adjustment of excess payment with effect from before commencement of Act 150*b*
——*S. 5 and Sch. A, Para 4* — Intermediate tenant holding under lease coming under S. 5 — Effect 20*e*
——*S. 7 (1) (c)*—*See* ibid, S. 3 (1) 150*b*
——*S. 9 and Sch. A*—Standard rent—Determination of—Methods—Duty of Rent Controller 20*c*
——*S. 9*—Strict rules of pleading are not to be insisted—But proof of facts necessary 20*d*
——*S. 9*—Duty of appellate Court—Fixation of standard rent under S. 9 (1) (f), Proviso — Dismissal of petition for fixation of fair rent by appellate authority on ground that case fell under Cl. (g) and evidence was not produced —

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (1950) *(contd.)*
Remand — Propriety of — (Civil P. C. (1908), O. 41, R. 25) 47*a*
——*S. 9*—Premises let out in December 1941—Mode of ascertaining standard rent — Rent Controller cannot determine prevailing rent till rent in 1941 is investigated 54*a*
——*S. 9*—Applicability to licensee — (Transfer of Property Act (1882), S. 105 — (Easements Act (1882), S. 52) 147
——*Ss. 9, 31 and 47* — Rules under S. 47 — Rule 9—Fixation of standard rent—Proper procedure — Matters to be taken into account—Civil P. C. (1908), O. 26 Rr. 9 and 10 and O. 18 R. 18 177
——*S. 9 and Sch. A* — Tenant spending large sums for making alterations in premises—Subsequent sub-letting by him — Fixation of standard rent—Basis of 284
——*Ss. 9, 17* — Determination of standard rent —Application under Act of 1948—Appeal decided in 1950—Provisions applicable 315
——*S. 9*—Fixation of standard rent 515
——*S. 9*—Standard rent, fixation of—(Evidence Act (1872), S. 13) 671
——*S. 9*—Standard rent—Onus 714
——*S. 9, Sch. A* — Applicability — (Civil P. C. (1908), S. 11) 782
——*S. 9 (1) (a) and Sch. A para 4* — Fixation of standard rent 465
——*S. 9 (e)*—*See also* ibid, S. 2 (8) 234
——*S. 9 (e)* — Whole of premises not let out on 1.12.41—Basic rent 126*b*
——*S. 9 (1) (e)* — Fixation of standard rent — Basis 93
——*S. 9 (1), cls. (c) and (g)* — Both clauses cannot be applied to same proceeding 243*a*
——*S. 9 (1) (f)* — *See also* Interpretation of Statutes 379*b*
——*S. 9 (1) (f), S. 9 (1) (f) Proviso and 9 (1) (g)*—Applicability 47*c*
——*S. 9 (1) (f)*—Applicability—Part of building completed after 31-12-1949 and let—Proviso to S. 9 (1) (f) does not apply 243*b*
——*S. 9 (1) (f)*—Construction 243*c*
——*S. 9 (1), Cls. (f) and (g)* — Applicability—Words 'entire construction' in proviso to S. 9 (1) (f)—Meaning of—Construction completed of part of a building — Portions of such completed construction let out—Application for fixation of fair rent — Clause (f) and not (g) of S. 9 (1) applies: A. I. R. 1953 Cal. 47, Dissented from 379*a*
——*S. 9 (1) (g)*—*See also* ibid, S. 9 (1) (f) 47*c*
——*S. 9 (1) (g)* — Premises constructed after 1941 but before 31-12-1949 — Standard rent 150*a*
——*S. 9 (2)*—Rent on prescribed date ascertainable — It is not permissible to take into consideration standard rent of similar houses in neighbourhood 20*f*

Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (1950) *(contd.)*
——*S. 11 (3)* — *See* Civil P. C. (1908), O. 21, R. 97 218
——*Ss. 12 and 18 (5)*—Retrospective operation of Act 136*d*
——*S. 12* — Scope of—Municipalities—Calcutta Municipal Act (3 of 1923), S. 527—S. 12, W. B. Premises Rent Control Act does not override S. 527, Calcutta Municipal Act 357*b*
——*S. 12 (1) (as amended by Act (62 of 1950)* —*See* ibid, S. 2 (11) 585*a*
——*S. 13 (2)*
See also (1) Civil P. C. (1908), S. 115 198*b*
(2) Civil P. C. (1908), O. 21, R. 97 218
——*S. 13 (2)* — Ejectment decree in favour of landlord against tenant — Landlord applying under O. 21, R. 97, Civil P. C., for delivery of possession from sub-tenant — Objection by sub-tenant under S. 13 (2) of W. B. Premises Rent Control Act claiming to have acquired tenancy directly under landlord — Application of sub-tenant not entertained by Judge proceedings being summary — Held on revision, that while the sub-tenant could not file independent application under S. 13 (2) in the summary proceedings for delivery of possession, his objection to the landlord's application under O. 21, R. 97 could be heard and determined in those summary proceedings — (Civil P. C. (1908), O. 21, R. 97) 198*a*
——*S. 13 (2)*—Civil P. C. (1908), O. 21, R. 100—Decree against tenant — Dispossession of sub-tenant—Application of restoration—Maintainability — (Civil P. C. (1908), S. 144, O. 21, R. 100) 598
——*Ss. 14 and 18 (5)* — Suit under Bengal House Rent Control Order, 1942—Applicability of S. 18 (5) 352*a*
——*Ss. 14 (1) and (3) Proviso and 18 (5) (as amended by West Bengal Act 62 (LXII) of 1950)*—Applicability of S. 14 to pending suits 136*e*
——*S. 14 (1)* — Order held was not one under S. 14 (1) 145*a*
——*S. 14 (3)*
See also (1) ibid, S. 14 (1) 136*e*
(2) ibid, S. 18 (5) **(FB)** 733*a*
——*S. 14 (3), Proviso*—"Within a period of 18 months"—Meaning of 145*b*
——*S. 14 (4)* — *See also* Evidence Act (1872), S. 115 409*b*
——*S. 14 (4)* — Court has no power to demand the tenant to deposit rent higher than the standard rent 407*a*
——*S. 14 (4)* — Scope — Tenant pleading that he is not a tenant — S. 14 (4) will not apply till that question is decided against him 409*a*

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (1950) *(contd.)*
——*S. 14 (4)*—Defence contemplated by section 409*c*
——*S. 14 (4)* — Default in making deposit of rent — Effect 600*a*
——*S. 14 (4)*—Legality of order under S. 14 (4) 600*b*
——*S. 14 (4)* — Type of suits contemplated by S. 14 (4) 600*c*
——*S. 14 (4)*—Defence against ejectment 762
——*S. 16*—*See* Letters Patent (Cal.), Cl. 13 589*a*,*b*
——*S. 17*—*See* ibid, S. 9 315
——*S. 17 (1)*—*See also* ibid S. 3 (1) 150*b*
——*S. 17 (1)*— Standardised rent prevails until new standard is fixed by appellate authority — Matter is not at large during pendency of appeal against order of Rent Controller which had fixed standard rent—(Civil P. C. (1908), S. 97) 407*b*
——*S. 17 (2)*—"Fixed" —Meaning of 424*a*
——*S. 17 (2) and Sch. A, Paras 1 (a), 1 (b) and 3 (b)*—Fixation of standard rent 424*b*
——*S. 18*—*See also* Civil P. C. (1908), S. 2 (2) 412
——*S. 18* — Order under, on application under S. 6 of W. B. Act 62 of 1950—Extension of time —(Civil P. C. (1908), S. 151)—(Houses and Rents — W. B. Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 6) 771*a*
——*S. 18 (1) (as amended)*—Scope —Ss. 5 and 6 of Amending Act (62 of 1950)—Scope and effect of—(Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Amendment Act (62 of 1950), Ss. 5 and 6) 102
——*S. 18 (1)* — "Decree for recovery of possession" includes order for recovery of possession under Chap. 7, Presidency Small Cause Courts Act 261*a*
——*S. 18 (1)* — Application for vacating order for possession beyond 60 days of coming into force of Act—Maintainability 261*b*
——*S. 18 (1) and (5)*—Applicability 261*c*
——*S. 18 (1)*—Consent decree 335
——*S. 18 (5)*
See also (1) ibid, S. 12 136*d*
(2) ibid, S. 14 352*a*
(3) ibid, S. 14 (1) 136*e*
(4) ibid, S. 18 (1) 261*c*
(5) Houses and Rents—West Bengal Premises Rent Control (Temperary Provisions) Amendment) Act (62 of 1950), S. 5 136*a*
——*Ss. 18 (5) and 14 (3), Pioviso, (as amended by W. B. Act 62 of 1950)*—Applicability of S. 14 (3), proviso in order to give relief under S. 18 (5) —(Interpretation of Statutes — Proviso) : 56 Cal. W N 353 ; A I R 1952 Cal. 898, Overruled ; 56 Cal W N 346 : A I R 1953 Cal. 136, partly Overruled **(FB)** 733*a*

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (1950) *(contd.)*
——*S. 20 (2)*—Applicability—Essentials 116*c*
——*S. 31*—*See also* ibid, S. 9 177
——*S. 31*—Report of Inspector — Inspector not examined as witness — Value of report — (Civil P. C. (1908), O. 26, R. 10) 126*c*
——*S. 31 (1) (a)*—Scope of—Does not empower Inspector to exercise judicial functions nor can Controller act on evidence obtained by Inspector 54*b*
——*S. 32*—Retrospective operation—(Limitation Act (1908), Ss. 18 and 29 (2)) — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), S. 32)— S. 18, Limitation Act did not apply to review proceedings 297*b*
——*S. 32 (3)* — Local inspection by appellate Court —Effect on hearing of appeal—(Civil P. C. (1908), S. 107, O. 18, R. 18) 126*a*
——*S. 34* — *See also* Constitution of India, Art. 20 (2) 85
——*S. 34*—Jurisdiction—(Civil P. C. (1908), S. 9) 414*a*
——*S. 34*—Supply of electricity 686*a*
——*S. 34* — Burden of proof — (Evidence Act (1872), Ss. 101 to 103) 686*b*
——*S. 40* — Prosecution under for taking pugree or selami in 1948—(Houses and Rents—Calcutta Rent Ordinance (5 of 1946), S. 9)—(Constitution of India, Art. 20) 599
——*S. 47*—*See also* ibid, S. 9 177
——*S. 47* — Rules under, R. 9 — Validity — (Criminal P. C., S. 5) 414b
——*Sch. A*
See (1) ibid, S. 9 284
(2) ibid, S. 9 782
——*Sch. A, Paras. 1 (a), 1 (b) and 3 (b)* — *See* ibid, S. 17 (2) 424*b*
——*Sch. A, Paras. 2 (b), Porviso and 3 (b)* — Scope 570*b*
——*Sch. A, Para. 3 (b)* — *See also* ibid, Sch. A Para. 2 (b) 570*b*
——*Sch. A, Para. 3 (b)*—'Has elapsed or elapses' 570*a*
——*Sch. A, Para. 4*—*See also* ibid, S. 9 (1) (a) 465
——*Sch. A, Para. 4* — Scope — Scaling up of standard rent 20*b*
——*Sch. A, Para. 4*—Scope—Does not prescribe method for determining actual standard rent 54*c*
West Bengal Rent Control (Temporary Provisions) (Amendment) Act *(62 of 1950), S. 2* —*See* Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 2 (ii) 566*a*
——*S. 5* — *See also* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 (1) 102

Houses and Rents — West Bengal Rent Control (Temporary Provisions) (Amendment) Act *(contd.)*
——*S. 5* — Meaning of — Provisions of original Act applicable to pending suits — (Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 (5)) 136*a*
——*Ss. 5 and 6*—Applicability—Order for possession made before West Bengal Premises Rent Control (Temporary Provisions) Act 17 of 1950 —S. 5 of the Amendment Act 1950 has no application — S. 6 also does not apply — S. 6 applies only where order for possession is made at any time between commencement of the main Act and the Amending Act 231
——*S. 6*
See (1) Civil P. C. (1908), S. 2 (2) 412; 524*a*
(2) Civil P. C. (1908), S. 115 771*b*
(3) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 771*a*
(4) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 (1) 102
West Bengal Premises Requisition and Control (Temporary Provisions) Act *(5 of 1947), S. 3 (1)*—*See also* Constitution of India, Art. 31 (2) 223*b*, *c*
——*S. 3 (1)*—Omission to specify public purpose 579

Import and Export Control Act *(18 of 1947), S. 3*—*See also* Constitution of India, Art. 226 591*a*
——*S. 3* — Statutory Notification referred to in Appendix H (i) and Appendix H (ii)—Notification No. 2 ITC/478 of Ministry of Commerce, D/. 6-3-1948, setting out conditions and circumstances under which import licence may be refused — (Constitution of India, Art. 226) 591*b*
——*S. 3*—In granting or refusing to grant licence authority does not act judicially 591*c*
Income-tax Act *(11 of 1922), S. 4 (1)* — *See* Bengal Agricultural Income-tax Act (4 of 1944), S. 2 (1) 344
——*S. 4 (3) (i)* — Property held under trust — Religious trust — Gift to family God through intervention of trustee 329
——*S. 4 (3) (vii)* — *See* Bengal Agricultural Income-tax Act (4 of 1944), S. 2 (1) 344
——*Ss. 5 (2), 5 (5) and 5 (7a)* — Notification under S. 3 (3), Excess Profits Tax Act—Income-tax assessment and provisional Excess Profits tax assessment completed — Subsequent transfer of case by commissioner under S. 5 (5), Income-tax Act to another Income-tax Officer—Transfer held one under S. 5 (5) and not under S. 5 (7-A)—Assessment by transferee Officer held valid—(Excess Profits Tax Act (1940), Ss. 3 (3), 13 (1) (14) 314

Income-tax Act *(contd.)*
——*S. 5 (5)* — *See* ibid, S. 5 (2) 314
——*S. 5 (7a)*—*See* ibid, S. 5 (2) 314
——*S. 10 (2) (vi), Sch., R. 2 (l) & R. 3 (b)* — Life insurance business — Depreciation on furniture, motor-cars and books 59*b*
——*S. 10 (2) (xv)*—Capital expenditure — It is not necessary that some asset or advantage should actually be brought into existence — Expenditure is to be attributed to capital 368*a*
——*S. 10 (2) (xv)* — Revenue expenditure — Meaning of 368*b*
——*S. 10 (2) (xv)*—Capital expenditure — Expenditure to be made "once and for all" explained 368*c*
——*S. 10 (2) (xv)* — Capital expenditure or revenue expenditure—Expenditure for maintaining strength of capital structure of Company and not an expenditure connected with process by which organisation operated to obtain regular returns for regular outlay — *Held* it was an expenditure for benefit of the business as a whole 368*d*
——*S. 10 (2) (xv)* — Capital expenditure or revenue expenditure—A newly formed company to enure for itself certain conditions of security undertaking to pay consideration to the grantor of security — Expenditure though periodical is in nature of initial outlay and payments cannot be debited against revenue receipts 368*e*
——*S. 10 (2) (xv)* — Capital expenditure or revenue expenditure—Competition cases — Three groups of, stated 368*f*
——*S. 18 (5) & Sch. R. 4* — "Income-tax paid by deduction at source from interest on securities or otherwise"—Meaning of — Tax paid directly on assessment 59*c*
——*S. 18A*—*See* Companies Act (1913), S. 230 (a) 487*a*
——*S. 24 (2)* — Same business — Meaning — Different businesses—Set off not allowed 127
——*S. 34* — *See also* Constitution of India, Art. 226 721*a*
——*S. 34*—Assessee's failure to disclose fact that he was dealer in shares—Notice under S. 34, held justified 721*b*
——*S. 34 (as amended in 1948)*—Retrospective operation — Effect of substitution of new section —Finance Act and Income-tax Act, relationship 721*c*
——*S. 66*—Statement of the case—Nature of 59*a*
——*S. 66 & Sch. R. 2 (b)*—Question to be framed —Nature 59*d*
——*S. 66*—Jurisdiction to admit further facts 59*h*
——*Sch., Rr. 2 (a) and 5*—"Annuities", Meaning of—(Insurance Act (1938), S. 2 (11)) 299
——*Sch., R. 2 (b)*
See also (1) ibid, S. 10 (2) (vi) 59*b*
(2) ibid, S. 66 59*d*

Income-tax Act *(contd.)*
——*Sch., R. 2 (b)* — Finding out real profits — Method 59*e*
——*Sch., R. 3 (a)* — *See also* Life Assurance Companies Act (1912), Fourth Sch., Cl. (9) (i) 59*f*
——*Sch., R. 3 (a) first Proviso* — "No account shall be taken of any such amounts etc." — Meaning of 59*g*
——*Sch., R. 3 (b)* — "Assets" — Organisation expenses 59*i*
——*Sch., R. 3 (b)*—"Other assets"—Loans 59*j*
——*Sch., R. 3 (b)*—"Reserved — Meaning of—Future loss or depreciation 59*k*
——*Sch., R. 4*—*See* ibid, S. 18 (5) 59*c*
——*Sch. R. 5* — *See* ibid, Sch. R. 2 (a) 299

Indian Independence Act (1947) *(10 & 11 Geo. VI, C. 30), Ss. 1, 7 and 19*—"British India" ceased to exist—(Constitution of India, Art. 1) **(SB)** 530*a*
——*S. 7*—*See* ibid, S. 1 **(SB)** 530*a*
——*S. 19* — *See* ibid, S. 1 **(SB)** 530*a*

Indian Independence (Rights, Property and Liabilities) Order (1947), *Arts. 10 (2) (b) and 12 (2)*—"Liability in respect of actionable wrong"—Suit by discharged Government servant against Province of Bengal dismissed—Appeal—Respondent in appeal 188*a*
——*Art. 12 (2)*—*See* ibid, Art. 10 (2) (b) 188*a*

Industrial Disputes Act *(10 of 1947), Ss. 2 (k), 2 (s)* — Dispute between dismissed employee and employer 613*a*
——*S. 2 (k)* — Individual dispute cannot be an industrial dispute 613*b*
——*Ss. 2 (k), 2 (s)* — Employee forced to retire on pension—Dispute taken up by union 613*c*
——*S. 2 (s)*—*See* ibid, S. 2 (k) 613*a,c*
——*S. 11 (7)* — *See* Industrial Disputes (Appellate Tribunal) Act (1950), S. 12 (1) 37
——*Ss. 15, 18* — Effect of re-instatement by award 613*d*
——*S. 15* — Waiver of rights under award — (Waiver) 613*e*
——*S. 18*— *See* ibid, S. 15 613*d*
——*S. 29*—Light to enforce award in Civil Court —(Civil P. C. (1908), S. 9) — (Special Tribunal) 613*f*

Industrial Disputes (Appellate Tribunal) Act *(48 of 1950), S. 12 (1)*—Order for costs against stranger to proceeding — When can be made—Order against stranger without jurisdiction—Remedy is by application under Art. 226, Constitution of India, and not by appeal under S. 12—(Constitution of India, Art. 226) — Civil P. C. (1908), S. 35) —(Industrial Disputes Act (1947), S. 11 (7)) 37

Influx from Pakistan (Control) Act *(23 of 1949), S. 5* — Permit allowing a person from Pakistan to stay in India for one specified year—Permit issued after expiring of period—Charge of overstaying in India cannot be based on such permit 79*a*
——*S. 5*—Permit allowing person from Pakistan to stay in India for purposes of visiting place in Pakistan for one year — Permit held to be "balderdash"—No charge under S. 5 held could be based unon such permit—Language of permit criticised 79*b*

Insurance Act *(4 of 1938), S. 2 (11)* — *See* Income-tax Act (1922), Sch. R. 2 (9) 299

International Law — Private—Civil P. C. S. 20—(Contract Act (1872), S. 2 (d)—Railways Act (1890), S. 80—Principles stated 366*a*

Interpretation Act (1889), *(52-53 Vict, C. 63), S. 38 (1)*—*See* Letters Patent (Cal), Cl. 15 **(SB)** 433*d*

Interpretation of Statutes
See also (1) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 (5) **(FB)** 733*a*
(2) Municipal Act (3 of 1923), S. 147 773*d*
(3) Workmens' Compensation Act (1923), S. 1 516*d*
——Sections should ordinarily be interpreted as they stand without the addition of any word 18*e*
——Proviso—Scope of 47*b*
——Intention of Legislature — Civil Procedure Code (1908), Pre 81*g*
——Consolidating Act 103*a*
——Too literal constructions leading to absurdity —Liberal construction 136*b*
——Retrospective effect 136*c*
——Interpretation clause—Definitions are limited to that particular statute 160*c*
——Adding of words — (Houses and Rents — West Bengal Premises Rent Control Act, 17 of 1950, S. 9 (1) (f)) — Court should not put in additional words in the provisions of the Statutes 379*b*
——Retrospective operation—(Civil P. C. (1908), Pre.) 566*b*
——Construction just in other statutes 566*c*
——Redundancy—(Civil P. C., (1908), Pre.) 570*c*
——Intention of Legislature—(Civil P. C. (1908), Pre.) **(FB)** 733*b*
——Reasonableness or unreasonableness — Civil P. C. (1908), Pre.) **(FB)** 733*c*
——Dispensation or suspension of part of statute —(Civil P. C. (1908), Pre.) **(FB)** 733*d*
——Principle—(Civil P. C. (1908), Pre.) **(FB)** 733*e*
——Casus omissus—(Civil P. C. (1908), Pre.) **(FB)** 733*f*

Iron and Steel Companies Amalgamation Act *(79 of 1952)*
See (1) Constitution of India (1950), Art. 19 (1) Cls. (c), (f) and (g) 695*e*
(2) Constitution of India (1950), Art. 31 695*a*

Iron and Steel Companies Amalgamation Act *(contd.)*
(3) Constitution of India (1950), Art. 31 (2) 695*d*

Iron and Steel Companies Amalgamation Ordinance *(8 of 1952)*
See (1) Constitution of India (1950), Art. 19 (1), Cls. (c), (f) & (g) 695*e*
(2) Constitution of India (1950), Art. 31 695*a*
(3) Constitution of India (1950), Art. 31 (2) 695*d*

Land Acquisition Act *(1 of 1894), S. 12*—*See* Civil P. C. (1908), S. 152 257*c*
——*S. 18 (2)*—*See* West Bengal Land (Requisition and Acquisition) Act (2 of 1948), S. 8 (2) 595

Land Customs Act *(19 of 1924), Ss. 2 (g), 3 and 4*—Land Customs area, meaning of 663*a*
——*S. 3* — *See* ibid, S. 2 (g) 663*a*
——*S. 3 (1)* — *See also* Central Excise and Salt Act (1944), S. 37 663*c*
——*S. 3 (1)* — Notifications Nos. 5 and 6, D/-27.2-1948, effect of 663*b*
——*S. 4*—*See* ibid, S. 2 (g) 663*a*

Landlord and Tenant—Rent decree—Execution—Decree for rent against some defendants and for costs against all 398*a*
——Rent decree — Decree against all recorded tenants—Civil P. C. (1908), O. 1, R. 10 398*b*

Letters Patent (Cal.), *Cl. 12* — *See also* Civil P. C. (1908), S. 20 235*a*
——*Cl. 12*—Jurisdiction—"Carry on business"—State carrying on commercial undertakings (like railways)—State does not carry on business—States' liability to be sued in its own Courts—(Constitution of India, Art. 300) — (Civil P. C. (1908), Ss. 9 and 20) 1*b*
——*Cl. 12*—Rescission of leave 235*b*
——*Cl. 12*—Leave under—Proper time 639
*——*Cl. 13* — Power to transfer suit is affected by S. 16 of Rent Control Act — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 16) 589*a*
——*Cl. 13* — Transfer of suit for purpose of justice—(Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (1950), S. 16) 589*b*
——*Cl. 15*
See also (1) Constitution of India, Art. 226 **(SB)** 433*a*
(2) Limitation Act (1908), Art. 151 **(SB)** 433*i*
——*Cl. 15* — Scope—Clause is not restricted to judgments given in exercise of jurisdiction specifically conferred by Letters Patent **(SB)** 433*b*
——*Cl. 15*—Scope—Not restricted to judgment given in exercise of jurisdiction existing at the date of Govt. of India Act, 1935 **(SB)** 433*c*

Letters Patent (Cal.) *(contd.)*
——*Cl. 15*—"Pursuant to S. 108, Govt. of India Act, 1915"—(Interpretation Act (1889), S. 38 (1)) —(General Clauses Act (1897), S. 8) **(SB)** 433*d*
——*Cl. 15* — Civil contempt and criminal contempt — Appeal under Cl. 15 — Constitution of India, Art. 215—AIR 1936 Bom 314, Dissented from 627*a*
——*Cl. 15* — Orders made in the exercise of revisional jurisdiction—(Civil P. C. (1908), S. 115) 636*a*
*——*Cl. 15* — Order made in exercise of powers of superintendence—(Constitution of India, Art. 227)—Civil P. C. (1908), S. 115) 636*b*

Life Assurance Companies Act *(6 of 1912), Sch. 4, Cl. (9) (i)* — Sum carried forward unappropriated — Deduction under R. 3 (a) of schedule to Income-tax Act — Income-tax Act (1922), Sch. R. 3 (a) 59*f*
Limitation Act *(9 of 1908), Preamble*—Strict construction 50*b*
——Preamble—Interpretation—Equitable considerations are out of place 50*a*
——*S. 5*—Sufficient cause **(SB)** 433*j*
——*S. 5*—Mistake of Court 624*b*
——*S. 5*—Mistake of Court 800
——*S. 18*—*See* Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32 297*b*
——*S. 29 (2)*
See (1) Debt Laws — Bengal Agricultural Debtors' Act (7 of 1936), S. 37A (8) 50*a*
(2) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32 297*b*
——*Art. 32*—Starting point 390
——*Art. 151* — Applicability — (Constitution of India, Art. 226)—(Letters Patent (Cal), Cl. 15) **(SB)** 433*i*
——*Art. 167* — *See* Civil P. C. (1908), O. 21, R. 35 499
——*Art. 179* — Leave to appeal from revisional judgment of High Court —Limitation —Date of signing cost-sheet not material — (Calcutta High Court Appellate Side Rules, Ch. VI, R. 8)—(Civil P. C. (1908), Ss. 2 (2) and 109) — (Constitution of India, Art. 133) 13
——*Art. 181*
See (1) Civil P. C. (1908), O. 22, R. 3 294
(2) Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), S. 37A (8) 50*a*
(3) Debt Laws — Bengal Money-lenders Act (10 of 1940), S. 34 (1) (a) (ii) 562*a*
(4) Tenancy Laws—Bengal Tenancy Act (8 of 1885), S. 26F (1) and (4) 715
——*Art. 182* — Civil P. C. (1908), S. 151 676*c*

Master and servant — *See* Civil P. C. (1908), O. 40, R. 1 574*f*

Motor Vehicles Act *(4 of 1939), S. 64*—Notice of appeal 587

MUNICIPALITIES

Bengal Municipal Act *(15 of 1932), S. 22 (as amended by Act 28 of 1951)* — Bengal Municipalities Election Rules, 1932, R. 17 — Powers of Chairman and Magistrate 542*b*

——*S. 22 (1) (g)*—Scope 542*d*

——*S. 26*—*See* Municipalities—Bengal Municipal Election Rules, R. 16 (2) 520*c*

——*Ss. 38 and 39* — Scrutiny and computation of votes—Certain votes cast at an election found to be invalid — It is improper for the Court to add these votes to the votes of a candidate who was at the bottom of the poll and to deduct the same number from the votes secured by each of the successful candidates — Proper procedure for the Court is to open the ballot box and to count itself the votes in order to find out in whose constituency the invalid votes had been cast—*(Obiter)* 40*a*

——*S. 38* — Rejection of nomination paper due to clerical mistake—Effect 184

——*S. 38 (d)*—Power of High Court to set aside election—Scope of 542*e*

——*S. 39*—*See* ibid, S. 38 40*a*

——*S. 56 (2)* — Revision of electoral roll — (Municipalities—Bengal Municipal Election Rules, Rr. 1 (6), 16 (2) 520*a*

——*Ss. 370, 408 and 418* — Refusal to issue licenses — Per Chakravartti C. J. (Das, Banerjee and Das Gupta JJ., concurring, S. R. Das Gupta J. dissenting) **(SB)** 433*l*

——*S. 370 (2)* — Refusal of licence on grounds not specified in section — Order of refusal is invalid in spite of Art. 48—(Constitution of India, Art. 48) 333*a*

——*Ss. 402, 403* — Discretion to maintain slaughter-house — Interference — (Constitution of India, Art. 226) **(SB)** 433*m*

——*S. 403* — *See* ibid, S. 402 **(SB)** 433*m*

——*S. 408* — *See* ibid, S. 370 **(SB)** 433*l*

——*S. 418* — *See* ibid, S. 370 **(SB)** 433*l*

——*S. 531*—Order to be appealed against if not an order under the Act, question of preferring appeal does not arise 333*c*

Bengal Municipal Election Rules, *R. 1 (6)* —

——*See* Municipalities — Bengal Municipal Act (15 of 1932), S. 56 (2) 520*a*

——*R. 16 (2)*—*See also* Municipalities—Bengal Municipal Act (15 of 1932), S. 56 (2) 520*a*

——*R. 16 (2)* — Non-compliance — Municipalities — (Bengal Municipal Act (15 of 1932), S. 26) 520*c*

Bengal Municipalities Election Rules *(1932), R. 17*—*See also* Municipalities—Bengal Municipal Act (15 of 1932), S. 12 542*b*

——*R. 17* — "Scrutiny of nomination," meaning of 542*a*

Municipalities — Bengal Municipalities Election Rules *(contd.)*

——*R. 20* — Powers of District Magistrate as appellate authority 542*c*

Calcutta Municipal Act *(3 of 1923), S. 3 (7)* — Definition of "building"—Scope of definition 160*b*

——*Ss. 3 (48), 144 (3) and 363* — "Occupier" —Non-inclusian of name, in assessment book, notice under S. 363 — True test 87*d*

——*Ss. 3 (48) and 527*—Occupier—Meaning of 357*a*

——*Ss. 3 (55), 425 (2)* — Report of Analyst — Evidence—(Criminal P. C. (1898), S. 510) 561*a*

——*Ss. 27 and 30* — Rules under, Rr. 12, 13, 14, 15—Rejection of nomination paper for absence of candidate 227*b*

——*S. 30* — *See also* ibid, S. 27 227*b*

——*S. 30* — Rules under—Rr. 3 (1) (b), 12 and 14—Returning Officer — Functus Officio 227*c*

——*Ss. 46 and 47 (1)(c)*— Improper acceptance of nomination paper 227*a*

——*S. 47 (1) (c)* — *See* ibid, S. 46 227*a*

——*Ss. 124, 127, 131, 363 and 364* — Assessment on unauthorised structures 202*a*

——*S. 127* — *See also* ibid, S. 124 202*a*

——*S. 127* — Rental value of neighbouring premises—Evidentiary value—(Evidence Act (1872), S. 9) 428*b*

——*S. 127 (b)*—Method of assessment — Rental value or evidence relating to nature of user—Relevancy 428*c*

——*S. 127 (b)* — Present value of land — Fixing of 428*d*

——*S. 131* — *See also* ibid, S. 124 202*a*

——*Ss. 131 and 138*—Defective notice—Effect 202*b*

——*S. 131* — Interpretation 202*c*

——*Ss. 131 (2) (b) and 147*—Distinction 773*b*

——*S. 131 (2) (b)*—Cancellation on the ground of irregularity — Meaning 773*c*

——*S. 138* — *See also* ibid, S. 131 202*b*

——*S. 138* — Increase of valuation how proved 327

——*S. 141* — Appeal by assessee — Question as to value of land — Burden of proof — (Evidence Act (1872), Ss. 101 to 103) 428*a*

——*S. 141* — Objection regarding period of assessment 773*a*

——*S. 144 (3)* — *See* ibid, S. 3 (48) 87*d*

——*S. 147*—*See also* ibid, S. 131 (2) (b) 773*b*

——*S. 147* — 'Appeal is preferred under S. 141' —Interpretation (Interpretation of Statutes):773*d*

——*Ss. 179, 180 (2), 492 (1) (c) and Sch. IX* —Prosecution under S. 492 (1) (c) 506

——*S. 180 (2)* — *See* ibid, S. 179 506

——*S. 363* — *See also* ibid, S. 124 202*a*

——*Ss. 363, 493 and 536* — Scope—Magistrate can impose fine and require owner to demolish:87*b*

——*S. 363* — Two kinds of notices 87*c*

Municipalities — Calcutta Municipal Act *(contd.)*
——*S. 363*—Entire building occupied by certain persons—Portion sought to be demolished—Tests to see who is occupier 87*e*
——*S. 363* — Order under — (Criminal P. C., S. 439) 410*a*
——*S. 363* — Notice, necessity of 410*b*
——*S. 364* — *See* ibid, S. 124 202*a*
——*Ss. 386/488*—*See also* Criminal P. C. (1898), S. 386 76*e*
——*Ss. 386/488* — Nuisance contemplated by section detected — Maximum or substantial penalty should be imposed—Possession of a licence to sell milk is no answer to charge under S. 386 76*d*
——*S. 386 (1) (c)* — *See also* Criminal P. C. (1898), S. 244 41*b*
——*S. 386 (1) (c)* — Mere keeping of a buffalo is not an offence under section — It must also be proved that the animal was kept 'for sale or hire or for sale of the produce thereof 41*a*
——*S. 391*—Sanction for construction of cinema house and also to use it as cinema house **(FB)** 179*d*
——*S. 406* — *See also* Bengal General Clauses Act (1 of 1899), S. 8, Cls. (d) and (e) 401*d*
——*S. 406*—"Seller"—Meaning of 561*b*
——*Ss. 407 and 422*—Notification No. 735 P. H. dated 20.3.1928 is *ultra vires* 706*c*
——*S. 407(1)(e) and (v)*—*See* ibid, S. 422: 706*a*
——*S. 412*—Mixture of argemone oil with mustard oil 384
——*S. 422*—*See also* ibid, S. 407 706*c*
——*Ss. 422 and 407 (1) (e) and (v)* — Mustard oil—Presumption under S. 422 706*a*
——*S. 422* — Notification No. 736 P. H. dated 20.3.1928—Strict construction 706*b*
——*S. 422* — Power of Government to make orders 706*d*
——*S. 424* — *See* Bengal Food Adulteration Act (6 of 1919), S. 10 485*a*
——*S. 425 (2)*—*See* ibid, S. 3 (55) 561*a*
——*S. 488* — *See also* Bengal Food Adulteration Act (6 of 1919), S. 10 485*a*
——*Ss. 488 and 527, Sch. 18, R. 4 (1)*—Notice under R. 4 (1) — Procedure to be followed by landlord 357*f*
——*S. 488 (2)* — "Continues to commit such offence" meaning of — Criminal P. C. (1898), S. 403 357*c*
——*S. 488 (2)*—Fresh requisition—Necessity 357*d*
——*S. 488 (2)* — Fine for offence not yet committed 357*e*
——*S. 492 (1) (c)*—*See* ibid, S. 179 506
——*S. 493*—*See also* ibid, S. 363 87*b*
——*S. 493* — Violation of building rules — Demolition—Imposition of fines 87*a*
——*S. 504*—Notices—General notice by Magistrate under Cl. (c) — Methods in Cls. (a) and (b) should first be exhausted 87*f*

Municipalities — Calcutta Municipal Act *(contd.)*
——*S. 527*
See (1) ibid, S. 3 (48) 357*a*
(2) ibid, S. 488 357*f*
(3) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 12 357*b*
——*S. 531*— Notification that Municipal Magistrate might sit any time or day or night in any place in Calcutta is within the terms of the section 76*a*
——*S. 531* — Mobile Court of Municipal Magistrate held in Motor van in accordance with Notification under S. 531 — Accused told that if he wished to be defended by lawyers his case would be adjourned and sitting held in ordinary place of trial—Accused not availing of the opportunity and pleading guilty — It could not be said that the accused was denied his right to be defended by lawyer—(Criminal P. C. (1898), S. 340) 76*b*
——*S. 536*—*See* ibid, S. 363 87*b*
——*Sch. 9*—*See* ibid, S. 179 506
——*Sch. 18, R. 4 (1)*—*See* ibid, S. 488 357*f*
Calcutta Municipal Act *(33 of 1951), S. 5 (1) (c) (vi) and (viii)*—Applicability 401*a*
——*S. 461*
See (1) Bengal General Clauses Act (1 of 1899), S. 8, Cls. (d) & (e) 401*d*
(2) Evidence Act (1872), S. 105 401*b*

Negotiable Instruments Act *(26 of 1881), Ss. 4 and 13*—Essentials 758*c*
——*S. 13*—*See* ibid, S. 4 758*c*
Partition Act *(4 of 1893), Ss. 2 and 3* — Application under S. 3—Time limit 18*b*
——*Ss. 2 and 3* — Order under S. 2 — Setting aside of 18*c*
——*Ss. 2 and 3*—Valuation made for sale under S. 2 — Need for fresh valuation for sale under S. 3 18*d*
——*S. 3*—*See also* ibid, S. 2 18 *b*; *c*; *d*
——*Ss. 3 and 8* — Order rejecting application under S. 3—Appeal against 18*a*
——*S. 4*— "Member of such family" — Wife of member of joint family owning dwelling house is such member 164*a*
——*S. 4 (1)*— "Dwelling house," meaning of—(T. P. Act (1882), S. 44) — (Words and Phrases—Dwelling house) 259
——*S. 8*—*See* ibid, S. 3 18*a*
Partnership Act *(9 of 1932), S. 69*—Scope of: 41 Cal W N 534, OVERRULED 497
Penal Code *(45 of 1860), Ss. 40 to 42 and 64 to 67* — Offence under Calcutta Municipal Act punishable with fine only — Magistrate has jurisdiction to impose sentence of simple imprisonment in default of fine—(Bengal General Clauses Act (1 of 1899), S. 26). *(Obiter)* 41*c*
——*S. 41*—*See* ibid, S. 40 41*c*
——*S. 42*—*See* ibid, S. 40 41*c*

Penal Code *(contd.)*
——*S. 64*—*See* ibid, S. 40 41*c*
——*S. 65*—*See* ibid, S. 40 41*c*
——*S. 66*—*See* ibid, S. 40 41*c*
——*S. 67*—*See* ibid, S. 40 41*c*
——*S. 96* — *See* Criminal P. C. (1898), S. 539B 457
——*S. 97*
See (1) Criminal P. C. (1898), S. 297 602*i*
(2) Criminal P. C. (1898), S. 539B 457
——*S. 99*—*See* Criminal P. C. (1898), S. 297 602*i*
——*Ss. 354 and 448*—Case under Ss. 354/448—Testimony of prosecutrix — What she said at or about time of occurrence being part of 'res gestae' can be corroborative evidence of her evidence — Conviction can be based on such testimony—(Evidence Act (1872), Ss. 6 and 133) 332
——*S. 376*—*See* Evidence Act (1872), S. 133 206*a*
——*S. 409* — *See* Prevention of Corruption Act (1947), S. 5 (1) (c) 681*a*
——*S. 420* — *See* West Bengal Criminal Law Amendment Special Courts Act (21 of 1949), Sch. Items 3 and 8 661*c*
——*S. 420* — *See* West Bengal Criminal Law Amendment Special Courts Act (21 of 1949), Sch. Item 8 661*d*
——*S. 448*—*See* ibid, S. 354 332
——*S. 464*—Making a false document—(Criminal P. C. (1898), S. 297 798
——*S. 499* — *See also* Criminal P. C. (1898), S. 202 689*a*
——*S. 499, Exception 4* — Reports of judicial proceedings — Necessity for contemporaneous publication — Minor errors in, effect of — Good faith—Necessity for 503
——*S. 500* — *See* Criminal P. C. (1898), S. 202 689*a*
Police Regulations, Bengal *(1915), R. 15* — Validity — Constitution of India, Arts. 311 (1) and 313 316*b*
Posts and Telegraphs Manual, *Vol. II, Regn. 17* — Scope—'Investigation', meaning of 504*a*
——*Vol. II, Regns. 17 and 21* — Suspension of employee 504*b*
——*Vol. II, Regns. 17 and 21*—Order of suspension—Duration of its effectiveness 504*c*
——*Vol. II, Regn. 21*—*See* ibid, Vol. 2, Regn. 17 504*b, c*
Powers of Attorney Act *(7 of 1882), S. 2* — *See* High Court Rules and Orders — Calcutta High Court Original Side Rules, Ch. 35, R. 15 606*b*
Precedents — Failure to notice ruling authority —Decision loses its binding force 1*a*
——Bench decision in Original Side appeal—It is equally binding upon all Judges sitting singly 352*b*
——Decisions of House of Lords and Court of appeal 516*c*
Presidency Small Cause Courts Act *(15 of 1882), S. 48*—Second appeal and not revision is the proper procedure against an appellate order of the Small Cause Court 624*a*
Press and Registration of Books Act *(25 of 1867), S. 4*—Cancellation of declaration 772
Prevention of Corruption Act *(2 of 1947), S. 3*—Proviso—Charge-sheet based on investigation made in contravention of proviso—Proceedings quashed as illegal — (Criminal P. C. (1898), S. 156): AIR 1951 All 546, Dissented from 226
——*S. 5 (1) (c) and (4)*—Prosecution of public servant either under S. 5 (1) (c) or under Penal Code (1860), S. 409 681*a*
——*S. 5 (4)*—*See* ibid, S. 5 (1) (c) 681*a*
Preventive Detention Act *(4 of 1950)* — *See* under PUBLIC SAFETY.
Private International Law—*See* International Law (Private).

PUBLIC SAFETY

Preventive Detention Act *(4 of 1950), S. 3*—Past acts 81*a*
——*S. 3*—Past acts 81*b*
——*Ss. 3 and 7* — Power of Court to question vagueness of grounds 81*c*
——*S. 3*—Previous penal acts 81*d*
——*S. 3*—Mala fides of detaining authority 81*e*
——*Ss. 3 and 5*—Illegality of arrest—Detention not per se invalid 81*f*
——*S. 3*—Mala fide orders—Order of detention after release in criminal case 129*d*
——*S. 3A (as amended by Act 4 of 1951)*—*See* ibid, S. 5 81*h*
——*S. 4 (a) and (b) (as amended by Act 4 of 1951)*—*See* ibid, S. 5 81*h*
——*S. 5*—*See also* ibid, S. 3 81*f*
——*Ss. 5, 3A and 4 (a) and (b) (as amended by Act 4 of 1951)*—Construction of S. 5 — Constitution of India, Art. 245 81*h*
——*S. 7*
See also (1) ibid, S. 3 81*c*
(2) Constitution of India, Art. 22 (5) 129*a*
——*S. 7*—Grounds of detention 129*b*
——*S. 7*—Facts in grounds of detention—High Court's power to question them 129*c*
——*S. 9*—Late representation 129*g*

Railways Act *(9 of 1890), S. 77* — *See* Civil P. C. (1908), S. 20 235*a*
——*S. 80*—*See* International Law — Private 366*a*
Registration Act *(16 of 1908), S. 17 (1) (b) and (e)* — Assignment of decree 325
——*S. 35* — Bengal Registration Rules, Rule 55 —Lease executed by *A* in favour of *B* — *A* not appearing before Registrar — Lease registered by *B* only—*Held*, the registration was effective only as against *B* but not against the executant *A* who did not appear or admit registration before Registrar 349*a*

Registration Act *(contd.)*
——*S. 49* — Unregistered lease for five years — Admissibility in evidence for collateral purposes 349*b*

Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act *(16 of 1951), Ss. 3 and 4* — Scope — (Criminal P. C. (1898), S. 522) 308*a*
——*S. 4*—*See* ibid, S. 3 308*a*

Representation of the People Act *(43 of 1951), S. 80*—*See* Constitution of India, Art. 329 (b) 98*a*
——*S. 81* — *See* Constitution of India, Art. 329 (b) 98*a*
——*S. 100*—*See* Constitution of India, Art. 329 (b) 98*a*
——*S. 170*—Civil Court — Includes High Court also 98*c*
——*S. 170*—Validity of — Constitution of India, Arts. 226, 327 98*d*
——*S. 170* — Bar of jurisdiction of Civil Courts —Extent of—Constitution of India, Art. 226:98*e*

SALES TAX

Bengal Finance (Sales Tax) Act *(6 of 1941), Ss. 2 (c) and 17*—Dealer—Interpretation 712*a*
——*S. 5 (2) (iii)* — Effect of change in designation of "Stores and Supply Departments" 324
——*S. 15* — *See* Constitution of India, Art. 226 712*c*
——*S. 17*—*See also* ibid, S. 2 (c) 712*a*
——*S. 17*—'Any tax payable in respect of such business remaining unpaid' — Meaning of 712*b*
——*S. 15*—*See* Constitution of India, Art. 226 712*c*
——*S. 21*—*See* Constitution of India, Art. 226 712*c*
——*R. 71*—*See* Constitution of India, Art. 226 712*c*
——*R. 74*—*See* Constitution of India, Art. 226 712*c*

Sea Customs Act *(8 of 1878), S. 169* — *See* Evidence Act (1872), S. 25 219
——*S. 198* — Absence of notice under — Effect 753*d*

Societies Registration Act *(21 of 1860), Ss. 5, 6* — Property held by trustees of unregistered Society becomes property of society after its registration 140*a*
——*S. 6*—*See also* ibid, S. 5 140*a*
——*S. 6* — Rule 15 (h) held not *ultra vires* — Delegation to one of trustees and suit as framed, held in order 140*b*

Special Tribunal — *See* Industrial Disputes Act (1947), S. 29 613*f*

Specific Relief Act *(1 of 1877), S. 21* — Contract to refer to arbitration — (Arbitration Act (1940), Ss. 20, 21 and 34) — (Civil P. C. (1908), O. 23, R. 3) 690*b*
——*S. 42* — Discretion of Court — Plaintiff, Government servant, discharged from service without complying with S. 240 (3), Government of India Act — Suit for declaration that order of discharge was illegal — (Government of India Act (1935), S. 240 (3)) 188*f*
——*S. 42*—Scope — Simple suit for declaration that an Ordinance or Act is *ultra vires* and for injunction is not maintainable 395*f*
——*S. 45* — Application for orders under S. 45 and writs of Mandamus dismissed by Single Judge of High Court—Appeal lies **FB** 179*a*
——*S. 46*—Application under S. 45—Affidavit—Requirements **FB** 179*b*
——*S. 56* — *See also* Civil P. C. (1903), O. 39, R. 2 377*c*
——*S. 56*—Scope of—(Civil P. C. (1908), O. 39, R. 1) — Section 56 does not prevent Court from restraining party from proceeding with judicial proceedings 377*f*

Succession Act *(39 of 1925), S. 9*—*See* Constitution of India, Art. 5 **(SB)** 530*e*
——*S. 10*—*See* Constitution of India, Art. 5 **(SB)** 530*f*
——*S. 59*—*See also* Evidence Act (1872), S. 90 471*c*
——*S. 59*—Testamentary capacity 462*f*
——*S. 61*—Proof of undue influence 471*e*
——*S. 62*—Non-production of will—Presumption 597
——*S. 63 (c)*—Scribe as attesting witness 462*a*
——*S. 63 (c)*—Presumption as to attestation — (Evidence Act (1872), S. 114 462*b*
——*S. 63 (c)*—Proof of attestation — Evidence not specific — Surrounding circumstances may be taken into account 462*c*
——*S. 63 (c)*—Proof of attestation 462*d*
——*S. 63 (c)*—Endorsement by Registrar 462*e*
——*S. 70*—*See also* ibid, S. 237 657*c*
——*S. 70* — Intention to revoke does not revoke will 103*d*
——*Ss. 102, 103, 232*—Residuary legatee 471*h*
——*S. 103*—*See* ibid, S. 102 471*h*
——*S. 232*—*See also* ibid, S. 102 471*h*
——*S. 232*—Universal legatee 471*g*
——*S. 237* — Propounder to prove existence of facts 657*b*
*——*Ss. 237 and 70* — Burden of proving revocation of will and presumption — (Evidence Act (1872), Ss. 101 to 103 and 114) 657*c*
——*S. 263*—Revocation of will — Power vested in Court as discretionary 103*c*
——*S. 263*—Revocation of grant of probate — Party entitled to controvert will standing by with knowledge — He should not be allowed to reopen case — (Evidence Act (1872), S. 115) 103*e*
——*S. 268*—Grant of Letters of administration —Parties 471*f*
——*S. 291* — *See* High Court Rules and Orders —Calcutta High Court Original Side Rules, Ch. 35, R. 15 606*b*

Sugar (Temporary Excise Duty) Act *(9 of 1947), S. 3* — Validity—(Constitution of India, Arts. 13 (1) and 19) 508

Suits Valuation Act *(7 of 1887), S. 8* — *See* Court-fees Act (1870), S. 7 (iv) (c) 34*a*

TENANCY LAWS

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act *(9 of 1940), S. 4*—Order under — Effect on execution completed by delivery of possession (Tenancy Laws — W. B. Non-Agricultural Act (20 of 1949), S. 88) 780*a*

Bengal Tenancy Act *(8 of 1885), S. 4*—Raiyat holding at fixed rate for limited period 312*b*

——*Ss. 6, 38 and 52* — Right of tenure-holder to reduction of rent 466

——*S. 26F*—Deposit of pre-emption money by pre-emptor cannot be returned on finding defect in pre-emptee's title 216

——*S. 26F*—Effect of reconveyance of property on right of pre-emption 565

——*Ss. 26F (1), (4) (a) and (7)* — *A*, *B* and *C* co-sharers in holding — Sale by *B* of his share—*A* pre-empting sale without impleading *C* — *C* subsequently pre-empting without impleading *A* within three years of sale — Rights of *A* and *C* inter se 239

——*S. 26F (1) and (4)* — Distinction—(Limitation Act (1908), Art. 181) 715

——*S. 26F (7)* — Sale of part of homestead by Kobala, and lease of same land by subsequent Kabuliat in favour of vendor — *Held*, that what was transferred was not only the superior interest but the whole interest 241

——*S. 38* — *See* ibid, S. 6 466

——*S. 52* — *See* ibid, S. 6 466

——*S. 105*—Constructive *res judicata* — (Civil P. C., S. 11) 328*a*

——*S. 162*—*See* Civil P. C. (1908), O. 21, R. 66 669*b*

——*Ss. 163, 164 and 165* — Absence of bidders —Nothing done by way of holding sale — Fresh sale proclamation is necessary 123*a*

——*Ss. 163 to 165 and 168-A* — Rent sale must be of entire holding 123*b*

——*S. 164* — *See* ibid, S. 163 123*a,b*

——*S. 165* — *See* ibid, S. 163 123*a,b*

——*S. 168A* —*See also* ibid, S. 163 123*b*

——*S. 168A*—Decree for arrears of rent of putni tenure—Execution — Stay of — Tenure sold in subsequent execution of rent decree in respect of subsequent period — Prayer for amendment and continuation of previous execution by sale of other properties — Maintainability 236

——*Ss. 178 and 191 (as amended in 1928)* — Effect of S. 191 — Stipulation about payment of Chouth 312*a*

——*S. 191* — *See* ibid, S. 178 312*a*

Calcutta Thika Tenancy Act *(2 of 1949), S. 27* —Order of controller under S. 29 relating to question affecting his jurisdiction — Order is not mere interlocutory — Appeal lies 201*a*

—— *Ss. 28, 29*—Applicability — (Tenancy Laws —Calcutta Thika Tenancy (Amendment) Act (6 of 1953), S. 1 proviso, 8) 770

Tenancy Laws—Calcutta Thika Tenancy Act *(contd.)*

——*S. 29* — *See also* ibid, S. 28 770

——S. *29* — Rules under Act, R. 4 (3) — Re-transfer of case to Munsif by controller 201*b*

Calcutta Thika Tenancy (Amendment) Act *(6 of 1953), S. 1, proviso* — *See* Tenancy Laws —Calcutta Thika Tenancy Act (2 of 1949), S. 28 770

Thika Tenancy (Amendment) Ordinance *(15 of 1952), S. 5*—Scope 625

——*S. 5 (2)*—Forum 752

W. B. Non-Agricultural Tenancy Act *(20 of 1949), S. 2 (5)*—Non-agricultural tenant includes ex-tenant 780*b*

——*S. 88* — *See* Tenancy Laws — Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 4 780*a*

——*Ss. 91 (1) and (2)* — Effect of repeal of Bengal Act, 9 of 1940 780*c*

Tort—Master and servant — Dismissal for misconduct—Nature of enquiry 581*d*

Transfer of Property Act *(4 of 1882), S. 6 (e)* —Transfer of right to recover damages in respect of property along with property itself — Validity 321*a*

——*S. 44*—*See* Partition Act (1893), S. 4 (1) 259

——*S. 53*—Applicability 251*b*

——*S. 53*—Objection of debtor or his assignee in claim case overruled — Declaratory suit by him under O. 21, R. 63, Civil P. C. — Suit not in representative capacity — Creditor can base his defence under S. 53 251*c*

——*S. 53A* — Scope — Enforcement of right expressly provided by contract 349*e*

——*Ss. 58 and 96*—Equitable mortgage—Nature of 208*a*

——*S. 68 (1) (a)*—Equitable mortgage—Right of mortgagee to recover mortgage-money 208*b*

——*S. 68 (2)* — "Stay the suit" — Application for stay when can be refused 208*c*

——*S. 68 (2)*—"Stay of suit"—Mortgagor denying mortgage cannot ask to stay suit 208*d*

——*S. 96*—*See* ibid, S. 58 208*a*

——*S. 100*—*See* Civil P. C. (1908), O. 34, R. 14 676*d*

——*S. 105*—*See also* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 147

——*S. 105* — Agreement conferring exclusive right to enjoyment of premises 149*a*

——*Ss. 105, 106*—Possession under invalid lease —Rent accepted — Nature of tenancy — Notice to quit — Validity 349*c*

——*S. 106*—*See also* ibid, S. 105 349*c*

——*S. 106* — Lease from month to month — Notice to quit — Notice demanding possession in the alternative at the end of tenancy which would expire next after 15 days from receipt of notice is valid 352*c*

T. P. Act *(contd.)*
——*S. 106*—Notice, sufficiency of 585*b*
——*S. 108 (J)*—Condition restraining alienation 729*a*
——*S. 111* — Notice to person who was managing director—Notice treated as notice to company —Validity 160*e*
——*S. 113* — Waiver of notice to quit — What constitutes — Notice to quit followed by notice demanding possession — No waiver 349*d*
——*S. 114A* — Breach of covenant to keep free seats in cinema house—(West Bengal Amusement Tax (Amendment) Act (11 of 1949), Ss 3, 4) 536
Universities Act *(8 of 1904), S. 25* — Regulations under — (Constitution of India, Arts. 14 and 19 (1) (g))—(Words and Phrases—"Occupation") 783*b*
——*S. 25 (1)* — Regulations under— Chap. 16, Regn. 7 — Scope 783*a*
Village Chawkidari Act *(Bengal Act 6 of 1870), S. 50* — Transfer under — Inclusive of income of chowkidari chakran lands — Zamindar cannot claim additional rent 328*b*
Waiver—*See* Industrial Disputes Act (1947), S. 15 613*e*
West Bengal Amusements Tax Amendment Act *(11 of 1949), S. 3*—*See* Transfer of Property Act (1882), S. 114A 536
——*S. 4* — *See* Transfer of Property Act (1882), S. 114A 536
West Bengal Bargadars Act *(2 of 1950)*—Rules under R. 6 (2) — Objection as to non-compliance with R. 6 (2) 632*b*
——*S. 3 (2)* — Division of produce 720*b*
——*Ss. 7 and 9 (2)*—Jurisdiction of Conciliation Board 632*a*
——*Ss. 7 and 9*—Dispute as to division or delivery of *barga* paddy — Dispute must be referred to Board — Civil Court has no jurisdiction — (Civil P. C. (1908), S. 9) 720*a*
——*S. 9*—*See* ibid, S. 7 720*a*
——*S. 9 (2)*—*See also* ibid, S. 7 632*a*
——*Ss. 9 (2), 7 (1) and 18*—Dispute not falling under S. 7 (1)—Board not in existence — Order staying suit is illegal — (Constitution of India, Art. 14) 95
West Bengal Cotton Cloth and Yarn Control Order *(1948), Cl. 13* — *See* Essential Supplies Act (1946), S. 3 492*b*
——*Cl. 14*—*See* Essential Supplies Act (1946), S. 3 492*b*
—— *Cl. 14*—Seizure of cloth by person not competent within meaning of Notification—Effect on conviction for contravening provisions regarding submission of monthly returns 492*a*
——*Cl. 18* — Non-display of price list—Accused cannot be assumed to have had cloth stamped with price in his shop at the relevant time — In the absence of evidence he cannot be held to have contravened the provisions of clause 406*a*
——*Cl. 18 (1)*—Failure to keep price list hanging in absence of cloth is no offence 322
West Bengal Cotton Cloth and Yarn Control Order *(contd.)*
——*Cl. 19*— Production of duplicate cash memo 406*b*
West Bengal Criminal Law Amendment (Special Courts) Act *(21 of 1949), S. 4 (as amended by West Bengal Act 12 of 1952)* — Trial by Special Judge — (Criminal P. C. (1898), S. 268) 681*b*
——*S. 12 (as amended in 1952)*—"Proceedings pending before a Court" — (Words and Phrases) 661*b*
——*Sch. Items 3 and 8*—Private person conspiring with public servants to cheat — (Penal Code (1860), S. 420) 661*c*
——*Sch. Item 8* — Jurisdiction to try offence of cheating — (Penal Code (1860), S. 420) 661*d*
——*Sch. Item 8*—Cheating with respect to Government money 661*e*
West Bengal Foodgrains Control Order, *1951* —*See also* Essential Supplies (Temporary Powers) Act (1946), S. 7 (2) (b) 476*a*
——*Para 10 and Explanation* — "Person" — (Essential Supplies (Temporary Powers) Act (1946), S. 7 (2) (b) Proviso) — (Genaral Clauses Act (1897), S. 3 (39)) 476*b*
West Bengal Foodgrains Intensive Procurement Order *(1952)* — *See also* Constitution of India, Art. 19 (1) (f) (g) 548*g*
——Validity — (Constitution of India, Art. 14) 548*n*
——Hearing of appeals in batches — Duty of Appellate Officer 719
——*Para 2 (1)*—'Director' 756*b*
——*Para. 3* — Estimate of director 756*d*
——*Form A*—Validity 756*c*
West Bengal Foodgrains (Movement Control) Order *(1951), Para 3 (2) and (3)* — *Bona fide* resident 408*a*
——*Para. 3 (3)*—Burden of proof — (Evidence Act (1872), S. 105) 408*b*
West Bengal Jute Goods Act *(5 of 1950), S. 2* *See also* Contract Act (1872), S. 23 618*a*
——*S. 2*—Validity of jute contracts—Burden of proof 618*c*
West Bengal Land Development and Planning Act *(21 of 1948), S. 2 (d* —*See* ibid, S 4: 704*d*
——*S. 4* — Validity — (Constitution of India, Arts. 19 (1) (f) and 19 (5)) 704*a*
——*S. 4* — Section does not contravene Art. 31 (1)—(Constitution of India, Art. 31 (1)) 704*b*
——*S. 4*—Notification under—"The satisfaction of Governor" 704*c*
——*Ss. 4 and 2 (d)*—Notification should specify particular public purpose for which acquisition is necessary—It need not mention all the clauses of S. 2 (d) 704*d*
——*S. 4* — Notification under Act held not opposed to natural justice 704*e*
——*S. 6* - Validity of declaration—West Bengal Land Development and Planning Rules (1948), R. 5 (2) 568

West Bengal Land Development and Planning Rules *(1948), R. 5 (2)*—*See* West Bengal Land Development and Planning Act (21 of 1948), S. 6 568

West Bengal Land (Requisition and Acquisition) Act *(2 of 1948), S. 8 (2)* — Time for making a reference — (Land Acquisition Act (1894), S. 18 (2)) 595

West Bengal Non-Agricultural Tenancy Act *(20 of 1949)*—*See* under TENANCY LAWS

West Bengal Premises Rent Control (Temporary Provisions) Act *(38 of 1948)*—*See* under HOUSES AND RENTS

West Bengal Premises Rent Control (Temporary Provisions) Act *(17 of 1950)*—*See* under HOUSES AND RENTS

West Bengal Premises Rent Control (Temporary Provisions) Amendment Act *(62 of 1950)*—*See* under HOUSES AND RENTS

West Bengal Premises Requisition and Control (Temporary Provisions) Act *(5 of 1947)* —*See* under HOUSES AND RENTS

West Bengal Raw Jute (Central Jute Board and Miscellaneous Provisions) Act *(6 of 1951)* — Validity of the Act — (Constitution of India, Sch. VII, List II, Item 26) 458*a*

—— *S. 2 (1)*—*See* ibid, S. 5 458*b*

—— *Ss. 5, 6, 7 and 2(1)*—"Appointed day": 458*b*

—— *S. 6*—*See* ibid, S. 5 458*b*

—— *S. 7*—*See* ibid, S. 5 458*b*

West Bengal Raw Jute Central Jute Board and Miscellaneous Provisions Ordinance *(17 of 1950)*

—— *S. 5 (2)*

See (1) Arbitration Act (1940), S. 34 450*b*

(2) Contract Act (1872), S. 23 450*c*

West Bengal Rice Mills Control Order *(1949), Para. 15* — Apprehension of abuse of power — Validity of law 187*c*

Words and Phrases — *'Dwelling house'* — *See* Partition Act (1893), S. 4 (1) 259

Words and Phrases *(contd.)*

—— *"Occupation"*—*See* Universities Act (1904), S. 25 783*b*

—— *Premises* — *See* Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 2 (8) 149*b*

—— *'Proceedings before a Court'*—*See* Criminal P. C. (1898), S. 496 661*a*

—— *'Proceedings pending before a Court* — *See* West Bengal Criminal Law Amendment Special Courts Act (21 of 1949) (as amended in 1952), S. 12 661*b*

Workmen's Compensation Act *(8 of 1923), Ss. 1, 3*—Stretched construction—(Interpretation of Statutes) 516*d*

—— *S. 3*—*See also* ibid, S. 1 516*d*

—— *S. 3* — "Arising out of and in the course of his employment" 143

—— *Ss. 3, 10*—Succession of accidents 516*a*

†—— *S. 3*—Series of tiny accidents 516*b*

—— *S. 10*—*See also* ibid, S. 3 516*a*

—— *S. 10, Proviso* — That some senior Officers in management had promised compensation is sufficient cause for not making claim within twelve months *(Obiter)* 74*b*

—— *S. 10, Proviso* — Claim not filed within twelve months of accident—Reasonable cause — That he returned to work and earned more wages, is not sufficient cause 74*c*

—— *S. 10, Proviso*—Sufficient cause established — Subsequent negligence and improper delay is immaterial 74*d*

—— *S. 10, Proviso* — Limitation — Sufficient cause—(Civil P. C. (1908), S. 100) 667

—— *S. 19*—Findings of fact—Duty of Commissioner 516*e*

—— *S. 30*—Commissioner holding that accident had been proved—It is finding of fact and cannot be challenged before High Court 74*a*

—— *S. 30* — Question whether workman was working overtime is one of fact—No appeal lies 336*a*

COMPARATIVE TABLE

(1952) 89 Calcutta Law Journal=A. I. R.

CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR		
1	1952	C	35	73	1951	SC	280	140	1953	C	15	211	1953	C	184	296	1953	C	102
15	"	"	184	84	1953	C	140	146	"	"	87	213	1952	"	898	299	1952	"	559
28	1953	"	10	95	1952	"	210	162	1952	"	705	224	"	"	763	301	"	"	679
33	1952	"	738	107	"	"	585	183	1953	"	526	241	1953	"	45	311	"	"	928
41	1953	"	103	115	"	"	779	196	1951	"	574	248	1952	"	773	313	1953	"	381
57	1951	SC	316	122	1953	"	566	204	1953	"	456	268	1953	"	223	319	1952	"	691
62	"	"	285	127	"	"	160	209	"	"	125	276	"	"	116				

(1952) 90 Calcutta Law Journal=A. I. R.

CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR		
1	1952	SC	143	73	1952	SC	231	133	1952	SC	319	206	1952	SC	145	263	1953	C	536
7	"	"	179	86	"	"	225	160	"	"	64	218	"	"	196	283	"	"	606
14	"	"	149	95	"	"	227					232	1953	C	145	295	"	"	235
25	1953	C	1	116	1953	C	425	180	"	"	205	237	"	"	36	298	1952	"	577
52	"	"	20	123	"	"	208	191	"	"	192	241	1952	SC	170	304	1953	"	357

CALCUTTA CASES OVERRULED, REVERSED AND DISSENTED FROM IN A.I.R. 1953

('66) 6 W. R. 71, Muddun Gopal v. Ram Buksh	Overruled in A. I. R. 1953 S. C. 495.
('98) 25 Cal. 858 = 2 Cal. W. N. 577, Punardeo Narain Singh v. Ram Sarup Roy	Dissented from in A. I. R. 1953 All. 24.
('06) 33 Cal. 927 = 3 Cal. L. J. 67, Hukumchand Baid v. Kamalanand Singh	Dissented from in A. I. R 1953 Cal. 467.
('06) 3 Cal. L. J. 257=10 Cal. W. N. 564, Bhagwat Sahay v. Pashupati Nath Bose	Dissented from in A. I. R. 1953 Pat. 342.
('07) 6 Cal L. J. 621, Lilibati v Bishun	Overruled in A. I. R. 1953 S. C. 125.
('12) 16 I. C. 742 = 17 Cal W. N. 5 = 16 Cal. L. J. 282, Kumeda Charan v. Asutosh Chattopadhya	Dissented from in A. I. R. 1953 Cal. 244.
('12) 17 I. C. 849 = 17 Cal. W. N. 1, Eastern Mortgaged and Agency Co. Ltd. v. Fakuruldin Mohomed	Dissented from in A. I. R. 1953 Raj. 121.
('13) 21 Ind. Cas. 407 (1) = 18 Cal. L. J. 141, Anandmoyi v. Rudra Mahanti	Dissented from in A. I. R. 1953 Raj. 69.
('25) A. I. R. 1925 Cal. 320 = 52 Cal. 128=29 Cal. W. N. 76=85 Ind. Cas. 870, Rajani Kanta Beg v. Rajabala Dasi	Dissented from in A. I. R. 1953 Pat. 342.
('26) A. I. R. 1926 Cal. 1166=44 Cal. L. J. 121 = 97 Ind. Cas 1003, Birendra Nath v. Satis Chandra	Dissented from in A. I. R. 1953 Pat. 267.
('26) A. I. R. 1926 Cal. 1205 = 96 Ind. Cas. 1056, Abdulla v. Mohammad Muslim	Dissented from in A. I. R. 1953 All. 797.
('31) A. I. R. 1931 Cal. 211 = 58 Cal. 628 = 52 Cal. L. J. 293=35 Cal. W. N. 238=130 I. C. 209, Golmur Bibi v. Abus Samad	Dissented from in A. I. R. 1953 Orissa 75.
('33) A. I. R. 1933 Cal. 142=34 Cri. L. J. 308 = 142 I. C. 297=1933 Cr. C. 203, Soko v. Emperor	Dissented from in A. I. R. 1953 M. B. 147.
('33) A. I. R. 1933 Cal. 496, Khorshedi Ali Bepari v. Prabhat Chandra Das	Dissented from in A. I. R. 1953 All. 120.
('34) A. I. R. 1934 Cal. 615 = 152 Ind. Cas. 215, J. C. Galstaun v. Janaki Nath	Dissented from in A. I. R. 1953 All. 184.
('36) 164 Ind. Cas. 73 = 39 Cal. W. N. 915, Chandulal Seraogi v. Purnachandra	Dissented from in A. I. R. 1953 M. B. 247.
('37) 41 Cal. W. N. 534, Radha Charan Saha v. Matilal Saha	Overruled in A. I. R. 1953 Cal. 497.
('45) Suit No. 2077 of 1939, D/. 14-2-1945 (Cal), Sm. Sovana Sundari Pal v. Satyendra Nath Chatterjee	Dissented from in A. I. R. 1953 Cal. 532.
('47) A. I. R. 1947 Cal. 49 = I. L. R. (1946) 2 Cal. 359 = 51 Cal. W. N. 42, Indian Electric Works v. Registrar of Trade Marks	Overruled in A. I. R. 1953 S. C. 357.
('47) A. I. R. 1947 Cal. 390 = 48 Cri. L. J. 908, Abdul Mannan v. Taiyab Ali	Dissented from in A. I. R. 1953 Cal. 308.
('48) I. L. R. (1948) 1 Cal. 81, Munshilal and Sons v. Modi Brothers	Dissented from in A. I. R. 1953 Bom. 386.
('50) A. I. R. 1950 Cal. 83, Mahaminad Ekramal Haque v. Province of Bengal	Dissented from in A. I. R. 1953 Him.-Pra. 5.
('50) 54 Cal. W. N. 960	Reversed in A. I. R. 1953 S. C. 125.
('50) A. I. R. 1950 Cal. 287, Benoy Krishna v. Mohanlal Goenka	Reversed in A. I. R. 1953 S. C. 65.
('51) Cri. Ref. Nos. 43 and 44 of 1951 (Cal.)	Dissented from in A. I. R. 1953 Cal 485.
('51) 55 Cal. W. N. 6, Monomohan v. Gobinda Das	Held overruled by A. I. R. 1951 S. C. 332 in A. I. R. 1953 Nag. 59.
('51) 55 Cal. W. N. 237 = 1950-21 I. T. R. 39 = 1951-21 Com. Cas. 239, Commr. of Income-tax, W. B. v. Jeewanlal Ltd.	Reversed in A. I. R. 1953 S. C. 473.
('51) 55 Cal W. N. 347, Dhanesh Prokash v. Lalit Mohan	Overruled in A. I. R. 1953 S. C. 148.
('51) 55 Cal. W. N. 421, Mohanlal v. Chunilal	Overruled in A. I. R. 1953 S. C. 148.
('51) 1951-20 I. T. R. 51 (Cal), Ladhuram Taparia v. B. K. Bagchi	Dissented from in A. I. R. 1953 Punj. 113.
('51) A. I. R. 1951 Cal. 32 = 55 Cal. W. N. 843, Atulya Dhan v. Sudhangsu	Overruled in A. I. R. 1953 S. C. 148.
('51) A. I. R. 1951 Cal. 111 = 55 Cal. W. N. 778, W. B. S. K. Co. of Society v. Mrs. Bella Banerjee	Dissented from in A. I. R. 1953 Assam 177.
('52) Award Case No. 226 of 1951 D/- 29-1-52 (Cal.), Bharat Wollen Mills Ltd. v Kumar Wollen Factory	Dissented from in A. I. R. 1953 Cal. 488.
('52) A. I. R. 1952 Cal. 126 = 55 Cal. W. N. 563, Jethmal v. Aloke Ganguly	Overruled in A. I. R. 1953 S. C. 148.
('52) A. I. R. 1952 Cal. 199=55 Cal. W. N. 621	Reversed in A. I. R. 1953 S. C. 148.
('52) A. I. R. 1953 Cal. 273 = 55 Cal. W. N. 719 (F.B.), Iswari Prosad Goenka v. N. R. Sen	Overruled in A. I. R. 1953 S. C. 146.
('52) A. I. R. 1952 Cal. 644 = 56 Cal. W. N. 701 = 1952 Cri. L. J. 1447, J. K. Gupte v. State	Overruled in A. I. R. 1953 S. C. 404.
('52) A. I. R. 1952 Cal. 898=56 Cal. W. N. 353 = 89 Cal L. J. 218, Balai Lal Das v. Manik Chand	Overruled in A. I. R. 1953 Cal. 733 (F.B.).
('53) A. I. R. 1953 Cal. 47 = 56 Cal. W. N. 639, A. N. Chatterjee v. Sampatmull	Dissented from in A. I. R. 1953 Cal. 379.
('53) A. I. R. 1953 Cal. 136 = 56 Cal. W. N. 346, United Commercial Press Ltd. v. Satyanarain Chamaria	Partly overruled in A. I. R. 1953 Cal. 733 (F.B.).

NOMINAL TABLE OF CASES

OF THE CALCUTTA HIGH COURT

Reported during the year 1952

Abani Mohan v. Biswanath Mukherjee, A I R (37) 1950 Cal 142=54 C W N 654=I L R (1951) 1 Cal 112.
Abdul Hamid v. State of West Bengal, A I R (40) 1953 Cal 223 = 89 Cal L J 268.
Abed Ali v. Prafulla Kumar Sen Gupta, A I R (39) 1952 Cal 544 = 56 Cal W N 97 (FB).
Abinash Chandra v. Madhusudan Mazumdar, A I R (39) 1952 Cal 673.
Abinash Chandra Hari v. Sree Sree Iswar Dharamraj Thakur, A I R (40) 1953 Cal 194=56 Cal W N 870
Abidhar Ghose v. Jagabandhu Roy Choudhury, A I R (39) 1952 Cal 846 = 56 Cal W N 643.
Ahumad Ali Biswas v. Jyotsna Kumar Bandopadhya, AIR (39) 1952 Cal 19
Ajayananda Paul v. Indian Homeopathic Medical Association, AIR (40) 1953 Cal 116=89 Cal L J 276.
Allen Berry & Co., Ltd. v. A. Das Gupta, A I R (39) 1952 Cal 850.
Amalendu Roy Choudhury v. Kailash Behari Mathur, 56 Cal W N 846.
Amalesh Chandra Roy v. State, A I R (39) 1952 Cal 481 = 1952 Cri L J 1013.
Amal Krishna Basu v. Chandi Charan Banerjee, A I R (40) 1953 Cal 145 = 56 Cal W N 528 = 90 Cal L J 232.
Amarendra Chandra Aich v. Narendra Kumar Basu, A I R (40) 1953 Cal 114 = 56 Cal W N 449.
Amarendra Nath Ghosal v. Bibhuti Bhusan Chowdhury, A I R (39) 1952 Cal 773 = 89 Cal L J 248.
—— —— v. Raghunath Nandan, A I R (39) 1952 Cal 849 = 56 Cal W N 107 = 1952 Cri L J 1736.
Ambujabarani Dasi v. Hosain Buksh, I L R (1951) 1 Cal 324.
Amulya Ranjan De v. Pulin Bihari Shaha, I L R (1951) 1 Cal 198.
Ananda Prosad Pakhira v. Haribar Manna, A I R (37) 1950 Cal 374 = 54 C W N 582 = I L R (1951) 1 Cal 433.
Anath Bandhu Samanta v. Corporation of Calcutta, AIR (39) 1952 Cal 759 = 56 Cal W N 594 = 1952-22 Com. Cas. 175 = 1952 Cri L J 1480.
Anila Bala Devi v. The Chairman Kandi Municipality, A I R (37) 1950 Cal 350 = 85 C L J 147=1950 A W R (Sup) 64 = 51 Cri L J 1325 = I L R (1951) 1 Cal 241.
Anjali Roy v. State of West Bengal, A I R (39) 1952 Cal 822.
—— —— v. State of West Bengal, A I R (39) 1952 Cal 825 = 56 Cal W N 801.
Annada Prosad Chowdhury v. Monotosan Roy, A I R (40) 1953 Cal 503 = 56 Cal W N 705 = 1953 Cri L J 1168.
Ansumali Majumdar v. State of West Bengal, A I R (39) 1952 Cal 632= 56 Cal W N 711 = 1952 Cri L J 1454.
Anwar Ali v. State of West Bengal, A I R (39) 1952 Cal 150 = 1952 Cri L J 450.
Aparnath Mukherjee v. Kanai Lal Chatterjee, A I R (37) 1950 Cal 300 = I L R (1951) 1 Cal 396.
Arthur Paul Bentall, In the matter of, A I R (39) 1952 Cal 815 = 57 Cal W N 323 (SB).
Arun Prokash Borel v. Tulsi Charan Bose, A I R (36) 1949 Cal 510 = I L R (1951) 1 Cal 331.
Ashutosh Banerjee v. Debjyoti Burman, A I R (40) 1953 Cal 227 = 56 Cal W N 819.
Ashutosh Bhattacharjee v. Satindra Kumar Choudhury, A I R (39) 1950 Cal 296 = 54 C W N 380= I L R (1951) 1 Cal 386.
Ashutosh Hait v. Indra Hait, A I R (39) 1952 Cal 217 =1952 Cri L J 579.
Assistant Collector of Customs for Appraisement v. Soorajmull Nagarmull, A I R (39) 1952 Cal 656 = 56 Cal W N 452.
Aswini Kumar Ghose v. Arbindo Bose, A I R (39) 1952 Cal 178 = 56 Cal W N 145 (SB).
Aswini Kumar Nath v. State of West Bengal, A I R (39) 1952 Cal 679 = 89 Cal L J 301.
Aswini Kumar Pramanik v. Dominon of India, A I R (39) 1952 Cal 251.

Baburam Agarwalla v. Jamunadas Ramji & Co., A I R (38) 1951 Cal 239 = 54 C W N 189 = 85 C L J 22 = I L R (1951) 1 Cal 257.
Badri Prosad v. State, A I R (40) 1953 Cal 28 = 56 C W N 406 = 1953 Cri L J 198.
Balai Lal Das v. Manik Chandra Pramanik, A I R (39) 1952 Cal 898=56 Cal W N 353=89 Cal L J 218.
Banarashi Lal Agarwala v. State, A I R (40) 1953 Cal 322 = 56 Cal W N 386 = 1953 Cri L J 742.
Bankim Chandra v. Anand Bazar Patrika, A I R (37) 1950 Cal 129 = 51 Cri L J 610 = ILR (1951) Cal 94.
Bank of Calcutta Ltd. v. Dhirendra Nath Roy, A I R (40) 1953 Cal 325=56 C W N 517.
Bansi v. Governor-General of India in Council, AIR (39) 1952 Cal 35=56 C W N 83=89 C L J 1 (FB).
Basanta Lal Saha v. P. C. Chakravarty, A I R (37) 1950 Cal 249 = 54 C W N 20 = 84 Cal L J 108 = I L R (1951) 1 Cal 25.
Basantlal Jagatramka v. Dominion of India, A I R (39) 1952 Cal 340.
Belait Sheikh v. State of West Bengal, A I R (39) 1952 Cal 753.

Bengal Agency & Stores Syndicate v. Stores & Engineering Supply Co., A I R (39) 1952 Cal 411.
Bengal Bank, Ltd. v. Satyendra Nath Das, A I R (39) 1952 Cal 385 = 1949-19 Com. Cas. 198.
Bengal Coal Co., Ltd. v. Balmukunda Goenka, I L R (1951) 1 Cal 168.
Benoy Shankar Dhandania v. Choteylal Dhandania, A I R (39) 1952 Cal 343 = 84 Cal L J 200.
Bhadreswar Majhi v. Corporation of Calcutta, A I R (39) 1952 Cal 683 = 56 Cal W N 558 = 1952 Cri L J 1364.

Bharat Saw Mill Co., Ltd. v. Tarapada Sur, I L R (1951) 1 Cal 341.
Bharat Vegetable Products Ltd., *In re*, 56 Cal W N 29 =1952-22 Com. Cas. 62.
Bhola Nath Mallick v. Mahadev Mallick, A I R (39) 1952 Cal 226 = 56 Cal W N 223.
Bholaram Agarwalla v. Sm. Jint, A I R (39) 1952 Cal 92.
Bhupendra Kishore Acharjya v. Keshab Sankar Roy, A I R (39) 1952 Cal 382.
Bhupesh Chandra Dutta v. Dr. M. N. Bose, A I R (40) 1953 Cal 198 = 56 Cal W N 832.
Bhuwalka Brothers Ltd. v. Dunichand Rateria, A I R (39) 1952 Cal 740 = 56 Cal W N 685 (SB).
Bibhuti Bhusan De v. Kshettra Gopal Datta, I L R (1951) 1 Cal 375.
Bidhu Bhusan Bagchi v. State of West Bengal, A I R (39) 1952 Cal 901.
Bijay Singh Karnawat v. Bilasray & Co., A I R (39) 1952 Cal 440.
Bimala Kanta Ghosh v. State, A I R (39) 1952 Cal 837 = 1952 Cri L J 1683.
Bimal Singh Khothari v. Muir Mills Co., Ltd., A I R (39) 1952 Cal 645 = 56 Cal W N 361 = 1952-22 Com. Cas. 248.

Biman Chandra Bose v. Dr. H. C. Mookherjee, A I R (39) 1952 Cal 799 = 56 Cal W N 651.
Birendra Nath Banerjee v. Shibaram Aditya, A I R (39) 1952 Cal 473.
Birendra Nath Roy v. Sm. Sukumari Bakshi, A I R (39) 1952 Cal 352.
Bishnu Charan v. Birendra Krishna Muzumdar, A I R (40) 1953 Cal 261 = 56 Cal W N 753.
Bishnu Murmoo v. Radhanath Patra, I L R (1951) 1 Cal 87.
Biswanath Bagchi v. Jitendra Nath Sarkar, I L R (1951) 1 Cal 383.
Borendra Nath Mitter, In the Goods of, A I R (39) 1952 Cal 418 = 84 Cal L J 126.
Boto Krishna Ghose v. Akhay Kumar Ghose, A I R (37) 1950 Cal 111 = 54 C W N 660 = I L R (1951) 1 Cal 103.

Buffatan Bibi v. Abdul Salim, A I R (37) 1950 Cal 304 = I L R (1951) 1 Cal 476.

Calcutta Discount Co., Ltd. v. Income-tax Officer Companies District 1, Calcutta, A I R (39) 1952 Cal 606 = 1952-21 I T R 579.
Calcutta Motor Cycle Co. v. Union of India, A I R (40) 1953 Cal 1 = 90 Cal L J 25.
Calcutta Pinjrapole Society v. S. Banerjee, A I R (39) 1952 Cal 891.
Central Hardware Mart M/S v. Corporation of Calcutta, A I R (39) 1952 Cal 39 = 1952 Cri L J 301.
Champa Devi v. Babulal Goenka, A I R (37) 1950 Cal 161= 54 C W N 207 = 51 Cri L J 626=I L R (1951) 1 Cal 299.

Chandrama Prasad Chamar v. State, I L R (1951) 1 Cal 539.
Charusila Dassi v. Madan Theatres Ltd., A I R (40) 1953 Cal 536 = 90 Cal L J 263.
Chatterjee, A. N. v. Sampatmull Bothra, A I R (40) 1953 Cal 47 = 56 C W N 639.
Chinese Tannery Owners Association v. Makhanlal Ganguly, A I R (39) 1952 Cal 560.
Chitra Debi v. Badri Bisal Bhakat, A I R (40) 1953 Cal 125 = 89 Cal L J 209.
Cohen, R. (Mrs.) v. S. J. Ezekiel, A I R (40) 1953 Cal 284 = 56 Cal W N 20.
Commr. of Income-tax, Calcutta v. Kamala Mills Ltd., Calcutta, A I R (39) 1952 Cal 383 = 1949-17 I T R 130.
Commr. of Income-tax, Calcutta v. Messrs. Piggot Chapman & Co., A I R (39) 1952 Cal 414 = 1949-17 I T R 317 = I L R (1950) 2 Cal 120.
Corporation of Calcutta v. Bhupal Chandra Sinha, A I R (37) 1950 Cal 421=54 C W N 438 = I L R (1951) 1 Cal 319.
—— v. Sailendra Nath Ghosh, A I R (40) 1953 Cal 202 = 56 C W N 779.
—— v. Surendra Nath Das Gupta, I L R (1951) 1 Cal 191.

Das Gupta, B. C. v. Bijoyanjan Rakshit, A I R (40) 1953 Cal 212 = 56 Cal W N 861.
Dawar, M. A. v. Ahmad Ali Khan, A I R (39) 1952 Cal 219.
Debabrata Basu v. Institute of Charactered Accountants, A I R (39) 1952 Cal 189 = 1952-22 Com. Cas. 138.
Debendra Bandhu Lahiri v. State of West Bengal, A I R (39) 1952 Cal 808.
Dhajadhari Chatterjee v. Nitya Nanda Roy, A I R (40) 1953 Cal 102 =89 Cal L J 296.
Dhirendra Nath Bera v. State, A I R (39) 1952 Cal 621 = 1952 Cri L J 1427.
Dinanath Kumar v. Nishi Kanta Kumar, A I R (39) 1952 Cal 102.
Dinendro Mullick v. Union of India, A I R (39) 1952 Cal 915.
Dipa Pal v. University of Calcutta, A I R (39) 1952 Cal 594 = 56 Cal W N 278.
Dominion of India v. Goverdhan Das Shroff, A I R (39) 1952 Cal 384.
—— v. Gosto Behary Kundu, A I R (37) 1950 Cal 247 =54 C W N 749 = I L R(1951) 1 Cal 354.
—— v. Netai Chandra Haldar, A I R (39) 1952 Cal 726 = 56 Cal W N 217.
Dubar Goula v. Union of India, A I R (39) 1952 Cal 496.
Dudhewalla & Co., Ltd. v. Govinda Ram, A I R (40) 1953 Cal 13 = 56 Cal W N 562.
—— v. Govindram Rameswarlal, A I R (39) 1952 Cal 585 = 56 Cal W N 315 = 89 Cal L J 107.

Dulal Chandra Chatterjee v. Gosthabehari Mitra, A I R (40) 1953 Cal 259 = 56 Cal W N 681.
Durjendra Krishna Deb v. K. Shaw, A I R (40) 1953 Cal 147 = 56 Cal W N 671.
Durlav Chandra Ghosh v. Benarashi Debi, A I R (39) 1952 Cal 728 = 56 Cal W N 495.

Edward Ezra v. State, A I R (40) 1953 Cal 263 = 56 Cal W N 875 = 1953 Cri L J 673.
Edwin Caslow Marcelline, In the Goods of, 56 Cal W N 650.
Ejahan Mollah v. Golam Robbani Mollah, A I R (39) 1952 Cal 203.
Elias & Co., Ltd. v. Banku Behari Saha, A I R (39) 1952 Cal 247 = 56 Cal W N 34 (FB).
Ennmul Huq v. King, I L R (1951) 1 Cal 204.
Equitable Coal Co., Ltd. v. Kashia Mahatin, A I R (39) 1952 Cal 877 = 56 Cal W N 189 = (1952.53) 4 F J R 111.
Esmail Pailan v. Sailendra Nath Mitra, A I R (39) 1952 Cal 779 = 89 Cal L J 115.

Gangadhur Ram Chandra Firm v. Dominion of India, A I R (37) 1950 Cal 394=I L R (1951) 1 Cal 119.
Girija Nandan Bhattacharyya v. Balaram Chatterjee, A I R (39) 1952 Cal 671 = 56 Cal W N 299.
Girish Chandra Nandy v. State, A I R (39) 1952 Cal 565 = 56 Cal W N 335 = 1952 Cri L J 1257.
Gobinda Chandra Dakua v. Dinesh Chandra Mitra, A I R (39) 1952 Cal 100=56 Cal W N 137.
Gokul Chand De v. Gopi Nath Day, A I R (39) 1952 Cal 705 = 89 Cal L J 162.
Gopal Chandra Banerjee v. Sailabala Debi, A I R (39) 1952 Cal 216.
Gour Gopal Mukharji v. Chief Secretary to the Govt. of West Bengal, A I R (40) 1953 Cal 81 = 56 Cal W N 427 = 1953 Cri L J 310.
Governor-General in Council (now Dominion of India) representing E. N. Rly., New Delhi v. Patal Paul & Co., Regd. Office at Bankura, A I R (39) 1952 Cal 285.
Gunadhar Das v. State, A I R (39) 1952 Cal 618 = 1952 Cri L J 1343.
Gupta, J. K. v. State, A I R (39) 1952 Cal 644= 56 Cal W N 701 = 1952 Cri L J 1447 (FB).
Gupta & Sons v. Sambhunath Mukhopadhyya, A I R (39) 1952 Cal 772 = 56 Cal W N 166.
Gurudasi Devi v. Chandi Charan Kundu, A I R (39) 1952 Cal 736 = 56 Cal W N 12.

Haran Chandra Dutt v. State of West Bengal, A I R (39) 1952 Cal 907.
Harbans Singh Chauhan v. Bewa Singh, A I R (39) 1952 Cal 73.
Harinarayan Shaw v. Gobardhandas, A I R (40) 1953 Cal 140=89 Cal L J 84.
Haripada Dutta v. Ananta Mandal, A I R (39) 1952 Cal 526=56 Cal W N 124.
Hemanga Coomar Mukherjee v. M. C. Chakravarthy, A I R (39) 1952 Cal 732 = 56 Cal W N 632 = 1952-22 Com Cas 270.
Hemanta Kumar Bhattacharjee v. N. N. Sen Gupta, A I R (40) 1953 Cal 504=56 Cal W N 676.
Hind Estate Ltd. v. Ansar Ahmed, A I R (40) 1953 Cal 54=56 Cal W N 543.
—— —— v. Grant James Ltd., A I R (40) 1953 Cal 20 = 56 Cal W N 566 = 90 Cal L J 52.
Hindusthan Co operative Insurance Society Ltd. v. Shyam Sunder Das, A I R (39) 1952 Cal 691=56 Cal W N 418=89 Cal L J 319.
Hooghly Bank Ltd. v. Mahendra Nath, A I R (37) 1950 Cal 195=54 Cal W N 327 = I I R (1951) 1 Cal 276.
Hub Lal Shaw v. Prem Raj, A I R (40) 1953 Cal 94=56 Cal W N 381.
Hurdeodas Agarwala v. State of West Bengal, A I R (39) 1952 Cal 857.

Indian and General Investment Trust Ltd. v. Raja of Khalikote, A I R (39) 1952 Cal 508.
Indian Spinning Mills Ltd. v. H. E. General Madan Shum Sher Bahadur Rana, A I R (40) 1953 Cal 355= 56 Cal W N 398=(1952)-22 Com Cas 162.
Indra Narayan Bera v. State of West Bengal, A I R (39) 1952 Cal 61.
Indra Narayan Kundu v. Girindra Nath Mitra, A I R (39) 1952 Cal 192.

Jadunath Roy v. Bank of Calcutta Ltd., A I R (39) 1952 Cal 506=56 Cal W N 92 = 1952-22 Com Cas 69 (SB).
Jahnabi Prosad v. Basudeb Paul, AIR (37) 1950 Cal 536=54 Cal W N 626=I L R (1951) 1 Cal 68.
Jamini Mohan Banerji v. M/s. Ram Kissan Das Bagree, I L R (1951) 1 Cal 139.
Jatindra Kumar Banerjee v. Ajit Kumar Banerjee, A I R (39) 1952 Cal 250.
Jatindra Mohan Karmakar v. Nityananda Das Bairagya, I L R (1951) 1 Cal 295.
Jatindra Nath Nandi v. Krishnadhan Nandi, A I R (40) 1953 Cal 34=56 Cal W N 858.
Jhabarmal Dudhwalla v. Govindram, A I R (39) 1952 Cal 121.
Jhabarmal Parasrampuria v. Dhanraj Nathani, 56 Cal W N 723=90 Cal L J 187.
Jitendra Nath Sarkar v. Biswanath Bagchi, A I R (39) 1952 Cal 201.
Judhisthir Chandra Adak v. P. R. Mukherjee, A I R (37) 1950 Cal 577 = 54 Cal W N 222 = I L R (1951) 1 Cal 160.
Jugal Kishore Dhandhania v. Subh Karan Lohia, A I R (39) 1952 Cal 571=56 Cal W N 170 (SB).
Jyotirmoy Bhattacharjee v. Chief Secy. to Govt. of West Bengal, A I R (39) 1952 Cal 562 = 56 Cal W N 246 = 1952 Cri L J 1255 = 1952 All W R (Sup) 57.

Kali Prosanna Roy Chowdhury v. State of West Bengal, A I R (39) 1952 Cal 769=56 Cal W N 492.
Kamla Sundari Dassi v. Nilmony Das, AIR (40) 1953 Cal 343=56 Cal W N 843=1953 Cri L J 814.

Kamal Singh Rampuria v. Shekhar Chand Rampuria, A I R (39) 1952 Cal 447.
Kamarhatty Co. Ltd. v. Abdul Samad, A I R (40) 1953 Cal 74=56 Cal W N 311.
Kanhaiyalal Jhanwar v. Pandit Shirali & Co., A I R (40) 1953 Cal 526=89 Cal L J 183=1953-23 Com Cas 399.

Karanji & Co. v. Indo-China Trading Co. Ltd., 56 Cal W N 763.
Kartick Chandra Bose v. Corporation of Calcutta, A I R (40) 1953 Cal 87=89 Cal L J 146.
Kashinath Das v. Kalipada Das, A I R (40) 1953 Cal 12=56 Cal W N 202=1953 Cri L J 160.
Kasiswar Basu v. Nakuleswar Bose, A I R (39) 1952 Cal 738=89 Cal L J 33.
Kazem Sardar v. State, A I R (40) 1953 Cal 425=90 Cal L J 116=1953 Cri L J 940.
Kedar Lal Seal v. Hari Lal Seal, 1952 Cal 176=85 Cal L J 299.
Kedarnath Daruka v. Corporation of Calcutta, A I R (39) 1952 Cal 570 = 56 Cal W N 165=1952 Cri L J 1260.

Khagendra Nath Ganguly v. State of West Bengal, A I R (39) 1952 Cal 855.
Khagendra Nath Pal v. Nilmani Datta, I L R (1951) 1 Cal 211.
Khorshed Ali v. The King, A I R (37) 1950 Cal 202=51 Cri L J 879=I L R (1951) 1 Cal 267.
Khudiram Mandal v. Jitendra Nath Mandal, A I R (39) 1952 Cal 713=56 Cal W N 608=1952 Cri L J 1411.

Kilburn Properties Ltd. v. Commr. of Income-tax, Bengal, A I R (39) 1952 Cal 333=1949-19 Com Cas 54=1949-17 I T R 134=I L R (1949) 2 Cal 314.
King (Emperor) v. Alfred D'Cruz, A I R (37) 1950 Cal 317 = 54 W N 321 = 51 Cri L J 1231=I L R (1951) 1 Cal 303.

King (Emperor) v. Bankim Chandra Das, I L R (1951) 1 Cal 243.
Kiran Chandra Dutta Roy v. Bijay Chandra Basu, A I R (39) 1952 Cal 123.
Kishori Mohan Karmakar v. Bhabataran Paik, I L R (1951) 1 Cal 222.
Kripalani, P. K. v. Mahabir Ram, A I R (39) 1952 Cal 452=1952 Cri L J 971.
Krishna Lal Mazumdar v. Manindra Nath Banerjee, A I R (40) 1953 Cal 231=56 Cal W N 258.
Krishna Mohan Kundu v. Nripendra Nath Nandi, A I R (39) 1952 Cal 577=56 Cal W N 531=90 Cal L J 298.

Kumar Brojendra Narain Singh Deo *In the Goods of*, A I R (40) 1953 Cal 606=90 Cal L J 283.
Kumarkhali Banking Corporation, Ltd. v. Surendra Nath Sarkar, A I R (39) 1952 Cal 751 = 56 Cal W N 180

Lajuklata Basak v. Nrishingha Prosad Roy, A I R (39) 1952 Cal 669=1952 Cri L J 1385.
Lal Behari Samanta v. Gourhari Dawn, A I R (39) 1952 Cal 253=54 C W N 912.
Lalit Mohan Das v. Biswanath Ghosh, A I R (39) 1952 Cal 868.
Lalit Mohan Konar v. Shyamapada Das, A I R (39) 1952 Cal 771.
Latikabala Dasi v. Anil Behari Ghose, A I R (40) 1953 Cal 103=89 Cal L J 41.
Legal Remembrancer, West Bengal v. Abdul Wadud, I L R (1951) 1 Cal 547.
Lilabati Rana W/o Santosh Kunar Rana v. Lalit Mohan Dey, A I R (39) 1952 Cal 499.

Mafazzal Hossain v. Musstt. Ayesha Bibi, A I R (40) 1953 Cal 126=56 Cal W N 750.
Mahadeb Jew v. Balkrishna Vyas, A I R (39) 1952 Cal 763=89 Cal L J 224.
Mahalakshmi Debi v. Sri Bama Charan Nandi, A I R (40) 1953 Cal 42=56 Cal W N 853.
Maharaja Bose v. Governor-General-in-Council, A I R (39) 1952 Cal 242=56 Cal W N 248.
Maharathi Prosad v. State, A I R (39) 1952 Cal 122.
Mahomed Idrish (alias) Sheikh Idrish v. The State, A I R (39) 1952 Cal 139=1952 Cri L J 349.
Makbul Ahammad Mallik v. Abdul Rahman Akhand, A I R (39) 1952 Cal 494=1952 Cri L J 944.
Makhan Lal Roy Parmanik v. Pramathanath Basu, A I R (40) 1953 Cal 50=56 Cal W N 770.
Mani Bhai Patel v. State, A I R (39) 1952 Cal 761=56 Cal W N 554=1952 Cri L J 1488.
Manick Chand Agarwalla v. State, A I R (39) 1952 Cal 730=56 Cal W N 384=1952 Cri L J 1472.
Manick Lal Mondal v. State, A I R (40) 1953 Cal 341=56 Cal W N 551=1953 Cri L J 783.
Manilal Roy v. Sm. Sunit Bala Debi, A I R (39) 1952 Cal 429.
Marzia Khatun Saheba v. Srimanta Kumar, A I R (40) 1953 Cal 315=56 Cal W N 95.
Meher Ali v. Tulsi Charan Chatterjee, A I R (39) 1952 Cal 204=1952 Cri L J 571
Metal Corporation of India Ltd. v. A. S. Subbaiyar, A I R (39) 1952 Cal 347=53 Cal W N 398=84 Cal L J 18.
Midnapore Zamindary Co. Ltd. v. Naba Kumar Singh Dudharia, A I R (37) 1950 Cal 298 = I L R (1951) 1 Cal 391.
Mihirlal v. Panchkari Santra, A I R (37) 1950 Cal 520=54 Cal W N 637=I L R (1951) 1 Cal 313.
Mirabala Dasi v. Binapani Dassi, A I R (41) 1954 Cal 163=56 Cal W N 761.
Mirza Ahmad Ispahani v. Bhudar Chandra Roy Chowdhury, A I R (39) 1952 Cal 23.
Mitter, S. C. v. The State, A I R (37) 1950 Cal 435=86 Cal L J 21=I L R (1951) 1 Cal 480.
Mohindra Prasad v. Poddar Brothers Ltd., A I R (39) 1952 Cal 614=56 Cal W N 228.
Monjur Mondal v. Ahmmad Mondal, A I R (40) 1953 Cal 155=56 Cal W N 506.
Mrittunjoy Banerji v. Bibhuti Bhusan Chakrabarti, I L R (1951) 1 Cal 535.
Mritunjoy Chakravarty v. Provat Kumar Pal, A I R (40) 1953 Cal 153 = 56 Cal W N 18 = 1953-22 I T R 353=1953 Cri L J 389.
Mrityunjoy Ganguly v. Bholanath Ganguly, A I R (38) 1951 Cal 455=I L R (1951) 1 Cal 213.
Mul Chand Khatar v. The State, A I R (40) 1953 Cal 492=56 Cal W N 789= 1953 Cri L J 1170.

Muneswari, Mt. v. Sm. Jugal Mohini Dasi, A I R (39) 1952 Cal 368.
Municipal Commrs., Howrah v. Jagabandhu Banerjee, AIR (37) 1950 Cal 201=ILR (1951) 1 Cal 279.

Naba Kumar Saha v. S. Banerjee, A I R (40) 1953 Cal 96=56 Cal W N 589=1953 Cri L J 306.
Naba Kumar Seal v. State of West Bengal, A I R (39) 1952 Cal 870.
Nader Chand Mallick v. State of West Bengal, A I R (39) 1952 Cal 67.
Nagendranath Karmakar v. Jotish Chandra Mukherjee, A I R (39) 1952 Cal 221.
Nagendra Nath Mitra v. Baldeoji Thakur, A I R (39) 1952 Cal 350.
Naimuddin Biswas v. The State, A I R (39) 1952 Cal 144=1952 Cri L J 406.
Nalini Chandra Pal v. Bijoy Ranjan Ganguly, A I R (40) 1953 Cal 53=56 Cal W N 537=1953 Cri L J 214.
Nandalal Ladia v. Provudayal Tikriwalla, A I R (39) 1952 Cal 74.
Narendra Nath Das v. Jnanendra Nath Das, 90 Cal L J 147.
Narendra Nath Sardar v. Sm. Fakirmani Dassi W/o Harananda Mondal, A I R (39) 1952 Cal 20.
Naresh S. v. Kanai Lal Roy Chowdhari, A I R (39) 1952 Cal 852=56 Cal W N 480.
Naresh Chandra Ray v. Dhirendra Nath Dey, A I R (37) 1950 Cal 323 = 54 Cal W N 601 = I L R (1951) 1 Cal 507.
Naresh Chandra Sanyal v. Union of India, A I R (39) 1952 Cal 757=56 Cal W N 539.
National Industries v. Sasoon Rice Mills Ltd., A I R (40) 1953 Cal 381=39 Cal L J 813.
National Iron & Steel Co Ltd., Belur v. Monorama Dassi, AIR (40) 1953 Cal 143=56 Cal W N 523.
National Tobacco Co. (India) Ltd. v. Hardit Singh, A I R (39) 1952 Cal 752=56 Cal W N 187.
Nazir Hussain v. State of West Bengal, A I R (39) 1952 Cal 853=1952 Cri L J 1738.
Nemai Chand Sen v. Kumud Behari Basu, I L R (1951) 1 Cal 404.
Nicholas Schinas v. Nemazie, A I R (39) 1952 Cal 859.
Niranjan Lal Arya v. The State, A I R (41) 1954 Cal 82=56 Cal W N 535=1954 Cri L J 308.
Nirmal Chandra Dutta v. Gopal Chandra Dey, A I R (40) 1953 Cal 150=56 Cal W N 291.
Niroda Mohan Roy v. Charu Chandra, A I R (37) 1950 Cal 401=54 Cal W N 455=I L R (1951) 1 Cal 34.
Nitish Chandra Ghosh v. Promode Kumar Ghosh, A I R (40) 1953 Cal 18=56 Cal W N 375.
Nitya Gopal Samanta v. Pran Krishna Dau, A I R (39) 1952 Cal 893=57 Cal W N 439.
Nityananda Ghosh v. Rajpur Chhaya Bani Cinema Ltd., A I R (40) 1953 Cal 208=90 Cal L J 123.
Nityananda Roy v. Rashbehari Roy, A I R (40) 1953 Cal 456=89 Cal L J 204=1953 Cri L J 1108.
Nossibolla v. D. Stephens, A I R (39) 1952 Cal 339.
Nrisingha Prosad Bose v. Nil Ratan Singha, A I R (39) 1951 Cal 221=54 Cal W N 683=I L R (1951) 1 Cal 283.
Nrisingh Prosad Pal v. Steel Products Ltd., A I R (40) 1953 Cal 15=89 Cal L J 140.
Nrisinha Kumar Sinha v. Returning Officer for the Constituency of Burwan Khargram, A I R (40) 1953 Cal 98=56 Cal W N 113.
——v. Shyam Sunder Debanshi, A I R (37) 1950 Cal 196=I L R (1951) 1 Cal 227.
Nur Mahammed Sheikh v. Seraj Sheikh, A I R (40) 1953 Cal 216=56 Cal W N 775.
Nurul Haqu v. State of West Bengal, A I R (39) 1952 Cal 874=56 Cal 183.

Panchanan Das Adikari v. Jagannath Prasad Shaw, A I R (40) 1953 Cal 201=56 Cal W N 759.
Panchanan Pal v. Nani Gopal Niyogi, I L R (1951) 1 Cal 438.
Panchu Gopal Das v. Amulya Dhan De, I L R (1951) 1 Cal 563.
Pannalal Kisanlal v. Lachmi Chand Swaika, 56 Cal W N 26.
Pannalal Sen v. Lakshmisona Pyne, A I R (39) 1952 Cal 840=56 Cal W N 597=91 Cal L J 69.
Parbati Devi v. The State, A I R (39) 1952 Cal 831=1952 Cri L J 1667.
Parraju, D v. General Manager B. N. Rly., A I R (39) 1952 Cal 610=56 Cal W N 264.
Parvati Devi v. State, A I R (39) 1952 Cal 835=1952 Cri L J 1672.
Paschim Banga Patrika, *In the matter of*, I L R (1951) 1 Cal 235 (SB).
Pasupati Gorai v. Brindaban Khan, I L R (1951) 1 Cal 82.
Peninsular Motor Corporation Ltd. v. State of West Bengal, A I R (39) 1952 Cal 220 = 1952 Cri L J 594.
Phani Bhusan Bose v. Province of Bengal, 54 C W N 176=I L R (1951) 1 Cal 250.
Phani Bhusan Ghosh v. Sibakali Basu, A I R (39) 1952 Cal 218=1952 Cri L J 582.
Pinju Sk. v. State, A I R (39) 1952 Cal 491 = 1952 A W R (Sup) 17=1952 Cri L J 1027.
Platts A. E. v. State, A I R (40) 1953 Cal 108=56 Cal W N 706=1953 Cri L J 335.
Prabhudas Mulji Doshi v. Governor-General of India in Council, I L R (1951) 1 Cal 443.
Prabirendra Mohan Tagore v. Anil Kumar Chatterji, I L R (1951) 1 Cal 133.
Printing & Industrial Machinery Ltd. v. Swastika Press Ltd., 90 Cal L J 105.
Probhat Kumar Chatterjee v. Latika Debi, A I R (40) 1953 Cal 196 = 56 Cal W N 757 = 91 Cal L J 173.
Probodh Kumar Sarkar v. Union of India, A I R (40) 1953 Cal 385=56 Cal W N 436.
Promode Kumar Roy v. Hirendra Nath Mukherjee, A I R (39) 1952 Cal 232.
Province of Bengal v. Amulya Dhone, A I R (37) 1950 Cal 356 = 54 C W N 297 = I L R (1951) 1 Cal 45.
Pulin Behari v. Divisional Supdt. Sealdah, A I R (40) 1953 Cal 45 =89 Cal L J 241=57 Cal W N 201.

Pulin Behari Dinda v. Byomkesh Mitra, A I R (40) 1953 Cal 40=56 Cal W N 872.
Pulin Krishna v. Sishupati Chakravarty, A I R (40) 1953 Cal 85=56 Cal W N 585=1953 Cri L J 294.
Punamchand Mohta v. S. Mukherjee, 56 Cal W N 15.
Puran Chandra Burman v. Mahomed Latif, A I R (40) 1953 Cal 566=89 Cal L J 122.
Purna Chandra Ghosh v. Chief Secretary, Govt. of West Bengal, I L R (1951) 1 Cal 327.
Purna Chandra Singha v. Sarojendra Kumar Dutt, A I R (40) 1953 Cal 251=56 Cal W N 740.
Purna Deb Roy v. Ram Chandra Rai, A I R (39) 1952 Cal 559 = 56 Cal W N 164=89 Cal L J 299 = 1952 Cri L J 1218.
Purnendu Nath Tagore v. Radhakanta Jew, A I R (37) 1950 Cal 318 = 54 C W N 476 = ILR (1951) 1 Cal 472.

Rabindra Chandra Seth v. Upendra Nath Ghosh, I L R (1951) 1 Cal 186.
Radha Films Ltd. v. West Bengal Board of Censors, A I R (39) 1952 Cal 653.
Radhagobinda Roy v. Narayan Dhoba, A I R (39) 1952 Cal 287.
Radha Krishna Sau v. Munchehara Bibi, I L R (1951) 1 Cal 415.
Rahamatulla Khan v. King, I L R (1951) 1 Cal 291.
Rajani Kanta Barui v. Bonbehari Sarkar, A I R (39) 1952 Cal 7=56 Cal W N 9.
Rajani Kanto Das v. Dayal Chand De, A I R (37) 1950 Cal 244 = 54 C W N 376 = I L R (1951) 1 Cal 359.
Rajendra Kumar Ruia v. Government of West Bengal, A I R (39) 1952 Cal 573=56 Cal W N 156.
Rajendranath Karmakar v. French Motor Car Co. Ltd., A I R (39) 1952 Cal 928=89 Cal L J 311.
Raj Kumar Shaw v. Dominion of India, A I R (40) 1953 Cal 235=90 Cal L J 295.
Rajlakshmi Debi v. State, A I R (40) 1953 Cal 154=56 Cal W N 221=1953 Cri L J 401.
Rajnarayan Kundu v Kristamati Dasi, A I R (39) 1952 Cal 631.
Rakhaldas Mukherjee v. S. P. Ghose, A I R (39) 1952 Cal 171.
Raman Lal Bathi v. Commr. of Police Calcutta, A I R (39) 1952 Cal 26 = 56 Cal W N 42 = 1952 Cri L J 204.
Ram Chandra Chakravarty v. State, A I R (39) 1952 Cal 493=1952 Cri L J 1032.
Ramchandra Sha v. Sachindra Kumar Mukhopadhya, A I R (40) 1953 Cal 184=56 Cal W N 379= 89 Cal L J 211.
Ram Dayal Tewari v. Corporation of Calcutta, A I R (40) 1953 Cal 76 = 56 Cal W N 339 = 1953 Cri L J 207.
Ramgopal Ramsarup v. Keshardeo Kanoria & Co , 89 Cal L J 332.
Ramhari Mandal v. Nilmoni Das, A I R (39) 1952 Cal 184= 89 Cal L J 15 = 56 Cal W N 325.
Ram Kalpa Kundu v. Kasi Nath Dutta, A I R (37) 1950 Cal 582 = 54 C W N 690 = I L R (1951) 1 Cal 216.
Ram Kissen Chandgothia v. State, A I R (39) 1952 Cal 639=56 Cal W N 659=1952 Cri L J 1441.
Ram Krishna Roy v. The State, A I R (39) 1952 Cal 231=1952 Cri L J 623.
Ram Kumar Agarwall v. P. C. Roy & Co. (India) Ltd., A I R (39) 1952 Cal 335=88 C L J 357.
Ram Nagina Singh v. Governor-General in Council, A I R (39) 1952 Cal 306=84 C L J 275.
Ram Ratan Karmarkar v. Amulya Charan Karmakar, A I R (40) 1953 Cal 232=56 Cal W N 728.
Ramrichpal Jhunjhunwalla v. M/s. Jagadish Prosad Laloo Prosad, A I R (40) 1953 Cal 243 = 56 Cal W N 797.
Ratan Chandra Nayak v. Adhar Biswas, A I R (40) 1952 Cal 72=56 Cal W N 302.
Ratepayers' Committee North Barrackpore Municipality v. Dwip Narayan Singh, A I R (39) 1952 Cal 127.
Rati Kanta Haldar v. Burro, A I R (37) 1950 Cal 354=I L R (1951) 1 Cal 370.
Rhotas Industries Ltd. v. Maharaja of Kasimbazar China Clay Mines., I L R (1951) 1 Cal 420.
Romesh Roy v. The King, A I R (39) 1952 Cal 228=1952 Cri L J 611.
Roy B. N. v. Shyam Sundar Sadhukhan, A I R (37) 1950 Cal 303=85 C L J 219=51 Cri L J 1149 = I L R (1951) 1 Cal 380.
Ruby General Insurance Co. Ltd. v. Commr. of Income-tax, Bengal, A I R (39) 1952 Cal 355= 1949-17 I T R 331=I L R (1950) 1 Cal 343.

Safedali Fakir v. Sm. Radharani Deb Sarkar, A I R (39) 1952 Cal 210 = 56 Cal W N 441 = 89 Cal L J 95.
Sailabala Dassee v. H. A Tappassier, A I R (39) 1952 Cal 455.
Saila Bala Devi v. Gouri Bala, A I R (39) 1952 Cal 749.
Sairu Sheik v. Sham Lal Sarkar, A I R (39) 1952 Cal 200=1952 Cri L J 566.
Sakhisona Dasi v. Gour Hari Jana, A I R (39) 1952 Cal 567=56 Cal W N 174.
Samayun Sheikh Md. v. Gostha Bala Dasi, I L R (1951) 1 Cal 207.
Sankar Mawli Dutt v. State, A I R (39) 1952 Cal 588=56 Cal W N 500=1952 Cri L J 1308.
Santi Priya Mukherjee v. Surendra Nath Chatterjee, A I R (39) 1952 Cal 137=1952 Cri L J 345.
Santiram Das v. Proshad Das, 1952 Cal 358.
Santosh Kumar Chatterji v. The King, A I R (39) 1952 Cal 193 = 1949-19 Com Cas 49 = 1952 Cri L J 552.
"The Saptah" *In re*, A I R (37) 1950 Cal 444=54 C W N 334=I L R (1951) 1 Cal 1.
Sarma, T. S. R. v. Nagendra Bala Debi Choudhurani, A I R (39) 1952 Cal 879=57 Cal W N 1=91 Cal L J 188 (FB).
Sarojini Debi v. Rabindra Mohan Sen, A I R (37) 1950 Cal 381=I L R (1951) 1 Cal 550.

Sasadhar Ghosh v. Haribar Kar, A I R (39) 1952 Cal 378=53 C W N 694=83 C L J 389=I L R (1950) 1 Cal 365.
Sasadhar Sarkar v. State, A I R (39) 1952 Cal 627=56 Cal W N 485=1952 Cri L J 1436.
Sashi Bhusan Singha v. Sankar Mahato, A I R (37) 1950 Cal 252=54 C W N 936=ILR (1951) 1 Cal 348.
Satish Chandra Karak v. Phani Bhusan De, A I R (39) 1952 Cal 696=56 Cal W N 207.
Satyanarain Chamaria v. Sewmurat Sharma, A I R (39) 1952 Cal 550=56 Cal W N 167.
Sen N. K. *In re*, A I R (39) 1952 Cal 551=1952 Cri L J 1249 (FB).
Setabganj Sugar Mills Ltd. v. Benozir Ahmed, A I R (39) 1952 Cal 116.
Shamlal Bania v. The King, A I R (39) 1952 Cal 288=1952 Cri L J 721.
Shew Pujan Rai Indrasan Rai v. Collector of Customs, A I R (39) 1952 Cal 789=1952 Cri L J 1651.
(Miss) Shibani Bose v. Pramotha Nath Banerjee, A I R (39) 1952 Cal 238.
Shibaram Aditya v. Subodh Kumar Das, A I R (39) 1952 Cal 533=56 Cal W N 82.
Shyamapada Pal v. State, A I R (39) 1952 Cal 284=1952 Cri L J 826.
Soshi Kumar Banerjee v. A. W Hill, A I R (40) 1953 Cal 195=56 Cal W N 845.
Sree Agrasen Store v. Ramrichpal Jhunjhunwalla, A I R (40) 1953 Cal 379=56 Cal W N 828.
Srimati Dasi v. Sibani Bala Mitra, I L R (1951) 1 Cal 559.
Srinath Zemindary *In re*, A I R (39) 1952 Cal 207.
Srinivas Malliah v. Krishna Kumar Chatterjee, A I R (39) 1952 Cal 804.
Sripati Dulay v. State, A I R (40) 1953 Cal 10=89 Cal L J 28=1953 Cri L J 128.
Sriram Arjundas v. Governor-General in Council, A I R (39) 1952 Cal 443=86 C L J 308.
State v. Anil Ranjan Dutta, A I R (39) 1952 Cal 534=1952 Cr L J 1154.
State v. Harish Chandra Mahanty, A I R (39) 1952 Cal 576=56 Cal W N 163=1952 Cr. L J 1275.
State v. Sadananda Darji, A I R (39) 1952 Cal 563=1952 All W R (Sup) 39=1952 Cri L J 1253.
Subala Devi v. Corporation of Calcutta, A I R (40) 1953 Cal 357 = 90 Cal L J 304 = 1953 Cri L J 775=57 Cal W N 461.
Subal Chandra Kundu v. State of West Bengal, A I R (39) 1952 Cal 255.
Sudhindra Nath Dutta v. The King, A I R (39) 1952 Cal 422.
Sudhindra Nath Dutta v. State, A I R (40) 1953 Cal 339 = 56 Cal W N 835=1953 Cri L J 795.
Sudhir Chandra, *In the matter of*, A I R (39) 1952 Cal 258=56 Cal W N 51= 1952 Cri L J 666 (SB).
Sukanta Halder v. The State, A I R (39) 1952 Cal 214=1952 Cri L J 575.
Sukdeo Singh v. Corporation of Calcutta, A I R (40) 1953 Cal 41=56 Cal W N 669=1953 Cri L J 196
Sukumar Mitra v. Tarasankar Ghosh, A I R (39) 1952 Cal 591=56 Cal W N 580=1952 Cri L J 1301
Supdt. and Ramembrancer of Legal Affairs, State of W. B. v. Rab Nawaz Khan, A I R (39) 1952 Cal 838=56 Cal W N 708=1952 Cri L J 1686.
Surendra Nath Poddar v. Governor General of India in Council, A I R (39) 1952 Cal 341.
Surendra Nath Sarkar v. Mah Bir Roy, A I R (40) 1953 Cal 36 = 56 Cal W N 679 = 90 Cal L J 237
Surja Kumar Sardar v. Manmatha Nath Naskar, A I R (40) 1953 Cal 200=56 Cal W N 841.
Sushil Chandra Ghosh v. Tushar Kanti Ghosh, I L R (1951) 1 Cal 126.
Sushil Kumar Chatterji v. Chandra Madhab Ray, I L R (1951) 1 Cal 401.
Sutlej Cotton Mills Ltd. v. Commr. of I.-T., West Bengal, A I R (37) 1950 Cal 551=1950-18 I T R 112 =I L R (1951) 1 Cal 59.
Swarnalata Biswas v. State of West Bengal, A I R (39) 1952 Cal 687.

Talbot & Co. v. Haricharan Halwasiya, A I R (39) 1952 Cal 47.
Tapeswari v. Sukharajia, A I R (39) 1952 Cal 432.
Tarafatullah Mandal v. S. N. Maitra, A I R (39) 1952 Cal 919=56 Cal W N 387=1953 Cri L J 136.
Tarakdas Dutta v. Saratchandra Paul, A I R (40) 1953 Cal 385=56 Cal W N 296.
Tara Pada Ray v. Shyama Pada Ray, A I R (39) 1952 Cal 579=57 Cal W N 356.
Taru Bala Roy v. The State, A I R (40) 1953 Cal 307 = 56 Cal W N 738=1953 Ori L J 712.
Tripura Modern Bank Ltd. v. Bansen & Co., A I R (39) 1952 Cal 781.
Tulsibala Rakshit v. N. N. Ghosal, A I R (40) 1953 Cal 109= 56 Cal W N 193=1953 Cri L J 344.
Tulsidas Jewraj v. State of W. B., A I R (39) 1952 Cal 912.
Tulsiram Shaw v. R. C. Pal Ltd., A I R (40) 1953 Cal 160=89 Cal L J 127.

Udaychand Mahatab v. Rammoh Hajra, A I R (40) 1953 Cal 123=56 Cal W N 272.
Union of India v. Ramnagina Singh, 89 C L J 342.
United Commercial Press Ltd. v. Satyanarain Chamaria, A I R (40) 1953 Cal 136 = 56 Cal W N 346.
University of Calcutta v. Dipa Pal, 56 Cal W N 730 (SB).
Upendra Nath Sinha v. Maharajadhiraj of Burdwan, A I R (37) 1950 Cal 146=54 C W N 310=I L R (1951) 1 Cal 91.

West Bengal Settlement Kanungoe Co-operative Credit Society Ltd. v. Mr. Bella Banerjee, A I R (39) 1952 Cal 554.

THE
ALL INDIA REPORTER
1953
Calcutta High Court

A. I. R. 1953 Calcutta 1

P. B. MUKHARJI J.

Calcutta Motor Cycle Co.—Plaintiff v. *Union of India—Defendant.*

Civil Suit No. 1045 of 1949, D/- 18-3-1952.

(a) Precedents—Failure to notice ruling authority—Decision loses its binding force.

A decision, which fails to notice the ruling authorities of the Court on the point, loses much of its binding character and has little persuasive force. In this view, a Division Bench decision on a point, which has not noticed ruling authorities on the point, is not binding on the Single Judge. [Para 33]

Anno. C. P. C., Pre N. 15.

(b) Letters Patent (Cal.), Cl. 12 — Jurisdiction—"Carry on business"—State carrying on commercial undertakings (like railways)—State does not carry on business—States' liability to be sued in its own Courts—(Constitution of India, Art. 300)—(Civil P. C. (1908), Ss. 9 & 20.)

The Calcutta High Court has no jurisdiction to entertain a suit against of the Union of India for damages on account of short delivery by State Railway where the cause of action has arisen wholly outside the ordinary original civil jurisdiction of that Court, on the sole ground that the Union of India carried on business within the local limits of such jurisdiction by reason of the fact that the principal offices of the Railway administration are within such limits. 14 Cal. 256, 40 Cal. 308, A. I. R. 1950 Cal. 207, *Foll.*; A. I. R. 1949 Cal. 622, *Held* no longer good law; *Case law discussed.* [Paras 3, 52]

The State in India claims no exemption from liability to be sued in its own Courts when the cause of action arises, either in contract or tort, against a State Railway.

But that part of Cl. 12 of the Letters Patent of the Calcutta High Court where the words "the defendant resides or carries on business" appear, cannot contextually and historically be applied to the State. It does not mean that the State cannot be sued. It certainly can be, wherever the cause of action arises either in whole or where in part with the leave of the Court.

The distinction between governmental functions of sovereign character and non-governmental functions still remains a valid test by which to determine the justiciable character of any particular act or conduct of the Government inspite of the difficulty of applying that test in a welfare State with its new patterns of social and public services. The reasons for upholding that test is founded primarily on the juristic concept that sovereign governmental actions unless excluded from the scrutiny of Courts, will mean creating a new right which no jurisprudence of any country has recognised except by special constitutional writs, and secondarily on the fact that unless so excluded it will involve the practical difficulty of constant interference with administration and invasion of public funds rendering any government or administration impossible.

The English and the American laws on the point are less rational and less progressive than the Indian Law. The progress and development of the Indian Law on this point should not be hampered by appeals to such laws. [Para 51]

There can be no doubt that the functions of the State in modern times have changed considerably and it is a fact that the State to-day does carry on many undertakings of a commercial or trading nature. It is inevitable that in any welfare State such activities will not only be constitutional but also natural and in accord with the spirit of a welfare State. But by carrying on a business, the State ifself does not become a business concern. By carrying on an undertaking like the railways the State itself does not become a railway corporation. The State is not an arithmetical or mechanical conglomoration of functions so that by undertaking a venture of commercial nature it is to be regarded as a commercial institution. It is quite true that one of its functions or even one of its duties in a welfare State might be to carry on an undertaking which formerly at any rate could only have been a private commercial enterprise. But that does not mean that the State "carries on business" within the meaning and intention of Cl. 12 of the Letters Patent. [Para 48]

Anno. L. P. (Cal.), Cl. 12, N. 13; C. P. C., S. 9, N. 57; S. 20, N. 10.

S. Roy—for Plaintiff; S. Talukdar—for Defendant.

REFERENCES: Courtwar/ Chronological/ Paras.

(1857-59) East India Co., v. Syed Ally: (7 Moo. Ind. App. 555 P. C.). 12
(1857-59) 7 Moo. Ind. App. 476 (P. C.). 12
('13) 40 Ind. App. 48: (40 Cal. 391 P. C.). 11
('68-69) 5 Bom. H. C. R. App. 1. 10
('73) 19 W. R. 341. 18
('75-76) 1 Cal. 11: (24 W. R. 309). 15
('85) Biprodass Dey v. Secy. of State: (11 Cal. 665). 23
('87) 14 Cal. 256. 18, 23, 25, 27, 29, 30, 33, 36, 47
('13) 40 Cal. 308: (21 Ind. Cas. 1). 23, 27, 30, 33, 35, 36, 47, 49
('26) 43 Cal. L. J. 574: (97 Ind. Cas. 246). 27
('32) 59 Cal. 150: (A. I. R. 1932 Cal. 146). 29
('32) 59 Cal. 1283: (A. I. R. 1932 Cal. 834). 28, 29
('41) I. L. R. (1941) 2 Cal. 160. 29
('47) 51 Cal. W. N. 537. 31
('49) 84 Cal. L. J. 175: (A. I. R. 1949 Cal. 622). 32, 33, 34, 35, 36.

('50) A. I. R. 1950 Cal. 207. 35, 36, 47
('50) 86 Cal. L. J. 98. 34
('51) 55 Cal. W. N. 113: (A. I. R. 1951 Cal. 37). 30
('52) 56 Cal. W. N. 83: (A. I. R. 1952 Cal. 35 F. B.). 29, 30, 34
1 Hyde 37. 18, 50
('27) 50 Mad. 449: (A. I. R. 1927 Mad. 689). 47
(1887) 12 A. C. 643: (56 L. J. P. C. 72). 44
(1906) A. C. 455: (75 L. J. K. B. 858). 49
(1858) 20 How 527: (15 Law Ed. 991). 45
(1881) 8 Q. B. D. 414: (51 L. J. Q. B. 86). 23
(1947) 330 U. S. 731: (91 Law Ed. 1209). 45
(1951) 341 U. S. 737: (95 Law Ed. 1331). 45

Judgment.—This suit has by consent of parties and counsel been tried on a preliminary point of jurisdiction.

[2] Before stating the preliminary point, it will be appropriate to refer to the nature of the suit, the claim made therein, and the admitted facts. In this suit a partnership firm by the name of Calcutta Motor and Cycle Company is suing the Dominion of India now the Union of India for a sum of Rs. 3,702-8-0 being the loss and damage which it is alleged to have suffered on account of short delivery of 483 pieces of bicycle chains out of a total consignment of 1000 pieces. These chains were despatched by the plaintiff from Byculla outside the jurisdiction of this Court to Howrah outside the jurisdiction of this Court and which were intended to be carried over the two Railways of the Bengal Nagpur Railway and the East Indian Railway, neither of which runs through any part of the territorial limits of the Ordinary Original Civil Jurisdiction of this Court. These two Railways are now State Railways. It is admitted that the cause of action for this suit arose entirely outside the original jurisdiction of this Court. These are the admitted facts. The jurisdiction that is claimed in the plaint is founded on the allegation first that the Union of India in running these Railways carries on business within the meaning of cl. 12 of the Letters Patent of this Court and secondly that the office and the principal places of such business are at No. 1 Royal Exchange Place and 105 Netaji Subhas Road, Calcutta, which are both admittedly within the original jurisdiction of this Court.

[3] The preliminary issue that by the consent of parties and counsel is now raised for trial is :

"Does the defendant carry on business within the jurisdiction of this Hon'ble Court."

The point in the issue is, has this Court jurisdiction to entertain a suit brought against the Union of India where the cause of action has arisen wholly outside the ordinary original civil jurisdiction of this Court, on the sole ground that the Union of India carries on business within the local limits of such jurisdiction by reason of the fact that the principal offices of the railway administration are within such limits.

[4] As the facts on which the issue is raised are admitted, no evidence has been led.

[5] This issue raises problems of great importance and far-reaching consequences. But this is not the first time that such an issue has been raised.

[6] The preliminary controversy technically arises on the celebrated words in cl. 12 of the Letters Patent of this High Court,—"if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits." Does the State, the Union of India in this case, "carry on business" within the meaning of the Letters Patent when it owns and manages a railway concern or a railway undertaking ?

[7] Another incidental controversy is, even if the State runs a railway and is said, therefore, to "carry on business," does it do so at the place where the principal offices of the railway are situate ? This is important because only on the ground that such principal office happens to be within the original jurisdiction of this Court that this Court is said to possess jurisdiction to entertain and try this suit.

[8] It will not be enough, therefore, to find that because the State runs the railway, therefore it carries on business, but it is also necessary to find that such business is carried on within jurisdiction on the ground that the principal office of the railway is within such limit. When both these grounds operate in favour of the plaintiff, then alone this Court will have jurisdiction to entertain and try this suit.

[9] I will examine the problem first from the point of view of the liability of the State to be sued in its own Courts, secondly from the point of view of the State as carrying on any particular business and thirdly from the point of view of the situs of such business. An examination of a large number of authorities however is inevitable having regard to the arguments at the bar.

[10] The liability of the State to be sued in its own Courts was first developed in Indian jurisprudence through the doctrine of negligence in the Law of Torts. The leading case of the *Peninsular and Oriental Steam Navigation Co.* v. *Secy. of State*, 5 BOM. H. C. R. APP. 1, in the year 1861 decided that the plaintiffs in that case whose horse was injured by reason of the negligent conduct of workmen employed by the Government in the dockyard at Kidderpore, had a right to sue the Secretary of State because the act complained of was done in carrying on an ordinary business and not in the exercise of governmental powers. The Secretary of State, it will be remembered, then represented the British Government in India. In that case the real question before the Court was not the liability of the State to be sued in cases not connected with the conduct of a business or commercial undertaking. But there are observations of the learned Chief Justice Sir Barnes Peacock in his judgment whose effect is to give immunity to the State in acts done in the course of governmental administration. The liability of the State to be sued in its own Courts

was determined by drawing a distinction between acts within the scope of governmental administration on the one hand and on the other, acts outside the governmental administration such as carrying on a business or commercial undertaking. The latter and not the former acts were held to be justiciable and cognisable by the Courts.

[11] The reasons of Sir Barnes Peacock C. J., found favour with and were accepted by the Lord Chancellor Viscount Haldane, in the Privy Council in *Secy. of State for India* v. *Moment J.*, 40 Ind. App. 48 at p. 51 (P. C.).

[12] In India there is a historic background to this legal concept of the liability of the State and that background is provided by her colonial past and the origin of the British administration in this country. Originally the East India Company was a trading corporation under Charter of the British Sovereign trading in India and gradually it took over and acquired powers of Government of this country. What was, therefore, a trading corporation to begin with, became subsequently the Government of the country. As a trading corporation, the liability of the East India Company to be sued was recognised. What the extent of that right was has, however been never fully analysed and Lord Haldane did not pause to consider it either in that case. In *The Secretary of State* v. *Kamachee Boye Sahaba*, otherwise known as the *Tanjore case*, reported in 7 Moo. Ind. App. 476 (P. C.) Lord Kingsdown delivering judgment observed that acts done by the East India Company in execution of sovereign powers were not subject to the control of the municipal Courts either of India or of Great Britain and referred to the cases of *The Nawab of Arcot* v. *The East India Co.* in the Court of Chancery in the year 1793 and *The East India Co.* v. *Syed Ally*, (7 Moo. Ind. App. 555 P. C.) before the Privy Council in 1827. Sir Hugh Cairns, as he then was, arguing at the bar for the Secretary of State for India in Council in that case distinguished the twofold character of the East India Company. He pointed out that first they were a trading corporation and secondly they had sovereign authority. He conceded that the East India Company was liable to be sued in the Courts in India as in England for acts done in their trading capacity. He also conceded that they could be sued upon a contract and referred to the decision of *The Bank of Bengal* v. *The United Company*.

[13] By the Imperial Government of India Act, 1885, it was declared that India was to be governed directly and in the name of the Crown acting through the Secretary of State sided by Council and to him were transferred the powers formerly exercised by the Board of Directors and the Board of Control of the East India Company. It is there provided by s. 65 that all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council as they could have done against the Company. The powers and properties of the East India Company, therefore, devolved upon the British Crown by this Statute.

[14] The continuity of legal development on this point in Indian jurisprudence was maintained by declaring that the British administration in so far as it acquired and carried out non-governmental functions of commercial character of the East India Company its liability was preserved, but in the field of its governmental functions its immunity was declared. That is the historic justification of the principle and distinction envisaged by Sir Barnes Peacock and approved by Lord Haldane.

[15] The distinction between governmental and non-governmental functions was later developed and applied by Judges in other branches of law as a test for finding out liability of the State. The doctrine of Sir Barnes Peacock was applied in 1875 to a case on contract by the learned Chief Justice Sir Richard Couch in *Nobin Chunder* v. *Secy. of State*, 1 cal. 11, upholding in appeal the judgment of Phear J., on the Original Side. Couch C. J. approved expressly and applied the observations of Sir Barnes Peacock C. J. He says:

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

[16] What is more important here to observe is that this doctrine was applied in this case to non-suit a claim which did not arise out of any tortious act but which arose out of a claim for compensation in an auction sale of licences to sell excisable liquors and drugs where the purchaser plaintiff claimed to be the highest bidder and where he alternatively claimed against the Government the return of the deposit he had made. It was, therefore, a claim akin to contract or quasi contract and for money repayable on failure of consideration.

[17] The principle thus was extended from torts to contracts.

[18] The next land mark in the development of the law on this branch is reached in 1886 in the celebrated case of *Doya Narain Tewari* v. *Secy. of State for India*, 14 cal. 256. In that case the plaintiff was appointed as a purchasing agent of the Commissarist Department of the Government of India in connection with the Second Kabul campaign on a salary of Rs. 100 per month and that suit was based on an implied contract on the part of the Government to pay whatever money had been advanced by the plaintiff for purchase of stores in course of his employment as the purchasing agent. This was another case on contract decided by two learned Judges on the Original Side. Mitter J., who delivered judgment in that case at p. 272 observed :

"The words by which the second head of jurisdiction has been defined in S. 12 of the Letters Patent are in my opinion inapplicable to it" (Secretary of State for India).

The same view was taken by Wells J. in *Rundle* v. *Secy. of State*, 1 Hyd. 37. There in that case Wells J., says that the words 'carry on business and personally work for gain' do not refer to an institution like the Government of India and he further held that the carrying on of the business of the Government could not be considered to be carrying on of business within the meaning of S. 12 of the Letters Patent. Mitter J., in *Doya Narain Tewari's case* continues at p. 272 to observe :

"It is somewhat difficult, nor is it necessary in this case, to define exactly what may be deemed 'business' within the meaning of S. 12 of the Letters Patent; but it is clear to me that the business of governing the country is not business within the meaning of S. 12 of the Letters Patent."

[19] At p. 273, Mitter J. after citing the case of *Nobin Chunder* v. *Buroda Kant*, 19 W. R. 341 and other cases comes to this conclusion which I must state in his own language :

"That the word 'business' in S. 12 of the Letters Patent was used in a restricted sense is also indicated by the words 'personally work for gain' to be found in the same section. The latter words would be unnecessary if the word 'business' had been intended to be used in an unrestricted sense."

[20] Mitter J. in that case goes further to observe at pp. 273 and 274 that it has been said that supposing the business of governing the country is not business within the meaning of S. 12 of the Letters Patent, still the Government in this country carries on various trades, such as, the trades in opium and salt, and the principal places of business of these trades are located in Calcutta. Mitter J. meets this argument at p. 274 by saying:

"But these trades are not carried on by the defendant in this case. As already observed the words 'carrying on of a business or trade' are inapplicable to this case. These trades, if they can be properly called trades, are carried on in one sense by the Government officers in charge of them, but they are so carried on for the benefit of the Indian Exchequer. For these reasons I am of opinion that this Court has no jurisdiction to entertain this suit."

[21] This conclusion of that judgment is directly on the point that I am asked to decide in this case.

[22] A criticism has been made at the bar of this decision saying that the same proceeded to this conclusion only on the point that the Secretary of State was merely a nominal person or rather a mere name. But that in my view is not the real ratio of the decision. The real ratio of the decision in my view is that the State or the Government could not be said to carry on business within the meaning of cl. 12 of the Letters Patent as construed and interpreted by the learned Judges. That is why I have just set out the relevant extracts from that judgment.

[23] In 1912 the problem again came before the Court and was decided by Sir Lawrence-Jenkins, Chief Justice, sitting with Harrington J. in appeal from the Original Side from a judgment of Chaudhuri J. in *Rodricks* v. *Secy. of State for India*, 40 cal. 308. This again is a case on the tort of malicious prosecution where the same doctrine was applied. The decision in this case is important because it decides almost the very identical point that has been raised before me in this suit. The original judgment in this case was delivered by Chaudhuri J. Although Chaudhuri J. dismissed the suit as being without jurisdiction being bound by the decision in *Doya Narain Tewari's case*, 14 cal. 256 he ventured to express his dissent from the views expressed in *Doya Narain Tewari's case*. In the course of the judgment Chaudhuri J. observes that the decision of Pigot J. in *Biprodass Dey* v. *Secy. of State for India*, 11 cal. 665 had taken a directly opposite view having held that such suit was maintainable. Chaudhuri J. at p. 311 in 40 cal. 308 observes :

"However differently the word 'business' may have been construed at different times, I do not think there is any question whatever that a 'carrying business,' is 'business' within the meaning of S. 12 of the Letters Patent, nor is there any doubt that a Railway company or other corporate body, or even a body of individuals whether incorporated or not, is a 'person' within the meaning of that section: see the definition of the word 'person' in the General Clauses Act, 1897. It cannot also be doubted that a railroad company, apart from the fact of having a registered office, 'carries on business' at its principal office where the directors meet and the general business of the company is transacted. Jessel M. R., in *Erichsen* v. *Last*, (1881) 8 Q. B. D. 414 said that where the 'Brain Power' is, there a trade or business is carried on. The question therefore, is as to whether the Secretary of State for India in Council is a 'person' within the meaning of S. 12 of the Letters Patent, and if so, does that 'person' carry on business in Calcutta, which at the time of the institution of this suit was the capital of the Government of India."

[24] Further on in the judgment at p. 314 Chaudhuri J. continues to observe :

"It seems to me difficult to say that the Government does not dwell in its own capital and that a Government engaged in trades, though it may be for purposes of the State, does not 'carry on business.' If Sir George Jessel is right that where the 'Brain Power' is, there trade or business is carried on, the assumption that the Brain Power of the Government of India is at its seat of Government, is not an unjustifiable assumption. I would have had, therefore, no hesitation in holding that the Secretary of State for India in Council, namely the Government dwells at its capital and carries on business there, and is thus amenable to the jurisdiction of this Court, in cases where a suit can be maintained against the Government."

[25] On appeal as I have said this view of Chaudhuri J. was not accepted by the learned Sir Lawrence-Jenkins C. J. sitting with Harrington J. At p. 317 of the judgment of the Court of appeal Sir Lawrence-Jenkins C. J. observes :

"Now, it is admitted that no part of the cause of action arose within the local jurisdiction of this Court: but it is contended that the Secretary of State for India in Council is a person who dwells or carries on business or personally works for gain within the local limits of Calcutta and it is on that ground and on that ground alone that we are asked to hold that there is jurisdiction. No doubt, this argument met with some favour in the Court of first instance, and the appellant suggests before us that he was encouraged by the view of the learned Judge to prefer this appeal. But in fact this is a point which was decided adversely to him as far back as 1886, and it has not been suggested that from that date to this, the decision to which I

refer has ever been questioned or doubted: *Doya Narain* v. *Secy. of State*, 14 Cal. 256. It was the decision not of a single Judge but of a Bench of two Judges, and I think it would be wrong for us not to follow that decision. I regard it as important that matters of this kind should have all the certainty possible and that the Court should not lightly disregard a decision definitely setting a question of jurisdiction such as that which arises in this case. If the decision is wrong then it must be for a higher tribunal to correct it. For my own part, I prefer to follow it as being a decision of a Bench of two Judges which has long been accepted as a governing authority."

[26] With these words the learned Chief Justice came to the conclusion that the Court had no jurisdiction. The ratio of this decision in appeal settles the point so far as I am concerned. In spite of the observation of Sir Lawrence-Jenkins C. J. the decision in *Doya Narain Tewari's case* again came up for criticism a few years later by Lort-Williams J.

[27] In 1926 this doctrine was applied to a Railway case by Sir C. C. Ghose J. sitting singly in *Baijnath Kamani* v. *Secy. of State*, 43 Cal. L. J. 574. The learned single Judge followed the decision in *Doya Narain Tewari's case*, 14 Cal. 256 and in *Rodrick's case*, 40 Cal 308.

[28] In 1932 the same principle was applied by Rankin C. J. sitting with C. C. Ghosh J. in coming to a decision in a suit, *Secretary of State* v. *Shreegobinda*, 59 Cal. 1289 where the plaintiff complained that the manager appointed by the Court of Wards had not done his duty by realising all monies with diligence and had not accounted to the Court of Wards for certain monies which he had collected. There the learned Chief Justice after reviewing various English and Indian authorities on the subject acted on the principle laid down by Sir Barnes Peacock distinguishing acts of Government as a sovereign power and acts of the Government in the conduct of a commercial undertaking. The learned Chief Justice in that case proceeds also upon the well-known principle of English law that where an act is done by an officer of the Government in the course of exercise of powers which cannot be lawfully exercised save by the sovereign power, no action in tort lies against the Secretary of State for India and for this purpose even the doctrine of *respondeat superior* is of no avail.

[29] In the meantime in 1930 the decision in *Doya Narain Tewari's case*, 14 Cal. 256 had come up for criticism by Lort-Williams J. in *Golab Ram Pali Ram* v. *Secy. of State*, I. L. R. (1941) 2 Cal. 160. Although the judgment was delivered in 1930, the Law Report did not report the decision until 11 years after in 1941. The result was that Rankin C. J. did not notice this decision of Lort-Williams J. when the learned Chief Justice was deciding the case of *Secretary of State* v. *Shreegobinda*, 59 Cal. 1289. In *Golab Ram Pali Ram's case*, there was an appeal to Rankin C. J. and Pearson J. but that was an appeal not on this point but from an order dismissing an application to revoke leave under cl. 12, Letters Patent, and reported in the same volume *Secy. of State* v. *Golabrai Paliram*, 59 cal. 150. In *Golab Ram Pali Ram's case* Lort-Williams J. expressed himself on the point in these terms at page 164 :

"The business of the Railways has changed and has increased enormously in the interval. It is nonsense to suggest now-a-days that they are kept up solely for the purpose of Government. The fact that a business of carriage by Railway is being carried on in India by some one is notorious. The fact that such a business called the East Bengal Railway is being carried on in Bengal and that its head office is situate at 3, Koilagha Street, Calcutta, is admitted. That such a business is a business within the meaning of Cl. 12 of the Letters Patent cannot be denied. It is the same kind of business as that carried on by Railway Companies in India which clearly come within the provision. It must be equally obvious that the proprietors of such a business carry on their business amongst other places at their head office where the general business of the undertaking is transacted and where the manager is to be found or, as was said by Chowdhuri J. where the brain lies."

The other point of this decision was that a notice under section 77, Railways Act, formed part of the cause of action in a suit against the Railway. On the question of S. 77, Railways Act, this decision has been expressly overruled by a Full Bench decision of this Court in *Bansi* v. *Governor-General of India in Council*, 56 Cal. W. N. 83.

[30] In another Division Bench decision in *Dominion of India* v. *Gopal Chandra*, 55 Cal. W. N. 113 the view of Lort-Williams J. that carriage by Railway was a business within the meaning of cl. 12, Letters Patent, was expressly dissented from and not followed and the decisions in *Doya Narain Tewary's case*, 14 Cal. 256 and in *Rodrick's case*, 40 Cal. 308 were expressly preferred and followed. On the question, however, of notice under S. 77, Railways Act, forming part of the cause of action, this Division Bench decision itself was overruled by the Full Bench decision in *Bansi* v. *Governor-General*, 56 Cal. W. N. 83.

[31] In 1946 the same principle was applied by a Division Bench to a Pattani case in *Udai Chand* v. *Province of Bengal*, 51 Cal. W. N. 537. In that case it is held that the Crown was not liable for the negligence of the Collector in holding a sale under the Pattani Regulation, 1819, and having negligently paid out the sale-proceeds thereof to a person who was not entitled to the same. Chakravartti J. delivering judgment at p. 541 laid down the law in the clearest possible terms :

"The principle deducible from these and other cases as we understand them is as follows : A distinction must be made between acts done by the Crown in pursuance of ventures which a private individual might undertake equally well and acts done in exercise of governmental powers which could not be lawfully exercised save by the sovereign authority or persons to whom the sovereign authority might delegate those powers."

[32] On behalf of the plaintiff reliance has been placed on a Bench decision in a Civil Revision case in *Dominion of India* v. *Jagdish Prosad Panna Lal, a Firm*, 84 Cal. L. J. 175. This was a decision in 1948 delivered by the learned Harries C. J. with whom Chakravartti J. concurred. This was a revision of an order of a Full Bench of the

Calcutta Small Causes Court on a question of compensation for short delivery against the East Indian Railway and the Bengal Nagpur Railway in a suit brought against the Government in the Small Causes Court. At p. 180 of that report, Harries, C. J. observes :

"Clearly the Bengal Nagpur Railway did not acquiesce in the institution of the suit but the case falls within the provision because the East Indian Railway carried on the business within the limits of the jurisdiction and leave of the Court has been given. That being so, the Court had jurisdiction."

The question here turned on the interpretation of s. 18 of the Presidency Court of Small Causes Act. Section 18 (a) of that Act relates to the cause of action as a ground of jurisdiction. Section 18 (c) of that Act relates to the residence or carrying on of business within limits as a ground of jurisdiction. Harries C. J., deals with this point of residence or carrying on of business at pp. 179-80 of the report and expresses himself in these terms :

"A company carries on business at its registered office, and it would appear to me that a railway treated as a separate entity would carry on its business at its head office. Admittedly, the head office of the East Indian Railway is within the local limits of the jurisdiction of the Small Cause Court, though the headquarters of the Bengal Nagpur Railway being at Kidderpore is outside such limits. It must be remembered that leave of the Court was obtained for bringing the suit and that being so, the case falls precisely within the terms of S. 18 (c). What that provision requires is that anyone of the defendants at the time of the institution of the suit actually and voluntarily resided or carried on business within the local limits of the jurisdiction of the Court and either that leave of the Court had been given for the institution of the suit, which had been done in this case, or that the defendant who did not reside or carry on business within the local limits acquiesced in the institution of the suit."

[33] In this decision no reference is made either to *Doya Narain Tewary's case*, 14 cal. 256 or to the decision in *Rodrick's case*, 40 cal. 308 the two most important and relevant authorities of this Court on the point. While the decisions in 14 cal. 256 and 40 cal. 308 are binding on me, the decision in Civil Revision of the Division Bench in *Dominion of India* v. *Jagadish Prosad Pannalal, a Firm*, 84 cal. L. J. 175 is not so binding. A decision which fails to notice the ruling authorities of the Court on the point loses much of its binding character and has little persuasive force.

[34] Then again the decision in *Jagadish Prosad Pannalal's case*, 84 cal. L. J. 175 has been criticised by Harries, C. J. himself in his subsequent judgments, first in an appeal from the Original Side in *Nilima Sarkar* v. *Governor-General in Council*, 86 cal. L. J. 98 and then again in the Full Bench case in *Bansi* v. *Governor-General of India in Council*, 56 cal. W. N. 83. There the reference to the Full Bench was made on two points distinctly. The points of reference appear at p. 85 of the report. The first point was whether notice under s. 77, Railways Act, was a part of the cause of action and the second point was the very point which is raised here and that is whether

"the Governor-General representing the two railways administrations in that case could not be said to have actually or voluntarily resided or carried on business or personally worked for gain within the jurisdiction of the Small Cause Court even though the head office of the East Indian Railway was within such jurisdiction."

The leading judgment in the Full Bench was delivered by Das J., Banerjee J. agreed. The learned Harries C. J. also agreed but added these few words which will appear at p. 92 of that report :

"I desire to add that I am satisfied that the view taken in the case of *Dominion of India* v. *Jagadish Prosad Pannalal*, 84 Cal. L. J. 175, a decision to which I was a party, is erroneous."

[35]. There is also yet another decision, to which the learned Chief Justice was a party, in the case of *Dominion of India* v. *Messrs. R. C. K. C. Nath & Co.*, A. I. R. 1950 cal. 207 which requires to be noticed. After this decision, *Jagadish Prosad Pannalal's case*, (84 cal. L. J. 175) can no longer in my view be regarded as good law. This is a clear authority for the proposition that the Court has no jurisdiction to entertain a suit brought against the Dominion of India where the cause of action has arisen wholly outside the ordinary original jurisdiction of that Court on the sole ground that the Government of India dwelt or carried on business or personally worked for gain within the local limits of that Court. Banerjee J. who delivered the judgment in that case with which Harries C. J. agreed observes at page 208 :

"So far as defendant 1, the Dominion of India is concerned, I think, the same principle applies, which was applicable in suits against the Secretary of State for India in Council. That principle, as stated in *Rodricks* v. *Secretary of State*, 40 Cal. 308, is this: 'The Court has no jurisdiction to entertain a suit brought against the Secretary of State for India in Council, where the cause of action has arisen wholly outside the ordinary original jurisdiction of that Court, on the sole ground that the Secretary of State for India in Council dwelt or carried on business or personally worked for gain within the local limits of that court."

[36] This shows that Harries C. J. has definitely revised his former view expressed in *Jagadish Prosad Pannalal's case*, (84 cal. L. J. 175) and has now accepted the principles followed in *Rodrick's case*, (40 cal. 308). The plaintiff's reliance, therefore, on the case of *Jagadish Prosad Pannalal* is a reliance on a broken reed. As I have already said the decision both in *Doya Narain Tewari's case*, (14 cal. 256) as well as in *Rodrick's case* are binding on me. I follow these decisions and so also I follow the view expressed by the learned Chief Justice himself in the later decision in *Dominion of India* v. *R. C. K. C. Nath & Co.*, A. I. R. 1950 cal. 207.

[37] This brings to an end the examination of the authorities on this point.

[38] An examination of the constitutional provisions and other statutory provisions relating to the State's liability to be sued in its own courts will at this stage be also relevant for determining the issue before me.

[39] Article 300 of the Constitution of India expressly provides that

"the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

As I read this provision in the Constitution I take it to mean that the State consents to being sued in its own Courts in India. This principle in the Constitution expressly reserves the right to sue and the obligation to be sued as they existed before the Constitution, subject of course to any statute by Parliament or State Legislature. While it affirms the principle of liability this constitutional provision does not in my view extend the scope of such liability. The scope or extent of such liability remains what it was before the Constitution subject however to such legislative amendments, Parliamentary or State, as are valid and permissible. The group of articles from 294 to 299 of the Constitution dealing with property, contract, rights and liabilities does not lead to any different conclusion either. In fact under Art. 294 (b) of the Constitution it is provided expressly that all rights, liabilities and obligations of the Government of the Dominion of India whether arising out of any contract or otherwise shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State. In Art. 299 dealing with contract the Constitution makes clear the form in which such contract is to be made and at the same time in sub-art. (2) excludes only the personal liability of the President, the Governor or the Rajpramukh on such contract or of any person making or executing such contract on their behalf. This express exclusion of personal liability implies maintaining the State's liability on the contract.

[40] The liability of the State is in my view also plain under the Indian Railways Act. Explicit recognition of the responsibility of a railway administration for loss, destruction or deterioration appears from s. 72, Railways Act, subject, no doubt, to the provisions under ss. 151, 152 and 161, Contract Act. Again under s. 76, Railways Act, express reference is made to burden of proof in suits against a railway administration for compensation for loss, destruction or deterioration. Railway administration under s. 3 (6), Railways Act includes a railway administration by the Government. I have no doubt in my mind that the State railway can claim no immunity from suits.

[41] The Civil Procedure Code of the country also provides and recognises such right of suits against the State.

[42] That is the statutory and constitutional position in India on State's liability to be sued in its own courts.

[43] Reference in this connection to the English and the American Law may be misleading and in my view is. But as both the English and American laws have been discussed at the bar, I propose to deal with them as briefly as possible.

[44] Taking first the English Law on the point, it is notorious that Crown procedure in England is a highly technical procedure and is a peculiar growth of English legal history. In the realm of contract, the subject in English can adopt a proceeding against the Crown known as petition of right. A long history struggling to extend gradually the liability of the Crown culminated in the Petition of Right Act of 1860. It is overlaid with many limitations. In the first place, the Crown need not in theory submit itself to the action at all unless it so chooses. An indispensable condition again in such proceeding is the issue of a fiat which theoretically at any rate is the King's own decree of grace "Let right be done". Technically this fiat again can be either granted or withheld.

In the realm of tort the ruling principle in England is that the King can do no wrong and no action of tort could lie against the Crown. Dr. C. K. Allen describes it. "This startling proposition is almost unique among civilised peoples", at page 256 of his book "Law and Orders" 1945 Edition. Its ancient origin has lost all relevance to the circumstances of modern society. Even the well-established principle of the Common Law of Torts *Respondeat Superior* did not apply to the Crown. After a long struggle in the sphere of torts the Statute in England intervened to wipe out some of the defects of proceeding against the Crown and that was provided by the Crown Proceedings Act, 1947, giving the right to sue the Crown and making the liability of the Crown in tort clear in some of its provisions. But this Statute is not a reform of the entire Crown Procedure but only a very limited reform in a limited field. Sir William Holdsworth, an eminent authority and jurist, expressed his views on this subject in vol. 38 of the Law Quarterly Review at p. 295 in these terms :

"The subject's rights against the Crown are, therefore, governed by the inadequate rules of the mediaeval common law. That injustice results is obvious. The subject is in this respect worse protected in this country than in some foreign countries, and in some of the colonies this injustice has been so obvious that it has been removed by enlarging the competence of the petition of right." It was said in 1887 in the case of *Farnell* v. *Bowman*, (1887) 12 A. C. 643 at p. 649 "that the local Governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior workmen. If, therefore, the maxim that 'the King can do no wrong' were applied to Colonial Governments, 'it would work much greater hardship than it does in England.' It is obvious that this reason applies with great force to the activities of our modern socialistic State; and that, in consequence a reform of the law on the lines of these colonial statutes is urgently needed in the interests of the public at large."

It will, therefore, be seen that the defects of Crown Procedure in England in proceeding against the Crown were crying out for a reform even after the pattern of Colonial Statutes and it will be insensible in my view to import all these mediæval immunities into the Indian Law where I find, as I have shown, the law has developed on entirely different lines.

[45] Nor in my opinion is the American Law a safe guide on this problem of State's liability to be sued in its own Courts. Chief Justice Taney of the American Supreme Court in *Jossep D. Beers* v. *The State of Arkans*, (1858) 20 HOW. 527 : 15 Law. Ed. 991 observes:

"It is an established principle of jurisprudence in all civilised nations that a sovereign state cannot be sued in its own Courts or in any other without its consent and permission; but it may if it thinks proper waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State and as this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted and may withdraw its consent whenever it may suppose that justice to the public requires it."

The principle of immunity from suits is said to apply to every sovereign power whether the form of Government is monarchical or republican and it is said to be essential to the common defence and the general welfare of the State. Historically it draws its origin from the doctrine of sovereign infallibility and juristically it drew its sustenance from the doctrine of State being the source and creator of law and therefore above the law. The principle of consent of the State and the withdrawability of the consent even pending the trial of a case in America have been applied to the several States in the United States except perhaps in cases where by the Constitution a State may be sued in the Supreme Court of the United States. That is a provision which appears to be recognised in the original jurisdiction of the Supreme Court of India as provided in ART. 131 of the Constitution. But a suit by a citizen of one State against another State in the Courts of the United States is prohibited by the 11th amendment of that Constitution and one State cannot create a controversy with another State within the meaning of that term as used in the Judicial Clauses of the American Constitution. In this respect the provisions of the American Constitution and the American law are very different from the Indian Constitution and the Indian law on this point. That the American Law is unsatisfactory from this point of view will appear from the recent decision of the Supreme Court of the United States in the American Dollar Steamship Lines litigation: *Land* v. *Dollar*, (1947) 330 U. S. 731 and *Land* v. *Dollar*, (1951) 341 U. S. 737 & 912.

[46] Neither the English doctrine that "the King can do no wrong" nor the American doctrine of State immunity in Court without the consent of State and which consent is withdrawable by the State pending trial, applies to India. The law in India has been and as I conceive it is more rational and progressive. In India, the Constitution records the consent of the State to be sued. Historically and under the Constitution, that is how I read the law in India on the liability of the State to be sued in its own Courts, I am therefore not *persuaded* by the English and the American law on this point to hold that an aggrieved person in India cannot sue the State on a contract with the State Railway. I am of the opinion and I hold he can.

[47] Then comes the question whether the State can be said to carry on business within the meaning of cl. 12, Letters Patent of this High Court. The Calcutta authorities directly bearing on the point are *Doya Narain* v. *Secretary of State*, 14 cal. 256. *Rodricks* v. *Secretary of State for India*, 40 cal. 308 and *Dominion of India* v. *Messrs. R. C. K. C. Nath & Co.*, A. I. R. 1950 cal. 207. I read these decisions to be clear authorities on the point that the State cannot be said to carry on business within the meaning of cl. 12, Letters Patent of this High Court. I will refer only to one more decision at this stage and that is of the Madras High Court in *Govindaraju Naidu* v. *Secretary of State*, 50 Mad. 449. This was a decision of a Bench of two Judges presided over by Coutts-Trotter C. J. The learned Chief Justice at p. 454 of the report observes deciding this point:

"In my opinion the words of the section do not cover the case of government at all. The only doubt I had was with regard to the word 'residence' occurring in that section. I was inclined to the view at one time that the government must be said to 'reside' in the place where its official headquarters are located, but on consideration I think that the word 'reside' must be taken to refer to natural persons and not to legal entities such as limited companies or governments."

Beasley J. sitting with the learned Chief Justice delivered a separate judgment in that case and expressed his "entire agreement" with the views expressed by Mitter J. in *Doya Narain Tewary's case* in 14 cal. 256. Beasley J. also agreed with the other Calcutta decision on *Rodricks* v. *Secretary of State*. The learned Judge goes on to observe at p. 459 :

"Nor do I think that the Government can be said to dwell anywhere. Whereas the words, 'carry on business' apply to a corporate body and to limited companies and 'personally work for gain' to an individual or individuals. The word 'dwell' can only apply to an individual in a private sense and not to an entity. The corporation cannot be said to dwell anywhere. It may have an office where it carries on business but it does not dwell there."

[48] There can be no doubt that the functions of the State in modern times have changed considerably and it is a fact that the State to-day does carry on many undertakings of a commercial or trading nature. The idea can be also found clearly from certain expressions used in the Constitution of India. Sub-article (2) of ART. 289 of the Constitution expressly refers to trade or business of any kind carried on by or on behalf of the

Government of a State. Sub-article (3) of the same article of the Constitution makes it clear that some trade or business Parliament may by law declare to be incidental to the ordinary functions of government. The first Amendment of the Constitution amending Art. 19, cl. 6, sub-cl. (2) expressly mentions the carrying on by the State or by corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise. It is inevitable in my view that in any welfare State such activities will not only be constitutional but also natural and in accord with the spirit of a welfare State. That is why Sir William Holdsworth in the passage that I have quoted elsewhere in the judgment indicates that the law in England should be so reformed as to admit the Crown liability for the State activities of a commercial or trading nature.

But here again the question has to be approached with a good deal of circumspection because what today is considered to be trade or business may not in the changing contour of the welfare State be regarded as a business or a trade but a necessary and indispensable State function.

Now for instance, in the particular case before me the question relates to railway administration. It is undoubtedly true that originally the railway was run by private companies under Charter of incorporation. Today running of railways by the State is regarded in many ways as an essential undertaking and essential activity of the State. Railway is said to provide, and rightly so, a form of public transport on which the welfare of the nation depends on a very large measure. Providing public transport in that sense, therefore, can also be considered as providing a kind of public service which is part of good administration and good government of a country.

The question here is not one of mere degree but of changing notions of quality of the State. With the developing ideas of the functions, powers and duties in a welfare State, it is I consider, difficult and perhaps subtle, to draw the line where administration ends and business begins or where administration begins and business ends. It appears to be a variable line which is bound to shift from time to time and relative in its concept with reference both to the time and society that the State has to serve. What was, therefore, in a police State of the nineteenth century a clear-cut notion and simplified formula of broad distinction between governmental and non-governmental functions as providing a workable test to determine the liability of the State, requires in the contemporary world, to be moulded in its application to fit in with a service State or a welfare State. By carrying on a business the State itself does not become a business concern. By carrying on an undertaking like the railways, the State itself does not become a railway corporation. The State is not an arithmetical or mechanical conglomoration of functions so that by undertaking a venture of commercial nature it is to be regarded as a commercial institution. I cannot persuade myself to accept the idea that the State in India is to be regarded as a trading corporation. It is quite true that one of its functions or even one of its duties in a welfare State might be to carry on an undertaking which formerly at any rate could only have been a private commercial enterprise. But does that mean that the State "carries on business" within the meaning and intention of cl. 12 of the Letters Patent? I have given my most anxious and careful consideration to the problem and I have come to this conclusion that this is not what was intended by cl. 12 of the Letters Patent.

[49] An astonishing result that ensures from the acceptance of the proposition that the State carries on business within the meaning of cl. 12 of the Letters Patent cannot be ignored in coming to a conclusion on the point. Assume that the State does carry on business within the meaning of cl. 12 of the Letters Patent. The next obvious question is where does it carry on the business or where is the situs of such State business? I have pursued with great interest the theory of Jessel, M. R. which is described as "brain power theory". Even if that theory is accepted, it may very legitimately be said that in the case of a State railway the brain is at the capital for it is natural to say that the brain of the State is at the capital.

Even if the alluring but deceptive theory of corporate personality of the State be said to be analogous to a company or a corporation then also on the principle laid down by Lord Loreburn in *De Beers Consolidated Mines Ltd.* v. *Howe*, (1906) A. C. 455 at p. 458 that a company resides or carries on business where its control resides, the control of the State can legitimately and properly be said to be at the capital. That indeed was suggested by Chaudhuri J. in *Rodrick's case* in 40 Cal. 308. In that case there was no difficulty because Calcutta happened to be the capital of India at that time. But today it is different. If on the same reasoning one were to come to a conclusion then the only conclusion would be that the brain to-day is now at New Delhi which is the present capital of India and the suit should, therefore, be filed not in Calcutta but at New Delhi.

But I am not persuaded by the brain power theory. I do not think that a business is carried on only by brain and I think the limbs are also indispensable in carrying on the business. Assuming that the State carries on a business, why can it not be said that it carries on the railway business throughout the length and breadth of the country wherever the railway lines run? There it also does carry on business of railway undertaking in running the railway and carrying freight and passengers over the rails. What is the result?

If that proposition is right then this suit could have been filed in Madras, or Bombay, Coimbatore or Bangalore or anywhere in India wherever there is a piece of railway line on the ground that the State carries on business within the precincts of those particular places.

[50] It seems to me, that is an absurd conclusion to reach. Yet I cannot see how one can avoid that conclusion, if it is to be held that the State carries on business within the meaning of cl. 12 of the Letters Patent. The ubiquity of the State within its own borders and its territorial omnipresence throughout the country justify the principle being pushed to its logical extreme and leading to the result that a suit could be filed anywhere wherever there is a railway run by the State. Not even a Judge would like to be in isolation in venturing an opinion on a point like this. I find myself not alone, although my companion is not a very modern one. Wells, J. in *Cubit Sparhall Rundle* v. *Secretary of State in Council*, 1 Hyde 37 observes at pp. 40-41 :

"It appears, upon the face of the plaint, not only that the land in question is situated out of the local limits of the ordinary original jurisdiction of the Court but also that the cause of action arose out of such local limits; but it was contended on behalf of the plaintiff that the defendant is subject to the jurisdiction of the Court under the other heads of jurisdiction individually the defendant cannot be said to be either dwelling or carrying on business or personally working for gain within the local limits of the ordinary original jurisdiction of this Court; but the defendant is proceeded against not as a private individual but as an authorised representative of the Government and as such he must for all purposes be connected with the present question to be treated as being in the same position as the Government itself.

And what is the position of the Government ? The Government of India is represented in this city which is its principal seat by the Governor-General or in his absence by the President in Council and throughout its extensive territories by its various officers, civil and military, in every grade of official rank. It may, therefore, be said to be present everywhere and be constructively dwelling in each and every place at the same time. But it cannot be allowed that this universal dwelling can give a plaintiff the right to elect the forum in which to sue the Government or to give every Court of justice in India the concurrent jurisdiction in all cases against the Government. Such a rule will be one-sided in its operation and would place the Government at a disadvantage which in the case of a private individual would amount to an evil of the greatest magnitude."

For these reasons I hold that the State cannot be said to "carry on business" within the meaning of cl. 12, Letters Patent of this High Court.

[51] On a review of the course of decisions of this Court and on a review of the historic background of the development of law in India on this particular point, and on an examination of the provisions of the Constitution of India and upon a scrutiny of the Indian Railways Act I draw certain conclusions. First, the State in India claims no exemption from liability to be sued in its own Courts when the cause of action arises either in contract or tort against a State Railway. Secondly, that part of cl. 12, Letters Patent of this High Court where the words "the defendant resides or carries on business" appear cannot contextually and historically be applied to the State. It does not mean that the State cannot be sued. It certainly can be wherever the cause of action arises either in whole or where in part with the leave of the Court. Thirdly, the distinction between governmental functions of sovereign character and non-governmental functions still remains a valid test by which to determine the justiciable character of any particular act or conduct of the Government inspite of the difficulty of applying that test in a welfare State with its new patterns of social and public services. The reason for upholding that test is founded primarily on the juristic concept that sovereign Governmental actions unless excluded from the scrutiny of Courts, will mean creating a new right which no jurisprudence of any country has recognised except by special constitutional writs, and secondarily on the fact that unless so excluded it will involve the practical difficulty of constant interference with administration and invasion of public funds rendering any Government or administration impossible. Fourthly, the English and the American laws on the point are less rational and less progressive than the Indian law. The progress and development of the Indian law on this point should not be hampered by appeals to such laws.

[52] I, therefore, hold that this Court has no jurisdiction to entertain this suit and I answer this preliminary issue against the plaintiff.

[53] The suit, therefore, must fail on the point of jurisdiction and is dismissed with costs.

A/V.B.B. *Suit dismissed.*

A. I. R. 1953 Calcutta 10

K. C. DAS GUPTA AND P. N. MOOKERJEE JJ.

Sripati Duley and others — *Accused-Petitioners* v. *State.*

Criminal Revn. No. 659 of 1950, D/- 1-2-1951.

Criminal P. C. (1898), Ss. 210, 211, 212 & 537—Non-compliance with Ss. 211 & 212.

The mere fact that a charge has been framed under S. 210 is not by itself sufficient for the commitment of the accused persons to the Court of Session. It cannot be said that the fact that S. 210 does not empower the Magistrate to make a commitment but S. 213 does, and that S. 213 comes into operation after the procedure in Ss. 211 and 212 has been followed is a fortuitous circumstance; it appears to be a clear and deliberate act of the legislature for the purpose of avoiding unnecessary and improper commitment. It may very well happen that after the Magistrate has obtained the list of witnesses, he will decide on scanning the list, to examine one or more of the witnesses named in the list. The evidence of such witness examined under S. 212 may conceivably be such as to make the Magistrate decide that though he originally did frame a charge under S. 210, the charge should be cancelled and the accused discharged. Provisions in Ss. 211 and 212 are substantial provisions of procedure and non-compliance with these is not curable by the provisions of S. 537. [Paras 5, 6]

Anno: Criminal P. C., S. 210, N. 2; S. 211, N. 1a; S. 212, N. 1; S. 537, N. 6.

Ajit Kumar Dutt—for Petitioners; *Harideb Chatterjee—for the State.*

Order.—This Rule was issued on the District Magistrate of Bankura to show cause why the order passed by a Magistrate committing these petitioners to the Court of Session for trial for offences under ss. 147 and 436, Penal Code, should not be quashed.

[2] It appears that information was lodged at the Thana on 20-8-1949, by Rashik Dome alleging that offences under ss. 143 and 436, Penal Code had been committed by a number of persons. The police after an enquiry sent up charge sheet only under s. 147, Penal Code, against all these petitioners. After examination of 6 of the prosecution witnesses the learned Magistrate came to the conclusion that the evidence disclosed a case under s. 436, Penal Code, and apparently he expressed his decision to enquire into the matter under the provisions of chap. XVIII, Criminal P. C. There was a prayer on behalf of the defence that as the charge sheet had been submitted under s. 147, Penal Code, they were not prepared for cross-examination at that stage.

Thereafter some more witnesses were examined in chief and after 11 witnesses had been examined in chief they were all cross-examined after which the learned Magistrate examined the accused. On 18-7-1950, the learned Magistrate framed charges against the accused persons under ss. 147 and 436, Penal Code and passed the following order:

"The accused are charged under S. 147/436, Penal Code, and are committed to the Court of Session by an order of commitment herewith. They are all taken in custody to be produced before the Sessions Court as and when directed."

Later in the day a prayer for bail being made the learned Magistrate directed *ad interim* bail till 31-7-1950. Still later the learned Magistrate passed the following order: "Accused are given 5 days' time to submit list of defence witnesses, if any."

[3] The two points which have been pressed before us with particular stress by Mr. Dutt on behalf of the petitioners are: (1) that the order of commitment is bad inasmuch as the learned Magistrate failed to follow the procedure laid down in ss. 211, 212 and 213, Criminal P. C. and (2) that the evidence recorded is such that no reasonable man can conclude therefrom that any offence under s. 436, Penal Code, was committed by any of the accused persons.

[4] Taking the second point for consideration first we think it sufficient to say for the purpose of this case that after going through the evidence recorded and considering Mr. Dutt's argument, we are unable to accept his contention that the evidence is such that no reasonable man can conclude therefrom that an offence under s. 436, Penal Code, was committed by the accused person. Whether if and when the case goes to Sessions, the Jury as the Judges of facts would accept the evidence as satisfactory or not, is a matter which we need not consider and on that we express no opinion. We express no opinion at all as regards the merits of evidence except saying that we are unable to accept Mr. Dutt's extreme contention noted above.

[5] The other contention raised by Mr. Dutt ought, in our opinion, to prevail. To understand whether the provisions in ss. 211 and 212, Criminal P. C., are matters of substance non-compliance with which should be considered in law to amount to illegality, not curable by s. 537, Criminal P. C., it is necessary to examine the scheme in which these two sections appear. Chapter XVIII, Criminal P. C. deals with enquiry into cases triable by the Court of Session or High Court and starts with s. 206. That section states what Magistrates have the power to commit for trial. Section 207 says that the procedure in the following sections shall be adopted for such enquiries. Section 208 provides that when the accused appears before the Magistrate, the Magistrate shall proceed to hear the complainant and take such evidence as might be produced in support of the prosecution or on behalf of the accused. It contains provisions as regards right of the accused to cross-examine the witnesses and also as regards the issue of process for compelling the attendance of any of the witnesses for the complainant or the accused. Then we come to ss. 209 and 210 which deal with the question of framing of charge or discharge of the accused.

These sections provide that after evidence mentioned in s. 208 has been recorded, and the accused has been examined for the purpose of enabling him to explain any circumstances appearing in the evidence, the Magistrate can do either of two things : if he finds that there are not sufficient grounds for committing the accused for trial he will record his reasons and discharge him unless it appears to him that he should be tried before himself or some other Magistrate in which case he should proceed accordingly. If, on the contrary, he is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge declaring with what offence the accused is charged and as soon as the charge is framed, it should be explained to the accused.

It is important to note that though under s. 210 the Magistrate, if satisfied that there are sufficient grounds for committing the accused for trial, is empowered to frame a charge, this section does not empower him to make the actual commitment. The commitment, if any, has to be made under s. 213, Criminal P. C. Before that stage is reached, the Magistrate has to follow the procedure under ss. 211 and 212, under the first of which the Magistrate has to ask the accused to give at once a list of the persons whom he wishes to be summoned and give evidence on his trial, and the second of which empowers the Magistrate to summon in his discretion and to examine any witness named in any list given to him under s. 211. If no such list is given by the accused, the Magistrate may make an order committing the

accused to trial ; if the accused has given a list the Magistrate may still make an order committing the accused for trial but that only after the Magistrate has exercised his discretion under s. 212.

We are unable to agree that the fact that s. 210 does not empower the Magistrate to make a commitment but s. 213 does, and that s. 213 comes into operation after the procedure in ss. 211 and 212 has been followed is a fortuitous circumstance ; it appears to us to be a clear and deliberate act of the legislature for the purpose of avoiding unnecessary and improper commitment. It may very well happen that after the Magistrate has obtained the list of witnesses, he will decide on scanning the list—it may very well be after suggestion has been made by the lawyers for the accused—to examine one or more of the witnesses named in the list. The evidence of such witness examined under s. 212 may conceivably be such as to make the Magistrate decide that though he originally did frame a charge under s. 210, the charge should be cancelled and the accused discharged.

This is what is in so many words provided in sub-s. (2) of s. 213 which runs as follows :

"If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused."

The mere fact that a charge has been framed under s. 210, Criminal P. C. is not by itself sufficient for the commitment of the accused persons to the Court of Session.

[6] On a careful consideration of this matter we have no doubt in our mind that these provisions in ss. 211 and 212 are substantial provisions of procedure and non-compliance with these is not curable by the provisions of s. 537, Criminal P. C.

[7] Accordingly, we set aside the order of commitment made by the learned Magistrate and order that after giving a fresh opportunity to the accused to give a list of witnesses for the defence under s. 211, Criminal P. C. he will follow the procedure as laid down in ss. 212 and 213, Criminal P. C. and dispose of the matter in accordance with law.

[8] The rule is disposed of accordingly.

[9] Let each of the accused be released on bail of Rs. 500 with one surety of the like amount during the period of enquiry.

B/D.H. *Order accordingly.*

A. I. R. 1953 Calcutta 12

P. B. MUKHARJI AND GUHA JJ.

Kashinath Das and others — Accused-Petitioners v. *Kalipada Das — Complainant-Opposite Party.*

Criminal Revn. No. 336 of 1951, D/-2-8-1951.

Criminal P. C. (1898), Ss. 211, 212, 213, 215, 439 and 537—Discretion to examine witnesses named in list under S. 211—Wrong exercise of — Order of commitment—Quashing of.

The provisions of Ss. 211, 212 and 213, Criminal P. C. are substantial provisions of procedure and non-compliance with them is not curable under S. 537, Criminal P. C.: A. I. R. 1953 Cal. 10, *Foll.* [Para 1]

Before a Magistrate makes an order of commitment under S. 213 the conditions laid down in Ss. 211 and 212 must be satisfied. One of these conditions is that he must be satisfied as to whether any examination of any of the witnesses mentioned in S. 211 of the Code is in his discretion required or not and it is only when he has been so satisfied that he can make the order committing the accused. This discretion has to be judicially exercised after bearing in mind the different objects of examination of witnesses before charge and after charge. Otherwise any order of commitment without making up his mind or exercising his discretion on this particular point mentioned in S. 212 of the Code cannot be justified or sustained. [Para 1]

Hence where a Magistrate after framing a charge under S. 210 and after receiving the list of witnesses supplied by the accused under S. 211 passes an order of commitment under S. 213 merely observing that no sufficient grounds had been made out for examining any of the witnesses under S. 212, the order of commitment cannot be sustained. [Paras 1 and 2]

Anno. Cr. P. C., S. 211, N. 1; S. 212, N. 1; S. 213, N. 6; S. 439, N. 28.

Ajit Kumar Dutt —for Petitioners; Profulla Kumar Banerjee—for the State; Debabrata Mukherjee—for Opposite Party.

REFERENCE Para

('51) Criminal Revn. No. 659 of 1950: (AIR 1953 Cal 10.) 1

P. B. Mukharji J. — The petitioners complained against the order of commitment made by the learned Magistrate on 30-3-1951, wrongly described as 30-1-1951. The petitioners by that order were committed to the Court of Session under s. 395, Penal Code. The order of commitment is one of those omnibus and rolled-up orders of committal which have become very frequent in these days but which nevertheless are in complete disregard of the statutory provisions contained in ss. 211, 212 and 213, Criminal P. C. Here in this order of committal, first, charge is framed, then the petitioners are committed to recite that the charge is read over and explained to the accused. Thereafter the accused are stated to have been called upon to furnish a list of persons whom they want to be summoned on the trial to give evidence on their behalf and then towards the end after having taken a list of witnesses the learned Magistrate records:

"I do not think that sufficient grounds had been made out for examining any of these witnesses under S. 212, Criminal P. C."

On a reading of this order, it will appear that the Magistrate has put the cart before the horse. After charge has been framed under s. 210, Criminal P. C. provides that a list of witnesses for defence shall be given by the accused. In fact the provision is that the accused shall be required at once to give such a list of persons whom he wishes to summon to give evidence on his trial. Then the Magistrate in his discretion under s. 212, Criminal P. C. may summon and examine any witnesses mentioned in that list under s. 211, Cri-

minal P. C. This discretion of the Magistrate has to be judicially exercised and is not to be confused with the examination of witnesses that he made before the charge was framed. Under s. 213, Criminal P. C., it is clearly laid down that when the accused on being required to give in a list under s. 211, Criminal P. C. has declined to do so or when he has given in such a list and the witnesses, if any, included therein whom the Magistrate desires to examine have been summoned and examined under s. 212, Criminal P. C. the Magistrate may make an order committing the accused for trial by the Court of Session. Now these conditions are the conditions which must be satisfied before the Magistrate makes an order of commitment. One of these conditions is that he must be satisfied as to whether any examination of any of the witnesses mentioned in s. 211, Criminal P. C. is in his discretion required or not and it is only when he has been so satisfied that he can make the order committing the accused. Otherwise, any order of commitment without making up his mind or exercising his discretion on this particular point mentioned in s. 212, Criminal P. C. cannot be justified or sustained.

The confusion on this branch of the procedure arises out of the fact that the object of examination of witnesses before framing of the charge is and may be very different from the object of examination of witnesses after the charge for the purposes of making an order to commitment. So long as these different objects are borne in mind clearly the confusion is easily avoided. After having made the order of commitment the learned Magistrate in this case went on to say that he did not think it necessary to examine any of the witnesses mentioned in the list supplied under s. 211, Criminal P. C., whereas he should have said that he had considered the question whether any witnesses should be examined under s. 212, Criminal P. C. and has come to the conclusion that no such examination was necessary and then should have proceeded to make the order of commitment. The reason why the object is different with regard to evidence taken after the charge is this. When evidence is taken under s. 208, Criminal P. C., that is done with a view to see whether a charge can be framed under s. 210, Criminal P. C., but when the Magistrate exercises his discretion whether after the charge has been framed he should examine the witnesses under s. 212, Criminal P. C., he does that with a view to find out whether he should make an order of commitment or not. This view which we take is supported by another decision of a Division Bench of this Court: *Sripati Duley* v. *State* in criminal Revn. No. 659 of 1950 (Cal.). This decision was given on 1-2-1951. There the Bench came to this conclusion:

"On a careful consideration of this matter we have no doubt in our mind that these provisions in Ss. 211 and 212 are substantial provisions of procedure and non-compliance with these is not curable by the provisions of S. 537, Criminal P. C."

We find ourselves in complete agreement with the view expressed there.

[2] On this ground alone the commitment order should be set aside.

[3] Two other points have been urged before us, one is that the examination of the accused under s. 209, Criminal P. C. had taken place at a time not justified by the terms of s. 209, Criminal P. C., the other is that under s. 208, Criminal P. C., some of the witnesses intended to be called by the defence on behalf of the accused were not allowed to be called by the Magistrate because they had been examined already and cross-examined as prosecution witnesses. It is not necessary for us in this case to decide these two points as we are satisfied that on the first ground the petitioners should succeed.

[4] The order of commitment of the Magistrate is therefore set aside and the rule is made absolute.

[5] We would only wish to add that it means that up to the stage that the charge has been framed the proceedings are regular but after the charge had been framed all the rest of the order of commitment is set aside and the proceedings will continue from after the stage of the framing of the charge.

[6] **Guha J.**—I agree.

B/K.S. *Order set aside.*

A. I. R. 1953 Calcutta 13

CHAKRAVARTTI AG. C. J. AND G. N. DAS J.

Dudhewalla & Co. Ltd.—*Petitioner* v. *Govindram Rameswarlal*—*Opposite Party.*

Supreme Court Appeal Tender Nos. 632 to 637 of 1952, D/- 21-5-1952 against the judgment of High Court reported in A. I. R. 1952 Cal. 585.

Limitation Act (1908), Art. 179 — Leave to appeal from revisional judgment of High Court — Limitation —Date of signing cost-sheet not material — (Calcutta High Court Appellate Side Rules, Ch. VI R. 8) — (Civil P. C. (1908), Ss. 2 (2) and 109)—(Constitution of India, Art. 133).

In computing the period of limitation for the purpose of an application for leave to appeal to the Supreme Court against a judgment of the High Court passed in its revisional jurisdiction, it is not possible to take into account the date on which the Assistant Registrar may sign the cost-sheet, though it may be necessary under R. 8 (4) of Ch. VI of the Appellate Side Rules to file the cost-sheet, along with the application for leave to appeal as such a cost-sheet cannot be treated as a decree under S. 2 (2), Civil P. C. [Paras 10 and 11]

Anno. Lim. Act, Art. 179, N. 3, 4;
Civil P. C., S. 2 (2) N. 3.

Apurbadhan Mukherjee and Sudhir Kumar Bose—for Petitioner; A. K. Sen and Pritish Roy — for Opposite Party.

Chakravartti, Ag. C. J. — These are six applications for leave to appeal to the Supreme Court against a judgment passed by this Court in its civil revisional jurisdiction in six cases. Those cases were heard together.

[2] The judgment was delivered on 14-1-1952 in all the six cases in the form of separate sections

of a single pronouncement and the learned Judges signed the judgment at the end. The applicants for leave to appeal to the Supreme Court made their first application for a certified copy on 8-2-1952 and we are informed from the Bar that that application was for a copy of the judgment. The requisites were filed on the same day and the copy was ready on the 12th of February next. Delivery of the copy was also taken on the same day. As the application was for a copy of the judgment, what was supplied was only a copy of the judgment.

[3] It appears that on 21-4-1952 the applicants for leave to appeal to the Supreme Court made a second application for copy and we are informed that this time they wanted a copy of the decree. The requisites were filed on the same day and the copy was ready for delivery on the 25th of April next. Actually delivery was taken on the 28th of April. As this time the application was for a copy of what was called the decree the office supplied a certified copy not merely of the judgment covering all the six cases signed by the learned Judge, but also a copy of the cost-sheet signed by an Assistant Registrar of the Appellate Side on 8-2-1952.

[4] The applications for leave were filed on 2-5-1952 but the office, besides pointing out several other defects of form also pointed out that the applications were barred by time, inasmuch as more than ninety days and the time allowable for obtaining a certified copy of the judgment had elapsed from the date of the judgment. It was, however, added that if the date on which the cost-sheet was signed by the Assistant Registrar was taken as the starting point of limitation or if the period between the date of the judgment and the date on which the cost-sheet was signed was deducted, the applications would appear to be in time. As this was a matter which, in the opinion of the office, was a matter for decision by the Court, it was placed before us and we have heard the parties.

[5] It will appear from the dates which I have already mentioned that if the date on which the judgment was pronounced be taken as the starting point of limitation, the period of limitation for applying for leave to appeal to the Supreme Court had already expired before the second application for a certified copy was made on 21-4-1952. I do not know whether a discovery of that position was the cause for making the second application for a copy, not of the judgment but this time of the 'decree.' If, however, the applicants are entitled in law to have the period of limitation computed from the later date on which the cost-sheet was signed, they are entitled to the benefit of such computation and the motive from which they made a second application for a copy will be entirely immaterial.

[6] I am, however, unable to hold that the date on which the Assistant Registrar signed the cost-sheet is in any way material. The proposed appeal is going to be an appeal from a final order passed by this Court in the exercise of its revisional jurisdiction. The relevant Article in the Constitution is Art. 133 and it mentions only "any judgment, decree or final order in a civil proceeding of a High Court" and stops there. What papers have to be filed along with a petition for leave to appeal is indicated in R. 8 of chap. VI of the Rules of the Appellate Side of this Court which deals with appeals to the Supreme Court. Mr. Mukherjee who appeared on behalf of the petitioners relied upon cl. (4) of R. 8 under which every petition for leave to appeal to the Supreme Court must be accompanied by "certified copies of the judgment and decree complained of." The contention of Mr. Mukherjee was that the cost-sheet signed by the Assistant Registrar was a decree and since under R. 8 (4) he was bound to file a copy of the cost-sheet, limitation could not start to run against him before the date on which the cost-sheet was signed or, in any event, he was entitled to a deduction of the period between the date of the judgment and the date of the signature of the cost-sheet.

[7] This argument assumes that the cost-sheet signed on 8-2-1952 by the Assistant Registrar is a decree and that it is a decree complained of by the proposed appeal. In my opinion, it is neither.

[8] The definition of 'decree' is well known and is to be found in S. 2 (2), Civil P. C. To recall the familiar terms, a "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. In the second place, under O. 20, R. 7 of the Code the decree must bear the date on which the judgment was pronounced and must be signed by the Judge who passed the decree. The proceedings to which the proposed appeals relate were proceedings for the standardisation of the rents of several premises and it is impossible to see how the rights of the parties with regard to any of the matters in controversy in those proceedings could be said to have been adjudicated on by the cost-sheet signed by the Assistant Registrar. Nor is it easy to see how the cost-sheet signed by an Assistant Registrar can be or can have the force or effect of a decree in view of the clear provisions of O. 20, R. 7, Civil P. C. The fact that decrees drawn up in suits or appeals contain a statement of the costs awarded, need not mislead anyone, because those decrees are statutorily required to contain and do in fact contain particulars of the claim and the Court's determination of the matter.

[9] Mr. Mukherjee, however, contended that the cost-sheet should not be regarded separately and that the judgment pronounced by the learned Judges, together with the cost-sheet, should be taken as embodying the formal adjudication by the Court on the rights of the parties with regard to matters in controversy in the proceedings concerned. On the argument of Mr. Mukherjee we would have

the curious result that a part of a decree is signed by the Judges of the Court, whereas another part is signed by a ministerial officer. I also enquired of Mr. Mukherjee whether, if he could not furnish any reason from the relevant provisions of law or any authority from any decided cases, he could at least refer us to some precedent when a proposed application for leave to appeal to the Supreme Court or to the Privy Council was thrown out on the ground that it was not accompanied by a copy of the cost-sheet or whether he could cite a case where the filing of the cost-sheet was insisted on. Mr. Mukherjee frankly conceded that he could not refer us to any such precedent or instance.

[10] In my view, in computing the period of limitation for the purpose of an application for leave to appeal to the Supreme Court against a judgment of this Court, passed in its revisional jurisdiction, it is not possible to take into account the date on which the Assistant Registrar may sign the cost-sheet.

[11] In the second place, even if we were to hold that the terms of R. 8 (4) of chap. VI of the Appellate Side Rules were sufficient to make it necessary that the cost-sheet in such a case must be filed along with the application for leave to appeal, it is further necessary to see whether, on the facts of this case, the cost-sheet can be regarded as "the decree complained of." I have looked into the grounds in the petitions of appeal and I do not find that as regards the costs themselves any particular ground has been taken or that the cost-sheet as such is complained of at all. It is quite true that in order that the award of costs may be challenged, it is not necessary to take a specific ground, since should the applicants succeed in their appeals on the merits, a reversal of the order for costs would consequentially follow. But if the applicants would insist that the cost-sheet must be taken into account in computing the period of limitation, they must not only establish that the cost-sheet can be treated as a decree within the meaning of s. 2 (2), Civil P. C., but also that the cost-sheet is or embodies an order which is complained of. I have already made it clear that neither of these tests is satisfied in the present case.

[12] In my opinion, the doubt felt by the office that the date on which the Assistant Registrar signed the cost-sheet could not be taken into consideration was well founded and that the present applications for leave to appeal to the Supreme Court are barred by limitation.

[13] Let these applications be returned to the office to be dealt with by them in accordance with our decision given above.

[14] **G. N. Das J.**—I agree.

B/D.R.R. *Applications dismissed.*

A. I. R. 1953 Calcutta 15

P. B. MUKHARJI J.

Nrisingh Prosad Paul, Applicant v. Steel Products Ltd., Defendant—Petitioner.

Application No. 1050 of 1950, D/- 3-9-1951.

Civil Procedure Code (1908), O. 6, R. 17 — Amendment of written statement — Amendment should be necessary to determine "real controversy" — Consideration for amendment of plaint and written statement are not same — Awarding of cost against amending party does not necessarily avoid prejudice.

Amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principles. Some important general principles are certainly common to both, such as the application for amendment whether of a plaint or a written statement must be bona fide and must also be for the purpose of determining "the real controversy" between the parties and where it is just. But the rule that the plaintiff cannot be allowed to amend his plaint so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the defence or the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Hence the Courts are inclined to be more liberal in allowing amendment of defence than of plaint and questions of prejudice are less likely to operate with same rigour in the former than in the latter case.

But nevertheless no amendment of a defence or written statement should be allowed which is no answer to the plaint and the cause of action pleaded therein. An immaterial and useless amendment should not be permitted by the Court. Nor does the Court allow amendment by introduction in the written statement of a stale and untenable set-off. These conclusions follow naturally from the "real controversy" rule in O. 6, R. 17.

The governing consideration in an application to amend the written statement should be how far, if at all the proposed amendment of the defence is necessary to determine the "real controversy" between the parties. If that test is not satisfied then the amendment should not be allowed, even on the ground that there can be no real prejudice by the amendment and that the costs awarded against the amending party will act as the panacea for any possible inconvenience occasioned by the amendment. There is always legal prejudice when irrelevant matters are allowed to be introduced by amendment.

The primary duty of a Court in deciding an application for amendment is not discharged by laying unction to its conscience with the thought that the order will not prejudice any party. The Court has the more positive duty to decide whether the proposed amendment is necessary to determine the real controversy between the parties. Nor is the primary consideration in such an application, to award costs against the amending party. The Courts do not exist for so commercial a purpose as to be mere institutions for dispensing costs without deciding the merits. They exist primarily for the justice of determining the genuine and real disputes between the parties and incidentally for awarding costs. The "real controversy" test is the basic test which governs the Court's unchartered powers of amendment of pleadings. No amendment should be allowed when the amendment does not satisfy this cardinal test. (1884) 26 Ch. D. 700, *Ref.*

[Paras. 10, 11, 12]

Anno: Civil P. C., O. 6, R. 17, N. 2, 11, 15.

G. P. Kar—for Applicant.

REFERENCE

(1884) 26 Ch. D. 700: (53 L. J. Ch. 891.) /Para. 12

Order. – I have no hesitation in dismissing this application for amendment of the written statement.

[2] In this application the defendant asks for amendment of its written statement after about five years. The suit was filed in 1946 and so was the written statement. I am satisfied that this application is not bona fide and the unusual delay is not explained by the affidavits.

[3] An attempt to explain the long period of five years is made in paras. 3 and 4 of the petition of the defendant company. The substance of that explanation is that some of the officers of the defendant company were alleged to have committed certain offences under the Defence of India Act and the Iron and Steel Control Order and in connection with the investigation of the case all books, papers and documents including the files relating to the disputes in the suit were taken over by the police. But even then these cases ended in the acquittal of the officers in July 1950. For the period from July 1950 until 11-7-1951 just about a year, no explanation is offered.

In para. 4 of the petition it is alleged that while the cases were pending the papers remained in the custody of the police. But surely the causes cannot be said to be pending when the defendant company's officers were acquitted and as stated in para. 3 of the petition the officers were acquitted in July 1950. In para. 4 of the petition it is alleged that the papers were made available to the defendant in the early part of 1951. No fact is stated in the petition or affidavit-in-reply to explain why all this time from July 1950 to early part of 1951 was taken for the defendant company to get the papers and nothing is shown what attempts or steps in that time were taken and on what dates for the recovery of such papers. What that early part of 1951 means is not stated but in any event this present application was not made until 11-7-1951, which is a very significant date.

This suit was once decreed on 29-3-1950 against the defendant. The decree was set aside on 15-5-1950 and the suit was restored. On 5-6-1951 the plaintiff's counsel mentioned the matter before my learned brother Sarkar J. for an early date of hearing and one month's time was given for the suit to appear in the peremptory list on 9-7-1951. Nothing was done even during this period of one month when the suit was under special order directed to be put on the list on 9-7-1951. The suit ultimately appeared on 10-7-1951 in the daily list. It was then, after the suit had appeared on the daily list for disposal that the defendant company thought of taking out the present summons. This summons was taken out on the very following day after the suit had appeared in the list on 10-7-1951. These dates do not support the defendant's rather laboured explanations for the delay offered in paras. 3 and 4 of the petition on the basis of cases with the Government and the acquittal of the officers of the defendant company in July 1950 and papers being made available in the early part of 1951. I am unable to believe that these assertions made in paras. 3 and 4 of the petition are at all *bona fide*. To me it appears that the only purpose of this application is to harass the plaintiff and delay the final hearing of this five year old commercial suit.

[4] On the merits of the amendments proposed the case of the defendant company should in my opinion also fail. The proposed amendments are shown in red ink in the schedule to the petition.

[5] The proposed amendments require to be analysed in order to show their nature and character.

[6] They plead in great details certain contracts which the defendant company had with the Governor-General-in-Council for supplying diverse quantity of Block Tackle and Pulley Blocks. The terms are set out in detail. Paragraphs 1, 2 and 3 are all new amendments which do not find a place in the original written statement. The next amendment that has been proposed is in para. 6 where the defendant company states that the plaintiff failed and neglected to fabricate and/or manufacture the said goods as a result whereof the defendants contract with the Governor-General-in-Council was abruptly terminated inflicting huge loss to the defendant. There was not a word of pleading to this effect in the original written statement. The proposed amendment claims to reserve the right to proceed against the plaintiff for the recovery of such loss after final adjustment of account with the Union of India which adjustment is still said to be pending. Thereafter in the new para. 7 one of the vital admissions made in the original written statement is completely deleted. That part of the original written statement which pleads that the defendant has already paid a portion of the price of the goods retained by the defendant, and that at all material times the defendant was and still is ready and willing to pay the price of the balance of the goods so retained and to return to the plaintiff the rejected goods is now proposed to be deleted by the amendment sought. The whole of that pleading is now struck off and in its place something new is substituted to the effect that the plaintiff failed and neglected to fabricate and supply the goods in time and therefore committed breach of the agreement. Here again it is pleaded that on proper accounts being taken a large sum of money would be due to the defendant for which the defendant reserves the right to file a separate suit. Such right of suit even if such claim could be made is of course now barred by limitation.

[7] The plaint in this suit has claimed the balance of price on the basis of goods sold and delivered by the plaintiff to the defendant. In that context either the proposed amendment in the written statement is relevant or it is not. If it is irrelevant then the amendment is unnecessary and cannot be allowed because that is not necessary to determine "the real controversy" between the parties under O. 6, R. 17, Civil P. C. If it is

relevant, it has only attempted to introduce entirely a new term in the contract by suggesting that its contract with the Government and the specification mentioned therein was the controlling factor in the contract between the plaintiff and the defendant. That is taking and pleading an entirely new defence. Even then I would have been prepared for reasons, I will presently state, to allow that amendment. But to suggest that such a defence could not have been taken by the defendant because of cases pending with the Government and because of the papers which are said to have been taken charge of by the police is an attempt to overreach the Court. I therefore disallow such amendment.

[8] The second amendment proposing to delete the admission that the defendant had been willing to pay the price of the balance of the goods returned and to return the rejected goods to the plaintiff is again a signal departure from the original defence. I cannot imagine how such withdrawal of defence can be said to depend on the papers taken charge of by the police. That again goes to show in my opinion that the application is not *bona fide* and the explanation for the delay is a mere excuse.

[9] Some authorities on amendment of plaint have been placed before me. The general principles are sufficiently clear and repetition of well-known authorities is not called for.

[10] It is necessary, however, to observe that amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principles. Some important general principles are certainly common to both, such as the application for amendment whether of a plaint or a written statement must be *bona fide* and must also be for the purpose of determining "the real controversy" between the parties and where it is just under O. 6, R. 17, Civil P. C. But the rule that the plaintiff cannot be allowed to amend his plaint so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the defence or the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Hence the Courts are inclined to be more liberal in allowing amendment of defence than of plaint and questions of prejudice are less likely to operate with same rigour in the former than in the latter case.

[11] But nevertheless no amendment of a defence or written statement should be allowed which is no answer to the plaint and the cause of action pleaded therein. An immaterial and useless amendment should not be permitted by the Court. Nor does the Court allow amendment by introduction in the written statement of a stale and untenable set off as attempted in this application. These conclusions follow naturally from the "real controversy" rule in O. 6, R. 17 of the Code and no authority is needed in support thereof. But if any authorities are needed, they are collected at p. 481 of the Annual Practice (1944 Edn.) under the heading "Immaterial and useless amendments" to which reference may be made.

[12] The governing consideration in an application to amend the written statement should be how far, if at all the proposed amendment of the defence is necessary to determine the "real controversy" between the parties. If that test is not satisfied, then the amendment should not be allowed, even on the ground that there can be no real prejudice by the amendment and that the costs awarded against the amending party will act as the panacea for any possible inconvenience occasioned by the amendment. There is always legal prejudice when irrelevant matters are allowed to be introduced by amendment.

Bowen L. J.'s famous dictum in *Cropper* v. *Smith*, (1884) 26 Ch. D. 700 at p. 711 "there is one panacea which heals every sore in litigation and that is costs" has all the lure of a dogma and therefore carries the usual defect of an ever-emphasised statement. It has been not a little responsible for the prevailing casual treatment by Courts of applications for amendment under the false comfort of costs being the universal remedy. The primary duty of a Court in deciding an application for amendment is not discharged by laying unction to its conscience with the thought that the order will not prejudice any party. The Court has the more positive duty to decide whether the proposed amendment is necessary to determine the real controversy between the parties. Nor is the primary consideration in such an application, to award costs against the amending party. The Courts do not exist for so commercial a purpose as to be mere institutions for dispensing costs without deciding the merits. They exist primarily for the justice of determining the genuine and real disputes between the parties and incidentally for awarding costs. The "real controversy" test is the basic test which governs the Courts' unchartered powers of amendment of pleadings. No amendment in my judgment should be allowed when the amendment does not satisfy this cardinal test.

[13] I am, therefore, unable to accede to the final argument of the learned counsel for the applicant, that whatever the merits may be of the proposed amendments, I should allow the amendment irrespective of their relevance on the real controversy between the parties herein and satisfy myself by awarding costs against his client the applicant.

[14] I am not satisfied at all either on the merits or the *bona fides* of this application. For the reasons I have stated I dismiss this application with costs. I certify this Chamber Summons to be a fit one for the employment of counsel.

B/R.G.D. *Application dismissed.*

A. I. R. 1953 Calcutta 18

R. P. MOOKERJEE AND LAHIRI JJ.

Nitish Chandra and another — Appellants v. *Promode Kumar and others—Respondents.*

Civil Rule No. 19 of 1951, D/- 5-9-1951.

(a) Partition Act (1893), Ss. 3 and 8— Order rejecting application under S. 3—Appeal against.

An order rejecting an application under S. 3 cannot be said to be a decree within the meaning of S. 8 and therefore an appeal is not maintainable against the order. [Para 9]

Anno. Partition Act, S. 8 N. 1 Pt. 2

(b) Partition Act (1893), Ss. 2 and 3 — Application under S. 3—Time limit.

An application under S. 3 could be made at any time after the request is made under S. 2 and before a sale has actually been held under S. 2 : A I R 1925 Mad. 1234, *Dissent*. [Para 12]

Anno. Partition Act, S. 3 N. 1.

(c) Partition Act (1893), Ss. 2 and 3 — Order under S. 2—Setting aside of.

An order under S. 2 is dependent upon a further order made under S. 3. If the Court makes an order under S. 3, the order for sale under S. 2 will disappear, and is not required to be set aside by appropriate proceedings. [Para 13]

Anno. Partition Act, S. 3 N. 1.

(d) Partition Act (1893), Ss. 2 and 3 — Valuation made for sale under S. 2—Need for fresh valuation for sale under S. 3.

The valuation made by the Commissioner for the purpose of sale under S. 2 cannot be accepted for the purpose of sale under S. 3. A fresh valuation must be made for the purpose. [Para 17]

Anno. Partition Act, S. 3 N. 1.

(e) Interpretation of Statutes—Sections should ordinarily be interpreted as they stand without the addition of any word. [Para 21]

Anno. C. P. C. Preamble N. 7.

Sankar Banerjee, Standing Counsel; A. N. Roy, Jajneswar Majumdar, Benoy Krishna Ghosh & Mihir Kumar Sarkar—for Appellants; Atul Chandra Gupta, Indu Prokash Chatterjee, Nirmal Chandra Chakravarti, Rabindra Nath Mitra, Anukul Chandra Dutta — (for No. 1); Saroj Kumar Chatterjee, Sudhir Chandra Majumdar — (for No. 2); Sambhu Nath Palit—(for No. 4); Chandra Sekhar Sen, Krishna Prosad Bose, Prasanta Kumar Ghose—(for No. 6); and Narendra Nath Choudhury — (for No. 7)—for Respondents.

REFERENCES : Courtwar/Chronological/	Paras.
('41) 45 Cal. W. N. 74 : (A. I. R. 1941 Cal. 311).	9
('50) A. I. R. 1950 Cal. 431.	15, 19
('25) 48 Mad. 920 : (A. I. R. 1925 Mad. 1234).	14, 20

Lahiri J.—This is an appeal by plaintiffs 1 and 2 in a suit for partition, and it is directed against an order, dated 8th July 1950, made by Sri P. N. Lahiri, Subordinate Judge, First Court, 24 Parganas, refusing the application of plaintiffs 1 and 2 under S. 3, Partition Act (ACT NO. 4 of 1893).

[2] The subject-matter of dispute is premises NO. 25A, Harish Mukherjee Road, which is the dwelling house of the parties. A preliminary decree was passed on 25th January 1949, holding that plaintiffs 1, 2 and 3, and defendants 1, 2 and 6 had one-seventh share each in the dwelling house, and defendants 3, 4 and 5 jointly had one-seventh share.

[3] After the passing of the preliminary decree, the Court appointed a Commissioner for the purpose of ascertaining whether the dwelling house could be partitioned amongst the seven co-sharers. The Commissioner submitted a report stating that it was not possible to divide the dwelling house by metes and bounds into seven allotments. Some of the co-sharers agreed to take a joint allotment before the Commissioner but two of them subsequently resiled from that position.

[4] On 14th January 1950, defendant 2 filed a petition with a prayer that the entire house should be put up to sale under s. 2, Partition Act; and it appears that this petition was supported by some other co-sharers.

[5] On 25th January 1950, the learned Subordinate Judge recorded an order which runs as follows :

"Co-sharers owning five-sevenths share are now pressing for sale. The Commissioner was asked to explore the possibilities of partition when the four-sevenths co-sharers wanted to take a joint allotment. As that arrangement has failed, I do not consider that partition will be feasible .... I therefore direct a sale of the Bhowanipore property."

[6] This order was evidently made under s. 2, Partition Act.

[7] On 8th July 1950, plaintiffs 1 and 2 filed an application for buying up the shares of the co-sharers at whose instance the order for sale under s. 2, Partition Act was made, and this application was filed under the provisions of s. 3, Partition Act. The Court below held that as there had already been an order under s. 2, Partition Act, the application under s. 3 of the said Act was not maintainable, and it accordingly rejected that application. Against this order, plaintiffs 1 and 2 have filed the present appeal.

[8] On behalf of the respondent, Mr. Gupta has raised a preliminary objection as to the maintainability of the appeal. It has been argued that an order for sale made under s. 3, Partition Act, is to be deemed to be a decree under s. 8, Partition Act, but an order rejecting an application under s. 3 cannot be said to be a decree within the meaning of s. 8.

[9] In support of this proposition, Mr. Gupta has relied upon the decision in *Bhuban Mohan* v. *Brojendra Chandra*, 45 Cal. W. N. 74, where a Division Bench of this Court has held that there is nothing in s. 8, Partition Act, to indicate that an order rejecting an application for sale should be deemed to be a decree. Although this was a case under s. 4, Partition Act, we think that the reasons given by the learned Judge apply with equal force to the case of an order rejecting an application under s. 3, Partition Act. We accordingly uphold the preliminary objection and hold that the appeal is not maintainable.

[10] The next question is whether the memorandum of appeal is to be treated as an application for revision under s. 115, Civil P. C. In the circumstances of this case, we have come to the

conclusion that we should give the appellants an opportunity of treating the memorandum of appeal into a petition of revision, and we have heard the learned Advocates on both sides on that footing.

[11] On behalf of the petitioners, it is contended that the learned Subordinate Judge failed to exercise a jurisdiction vested in him by law in coming to the conclusion that an application under s. 3, Partition Act, does not lie after an order for sale has been made under s. 2 of the Act.

[11a] Section 3 (1), Partition Act, runs as follows:

"If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained. . . ."

[12] On a plain reading of the section, it seems to us that an application under s. 3 can be filed after the request has been made to the Court under s. 2, Partition Act. The section does not provide for any limit of time after which the application cannot be entertained. In these circumstances, on a plain reading of the section we would hold that an application under s. 3 could be made at any time after the request is made under s. 2 and before a sale has actually been held under s. 2.

[13] Mr. Gupta appearing for the opposite parties has argued that an order under s. 2, Partition Act, is a decree, and if that decree is not set aside by appropriate proceedings, it cannot be set aside merely by an application under s. 3. We are afraid that we are unable to accept this view. An order under s. 2, Partition Act, is dependent upon a further order made under s. 3 of the said Act. If the Court makes an order under s. 3, the order for sale under s. 2 will disappear.

[14] Reliance is also placed upon the decision of the Madras High Court in *Angamuthu Mudaliar* v. *Ratna Mudaliar*, 48 Mad. 920, where it has been held that the proper time to apply under s. 3 is after the request has been made by co-sharers owning a moiety share or upwards that the property should be sold under s. 2, and "before a Court makes an order under s. 2." In our opinion, this decision proceeds upon a narrow construction of s. 3. The words, "before a Court makes an order under s. 2," are not to be found in s. 3. All that s. 3 requires is that the application should be filed after a request has been made by the co-sharers under s. 2 of the Act. In the absence of any restrictive provision in s. 3, we are unable to hold that the limiting point of time when the application should be made under that section is the date on which the order under s. 2 is made. We are accordingly unable to accept the view of the Madras High Court as to the scope of s. 3, Partition Act.

[15] The view as to the scope of s. 3, Partition Act which we have taken is justified by the decision of this Court given by my learned brother Mookerjee J. in *Manik Lal* v. *Pulin Behari*, A. I. R. 1950 Cal. 431, where after a review of the decisions of this and other High Courts and the different sections of the Partition Act, my learned brother came to the conclusion that the provisions of ss. 2, 3 and 4, Partition Act should be liberally construed, and it was definitely held in that case that there is no reason why before the sale actually takes place under s. 2, Partition Act, it will not be open to the co-sharers to exercise the option which is given to them under s. 3 of the Act.

[16] We accordingly hold that the view taken by the Subordinate Judge as to the scope of s. 3, Partition Act, is wrong. The application for revision must be allowed and the order of the learned Subordinate Judge, dated 8-7-1950, should be set aside. The learned Subordinate Judge is directed to make a valuation of the shares of the parties who asked for sale and to offer to sell the house to plaintiffs 1 and 2 at the price so ascertained.

[17] The valuation which was made by the commissioner was for the purpose of sale under s. 2, Partition Act. That valuation cannot be accepted for the purpose of sale under s. 3. This valuation under s. 3 must be made afresh by the appointment of a commissioner. On receipt of the commissioner's report, the learned Subordinate Judge will hear the parties on the question of valuation and fix a valuation under s. 3, Partition Act.

[18] As the petitioners have misconceived their remedy, they are not entitled to any costs of this Court.

[19] **R. P. Mookerjee J.** — I agree. As I have already expressed my views in an earlier decision in *Manik Lal* v. *Pulin Behari*, A. I. R. 1950 Cal. 431, I shall add only a few words.

[20] The only question raised in the case before us is whether after an order has been made under s. 2, Partition Act, it is competent for the Court to entertain an application under s. 3 of the same Act. There is no doubt that the jurisdiction of the Court to entertain an application under s. 3 begins only after a request has been made, as envisaged in s. 2 of the Act. There is no other limit put under s. 3 as to within which time such an application may be made. Reliance has been placed upon *Angamuthu Mudaliar* v. *Ratna Mudaliar*, 48 Mad. 920, and it appears that the learned Judges introduced certain words into s. 3 to limit the time within which such an application can be made.

[21] It is one of the fundamental rules of interpretation that the sections should ordinarily be interpreted as they stand without the addition of any word. If s. 3, Partition Act, can reasonably be interpreted without the importation of such words it will not be proper for the Court to introduce limitations based upon such new words so as to make it impossible for an application to be made after a particular date.

[22] As has been pointed out by my learned brother any time before the sale, directed under s. 2, actually takes place, it is open to the Court to entertain an application under s. 3 and to pass a proper order if the conditions imposed in s. 3 are satisfied. The very purpose for which the provisions contained in ss. 2, 3 and 6, Partition Act, were introduced was to give a special privilege to the co-sharers over an outsider coming into the picture, even though the interest of the cosharers as a body might have been better served by not introducing the provisions as contained in ss. 2 and 3. It is not for us to consider whether such provisions ought to have been made by the Legislature. We are required only to interpret the provisions, and to give effect to the intention of the Legislature. When there is no restriction imposed by the Legislature, it is not competent for the Court to introduce such restrictions in s. 3. An application under s. 3 may be entertained by the Court on fulfilment of the conditions imposed therein until and unless the sale has already taken place.

[23] I agree with the order and directions given for fixing the valuation anew. The valuation which was fixed previously was for the purpose of having a reserve price over which outsiders would be required to bid. In the case of a sale under s. 3, the cosharer becomes entitled to get the property at the valuation fixed by the Court. That requires a very careful decision by the Court as the interest of all the co-sharers must be borne in mind when fixing such a price for the purpose of s. 3. It is, therefore, only reasonable that the learned Subordinate Judge will take further steps for fixing the price under s. 3 as provided under the law. He will also give an opportunity to the parties to be heard before he fixes the price as under that section.

B/V.R.B. *Revision allowed.*

A. I. R. 1953 Calcutta 20

CHAKRAVARTTI AND SINHA JJ.

Hind Estate Ltd. — Petitioner v. *Grant James Ltd. — Opposite Party.*

Civil Revn. Cases Nos. 3265 and 3267 of 1951, D/- 25-4-1952.

(a) Civil P. C. (1908), O. 41, R. 33— Applicability— Interference in favour of single respondent.

Order 41, R. 33 applies only to cases where one or some at least of the plaintiffs or defendants have appealed and in such a case the appellate Court can interfere in favour of any or all of the non-appealing respondents or respondents who have not preferred any cross-objections. Where there is a single respondent and he has not appealed, nor has he filed any cross-objection, O. 41, R. 33 does not empower the appellate Court to interfere in favour of such a respondent: A. I. R. 1935 Cal 458 and A. I. R. 1939 Cal. 582, *Foll.* [Para 16]

Anno. C. P. C., O. 41, R. 33, N. 6, Pts. 14 to 16.

(b) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Sch. A, Para 4—Scope — Scaling up of standard rent.

Paragraph 4 of Sch. A does not prescribe method of assessment for cases where the applicant for the standardisation of rent is a sub-tenant. That paragraph only prescribes the maximum limit which the standard rent fixed for the sub-tenant must not exceed. It comes into operation only after the standard rent has been fixed by the application of principles to be found in other provisions of the Act and it is to be applied by way of a check in order to see that the standard rent, otherwise determined, does not go beyond the maximum prescribed by the paragraph. If it does exceed that maximum, it has then to be scaled down. But the paragraph does not provide or require that if the standard rent, otherwise determined, falls below the maximum prescribed by para. 4 it has to be scaled up so that it may reach the prescribed maximum limit. [Para 17]

(c) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 and Sch. A — Standard rent — Determination of— Methods—Duty of Rent Controller.

The Act prescribes no one method of determining the standard rent, but provides a variety of methods to be followed respectively, in a variety of circumstances. The first task of the Rent Controller is, therefore, to ascertain what the special facts of the case are and then to see which of the many provisions of S. 9 or Sch. A is attracted. (Scheme of the Act indicated.) [Para 19]

(d) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 —Strict rules of pleading are not to be insisted — But proof of facts necessary.

It will probably not be right to inisist on the strict rules of pleading in a case under the Rent Control Act, but if a tenant will not plead, he must at least prove the facts which are necessary for him to establish if he is to succeed. [Para 21]

(e) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 5 and Sch. A, Para 4 — Intermediate tenant holding under lease coming under S. 5—Effect.

Even if para. 4 of Sch. A cannot be applied in cases where the intermediate tenant holds under a lease coming under S. 5, the only effect will be that in such cases the standard rent fixed for the sub-tenant by applying the provisions relevant to his case cannot be checked by reference to the maximum prescribed in the paragraph. [Para 24]

(f) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (2)—Rent on prescribed date ascertainable — It is not permissible to take into consideration standard rent of similar houses in neighbourhood: (1942) 2 All E. R. 567, *Rel. on.* — Per *Sinha J.* [Para 38]

Manindra Nath Ghosh, Sibdas Ghosh and Anil Kumar Sett—for Petitioner; Sudhangsu Kumar Sen—for Opposite Party.

REFERENCES : Courtward/Chronological/	Paras.
('35) 39 Cal W N 420 : (A I R 1935 Cal 458)	16
('39) 69 Cal L J 385 : (AIR 1939 Cal 582)	16
('52) Civil Revn. No. 3266 of 1951 : (56 Cal W N 543).	17, 22
(1942) 2 All E R 567	38
(1945) K B 400 : (114 L J K B 350)	29

Chakravartti J.—These are two Rules directed against an order dated 29th August 1951, passed by Sri Syamadas Chatterjee, First Additional Subordinate Judge, Alipore, modifying a common order dated 8th January 1951, passed by the Additional Rent Controller, Sri K. P. Chattoraj, by which he fixed the standard rent for two tenancies on applications made by the respective tenants. The petitioner in the Rules before us is the landlord.

[2] The tenancies are in respect of two suites of rooms in premises NO. 220/1, Lower Circular Road, which appears to be a large and luxuriously constructed building. In the case out of which Rule NO. 3265 arises, the tenant is Grant James Limited and the suite occupied by the Company is situated on the fourth floor and consists of four living rooms with mosaic floor and colour-wash walls, two bath rooms with necessary fittings, one passage room, one verandah and one kitchen. The total floor space is 1256 sq. ft. In the case out of which Rule NO. 3267 arises, the tenant is one Mr. M. M. Berger and the suite occupied by him is situated on the third floor, consisting of the same number of similar rooms, but slightly less spacious. The total floor space occupied by this suite is 1204 sq. ft. The contract rent in the case of each of these tenancies is RS. 225 per month.

[3] The landlord of the tenants is Hind Estate Limited, which, in its turn, is a lessee of the building, holding, it is alleged, under a lease which covers premises NO. 220/1, Lower Circular Road and several other buildings.

[4] Both the tenants made applications for the standardisation of their rents on 19-9-1950, through a common Pleader and from the contents of their applications and the language in which they are expressed, it would seem that they were acting in concert. The only allegation made in the applications was that the landlord company had obtained a lease of several buildings, including premises NO. 220/1, Lower Circular Road, at a consolidated monthly rent of RS. 2400 whereas it was realising about RS. 2000 from premises NO. 220/1, Lower Circular Road, alone. It was added that the rents charged in respect of the tenancies were exorbitant and considerably higher than the rents paid for similar premises in the locality. The suggestion made by the applicants themselves was that the fair rent would be RS. 100 per month in each case.

[5] It would appear that all that the applicants wanted by their applications was that in view of the rent paid by their immediate landlord, the rent paid by themselves should be scaled down in accordance with the provisions of PARA. 4 of SCH. A to the West Bengal Premises Rent Control Act, 1950. The actual prayer, however, was in a general form for standardisation of the rent and the applications were styled as applications "under S. 9 of the Act, read with PARA. 4, SCH. A."

[6] The written statement filed by the landlord Company is a study in avoidance and prevarication. It simply stated that the rent payable in respect of the tenancies was not excessive, that the deed of lease referred to by the applicants would speak for itself and that the Company had to pay various other impositions in addition to the rent of RS. 2400 in respect of the lease taken by itself.

[7] The case was sent to the Additional Rent Controller for disposal and on 29-9-1950, he made an order for an inspection of the whole building. The Inspector, however, was unable to obtain access to all the suites and on his reporting his difficulty to the Additional Rent Controller, the latter made an order on 7-12-1951, directing the landlord Company to produce its lease and also to supply the names of the sub-tenants so that the applicants might take out notices against them under S. 31 of the Act for allowing an inspection. No lease or copy of the lease was ever produced, nor were the names of the sub-tenants supplied. On the other hand, the Company failed to appear at all on the next two dates of hearing and when at last a Pleader appeared on its behalf on 3-1-1951, it was only to ask for a long adjournment. The Additional Rent Controller had occasion to remark that the landlord Company was deliberately trying to obstruct the standardisation of rent and to delay the disposal of the proceedings. No strictures were ever better deserved.

[8] The Additional Rent Controller disposed of the cases on 8-1-1951, and fixed the standard rent in each case at RS. 100 per month. That he did by determining the standard rent payable by the landlord Company in respect of each of the premises and adding thereto a further six and a quarter per cent. thereof under the provisions of PARA. 4 of SCH. A to the Act. In determining the standard rent payable by the landlord Company, the Additional Rent Controller proceeded by way of ascertaining the reasonable rent from the rent prevailing in the locality in respect of similar premises.

[9] From that decision of the Additional Rent Controller, the landlord Company preferred two appeals. The learned First Additional Subordinate Judge of Alipore, who came to deal with the appeals, thought that the total floor space occupied by the suites should be ascertained and also that the Inspector should be examined. In the view, he remanded the case to the Additional Rent Controller in order that the floor space might be ascertained and an examination of the Inspector held. The Additional Rent Controller complied with those directions in due course and returned his findings to the learned Additional Subordinate Judge. Those findings are to be found in an order dated 20-8-1951.

[10] When the case was pending before the Additional Rent Controller on remand, the landlord Company made an application for the acceptance of the lease as additional evidence, but not without protesting that the Rent Controller had no jurisdiction whatever to require it to produce the lease and that it was being compelled to submit to an illegal requisition. The Assistant Rent Controller rejected the application in the view that at that stage he had no use for the lease and that the case had been remanded to him for a very limited purpose, which did not include reception of additional evidence.

[11] On receipt of the further findings of the Additional Rent Controller, the learned Additional Subordinate Judge finally disposed of the appeals. He upheld the standard rent fixed for the landlord Company by the Additional Rent Controller, but disallowed the addition of a further six and a quarter per cent. in the view that Para. 4 of sch. A did not apply to the case by reason of the provisions of s. 5 of the Act. He, therefore, reduced the rent to Rs. 94-2-0 in each case, although what he had before him was only an appeal by the landlord and no appeal or cross-objection by either of the tenants. It is against that order of the learned Additional Subordinate Judge that the present Rules were taken out.

[12] At the very outset, we intimated to the learned Advocate appearing for the landlord Company that the jurisdiction under s. 32 (4), West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, was only discretionary and his client could hardly expect this Court to exercise it in its favour in view of its persistent refusal to co-operate with the Court by producing a document which was in its possession and by furnishing information which lay within its special knowledge. Mr. Ghosh made no attempt to defend the conduct of his client, but submitted that if, after hearing him, we are satisfied that a case for re-trial had been made out, he would ask for an order of remand on behalf of his client on paying all costs of the opposite parties, so far incurred. He also assured us that if the cases were remanded, such recalcitrance on the part of his client as had occurred in the past, would not occur again. In view of that assurance given to us and also for the reason that both the orders complained of appeared to us to be erroneous, we decided to deal with the cases on the merits.

[13] The principle according to which the authorities below assessed the standard rent in these cases is common to both of them, but as there are certain special points about the judgment of the Additional Subordinate Judge, I shall deal first with that judgment. As I have stated, he had before him only two appeals by the landlord and yet he reduced the rent in favour of the tenants. He also purported to hold that para. 4 of sch. A did not apply, although he himself held that the lease was not in evidence and was nowhere to be found. It is clear that the learned Judge committed at least two palpable errors.

[14] The learned Judge rejected the contention of the landlord appellant that the Additional Rent Controller had wrongly refused to accept in evidence the lease filed by it. He observed that no lease had ever been filed and he had been unable to discover any lease, although he had closely examined the record. He added that there was nothing in the case to show that the attention of the Additional Rent Controller was ever sought to be drawn to any lease filed. It is not easy to understand what record the learned Judge "closely examined." As I have stated already, when the case was sent back on remand, the landlord company made an application to the Additional Rent Controller for reception of the lease as additional evidence and that application, together with the original lease annexed, is to be found on the file. It is perfectly clear that what was argued before the learned Judge was that the Additional Rent Controller had been wrong in refusing to accept the lease as additional evidence. He misappreciated that argument and his examination of the record also appears to have been very cursory, although he calls it very close.

[15] On the merits of the case, the learned Judge, as I have already stated, held that the landlord was not entitled to the addition of a six and a quarter per cent to the standard rent payable by him, because, in view of the provisions of s. 5 of the Act, para. 4 of sch. A would not apply to the case. Section 5 of the Act deals with leases executed after 1st December 1941, which are leases for not less than 15 years and not terminable at the will of the landlord. If, as the learned Judge himself states, the lease was nowhere to be found, it is impossible to see wherefrom he got the terms of the lease on which he purported to act and by which alone s. 5 of the Act would be attracted.

It is true that Mrs. M. M. Berger, in her evidence, made some reference to the terms of the lease but, quite apart from the question as to whether the terms of a written lease could be proved by oral evidence, Mrs. Berger did not make any reference to any condition contained in the lease that the landlord would not be able to terminate it at his will during its currency. There was thus clearly no foundation for the view taken by the learned Judge.

[16] The next thing which the learned Judge proceeded to do was to give effect to his view of the landlord's lease and to reduce the rent in the manner I have already stated. Under what provision of the law he did so, it is difficult to understand. Section 32 (3) of the Act provides that appeals from orders of the Rent Controller shall be treated as appeals from orders under the Code of Civil Procedure. Order 43, R. 2, Civil P. C., purports to lay down the procedure applicable to appeals from orders, but it merely says that the provisions of O. 41 shall apply. In O. 41, the only provision relevant to the present question is R. 33 which empowers the appellate Court to modify the decree in favour of all or any of the respondents who may not have appealed or filed a cross-objection.

It is, however, firmly established, at least so far as this Court is concerned, that O. 41, R. 33 applies only to cases where one or some at least of the plaintiffs or defendants have appealed and in such a case the appellate Court can interfere in favour of any or all of the non-appealing respondents or respondents who have not preferred

any cross-objections. Where there is a single respondent and he has not appealed, nor has he filed any cross-objection, O. 41, R. 33 does not empower the appellate Court to interfere in favour of such a respondent. If authority for this proposition is needed, it will be found in the cases of *Dinanath Chandra* v. *Sm. Sudhanyamoni Dasi*, 39 Cal. W. N. 420 and *Farok Ahmed Meah* v. *Lalit Mohan*, 69 Cal. L. J. 385. One should have thought that this proposition had now become a commonplace of judicial procedure, but it appears that it still requires to be repeated.

[17] Proceeding now to the order of the Additional Rent Controller, I need only to deal with the principle adopted by him in assessing the standard rent which the learned Additional Subordinate Judge also approved. Both of them proceeded on the footing that for cases where the applicant for the standardisation of rent is a sub-tenant, para. 4 of sch. A prescribes the method of assessment and that, according to that method, the standard rent payable by the tenant under whom the sub-tenant holds has first to be determined and thereafter six and a quarter per cent thereof must always be added which will give the standard rent payable by the sub-tenant. The authorities below have also proceeded on the footing that in ascertaining the standard rent payable by the intermediate tenant, it is proper to refer to the rent prevailing in the locality for similar premises and ascertain the standard rent therefrom.

As I had occasion to point out in *Hind Estate Ltd.* v. *Ansar Ahmed*, civil Revn. No. 3266 of 1951, decided on 21st April last, it is altogether erroneous to suppose that para. 4 of sch. A prescribes a method of assessment for cases where the applicant for the standardisation of rent is a sub-tenant. That paragraph only prescribes the maximum limit which the standard rent fixed for the sub-tenant must not exceed. It comes into operation only after the standard rent has been fixed by the application of principles to be found in other provisions of the Act and it is to be applied by way of a check in order to see that the standard rent otherwise determined, does not go beyond the maximum prescribed by the paragraph. If it does exceed that maximum, it has then to be scaled down. But the paragraph does not provide or require that if the standard rent, otherwise determined, falls below the maximum prescribed by para. 4, it has to be scaled up so that it may reach the prescribed maximum limit. In so far as the authorities below purported to make the assessment itself under para. 4 of sch. A, they were obviously in error.

[18] The whole approach of the authorities below to the task of fixing the standard rent of the sub-tenant in the present cases was thus fundamentally erroneous. It was also erroneous as respects the method followed in determining the standard rent payable by the intermediate tenant.

[19] It is regrettable that even after the Rent Act of 1950 has been in operation for more than two years, it should still be necessary to point out that the Act prescribes no one method of determining the standard rent, but provides a variety of methods to be followed respectively, in a variety of circumstances. The first task of the Rent Controller is, therefore, to ascertain what the special facts of the case are and then to see which of the many provisions of S. 9 or sch. A is attracted. The enquiry must begin from the basic rent. For the purposes of ascertaining the basic rent, it must first be seen whether the standard rent was previously fixed at any time and if it was whether more than three years have elapsed from the date when it was so fixed. If the standard rent was fixed on a previous occasion, the amount fixed has got to be adopted as the basic rent and then the standard rent for the present occasion is to be determined by applying R. 2 of sch. A in the case of residential tenancies and R. 3 in the case of non-residential or mainly non-residential tenancies.

If no standard rent was fixed on any previous occasion, then the first enquiry must be whether the premises were built after 31-12-1948. If they were built after that date, the standard rent must be fixed by reference to the method prescribed in R. 9 (1) (f), but if the premises were already in existence in December, 1948, the next enquiry must be whether they were in existence on 1-12-1941, and if they were in existence on that date, whether they were then let out to a tenant. If it is found that the premises did exist on 1-12-1941, and were let out to a tenant, the next enquiry must be, what was the rent which the premises then bore.

If that rent can be ascertained, the amount of the rent should be taken as the basic rent and further additions must be made thereto for the purposes of determining the standard rent in accordance with the provisions of R. 2 or R. 3 of sch. A, as the case may be. If, however, the premises were not in existence on 1-12-1941, or having been in existence, were not let out, then the Rent Controller must proceed under the provisions of S. 9 (1) (e) and ascertain at what rent the premises, if let out in December, 1941, could reasonably have been so let. The amount of the rent, so ascertained, would be the basic rent in such a case and the Rent Controller is then to apply the provisions of sch. A for the purposes of determining the standard rent, although the Schedule would not in terms apply.

If it is found that the premises did exist in December, 1941, and were also let out to a tenant, but the rent at which they were let out cannot be ascertained, then the Rent Controller is to proceed under S. 9 (2) and determine what the rent may have been at which the premises were, in

all probability, let out in 1941. After ascertaining that amount, he has to take that as the basic rent and then work out the standard rent by reference to the provisions of R. 2 or R. 3 of sch. A, as the case may be. Where none of the other provisions of S. 9 applies, the Rent Controller is to proceed under the provisions of S. 9 (1) (g). It is only in cases coming under S. 9 (2) and probably also in those under S. 9 (1) (c) and 9 (1) (g) that enquiry about the prevailing rent is permissible and pertinent.

[20] The above, in brief, is the scheme of the Act and the Rules which I have summarised, only incompletely, apply equally to the case of a tenant and that of a sub-tenant. It is by reference to these Rules that the standard rent payable by a sub-tenant must first be determined and only after it has been so determined, is the propriety of the amount to be checked by reference to the limit laid down in para. 4 of sch. A.

[21] It is perfectly clear that in the present cases, neither the Additional Rent Controller, nor the Additional Subordinate Judge paid any attention to any of these rules. They proceeded straightaway to make an enquiry about the rent prevailing in the locality, without ascertaining whether the premises had been constructed after December, 1948 or whether they existed in 1941 or whether if they had existed, they had been let out. They also thought it right to refer to the rents paid by occupants of individual flats directly to owners for the purpose of ascertaining the standard rent payable by an intermediate tenant who held under a lease covering the entire building and also other buildings.

As I have already said, the applicants themselves in their applications stated none of the material facts. It will probably not be right to insist on the strict rules of pleading in a case under the Rent Control Act, but if a tenant will not plead, he must at least prove the facts which are necessary for him to establish if he is to succeed. In the present case, the necessary facts were neither pleaded nor proved and, as I have pointed out, the method adopted by both the authorities below in determining the standard rent was altogether erroneous.

[22] As in *Hind Estate Ltd.* v. *Ansar Ahmad*, civil Revision case No. 3266 of 1951, to which I have already referred, so in these cases, a question was raised as to the effect of S. 5 on Para. 4 of Sch. A. Section 5, as I have already stated, provides that no provisions of the Act shall apply to leases taken after 1-12-1941 which are leases for not less than 15 years and which are not terminable at the will of the landlord. If no provisions of the Act apply to such leases, it seems to be reasonably clear that there can be no question of any standard rent in respect of them, since the standard rent is a creature of the Rent Act. Paragraph 4 of sch. A, however, requires the Rent Control Authorities first to determine the standard rent payable by the intermediate tenant in respect of the premises concerned. But if such intermediate tenant be a tenant holding under a lease which comes under S. 5, difficulty obviously arises as regards determining the standard rent payable by him. The question raised in these cases was in what way that difficulty was to be solved.

[23] The Act contains two provisions, laying down in respect of two kinds of leases, that nothing in the Act shall apply to them. One provision is a proviso to S. 3 which deals with leases granted before 1-12-1941, which are leases for a specified period, but the period of which has not yet expired. The other provision is S. 5 which deals with lease of the particular kind which, I have already referred to, granted after 1-12-1941. Paragraph 4 of sch. A provides for the case where the intermediate tenant holds under a lease coming under the proviso to S. 3, but it makes no reference to a case where the lease may be one coming under S. 5. Whether this absence of a reference to S. 5 in Para. 4 of sch. A is an inadvertent omission which a Court would be entitled to make good by way of a judicial interpretation of the paragraph or whether the omission is a deliberate one, made in pursuance of a legislative policy, is a question which requires careful consideration.

Even if it be not possible to import S. 5 into para. 4 of sch. A by way of supplying an omission, it may still have to be considered whether the omission cannot be filled up by applying the provisions of S. 9 (1) (g). That section provides that where no provision of the Act for fixing the standard rent applies to any premises, the standard rent would be determined at the rate which is fair and reasonable. It is at least a question whether, if the standard rent of lease coming under S. 5 cannot be determined otherwise, it cannot still be determined by applying the provision of S. 9 (1) (g). But the obvious objection to that solution is that if nothing in the Act applies to a lease coming under S. 5, S. 9 (1) (g) does not apply either.

[24] I may, however, point out that even if para. 4 of sch. A cannot be applied in cases where the intermediate tenant holds under a lease coming under S. 5, the only effect will be that in such cases the standard rent fixed for the sub-tenant by applying the provisions relevant to his case cannot be checked by reference to the maximum prescribed in the paragraph. There can be no other effect flowing from the omission.

[25] I have indicated some of the difficulties attaching to this question, but I do not consider it necessary to decide it finally, inasmuch as it is not yet known whether it will require decision in the present case. As I have pointed out, the lease is not yet in evidence and we do not know whether it is really a lease for 99 years, executed after 1-12-1941, and whether it is or is not terminable at the will of the landlord. When those particulars are ascertained, if they are, and in case the

lease is proved, this question will have to be gone into by the proper authorities.

[26] For the reasons I have given, however, the orders of the authorities below must be set aside, but on terms. We accordingly direct that on the landlord petitioner depositing with the Additional Rent Controller within two weeks of the arrival of the record in the tribunal a sum of Rs. 250 in each case to the credit of the tenant concerned, these Rules shall be treated as made absolute. The orders complained of shall stand reversed and the Additional Rent Controller shall proceed to hear and determine the cases in accordance with law. In case such deposits are made, the tenants opposite parties will be entitled to withdraw and retain the amounts concerned as costs, irrespective of the final result of the cases. If the deposits are not made within the time mentioned above, these Rules shall stand discharged with costs, hearing fee being assessed at three gold mohurs in each case.

[27] **Sinha J.** — These are two rules issued upon the opposite parties to show cause why the orders complained of should not be set aside. In both the applications, Messrs. Hind Estate Limited, a company incorporated under the Indian Companies Act, is the petitioner. In the first case, the opposite party is also a company, whereas in the second case the opposite party is an individual of the name of M. M. Berger. Both the Additional Rent Controller and the 1st Additional Subordinate Judge, 24-Parganas have disposed of the two cases by one judgment. I am unable to see how or why this was done. It may be that the subject matters for determination are similar but that can scarcely be an appropriate reason for consolidating two cases where the parties are entirely different.

[28] Rules were issued in these two cases as well as in case No. 1949-B of 1950 (C. R. No. 3266 of 1951) and it was directed that these rules should be heard together. At the invitation of the parties, however, these two rules have been heard together and the third rule separately. The facts in these two rules are briefly as follows:

(His Lordship after stating the facts proceeded:)

[29] The orders challenged as also the contentions of the respective parties as pressed before the Rent Controller and the learned Subordinate Judge, show a total lack of appreciation as to the provisions of the said Act, regarding the fixation of the standard rent in respect of residential premises. I am however tempted to repeat the well known observation of Lord Justice Mackinnon in *Vaughan* v. *Shaw*, 1945 K. B. 400 at p. 401, which is well applicable to the particular piece of legislation which we have to consider in this case.

"This is yet another . . . problem arising from that welter of chaotic verbiage which may be cited together as the Rent and Mortgage Restriction Acts 1920 to 1939. We have had our attention called to a great number of passages in this obscure mass of words and it is obvious that this is an extremely obscure and difficult point . . . . It seems to me that the learned Judge was wrong—venially wrong—because anybody may be forgiven for making a mistake about this series of Acts . . ."

[30] Here also we have had a series of Acts and Ordinances regulating the relations between a landlord and his tenant, and the law on the subject is constantly changing. It would therefore not be surprising that there should exist some confusion regarding the subtler points involved in it, but what is surprising is that the Rent Controller, who must be constantly fixing the standard rent in thousands of cases should be quite unaware of the principles upon which it should be calculated. It is therefore necessary to explain as to how the standard rent should be calculated and to see how the Rent Controller and the learned Subordinate Judge having actually calculated the same and the error into which they have fallen. Standard rent has been thus defined in the West Bengal Premises Rent Control Act, 1950, s. 2 (10):

" 'Standard rent' in relation to any premises means,

(a) the standard rent determined in accordance with the provisions of Sch. 'A'.

(b) where the rent has been fixed under S. 9, the rent so fixed; or at which it would have been fixed if application were made under the same section."

[31] Coming to s. 9 of the Act we find that the standard rent is to be fixed by the Rent Controller upon an application by the landlord or the tenant, in accordance with the principles stated therein. In fact the Section says " . . . Controller *shall*, on application by the landlord or tenant, fix the standard rent as set forth hereunder." In this matter, the Rent Controller has no discretion, and is not at liberty to disregard the rules of computation laid down by the Act. In fact the Advisory Committee's report states as follows:

"In the matter of fixation of standard rent under S. 9 we consider it necessary for inspiring public confidence to restrict the discretion given to the Controller by making specific and precise provisions as to the rate of increment in many cases . . . The amendments lay down definite methods of fixing standard rent in different cases instead of leaving matters to a great extent to the discretion of the Controller about which considerable dissatisfaction came to our notice during taking of evidence and which we consider to be not unfounded."

[32] Section 9 (1) (a) of the Act lays down that where the provision of sch. 'A' applied and there is no cause for alteration by reason of any of the circumstances mentioned in cls. (b), (c), (d), (e) & (f), then the standard rent must be determined in accordance with sch. 'A'. Where it does not apply and there is no provision in the Act applicable to the computation, then alone it must be determined at a rate which is fair and reasonable (cl. g.). Coming to sch. 'A', we find that it contains four rules. Rule 1 defines the term 'Basic rent', R. 2 defines 'standard rent' as used in connection with residential premises and R. 3 defines 'standard rent' as used in connection with non-residential premises. In both cases it means the basic rent plus a certain specified sum.

Rule 4 lays down that where any premises had been sub-let, the standard rent of the sub-tenant should not exceed the standard rent payable by the tenant by six and a quarter per centum. Rule 4 is therefore not a method of computation of the standard rent but merely lays down a limit beyond which the tenant cannot charge his sub-tenant. This was introduced to stop trafficking in rents, as people are always found ready to exploit the misery of poor sub-tenants and to make a profit out of taking leases at low rents and in turn letting the properties out at disproportionately high rents. As will be found presently, the Rent Controller completely lost sight of this and thought that the assessment of the standard rent of sub-tenant must itself be done under R. 4 of sch. 'A'.

[33] Analysing the provisions of sch. 'A', Rr. 1 & 2, we find as follows:

Basic rent as defined by sch. 'A' means:

(a) The rent fixed by the Controller under the Bengal House Rent Control Order, 1942, or the Calcutta Rent Control Order, 1943, or the Calcutta Rent Ordinance, 1946.

(b) If the rent has never been fixed under any of the provisions aforesaid, then the rent which was payable for the premises on 1-12-1941.

(c) If the rent has never been so fixed, but increased between 1-12-1941 and 1-4-1950 (when the Act came into operation) then the increased rent which was last paid, but so as not to exceed the rent payable on 1-12-1941 by more than 10 per cent. in respect of premises within Calcutta and 20 per cent. in case of other premises.

[34] 'Standard rent', in the case of premises used for residential or mainly residential purposes is basic rent + 5 per cent. of basic rent where it does not exceed Rs. 100 per month or basic rent + 10 per cent. of basic rent where it exceeds Rs. 100, provided however that the increased percentages mentioned above will not be added, in case where the rent had been fixed under any of the enactments mentioned in R. 1 (a) until after the expiration of three years after such fixation; or where rent has not been so fixed but increased between the 1-12-1941 and 1-4-1950, until the expiration of three years from the date of the first payment of the increased rent.

These are the principal rules to be followed in computing the standard rent, but it is conceivable that certain difficulties may still arise and these have also been provided for. For example, if it is found that the premises have not at all been let out on 1-12-1941 or only let out in part, or where it has been let out at a nominal rent or for some consideration other than money rent or in addition to money rent. These contingencies have been provided for in S. 9 (1) (e). In such cases, the standard rent is fixed at a rate in accordance with sch. 'A,' taking the rent which would have been reasonably payable for the premises if let on 1-12-1941, as basic rent under the said Schedule.

[35] But it may so happen, that the Controller is required by the Act to determine the rent at which the premises were let out on 1-12-1941 but it is not reasonably practicable to obtain sufficient evidence for determining the said rent. This contingency has been provided for in s. 9 (2). In such a case, the Controller must determine approximately the rent at which in reasonable probability the premises were let on the date, and the rent so determined shall be deemed to be the rent at which the premises were let on 1-12-1941. In such a case, two important rules are to be followed by the Rent Controller. (1) That in arriving at such a computation he may have regard to the standard rent of similar premises in the neighbourhood and (2) he may make presumption either against the landlord or tenant who in his opinion is in a position to produce relevant evidence but is refraining from doing so.

[36] Lastly, we may have a case where no provision of the Act applies, for example where the premises itself came into existence after 1-12-1941 but before 31-12-1949. In such cases, the provision of S. 9 (1) (g) applies and the Controller would have to determine the rate which is fair and reasonable. If the premises have been wholly or substantially constructed after 31-12-1949, then the standard rent is fixed in accordance with the rules laid down in S. 9 (1) (f). Therefore, the correct approach to be made in computation of the standard rent must be as follows :

(1) Find out whether any provision of the Act for fixing standard rent applies. If no such provision applies proceed under S. 9 (1) (g).

(2) If there is any provision of computation as laid down by the Act which is applicable, find out whether sch. 'A' applies. Schedule 'A' will not apply, if the premises have not been let out on 1-12-1941 or being let rent free on nominal rent or for some consideration other than money rent or in addition to money rent. In such a case proceed under S. 9 (1) (e).

(3) If sch. 'A' applies, or if S. 9 (1) (e) applies calculate the 'basic rent' according to the method laid down in R. (1) of sch. A or S. 9 (1) (e) as the case may be.

(4) In cases (2) and (3), calculate the standard rent according to the provisions of R. (2) sch. 'A' in case of premises used for residential or mainly residential purposes and R. (3) in case of premises which are used or mainly used otherwise than for residential purposes.

(5) After fixation of standard rent in accordance with the above rules, the same must be further altered or modified if circumstances exist as are stated in the following sub-sections of S. 9 (1) of the Act, viz., (b) Increase of Municipal taxes, rates or cesses), (c) (addition, alteration or improvement made by the landlord, not being tenantable

repairs only) and (d) (supply of furniture), in accordance with the provisions of these rules.

(6) If the premises have been wholly or substantially constructed after 31-12-1949 proceed to fix the standard rent under S. 9 (1) (f).

(7) In the case of premises which have been sub-let, the standard rent of the sub-tenant will be computed according to the above rules, but there is a ceiling laid down in such cases and this is provided for in R. 4 of sch. A. The standard rent in such a case must not exceed this figure and the calculation must be checked with this ceiling and the excess eliminated. Such a calculation necessarily involves the computation of the 'standard rent' of the tenant, as well. If such a computation cannot be made as a matter of law then this rule cannot be applied.

[37] Now let us see what procedure was followed by the Rent Controller and the learned Subordinate Judge in computing the standard rent. The first thing that the Rent Controller did was to employ an inspector to inspect the premises and report, which he did. The inspector has given the accommodation of the whole premises and the accommodation, measurement and amenities of the suites occupied by the tenants. The inspector was not allowed access by all the other tenants in the premises, hence I do not see how his report or his evidence subsequently given regarding the accommodation relating to the entire premises is reliable.

In view of this difficulty in measuring the entire premises, the Rent Controller called for the original lease, but it was not produced. The Rent Controller then at once went to R. 4 of sch. 'A.' He said that he must first ascertain the standard rent of Messrs. Hind Estate Ltd. and then ascertain the proportionate share of it of the sub-tenants (petitioners before him) and then add 6¼ per cent. to it. For purposes of finding out the standard rent of Messrs. Hind Estate Ltd. he took help of EX. 1, which shows the standard rent as fixed of a tenant occupying a suite in a portion of premises NO. 220, Lower Circular Road.

[38] It is obvious therefore that he totally ignored the rules for calculating the standard rent. He did not consider whether any of the provisions of the Act applies for computation of standard rent. He assumed that sch. 'A' applies and goes straight to R. 4 which is not a rule meant for computing the standard rent at all. He then turns from R. 4 to nothing at all except perhaps what he considers as a reasonable method, and makes a computation without even thinking as to whether it was necessary or possible to determine the rent paid on 1-12-1941 or an approximate and reasonable rent paid on that date or as to whether any of the other sub-rules of S. 9 applied to the case. No attempt whatsoever was made to find out the basic rent.

Apart from the defects mentioned above, the computation is wrong on the face of it. A comparison is made with the standard rent of a tenant occupying only a portion of premises NO. 220 Lower Circular Road, in order to find out the standard rent of Messrs. Hind Estates Ltd. with regard to the entire premises NO. 220/1 Lower Circular Road, (consisting partly of residential and partly of non-residential tenancies) which is clearly wrong. It is therefore mystifying, how the Rent Controller ever came to the figure of RS. 94-2-0. He then added to it 6¼ per cent. and came to the round figure of RS. 100. This figure is based on no principles or rules and is clearly incorrect.

Learned Advocate appearing for the respondents did not attempt to justify the method of calculation by reference to the Act but said this kind of calculation is invariably made by the Rent Controller in computing standard rent. If so, this is an amazing state of affairs. If any principle is well settled, it is this that where the rent on the prescribed date could be ascertained, it was not permissible to take into account the standard rents of similar houses in the neighbourhood. In *Chamberlain* v. *Farr*, (1942) 2 ALL E. R. 567, Lord Greene M. R. observed as follows:

"Whether it was economic rent or not, it was in fact the rent at which the dwelling house was let on the relevant date. Once there is sufficient evidence to enable the Court to ascertain that rent, the Court is precluded from having regard to the standard rents of similar dwelling houses in the neighbourhood."

[39] The learned Subordinate Judge who heard the appeal also seems to have no clearer idea of the procedure to be adopted in computing the standard rent. It appears that the lawyer for the respondent argued that the Rent Controller did not take into consideration R. 4 of sch. 'A.' This was a surprising argument inasmuch as the Rent Controller started his computation upon that rule and that is one of the primary reasons why he went wrong. The learned Subordinate Judge rightly observed that the Rent Controller did consider R. 4 of sch. 'A' but then went on to hold that R. 4 did not apply because of S. 5 of the Act. He then deducted the 6¼ per cent- from RS. 100 and somehow arrived at RS. 94-2-0. Apart from the fact that he could not scale down the amount in favour of the sub-tenant in an appeal by Messrs. Hind Estates Ltd. while the sub-tenants themselves did not appeal or make any cross-objection, the results of his calculation are themselves quite inaccurate.

The learned Judge also failed to approach the question according to the rules prescribed. As the lease was never produced, far less proved, the learned Judge was not in a position to decide whether S. 5 at all applied or not. Until the lease is proved, there is no reason why R. 4 should not apply, because the question of S. 5 does not arise at all. It is therefore not necessary in this case to decide the point whether S. 5 applies to the lease in question and if no provision of the Act applies to it, then whether a standard rent of the whole

demise can ever be calculated either under R. 4 of sch. 'A' or S. 9 (1) (g).

[40] In the premises, the conclusions arrived at by the Rent Controller as well as the learned Subordinate Judge are clearly wrong and must be set aside. I agree with the order made by my Lord, including the matter of costs.

B/V.R.B. *Order accordingly.*

A. I. R. 1953 Calcutta 28

P. B. MUKHARJI AND P. N. MOOKERJEE JJ.

Badri Prosad—Petitioner v. *State.*

Criminal Misc. Case No. 364 of 1951, D/- 5-12-1951.

(a) Essential Supplies (Temporary Powers) Act (1946 as amended by Act 52 of 1950), Ss. 7(2) proviso, 13A—Offence under S. 7 (2), proviso—Granting bail—Consideration under S. 13A.

Section 13A fetters and circumscribes the Court's power to grant bail in offences under the proviso to sub-s. (2) of S. 7. The Court cannot grant bail in such cases without giving an opportunity to the prosecution to oppose the application. Its first duty, therefore, is to give the prosecution that opportunity. If in spite of this opportunity, the prosecution does not oppose, then the further rigours of this section do not operate and the Court is free to decide the question of grant of bail apart from and independently of this section by reason of S. 5 (2), Criminal P. C. But if the prosecution does oppose the application for bail, then comes the second duty of the Court under the section. In that event the Court cannot grant bail unless it appears to the Court that there are reasonable grounds for believing that the applicant for bail is not guilty. Section 13A, Essential Supplies Act, represents a new species of non-bailable offence with its own rules for bail and that section, therefore, is an extension of S. 497, Criminal P. C.

In weighing the likelihood of the guilt or otherwise of the accused at a stage when he is under trial and when he ordinarily asks for bail, the Court has necessarily to act on a reasonable intelligent anticipation which *ex hypothesi* must, to a certain extent, be problematical at that stage because the trial has not run its course so as to enable a conclusive decision on the guilt or innocence of the accused. The statute requires that there must be reasonable grounds for believing that the accused is not guilty. Each of these words used in this section is important. In the first instance there must be reasonable ground. The Court has to reach that state of belief judicially on reasonable grounds and not unreasonably or arbitrarily. Secondly, what is required by the section is a belief and not a conclusive decision because that is not possible without the trial. In other words the Court has to believe at least *prima facie* that the accused is not guilty.

It is essential to bear in mind that the restrictions in granting bail under S. 13A apply only in the case of an offence that attracts the proviso to S. 7 (2). It is, therefore, necessary to make it clear and apparent in the charge that it is so before any question of applying S. 13A can arise. It may not be enough to say merely that the accused is charged under S. 7 (2) because that sub-section describes a variety of offences not all of which attract S. 13A. It is the more specific offence under the proviso to sub-s. (2) of S. 7 in respect of which the special provisions for bail in S. 13A operate. The proviso may not be specifically stated in the charge but the other facts stated in the charge must clearly show that the proviso to S. 7 (2) is attracted. It is a matter of form and not of substance.

To constitute an offence under S. 7. (2), Proviso there must be *mens rea*. There must be something on the record, at the stage of granting bail, from which any reasonable ground can be said to exist for believing that the accused had any *mens rea*.

The Court, granting bail in these case, can certainly consider the charge made and the attendant facts including such police report which it may consider proper. It is also entitled to look at the facts stated in the petition for bail by the accused. That indicates that the Court is also entitled to look into the grounds of opposition made by the prosecution in opposing the bail. These are some of the matertials available to the Court to find whether there are reasonable grounds for believing that the accused is not guilty. Unless the Court comes to that belief, the Court cannot, under the statute grant any bail to the accused.

While considering the reasonable grounds for belief the Court also has to bear in mind, the presumption of innocence in favour of the accused. That presumption is a legal presumption and has to be rebutted by some materials or other if its effect is to be denied. This presumption is not only for the trial but also for the purpose of granting or refusing a bail:

Held on facts that the materials on record at this stage did not show that the accused had the necessary guilty knowledge or *mens rea*. That on the materials so far appearing on record there were reasonable grounds for believing that the accused was not guilty within the meaning of S. 13A (b), Essential Supplies Act.

[Paras 7, 8, 11, 12, 16 & 17]

(b) General Clauses Act (1897), S. 26—Acts forming offences under two sections of enactment—Prosecution can prosecute under any of them. [Para 15]

Anno. General Clauses Act, S. 26 N. 1

Sudhansu S. Mukherjee — for Petitioner ; Amaresh Chandra Roy and Nirmal Kumar Sen, D. L. R. — for the State.

REFERENCES : Courtwar/Chronological/ Paras.

('45) A. I. R. 1945 P. C. 94 : (46 Cri. L. J. 662) 21
('47) Srinivas Mall v. Emperor, 51 Cal. W. N. 900 : (A. I. R. 1947 P. C. 135) 10, 27
('48) 52 Cal. W. N. 617 : (A. I. R. 1948 Cal. 287 : 49 Cri. L. J. 509) 10, 26
('49) 53 Cal. W. N. 300 : (A. I. R. 1949 Cal. 348 : 50 Cri. L. J. 590) 10, 26
('50) 54 Cal. W. N. 829: (A. I. R. 1951 Cal. 303). 10
('51) Cri. Misc. No. 185 of 1951, D/- 30-5-1951: (A.I.R. 1951 Cal. 120 : 52 Cri. L. J. 934 F. B.) 14
('51) A. I. R. 1951 Cal. 581 : (52 Cri L. J. 1480) 15
('52) 56 Cal. W. N. 1 : (A. I. R. 1951 Cal. 133 : 52 Cri. L. J. 1226 F. B.) 15

P. B. Mukharji J.—This is an application for bail under S. 498, Criminal P. C. The central question in this application is, how far the powers of the Court to grant bail have been cut down by S. 13A, Essential Supplies (Temporary Powers) Act, as amended.

[2] It is necessary to state briefly the relevant facts leading up to this application. The petitioner is an accused charged under S. 7 (2), Essential Supplies Act. The prosecution case, briefly, is that on the morning of 14-10-1951 at about 5/15 A. M. the petitioner was found driving lorry NO. CH-1746 containing bags of rice coming along the Grand Trunk Road from Magra side being piloted by another lorry NO. CH-519 which was proceeding a little ahead of lorry NO. CH-1746. On this lorry NO. 1746 was found rice weighing 151 mds. contained in 77 bags. This lorry was being driven by the petitioner and there was another man named Lakshminarayan, who was sitting by the side of the petitioner who was driving the lorry. The prosecution case is that neither the petitioner nor Lakshminarayan could produce any licence or permit. The petitioner was accordingly charged

under S. 7 (2), Essential Supplies Act for violation of RR. 10 (1) and 3, Bengal Foodgrains Control Order, 1945.

[3] The defence for the petitioner is that he had no guilty knowledge and, in fact, he had no knowledge whatever that there was no requisite permit for these bags of rice. It is his case that he was only the driver of this lorry which was hired by the owner of these bags of rice. In fact before the Sessions Judge at Alipore in his petition for bail he states that he took the lorry to Pandua to collect sand and was waiting on the road when a Bengali business man describing himself as a registered dealer in rice engaged him to carry the rice from Kalna Road to Chanditala and in fact a paper was shown to the petitioner by the owner, which paper was described to be a permit. The petitioner started the lorry from Kalna Road at about 4 A. M. and the lorry was checked at Magra and he states that the permit was shown to the officer and the lorry was allowed to run. Thereafter the lorry was stopped by a police officer and on the sight of the police officer the owner of the rice ran away and the petitioner was apprehended. The petitioner states that having been questioned by the police he stated all these facts before the police and in fact drew their attention to the owner who was still then running. In his petition before us, he has repeated the same facts stating that he had no reason to suspect that the owner of the bags had not the necessary permit or licence. He has also alleged that the owner of the bags was seated on the lorry and when the vehicle was stopped by the police he made himself scarce in the confusion. In short, the defence is that the petitioner is a mere carrier and he has no guilty knowledge or the necessary *mens rea* to be charged with any offence under the Statute.

[4] The petitioner moved for bail before the Magistrate but his application was rejected. He thereafter moved the Sessions Judge unsuccessfully. On 22-10-1951, the Judge in vacation made an order to the effect that as the bags of rice in question were found in the lorry which was driven by the petitioner there were no reasonable grounds for believing that the petitioner was not guilty in the circumstances. Thereafter on 22-11-1951, he moved also the Sessions Judge when the learned Sessions Judge refused to enlarge him on bail on the ground that there was no reasonable ground for believing that the accused was not guilty in respect of the offence said to have been committed under the Act. The petitioner now moves us for bail.

[5] The whole question in this application turns upon the construction of S. 13A, Essential Supplies Act. That section was introduced by Act 52 of 1950. It purports to make special provisions regarding bail of persons, accused or convicted of an offence under S. 3 of the Act relating to foodgrains and punishable under the proviso to sub-s. (2) of S. 7 of the Act. It will be desirable to state the section at this stage fully. It reads as follows :

"*Section 13A.* Special Provisions Regarding Bail. - Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), no person accused or convicted of a contravention of any order under S. 3 relating to food-grains which is punishable under the proviso to sub-s. (2) of S. 7 shall if in custody, be released on bail or on his own bond unless

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application it appears to the Court that there are reasonable grounds for believing that he is not guilty of such contravention."

[6] As I read this section, its effect is to fetter and circumscribe the Court's power to grant bail. The Court cannot grant bail in such cases without giving an opportunity to the prosecution to oppose the application. Its first duty, therefore, is to give the prosecution that opportunity. If inspite of this opportunity the prosecution does not oppose, then the further rigours of this section do not operate and the Court is free to decide the question of grant of bail apart from and independently of this section by reason of S. 5 (2), Criminal P. C. But if the prosecution does oppose the application for bail, then comes the second duty of the Court under the section. In that event the Court cannot grant bail unless it appears to the Court that there are reasonable grounds for believing that the applicant for bail is not guilty.

[7] At first sight such a provision appears to imply a marked departure from the accepted notions in Criminal Jurisprudence of granting bail. The section expressly begins by saying that its provisions are notwithstanding anything contained, in the Criminal Procedure Code. The approach, therefore, to the construction of this section should be without the pre-conceived notions inherited under the Criminal Procedure Code. That much is clear.

But on closer reflection the first impression of the section sheds a good deal of its novelty and it does not appear to be such a drastic innovation because the words used in that section have the familiar ring of S. 497, Criminal P. C., which in cases of non-bailable offences uses the expressions "reasonable grounds for believing that he has been guilty" and "no reasonable grounds for believing that the accused has committed a non-bailable offence." Under S. 497, Criminal P. C., therefore, the Court has also to consider reasonable grounds for belief. Here, however, a word of caution is necessary. It is time that there under S. 497, Criminal P. C., what prevents bail is the reasonable ground for believing that the accused is guilty. That in actual practice works more favourably to the accused in the sense that at the early stages, before the regular trial has started, it is easier for the Court without the full materials to say that there are no reasonable grounds for believing that he is guilty and thus admit him to bail. But in a case, however, under S. 13A, Essential Supplies Act, it is the converse and more difficult case of reason-

able ground for believing that the applicant for bail is not guilty. It is difficult because in actual practice it is bound to be unfavourable to the applicant for bail in the sense that at the early stages, before the regular trial has started, it will ordinarily be difficult and may in some cases be impossible for the Court to say without sufficient materials that there are reasonable grounds for believing that he is not guilty. But that is the handicap which the statute has imposed in this case. Its effect is that S. 13A, Essential Supplies Act, represents a new species of non-bailable offence with its own rules for bail and that section, therefore, is an extension of S. 497, Criminal P. C.

At the same time the point remains that the consideration of reasonable grounds for belief at the early stages of a trial is not altogether novel and not unknown in the Criminal Procedure Code. Among the many cogent considerations moving the Court to grant a bail, the nature of the offence with which the accused is charged and the likelihood or otherwise of his being guilty thereunder have always played a relevant part. That is a consideration approved by judicial tradition sanctioned by legislative practice, and justified by common prudence. The reason is clear. Bail in its fundamental concept is a security for the prisoner's appearance to answer the charge at a specified time and place. If that security is given and is regarded as enough and safe he is released pending trial. It is only but natural and relevant therefore for any Court to consider such security in relation to and in the light of the nature of crime charged and the likelihood or otherwise of the guilt of the accused thereunder. That is why different provisions are made and different considerations are applied in granting bails in bailable and non-bailable offences.

[8] In weighing the likelihood of the guilt or otherwise of the accused at a stage when he is under trial and when he ordinarily asks for bail, the Court has necessarily to act on a reasonable and intelligent anticipation which *ex hypothesi* must, to a certain extent, be problematical at that stage because the trial has not run its course so as to enable a conclusive decision on the guilt or innocence of the accused. The test supplied, therefore, by the statute in this context is the reasonable test. The statute requires that there must be reasonable grounds for believing that the accused is not guilty. Each of these words used in this section is important. In the first instance there must be reasonable ground. The Court has to reach that state of belief judicially on reasonable grounds and not unreasonably or arbitrarily. Secondly, what is required by the section is a belief and not a conclusive decision because that is not possible without the trial. In other words the Court has to believe at least prima facie that the accused is not guilty.

[9] Now, in this case before us no evidence has been given as yet. The only material before the Court is that a lorry driver has been charged under S. 7 (2), Essential Supplies Act and it is stated in the charge that the accused lorry driver was carrying out of the cordoned area without permit, certain bags of rice in that particular lorry he happened to be driving at the time of seizure. The main question, therefore, is whether the accused lorry driver had any reason to believe that there was no legal permit for the rice or that he had any knowledge on the point. There cannot be a general rule whether a carrier should or should not know what he carries. It may be said on the one hand that the driver of a hired lorry would not normally know or enquire as to what is being carried inside the lorry by the hirer. On the other hand, it may be said that this, by itself, while may not lead to any reasonable conclusion about the knowledge of the driver, taken with other circumstances, might imply such knowledge. In every case it will be a question of fact. Now the defence of the accused is that the owner of the rice, who was required to have the permit was actually in the lorry but escaped when the police arrived. The lorry itself was a hired one and the driver was not the owner of the lorry. Now these are the only materials before the Court at the present stage.

[10] The question, therefore, reduces itself to this that on these materials does it appear to the Court that they provide reasonable grounds for believing that he is not guilty? I do not find anything on the record from which any reasonable ground can be said to exist for believing that the present petitioner had any *mens rea*. That I consider to be fundamental in case of an offence charged under the Act. He may be proved to have *mens rea* after evidence or after the conclusion of the trial but nothing appears on the record at the present stage even to suggest it. There have been a number of decisions of this Court to show that *mens rea* is essential for an offence under this statute. In the case of *Bholaprosad* v. *The King*, 53 Cal. W. N. 300, the learned Chief Justice sitting with Das J., decided this point. In delivering judgment Harries C. J. at page 301 observed:

"In India Courts had held that provisions such as those contained in the Order to which I have referred created an absolute liability and that a servant could be liable although he had no guilty knowledge at all. Their Lordships of the Privy Council, however, in the case o *Srinivas Mall* v. *Emperor* (A. I. R. 1947 P. C. 135) held that no conviction for such offences could be sustained without *mens rea* being established. Their Lordships laid down that unless the statute either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant (accused) should not be found guilty of an offence under the criminal Law, unless he has a guilty mind."

This decision is also an authority for the proposition that offences which can be held to be committed without a guilty mind are usually of a comparative minor character but it is to be observed that the breaches of this Control Order involved punishment extending to three years' or even

7 years' rigorous imprisonment. It was, therefore, held that these offences were not minor offences for which a man could be found guilty without having the necessary guilty knowledge. This case was also a case under the Essential Supplies Act. To the same effect are the decisions of this Court in *Md. Azam Khan* v. *The King*, 52 cal. w. n. 617, under the Bengal Foodgrains Control Order, 1945 and in *Kedarnath Agarwalla* v. *State*, 54 cal. w. n. 829.

[11] It has, therefore, to be seen that at this stage when just a charge has been made by the police in a case under the Essential Supplies Act what are the available materials from which the Court has to find reasonable grounds for believing that the accused is not guilty before he can be granted bail. The Court granting bail in these cases, to my mind, can certainly consider the charge made and the attendant facts including such police report which he may consider proper. He is also entitled to look at the facts stated in the petition for bail by the accused. Then again, the statute in this case makes it clear that this restriction on the powers to grant bail will only operate in case where the prosecution opposes the application for bail. That indicates that the Court is also entitled to look into the grounds of opposition made by the prosecution in opposing the bail. These are some of the materials available to the Court to find whether there are reasonable grounds for believing that the accused is not guilty. Unless the Court comes to that belief the Court cannot, under the Statute grant any bail to the accused.

[12] In my view it will be an entirely erroneous approach which misses the effect of the presumption of innocence in favour of the accused. That presumption is a legal presumption and has to be rebutted by some materials or other if its effect is to be denied. It has been argued on behalf of the State that the presumption is only for the trial and not for the purpose of granting or refusing a bail. I am unable to accept this argument. I have always known that the principle of presumption of innocence means that the accused is presumed to be innocent until he is proved to be guilty. That is a pervasive presumption which continues from the very inception of any criminal proceeding until proof is effected under the Indian Evidence Act of his guilt. The stage when the accused is asking for a bail is in my opinion also a stage where the principle of presumption of innocence operates. A Statute can take away such presumption. But that is not the case here. In my judgment s. 13A, Essential Supplies Act, does not have the effect of saying that the accused is presumed to be guilty. The Statute does not take away the presumption. Therefore, that presumption is also a relevant consideration for the Court at this stage in coming to a belief that the accused is not guilty. This presumption of innocence however is not to be confused with the other universal tenet of reasonable doubt in Criminal jurisprudence. The principle of reasonable doubt means that if there is any doubt about the guilt of the accused the benefit of that doubt is given to the accused so that he is acquitted. Here however under s. 13A, Essential Supplies Act, the Court must come to a belief that the accused is not guilty before a bail can be granted, so that if the Court cannot come to that positive belief and that belief is itself in doubt then the condition for granting bail under this section is not satisfied and in that event the bail is refused.

[13] It has also been contended before us on behalf of the petitioner, that there cannot be any question of the accused being guilty before an actual proof under s. 3, Evidence Act. In my opinion this test cannot be applied in the case for granting bail under this statute, and I accept the contention put forward by the state on this point. The Court has to make up its mind and reach that state of belief long before actual proof of guilt is forthcoming. Proof under s. 3, Evidence Act, makes it quite clear that the Court has to consider all the matters before it. Now the Court cannot consider all the matters before it at this stage for the very simple reason that no evidence has been given. As I have said earlier the Court at this stage can only make a reasonable and intelligent anticipation of the guilt.

[14] On behalf of the petitioner it has been argued that the scheme of the Foodgrains Control Order, 1945 provides for different types of licences, as for instance licence for possession or storage and licence to carry. Reference was made in this connection to cl. 4 of the Control Order. It is therefore contended that under cl. 10 (1) of the Foodgrains Control Order this cannot be any offence at all because cl. 10 (1) of the Order must be limited to producer's licence to possess. I am unable to accept this contention. The language of cl. 10 (1) of the Control Order leaves no room for doubt in my mind that it includes also any person other than one holding a licence under the Order, and cannot be limited only. This argument on behalf of the petitioner was made on the basis that the Foodgrains Control Order, 1945, continues as an order under this Act as was decided in *Ramananda Agarwalla* v. *State*, cri. misc. no. 185 of 1951; by a Special Bench of this Court presided over by Harries C. J. and Das and Banerjee JJ., d/- 30th May 1951.

[15] It is necessary to notice another argument advanced by the petitioner also on the basis of the provisions of the Foodgrains Control Order, 1945, forming part of the Essential Supplies Act. It is attractively presented in the garb of the proposition that when an offence comes under and is punishable under two different sections of the same Act, one more rigorous than the other, the accused can choose under which section he should be proceeded against. It is said that the breach of the provision regarding licence to carry is punishable under cl. 16 of the Control Order and

therefore cannot also be punishable under s. 7 (2), Essential Supplies Act.

I am unable to accept that argument. I consider such a view is legally unsound as a general proposition. In my opinion it is open to the prosecution to choose the section under which it wants to proceed against the accused. That option is of the prosecution and not of the accused. Inherent in the idea of prosecution is the prosecutor's right to select the form and manner of prosecution that the law permits. A statute may put restriction or conditions or prohibition on such right but this statute does not do so here. The mere fact that there is another section under which the accused could also be proceeded against does not take away the right of the prosecution to proceed against the other available section.

The principle, that unless there is anything to the contrary in the Statute under consideration an act which constitutes an offence under two or more enactments then the offender remains liable to be prosecuted and punished under any one of these enactments, is well settled in criminal jurisprudence. Its recognition is explicit in s. 26, General Clauses Act. As a juristic idea the same principle in my judgment applies where the act constitutes an offence under two different sections of the same enactment. To hold otherwise will be to make a difference where none exists on principle or reason. What the law abhors and prohibits is that the accused shall be punished twice for the same offence. But that is an entirely different proposition. No decided case or authority was placed before us on this point. As far as I know there are decisions of this Court on an analogous point where the offence falls under two sections, one requiring sanction and the other not, the prosecution could fall back upon the section not requiring sanction where, in fact, no sanction had been given. The ratio of these decisions is that it is open to the prosecution to choose its course and there is nothing illegal or unjust if the prosecution is competent to bring the offence under the section which does not require sanction, to do so. Reference in this connection also be made to a recent Full Bench decision of this Court in *Dhirendra Nath* v. *Nurul Huda*, 56 cal. w. n. 1 (f. b.) and to my judgment in *Pramatha Nath* v. *State*, a. i. r. 1951 cal. 581.

[16] Before I conclude reference is necessary to one other point which arose in the course of the arguments in this case. It is essential in my view to bear in mind that the restrictions in granting bail under s. 13A, Essential Supplies Act apply only in the case of an offence that attracts the proviso to s. 7 (2) of the Act. It is therefore necessary to make it clear and apparent in the charge that it is so before any question of applying s. 13A can arise. It may not be enough to say merely that the accused is charged under s. 7 (2) of the Act because that sub-section describes a variety of offences not all of which attract s. 13A of the Act. It is the more specific offence under the proviso to sub-s. 2 of s. 7 in respect of which the special provisions for bail in s. 13A of the Act operate. In this case the proviso is not specifically stated in the charge but the other facts stated in the charge clearly show that the proviso to s. 7 (2) is attracted. Here, therefore, it is a matter of form and not of substance. But having regard to the language of s. 7 (2) describing various offences, this may in some cases be a matter of great substance and not of mere form.

[17] The point on which I am convinced that the accused should be granted bail in this case is the point of *mens rea*. Present materials on record at this stage do not show that the accused had the necessary guilty knowledge or *mens rea*. On the materials so far appearing on record I am of opinion that there are reasonable grounds for believing that the accused is not guilty within the meaning of s. 13A (b), Essential Supplies Act. This is not, in any way, to indicate that he cannot be found guilty at the trial but this is only to say that it is so at the present moment for the only purpose of deciding the question whether the accused is entitled to bail or not. For that purpose alone I hold that there are reasonable grounds for believing that he is not guilty, and should therefore be granted bail.

[18] I, therefore, order and direct that the petitioner be admitted to bail to the satisfaction of the District Magistrate of Hooghly.

[19] **P. N. Mookerjee J.** — I agree that this application should be allowed and pending trial the petitioner should be released on bail to the satisfaction of the District Magistrate.

[20] Two questions really arise for decision at this stage. The first question concerns the true interpretation of s. 13A, Essential Supplies Temporary Powers Act and thus raises an issue of general importance. The second question is more particularly related to the case before us, namely, whether in the circumstances of this case the petitioner is entitled to be admitted to bail under the terms of the said s. 13A and its determination necessarily depends on the facts of this particular case and on the materials before us.

[21] In criminal trials applications for bail are a familiar feature. In almost all cases the accused, unless he is singularly helpless or unfortunate —usually applies, shortly after his arrest, for being enlarged on bail. That is generally his first step to regain—may be only temporarily—his lost liberty and the Code of Criminal Procedure which governs all criminal trials in the absence of special provisions excluding its application contains elaborate provisions for the guidance of Courts in the matter of bails. These provisions are to be found in ss. 496-498 and s. 426 of the Code, the first group of sections applying when the trial pends, the other section dealing with the question of post-conviction bails both before the trial Court and before the

Appellate Court: vide *Jairamdas* v. *Emperor*, A. I. R. 1945 P. C. 94.

[22] Bail is in essence a security for appearance or attendance of the accused and its seriousness and importance varies with the character and gravity of the offence with which he is charged. In the Code offences have been classified as 'bailable' and 'non-bailable' and between these two classes a clear distinction has been drawn therein. Bailable offences are to be found in the second Schedule of the Code or in the express provisions of other laws, all other offences being classed as 'non-bailable'. In offences of the former class bail is a matter of right but in the latter class it depends on the Court's discretion and other relevant circumstances including the nature of the offence charged. In bailable offences grant of bail is the inflexible rule, there being no exception provided in the Code. In non-bailable cases also, subject to one specified exception, bail is usually granted unless—and here too there is a statutory exception in favour of grant of bail—the Court feels disinclined to exercise its judicial discretion in favour of the alleged offender. The first specified exception enjoins refusal of bail where there are reasonable grounds for believing that the accused—not being under the age of sixteen years or a women or a sick or infirm person — has been guilty of an offence punishable with death or transportation for life. The other statutory exception, above referred to, recommends the grant of bail in all cases where there are no reasonable grounds for believing that the accused has committed a 'non-bailable offence' but that there are sufficient grounds for further enquiry into his alleged guilt.

[23] The above in brief outlines is the scheme of the Code in the matter of bail and in that scheme one factor stands out in bold relief. Reasonable belief in the guilt or innocence of the accused plays a leading role in the matter of grant or refusal of bail and is often a deciding factor. Under S. 497 (1), reasonable belief in the guilt of the accused when the offence charged is 'non-bailable' and punishable with death or transportation for life disentitles him from getting bail. Under S. 497 (2) which deals with other cases of 'non-bailable offences', reasonable belief in the innocence of the person charged generally determines the question of bail in his favour. Barring these two specified types of cases in all other cases where the offence charged is 'non-bailable' — be it punishable with death or transportation for life or any other punishment — the matter of bail is left entirely in the discretion of the Court. These latter include also cases where the Court is unable to form a reasonable belief in the guilt or innocence of the accused, that is, cases where it entertains, at the stage when bail is applied for, reasonable doubt as to both his guilt and innocence and in such cases also the discretion of the Court, though it has to be exercised judicially, is left unfettered by the Code.

[24] The Essential Supplies (Temporary Powers) Act by enacting S. 13A has considerably curtailed the Court's power, above outlined, to grant bails where the offence charged is one under S. 7 (2) proviso of the Act. In cases of other offences, though falling under the Act, the Court's power is not affected but if S. 7 (2) proviso covers the case the Court's discretion in the matter of grant of bail becomes greatly circumscribed. It cannot grant bail unless opportunity has been given to the prosecution to oppose the same. It cannot also grant bail, when opposed, unless it has reasonable ground for believing that the accused is 'not guilty'. The changes introduced are thus of a very vital character and the consequences thereof are indeed far-reaching. The section imposes a clear duty on the Court — before it can order bail — to give opportunity to the prosecution to oppose the prayer for bail and only when in spite of such opportunity the prosecution neglects or fails to oppose the same the Court is free to consider the question of bail in the light of the relevant provisions of the Criminal Procedure Code. When bail is opposed by the prosecution the second restriction on the Court's power is brought into play and the Court cannot grant bail unless it reasonably believes in the innocence of the accused. It follows therefore that if in cases of opposition the Court is unable to form a reasonable belief in the guilt or innocence of the accused bail has to be refused — in other words, when the question of bail falls to be considered under S. 13A, Essential Supplies (Temporary Powers) Act benefit of reasonable doubt goes to the prosecution. This is indeed startling and it marks a drastic departure from the Code and as it undoubtedly works to the prejudice of the accused its seriousness cannot be underrated.

In cases, therefore, under S. 7 (2) proviso, Essential Supplies (Temporary Powers) Act, the Court has a special responsibility—in regard to both the prosecution and the accused — and the due discharge of this responsibility is often beset with great difficulties. These difficulties arise primarily because of the stage at which the question of bail generally arises for consideration. At that stage the materials are in most cases hardly sufficient to enable the Court to form easily a reasonable belief either in the guilt or innocence of the accused unless of course the prosecution materials are either very strong or particularly weak and it has to strive hard to make up its mind one way or the other, remembering that its failure in this respect may have the effect of condemning a man—about whose guilt no reasonable ground for belief exists — to custody. In approaching the question, therefore, the Court has to act with the utmost circumspection and it has to scan and scan with the greatest care — the available materials — scanty though they be—in the light of the proper test and against the appropriate background.

[25] In matters of bail the test to be applied is the test of belief as opposed to decision or conclu-

sion which marks the end of the trial. The belief should no doubt be reasonable but once that is reached one way or the other that is either with regard to the guilt or the innocence of the accused nothing further is generally required to decide the question of bail.

It is to be remembered also that in this country, as in England, there is the well-known presumption of innocence in favour of the accused in all criminal trials. That presumption is a fundamental and inalienable feature of our criminal jurisprudence and though it can hardly reveal itself in its true form and in the fulness of its glory except when the trial has run its full course and a conclusion in the shape or sense of decision —as distinct from belief—has to be reached yet its influence cannot and ought not to be wholly discarded when bail is considered either under the Code or under the Essential Supplies (Temporary Powers) Act. The basic concept underlying the administration of criminal justice in this country enjoins that the reasonable belief in the guilt or innocence of the accused which largely determines the question of bail would have to be formed against the background of this 'presumption of innocence' whether the case is under the Code or under the Essential Supplies (Temporary Powers) Act and it is only when the belief itself is left in doubt even against the background of this presumption that S. 13A, Essential Supplies (Temporary Powers) Act actually leads to a different result from the Criminal Procedure Code — the former dictating refusal of bail, the latter favouring grant thereof. The presumption is never wholly out of the picture though its effect varies as it applies to trials or matters of bail or to bail under the Code or under the Essential Supplies (Temporary Powers) Act. On the strength of this presumption, the benefit of doubt goes to the accused whether the matter is one for decision at the end of trial or whether it is one for reasonable belief in the matter of bails under the Code and though the same result does not obtain when S. 13A, Essential Supplies (Temporary Powers) Act invades the picture the presumption still continues to furnish the background against which the entire scene has to be set and seen and reasonable belief in the innocence of the accused has to be formed. To that extent at least, the presumption still applies and it will be wrong to discard it altogether simply because the case is one which attracts S. 13A, Essential Supplies (Temporary Powers) Act. This approach secures harmony between this special statute and the basic principles underlying our criminal jurisprudence and and there is no reason why that approach should be forsaken to the grave prejudice of the man in custody who may yet prove his innocence at the trial and get honourably acquitted.

[26] In the above light have to be considered the available materials before us. They are, as already stated by my learned brother, the prosecution allegation that the accused was driving the lorry which contained prohibited foodgrains beyond twice the maximum quantity prescribed under the Bengal Foodgrains Control Order without the requisite permit for possession and the accused's version, as given out up till this stage, that he was merely the driver of the lorry which had been hired by an unknown person who escaped as soon as the lorry was apprehended and that he had no knowledge — and had even no reason to suspect — that the said person had not the requisite permit as, in fact, a permit was shown to him by that person when the lorry was loaded and was actually checked and passed as in order at an earlier checking station on the way. This version of the accused in the circumstances and probabilities of this case at the present stage is particularly important in view of the decisions of this Court in the cases of *Md. Azam Khan* v. *The King*, 52 Cal. W. N. 617 and *Bhola Prosad* v. *The King*, 53 Cal. W. N. 300 to which reference has already been made by my learned brother which lay down that in major offences—and there can be no question that an offence under S. 7 (2), Proviso, Essential Supplies (Temporary Powers) Act is a major offence in the sense in which that expression has been used in those decisions, it being punishable with "imprisonment for a term which may extend to seven years and to a fine etc." — 'mens rea' on the part of the accused is essential and has to be proved by the prosecution before a conviction can be obtained. Those decisions are based on the principle of the Judicial Committee's decision reported in *Srinivas Mall* v. *Emperor*, 51 Cal. W. N. 900 (P. C.) and I need only express my respectful concurrence with the same. This aspect of the matter — namely that mens rea is essential for conviction — is also a relevant consideration at the present stage when the question of bail requires determination and has to be given its due weight along with the other relevant circumstances in arriving at a decision in the present case.

[27] Bearing in mind all that has been said above I have considered carefully the available materials, now before us, and it seems to me that the cumulative effect of these materials in the light of the relevant aspects, tests and considerations against the appropriate background inclines in favour of the accused. I, accordingly, agree with my learned brother that this application for bail ought to be allowed and I concur in the order proposed by him.

B/R.G.D. *Bail granted.*

A. I. R. 1953 Calcutta 34

G. N. DAS AND GUHA RAY JJ.

Jatindra Nath Nandi and others—*Petitioners* v. *Krishnadhan Nandi and another*— *Opposite Party.*

Civil Revn. Case No. 1446 of 1952, D/- 7-8-1952.

(a) Court-fees Act (1870), Ss. 7 (iv) (c), (v) (a) and 8 (c) (Beng.) — Suit for declaration of right to *pala* of worship and injunction — S. 7 (iv) (c) applies—Mode of valuation — Court's power to revise—(Suits Valuation Act (1887), S. 8).

The plaintiff brought a suit for declaration of his right to *pala* of worship and for an injunction restraining the defendants from interfering with the plaintiff's exercise of the right. There was no allegation in the plaint that the plaintiff had been dispossessed of the *debottar* properties nor was there any prayer for possession of the same. In the plaint it was clearly asserted that the property was absolute *debottar* property and as such the whole of the income was properly payable for the performance of sheba and puja of the deity reserving no profits whatsoever to the *paladar*. The deity's title was not in controversy, on the allegation made in the plaint :

Held that on the allegations in the plaint the suit came within the purview of S. 7 (iv) (c) and not under S. 7 (v) (a), Court-fees Act. In a suit falling under S. 7 (iv) (c) the plaintiff had the option of valuing his relief subject of course to its correction by the Court under S. 8-c (Bengal) provided there is an objective standard of valuation. But there being no such objective standard in the present case, the Court must accept the valuation put by the plaintiff as correct and it cannot be called in question by the defendant: A. I. R. 1934 Cal. 250, *Ref.*; 40 Cal. 245 and A.I.R. 1930 Cal. 41, *Disting.* [Paras 4, 5]

Anno. Court-fees Act, S. 7 (iv) (c), N. 4, 21, 22, 23 ; S. 8 (A) to 8 (F) (Beng.), N. 1 ; Suits Valuation Act, S. 8, N. 1, 5.

(b) Civil P. C. (1908), S. 115 — 'May make such order in the case as it thinks fit.'

The High Court is perfectly competent to see that proper orders are made when the matter comes up in revision before it. The mere fact that the rule is limited to a particular ground should not stand in the way of the High Court making an order in accordance with law, where all the necessary parties are represented before it. [Para 6]

Anno. C. P. C., S. 115, N. 16.

Surendra Nath Basu with Ramendra Nath Basu—for Petitioners ; Dhirendra Nath Guha Thakurta with Hemendra Nath Banerji—for Opposite Party.

REFERENCES : Courtwar/Chronological/ Paras
('13) 40 Cal. 245 : (17 Ind. Cas. 162). 4
('33) 58 Cal. L. J. 171 : (A. I. R. 1934 Cal. 250). 5
('30) 126 Ind. Cas. 267 : (A. I. R. 1930 Cal. 41). 4, 5

G. N. Das J. — This rule was obtained by the defendants against an order of a learned Subordinate Judge valuing the suit instituted by the plaintiffs for purpose of jurisdiction of the Court.

[2] In order to understand the question which was pressed before us, it is necessary to state the case made by the plaintiffs opposite-parties in their plaint. The plaintiffs' case is that the predecessors of the parties endowed certain properties in favour of the deity Sree Sree Iswar Sridhar Jiu and in course of succession the plaintiffs are now entitled to participate in the sheba and puja of the deity. It is alleged that by mutual arrangement the sheba and puja of the deity is performed by turns, the shebaits having respective *palas* of their own. The plaintiffs' allegation is that the defendants are not allowing them to enjoy the privilege of worshipping the deity and performing the sheba and puja of the deity during the *pala* of worship. They therefore brought this suit for the purpose of declaring that the plaintiffs and the *pro forma* defendants are entitled to the *pala* of worship for six months from Baisakh to Aswin. They also prayed for an injunction restraining the principal defendants from interfering with their enjoyment of the disputed *pala* of worship and from not giving them facilities for that purpose. There is no allegation that the plaintiffs have been dispossessed from the *debottar* properties nor is there any prayer for recovery of possession of the said properties.

[3] In the Courts below this suit had a chequered career over the simple question of valuation of the relief. The plaintiffs valued the relief at Rs. 100 and the plaint was filed in the Munsif's Court. On the objection of the defendants, the matter was ultimately remitted to a commissioner for valuing the shebaiti right. The commissioner valued the shebaiti right at Rs. 9,247-8-0. The learned Munsif accepted this valuation and directed the plaint to be returned for presentation to the proper Court as the learned Munsif was not competent to try suits up to that value. On appeal the learned Subordinate Judge was of opinion that the suit was valued at Rs. 1,747-8-0 and was therefore within the pecuniary jurisdiction of the Munsif.

[4] Against this decision, the defendants have came up on revision and obtained this rule on the limited ground that in valuing the suit the expenses incurred for realising the profits should not be deducted. Such a contention presupposes that the suit comes within s. 7 (v) (a), Court-fees Act. Section 7 (v) (a), Court-fees Act, relates to suits for possession of land, building and garden. I have already stated the case made by the plaintiffs. In substance it is a suit for declaration of the right to a *pala* and for an injunction restraining the defendants from interfering with the plaintiffs' exercise of that right. It is entirely erroneous to suppose that this is a suit for recovery of possession of the *debottar* property. In my opinion, this is a suit which ought to come within the purview of s. 7 (iv) (c), Court-fees Act, namely, a suit for declaration where consequential relief is prayed for. In such a suit the plaintiff has the option of valuing his relief. This right is undoubtedly subject to correction under the provisions of s. 8 (c), Court-fees Act, provided there is an objective standard of valuation. In the present case, however, there is no such standard. It is impossible for any Court to ascertain what the value of a *pala* would be. In the plaint it is clearly asserted that the property is absolute *debottar* property and as such the whole of the income was properly payable for the performance of sheba and puja of the deity reserving no profits whatsoever to the *paladar*. The deity's title is not in controversy, on the allegations made in the plaint. The title to the property also is not in controversy. It is only the right to perform the sheba and puja that is in litigation. In the circumstances, in my opinion, s. 7 (v) (a), Court-fees Act, has no application whatsover.

Mr. Bose for the petitioner, however, contended that the view taken by us is opposed to two Bench decisions of this Court in the cases of *Raj Krishna Dey* v. *Bipin Behari Dey*, 40 cal. 245 and *Manik Chandra* v. *Dambharudhar Sarma*, 126 Ind. cas. 267 (cal.). In my opinion, these cases are clearly distinguishable. In the case first cited, the plaintiff alleged that he was the sole shebait of the deity and that he was seeking to recover possession from the defendants who, on the plaintiff's allegation, were not interested in the deity's property. That was a case where in substance the deity sought to recover possession of the deity's properties from certain strangers. There was therefore an objective standard of valuation in that case.

[5] In the later case cited, namely, the case of *Manik Chandra* v. *Dambharudhar Sarma*, 126 Ind. cas. 267 (cal.), there was an express averment that the plaintiff had been excluded from the *debottar* property, and as such the case came within s. 7 (v) (a), Court-fees Act. The present case, in my opinion, is akin to the case of *Hridey Kishore* v. *Hari Bhusan*, 58 Cal. L. J. 171. As Guha J. rightly pointed out, that suit was intended to enable the plaintiff to exercise his power of management in regard to *debottar* properties and to injunct the defendants from interfering with the exercise of that right. I am accordingly of the opinion that the valuation as put by the plaintiffs on their plaint was correct and was not liable to be called in question by the defendants.

[6] Mr. Bose contended before us that this rule was limited to a particular ground and the whole matter was not before us. In my opinion, the question of valuing the subject-matter of the suit was specifically raised before the Courts below and in order to determine the rule itself it is necessary to investigate into this question. In any event, this Court is perfectly competent to see that proper orders are made when the matter comes up in revision before this Court. The mere fact that the plaintiffs did not move should not stand in the way of this Court making an order in accordance with law, as all the necessary parties are represented before us.

[7] After this revision case has been argued at some length Mr. Bose wanted to withdraw this revision petition. In my opinion, such a course should not be permitted at the stage the case reached when such prayer was made.

[8] In these circumstances, this rule must be discharged but in the circumstances of this case the parties will bear their own costs in this rule. The suit will proceed on the valuation as originally made by the plaintiffs.

[9] **Guha Ray J.** — I agree.

B./K.S. *Rule discharged.*

A. I. R. 1953 Calcutta 36

G. N. DAS AND GUHA RAY JJ.

Surendra Nath Sarkar—Plaintiff — Appellant v. *Mahabir Roy and others—Defendants—Respondents.*

A. F. O. D. No. 310 of 1947, D/- 29-5-1952.

(a) Court-fees Act (1870), S. 7 (iv) (b), S. 7 (v) and Sch. II, Art. 17 (vi)—Suit for partition— Property in possession of co-sharer as tenant from month to month —Court-fee.

A suit by one co-sharer against another co-sharer for partition of joint property of which the defendant is in possession as a tenant, is a suit for partition pure and simple not chargeable with ad valorem court-fees, inasmuch as the plaintiff must be regarded to be in juridical possession of his interest in the property. [Para 4]

Anno. Court-fees Act, S. 7 (iv) (b), N. 2, 7.

(b) Co-sharer — Partition — Suit for — Property in possession of tenant—Maintainability of suit.

If an item of property is joint and is held by co-sharers each of them has the right to get his share partitioned and convert his joint tenancy into a tenancy held in severalty by each one of them. The fact that there may be inconvenience in partitioning or that a partition may prejudice the rights of one or the other of the parties is per se no ground for disallowing the right of the claimant co-sharer for partition. It is no doubt true that in a case where the suit property is in the possession of a tenant (in this case in the possession of another co-sharer as tenant from month to month) it may not be possible for the Court, after the final decree, to put the plaintiff co-sharer in possession. But that is not an objection to the passing of a preliminary decree because in such cases the plaintiff can always be given a decree entitling him to symbolical possession of his undivided share in the property. [Para 6]

Anno. Civil P. C., O. 21, R. 36, N. 1.

Rajendra B. Bakshi and Joy Gopal Ghose— for Appellant; Satya Charan Pain—for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('02) 25 Mad 504 7
('03) 26 Mad 78 7

G. N. Das J.— This is an appeal by the plaintiff and is directed against a judgment and decree passed by Janab N. Ahmed, Subordinate Judge, 1st Court, Howrah, dated 12-5-1947.

[2] The property in dispute belonged to three sisters Hedatan Bibi, Latifan Bibi and Kanij Fatema Bibi. It is not disputed at this stage that the interest of Hedatan Bibi has devolved ultimately on defendant 1 Mohabir Roy. Latifan Bibi is defendant 2. Kanij Fatema Bibi's interest was purchased by the plaintiff by a kobala on 17-6-1942. The position, therefore, was that the plaintiff had a one-third share in the disputed property. Defendant 1 had another third share and defendant 2 had the remaining one-third share. It is not disputed further that the entire property is in the occupation of defendant 1 Mohabir Roy as a monthly tenant. The plaintiff instituted the present suit for partition of his one-third share by metes and bounds. Defendant 1 Mohabir Roy raised several defences but it is necessary to state only two of them for the purposes of the present appeal. It was pleaded that the present suit being a suit for partition of the property in the possession of a tenant, no decree for partition should be made because the plaintiff has no actual possession of the premises. It was also pleaded that

ad valorem court-fees had to be paid on the plaint. The learned Subordinate Judge dismissed the plaintiff's suit on these two grounds.

[3] It may be pointed out that the learned Subordinate Judge repelled the plaintiff's allegations that the defendant Mohabir Roy had surrendered the disputed tenancy or that there was a merger of the tenancy held by defendant 1 in the superior interest held by the plaintiff and defendants 1 and 2. Mr. Bakshi appearing for the plaintiff-appellant has not contested the propriety of these two findings of the learned Subordinate Judge. He has contested the propriety of the two findings reached by the learned Subordinate Judge, namely, that ad valorem court-fees were payable on the plaint and that the suit for partition was not maintainable, the property being in the possession of a tenant.

[4] As regards the first contention, although the property in dispute is in the possession of a tenant from month to month, the plaintiff along with his co-sharers has juridical possession in the same. As such, the plaintiff must be deemed to be in possession of his interest in the joint property and no ad valorem court-fee is payable. The suit should be regarded as a suit for partition pure and simple. The first ground on which the learned Subordinate Judge dismissed the plaintiff's suit must, therefore, be set aside.

[5] As regards the second contention, namely, whether a suit for partition is maintainable as the sole item of property which is the subject-matter of partition is in the possession of a tenant who, in the present case, happens to be a co-sharer in the disputed property, the learned Subordinate Judge has answered the same in the negative.

[6] As I have already indicated, the shares of the plaintiff, defendant 1 (who is also the tenant) and defendant 2 in the disputed property are equal and this fact is not disputed. It cannot be disputed that the nature of the property is such as does not preclude a partition of the same. The only contention is that as the property is in the occupation of a tenant, actual partition by metes and bounds and delivery of actual physical possession being impossible, a suit for partition cannot be made. If an item of property is joint and is held by co-sharers each of the co-sharers has a right to get his share partitioned and to convert his joint tenancy into a tenancy held in severalty by each one of the co-sharers. The fact that there may be inconvenience in partitioning the property or that a partition may prejudice the rights of one or the other of the parties is per se no ground for disallowing the right of a co-sharer to claim partition of his undivided interest. It is quite true that in a case like the present it may not be possible for the Court to put the plaintiff into physical possession of the property after a final decree for partition has been made, and the plaintiff may have to content himself with a decree entitling him to symbolical possession of his undivided share in the property. That such possession can be delivered is apparent from the provisions of O. 21, R. 36, Civil P. C. which lays down the procedure for delivery of possession of property in the possession of a tenant. In my opinion, the mere fact that the subject-matter of partition is tenanted does not preclude the Court from passing a preliminary decree for partition.

[7] The view taken by me is supported by two decisions of the Madras High Court, (1) in the case of *Suryanarayanamurti* v. *Tammanna*, 25 Mad. 504 and (2) in the case of *Uppala Raghava Charlu* v. *Uppala Ramanuja Charlu*, 26 Mad. 78. In both these cases the Madras High Court took the view that the mere fact that the property which is the subject-matter of partition is in the occupation of a tenant does not disentitle a co-sharer in an undivided property from claiming partition. The second contention raised by Mr. Bakshi must therefore be given effect to.

[8] The result is that the decision of the learned Subordinate Judge must be set aside and a preliminary decree for partition must now be made. The plaintiff appellant will have a decree for costs of the trial Court to the extent of one-third. He will also have his costs of this appeal—hearing fee being assessed at five gold mohurs.

[9] **Guha Ray J.**—I agree.

B.M.K.S. *Appeal allowed.*

A. I. R. 1953 Calcutta 37

BOSE J.

United Commercial Bank Ltd.—*Petitioner* v. *Kartar Singh Campbellpuri* — *Respondent.*

Civil Revn. No. 1801 of 1951, D/- 1-5-1952.

Industrial Disputes (Appellate Tribunal) Act (1950), Ss. 11 (7) and 12 (1) — Order for costs against stranger to proceeding—When can be made—Order against stranger without jurisdiction —Remedy is by application under Art. 226, Constitution of India, and not by appeal under S. 12 — (Constitution of India, Art. 226) — (Civil P. C. (1908), S. 35).

The absence of the word "party" in S. 11 (7) indicates that the Legislature has conferred the largest discretion on the Tribunal to make even a stranger to the proceeding liable for the payment of costs in appropriate cases. Now a stranger to a proceeding can be made liable to pay the costs only under certain special circumstances, such as where a proceeding is an abuse of the process of the Court. 50 Cal. W. N. 296 and A. I. R. 1930 Mad. 577, *Referred.* [Paras 8 and 10]

It is only on well-recognised principles that a Court can make an order for costs against a person not a party to a proceeding. [Para 12]

Where some of the employees of the petitioner bank, who were members of a Union formed by employees of the various Banks, represented the cause of the employees of some other banks in a proceeding relating to industrial dispute to which neither the employees' representatives nor the petitioner bank were parties and the Tribunal passed an order against the petitioner bank for costs incurred by the employees' representatives incidental to the proceedings without giving opportunity to the petitioner to put forward its case and to be heard in the matter:

Held, (1) that not only there was no judicial exercise of discretion but the order passed was in violation of

the principles of natural justice and was thus an order passed without jurisdiction and was liable to be quashed by Certiorari;

(2) that the petitioner not having been made a party to the proceeding was not an aggrieved person within the meaning of S. 12 (1) and therefore had no right of appeal under S. 12 (1). He had, therefore, properly invoked the jurisdiction of the High Court under Art. 226. 50 C. W. N. 296, *Disting.* [Paras 6, 18].

Anno. Civil P. C., S. 35, N. 9.

K. K. Bose and Purnendu Sekhar Bose — for Petitioner ; Sitaram Banerjee and S. K. Rai Choudhury — for Respondent.

REFERENCES: Courtwar / Chronological / Paras.

('42) AIR 1942 All 233: (I L R (1942) All 832 F.B.) 18
('46) 50 Cal W N 296 6, 10
('30) 53 Mad 708: (A I R 1930 Mad 577) 11
('52) 1 All E R 122 9

Order.— This is an application under Art. 226 of the Constitution for an appropriate Writ for quashing of an order of an Industrial Tribunal dated 19-5-1951 whereby the petitioner has been directed to pay certain costs and expenses incurred by an employee of the petitioner in connection with certain proceedings before the Industrial Tribunal at Dehra-Dun.

[2] The petitioner is a company incorporated under the Indian Companies Act having its registered office at Delhi and its head office at 2 Royal Exchange Place, Calcutta. The respondent is the Chairman, Central Government Industrial Tribunal, Calcutta, having his office at 20/1, Gurusaday Dutt Road, Ballygunge, Calcutta, within the jurisdiction of this Court.

[3] The case of the petitioner is that one A. C. Kakkar is an employee of the petitioner and Mr. Kakkar represented the employees of several other banks in certain proceedings in connection with industrial disputes between those banks and their employees before the respondent, sitting as Chairman of the Central Government Industrial Tribunal at Dehra Dun between 7-5-1951 and 19-5-1951. Neither the petitioner Bank nor its employees were parties to any of the disputes or proceedings dealt with by the respondent at the sitting of the Tribunal at Dehra Dun, nor did Mr. Kakkar attend the proceedings in his capacity as representative of the employees of the petitioner Bank. At the conclusion of the proceedings the respondent by an order made on 19-5-1951 directed that the Union representatives should be paid by the respective banks of which they were employees, single second class fare both ways from their place of duty to Dehra Dun and back and diem allowance at the rate of Rs. 5 per day for the days they attended at Dehra Dun. The petitioner was directed to pay the expenses incurred by Mr. Kakkar. The order was made without hearing the petitioner bank which was not a party to the proceedings in which the order was made.

The petitioner submits that the Banks which were parties to the proceedings at Dehra Dun and the cause of whose employees the said Mr. Kakkar was representing in those proceedings should bear the costs and expenses of Mr. Kakkar and the petitioner Bank which was not a party to any of the proceedings at Dehra Dun should not be made liable to pay the costs and expenses incurred by Mr. Kakkar in connection with the said proceedings at Dehra Dun. After the order was made and communicated to the petitioner, representation was made on behalf of the petitioner to the respondent by a letter dated 1-6-1951. The respondent thereupon heard a representative of the petitioner at a sitting held at Naini Tal but confirmed the order made by him on 19-5-1951. This order of confirmation was made on 9-6-1951 but was communicated to the petitioner on or about 9-7-1951, and subsequently by a letter dated 10-7-1951 the respondent called upon the petitioner to pay to Mr. Kakkar the expenses ordered to be paid by him. The petitioner thereupon moved this Court and obtained a Rule Nisi.

[4] Mr. Sitaram Banerjee who appears for the opposite party has contended that the petitioner's proper remedy is to appeal from the decision of the Tribunal under s. 7, Industrial Disputes (Appellate Tribunal) Act, 1950 (Act 48 of 1950) and its remedy is not by way of an application under Art. 226 of the Constitution. It is submitted that the question of the power of the tribunal to award costs against one not a party to the proceeding is a substantial question of law and hence the decision is appealable under s. 7 (1) (a) of the Act.

[5] It appears to me that this contention cannot be accepted. The right of appeal is a creature of Statute and it can be exercised only by those in whom the power is vested expressly or impliedly by the Statute. The Industrial Disputes Act 1947 and the Industrial Disputes (Appellate Tribunal) Act have set up Special Tribunals with special jurisdiction to decide industrial disputes. Section 12, Industrial Disputes (Appellate Tribunal) Act, is as follows:

12. *Presentation of Appeal* —An appeal under this Act against any award or decision of an industrial tribunal may be presented to the Appellate Tribunal by

(i) any party which is aggrieved by the award or decision; or

(ii) the appropriate Government or the Central Government, where it is not the appropriate Government, whether or not such Government is a party to the dispute."

[6] Thus sub-s. (1) of this section entitles only a party aggrieved to present an appeal and not a person who is a stranger to the proceeding. The petitioner was not a party to the proceeding in which the decision directing it to pay certain expenses of its employee was made. It was therefore not open to the petitioner to present an appeal to the Appellate Tribunal. Mr. Banerjee referred to the case in *Prokash Krishna* v. *Radha Madan Gopal*, 50 cal. W. N. 296 in support of his proposition that a stranger can appeal. But the case does not support that proposition. In that case one of the appellants was a defendant and the other was the next friend of the deity till sometime of the suit and then he was removed

by an order of Court. This contention of Mr. Banerjee therefore fails.

[7] The question that therefore falls for determination is whether the petitioner is entitled to any relief in this application under Art. 226 of the Constitution. I am of the view that the petitioner is so entitled. Section 11 (7), Industrial Disputes Act, is in the following terms:

"Subject to the rules made under this Act, the costs of and incidental to any proceeding before a Tribunal shall be in the discretion of the Tribunal and the Tribunal shall have full power to determine by and to whom and to what extent and subject to what conditions, if any, such costs are to be paid and to give all necessary directions for the purposes aforesaid and such costs may on application made to it by the person entitled be recovered as arrears of land revenue or as a public demand by the appropriate Government."

[8] The wording of this section is very similar to the wording of s. 35, Civil P. C., and the words "by whom" are extremely wide and give the Tribunal a complete discretion in the matter of costs. The fact that the word "party" has not been used as in s. 35A, Civil P. C., gives clear indication that the Legislature deliberately omitted the word "party" in s. 11 (7) of the Act in order to confer the largest discretion on the Tribunal to make even a stranger to the proceeding liable for the payment of costs in appropriate cases. There can therefore be no doubt that the Tribunal has jurisdiction to direct a person who is not a party, to pay costs of and incidental to a proceeding, to such person as the Tribunal may direct. The expenses directed to be paid in the present case are those incurred for attending and conducting the proceedings at Dehra Dun and so these are costs incidental to the proceedings. The Tribunal had therefore jurisdiction to direct payment of these costs.

[9] It has been held however that if the order impugned is a "speaking order" or in other words an order which on the face of it sets out the reasons for making the order, such an order can be quashed by certiorari if the reasons are bad in law. See *R.* v. *Northumberland Compensation Appeal Tribunal*; *Ex Parte Shaw*, (1952) 1 ALL E. R. 122.

[10] Now a stranger to a proceeding can be made liable to pay the costs only under certain special circumstances. When a proceeding is an abuse of the process of the Court, costs have been directed to be paid by a stranger to the proceeding. Thus, for example, if a person not a party uses the name of a man of straw as plaintiff or uses the name of another as a blind for himself such conduct is an abuse of the process of the Court and that person can be ordered to pay the costs: *Prokash* v. *Radha Madan Gopal*, 50 Cal. W. N. 296 at p. 304.

[11] So also a person executing a Security Bond has been directed to pay the costs payable under a decree although he was not a party to the suit and no decree was passed against him on the ground that he had made himself liable under the Bond for payment of the costs, *Asuram Sadasuk* v. *Sub-Collector, Rajahmundry*, 53 Mad. 708.

[12] It is only on well-recognised principles that a Court can make an order for costs against a person not a party to a proceeding.

[13] The respondent however has formulated a principle of his own and directed the Banks concerned to pay the expenses of their respective employees although such employees incurred the expenses in representing the interest of others in proceedings to which the Employer Banks were not parties at all. This does not appear to be a proper exercise of the discretion. The order made by the respondent was based on a wrong apprehension of the scope of the power vested in him under the provisions of s. 11 (7), Industrial Disputes Act (Act 14 of 1947). In dealing with the claim of the representatives for diem allowance the respondent states :

"There is no provision for this demand in the Act but it has been recognised by this time by me also, with some modification, that the Union representatives should be paid as office bearers and representatives of Union and I see no good reason to depart from this establishment practice. I would, therefore, according to modified rates adopted by me direct that the Union representatives would be paid by their banks concerned, single second class fare both ways from their place of duty to Dehra Dun and back as well as Diem allowance at the rate of Rs. 5 (five) per day for the days they attended the proceedings of the Tribunal at Dehra Dun."

[14] The names of the representatives are then set out and the respondent later on states in the order that these representatives should be treated as on duty for the days they attended at Dehra Dun.

[15] The petitioner has been directed by this order to pay the railway fares and 13 days' allowance.

[16] The Union which has been formed for the purpose of collective bargaining is for the benefit of the employees and for promotion of their interest. It is the employees who are the members of the Union. If the employees have decided that they will be represented in the proceedings by certain selected representatives of the employees, I fail to see on what reasonable principle the employer banks can be made liable to pay the expenses incurred by these representatives, employees. In the present case the petitioner bank had no control over the proceedings at Dehra Dun and if the parties to these proceedings at Dehra Dun had with the assistance of the representatives including Mr. Kakkar prosecuted the proceedings, say, for several months, would it be a reasonable order to direct the petitioner to bear the burden of the entire cost incurred by the representative for these several months although the petitioner was not a party to the proceedings and derived no benefit out of these proceedings? Does it make any difference that only few days' expenses have been directed to be borne by the petitioner? The answers must be in the negative. It may be that the principles on which a Civil Court exercises

discretion in awarding costs against strangers to the proceedings in ordinary civil litigation may not have scope for their application in proceedings relating to industrial disputes and certain different principles may have to be applied in the matter of awarding costs in respect of such proceedings, but the so-called principle on the basis of which the petitioner has been directed to pay the expenses of Mr. Kakkar in the present case does not commend to me as a sound exercise of the discretion. It is a capricious exercise of the power.

[17] Not only there has been no judicial exercise of the discretion but the Order dated 19th MAY 1951 appears to have been passed in violation of the fundamental principles of judicial procedure. There cannot be any doubt that the Tribunal was acting judicially or quasi-judicially in determining the liability for costs and yet no opportunity was afforded to the petitioner to put forward its case and to be heard in the matter.

[18] In dealing with the question as to the circumstances under which an order for costs can be made against a stranger to a suit a Full Bench of the Allahabad High Court held that before such an order can be passed the stranger should be made a party to the litigation and he must be given an opportunity of being heard. See *Chandra Shekhar* v. *Manohar Lal*, A. I. R. 1942 ALL. 233 (F. B.). The order of 19th MAY 1951 which was passed in violation of the principles of natural justice was thus an order passed without jurisdiction and was liable to be quashed by Certiorari. It appears however that subsequently upon representation being made by the petitioner a representative of the petitioner was heard on 9th JUNE 1951 at Naini Tal but the respondent confirmed the order that he made on 19th MAY 1951 at Dehra Dun. The petitioner has however not been made a party to the proceeding and has thus been deprived of its right of appeal under the Industrial Disputes (Appellate Tribunal) Act. In the circumstances the petitioner has properly invoked the jurisdiction of this Court under ART. 226 of the Constitution.

[19] In my view this petition should succeed. The Rule is made absolute. The orders dated 19th MAY 1951 and 9th JUNE 1951 are quashed. The opposite party is directed to forbear from giving effect to these orders. The petitioner is entitled to costs of the present proceedings. Hearing fee is assessed at three gold mohurs.

B/G.M.J. *Rule made absolute.*

A. I. R. 1953 Calcutta 40

K. C. DAS GUPTA AND LAHIRI JJ.

Pulin Behari Dinda and another—*Petitioners* v. *Byomkesh Mitra and others*—*Opposite Party.*

Civil Revn. Cases Nos. 87 and 88 of 1952, D/-4-7-1952.

(a) Municipalities — Bengal Municipal Act (15 of 1932), Ss. 38 and 39 — Scrutiny and computation of votes—Certain votes cast at an election found to be invalid—It is improper for the Court to add these votes to the votes of a candidate who was at the bottom of the poll and to deduct the same number from the votes secured by each of the successful candidates—Proper procedure for the Court is to open the ballot box and to count itself the votes in order to find out in whose constituency the invalid votes had been cast—*(Obiter)*. [Paras 2, 3]

(b) Constitution of India, Art. 227—Laches of applicant — Court would refuse to interfere if no special circumstances are shown to explain delay and position of parties has changed.

While the Court would not hesitate to exercise its extraordinary jurisdiction under Art. 227 of the Constitution to cure defects of justice committed by tribunals in the country, the Court has to take into consideration the conduct of the party as well as the consequences which would ensue as a result of such interference. [Para 5]

Thus, where the petitioner under Art. 227 is guilty of inordinate delay of two months and a half in impugning the order setting aside the election and ordering a fresh election and in the meanwhile steps have been taken in furtherance of the impugned order to hold fresh election and in fact the fresh election is held before the petition comes for hearing before the High Court, it would refuse to exercise the extraordinary jurisdiction under Art. 227 when no special circumstances are shown to exist to explain the delay. [Para 5]

Apurba Charan Mukherjee and Saroj Kumar Maitra—*for Petitioners; Purnendu Sekhar Basu*—*for Opposite Party.*

K. C. Das Gupta J.—In this case two persons who along with one Pulin Behari Dinda had been declared elected as municipal commissioner in the municipal election in ward NO. II in Midnapore, have asked for the Court's interference under ART. 227 of the Constitution with the order passed on 26-9-1951 by the Additional Subordinate Judge, Midnapore, in an application under S. 38, Bengal Municipal Act for setting aside the election. The validity of the election was challenged on a large number of grounds. The learned Subordinate Judge held that there was no substance in most of the objections. He found however that two voters had been prevented from casting their votes because the polling booth was not opened at the proper time, that two votes were cast in the names of two dead persons that the vote cast in the name of the Manager, Burma Shell Co., was cast by somebody else than the manager and also that the vote cast in this constituency by one Anil Kumar Kundu was invalid as he had already exercised his franchise in another constituency. In deciding the question whether these contraventions in law had materially affected the election the learned Judge thought that it should be proper to add the six votes to the person who was at the bottom of the poll and that the 4 invalid votes should be deducted from the total number of votes secured by each of the successful candidates. It was on such accounting that he came to the conclusion that the irregularities and illegalities found by him had materially affected the result of the election.

[2] It has been contended before us that the learned Judge was wrong in his view that in a municipal election a person could not vote more

than once in two different wards but the main ground on which his decision was challenged was that the learned Judge should have himself opened the ballot box and counted the vote to find out in whose constituency in fact the 4 invalid votes had been cast and that it was mathematically wrong for him to deduct the 4 votes several times over from the total votes secured by the different candidates.

[3] In my judgment, there is much force in this contention which has been pressed before us by Mr. Mukherjee on behalf of the petitioner and we might have been inclined to interfere if the petitioner had moved this Court within a reasonable time. Considering the great delay after which the petitioner moved this Court I have come to the conclusion that the Court's extraordinary jurisdiction under Art. 227 of the Constitution should not be exercised.

[4] The order setting aside the election and directing fresh election to be held was passed by the learned Subordinate Judge on 26-9-1951. This Court was not moved till 6-12-1952. It appears that on 16-11-1951, to implement the order passed by the Subordinate Judge, the District Magistrate issued an order fixing 8-3-1952 for the election and that on 14-12-1951 the commissioners of the municipality fixed the last date for nomination on 30-1-1952. It is difficult to understand why during all this time the petitioner did not think fit to move this Court. The position now is that the election has been held. It is true that the petitioner moved this Court more than 2 months before the date of election but it cannot be overlooked that the great delay made by him in moving this Court was at least in part responsible for the situation that the matter could not be taken up for hearing before the date of election. If he had moved this Court in time there would have been a reasonable chance of the matter being taken up and disposed of before 8-3-1952.

[5] While the Court would not hesitate to exercise its extraordinary jurisdiction under Art. 227 of the Constitution to cure defects of justice committed by tribunals in the country, the Court has to take into consideration the conduct of the party as well as the consequences which would ensue as a result of such interference. If in this case the parties had moved this Court in time, the consequences which would now result if this Court interferes with the decision of the Subordinate Judge might have been avoided. The fact of delay made by the petitioner in moving this Court is, therefore, in my opinion, a circumstance which this Court is bound to take into consideration in deciding whether it should exercise its extraordinary jurisdiction. As no special circumstances have been established to explain his delay it will be improper to act under Art. 227 of the Constitution in such cases of delay. To do so would be to encourage parties to come at any time they liked.

[6] On consideration of these circumstances I have come to the conclusion that this application should be rejected. In the result these Rules are discharged. There will be no order as to costs.

[7] **Lahiri J.**—I agree.

B/K.S. *Rules discharged.*

A. I. R. 1953 Calcutta 41

K. C. CHUNDER J.

Sukdeo Singh — Petitioner v. Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 248 of 1952, D/- 26-6-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), S. 386 (1) (c) — Mere keeping of a buffalo is not an offence under section—It must also be proved that the animal was kept 'for sale or hire or for sale of the produce thereof'. [Para 1]

(b) Criminal P. C. (1898), Ss. 244, 256, 261 and 262—Trial before Municipal Court for offence against Municipal Act — Accused pleading not guilty — Accused has every right to adduce evidence in defence—Accused cannot be denied this right — (Municipalities — Calcutta Municipal Act (3 of 1923), S. 386 (1) (c).) [Para 2]

Anno. Criminal P. C., S. 244, N. 7 ; S. 256, N. 10 ; S. 261, N. 4 and S. 262, N. 2.

(c) Penal Code (1860), Ss. 40 to 42 and 64 to 67 — Offence under Calcutta Municipal Act punishable with fine only — Magistrate has jurisdiction to impose sentence of simple imprisonment in default of fine — (Bengal General Clauses Act (1 of 1899), S. 26). *(Obiter).*

(Obiter).— The Calcutta Municipal Act is a Special or Local law within the meaning of Ss. 41 and 42, Penal Code, and therefore, by virtue of S. 40 (2), Penal Code, offences under the Municipal Act will be offences for purposes of Ss. 64 to 67, Penal Code. [Para 3]

Moreover, by virtue of S. 26, Bengal General Clauses Act, 1899, the provisions of Ss. 63 to 70, Penal Code, will also apply to the Calcutta Municipal Act. [Para 3]

Hence, where an offence under the Calcutta Municipal Act is punishable with fine only, the Magistrate has jurisdiction to impose a sentence of simple imprisonment in default of fine by virtue of S. 64, Penal Code : 15 Cal. W. N. 906 and 56 Cal. W. N. 339, *Doubted.* [Para 3]

Gopal Chandra Narayan Choudhury—for Petitioner; Ajoy Kumar Bose—for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras.
('11) 15 Cal. W. N. 906 : (11 Ind. Cas. 143). 3
('52) 56 Cal. W. N. 339. 3

Order.— This rule was issued at the instance of an accused person who had been convicted by a Municipal Magistrate sitting in a Mobile Court for an offence under s. 386 (1) (c), Calcutta Municipal Act, read with s. 488 of the said Act. The accused was caught hold of and produced before the Magistrate and the charge against him was that he kept a buffalo. The learned Magistrate's judgment as regards the evidence is this :

"Sukdeo (that is, the accused) does not plead guilty. S. O. G. C. Roy says he has one buffalo. He denied. Fined Rs. 15, in default S. I. for week."

Accepting everything that the S. O. G. C. Roy said as gospel truth I fail to see how any conviction could be based on the evidence. Perhaps as it was a mobile Court it was too much for the learned Magistrate to be burdened with a copy of the Municipal Act. If he had barely referred to

s. 386 (1) (c) itself he would have seen that it is in these terms :

"(c) keeping horses, cattle or other four footed animals for sale or hire or for sale of the produce thereof".

Mere keeping of a buffalo is not an offence and all that the evidence says is that he merely kept a buffalo. The other ingredients, namely, 'for sale or hire or for sale of the produce thereof' appear nowhere within the four corners of the report. In submitting his explanation even he does not look up the section to see what error, if any, he has committed. In submitting his explanation to a superior Court he should look up the Act itself. On the evidence adduced the conviction cannot stand.

[2] Then again the learned Magistrate was perhaps under the impression that as a Municipal Court he was not guided by any fetters of law or procedure. When the accused pleaded not guilty he had every right to adduce evidence in defence. He was denied this right. I do not know whether it was the learned Magistrate's idea that the Municipal Courts are now to be guided by the principles under which the Kazis used to administer justice during the Mogul rule. The conviction and sentence must therefore be set aside.

[3] It was urged before me that as a mere fine was provided for in the Act itself the learned Magistrate had no jurisdiction to inflict a sentence of simple imprisonment in default of payment of fine. My attention has been drawn to two decisions of this Court to that effect, one reported in the case of *Basanta Kumari* v. *Corporation of Calcutta*, 15 cal. W. N. 906, and another, which did not notice the previous decision but treated the matter as de novo, by my learned brother Chakravartti and Sinha JJ. reported in the case of *Ram Dayal Tewari* v. *Corporation of Calcutta*, 56 cal. W. N. 339. Unfortunately, in both these decisions, it was not noticed that under the Indian Penal Code offences are classified in different ways. In some cases offences are only offences under the Indian Penal Code. It would be right in such cases to say, as the learned Judges of the Division Bench have said, that offences under the Indian Penal Code refer to offences only under that Code. Section 40, Penal Code, is not wholly to that effect. It says that in connection with the provisions of ss. 64 to 67, Penal Code, the word 'offence' includes anything punishable under the Indian Penal Code or under the special or local law as hereinafter defined and in s. 41 special law had been defined as a special law applicable to a particular subject and in s. 42 the local law has been defined as a law applicable only to a particular part of British India. There can therefore be no doubt that the Calcutta Municipal Act will come within the definition of special and local law and s. 64 which deals with imprisonment in default of fine is made applicable under the Indian Penal Code not merely to offences under the Indian Penal Code but also under special and local laws.

Then again, in s. 26, Bengal General Clauses Act, (Act 1 of 1899), it is definitely provided that :

"Sections 63 to 70, Penal Code, and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fine was applied to all fines imposed under any Bengal Act or any ....."

Therefore ss. 63 to 70, Penal Code, will also apply to the Calcutta Municipal Act as the Calcutta Municipal Act is an Act of Bengal Legislature being Bengal Act 3 of 1923, which is subsequent to Bengal General Clauses Act, Bengal Act 1 of 1899. Therefore with great respect I doubt the correctness of both the Division Bench decisions which appear to me to go against definite statutory provisions. Had it been necessary for me to make a reference to Full Bench I would have done so, but in the present case as the conviction and sentence must be set aside on the ground that the learned Magistrate did not consider himself bound by any provision of law, no reference to the Full Bench can be made.

[4] The result therefore is that the rule is made absolute. The conviction and sentence are set aside and the fine, if paid, is to be refunded.

B/K.S. *Conviction and sentence set aside.*

A. I. R. 1953 Calcutta 42

G. N. DAS AND GUHA RAY JJ.

Sm. Mahalakshmi Debi and another — Petitioners v. *Bama Charan Nandi and another — Respondents.*

First Appeal No. 48 of 1952, D/- 14-8-1952.

(a) Civil P. C. (1908), S. 115 — Dismissal of suit under S. 8B (3) (Bengal), Court-fees Act — Appeal against decree, embodying order, dismissed for non-payment of printing costs — Subsequent application in revision against order of lower Court, dismissing suit under S. 8B (3) (Bengal), Court-fees Act, is not incompetent by reason of dismissal of appeal—(Court-fees Act (1870), S. 8B, (Bengal)). [Para 6]

Anno. Civil P. C., S. 115, N. 27b; Court-fees Act, S. 8B Notes 8A to 8F (Bengal).

(b) Civil P. C. (1908), O. 7, R. 11 — Insufficiently stamped plaint — Dismissal of suit under S. 8B (3) (Bengal), Court-fees Act is not tantamount to rejection of plaint — (Court-fees Act (1870), S. 8B (3) (Bengal)).

An interpretation that the effect of an order under S. 8B (3) (Bengal), Court-fees Act, is a rejection of the plaint inspite of the fact that the section uses the expression "the suit shall be dismissed," though plausible, cannot be accepted. By the Court-fees (Amendment) Act 1935 a distinction has been clearly drawn between the rejection of a plaint in S. 6 (2) and the dismissal of the suit under S. 8B (3) (Bengal). Therefore, S. 6 (2) and S. 8B (3) of the amended Court-fees Act and O. 7, R. 11, Civil P. C. should be so construed as to make them consistent. The real intention of the Legislature seems to be that if after the plaint has been filed the Court is of opinion that the plaint is insufficiently stamped, the Court can make an order for rejection of the plaint. If however the question of court-fees payable is gone into at a later stage after the defendant has entered appearance and the Court then comes to a decision and makes an order under

S. 8B (3) (Bengal), the effect of disposing of the suit for non-compliance with the order for payment of court-fees is a dismissal of the suit under S. 8B (3) (Bengal), Court-fees Act. It is therefore not possible to construe a dismissal of the suit under S. 8B (3) (Bengal) as a equivalent to a rejection of the plaint under O. 7, R. 11, Civil P. C. [Para 8]

Anno. Civil P. C., O. 7, R. 11, N 10; Court-fees Act, S. 8B, Notes 8A to 8F (Bengal).

(c) Civil P. C. (1908), S. 2 (2) — Adjudication on court-fees—Order of dismissal of suit under S. 8B (3) (Bengal), Court-fees Act — (Court-fees Act (1870), S. 8B (3) (Bengal)).

The mere fact that a decree has actually been drawn up after ordering the dismissal of suit under S. 8B (3) (Bengal), Court-fees Act, does not affect the question whether a decision is a decree or not the determination of which depends on the terms of S. 2 (2), Civil P. C. An adjudication upon a matter of court-fees does not determine any of the matters in controversy in the suit. As such, a dismissal under S. 8B (3) (Bengal) cannot be regarded as a decree within S. 2 (2), Civil P. C. [Para 9]

Anno. Civil P. C., S. 2 (2), N. 6.

(d) Court-fees Act (1870), S. 7 (4) (c), Sch. II, Art. 17 (6) and S. 7 (VIA) (Bengal) — Applicability — Suit by plaintiff in possession for declaration of shares of parties—Plaint also containing prayer for declaring preliminary decree in previous suit fraudulent and invalid and restraining defendant permanently from executing decree—Court-fees payable.

The passing of a preliminary decree for partition in a suit does not bar a second suit for partition between the parties and in such a suit a prayer for declaration that the preliminary decree passed in the previous suit is fraudulent and invalid is a superfluous prayer and does not alter the nature of the suit itself. Regarded in this light the plaint which contains the allegation that the plaintiff is in possession and also a prayer to the Court to declare the respective shares of the parties in the suit property and pass an order restraining the defendant permanently from executing the decree must be regarded as a plaint in a suit for partition with a prayer for an injunction. Such a suit cannot be regarded as coming within S. 7 (IV) (c), Court-fees Act, but it is a suit for partition which comes within Sch. 2, Art. 17 (6), Court-fees Act. The allegation in the plaint being that the plaintiffs are in possession S. 7 (VIA) (Bengal), Court-fees Act can have no application in the case. As the suit comes within Sch. 2, Art. 17 (6), Court-fees Act the court-fees payable on the prayer for partition is only Rs. 15: A. I. R. 1938 Oudh 1 (F. B.); A. I. R. 1930 Cal. 686 and A. I. R. 1939 Pat. 274, *Disting.* [Para 10]

Anno. Court-fees Act, S. 7 (4) (c), N. 1; Sch. II, Art. 17 (vi), N. 10.

Ranjit Kumar Banerjee — for Petitioners; Bijan B. Mitter — for Respondents.

REFERENCES: Courtwar/ Chronological/ Paras.

('30) 34 Cal. W. N. 870 : (A. I. R. 1930 Cal. 686) 11
('48) 52 Cal. W. N. 684 : (I. L. R. (1948) 2 Cal. 149) 8
('38) 13 Luck 628 : (A. I. R. 1938 Oudh 1 F. B.) 10
('39) 18 Pat. 267 : (A. I. R. 1939 Pat. 274) 11

G. N. Das J.—This is an application on behalf of the plaintiffs-petitioners and is directed against an order made by Mr. Fatik Chandra Roy Choudhury, learned Subordinate Judge, Hooghly, holding that the suit was not properly valued and stamped and requiring the plaintiffs to put in the deficit court-fees within one week from that date.

[2] The plaintiffs' allegation in the plaint is that the disputed properties which are described in items Nos. 1 to 4 of the plaint belonged at one time to a joint family consisting of four brothers, Bama Charan, defendant 1 of this suit, Shama Charan, Panchanan and Satish. Shama Charan's son Kalipada is defendant 2 in this suit. Panchanan's widow Mahalaxmi is plaintiff 1 and his son Dulal is plaintiff 2. Satish is dead. On certain allegations made in the plaint the plaintiffs alleged that a preliminary decree passed in a previous suit for partition being Title suit No. 31 of 1947 was inoperative, fraudulent and not binding on the plaintiffs of this suit.

The plaintiffs alleged that in items Nos. 2 to 4 of the plaint in the present suit the plaintiffs have 8 annas share and defendant 2 the other 8 annas share and in item No. 1 the plaintiffs have 6 annas share; defendant 2, 6 annas share and defendant 1 the remaining 4 annas share. The plaintiffs also alleged that defendant 1 had executed the decree for partition in the aforesaid suit No. 31 of 1947 and was trying to realise the sums of money which under that decree were to be paid by the present plaintiffs. The plaintiffs further alleged that they were in possession of the disputed properties inspite of the aforesaid decree for partition. The plaintiffs accordingly prayed for a declaration (1) that the decree dated 24-7-1947, in suit No. 31 of 1947 was void, inoperative, fraudulent and not binding on the plaintiffs, and (2) that in item No. 1 of the plaint schedule the plaintiffs have 6 annas share, defendant 2, 6 annas share and defendant 1 the remaining 4 annas share and in the other items the plaintiffs have 8 annas share and defendant 2 the remaining 8 annas share, defendant 1 having no share in the said properties. The plaintiffs also prayed for a permanent injunction restraining the defendants from executing the decree obtained in the said suit No. 31 of 1947. The suit was valued at Rs. 13,950 for partition and a court-fee of Rs. 15 was paid therefor. The suit was valued at Rs. 50 for declaration and a court-fee of Rs. 2-13-0 was paid on the said sum of Rs. 50.

[3] The defendants entered appearance and raised a preliminary issue, namely, whether the suit was properly valued and whether proper court-fees were paid. This issue was decided by the learned Subordinate Judge on 27-8-1951. The learned Judge was of the opinion that the suit should have been valued on an objective basis, that basis being the difference in the value of the plaintiffs' share as decreed in the previous suit for partition and the share as claimed in this suit. On this basis the learned Judge was of the opinion that in item No. 1 the increased share which the plaintiffs claimed was 1/8th and the increased share claimed by the plaintiffs in items Nos. 2 to 4 was 1/4th. Taking the value of these items from the plaint the learned Judge valued the excess share claimed by the plaintiffs in item No. 1 at Rs. 500 and the value of the excess share in items Nos. 2 to 4 at Rs. 2487-8 annas, that is to say, the learned Judge thought that the objective value should be Rs. 2987-8 annas and calculating court-fees ad valorem on this sum the learned Judge was of the opinion that the plaintiffs were required to pay

Rs. 258-12 annas. The learned Judge directed that the deficit court-fees should be paid within one week.

The case was put up for hearing on 11-9-1951. On the said day the plaintiffs filed an application under s. 151, Civil P. C. for re-consideration of the order made by the learned Judge on 27-8-1951. This application was rejected by order No. 24. Then the learned Judge recorded the following order on the same day : "Defendant files hajira. Plaintiffs take no steps. Suit dismissed under s. 8B (3), Court-fees Act on contest. Costs to the defendant." It appears from the High Court file that the learned Judge drew up a decree embodying his order that the suit was dismissed under s. 8B (3), Court-fees Act, and specifying the costs decreed in favour of the defendants.

[4] Against the said order the plaintiffs filed a First Appeal in this Court on 3-1-1952. This appeal was registered as F. A. 48 of 1952. It appears from the Order Book that on 11-6-1952, an order was made by this Court directing the plaintiffs to deposit the initial printing cost on or before 3-7-1952, with a direction that in default of payment the appeal will stand dismissed. No deposit was made as directed and it appears that on 17-7-1952, an entry was made in the Order Book that the appeal had stood dismissed for non-payment of the initial printing cost.

[5] On 4-1-1952, the plaintiffs also made an application under s. 115, Civil P. C. challenging the propriety of the order made by the learned Subordinate Judge on 11-9-1951, dismissing the suit under s. 8B (3), Court-fees Act. Notices of this application were served on the defendants and the office note states that these notices have been properly served.

[6] Mr. Mitter, learned Advocate for defendant 1, has raised two preliminary objections. In the first place he contended that as the appeal had stood dismissed the application itself became incompetent. There is no force in this preliminary objection. The application with which we are now concerned is an independent application under s. 115, Civil P. C. and is directed against the order referred to above.

[7] The second preliminary objection raised by Mr. Mitter was that the order under s. 8B (3), Court-fees Act, must be regarded as the rejection of a plaint under o. 7, R. 11, Civil P. C. and must be deemed to be a decree within s. 2 (2), Civil P. C., and an appeal was competent, that such an appeal had been filed and was allowed to be dismissed. The plaintiffs have accordingly lost their remedy.

[8] The validity of this objection depends on the fact whether an order under s. 8B (3), Court-fees Act, must be regarded as rejection of a plaint under o. 7, R. 11, Civil P. C. It may be pointed out that by the Court-fees (Amendment) Act, 1935, both ss. 6 and 8 were amended. Section 6 was amended so as to make it clear that when the plaint has been filed on a paper which is insufficiently stamped the Court shall direct payment of the deficit court-fees within a specified time and in case of default shall make an order directing the rejection of the plaint. Section 8B (3), Court-fees Act, which was added by the amending Act provided that after the summonses of the suit have been served on the defendants, at any time after the defendants have entered appearance or thereafter but before the delivery of the judgment, the Court can make an enquiry as to the sufficiency of the court-fees necessary to be affixed to the plaint and if the Court is of the opinion that the court-fees already paid are insufficient the Court shall make an order either directing the plaintiff either to furnish security or to put in the deficit court-fees within a specified period. Section 8B (3) provides that in case of non-compliance with the said order of the Court within the time so specified by the Court, the Court shall dismiss the suit under s. 8B (3), Court-fees Act.

It was contended that though s. 8B (3) uses the expression "the suit shall be dismissed," the real effect of the order is a rejection of the plaint. Such an interpretation, though plausible, cannot be accepted. By the said amendments of the Court-fees Act, a distinction has been clearly drawn between the rejection of a plaint in s. 6 (2) and the dismissal of the suit under s. 8B (3) of the amended Court-fees Act. We must therefore so construe s. 6 (2) and s. 8B (3) of the amended Court-fees Act, and o. 7, R. 11, Civil P. C., so as to make them consistent. It seems to us that the real intention of the Legislature was that if after the plaint has been filed the Court is of opinion that the plaint is insufficiently stamped, the Court can make an order for rejection of the plaint. If however the question of court-fees payable is gone into at a later stage after the defendant has entered appearance and the Court then comes to a decision and makes an order under s. 8B (3), the effect of disposing of the suit for non-compliance with the order for payment of court-fees is a dismissal of the suit under s. 8B (3), Court-fees Act. It is therefore not possible to construe a dismissal of the suit under s. 8B (3) as equivalent to a rejection of the plaint under o. 7, R. 11, Civil P. C. This view was taken by one of the members of this Bench in the case of *Sudhir Kumar* v. *Mohadeb Chakraborty*, 52 Cal. W. N. 684.

[9] The question there is whether the dismissal of a suit under s. 8B (3), Court-fees Act, can be regarded as a decree. The mere fact that a decree has actually been drawn up does not matter because the question whether a decision is a decree or not depends on the terms of s. 2 (2), Civil P. C. An adjudication upon a matter of court-fees does not determine any of the matters in controversy in the suit. As such, a dismissal under s. 8B (3) cannot be regarded as a decree within s. 2 (2), Civil P. C. It may be mentioned that the rejection of a plaint for non-compliance with the direc-

tion for payment of court-fees or otherwise under O. 7, R. 11, Civil P. C., is expressly stated to be included within the definition of a decree under S. 2 (2), Civil P. C. I am therefore of opinion that the dismissal of the suit under S. 8B (3) is not a decree and the order complained of was not appealable. Their revision petition is therefore competent provided the matter comes within S. 115, Civil P. C.

[10] The question in this case is not a mere question of valuing the relief claimed. The question is bound up with the determination of the category to which the suit belongs for the purposes of determining the court-fees payable. In the present case the plaintiffs complained of a preliminary decree which was passed in a previous suit as being invalid and fraudulent and not binding on the plaintiffs. The prayer for a declaration which was made was not really necessary on the allegations made in the plaint. The decree was expressed to be and was in fact a preliminary decree. We have to consider the plaint as a whole and reading it as a whole I am of opinion that the suit as framed was really a suit for partition. The prayer for a declaration which was made in prayer (1) of the plaint was really an unnecessary prayer and was intended to meet a possible defence which might have been raised by the defendants.

It is well known that the passing of a preliminary decree does not bar a second suit for partition. The declaration which was therefore prayed for was a superfluous prayer and does not alter the nature of the suit itself. Regarded in this light, the plaint must be regarded as a plaint in a suit for partition with a prayer for an injunction. Such a suit cannot be regarded as coming within S. 7 (4) (c), Court-fees Act. It is not a suit for a declaration where consequential relief is prayed for but it is a suit for partition which comes within sch. 2, Art. 17 (6), Court-fees Act. The allegation in the plaint is that the plaintiffs are in possession. Section 7VIA, Court-fees Act can have no application in this case. As the suit comes within sch. 2. Art. 17 (6), Court-fees Act, court-fees payable on the prayer for partition is only Rs. 15. Mr. Mitter referred us to a decision of the Oudh Chief Court in the case of *Mt. Rup Rani* v. *Bithal Das*, 13 Luck. 628 (F.B.). In that case an item of joint property had been sold in execution of a prior decree. A final decree for partition had already been made. In those circumstances the Court was of the opinion that the institution of the suit could not be regarded as a pure suit for partition which would come within sch. 2, Art. 17 (6), Court-fees Act.

[11] Nor does the principle enunciated in the case of *In the matter of Kali Pada Mukherjee*, 34 Cal. W. N. 870 apply because the suit, as already stated, is not a suit for declaration with prayers for consequential relief. In the latter class of suits the plaintiff has to value the relief for the purposes of jurisdiction and court-fees at an identical figure. In my opinion, the learned Judge was not right in calculating the difference in the value of the relief which the plaintiffs got in the earlier partition suit and the value of the relief which the plaintiffs prayed for in the present suit. Possibly, the learned Judge had in his mind the decision of the Patna High Court in the case of *Sital Prasad* v. *Ramdas Sah*, 18 Pat. 267. In that case there was a previous completed partition, and the decision is clearly distinguishable. My conclusion, therefore, is that the suit has been properly valued and proper court-fees have been paid.

[12] In the result, the orders complained of in the petition must be set aside and the preliminary issue must be determined in favour of the plaintiffs. The suit must be regarded as properly valued and stamped and it will now proceed to trial.

[13] In view of the circumstances, we direct that the parties will bear their own costs.

[14] **Guha Ray J.**—I agree.

B/M.K.S. *Application allowed.*

A. I. R. 1953 Calcutta 45

BOSE J.

Pulin Behari Chakraburty—*Petitioner* v. *The Divisional Superintendent, Sealdah East Indian Rly. and others*—*Opposite Party.*

Civil Rule No. 2020 of 1951, D/- 11-2-1952.

(a) Civil Service Regulation and State Railway Establishment Code, R. 11 (a) — Employee summoned by Criminal Court to answer criminal charge—On appearance such person granted bail to secure future attendance—It is not "arrest"—He cannot be suspended.

Where a non-gazetted railway employee was sent a summons under S. 68, Cr. P. C., and was directed to appear before a Special Court to answer a charge under S. 420/120B, Penal Code and on his appearance a bail was was granted to him for purposes of securing his future attendance he cannot be said to have been arrested, and cannot be suspended under R. 11 (a), Civil Service Regulation and State Railway Establishment Code. [Para 14]

(b) Civil Service Regulation and State Railway Establishment Code, Rule 11 (b)—It applies to case of disciplinary or departmental proceedings against employee and not to case of criminal proceedings before Court of law. [Para 15]

(c) Civil Service Regulation and State Railway Establishment Code, Rule 11 — Though railway employee can be suspended or dismissed for any reason administration considers sufficient, punishment has to be in accordance with rules of service governing the matter. [Para 17]

(d) Constitution of India, Art. 311 — Suspension is not reduction in rank within meaning of Article—Article has no application to cases of suspension : A. I. R. 1952 Cal. 769, *Rel. on* ; A. I. R. 1949 Nag. 118, *Dissent.* [Para 19]

Sanat Kumar Mukherjee and Subodh Kumar Bhattacharyya—for Petitioner ; *Bhabesh Narayan Bose — for Opposite Party Nos. 1-3* ; *Sitaram Banerjee and Smriti Kumar Rai Choudhury—for the State of West Bengal.*

REFERENCES : Courtwar/Chronological/ Paras

('50) Case No. 33 of 1950 (Cal) 3

('51) O. S. Matter No. 130 of 1951 : (A.I.R. 1952 Cal. 769) 19

('49) A.I.R. 1949 Nag. 118 : (I.L.R. (1948) Nag. 576) 19

Order.—This is an application under ART. 226 of the Constitution of India for an appropriate writ for directing the opposite parties to forbear from giving effect to an order of suspension passed on 28-9-1950, and also for quashing of certain criminal proceedings pending against the petitioner in the Special Court at Alipore.

[2] The petitioner is an employee under the East Indian Railway and was at all material times officiating as Chief Inspector, East Indian Railway grain depot Chitpore. The petitioner joined the East Indian Railway Administration on or about 1-10-1927 as an assistant and since his appointment he has been awarded several promotions in service.

[3] On 18-8-1950, the petitioner was served with a summons dated 1-8-1950, directing the petitioner to appear before the Special Judge of the Special Court at Survey Buildings (Alipore) Calcutta, on 13-9-1950. This summons was issued under S. 68, Criminal P. C. and directed that the attendance of the petitioner was necessary to answer a charge of an offence under S. 420/120B, Penal Code in *State* v. *A. C. Khanna*, CASE NO. 33 of 1950 (cal.).

[4] In compliance with the said summons, the petitioner appeared before the Special Judge, Alipore, and the Special Judge granted him bail on that day and directed the petitioner to appear again on 16-11-1950.

[5] In the meantime on or about 28-9-1950, the petitioner received a letter from the Assistant Controller (G.S.) SDA who is opposite party NO. 2, intimating that the petitioner was placed under suspension with effect from 29-9-1950.

[6] It is alleged in the petition that before this order of suspension was passed no opportunity was given to the petitioner to offer an explanation nor was any charge sheet given to the petitioner, nor was he called upon to show cause in respect of such charges. It is further alleged that the petitioner was never put under arrest or committed to prison and, therefore, the order of suspension that was issued was an illegal order.

[7] In the petition, the petitioner has also challenged the jurisdiction of the Special Court to try the case of the petitioner that is pending there. At the hearing, however, the learned Advocate appearing for the petitioner has not pressed this point.

[8] In the counter affidavit, which has been affirmed by opposite party NO. 2, it is stated that inasmuch as a case was started against the petitioner, and he was undergoing trial before the Special Court at Alipore, there was no alternative left to the Railway Administration but to put him under suspension because of the specific provisions in the Civil Service Regulations and State Railway Establishment Code to that effect (para 4). In para. 6 of the said counter affidavit it is stated that the fact that the petitioner was granted bail by the Magistrate or the Special Court at Alipore implies that he had been arrested beforehand and as such the order of suspension was properly made.

[9] Mr. Mukherjee, appearing on behalf of the petitioner, has drawn my attention to R. 11 (a) of the Regulations regarding disciplinary action against non-gazetted staff including removal from service, dismissal and rights of appeal, published under the authority of the East Indian Railway. Rule 11 (a) runs as follows:

"SUSPENSION—A Railway servant shall be placed under suspension when he is arrested or committed to prison pending trial by a Court of law, and he shall remain under suspension until judgment is delivered by the Court unless, in the event of his release on bail, the authority competent to suspend him decides to allow him to resume duty pending decision of the Court and

(b) A railway servant whose conduct is undergoing investigation on a charge maximum penalty for which is dismissal or removal from the service may, at the discretion of the competent authority, be kept under suspension until his case has been finally decided. The period of suspension under this sub-rule should not normally exceed 4 months except with the approval of the authority next above that imposing the penalty."

[10] Mr. Mukherjee argues that as he was not at any point of time placed under arrest or was committed to prison, the railway authorities had no power to pass an order of suspension against the petitioner in exercise of the power conferred under this R. 11 (a).

[11] Section 46 (1), Criminal Procedure Code provides as follows:

"In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action."

[12] So the mode in which an arrest can be effected is laid down in this section. It is clear that no such thing happened in this case.

[13] Section 65, Criminal Procedure Code, states that any Magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant. It does not appear that the Magistrate of the Special Court at Alipur in the present case purported to act under this section.

[14] Section 496, Criminal Procedure Code, is as follows:

"When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail.

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided."

The proviso, however, need not be set out here as it is not material for the purpose of this case. This section sets out the various circumstances under which a bail can be granted and a clear distinction has been drawn between cases of arrest and detention and cases where the accused appears pursuant to or in answer to a summons issued by

the Court. The section makes it quite clear that appearance in answer to a summons and appearance under arrest are not the same thing. As I have pointed out before, the petitioner was in the present case directed to appear before the Special Court by a summons issued under s. 68, Criminal Procedure Code. As is well known, a summons is a milder form of process and is issued either for appearance (s. 68) or for producing documents or things (s. 94). In this case, the Magistrate granted bail to the petitioner for the purpose of securing his future attendance in Court. It does not appear that at any stage the petitioner was deemed to be under arrest or as being in police custody. It appears to me that the railway authorities had no power in the facts and circumstances of this case to issue any order of suspension under R. 11 (a) of the Regulations.

[15] Mr. Mukherjee also submitted that even if R. 11 (b) is applicable in this case, it does not appear that the order of suspension of the petitioner in this case was approved by the authority next above that imposing the penalty and as the period of suspension has exceeded four months in the present case the order must be deemed to be bad. But as is pointed out by Mr. Bose, appearing for the railway administration, this rule is only applicable in the case of disciplinary or departmental proceeding that might be started against the petitioner on a particular charge. It has no reference and cannot apply to any proceeding pending before a court of law. The question of applicability of R. 11 (b) may, therefore, be ruled out of consideration.

[16] It was pointed out by Mr. Bose on behalf of the opposite parties that the service agreement, which was entered into between the petitioner and the railway administration, provides inter alia, in cl. (3) as follows:

"....that the Administration has full power and authority at any time, for any reason that it may consider sufficient, to suspend or dismiss or otherwise punish the railway servant according to the rules of the service in which he is for the time being employed."

[17] It is submitted that the railway administration can suspend the petitioner for any reason which they consider as sufficient. It is clear, however, that this suspension, dismissal or any other punishment that may be inflicted upon a railway servant must be in accordance with the rules of service governing the matter. As I have pointed out, R. 11 (a) and (b) deal specifically with cases of suspension and as a specific rule has been provided relating to this matter, this rule must govern all questions of suspension that may arise between a railway employee and the railway administration. It appears to me that except on the grounds and in the circumstances prescribed in R. 11 (a) no order of suspension can be passed by the railway administration on its employees.

[18] It was further submitted by Mr. Mukherjee for the petitioner that as no opportunity was given to him to show cause before the order of suspension was made, the order is bad. It is clear, however, from R. 12 of the Regulations that it is only before an order imposing penalties which are specified in items NOS. 2 to 6 of rule 2 is passed that a railway servant is entitled to be informed of the definite offence with which he is charged and he is entitled to an opportunity to show cause why a lesser penalty should not be imposed. The penalty of suspension is, however, item NO. 7 and so outside the operation of R. 12.

[19] It was further contended by Mr. Mukherjee that suspension is reduction in rank within the meaning of ART. 311 of the Constitution of India and therefore his client should have been given reasonable opportunity to show cause as is contemplated by that Article before the order of suspension was passed by the railway authorities. I have already held in the case of *Kali Prasanna Roy* v. *State of West Bengal*, Original Side Matter NO. 130 of 1951 (cal.) differing from a decision of the Nagpur High Court reported in *Provincial Govt. C. P. & Berar* v. *Shamshul Hussain*, A. I. R. 1949 Nag. 118, that suspension is not reduction in rank within the meaning of ART. 311 of the Constitution of India. In my view, the petitioner was not entitled to have any opportunity to show cause before the order of suspension was made. In view, however, of my finding on the point that as the order of suspension was not passed in compliance with R. 11 (a) of the Regulations, the order is bad, this petition must succeed in part.

[20] The Rule is made absolute to the extent that the order of suspension dated 28-9-1950 is cancelled and the opposite parties are directed to forbear from giving effect to that order.

[21] There will be no order as to costs.

B/R.G.D. *Order accordingly.*

A. I. R. 1953 Calcutta 47

P. N. MOOKERJEE J.

A. N. Chatterjee and others — *Petitioners* v. *Sampatmull Bothra*—*Opposite Party.*

Civil Rules Nos. 2228 to 2242 of 1951, D/- 21-8-1952.

(a) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 — Duty of appellate Court—Fixation of standard rent under S. 9 (1) (f), Proviso — Dismissal of petition for fixation of fair rent by appellate authority on ground that case fell under Cl. (g) and evidence was not produced — Remand — Propriety of — (Civil P. C. (1908), O. 41, R. 25).

Where before the Rent Controller both parties rested their case on S. 9 (1) (f), and no question of the residuary provision, namely, S. 9 (1) (g) of the Act was, even remotely, raised or canvassed the dismissal of the tenant's application for absence of materials under S. 9 (1) (g) without giving him opportunity to produce the same can hardly be justified. If in law, the position be that the case is outside S. 9 (1) (f) and has to be dealt with under the residuary S. 9 (1) (g) of the Act, there must be a remand to the Rent Controller of the case so that the parties may have proper opportunities of producing before

him relevant materials for the purpose of his decision under the said section. [Para 4]

Anno. Civil P. C., O. 41, R. 25, N. 5.

(b) Interpretation of Statutes — Proviso—Scope of.

A proviso forms an exception to the main part of a section and, if a case otherwise comes within the latter, the general rule would apply unless the proviso is attracted. The proper approach in such cases would be to find out first whether, apart from the proviso the main part can be applied and then to consider whether the proviso would be attracted. If the particular case cannot at all be brought within the main part of the relevant statutory provision question of application of the proviso would not arise and other parts of the statute would have to be looked into for deciding the case. If the case is well within the main part but the proviso also applies, the latter would prevail. If, on the other hand, in any case, in which the main part clearly applies and the proviso does not, the decision must be made under the main part of the section and, merely because the proviso cannot be attracted thereto, the case would not be taken away from the main part. [Para 7]

Anno. Civil P. C., Preamble, N. 14.

(c) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (1) (f), S. 9 (1) (f) Proviso and 9 (1) (g)—Applicability.

It is not correct to say that whenever the "premises" concerned form part of a bigger construction, the main part of S. 9 (1) (f), Rent Control Act, would not apply as that would be too broad to be accepted. The true position is that if, in such a case, the proviso be found applicable, the main part of the section would cease to apply; otherwise the latter would govern the case. [Para 7]

The proviso will not apply to cases where the building, the construction of which, taken as a whole is not at least substantially complete for the purpose of being let out to tenants. [Para 6]

The inapplicability of the proviso, however, would not remove a case from the operation of the main part of S. 9 (1) (f) when that is applicable. Thus when the portions of a building, in the occupation of tenants are admittedly "premises" under the Act, constructed after 31-12-1949, the main part becomes applicable, and when the case is one to which the proviso cannot be applied, the rents of those portions have to be standardised according to S. 9 (1) (f). To such a case the residuary Cl. (g) of the section cannot be applied. [Para 8]

Atul Chandra Gupta, Chandra Narayan Laik and Pabitra Kumar Banerjee—for Petitioners; S. M. Bose, Advocate-General and Lal Mohan Ghosh —for Opposite Party.

Order.—These are fifteen Rules obtained by as many tenants of premises NO. P-36, Royal Exhange Place Extension, Calcutta, wherein the tenants petitioners complain against the dismissal of their applications under ss. 9 and 10, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, for fixation of standard rents and refund of alleged excess payments.

[2] Before the Rent Controller, more precisely, the Additional Rent Controller of Calcutta,—there were sixteen applications by sixteen tenants, namely, the petitioners before me and M/s. Mittra Sadani & Co. All the said applications were opposed by the landlord Sampatmull Bothra, who is the opposite party, in all the present Rules. The Rent Controller fixed the standard rents under the proviso to s. 9 (1) (f) of the Act assessing the 'entire construction' for the purposes of that proviso at Rs. 6,73,703-6-5—Rs. 3,18,855-5-6 being the "market price" of land at the relevant date and Rs. 3,54,848 being "the actual cost of construction"—and calculating the proportion in each case as contemplated in the said proviso to s. 9 (1) (f). The landlord appealed and the learned Judge, who heard the appeals accepted the landlord's plea, raised before him for the first time, that s. 9 (1) (f),—be it the main part or the proviso—had no application to any of the above cases, all of which fell within s. 9 (1) (g), there being no other part of s. 9 applicable to the same. The learned Judge further held that as, in the cases before him, there were no materials for coming to a decision under s. 9 (1) (g) of the Act, the tenants' applications in all the sixteen cases were liable to be dismissed. The learned Judge accordingly allowed the landlord's appeals and dismissed the tenants' applications. Against this decision, the present Rules have been obtained by fifteen of the sixteen tenants concerned, the other tenant, M/s. Mittra Sadani & Co., who was the applicant in case NO. 443A of 1941 before the Rent Controller, not having moved against the dismissal of its application by the Appellate Judge.

[3] On behalf of the petitioners two points have been urged by Mr. Gupta. In the first place, Mr. Gupta has contended that the present cases are covered by s. 9 (1) (f)—at any rate by the proviso thereof; and, if the proviso applies, the cases were correctly decided by the Rent Controller. His second argument is that, even assuming that his first contention is unacceptable and the tenants' applications could only be dealt with under s. 9 (1) (g) of the Act, the learned Judge was in error, in the circumstances of the present cases, in not giving opportunities to the tenants applicants to produce proper materials for a decision under that section and in dismissing their applications straightway on a plea raised against them for the first time at the appellate stage.

[4] That there is considerable force in the second submission of Mr. Gupta cannot be denied. It appears from the proceedings before the Rent Controller that there both parties rested their case on s. 9 (1) (f) and no question of the residuary provision, namely, s. 9 (1) (g) of the Act was, even remotely raised or canvassed. In such circumstances the dismissal of the tenants' applications for absence of materials under s. 9 (1) (g) without giving them opportunity to produce the same can hardly be justified and, if, in law, the position be that the present cases are outside s. 9 (1) (f) and have to be dealt with under the residuary s. 9 (1) (g) of the Act, there must be a remand to the Rent Controller in each of these cases so that the parties may have proper opportunities of producing before him relevant materials for the purpose of his decision under the said section. This view has not been seriously challenged by the learned Advocate-General, who appears for the landlord opposite-party, but his main argument has been directed against the first submission of Mr. Gupta which I shall presently examine.

[5] On the applicability or otherwise of S. 9 (1) (f) the respective arguments may be summarised thus:

The petitioners contend that as the portions in their respective occupation are 'premises' within the definition of that term in the Rent Control Act and as admittedly the said 'premises' were constructed—at least substantially, if not wholly, —after 31-12-1949, S. 9 (1) (f) — either the main part or the proviso thereof — would govern the present cases. On behalf of the opposite party it has not been disputed before me that the portions occupied by the petitioners are 'premises' within the meaning of the Rent Control Act nor has it been denied that the said 'premises' were constructed substantially after 31-12-1949. But it has been strongly urged by the learned Advocate-General that as the said 'premises' admittedly form part of the entire construction intended to be raised at NO. P-36 Royal Exchange Place Extension, S. 9 (1) (f) could be attracted to the present cases—if at all that section be applicable—only in its proviso but that this latter, namely, the proviso to S. 9 (1) (f), cannot apply to these cases as the entire 'construction,' namely, the proposed building, which, as the sanctioned plan shows, is a six storeyed one, has not been constructed even substantially but has been constructed roughly up to the third storey only and even that construction up to the third storey is yet far from complete. In other words, the submission is that for attracting the proviso to S. 9 (1) (f) 'the construction' or 'the entire construction,' of which the premises concerned would form a part must be at least substantially complete. The learned Advocate-General accordingly argues that neither the main part of S. 9 (1) (f) nor its proviso can be applied to the present cases so that the petitioners' rents have to be standardised under the residuary provision namely, S. 9 (1) (g) of the Act.

[6] The point thus arising from the respective contentions, above noted, is not altogether free from difficulty. Clearly, if the proviso had not been there, S. 9 (1) (f) would have covered the present cases as the portions occupied by the petitioners are undeniably 'premises' within the meaning of the Rent Control Act and were also substantially, if not wholly, constructed after 31-12-1949. The proviso, however, apparently creates a difficulty. On the proviso it may be broadly argued that where the 'premises' concerned form part of a bigger construction, the main part of S. 9 (1) (f) would not apply and the case can be dealt with under S. 9 (1) (f) only if it can be brought within the proviso. If such be the correct position in law, I would agree with the learned Advocate-General that S. 9 (1) (f) including its proviso must be left out altogether in deciding the present cases, as, in my opinion, the construction at the relevant site, namely, P-36 Royal Exchange Place Extension—whether it be taken to be the proposed six-storeyed building, as contended for by the opposite party, or that building up to the third storey level as urged by the petitioners, cannot, on the materials before me, be said to be even substantially complete so as to come within the term 'construction' as used in the proviso to S. 9 (1) (f) of the Act. That term—so it seems to me — connotes a building or construction which taken as a whole is at least substantially complete for the purpose of letting it out to tenants. This is sufficiently indicated by the proviso to S. 9 (1) (f) of the Act under which 'the total standard rent of the entire premises' has to be determined, as otherwise 'the fair proportion' enjoined therein, cannot be struck. In this view of the matter, I hold that the proviso to S. 9 (1) (f) of the Act cannot apply to the present cases and the decision of the Additional Rent Controller standardising the rents under that proviso cannot be sustained. It may be noted here that the Additional Rent Controller himself while standardising the petitioners' rents under the said proviso found some serious difficulties arising from the incomplete construction but he solved these difficulties by the simple—though not very happy or correct — method of ignoring the unfinished portion and leaving it altogether out of consideration in the matter of standardisation of rent. Such a solution appears to be hardly just or proper particularly when the unfinished portion cannot be said to be a small part of the building or construction in question, or, in other words, when its costs of construction cannot be considered negligible in relation to the costs of the finished part of the building. I agree, therefore, with the learned Advocate General that the proviso to S. 9 (1) (f) cannot be attracted to the cases before me.

[7] How then are the petitioners' rents to be standardised? There can be no question that the different portions of the building at P. 36 Royal Exchange Place Extension in the occupation of the petitioners as tenants are 'premises' under the Rent Control Act. There is also no dispute as already stated, that they were constructed, at least substantially, after 31-12-1949. Prima facie, therefore, the present cases come under the main part of S. 9 (1) (f). I have also held above that the proviso to S. 9 (1) (f) canot apply to these cases before me. In law, therefore, the petitioners' rents will have to be standardised under the main part of S. 9 (1) (f), as, in my view, the general rule for standardisation of rents of 'premises' wholly or substantially constructed after 31-12 1949, is to be found in the main part of S. 9 (1) (f) subject only to the exception, contained in its proviso. This follows from the well-known canon of statutory construction that the purpose of enacting a proviso is to provide for cases where the general rule embodied in the main part of the relevant statutory provision, which would otherwise have applied, is intended not to apply. A proviso, in other words, forms an exception to the main part and, if a case other-

wise comes within the latter, the general rule would apply unless the proviso is attracted. The proper approach in such cases would be to find out first whether, apart from the proviso, the main part can be applied and then to consider whether the proviso would be attracted. If the particular case cannot at all be brought within the main part of the relevant statutory provision, question of application of the proviso would not arise and other parts of the statute would have to be looked into for deciding the case. If the case is well within the main part but the proviso also applies, the later would prevail. If, on the other hand, in any such case—that is, where the main part clearly applies — the proviso be found inapplicable, the decision must be made under the main part of the section and, merely because the proviso cannot be attracted thereto, the case would not be taken away from the main part. The argument, therefore, that whenever the 'premises' concerned form part of a bigger construction, the main part of S. 9 (1) (f), Rent Control Act would not apply is not correct and is too broad to be accepted. The true position is that, if, in such a case, the proviso be found applicable, the main part of the section would cease to apply; otherwise the latter would govern the case.

[8] In my opinion, therefore, s. 9 (1) (f), properly interpreted, would apply to—and would thus cover—all cases where the 'premises' in question were built, substantially at least, after the 31-12-1949—the main part of the section applying to those of such cases where the proviso would be found inapplicable and the proviso governing the rest. I hold accordingly that the present cases would be governed by the main part of s. 9 (1) (f), as, on the admitted cases of both the parties, all requisites under the main part of S. 9 (1) (f), apart from its proviso, are clearly present in these cases. Plainly, therefore, there is no scope or occasion for invoking the residuary s. 9 (1) (g) for standardising the petitioners' rents and the decision of the learned Appellate Judge cannot be sustained.

[9] The result, therefore, is that this Rule is made absolute to this extent that the decisions of both the Rent Controller and the learned Appellate Judge are set aside and the cases are sent back to the Rent Controller to be dealt with by him under the main part of s. 9 (1) (f), West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, in the light of the observations contained in this judgment. It will be open to the parties to apply to the Rent Controller to adduce, if they are so advised, further or addit onal evidence on matters, relevant under that statutory provision, and the Rent Controller will consider all such applications, if made, on the merits. The petitioners' rent will then be standardised by him under the main part of s. 9 (1) (f) on the materials, already on record and such further evidence as may be adduced by the parties in pursuance of the leave above granted.

[10] There will be no order for costs in these Rules.

B/M.K.S. Rule discharged; cases remanded.

A. I. R. 1953 Calcutta 50

G. N. DAS AND K. C. DAS GUPTA JJ.

Makhanlal Roy Pramanick and others—Petitioners v. *Pramathanath Basu and others — Opposite Party.*

Civil Revn. No. 336 of 1951, D/- 28-1-1952.

(a) Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), Ss. 37A (8) and 45 — Proceeding under S. 37A — Applicability of Art. 181, Limitation Act — (Limitation Act (1908), S. 29 (2) and Art. 181).

Article 181, Limitation Act is not excluded in proceedings under the Bengal Agricultural Debtors Act, in the absence of an express provision. But the presentation of the award under S. 37A (8), Agricultural Debtors Act cannot be regarded as an application within the meaning of the word occurring in Art. 181 and that Article, therefore, does not apply to cases under S. 37A (8) of the Act. *Case law discussed.* [Paras 10 and 15]

Anno. Limitation Act, S. 29 N. 3, 4; Art. 181 N. 22.

(b) Limitation Act (1908), Preamble — Strict construction.

A Court ought not to put such an interpretation upon a Statute of limitation by implication and inference as may have a penalising effect unless the Court is forced to do so by the irresistible force of the language used. The Limitation Act, being an Act which takes away or restricts the right to take legal proceedings, must, where its language is ambiguous, be construed strictly, i.e., in favour of the right to proceed. [Para 14]

Anno. Limitation Act, Preamble, N. 6b.

(c) Limitation Act (1908), Preample—Interpretation —Equitable considerations are out of place.

Statutes of limitation are, in their nature, strict and inflexible and in construing the provisions of such Statutes, equitable considerations are out of place, the strict grammatical meaning of the words being the only safe guide. [Para 15]

Anno. Limitation Act, Preamble, N. 6B.

Sarat Chandra Jana, and Akshay Charan Pramanik—for Petitioners; Hiralal Chakraborty, Manindra Kr. Ghose and Gourhari Mitra—for Opposite Party.

REFERENCES : Courtwar/Chronological/	Paras.
('29) 56 Ind. App. 30 : (A. I. R. 1929 P. C. 19)	16
('32) 59 Ind. App. 283 : (A. I. R. 1932 P. C. 165)	15
('81-82) 6 Bom. 586.	16
('94) 21 Cal. 259.	16
('48) 52 Cal. W. N. 64 : (A. I. R. 1948 Cal. 48)	18
('49) S. M. A. No. 17 of 1949 (Cal.)	19
('49) Nandalal v. Dinendranath, Decided on 19-1-1949 (Cal.)	18, 21
('51) 55 Cal. W. N. 64 : (A. I. R. 1950 Cal. 519)	18
('37) A. I. R. 1937 Mad 51 : (I. L. R. (1937) Mad. 495)	18

G. N. Das J.—This rule which was obtained by the judgment-debtors arises out of proceedings under S. 37A, Bengal Agricultural Debtors Act, 1935, hereinafter called the Act.

[2] In execution of a decree for arrears of rent obtained by opposite party No. 1, the latter auction-purchased the disputed property on 16-5-1939.

[3] After the enactment of Act II B. C. of 1942 which added S. 37A to the Act, the petitioners

initiated proceedings under the section before the Debt Settlement Board, Tamluk.

[4] On 28-10-1945, the Board made an award under S. 37A (5) of the Act. The award recites that as the applicants, the decree-holders, the landlords and the mortgagees have failed to come to an amicable settlement, the Board has determined the debt under S. 37A (5). The award was drawn up in FORM NO. 19 (B), Sch. (Ka) of the award gave a description of the debtors, sch. (Kha) (1) that of the decree holders, sch. (Kha) (2) that of the mortgagees which was blank in the present case, sch (Ga) gave particulars of the decree, sch. (Gha) particulars of that debts of the debtors, sch. (Una) a description of the properties to be restored to the possession of the debtors.

[5] Schedule (Gha) stated that the decretal dues of the opposite party NO. 1, (decree-holder and auction-purchaser) amounted to RS. 1,595-5-6 pies only, that the annual income of the property sold was RS. 511 and that the opposite party NO. 1 had realised Rs. 3,066 and nothing was due to the opposite party NO. 1.

[6] The award was presented for registration on 2-2-1946, and was registered on 13-3-1946.

[7] It appears that on 15-6-1948, the records were put up before the Special Officer, D. C. Tamluk. The Officer recorded the following order on that date:

"The records were found after the investment of powers under S. 7. On an examination of the records it appears that the previous Board has disposed of the case and made an award. It appears that the award has not been registered and that the time for registration has expired. In these circumstances, this case is disposed of on maintaining the award of the Board. The parties may be informed and the records may be sent to the Record Room after proper classification."

[8] On 17-1-1950, the petitioners presented a copy of the award to the First Court of the Munsif, Tamluk, for relief under S. 37A (8) of the Act. The opposite party NO. 1 contested the prayer on the ground of limitation. The learned Munsif gave effect to the objection raised by the opposite party NO. 1 and refused the prayer of the petitioner on the ground of limitation. The petitioners preferred an appeal before the District Judge who affirmed the decision of the Munsif. The learned District Judge while dismissing the appeal expressed a doubt about the competency of the appeal.

[9] Mr. Jana, learned Advocate for the petitioner, raised three points: (1) Article 181, Limitation Act did not apply and there was no limitation for obtaining relief under S. 37A (8) of the Act; (2) Even assuming that ART. 181, Limitation Act was applicable, the proceedings under S. 37A of the Act were pending till 15-6-1948, and S. 52 of the Act extended the period from 28-10-1945, till 15-6-1948, and the prayer for relief under S. 37A (8) of the Act was consequently saved from the bar of limitation, and, (3) Assuming that ART. 181, Limitation Act applied, time did not begin to run till 15-6-1948, when the final order was made in the proceedings under S. 37A of the Act.

[10] I shall take up the above points in the order mentioned above. The main question for consideration is whether ART. 181, Limitation Act applies to a proceeding for relief under S. 37A of the Act. The first question is whether the Indian Limitation Act is at all applicable to proceedings under the Bengal Agricultural Debtors Act. Section 29, Limitation Act makes that Act applicable to proceedings under other Acts unless the applicability thereof is expressly excluded. Section 45, Agricultural Debtors Act excludes only the Code of Civil Procedure and the Indian Evidence Act. It follows, therefore, that ART. 181, Limitation Act is not excluded in proceedings under the Bengal Agricultural Debtors Act in the absence of an express provision. The question, however, remains whether the said section is attracted to a proceeding under S. 37A (8), Agricultural Debtors Act.

[11] Article 181 is one of the Articles in sch. 1, 3rd Division, which deals with applications. All the articles in the 3rd Division commencing with ART. 158 down to ART. 183 deal with cases where the Court has to be moved by an application which is required to be filed under the express provision of the relevant Statute. None of these Articles deal with cases where no application is necessary to be filed and where the Court is asked to do an act which it is bound to do and which it has no discretion to refuse to do. Section 37A (8) runs as follows:

"The debtor may present a copy of the award made under sub-s. (5) to the civil Court or Certificate Officer at whose order the property was sold and such Court or Certificate Officer shall thereupon direct that the sale be set aside, that the debtor together with any person who was in possession of the property sold or any part thereof at the time of delivery of possession of such property to the decree-holder as an under-raiyat of the debtor and who has been evicted therefrom by reason of such sale be restored to possession of the property and with effect from the 1st day of *Baisak* next following or the 1st day of Kartick next following whichever is earlier."

[12] Neither the sub-section nor the rules framed under the Act speak of the making of an application by the debtor. The debtor has merely to present a copy of the award. No time limit has been prescribed for such presentation. On such presentation the civil Court or the Certificate Officer is bound to act as provided in the sub-section. It is significant to note that the award contains all the mater als which may be necessary for the Court or the Certificate Officer to know before action can be taken in terms of the sub-section.

[13] There is no express provision either in the Act or in the Rules for a notice to be issued on the decree-holder auction-purchaser or the landlord or mortgagee before the Court or the Certificate Officer can take action under the sub-section. It has to be borne in mind that the restoration of possession is the main relief which has to be made

in the original application under S. 37A (1) of the Act. A period of limitation for such an application is provided for in S. 37A (2) of the Act. Section 37A (8) only prescribed the extent of such relief and the procedure by which and the Tribunal by which the relief already prayed for in the application under S. 37A (1) will be worked out.

[14] The contention of Mr. Chakraborty, learned Advocate for the opposite party NO. 1 that the presentation of the award should by implication be regarded as an application is opposed to the rule of construction applicable to cases of limitation, namely, that the Court ought not to put such an interpretation upon a Statute of limitation by implication and inference as may have a penalising effect unless the Court is forced to do so by the irresistible force of the language used. It is well settled that the Limitation Act, being an Act which takes away or restricts the right to take legal proceedings, must, where its language is ambiguous, be construed strictly i. e. in favour of the right to proceed.

[15] The further contention of Mr. Chakraborty that if the operation of ART. 181, Limitation Act is excluded in this case and if it is held that there is no period of limitation it will lead to great hardship, cannot be accepted. Statutes of limitation are, in their nature, strict and inflexible and in construing the provisions of such Statutes, equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. In a case like the present an argument based on the ground of hardship comes with an ill grace from the decree-holder auction-purchaser.

On the making of an award under S. 37A (5) the decree-holder auction purchaser is under the law bound to restore possession to the judgment-debtor, and can hardly complain of any prejudice if the judgment-debtor makes a delay in presenting the award. In such a case the decree-holder auction-purchaser obtains the boon of delay which is so dear to him and if he is vertuously inclined there is nothing to prevent him from giving up possession. See *Nagendranath* v. *Suresh Chandra*, 59 Ind. App. 283 (P. C.). In these circumstances, I am of the opinion that the presentation of the award under S. 37A (8), Agricultural Debtors Act cannot be regarded as an application within the meaning of the word occurring in ART. 181, Limitation Act and that the Article therefore does not apply to cases under S. 37A (8) of the Act.

[16] The view taken by me is in consonance with the principles which underlie the cases of an application for the issue of a sale certificate, vide *Vithal Janardan* v. *Vithojirao Putlajirao*, 6 Bom. 586, where the learned Chief Justice laid stress on the fact that "the provisions of the Limitation Act do not apply to applications to a Court to do what it has no discretion to refuse . . . . ", or of an application for amendment of a decree, vide *Kalu* v. *Latu*, 21 Cal. 259 at p. 260 where Banerji J. opined that

"there is no limitation for an application under S. 206, it being the duty of the Court to amend a decree under that section whenever it is found to be not in accordance with its judgment"

or of an application by a decree-holder for certifying a payment made out of Court under O. 21, R. 2 (1), Civil P. C., vide *Shri Prokash Singh* v. *Allahabad Bank Ltd.*, 56 Ind. App. 30 (P. C.) where Sir Lancelot Sanderson delivering the opinion of the Board stated the *ratio decidendi* in this following words:

"The rule imposes a duty upon the decree-holder to certify the payment and a duty upon the Court upon such certificate being given to record such payment."

[17] The view taken by me is also supported by the fact that the Agricultural Debtors Act and the rules framed thereunder prescribe diverse periods of limitation in diverse cases but are silent as regards the period of limitation for the presentation of an award under S. 37A (8), Agricultural Debtors Act.

[18] I shall now deal with certain cases cited by Mr. Chakraborty on behalf of opposite party NO. 1. In the case of the *Co-operative Credit Society Arunganan* v. *Chinna Swami Udayan*, A. I. R. 1937 Mad. 31, ART. 181, Limitation Act was held to be applicable to an application to enfore an award made by the Registrar, Co-operative Societies. But in that case R. 5 (4) (b) framed under the Act expressly provided for the making of an application for the purpose of enforcing the award. The decision is therefore distinguishable. In the case of *Asmatali Sharif* v. *Mujaharali Sardar*, 52 Cal. W. N. 64, ART. 181, Limitation Act was held to be applicable to proceedings under S. 26F, Bengal Tenancy Act. The decision is distinguishable on the ground that the proceedings under S. 26F, Bengal Tenancy Act start on an application being filed by the cosharer tenant.

The case of *Jatindranath Naskar* v. *Baharuddi Molla*, 55 Cal. W. N. 64 merely laid down that the procedure to be followed in proceedings under S. 37A (8), Agricultural Debtors Act is that prescribed in the Code as regards execution of decrees. This decision does not throw any light on the question before us. In the unreported case of *Nandalal* v. *Dinendranath*, decided on 19-1-1949 (Cal.) Chakravarti J. merely held that the Court in proceedings under S. 37A (8) of the Act has jurisdiction to see what the award was and whether on the face of the award it did not affect their interests. This case also does not deal with the question which falls to be decided in the present case.

[19] The view taken by me is in consonance with the opinion of Roxburgh J. in the case of *Mrityunjoy Mukherji* v. *Ashutosh Thakur*, S. M. A. 17 of 1949, D/- 3-5-1950 (Cal.). The learned Judge held that the presentation of an award under S. 37A (8) cannot be regarded as the making of an application and that there is no period of

limitation in such cases. I share the hope expressed by the learned Judge in that case that

"it is necessary that some provision should be made at some stage limiting the time within which such award may be presented to the Court or Certificate Officer for carrying out the provisions laid down in S. 37A (8) of the Act."

The decision of Roxburgh J. in the above case was affirmed on 7-3-1951, in Letters Patent Appeal No. 6 of 1950 but on a different ground. I am therefore of opinion that the Courts below were wrong in holding that the application was barred by limitation.

[20] In this view of the matter the other points raised by Mr. Jana need not be gone into. I may point out that Mr. Chakraborty did not dispute the competence of the present application on the ground that a second appeal lay to this Court.

[21] The lower appellate Court seemed to be in doubt on the question whether an appeal lay to that Court but did not decide the question presumably because the Court dismissed the appeal on the ground of limitation. I may point out that in the unreported decision in the case of *Nandalal* v. *Dinendranath*, referred to above, Chakravartti J. was of the opinion that an appeal lay in such cases. It is not necessary for me to express an opinion on this question because even if a second appeal was competent, the facts of the case are such as would have justified us in converting this petition in revision into a Memorandum of Appeal and in giving relief to the petitioner on that footing.

[22] The result, therefore, is that the revision petition succeeds, the orders made by the Courts below are set aside and this case is remitted to the trial Court for giving relief to the debtors in terms of S. 37A (8) of the Act.

[23] The Rule is accordingly made absolute. The petitioners will have their costs in this Court and in the Courts below.

[24] **K. C. Das Gupta J.**—I agree.

B/V.R.B. *Rule made absolute.*

A. I. R. 1953 Calcutta 53

HARRIES C. J. AND S. R. DAS GUPTA J.

Nalin Chandra Pal — Petitioner v. *Bejoy Ranjan Ganguly and another—Opposite Party.*

Misc. Case No. 19 of 1952, D/- 21-4-1952.

Contempt of Courts Act (1926), Ss. 1, 3 — Letter by party to proceedings to third party to bring pressure on other party — Held, tended to interfere with due course of justice and amounted to contempt of Court.

A filed a complaint against *B* charging him of an offence under Ss. 420 and 406, Penal Code. The complaint was dismissed and *B* was discharged. *A* then moved the High Court in revision and obtained a rule against *B*. In the meanwhile *A* wrote to the President of the local Congress Committee that certain criminal proceedings were pending against *B* who was a candidate for certain election and requested him to settle *A's* claim to save *B* as a Congress candidate from illfame :

Held (1) that the letter was an attempt by *A* to bring pressure on *B* who was a party to the proceeding to admit *A's* claim and was clearly contempt of the High Court as it tended to interfere with the due course of justice in the Court; [Para 10]

(2) But as it was a first case of the kind, a sentence of fine of Rs. 75 would be sufficient. [Para 12]

Anno. Contempt of Courts Act, S. 1, N. 3 ; S. 3, N. 1.

N. K. Basu with Ajit Kumar Dutt and Kanai Lal Dutta — for Petitioner ; Bibhuti Bhusan Das Gupta — for Opposite Party.

Harries C. J.—This is an application for the conviction and punishment of the opposite-parties for contempt of this Court.

[2] The opposite-party No. 1 Bejoy Ranjan Ganguly filed a complaint in the Court of the Sub-Divisional Officer, Alipore, against the present petitioner and another charging them with offences under ss. 420 and 406, Penal Code. It is unnecessary to deal in detail with these offences. But what was suggested was that the opposite-party had been induced to take certain land on the representation that the land belonged to certain lessors, whereas in fact it was said that it was khas-mahal land.

[3] The matter first came before a Sub-Divisional Magistrate who directed a Circle Officer to hold an enquiry. The latter submitted a report and expressed the view that this was not a criminal matter.

[4] The opposite-party thereafter filed a petition and on that a judicial enquiry was held by a learned Magistrate. The learned Magistrate was of opinion that the offence under S. 406 was entirely misconceived and that there was no material upon which any charge of cheating could be sustained. The result was that the complaint was dismissed under S. 203, Criminal P. C.

[5] The opposite-party No. 1 thereupon filed a revision application in the Court of the District Magistrate who held eventually that there was no ground whatsoever for interference and that the order of discharge was fully justified.

[6] The opposite-party then moved this Court in revision and a rule was issued calling upon the present petitioner and his co-accused to show cause why the orders made by the trial Court and the Additional District Magistrate should not be set aside.

[7] While this revisional application was pending the petitioner alleges that the opposite-party wrote a letter to the President of the West Bengal Pradesh Congress Committee through the Secretary. It seems that the petitioner was at that time a candidate for election in the General Election and was a candidate nominated by the Congress party. In this letter it is pointed out that there were criminal proceedings pending against the petitioner and that it was very doubtful whether he could escape from criminal liability. The writer then adds :

"To save him and also the Congress candidate as Mr. Paul's illfame will affect them, I request you to arrange with Mr. Paul to repay our full amount with costs."

[8] Reading this letter, which is Exhibit B to the petition, there can, I think, be no doubt what-

soever that the writer intended to bring pressure through the President of the West Bengal Pradesh Congress Committee on the petitioner to pay up what it was alleged he had cheated the opposite-party. It is pointed out that the probabilities are that the petitioner will be convicted and that would bring great disgrace on all concerned. Therefore, the President is urged to bring pressure on the petitioner.

[9] The petitioner was upholding the orders of the Courts below which exonerated him from all criminal liability. If the Congress President had attempted to bring pressure on him and I may say at once that it is not suggested that the Congress President ever acted in that manner — it might have had serious consequences. The opposite-party certainly wished and expected the Congress President to bring pressure on the petitioner, and had he done so the whole course of events might have been completely changed. Fortunately, it would appear that the Congress President took the right course and reported the matter to the petitioner leaving it to him to take what action he thought proper.

[10] Attempting in this way to bring pressure upon a party to proceedings, undoubtedly tends substantially to interfere with the due course of justice. Here the petitioner may have been so coerced as to admit liability in a case in which he might well be not liable. It appears to me that this letter, EXHIBIT B, is clearly contempt of Court in that it tended to interfere with the due course of justice in this Court. It was written with the object of making the petitioner withdraw and admit the justice of the opposite-party's claim.

[11] There is no doubt as to the authorship of this letter because the opposite-party NO. 1 admits that it was written on his behalf by the pen of his son, opposite-party NO. 2. It is said that opposite-party NO. 2 is a minor, and in any event obviously the responsibility for this letter is the responsibility of opposite-party NO. 1. We, therefore, do not think that it is necessary to find opposite-party NO. 2 guilty.

[12] Opposite-party NO. 1 however is clearly guilty of contempt of Court and the only matter which has caused us any anxiety is the appropriate punishment to be inflicted. If this sort of thing occurs again, this Court will have no alternative but to impose a substantial period of imprisonment. But as this is the first case of this kind which has come before myself and my learned brother, we are inclined to take a more lenient view. We think that the interests of justice will be met by imposing a fine of RS. 75 (seventy-five rupees). The opposite-party NO. 1 is given fourteen days to pay the fine. But if it is not paid within that time he will undergo a period of fourteen days' simple imprisonment.

[13] **S. R. Das Gupta J.** — I agree.

B/D.R.R. *Opposite party convicted.*

A. I. R. 1953 Calcutta 54

CHAKRAVARTTI AND SINHA JJ.

Hind Estate Ltd. — Landlord—Petitioner v. *Ansar Ahmed—(Tenant)—Opposite Party.*

Civil Rule No. 3266 of 1951, D/- 21-4-1952.

(a) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 — Premises let out in December 1941—Mode of ascertaining standard rent — Rent Controller cannot determine prevailing rent till rent in 1941 is investigated.

Where the premises are let out in December 1941, S. 9 prescribes a specific method of fixing its standard rent. If the rent then paid is ascertainable, the standard rent has to be worked out in a particular way. If such rent cannot be ascertained, then only it is permissible under S. 9 (2) to determine approximately the rent at which in reasonable probability the premises were let out on that date. Even S. 9 (2) does not speak of ascertaining the prevailing rent at the date of the application, but speaks of ascertaining the rent which might in reasonable probability be payable for the premises in December 1941. In such cases, therefore, the Rent Controller has no jurisdiction at all to proceed straight way to determine what the prevailing rent is till he has investigated whether the allegation that the premises had been let out in 1941 was true and if true, what was the rent paid in 1941. [Para 14]

(b) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 31 (1) (a) — Scope of — Does not empower Inspector to exercise judicial functions nor can Controller act on evidence obtained by Inspector.

Section 31 (1) (a) only means that, if authorised by the Rent Controller, the Inspector may enter and inspect any premises that he may have been authorised to enter and inspect. It certainly does not empower the Controller to authorise the Inspector to exercise judicial functions and take evidence from parties, far less does it authorise the Controller to act on such evidence of the second degree collected by the Inspector.

Where, therefore, an Inspector, acting under an authorisation under S. 31 (1) (a), ascertained the rents of other premises in the locality by taking evidence of their tenants and submitted his report and the Rent Controller acted on the information so collected by the Inspector, without examining him as a witness :

Held, that the materials on which the Rent Controller acted were unauthorised by law and inadmissible in evidence and since the whole order was based upon those materials, the order could not stand. [Para 15]

(c) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Sch. A, Para. 4 — Scope — Does not prescribe method for determining actual standard rent.

Paragraph 4 of Sch. A does not, by itself prescribe the method of determining the actual standard rent payable by a sub-tenant. It only states the maximum limit beyond which the standard rent fixed for a sub-tenant cannot be allowed to go, but the standard rent of such sub-tenant has itself to be determined first by reference to other provisions of S. 9 and of the Schedule. To apply para. 4 as if it prescribes the operations to be carried out for the purpose of determining the actual standard rent is entirely erroneous. [Paras 17 and 18]

Manindra Nath Ghosh, Sibdas Ghosh and Anil Kumar Sett — for Petitioner; Satyendra Prosad Sen — for Opposite Party.

Chakravartti J. — This Rule is directed against an order, dated 14-9-1951, passed by Sri N. Banerjee, Additional Subordinate Judge of Alipore, whereby he affirmed an order passed on 6-1-1951, by the Rent Controller, Calcutta. The

petitioner before us is the landlord of the premises concerned namely, the Hind Estate Limited.

[2] It appears that the petitioner holds a lease for 99 years in respect of premises No. 220/1, Lower Circular Road, and certain other premises. That lease is dated 30-12-1948. The opposite party is admittedly a tenant in respect of one shop room in premises No. 220/1, Lower Circular Road, and it is to the fixation of the standard rent for that one shop room that the present Rule relates.

[3] The application for the fixation of a standard rent was made by the tenant opposite party on 27-10-1950. In Para. 4 of that application it was stated that the shop room was a small one, measuring 15' 10" by 8' and that the rent in December 1941, was about Rs. 20 only. The current rent, however, that was being paid by the tenant was Rs. 54-4-0 and the complaint made by the tenant was that that rent was exorbitant, compared with the rent with regard to similar premises prevailing in the locality.

[4] In the written statement filed on behalf of the landlord it was denied that the rent was exorbitant, but nothing one way or the other was said in respect of the allegation that the premises, namely, the shop room concerned, had been tenanted in December, 1941, and had then borne a rent of about Rs. 20 only. In fact, the allegation appears to have been overlooked altogether even by the authorities below.

[5] The Rent Controller obviously treated the case as one where either the premises had not been let out in December, 1941, at all or where the rent borne in December, 1941, could not be ascertained. He, therefore, proceeded to ascertain what the prevailing rent was and for that purpose appears to have relied entirely on a report submitted by an Inspector which contained references to rents said to be paid in respect of other similar premises in the locality. He considered the rates reported by the Inspector between which, however, there was a wide divergence and he solved the problem by striking a mean between those rates. The figure adopted by him was Rs. 25. Having done so, he took the next step of adding 10 per cent to Rs. 25 and reached the figure of Rs. 27-8-0.

[6] The Rent Controller then turned his attention to para. 4 of sch. A to the West Bengal Premises Rent Control Act of 1950 and prefaced his discussion of that part of the case with the remark that the rent in the case before him "should be assessed under sch. 4 of para. 5 inasmuch as the petitioner is the sub-tenant of the opposite party who is the tenant of the first degree." Proceeding to work out the rent in accordance with para. 4, the Rent Controller first determined the standard rent payable by the petitioner in respect of the shop room sub-let to the opposite party to be Rs. 27 8-0. To that he added a further six and a quarter per cent allowable under para. 4 and thus reached the figure of Rs. 29-3-6. In the end he declared that the standard rent of the tenancy in question would be Rs. 29-3-6 with effect from November, 1950.

[7] It is not at all clear what process of reasoning the Rent Controller actually applied in reaching the result which he arrived at. As I have already indicated, in the earlier part of his order he was fixing the rent by reference to the rent prevailing in the locality. In the latter part of the order he seems to have treated the case as one where all that was necessary to do was to ascertain the standard rent payable by the tenant of the first degree and then to carry out certain mathematical operations. If the rent payable by the opposite party fell to be determined under para. 4 of sch. A, it is difficult to see for what purpose the Rent Controller indulged in all that enquiry about the prevailing rents.

[8] The most charitable construction that one can place on the order of the Rent Controller is that as, in ascertaining the prevailing rent he was proceeding more or less on guess work, he allowed the petitioner the maximum which, according to him, was allowable under para. 4. If that was what he did, he really determined the rent payable by the opposite party under para. 4 of sch. A.

[9] The landlord did not accept the order of the Rent Controller and appealed. The learned Additional Subordinate Judge upheld the order of the learned Rent Controller and observed that after having found that the basic rent payable for the disputed shop room would be Rs. 25 per month, the Rent Controller had "fixed the standard rent at Rs. 29-3-6 per month, allowing the increases on the basic rent at the rates admissible under the law." Since the learned Judge was referring to the additions made by the Rent Controller to Rs. 25 and also saying that those additions had been made at rates admissible under the law, it is clear that he approved of the application by the Rent Controller of para. 4 of sch. A and also approved of the manner in which the paragraph had been applied.

[10] Three points were urged before us in support of the present Rule. It was contended in the first instance that the opposite party having gone to the Rent Controller with the specific allegation that the premises were tenanted in 1941 and having further taken it upon himself to state the amount of rent borne by the premises in that year, although he gave only an approximate figure, but not having led any evidence to establish what the actual rent paid in 1941 had been, his application should have been dismissed straightway.

[11] It was contended in the second place that in so far as the Rent Controller had relied upon the Inspector's report as regards the rent said to be paid in respect of certain other premises, he had acted on evidence inadmissible in law.

[12] The third contention was that the Rent Controller and also the learned Judge had been wholly in error in applying para. 4 of sch. A at

all, inasmuch as the petitioner's lease was a lease for 99 years and therefore outside the Act by reason of the provisions of s. 5. It was urged that if, as s. 5 provided, nothing in the Act applied to a lease of this character, there could not possibly be a standard rent payable by the petitioner within the meaning of para. 4 of sch. A and consequently, that paragraph could not be applied to the present case at all.

[13] In my opinion, the first two grounds urged on behalf of the petitioner are well founded, and it is not necessary to decide finally the third point raised.

[14] It is true that the petitioner did not definitely traverse the allegation made in the application that the premises concerned were tenanted in 1941 and had borne a rent of about Rs. 20 at that time. But if such silence was to be construed as an admission at all, the fact admitted would be that there was a tenancy in December 1941, and that the rent was about Rs. 20 as alleged. The actual rent would still have to be proved and found. But quite apart from that, it seems to me that since the tenant came to the Rent Controller with the case that the premises had been tenanted in December, 1941, the duty of the Rent Controller was clearly to try to ascertain first what the rent paid in respect of the shop room in 1941 was if, in fact, it had been tenanted. The Rent Control Act prescribes a specific method for fixing the standard rent in cases where the premises were let out in December, 1941. If the rent then paid is ascertainable, the standard rent has to be worked out in a particular way. If such rent cannot be ascertained, then only it is permissible under s. 9 (2) to determine approximately the rent at which in reasonable probability the premises were let out on that date. It is noticeable that even s. 9 (2) does not speak of ascertaining the prevailing rent at the date of the application but speaks of ascertaining the rent which might in reasonable probability be payable for the premises in December 1941. But the point which requires to be stressed is that the structure of the application of the opposite party having been what it was, the Rent Controller had no jurisdiction under the Act at all to proceed straightway to determine what the prevailing rent was till he had investigated whether the allegation of the tenant that the premises had been let out in 1941 was true and if it was true, whether it was possible to ascertain what the rent paid in 1941 had been. Till he disposed of that part of the case in accordance with the law, he had no power whatsoever to digress to any other method of fixing the standard rent. In my opinion, the whole approach of the Rent Controller and, therefore, also the learned Subordinate Judge was mistaken and the case was not properly investigated or tried at all.

[15] Equally sound, in my view, is the second ground taken. As I have already stated, the Rent Controller acted entirely on two reports submitted by the Inspector. In those reports he made references to the enquiries which he had made and the rent which he found was payable in respect of certain other premises. That information he could have collected only by enquiries made from the tenants of those premises or of other parties, but in any event by, in effect, taking evidence. This Court has had previous occasion to draw the attention of the Rent Control authorities to the very limited scope of s. 31 of the Act. That section by sub-s. 1 (a) does no more than empower the Rent Controller to authorise any officer subordinate to him to enter and inspect any premises at any time before sun rise and sun set. The provision can only mean that, if authorised by the Rent Controller, the Inspector may enter and inspect any premises that he may have been authorised to enter and inspect. I would concede that after making such entry and inspection, he would be entitled to report to the Rent Controller particulars about the premises so entered and inspected, such as their measurements or the condition in which they are, in other words, the physical peculiarities of the premises.

But the section certainly does not empower the Controller to authorise the Inspector to exercise judicial functions and take evidence from parties, far less does it authorise the Controller to act on such evidence of the second degree collected by the Inspector. It is true that sub-s. (2) refers to the Controller's power to summon and enforce the attendance of witnesses in the manner laid down in the Civil Procedure Code. But the section, it seems to me, is limited to the method and manner of compelling the attendance of witnesses before the Controller himself. In any event, the question whether the Inspector can examine any witness, if specially authorised in that behalf by the Controller by way of commissioning him to do so need be considered in this case, inasmuch as there is no order passed by the Controller so authorising the Inspector. In the present case, the Inspector acted merely under an authorisation to inspect and it is at least clear that under such authorisation he had no jurisdiction whatsoever to examine witnesses, nor had the Controller any authority in law to act upon the information so collected by the Rent Controller. It thus follows that the materials on which the Rent Controller acted were unauthorised by law and inadmissible in evidence and since the whole order is based upon those materials, the order cannot possibly stand.

[16] Proceeding now to the third ground, it presents a question of some difficulty as to what s. 5 of the Act really means. As a matter of language it certainly says that nothing in the Act shall apply to a lease entered into after 1-12-1941, for a period of not less than 15 years. A restricted construction of that language would be that the scope of the section is limited to excluding the operation of the Act as between the lessee under such a lease and his landlord. On the other hand,

the language used by the Legislature which, as I have already stated, "nothing in this Act shall apply" is absolute and it is at least arguable that nothing contained in the Rent Control Act shall be applicable to a non-terminable lease for more than 15 years, granted after December 1941, for any purpose whatsoever. If the latter view be the true view, it would necessarily follow that there cannot possibly be any standard rent payable by a tenant who holds under a lease executed after 1-12-1941 and a lease for a period of not less than 15 years. Standard rent is a creature of the Rent Control Act and if nothing in the Act applies to such a lease, it is perfectly clear that in respect of such a lease, there cannot be a standard rent at all. The effect of that view under Para. 4 of Sch. A would be that in cases where certain premises have been sub-let, but the tenant who had sub-let them holds under a lease for more than 15 years taken after 1-12-1941, the para would not be applicable at all. If so, then in such cases if the sub-tenant applied for the fixation of the standard rent, it would not be possible to extend to him the benefit of the para. In other words, the effect of the view would be to establish that there is a lacuna in the Act leaving the cases where a sub-tenant holds under a tenant who himself holds under a lease for more than 15 years taken after 1-12-1941 unprovided for, so far as the purposes of Para. 4 are concerned.

[17] As, however, this question would not become relevant till the stage of fixing the actual standard rent was reached and since in the present case the very initial approach of the authorities below was mistaken, I do not consider it necessary to decide in advance what the true view of S. 5, read with S. 4 of Sch. A would be. This much, however, appears to be clear that Para. 4 of Sch. A does not, by itself, prescribe the method of determining the actual standard rent payable by a sub-tenant. It only states the maximum limit beyond which the standard rent fixed for a sub-tenant cannot be allowed to go, but the standard rent of such sub-tenant has itself to be determined first by reference to other provisions of S. 9 and of the Schedule. Even as regards that aspect of Para. 4 of Sch. A, the Rent Controller, and with him the learned Judge, seem to have gone wrong, inasmuch as the Rent Controller at least, so far as the language used by him is concerned, appears to have fixed the standard rent under para. 4 itself and the learned Judge approved of that method.

[18] In my view, to apply para. 4 as if it prescribes the operations to be carried out for the purpose of determining the actual standard rent is entirely erroneous and at least to that extent I would accept the third ground urged by the petitioner as well. But as I have said, it is not necessary to decide and we are not deciding what the true view of S. 5 is and what the effect of the correct view on para. 4 of Schedule would be.

[19] For the reasons given above, the orders complained of cannot be upheld. The Rule is accordingly made absolute. The order of the learned Additional Subordinate Judge and the Rent Controller are both set aside and the case is sent back to the Rent Controller for decision in accordance with law.

[20] The petitioner will have his costs of this Rule which we assess at two gold mohurs.

* * * *

[21] **Sinha J.**—This case raises an important point as to the principles which should determine the approach by the Rent Controller in computation of the 'standard rent' in respect of non-residential premises. The facts relating to this case are fairly simple. The premises which is the subject matter of the application is a portion of premises Nos. 220/1, Lower Circular Road, which appears to be a huge building on Lower Circular Road and which has a number of tenants occupying different suites. The opposite party who is a minor occupies a road-side ground floor-garage on the north western corner of the building which is used for business purposes. The previous rent of the shop room was Rs. 50 per month which was subsequently raised to Rs. 54-4-0. The premises belongs to one Md. Amin and the petitioner Hind Estate Ltd., hold this property and several other properties under a lease for 99 years. The opposite party Ansar Ahmad through his guardian and next friend Md. Ismail, made an application on 27-10-1950 praying for the standardisation of the rent. He also prayed that an inspection be held of the premises. In the application it was stated that the shop room was a small one measuring 15′-10″ x 8′ and its rent in December 1941 was about Rs. 20 only.

In the written statement filed on behalf of the Hind Estate Ltd. this allegation about the rent in December 1941 was not expressly traversed. All that was said was that the rent was not at all exorbitant but was, at all material times, and still was, unduly low, nominal, unfair, unjust and unreasonable. The premises was then inspected. It was inspected by what are called "Inspectors" appointed by the Rent Controller and according to the report dated 27th November there was a similar garage in the vicinity yielding a rent of Rs. 56-4-0 per month. The Inspector admitted that the leasehold could not be measured as the other tenants refused to give access. It appears that there is a second report a month thereafter which states that there was another shop room in No. 50B Theatre Road situated nearby, occupied for thirty years at a rent of Rs. 18 per month. Now upon those two reports and on further evidence the Rent Controller arrived at his findings and ascertained the standard rent to be Rs. 29-3-6 with effect from November 1950. The method by which he arrived at this figure is somewhat surprising. He first of all refers to these two tenants in the vicinity, one paying Rs. 56-4-0 and the other

paying Rs. 18 and correctly comes to the conclusion that it is impossible to come to the conclusion that there was any parity in the rent prevailing in the locality. He then says that the "rent", meaning undoubtedly "the standard rent", should be assessed under sch. 'A' para. 4 of the Act inasmuch as the petitioner was a sub-tenant.

As I shall presently show, the learned Rent Controller started where he should have finished and that para. 4 of sch. 'A' is not the relevant rule for assessment of the standard rent but only prescribes a limit. He then notices the lack of parity in the rent of the locality and says that the most reasonable thing to do was to take the 'average'. I am at a loss to understand as to how he calculates the average; whether it is the mean of the two figures he had before him or whether it involved any calculation of the other rentals in the premises. I am also mystified as to how he could work out a proportion because his own Inspector said that it was impossible to measure any part of the leasehold premises, the tenants having refused to allow him to do so. However by some method of calculation he came to the average of Rs. 25, as he says "in round number". Then he says that under sch. 'A', para. 3, sub-s. (b) the landlord was entitled to 10 p. c. over this and then ultimately he came to the conclusion that the reasonable standard rent payable by the opposite party (meaning the Hind Estate Ltd.) for the petitioner's portion of the tenancy should be in his opinion Rs. 27-8-0. In other words, relying on the two figures above named he calculated the standard rent of the lessee and by adding thereto six quarter per cent. arrived at the figure Rs. 29-3-6 being the standard rent payable by the opposite party.

This is an entirely erroneous method of calculation. The relevant section is S. 9, West Bengal Premises Rent Control (Temporary Provisions) Act, read with sch 'A'. Section 9 (1) (a) refers us to sch. 'A'. Schedule 'A' consists of four rules. Rule 1 gives us the definition of 'basic rent', firstly where rent has been fixed and secondly where it has not been so fixed. Rule 2 refers to the ascertainment of standard rent of residential premises by adding a specific sum to the basic rent. Rule 3 gives the method of the calculation of standard rent of non-residential premises. Rule 3 states that where premises have been sublet the standard rent of the sub-tenant should not exceed by six quarter per cent. the standard rent or a proportionate part thereof which might be taken as reasonably payable by the tenant who sublets the premises according as the premises are sublet in whole or in part and where because of the proviso to S. 3, the tenant had no standard rent under the Act, the excess mentioned above should be with reference to the rent payable by the tenant. Therefore where it is possible to ascertain the rent which was payable on 1-12-1941 then the basic rent ought to be determined as laid down in R. 1 (b) of sch. 'A'. In this particular case, the petitioner before the Rent Controller had stated that the property was let out in December 1941 and this was not denied. Therefore there is no valid reason to ignore the provisions of R. 1 (b). In specific cases it may so happen that it will be very difficult to obtain sufficient evidence for determining the exact rent payable on 1-12-1941 but that contingency again is provided for in S. 9 (2). Finally, it is not possible at all to determine the rent in December 1941 and if the case is covered by no other section of the Act then under S. 9 (1) (g) the standard rent should be determined at the rate which is fair and reasonable. From this it will at once appear that the Rent Controller made entirely erroneous approach to the question. First of all he wholly ignored the question as to what was the rent in December 1941. Secondly, he attempted to assess the standard rent by the help of sch. 'A', R. 4, and next he was wholly in error in the method he adopted in assessing that rent.

This is not the way in which the standard rent should be calculated. Rule 4 of sch. 'A' is there to prevent trafficking in rents and lays down a ceiling over which the property cannot be sublet. But it is of no help in assessing or ascertaining the standard rent. In reading the order of the Rent Controller and the learned Subordinate Judge it is very difficult to discover why rent in December 1941 is never sought to be determined. It was suggested by the learned advocate that the respondent had mentioned the sum "of about Rs. 20" but this was his surmise and therefore the Courts did not take any notice of it. But this is scarcely a satisfactory explanation. There is nothing to show whether this was his surmise or not and the Courts below did not at all refer to this aspect of the question. It is clear therefore that the method of computation adopted is wrong and the result arrived at is erroneous and cannot be supported.

[22] The next point is as to the evidence which has been utilised for arriving at the standard rent. Our attention has been drawn to S. 31 and the rules framed under the Act to support the action of the Courts below in relying on the reports of the Inspectors. But S. 31 does not empower any Inspector to take evidence about the rent paid in premises other than the one in question. According to the report of the Inspector he came to hear in one case about the rent paid and in the other case saw the rent bill. The Inspector was not called to give evidence nor were the rent bills produced nor was the person who gave the information to the Inspector called. Under those circumstances the Rent Controller clearly based his finding on inadmissible evidence.

[23] The 'standard rent' as fixed can therefore not be supported. I agree with the order made by my Lord.

B/D.R.R. *Rule made absolute.*

A. I. R. 1953 Calcutta 59

CHAKRAVARTTI AND S. R. DAS GUPTA JJ.

Calcutta Insurance Ltd.—Assessee v. *Commr. of Income-tax.*

Ref. No. 2 of 1946 and No. 4 of 1947, D/- 28-11-1951.

(a) Income-tax Act (1922), S. 66—Statement of the case—Nature of.

The statement of the case ought certainly not to be a judgment on the application for a reference, recounting in detail the whole controversy on the application and the Tribunal's views thereon and covering not only the point as to whether the questions formulated arise or not but also, once again, their merits. The Tribunal may, if it chooses, record an order on the application for a reference and where it declines to state a case at all or a case on any of the questions formulated, it is perhaps necessary to do so. But when it has reached the stage of R. 43 of its own Rules and decided to make a reference or when it has been directed by the High Court to do so, all controversy has been left behind and the statement of the case contemplated by the Rule, as also by S. 66 of the Act, is obviously a separate document of a neutral character which must be limited to the questions referred and in which should be incorporated only the facts relevant to those questions as found by the Tribunal, the contentions of the parties, the decision thereon as recorded in the appellate order and the questions of law which arise. If a model is required, one will be found in the statements drawn up by the General or the Special Commissioners in England, incorporated in the reports in the Tax Cases.

[Para 2]

Anno. Income-tax Act, S. 66 N. 1.

(b) Income-tax Act (1922), S. 10 (2) (vi), Sch. R. 2 (b) & R. 3 (b)—Life insurance business—Depreciation on furniture, motor-cars and books.

Profits of a life insurance business are treated by the Income-tax Act as a class by themselves and there is no reason to presume that all the general provisions of the Act relating to computation of business income must occur somewhere or other in the Schedule. "Expenditure" in R. 2 (b) does not include depreciation and does not, therefore, attract S. 10 (2) (vi). Depreciation on furniture, motor-cars and books is outside the purview of R. 3 (b). That rule does not cover assets of all kinds, but is limited to securities and similar assets. Thus in the case of life insurance companies, depreciation on furniture, motor-cars and books is not governed by either S. 10 (2) (vi), read with R. 2 (b) or by R. 3 (b). For practical purposes, it is sufficient for the assessee if R. 2 (b) is excluded, for even if such depreciation does not come under R. 3 (b), it has still to be allowed in full, since there is no other provision in the Schedule for disallowing it or reducing its amount. Subject to the adjustments directed by the Schedule the actuarial surplus must stand. There is thus either a lacuna in the Schedule or an intention that in the case of life insurance companies depreciation on the assets mentioned in S. 10 (2) (vi) so far as it is debited in the accounts, must be allowed in full.

[Paras 19, 20, 21, 22, 23]

Anno. Income-tax Act, S. 10 N. 8.

(c) Income-tax Act (1922), S. 18 (5) & Sch. R. 4 — "Income tax paid by deduction at source from interest on securities or otherwise' — Meaning of — Tax paid directly on assessment.

The word 'income-tax paid by deduction at source from interest on securities or otherwise', appearing in R. 4 of the Schedule does not include tax paid through assessments during the preceding intervaluation period. The rule is concerned only with the credit allowable under S. 18 (5) and with nothing else. All that it does is that it substitutes for the credit allowable under S. 18 (5), a credit of another kind, but anything not covered by S. 18 (5), is clearly outside its purview. It does use the expression "paid by deduction at source from interest on securities or otherwise," but the reason for the addition of the word "otherwise" is plain. Section 18 (5) allows credit for any deduction made under S. 18 and for the amount of any increase on dividends made under S. 16 (2). The expression "paid by deduction at source from interest on securities" in R. 4 refers to the first sum. The dividend received by a share-holder of a company is treated as his share of the profits, less tax thereon which has been paid by the company on his behalf, and the amount of the tax so paid is the amount by which the dividend is increased under S. 16 (2), for that also is a part of his income. The amount is, therefore, first added to the assessable income under S. 16 (2), and then credit is given for it under S. 18 (5), against the tax payable. Such amount also is thus "paid by deduction at source" and the words "or otherwise" in R. 4 refers to this amount which is the second sum mentioned in S. 18 (5). But there can be no question of the words "or otherwise" importing the tax paid directly on assessment.

[Para 27]

Anno. Income-tax Act, S. 18 N. 1.

(d) Income-tax Act (1922), S. 66 & Sch. R. 2 (b) — Question to be framed—Nature.

When the point to be decided is whether a particular sum was rightly added back, the character of the sum is the matter in issue and it cannot be proper to assume in the question framed that the sum is not of a particular character. If the assumption is negatived, the only answer which the Court can properly give is that the question does not arise.

[Para 29]

Anno. Income-tax Act, S. 66 N. 1.

(e) Income-tax Act (1922), Sch. R. 2 (b) — Finding out real profits—Method.

The task of the income-tax office under R. 2 (b) of the Schedule is to find out the real profits of the last intervaluation period, but the surplus disclosed by the actuarial valuation will not necessarily represent such profits, because there may have been, at the beginning of the period, some surplus outstanding from the previous period, in which case the actual profits of the period under consideration will be the last surplus minus the previous surplus; or there may have been an outstanding deficit, in which case the real profits of the period will be the surplus plus the amount of the previous deficit, because the deficit must have been wiped out before the surplus resulted. In order to ascertain the real profits of the last intervaluation period, the previous surplus, if any, must, therefore, be deducted or the amount of the previous deficit, if any, added. If the case comes under the second part of R. 2 (b), the rule does not say that whatever surplus was disclosed by the next preceding valuation must be excluded, but only so much of that surplus as may have been included in the last surplus which is being adjusted. How much has been included is a problem of arithmetic and accounting and so a question of fact and not a question of law.

[Paras 30, 31]

(f) Life Assurance Companies Act (1912), Fourth Sch. Cl. (9) (i)—Sum carried forward unappropriated —Deduction under R. 3 (a) of Schedule to Income-tax Act—Income-tax Act (1922), Sch. R. 3 (a).

Sub-clause (1) of cl. 9 begins with the words "allocated as follows" and, among the heads of allocation, "carried forward unappropriated" is a distinct item, distinct both from allocation among policy-holders and allocation to reserve funds or to other accounts. It is itself a head of allocation. There is no head in the clause such as "carried forward unappropriated out of the sum allocated under (a), (b), (c) or (d)." The share-holders and the policy-holders being the only persons interested in the profits of a life insurance company, there may first be an over-head apportionment as between the two classes. Actual allocation of any particular sum is a further process. The contents of the statutory report, read with Cl. 9 (1) of the Fourth Schedule to the Insurance Act of 1912, are conclusive. Any amount "carried forward unappropriated" under the Ninth Part of the Fourth Schedule to the actuary's report, will form part of the surplus disclosed at the next valuation and will be liable

to be distributed according to the recommendations then made and there will be nothing to compel the insurer to allocate it to policy-holders only. Accordingly, the assessee is not entitled to a deduction of one-half of the sum under R. 3 (a), Schedule to the Income-tax Act. [Para 40]

(g) Income-tax Act (1922), Sch. R. 3 (a) first Proviso—"No account shall be taken of any such amounts etc."—Meaning of.

Under R. 3 and, therefore, under R. 3 (a) the surplus is to be computed, not for the purpose of R. 2 (b) but for the purpose of the whole R. 2, that is to say, for the purpose of determining the taxable "profits and gains" of the business. What it means is that the surplus ascertained under R. 2 (b) is to be further adjusted under R. 3, except in the case of sub-r. (c), by reference to the manner in which the surplus has been utilised and the "amounts" referred to in R. 3 (a), are, therefore, amounts paid or reserved or expended out of the surplus. The function of a proviso is to except a case which would otherwise fall within the general language of the main enactment and under the proviso what shall be deducted will only be the amounts paid or spent or reserved out of the surplus of the last valuation period, but so far as any portion of the amounts, actually paid or spent or reserved, came out of the surplus of a previous period, still lying unappropriated in the hands of the insurer at the time of the distribution, the same shall be disregarded and one-half of such portion shall not be included in the deduction. The result of the exclusion of such portion will be to reduce the amount of the deduction and make the taxable profits larger. It is the proviso which provides for the exclusion in the case of the first computation and the words "no account shall be taken of any such amounts etc." mean that such amounts shall not be taken into account or shall be kept out of account, in other words, they will not be included in the amount of which one-half is to be deducted. The effect of this exclusion will be to reduce the amount that would otherwise have to be deducted under R. 3 (a), and it is in that way that the proviso restricts the operation of the rule in the case of the first computation and makes the taxable profits larger. [Para 45, 46, 49]

(h) Income-tax Act (1922), S. 66 — Jurisdiction to admit further facts.

It is not possible in a reference to go beyond the statement of the case and admit further facts which alone supply the foundation for a particular contention. A.I.R. 1951 S. C. 108, *Foll.* [Para 56]

Anno. Income-tax Act, S 66 N 20.

(i) Income-tax Act (1922), Sch. R. 3 (b)—"Assets" —Organisation expenses.

"Other assets" contemplated by R. 3 (b) are assets of the nature of investments which may appreciate or depreciate, about which it is appropriate to speak of realisation and realisation of which may result in gain or loss. It is difficult to think of any asset, particularly a realisable asset, acquired by organisation expenses. They may be carried on the assets side of the balance-sheet, but that is only a method of accounting and as assets, such assets are fictitious, because they have no real existence in the shape of anything which may be the subject-matter of realisation. Organisation expenses cannot come within such assets. [Para 57]

(j) Income-tax Act (1922), Sch. R. 3 (b)—"Other assets"—Loans.

Bad debts in respect of which an allowance is available for purposes of income-tax are trading debts, i.e., debts constituted by outstanding business dues or, in the case of bankers and money-lenders, debts arising out of loans granted in the course of the money-lending business. Financial accommodation granted to employees or sums over-drawn by an employee on his commission account are not debts which, on becoming irrecoverable, can be claimed as bad debts for purposes of income-tax. The allowance for bad debts is a revenue allowance, but it shows the principle applicable, because the allowances under R. 3 (b), although capital allowances in form, really rest on an assumed basis that the insurance company carries on a business of dealing in investments and, therefore, the principle may be referred to for ascertaining what kind of debts are contemplated by R. 3 (b), if "other assets" mentioned by it include debts due to the company. Rule 3 (b) may include loans granted by the company out of its surplus funds as investments of its money and with regard to such loans it will obviously be appropriate to speak of realisation and of gain or loss. [Para 58]

(k) Income-tax Act (1922), Sch. R. 3 (b)—'Reserved' —Meaning of—Future loss or depreciation.

The material words in R. 3 (b) are "any amount either written off or reserved in the accounts or through the actuarial valuation to meet depreciation of or loss on the realisation of securities." As to writing off, it is perfectly clear that no loss can be written off unless it has actually occurred. "Reserved" occurs in the rule as an alternative to writing off and the scope of the two operations is obviously co-extensive. Strictly speaking, "written off" seems to go better with loss and "reserved" with depreciation, but in income-tax language, depreciation is also loss and there is no reason to think that the rule is, on the one hand, limiting writing off of losses on realisation to actual losses and on the other, contemplating losses by depreciation as comprising apprehended losses as well, in complete variance with the ordinary income-tax law. It is true that the word "reserved" itself implies a future contingency against which the reservation is made, but even that implication of the word does not involve a difference from writing off as regards the requirement that, like loss, the depreciation also must be a present depreciation which has already occurred and which requires to be met. Rule 3 (b) contemplates that a loss on realisation or loss by depreciation must actually have occurred. On general grounds too it is clear that since the Schedule is concerned with the computation of the profits of the last valuation period, there is no reason why in R. 3 (b) it should provide for deduction of any amount as loss where in fact no loss occurred. A. I. R. 1938 Bom. 345 ; A.I.R. 1946 Sind 25, *Rel. on.* [Paras 62 & 63]

Sukumar Mitra — for Assessee ; E. Meyer — for Income-tax Department.

REFERENCES : Courtwar/Chronological/	Paras
('34) 1934-2 I T R 63 : (AIR 1934 P C 45)	44
('39) 1939-7 I T R 402 : (AIR 1939 P C 190)	30
('51) 1951-19 I T R 191 : (AIR 1951 S C 108)	56
('38) 1938-6 I T R 44 : (AIR 1938 Bom 345)	61, 62
('37) 1937-5 I T R 349 (Cal)	26
('37) 1937-5 I T R 397 (Cal)	26
('46) 1946 14 I T R 347 : (AIR 1946 Sind 25)	62
(1885) 10 A C 438 : (55 L J Q B 92)	44

Chakravartti J.— There are two references before us relating to the assessment of the same assessee for the same assessment year and both at the instance of the assessee, the Calcutta Insurance Ltd. Reference No. 2 of 1946 was made by the Tribunal under s. 66 (1), Income-tax Act, and comprises two questions of law. The application on which the reference was made formulated nine questions, but with regard to seven of them, the Tribunal refused to state a case on the ground either that no question of law arose or that the question was based on an incorrect statement of facts. Thereupon, the company moved this Court under s. 66 (2) of the Act and obtained a direction to the Tribunal to state a case on six of the seven questions, one of which was slightly re-cast. Reference No. 4 of 1947 was made in accordance with that direction. In making that reference, the Tribunal did not submit a fresh 'Statement

of the case', as the facts relating to the further questions directed to be referred were all to be found in the original statement.

[2] I have had occasion to comment in the past and find it necessary to comment again on the form in which the Tribunal is often found to draw up the statement of the case. It seems to think that the statement of the case means the judgment on the application for a reference. In the present case, for example, the original reference was limited only to two questions of law and yet what was sent up as the statement of the case was the order passed on the application for a reference, containing a discussion, question by question, of all the nine questions formulated. The facts relating to the seven questions, not referred, were entirely different and severable, except to a slight extent in one case, and clearly no reference to them was at all relevant, far less any discussion of the questions on the merits. Then again, the statement of the case ought certainly not to be a judgment on the application for a reference, recounting in detail the whole controversy on the application and the Tribunal's views thereon and covering not only the point as to whether the questions formulated arise or not but also, once again, their merits. The Tribunal may, if it chooses, record an order on the application for a reference and where it declines to state a case at all or a case on any of the questions formulated, it is perhaps necessary to do so. But when it has reached the stage of R. 43 of its own Rules and decided to make a reference or when it has been directed by the High Court to do so, all controversy has been left behind and the statement of the case contemplated by the Rule, as also by S. 66 of the Act, is obviously a separate document of a neutral character which must be limited to the questions referred and in which should be incorporated only the facts relevant to those questions as found by the Tribunal, the contentions of the parties, the decision thereon as recorded in the appellate order and the questions of law which arise. If a model is required, one will be found in the statements drawn up by the General or the Special Commissioners in England, incorporated in the reports in the Tax cases.

[3] In fairness to the Tribunal in the present case, I must add that it was placed in a difficult position by reason of the manner in which the proceedings were conducted on behalf of the assessee. The assessment was an assessment of an insurance business and the objections related to individual items of deduction claimed by the company or 'add-back's made by the Income-tax Officer. The Tribunal has pointed out that at the stage of the appeal the assessee was unable, in some cases, even to state what the ground of the objection was and at the stage of the application for a reference, questions were raised and debated on an incomplete and incorrect basis of facts. Before us as well as I shall presently show, totally contradictory contentions were put forward in relation to two of the questions.

[4] To turn now to the facts of the case, the order out of which the questions arise covered four appeals, relating to the respective assessments of the company for four successive years, viz., 1939-40, 1940-41, 1941-42 and 1942-43. A common order was passed, because the questions involved in all the appeals were identical. The present references, however, are limited to the year 1939-40. The reason is that although the application for a reference referred to all the four assessment years, only one reference fee was paid and on that being pointed out to the Advocate for the company, he stated that the application might be treated as relating to the 1939-40 assessment only. Accordingly, a reference limited to that assessment was made. There was no direction in the subsequent order of the High Court to enlarge the scope of the reference so as to cover the three other assessments and in the circumstances of the case, no such direction could be given. The assessments for the years 1940-41, 1941-42 and 1942-43 are, therefore, not covered by the references. The only assessment they relate to is the assessment for the year 1939-40.

[5] Since each one of the questions is concerned with some individual item in the computation of the company's profits, it is not possible to give anything like a general statement of the facts. All that may be stated here is that the assessee is an insurance company and its profits were computed under R. 2(b) of the schedule to the Income-tax Act, i. e. on the basis of the surplus disclosed by the last actuarial valuation. That valuation was for the quinquennium ended on 31-12-1937 and it appears that the previous valuation had been for a period of two years, ended on 31-12-1932 and, before that, there had been another valuation in 1930. The assessment made by the Income-tax Officer was modified by the Appellate Assistant Commissioner in the assessee's favour with regard to one item which is the subject-matter of question (iv) in Ref. No. 4 of 1947. The assessment, so modified, was upheld by the Tribunal on further appeal.

[6] The total number of the questions referred is eight and, between them they cover a part of R. 2 (b), R. 4 and all but one of the several clauses and provisos of R. 3, Schedule to the Income-tax Act. No useful purpose will be served by setting out all the questions at one place. They can more conveniently be taken up one by one and disposed of.

[7] Reference No. 2 of 1946, as has already been stated, comprises two questions. Question 1 is in the following terms:

> In the computation of income, profits and gains of a life insurance business, is the allowance for depreciation on furniture, motor-car and books governed by S. 10 (2) (vi), Income-tax Act or by R. 3 (b), Schedule to the Act, taking these assets as being included in "other assets" appears in the Rule?

[8] Although stated in a general form, the question really relates to a specific item of Rs. 7938 which is the subject-matter of separate question, question (ii), in Reference No. 4 of 1947. That question, which ought obviously to be considered along with the question set out above, is as follows;

Depreciation being allowable as deduction under S. 10, can the sum of Rs. 7938, the amount of depreciation written off, be added back for computation of the actuarial surplus under R. 2 (b)?

[9] In order that the facts and the contentions of the parties may be understood, it is necessary to refer first to the relevant provisions of law. Rule 2 (b) of the Schedule provides that in computing the profits of a life insurance business under that Rule and adjusting for that purpose the actuarial surplus disclosed by the last valuation, "any expenditure other than expenditure which may under the provisions of S. 10 of this Act be allowed" should be excluded. In other words, if allowance has been made in the actuarial valuation for any expenditure not allowable under S. 10, the same should be disallowed and added back to the surplus. Section 10 (2) (vi) provides for a depreciation allowance on "plant or furniture" used for the purposes of a business and under S. 10 (5) 'plant' in S. 10 (2) includes vehicles and books. It thus deals directly with the depreciation with which we are concerned here. The allowance is to be not whatever depreciation may be put down in the assessee's books, but only a sum equivalent to such percentage on the written down value of the articles concerned as may be prescribed and the prescribed percentages are to be found in R. 8 of the Rules framed under the Act. While R. 2 (b) of the Schedule, read with S. 10, is to the above effect, R. 3 (b) provides that in computing the surplus for the purpose of R. 2,

"any amount either written off or reserved in the accounts or through the actuarial valuation balance-sheet to meet depreciation of or loss on the realisation of securities or other assets shall be allowed as a deduction and any sums taken credit for in the accounts or actuarial valuation balance sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus."

[10] There is a proviso to the Rule which states, to put it broadly, that if it appears to the Income-tax Officer that

"the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus",

he may, after consultation with the Superintendent of Insurance, adjust the depreciation or appreciation so as to increase the surplus to a fair and just figure.

[11] The facts relevant to the present question are that during the last valuation period, the company had written off in its accounts a sum of Rs. 7938 as depreciation on furniture, books and motor-cars. The Income-tax Officer treated the case as one under R. 2 (b) of the Schedule, read with S. 10 (2) (vi), and what he did was that he first added back the whole sum of Rs. 7938 and then deducted a depreciation allowance of Rs. 7090 which was the amount allowable according to the percentages prescribed. In effect, therefore, he added back only a sum of Rs. 848. The contention of the assessee is that the full amount of Rs. 7938 ought to have been allowed.

[12] Now, the assessee did not seem to know its own mind as to the ground on which it would base its claim. Question (1) of reference No. 2, which is the Tribunal's paraphrase of question VI formulated by the assessee, proceeds on the view that R. 3 (b) of the Schedule and not S. 10 (2) (vi) applied to the case. That view was sought to be supported before us with the argument that although R. 2 (b) imported S. 10, the allowances provided for by that section covered both items of expenditure, i. e. monies actually spent, and items of depreciation, but R. 2 (b) mentioned only 'expenditure' while 'depreciation' was dealt with separately in R. 3 (b). It was accordingly contended by Mr. Mitra that in computing the surplus of a life insurance business under the Schedule, the full amount of depreciation on furniture, motor-cars and books, written off in the accounts, was to be allowed under R. 3 (b) and the percentage referred to in S. 10 (2) (vi) could not be applied under the authority of R. 2 (b). Question (ii) of Reference No. 4, however, puts the claim entirely under S. 10 and asks whether depreciation being allowable under that section and the sum of Rs. 7938 being an amount of depreciation, it could be added back under R. 2 (b), since S. 10 does not apply of its own force to profits of life insurance companies but applies only so far as it is imported by R. 2 (b), the question assumes that depreciation is 'expenditure' within the meaning of the Rule and that what was written off in the present case was not in excess of what was allowable under S. 10. The grounds of the assessee's claim under the two questions are thus mutually contradictory.

[13] I put it to Mr. Mitra in course of the argument that if he pressed his view of question (i) of Reference No. 2, he could not at the same time press Question (ii) of Reference No. 4 as he had been doing and that the latter ought logically to be struck out. Ultimately, he stated that he would have no objection if that was done. On further consideration, however, I think that since the question has been referred under a direction of this Court, it will be better to deal with it, as it is.

[14] With regard to Question (i), it was further contended by Mr. Mitra that "other assets" in R. 3 (b) would cover furniture, motor-cars and books. He also argued that the scheme of the Schedule was not that only such debit items in the valuation sheet as were expressly allowable under the Schedule were to be allowed, but the scheme was that only such items as were expressly disallowable were to be excluded. The point of

this argument was that as depreciation on furniture, motor-cars and books, written off in the accounts, was not disallowable under any express provision of the schedule, it could not be disallowed.

[15] With regard to Question (ii), it was contended on behalf of the Commissioner of Income-tax by Mr. Meyer that S. 10 (2) itself used the word 'expenditure' in cls. (xii), (xiv) and (xv) and, therefore, R. 2 (b) of the Schedule, which spoke of 'expenditure' allowable under S. 10, must be taken as limited to those clauses of S. 10 (2) where the word had been used. This contention, if correct, would establish that R. 2 (b) had no concern with depreciation and might enable Mr. Meyer to get rid of Question (ii), but it would throw him, if I may use the expression, right into the arms of R. 3 (b) and Question (i). Mr. Meyer realised this and with regard to R. 3 (b) he contended that "other assets" contemplated by that Rule were assets of the same kind as the variety expressly mentioned, viz., securities. As an illustration, he mentioned shares. He contended further that since the Rule directed depreciation on securities and other assets to be allowed and appreciation on securities and other assets to be included in the surplus, "other assets" must be assets capable of both appreciation and depreciation which furniture, motor-cars and books were not. It was pointed out that the article 'the' had been prefixed to the expression "securities and other assets" in the second part of the Rule which, it was said, clearly showed that the same assets were contemplated by both the parts and, therefore, the assets which the Rule had in view were only such assets as were capable of both appreciation and depreciation. In connection with Question (i) Mr. Meyer submitted that depreciation on furniture, motor-cars and books would be governed by S. 10 (2) (vi). The contradictory grounds on which the two questions were based thus involved both sides in contradictions.

[16] In my opinion, Question (ii) of Reference No. 4 must be disposed of on the short ground that it does not arise. It asks whether the sum of Rs. 7938 could be rightly added back as disallowable, whereas what was really added back was only Rs. 848, the rest being allowed. The question thus puts in issue the correctness of something which was not in fact done and, therefore, it does not arise. In the above view, it is not necessary to examine the legal basis of the question, although it may be pointed out that if S. 10 applied, as the question assumes, the manner in which the Income-tax Officer dealt with the amount was obviously correct.

[17] With regard to the same amount, Question (i) of Reference No. 2 presents a problem of decision between S. 10 (2) (vi) of the Act and R. 3 (b) of the Schedule, although instead of the specific sum of Rs. 7938, the subject-matter for consideration has been put in general terms as "depreciation on furniture, motor-cars and books." By reason of the provisions of S. 10 (7) of the Act, S. 10 (2) (vi) will not apply to such depreciation in the computation of the profits of a life insurance business, unless it has been made applicable by the Schedule or, to be more precise, by R. 2 (b) which is the only Rule which mentions S. 10. But R. 2 (b) cannot be said to import S. 10 (2) (vi), unless the word 'expenditure' used in the Rule includes depreciation. On the other hand, the schedule expressly deals with depreciation in R. 3 (b). The question asked is under which of these provisions depreciation on furniture, motor-cars and books falls in the case of the profits of a life insurance business. It cannot fall under both, as the two questions formulated by the assessee, between them, somewhat absurdly suggested.

[18] The general provision relating to the computation of business income is to be found in S. 10 of the Act and the provision there contained is that such income is to be computed after making certain specified "allowances." The allowances specified in the section comprise both items of expenditure and items of depreciation. Prima facie, it might appear that in the case of the profits of a life insurance business, the framers of the schedule had placed the expenditure items of S. 10 under R. 2 (2) and the depreciation items under R. 3 (b). A closer examination of the Rule, however, reveals that such is not the fact.

[19] It may be useful to remind ourselves at this stage that in computing the profits of a life insurance business on the actuarial surplus basis, as in the present case, the Income-tax Officer does not proceed in the ordinary way but starts with the surplus, in arriving at which certain debits and credits have already been taken into account. His task is to adjust the surplus in the manner directed by the Schedule. The direction in R. 2 (b) is to disallow debits of expenditure, not warranted by S. 10. The direction in R. 3 (b) is to allow debits of depreciation on the assets, there mentioned, in full. The scheme of the schedule obviously is that subject to the adjustments specifically indicated, the actuarial surplus must stand. Profits of a life insurance business are treated by the Income-tax Act as a class by themselves and there is no reason to presume that all the general provisions of the Act relating to the computation of business income must occur somewhere or other in the schedule. With these considerations in mind, we might proceed to consider the question referred and the contentions of the parties.

[20] In my opinion, Mr. Mitra was right in contending, as he did in connection with the present question, that 'expenditure' in R. 2 (b) does not include depreciation and does not, therefore, attract S. 10 (2) (vi). The same, it will be remembered, was the contention of Mr. Meyer in connection with the other question and indeed he went even further and contended that the refer-

ence to S. 10 in R. 2 (b) must be taken as limited to cls. (xii), (xiv) and (xv), S. 10 (2), where the word 'expenditure' had been used. I cannot accept the latter contention as correct. In the year 1939-40 to which the assessment relates, the present cls. (xii) and (xiv) were not in existence, but besides cl. (xv) which was then cl. (xii), there were cls. (i) to (v) and (vii) to (x) in the same form as at present, dealing with payments of specific kinds but not using the word 'expenditure'. I cannot agree that even those clauses are outside the contemplation of R. 2 (b) and that all that the Rule covered in 1939-40 was expenditure allowable under the general provisions of what was then cl. (xii) and that all that it covers now is expenditure allowable under cls. (xii), (xiv) and (xv). Such a construction would be contrary to the plain language of the Rule. Still, however, the clauses I have mentioned do not carry R. 2 (b) beyond expenditure, whether described in S. 10 by that word or not. I cannot accept Mr. Meyer's contention, advanced in connection with the present question, that R. 2 (b) covers depreciation as well, which the Tribunal also appears to have held. Both in actual commercial operations and in the view of the Income-tax Act, indeed in the view of S. 10 itself, depreciation of assets is something entirely different and distinct from expenditure and if the Legislature, while framing R. 2 (b) and incorporating therein a reference to S. 10, used only the word 'expenditure', I can see no reason for supposing that it intended that word to cover depreciation also. Mr. Meyer, when asked, was unable to give any instance where depreciation and expenditure had been treated as synonymous. No question could have arisen if R. 2 (b) had used the word "allowances" which is the general expression used in S. 10 to cover both expenditure and depreciation. In my view, R. 2 (b) is concerned only with expenses and merely provides that in adjusting the surplus, the Income-tax Officer must scrutinize the composition of the valuation sheet and the Revenue Account of the company and if he comes across debits of expenditure not allowable under S. 10, he must exclude them in making his computation. The Rule has no concern with depreciation and does not import S. 10 (2) (vi).

[21] It does not, however, follow that depreciation on furniture, motor-cars and books must then come under R. 3 (b). In my view, that Rule does not cover assets of all kinds, but is limited to securities and similar assets, as Mr. Meyer contended. If assets of all kinds were intended to be covered, there was no reason why the Rule should not have said so and why securities should have been specifically mentioned and then the words "or other assets" added. The reason clearly is that the Rule is limited to securities and assets of the same kind. It is also clear that the similarity contemplated by the Rule is that the other assets are, like securities, capable of both appreciation and depreciation and they are assets of the kind of which both rise and fall in value and both gain and loss on realisation are ordinarily taken into account in valuing a business or computing its profits. It is not possible to say that the same assets need not be capable of both appreciation and depreciation, for the definite article prefixed to the words "securities or other assets" in the second part of the Rule clearly suggests that the assets there contemplated are the same assets as are contemplated by the first part. It was, however, contended that even furniture, motor-cars and books might appreciate in value. While that is not an impossibility, the real point is that appreciation of such equipments of a business concern are not taken into account in ordinary commercial accounting in valuing or computing the profits of a business. The Rule is concerned with adjustment of the actuarial surplus and clearly it has reference to what is to be normally found in the accounts from which the surplus has been determined. But that is not all. The Rule speaks not only of appreciation and depreciation of securities or other assets but also of gain or loss on their realisation. No doubt can be left by that language that the assets contemplated are assets of the nature of investments which may appreciate or depreciate and which are of such kind that they have to be or may be realised. It need hardly be pointed out that it is entirely inappropriate to think or speak of realisation in the case of assets like furniture, motor-cars and books. That the assets contemplated are investments is made even clearer by the proviso to the Rule which inter-relates interest and valuation. For all these reasons, I am clearly of opinion that depreciation on furniture, motor-cars and books is outside the purview of R. 3 (b).

[22] Although it is not strictly necessary for the purpose of answering the question, I may point out what R. 3 (b) really means. Apart from the proviso, it is practically the same as the old R. 30. A life insurance company must be prepared to pay claims under the policies issued by it, as and when they mature, and for that purpose must provide itself with sufficient funds. The premia received can never be sufficient and, therefore, the funds require to be augmented by investments which will bring in interest or dividends or may result in profit, if disposed of. The investments may appreciate or depreciate or may become unrealisable wholly or in part or their realisation may result in gain or loss. But since an insurance company is not a dealer in investments, such appreciation or depreciation or gain or loss would not be profit or loss in the revenue sense but increase or decrease of capital, in other words, capital gain or capital loss. The company would not be entitled to a deduction of such loss under the ordinary provisions of the Income-tax Act, nor would the gains be liable to be added to its taxable profits. But as the financial position of a

life insurance company *vis a vis* its liabilities under the outstanding policies, in other words, its ability to carry on successfully the life insurance business, depends very largely on the results of its investments, it was apparently thought proper to make a special provision and such provision has been made by the schedule in R. 3 (b) which gives the company credit for losses on its investments and, correspondingly, brings gains thereon under liability to tax. That is the reason why such depreciation or loss is not placed under R. 2 (b) which deals with allowances that may be had under the ordinary provisions of the Income tax Act contained in S. 10, but is provided for separately. That is also another indication that depreciation on furniture, motor-cars and books which is not depreciation on investments and which is expressly provided for in S. 10 (2) (vi), read with S. 10 (5), cannot be within R. 3 (b). The reference to both accounts and the actuarial valuation which is to be found in the Rule is due to the fact (that ?) sometimes a company does not pass the investment gains or losses through the Revenue Account, but takes them from some other account or accounts directly to the Balance-sheet.

[23] In the result, I am of opinion that in the case of life insurance companies, depreciation on furniture, motor-cars and books is not governed by either S. 10 (2) (vi), read with R. 2 (b), or by R. 3 (b). For practical purpose, it is sufficient for the assessee if R. 2 (b) is excluded, for even if such depreciation does not come under R. 3 (b), it has still to be allowed in full, since there is no other provision in the Schedule for disallowing it or reducing its amount. As I have already explained, subject to the adjustments directed by the Schedule, the actuarial surplus must stand. There is thus either a lacuna in the schedule or an intention that in the case of life insurance companies, depreciation on the assets mentioned in S. 10 (2) (vi), so far as it is debited in the accounts, must be allowed in full. Question (i) of Reference NO. 2 must, therefore, be answered in the assessee's favour.

[24] Proceeding next to Question (2) of Reference NO. 2, it is in the following terms:

Whether "income tax paid by deduction at source on interest on securities or otherwise," appearing in R. 4 of the Schedule to the Income-tax Act, includes tax paid through assessments during the preceding inter-valuation period?

[25] It appears to me that the question is sufficiently answered by R. 4 itself which runs as follows:

Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in computing the tax payable for that year, credit shall not be given in accordance with sub-s. (5) of S. 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the income-tax paid by deduction at source from interest on securities or otherwise during such period.

[26] Section 18 (5) provides that in computing the tax payable by an assessee for any year, credit shall be given to him for the tax deducted at source from his income in the previous year under the provisions of S. 18 and also for any sum by which his dividend income of that year has been increased under S. 16 (2). These sums are treated as tax already paid by the assessee on his income of the previous year which is the income that is being assessed. In the first case, the amount deducted is obviously so. In the second case, the amount represents the tax which the company, paying the dividend, has itself paid on the share of the profits allocated to the assessee, leaving as the balance the dividend amount actually paid to him, and such tax is under the provisions of S. 49B treated as tax paid by the assessee himself. It is by the amount of this tax that the dividend income is increased under S. 16 (2). In the case of a life insurance company, when the actual profits of the previous year are determined, whether on the basis of an actuarial valuation limited to that year or otherwise, credit may properly be given under S. 18 (5), against the tax payable on the whole income of the accounting year for the tax deducted at source in that year and for the sum by which the dividend income of that year has been grossed up. In such a case, the credit given will be for the actual amount of the tax paid on the actual amount of the relevant receipts included in the assessable income. But where the profits of any "previous year" are determined on the basis of the actuarial surplus disclosed by a valuation which was a valuation for a period covering several years, such profits are, leaving aside the adjustments, only the annual average of that surplus, i.e., the average of the profits of an antecedent period, and not the actual profits of the year concerned. In such a case where the income assessed for the previous year is only a notional figure, based on the profits of an antecedent period, it will obviously be inappropriate to give credit under S. 18 (5), for the tax actually deducted in the previous year, for such deduction will have no relation to the income brought under assessment. But it was held by this Court in the cases of *North British Mercantile Insurance Co., In re*, 1937-5 I. T. R. 349 (cal.), and *Phoenix Assurance Co., In re*, 1937-5 I. T. R. 397 (cal.) under the old RR. 25 and 35 that even in such a case effect had to be given to S. 18 (5), because the section had no reference to any particular method of assessment. Rule 4 is intended to counteract the effect of those decisions and provides that where in any year of assessment, the profits adopted for the previous year are the annual average of the profits of an antecedent period, the credit to which the assessee will be entitled will also be credit for the annual average of the tax deducted at source during the same period and not credit, in accordance with S. 18 (5), for the tax actually deducted in the previous year.

[27] The contention of the assessee under the question referred is that under R. 4, credit must be given not only for the annual average of the

tax deducted at source, but also for such average of the tax paid directly on assessment. The latter, it is said, is drawn in by the word 'otherwise,' occurring in the rule. The contention is untenable on the face of it, as the Tribunal has pointed out. The rule is concerned only with the credit allowable under S. 18 (5) and with nothing else. All that it does is that it substitutes for the credit allowable under S. 18 (5), a credit of another kind, but anything not covered by S. 18 (5), as tax paid directly on assessment is not, is clearly outside its purview. It does use the expression "paid by deduction at source from interest on securities or otherwise," but the reason for the addition of the word 'otherwise' is plain. Section 18 provides, in the case of residents, for deduction at source of tax on salaries and interest on securities, but in the case of an insurance company, only the latter is relevant. Section 18 (5) allows credit for any deduction made under S. 18 and for the amount of any increase on dividends made under S. 16 (2). The expression "paid by deduction at source from interest on securities" in R. 4 refers to the first sum. As has already been explained, the dividend received by a share holder of a company is treated as his share of the profits, less tax thereon which has been paid by the company on his behalf, and the amount of the tax so paid is the amount by which the dividend is increased under S. 16 (2), for that also is a part of his income. It is an amount which the share-holder would have received from the company as a part of his share of the profits, if the company had not deducted it and paid it out as tax on his behalf, paying him as dividend only the balance left. The amount is, therefore, first added to the assessable income under S. 16 (2) and then credit is given for it under S. 18 (5) against the tax payable. Such amount also is thus "paid by deduction at source" and the words "or otherwise" in R. 4 refer to this amount which is the second sum mentioned in S. 18 (5). But there can be no question of the words "or otherwise" importing the tax paid directly on assessment. As the Tribunal has pointed out, a question of giving credit can arise only when before the assessment for a particular year has been made, some tax payable on the income of that year has already been realised. Tax paid under an assessment is tax paid on demand as due under an assessment which has been completed and no credit can possibly be given for such payment in a future assessment. Indeed, as the Tribunal has also pointed out, if the assessee's contention were correct, all the tax realised from a life insurance company would ultimately have to be refunded and such companies might as well have been exempted from taxation altogether.

[28] I may now proceed to Reference No. 4 of 1947. The first question in that reference is the following :

The sum of Rs. 1,058 (one thousand and fifty eight) not being an expenditure at all or not an expenditure within the meaning of S. 10, was it correct to add back the same to the actuarial surplus disclosed by the last actuarial valuation for the period ending 31-12-1937 ?

[29] The form of the question is open to serious objection. When the point to be decided is whether a particular sum was rightly added back, the character of the sum is the matter in issue and it cannot be proper to assume in the question framed, as has been done in the present case, that the sum is not of a particular character. If the assumption is negatived, the only answer which the Court can properly give is that the question does not arise. I may also point out that as formulated before the Tribunal, the question did not include the phrase "not being an expenditure at all" and the question, as it stands now, is a question which the Tribunal was never asked to refer. However, as the question has been directed to be referred, it must be dealt with.

[30] The facts are as follows. The last valuation of the company's business was for a period of five years and as at 31-12-1937, and before that there had been valuations as at 31-12-1932 and 31-12-1930. At the end of 1932, there was a surplus of Rs. 39,085, of which Rs. 27,776, was allocated to policy-holders and Rs. 2,420, to share-holders, leaving a balance of Rs. 14,889, which was "carried forward unappropriated". The ultimate surplus at the valuation next preceding the last valuation was thus Rs. 14,889. The surplus disclosed by the last valuation, i. e., the valuation as at 31-12-1937. was Rs. 1,27,994. Now, the task of the Income-tax Officer under R. 2 of the Schedule is to find out the real profits of the last intervaluation period but the surplus disclosed by the actuarial valuation will not necessarily represent such profits, because there may have been, at the beginning of the period, some surplus outstanding from the previous period, in which case the actual profits of the period under consideration will be the last surplus *minus* the previous surplus ; or there may have been an outstanding deficit, in which case the real profits of the period will be the surplus *plus* the amount of the previous deficit, because the deficit must have been wiped out before the surplus resulted. In order to ascertain the real profits of the last intervaluation period, the previous surplus, if any, must, therefore, be deducted or the amount of the previous deficit, if any, added. This was pointed out by the Privy Council in the case of *Commr. of Income-tax Bengal* v. *Himalaya Assurance Co.*, 1939-7 I. T. R. 402 (P.C.), where the old R. 25 fell to be considered, although their Lordships did not give effect to the view because of a previous decision. But it has now been expressly provided for in R. 2 (b) which directs the Income-tax officer to adjust the surplus disclosed by the last actuarial valuation "so as to exclude from it any surplus or deficit included therein which was made in any earlier intervaluation period." Leaving aside the case of a deficit which does not arise in the present case, the task

of the Income-tax Officer was to find out what amount, included in the surplus of the 1937 valuation, was surplus carried over from the 1932 valuation. Had there been no facts, other than those stated above, such amount would be Rs. 14,889, and the whole of the amount would have to be deducted from Rs. 1,27,994, which is what the assessee contends. But the sum of Rs. 14,889, the surplus of the 1932 valuation, included a sum of Rs. 1058, "carried forward unappropriated from the 1930 valuation, but allocated to share-holders." That means, as it appears from the appellate order of the Tribunal, that at the 1930 valuation, this amount was allocated to share-holders and recommended to be taken over to the Reserve Fund, but neither was that done, nor was the amount paid to share-holders. Nothing, however, turns on that circumstance, so far as the present question is concerned and the only point to be noticed is that the amount remained unappropriated and came to form a part of 1932 surplus of Rs. 14,889. In 1934, however, the amount of 1058, was debited to the Revenue Account and transferred to the Dividend Equalisation Fund and it need hardly be pointed out that as soon as that was done, the surplus carried along so far was reduced by Rs. 1058, and became Rs. 13,831. When, therefore, the next valuation was made in 1937, the surplus outstanding at that time from 1932 was only Rs. 13,831, and that was the amount of the previous surplus which went into Rs. 1,27,994, the surplus of 1937, and not Rs. 14,889. The Income-tax Officer might have deducted from the surplus of 1937 the sum of Rs. 13,831 straightway, as that was really the surplus of the previous intervaluation period included in the last surplus, but what he did instead was that he first deducted the whole sum of Rs. 14,889, and then added back Rs. 1058. The result was the same. There cannot be the slightest doubt that all the deduction which the assessee was entitled to under this head was a deduction of Rs. 13,831, which it, in fact, got.

[31] Turning now to the question referred, if the amount of Rs. 1058 was expenditure, but "not an expenditure within the meaning of S. 10," it was obviously liable to be disallowed and added back under the express terms of R. 2 (b). But it is clear that no question of expenditure arises. Whether the amount was to be allowed or disallowed, does not fall to be determined by whether it was or was not expenditure or allowable expenditure but by whether it was or was not included in the surplus of Rs. 1, 27,994, disclosed by the 1937 valuation. On the facts I have set out, it was clearly not included. The case is not one under that part of R. 2 (b) which speaks of excluding from the surplus "any expenditure other than expenditure which may under the provisions of S. 10 of this Act be allowed," but a case under that part which speaks of excluding "any surplus included therein which was made in any earlier inter-valuation period," the amount of Rs. 1058 was not an expense of carrying on the business during the last valuation period, but a belated appropriation of a portion of the 1932 surplus in accordance with the recommendation made at the 1930 valuation when the amount had first emerged as a surplus. If the case comes under the second part of R. 2 (b) that I have quoted, it is to be noticed that the Rule does not say that whatever surplus was disclosed by the next preceding valuation must be excluded, but only so much of that surplus as may have been included in the last surplus which is being adjusted. How much has been included is a problem of arithmetic and accounting and so a question of fact and not a question of law, but, in any event, the question in the present case was correctly answered by the Income-tax Officer.

[32] Question (ii) of this Reference has already been dealt with. Question (iii) is in the following terms :

"Having regard to the finding of the valuing actuary that a sum of Rs. 1 15,195 was policy-holders' share out of which Rs. 108,620 was for immediate payment to policy-holders and the balance of Rs. 6575 was to be carried forward, whether in determining the allowance as deduction permissible under R. 3 (a), one-half of the said Rs. 1,15,195 was allowable as deduction."

[33] This again is a question of fact and the form of the question is open to the same objection as question (i). Rule 3 (a) provides that :

"In computing the surplus for the purpose of R. 2 :

(a) One-half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction."

[34] The question formulated rests on two premises, viz., (a) that the valuing actuary found a sum of Rs. 1,15,195 to be the policy-holder's share of the divisible surplus and (b) that of the said sum, a sum of Rs. 6575 was, instead of being paid out immediately, carried forward. If these premises be correct, the sum of Rs. 6575 was carried forward as reserved for policy-holders and the assessee would obviously be entitled under R. 3 (a) to a deduction of one-half of the whole sum of Rs. 1,15,195 and not merely to one-half of rupees 1,08,620, as allowed by the Income-tax Officer. But it is not that the Tribunal has held the premises to be correct and yet held that the assessee was not entitled to a deduction of one-half of the entire amount. Rightly or wrongly, it has held the premises to be incorrect and thus the question assumes the very facts, the correctness of which is the matter for enquiry. The question, again, as to whether the sum of Rs. 6575 was reserved for the policy-holders is obviously a question of fact.

[35] But the question having been directed to be referred, must be dealt with and the facts require to be stated in some detail. The last valuation was made in 1937 and, therefore, the Insurance Act applicable was the Act of 1912. In accordance with S. 8 of the Act, the actuary prepared an abstract of his valuation report and he prefixed to it a forwarding letter addressed to the Directors. The whole was called the Valuation

Report. The Tribunal has referred to these documents and although we cannot make a fresh finding of fact in a Reference, our attention was drawn to the valuation Report itself which is one of the documents included in the Appendix to the Statement of the Case, although it has not been printed on the ground that it was separately available in print. The Tribunal has pointed out that in the abstract of the report itself, in the part drawn up in accordance with cl. 9, sch. 4 to the Act, the following statement occurs :

"The total profit made by the Company has been Rs. 1,27,994 allocated as follows :

(a) Rupees 1,08,620 among policy-holders with immediate participation in profits (details omitted).

(b) Rupees 12,799 among the shareholders.

(c) Rupees 6,575 carried forward unappropriated."

[36] It will be seen that what is allocated to the policy-holders is only a sum of RS. 1,08,620 and that RS. 6,575 is a separate sum which is the balance left after the appropriations and is carried forward "unappropriated". In the forwarding letter, however, the actuary stated as follows :

"The valuation discloses a surplus of Rs. 1,27,994. This is allocated as follows :

The total divisible surplus ...	Rs.	1,27,994
Less 1/10th, being shareholders' share	Rs.	12,799
Policy-holders' share ...	Rs.	1,15,195
The provision necessary for a simple Reversionary Bonus (details omitted) :	Rs.	1,07,222
The amount required as Bonus to Policies becoming claims by maturity during the inter-valuation period ...	Rs.	1,398
	Rs.	1,08,620
Balance ...	Rs.	6,575

The balance of Rs. 6,575 is carried forward unappropriated."

[37] It is only in the forwarding letter that the policy-holders' share is stated to be RS. 1,15,195 but even there, ultimately, RS. 6,575 is not shown as reserved for policy-holders and is not recommended to be taken to a Reserve Fund, (as in the case of the sum of RS. 1058, allocated to the shareholders at the 1930 distribution, which we saw under Question (i)), but is carried forward "unappropriated", exactly as in the abstract of the report. The Tribunal has pointed out that in the question framed by the assessee, the important word "unappropriated" has been omitted.

[38] The contention of the assessee is that even the sum of RS. 6575 was allocated to the policy-holders and though not appropriated, was reserved for them and that, therefore, one-half of this sum also ought to have been deducted under R. 3 (a). The contention of Mr. Mitra before us can be summarised by saying that, according to him, the sum of RS. 6,575 was the unappropriated balance of the amount allocated to policy-holders.

[39] In my opinion, the contention of the assessee cannot be accepted. The material document is the statutory abstract of the valuation report according to which the sum of RS. 6575 is no part of any sum allocated to policy-holders, but is simply "carried forward unappropriated". Under S. 8 of the Act, the abstract had to be made "in the form set forth in sch. 4." Schedule 4 contains nine clauses each of which mentions one or more things which must be included in the abstract and cl. 9 provides that it must include—

"The results of the valuation, showing :

(1) the total amount of profit made by the company, allocated as follows :

(a) among the policy-holders with immediate participation, and the number and amount of the policies which participated ;

(b) among policy-holders with deferred participation, and the number and amount of policies which participated;

(c) among the share-holders ;

(d) to reserve funds, or other accounts;

(e) carried forward unappropriated."

[40] It will be seen that sub-cl. (1) begins with the words "allocated as follows" and, among the heads of allocation, "carried forward unappropriated" is a distinct item, distinct both from allocation among policy-holders and allocation to reserve funds or to other accounts. It is itself a head of allocation. There is no head in the clause such as "carried forward unappropriated out of the sum allocated under (a), (b), (c) or (d)." The abstract in the present case is exactly in this prescribed form and contains entries under heads corresponding to heads (a), (c) and (e). The amount of RS. 6575, shown as "carried forward unappropriated" is thus an amount not allocated otherwise and indeed the abstract specifically says under head 'a', that the amount allocated to policy-holders is only RS. 1,08,620. The entry, regarding the RS. 6575 is clearly an entry under head (e) of cl. 9 (1) of sch. 4 to the Act. If, as Mr. Mitra contended, the amount was reserved for policy-holders, there was no reason why an entry to that effect should not have been made under head (d) of cl. 9 (1) of sch. 4. It is true that in the forwarding letter, the actuary first stated that the policy-holders' share was RS. 1,15,195, but that, as the Tribunal has pointed out, might only mean that as between the share-holders and the policy-holders, RS. 1,15,195 of the profits would be available for being allocated to the latter. The actual allocation, as shown in the abstract of the actuarial report, was only of RS. 1,08,620 and the rest was directed to be "carried forward unappropriated." Indeed, the forwarding letter itself proceeds to say so. Mr. Mitra drew our attention to the statement in the abstract under cl. 8 of the Schedule to the effect that 90% of the divisible surplus had been allocated to the policy-holders and 10% to the share-holders. Clause 8 requires the abstract to state the principles upon which the distribution of profits among the share-holders and policy-holders was made and apart from the fact that the statement relied on appears to be irrelevant to cl. 8, it is not inconsistent with the meaning attributed by the Tribunal to the opening statement in the forwarding letter. The share-holders and the policy-holders being the only persons interested

in the profits of a life insurance company, there may first be an overhead apportionment as between the two classes. Actual allocation of any particular sum is a further process and there is no evidence in the actuarial report of the allocation of the sum of Rs. 6,575 to policy-holders. Indeed, the evidence is definitely to the contrary. There is no finding, nor anything to show, that the sum of Rs. 6,575 was subsequently applied to the use of the policy-holders under a recommendation contained in the valuation report, from which it could be inferred that the sum had really been ear-marked for the policy-holders at the 1937 distribution of the surplus. The question is one of pure fact and in a reference we must go by the finding of the Tribunal. In any event, the contents of the statutory report, read with cl. 9 (1) of sch. 4 to the Insurance Act of 1912, are conclusive and the sum of Rs. 6,575 was, in my opinion, neither paid to, nor reserved for, nor expended on behalf of the policy-holders, as the Tribunal has held. Any amount, like the present amount of Rs. 6,575, "carried forward unappropriated" under Part 9 of sch. 4 to the actuary's report, will form part of the surplus disclosed at the next valuation and will be liable to be distributed according to the recommendations then made and there will be nothing to compel the insurer to allocate it to policy-holders only. Accordingly, the assessee was not entitled to a deduction of one-half of the sum of Rs. 6,575 under R. 3 (a).

[41] The next question is Question (iv) and it is in the following terms :

"Having regard to the provisions of the first proviso to R. 3 (a), whether the sum of Rs. 13,831 or any part of it can be excluded while computing the surplus for the purpose of R. 2 ?"

[42] The sum of Rs. 13,831, is the same that we came across in connection with Question (i). It is the amount of the 1932 surplus which was included in the larger surplus disclosed by the 1937 valuation, but is referred to here in connection with a different plea.

[43] Here again, in order that the question may be understood it is necessary to refer first to the relevant provisions of law. They are R. 3 (a) and the first proviso thereto, reading as follows :

"3. In computing the surplus for the purpose of R. 2 :

(a) One-half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction :

Provided that in the first such computation made under this rule of any such surplus, no account shall be taken of any such amounts to the extent to which they are paid out of or in respect of any surplus brought forward from a previous inter-valuation period."

[44] The amounts referred to in cl. (a) above are not amounts of claims paid, which have already been deducted by the actuary in arriving at the surplus, but amounts paid out of the surplus, or reserved thereout for payment, as bonus to participating policy-holders or spent for them in other ways. In England, the whole of such amounts are now deductible under S. 16 (1), Finance Act of 1923, which was enacted on the recommendation of the Royal Commission of 1920 and superseded the decision in *Last* v. *London Assurance Corporation Co.*, (1885) 10 A. C. 438. In India, however, before the Act of 1939, no part of such amounts was deductible, because according to the Revenue, and as was held by the Privy Council in *Bharat Insurance Co. Ltd.* v. *Comm. of Income-tax, Punjab*, 1934-2 I. T. R. 63 (P. C.), such amounts were paid out of profits after the same had been earned. On the other hand, the insurance companies had always been contending that participating policy-holders were charged a higher rate of premium in order to provide for payment of a bonus to them and dividends to share-holders and that the payment of the bonus was merely a return of that excess premium and, therefore, a return of capital and not payment of a share of the profits. Clause (a) represents a compromise between these two views. It was found on an analysis of the relevant figures that in fact the surplus out of which the bonus was paid arose partly out of the excess premia realised and partly out of profits and accordingly a rough proportion of half-and-half was laid down.

[45] It may be added that the use of the bare word 'amounts' in R. 3 (a), as contrasted with "any part of the profits" in the English section, ought not to mislead anyone into thinking that the Rule deals with items of payment or expenditure made or incurred in the course of carrying on the business. Under R. 2 (b), the surplus disclosed by actuarial valuation is to be adjusted. Under R. 3, and, therefore, under R. 3 (a), the surplus is to be computed, not for the purpose of R. 2 (b) but for the purpose of the whole R. 2, that is to say, for the purpose of determining the taxable "profits and gains" of the business. What it means is that the surplus ascertained under R. 2 (b) is to be further adjusted under R. 3, except in the case of sub-r. (c), by reference to the manner in which the surplus has been utilised and the 'amounts' referred to in R. 3 (a) are, therefore, amounts paid or reserved or expended out of the surplus.

[46] What is important to notice is that R. 3 (a) directs a deduction to be made from the surplus and, therefore, the larger the deduction, the smaller will be the taxable profits. Under cl. (a), read without the proviso, the whole of the amounts allocated to the participating policy-holders out of the surplus, whether for immediate payment or for reservation, is to be taken into account and one-half thereof deducted. But then comes the proviso, limited in its operation to the first computation under the 1939 Act. The function of a proviso is to except a case which would otherwise fall within the general language of the main enactment and the proviso in the present case lays down that in making the deduction under cl. (a) at the first computation under the

new rules, that portion of the amounts paid to or reserved for or expended on behalf of policy-holders which is relatable to the surplus brought forward from a previous valuation period as paid out of that surplus, shall not be taken into account. In other words, what shall be deducted will only be the amounts paid or spent or reserved out of the surplus of the last valuation period, but so far as any portion of the amounts, actually paid or spent or reserved, came out of the surplus of a previous period, still lying unappropriated in the hands of the insurer at the time of the distribution, the same shall be disregarded and one-half of such portion shall not be included in the deduction. The result of the exclusion of such portion will be to reduce the amount of the deduction and make the taxable profits larger. The contention of the assessee, however, is that the meaning of cl. (a) and proviso 1 thereto is quite the opposite.

[47] It will be convenient now to state the facts. The computation for the 1939-40 assessment was the first computation under the schedule. It has already been seen that the amount of the surplus of the previous valuation period ending in 1932 which was included in the total surplus disclosed by the 1937 valuation, was Rs. 13,831. In making the deduction under R. 3 (a) and computing the amount of which one-half was to be taken, the Income-tax Officer excluded the entire amount of Rs. 13,831 from Rs. 1,08,620, the amount allocated out of the surplus to policy-holders. On appeal, the Appellate Assistant Commissioner held that the whole amount of Rs. 13,831 ought not to be excluded but only that proportion of it which might fairly be said to have gone into the amount allocated to the policy-holders. Accordingly, he apportioned the latter amount between the previous surplus carried forward and the net surplus of the last valuation on a *pro rata* basis and determined the proportion to be Rs. 11,737, which he directed to be excluded. His decision was upheld by the Tribunal. The expression "or any part of it" in the question referred has reference to this reduction. No question was raised before us as to the method by which the proportion was worked out or the correctness of the amount determined. But the contention was that under the proviso, no part of the sum of Rs. 13,831 was liable to be deducted at all.

[48] According to Mr. Mitra, in determining the amount of which one-half was to be deducted under R. 3 (a), the Income-tax Officer would have, but for the proviso, to exclude the amount which had come out of the previous surplus, for, his task was to compute the surplus of the last valuation period. But the proviso enjoined that in the first computation under the new rules, no such exclusion was to be made. In other words, one-half of the whole amount paid to or spent or reserved for policy-holders was to be deducted. It was contended that the words "no account shall be taken of," occurring in the proviso, meant "ignored" and the proviso meant that in the first computation, the fact that a part of the total amount paid to or reserved for policy-holders had come out of the surplus of a previous period was not to be taken into consideration. In support of his construction of the words "no account shall be taken," Mr. Mitra referred to ss. 15 (2-A) and 44E (3) (b) of the Act where also the same words had been used.

[49] Mr. Mitra did not seem to realise that if his contention was correct, his client might save some tax in the 1939-40 assessment, but would be consigned to a liability for a heavier tax in all future assessments. On the view contended for by him, the deduction in the first assessment would be larger and in subsequent assessments smaller, for them, according to him, the amount coming out of the surplus of the previous period would have to be excluded from the amount of which one-half was to be deducted, the proviso no longer operating. As I have already explained, such is not the meaning of the rule or the proviso. It is to be noticed that by the time the stage of R. 3 (a) is reached, the surplus carried forward from the previous period has already been deducted from the surplus of the last valuation under R. 2 (b) as Rs. 13,831 was in the present case. That deduction is for the purpose of ascertaining what the surplus of the last valuation period itself was. Rule 3 (a) is concerned with laying down what portion of the surplus, as ascertained, shall be taken as taxable profits and it directs that one-half of the amounts paid to or reserved for the policy-holders shall be deducted. Since the direction, as I have explained, is on the basis that to the extent of one-half, the payment or reservation of the amounts may be taken to be return of capital, to that extent the amounts are not profits at all and, therefore, it is immaterial to what period the funds out of which they were paid or reserved belonged, i. e., when the capital returned was received or emerged as a surplus. A full one-half of the total amount paid or reserved for policy-holders is, therefore, to be deducted and there could be no reason for excluding any portion on the ground that it was provided out of the surplus of a previous period. It is for that reason that R. 3 (a), taken by itself, is wholly unqualified and Mr. Mitra was not right in contending that in applying it, without the proviso, the amounts coming out of a previous surplus were to be excluded. It is the proviso which provides for the exclusion in the case of the first computation and the words "no account shall be taken of any such amounts etc." mean that such amounts shall not be taken into account or shall be kept out of account, in other words, they will not be included in the amount of which one-half is to be deducted. The effect of this exclusion will be to reduce the amount that would otherwise have to be deducted under R. 3 (a) and it is in that way that

the proviso restricts the operation of the Rule in the case of the first computation and makes the taxable profits larger. We are not concerned with the policy of the Legislature, but the reason for the proviso has been suggested to be that since no part of the amounts allocated to the policy-holders was formerly deductible and one-half was now being allowed, it was sought to moderate the sudden fall of revenue in the first year. The construction I have placed on the words "no account shall be taken" viz., shall not be taken into account or shall be left out of account, is perfectly consistent with the meaning of the same words in SS. 15 (2-A) and 44E (3) (b) cited by Mr. Mitra.

[50] For the reasons given above, I am of opinion that so much of the sum of RS. 1,08,620, allocated to the policy holders, as was paid out of the previous surplus of RS. 13,831 was liable to be excluded by virtue of the proviso to R. 3 (a), the computation being the first computation under the Rules. There can be no reason to suppose that the whole of the amount allocated to the policy-holders was paid out of the surplus of the last valuation period, leaving the previous surplus untouched, nor that the entire amount of the previous surplus was first exhausted. In the circumstances, to work out a proportion, as the Appellate Assistant Commissioner did, was obviously the fairest thing that could be done, as the Tribunal has held.

[51] Proceeding now to question (v), that question runs thus :

Was the Appellant entitled in law to claim allowance as deluction the sum of Rs. 31,317 being other assets written off under the provisions of R. 3 (b)?

[52] Rule 3 (b) has already been quoted in connection with question (ii). The facts relevant to the present question are that during the last valuation period, there was appreciation of securities held by the company to the extent of RS. 97,112 and at the same time there was depreciation to the extent of RS. 15. In the Statement of the Case, the latter amount is referred to as "loss", but it is explained in the appellate order of the Tribunal that this loss was due to depreciation. The former of the two amounts was liable to be included in the surplus under the second part of R. 3 (b) and the latter was liable to be deducted under the first part, but the Income-tax Officer, instead of carrying out two operations of addition and subtraction, merely included the amount of the net appreciation which was RS. 81,318. The further facts are stated by the Tribunal in the following words :

"Out of the net profits of Rs. 81,398 mentioned above, a sum of Rs. 31 317 was taken to an account called Organisation Account. Organisation expenses were written off to the extent of this sum, or in other words, were reduced by this sum."

[53] In the appellate order of the Tribunal, the name of the account is given as Organisation Expenses Account. The contention of the assessee is that the organisation expenses were "other assets" within the meaning of R. 3 (b) and as the sum of RS. 31,317 was written off to meet the loss on the realisation of such assets, the assessee was entitled under the Rule to its deduction from the surplus.

[54] It appears to me that the reference to the appreciation and depreciation of the securities is pointless. The material fact is that a sum of RS. 31,317 was set off against the organisation expenses, but wherefrom that sum came and how exactly it was earned, is immaterial. The real question is whether organisation expenses are "assets" within the meaning of R. 3 (b) and whether setting off a portion of the profits against organisation expenses can be regarded as "writing off" the amount concerned "to meet loss on the realisation of" those assets.

[55] Prima facie, it is difficult to see how expenses can be assets, particularly assets capable of realisation. Mr. Mitra, however, tried to introduce some new facts and stated that the expenses concerned were really advances granted to the organisers which they had failed to repay and which had become irrecoverable. According to him, the expenses were thus debts due to the company and loss had been suffered on their realisation.

[56] I am afraid it is not possible in a reference to go beyond the Statement of the Case and admit further facts which alone supply the foundation for a particular contention. A stern reminder of this limitation is contained in the recent judgment of the Supreme Court in the case of *Commr. of Income-tax, West Bengal* v. *Calcutta Agency Ltd.*, (1951) 19 I. T. R. 191 (S. C.). Neither the Statement of the Case in the present case, nor the appellate order of the Tribunal contains any finding or material to show that the expenses concerned were anything other than expenses, properly so called, i. e., sums spent out.

[57] I have already given, in connection with question (ii), my reasons for holding that "other assets" contemplated by R. 3 (b), are assets of the nature of investments which may appreciate or depreciate, about which it is appropriate to speak of realisation and realisation of which may result in gain or loss. I am unable to see how organization expenses can come under the category of such assets. If they are business expenditure, they would fall to be considered under R. 2 (b), read with S. 10 of the Act. If they are capital expenditure, they would still not, by themselves, be assets, although any asset acquired by or through them may be an asset. It is, however, difficult to think of any asset, particularly a realisable asset, acquired by organisation expenses. They may be carried on the assets side of the Balance Sheet, as was said to have been done in the present case, but that is only a method of accounting and, as assets, such assets are fictitious, because they have no real existence in the shape of anything which may be the subject-matter of realisation. This last point appears to me to be decisive, for, apart from appreciation and depreciation, R. 3 (b) contemplates assets

which are held by the company for realisation or at least such assets as may be realised and which on realisation, may bring in gain or cause loss. It is impossible to see how organisation expenses can be realised as assets are realised and how there can be dealings in organisation expenses, leading to loss or gain. Further, R. 3 (b) speaks of "loss on the realisation of assets" which clearly contemplates that there has been a transaction of realisation and such transaction has resulted in loss. It is not even arguable that there was or could be any transaction of realisation in the present case. Mr. Mitra contended that the organisation expenses had always been shown as assets, had formed part of the surplus and had suffered tax in the past and it would be inequitable if a balancing allowance was not granted, when they were written off. Even if the facts be as stated, about which there is no finding, we are concerned here with only what the Act allows under R. 3(b). As I have tried to explain in connection with question (ii), R. 3 (b) seeks to give relief to life insurance companies by treating them as dealers in investments although they are really not so and the "other assets" contemplated by the Rule are assets of the nature of investments. I am clearly of opinion that organisation expenses cannot come within such assets.

[58] I have already pointed out that the further facts sought to be introduced by Mr. Mitra are not admissible, but I may add a word with regard to them. On the basis that the expenses concerned were advances made to the organisers, the argument of Mr. Mitra appeared to proceed on principles applicable to bad debts. But it is well settled that bad debts in respect of which an allowance is available for purposes of income-tax are trading debts, i. e., debts constituted by outstanding business dues or, in the case of bankers and money-lenders, debts arising out of loans granted in the course of the money lending business. Financial accommodation granted to employees or sums over-drawn by an employee on his commission account are not debts which, on becoming irrecoverable, can be claimed as bad debts for purposes of income-tax. I am not forgetting that the allowance for bad debts I am speaking of is a revenue allowance, but it shows the principle applicable, because the allowances under R. 3 (b), although capital allowances in form, really rest on an assumed basis that the insurance company carries on a business of dealing in investments and, therefore, the principle may be referred to for ascertaining what kind of debts are contemplated by R. 3 (b), if "other assets" mentioned by it include debts due to the company. In my opinion, R. 3 (b) may include loans granted by the company out of its surplus funds as investments of its money and with regard to such loans it will obviously be appropriate to speak of realisation and of gain or loss. But even assuming that the organisation expenses written off in the present case were loans advanced to organisers, there is nothing to show that they were loans of the above kind or of what kind they were. A mere statement that they were advances would not bring them within R. 3 (b). I need not, however, pursue this point further, because, on the facts s ated by the Tribunal, it does not arise. In my opinion, for the reasons I have given, the assessee was not entitled to a deduction of the sum of Rs. 31,317 on the basis that it was an amount written off to meet a loss on the realisation of assets.

[59] The last question is Question (vi) which is in the following terms :

Whether the sum of Rs. 50,081 carried to the Investment Reserve Fund was admissible as deduction under R. 3 (b) of the Schedule ?

[60] We have seen in connection with the preceding question that the net appreciation of the securities was Rs. 81,398 and that out of that amount, Rs. 31,317, was carried to the Organisation Expenses Account. The balance left was Rs. 50,081, and that is the sum referred to in the present question. This sum was carried to the Investment Reserve Fund. The contention of the assessee is that the amount was "reserved in the accounts to meet depreciation of or loss on the realisation of securities" and that, therefore, it ought to have been deducted from the surplus under R. 3 (b). The Tribunal rejected the contention on the ground that the Rule contemplated a depreciation or loss which had actually occurred and none having occurred in the present case, the deduction claimed was not allowable.

[61] It was contended by Mr. Mitra that the language of the Rule was wide enough to cover both loss or depreciation which had actually occurred and future loss or depreciation. He referred to the dictionary meaning of the word 'reserve' which, according to the Oxford Dictionary, was "to keep for future use, to keep back or hold over for a later time" and contended that the Rule did not, in any way, limit the contingency contemplated by it to actual loss or depreciation. According to Mr. Mitra, the decision of the Bombay High Court in the case of the *Commr. of Income-tax Bombay* v. *Western India Life Insurance Co. Ltd.*, 1938-6 I. T. R. 44 (BOM.) in which a contrary view had been taken under the old R. 30, was not correct.

[62] In my opinion, the answer to the question is not to be found in the dictionary meaning of the word 'reserve' or any other word, but in what the Rule aims at and intends and what, taken as a whole, it says. As I have already explained, although in the case of a life insurance company, depreciation of or loss on the realisation of securities held by it is really decrease of capital or capital loss, R. 3 (b), in effect, treats such a company as a dealer in investments and gives it a right to claim deduction on the ground of such depreciation or loss. But, there is no reason to

suppose that the Rule gives a life insurance company greater rights than those of an assessee who actually deals in securities. Such an assessee can only claim that losses actually suffered by him, whether on the purchases and sales of securities or by their depreciation, shall be taken into account in his assessment, but he cannot claim that future or apprehended losses shall also be taken into account. Rule 3 (b) places insurance companies exactly in the same position. The material words in it are "any amount either written off or reserved in the accounts or through the actuarial valuation to meet depreciation of or loss on the realisation of securities." As to writing off, it is perfectly clear that no loss can be written off unless it has actually occurred. "Reserved" occurs in the Rule as an alternative to writing off and the scope of the two operations is obviously co-extensive. Strictly speaking, "written off" seems to go better with loss and "reserved" with depreciation, but in income-tax language, depreciation is also loss and there is no reason to think that the Rule is, on the one hand, limiting writing off of losses on realisation to actual losses and on the other, contemplating losses by depreciation as comprising apprehended losses as well, in complete variance with the ordinary income-tax. It is true that the word "reserved" itself implies a future contingency against which the reservation is made, but even that implication of the word does not involve a difference from writing off as regards the requirement that, like loss, the depreciation also must be a present depreciation which has already occurred and which requires to be met. The reason why there is no difference is that in a case of depreciation, the asset is still being held and depreciation is only a fall in value of the asset below its cost price and, therefore, only a notional loss. No actual loss is suffered until the asset is sold and unless depreciation exists at the date of the sale as well. When an amount is reserved to meet depreciation, it is undoubtedly reserved to meet this possible actual loss on sale, which is a future contingency, but the basis of such depreciation is that a depreciation has already occurred and notice must be taken of it and that the notional loss which has resulted foreshadows an actual loss which requires to be provided against. There must thus be a present depreciation and present notional loss, although the actual loss may be a future contingency. The loss must, however, be a loss occurring upon a computation of both appreciation and depreciation of assets of the class concerned, because if inspite of depreciation of some of the assets of the class, the net result is still a profit or at least no loss, there will be no necessity or justification for taking anything to the reserve out of the profits to provide against loss by depreciation under the head concerned. Again, although the present loss is only notional, commercial practice treats it as actual loss and income-tax allows it to be so treated, of course when the accounts are kept on the mercantile basis. The measure of the present notional loss, as determined at the stock valuation, is the measure of the deduction allowed. Rule 3 (b) embodies the same principle and provides for a deduction to the extent of any actual loss written off and to the extent of so much of any actual depreciation as has been sought to be met by taking an amount to a reserve fund. The language used in the Rule leaves no doubt that such is its intention. If Mr. Mitra's contention was correct, a life insurance company would be in a position to escape tax on any amount it pleased by simply taking it to a reserve fund on the plea that it was intended to meet future depreciation. Such a contention cannot be entertained for a moment. Reference was made to the proviso to the Rule and it was contended that the Income-tax Officer could always revise and adjust the depreciation allowance claimed, but apart from the fact that that provision is a very inadequate safeguard against extravagant appropriations to depreciation, it throws no light on the question as to whether R. 3 (b) contemplates that a loss on realisation or loss by depreciation must actually have occurred.

In my opinion, the answer to that question must be in the affirmative, as was held in *Re Commr. of Income-tax, Bombay* v. *Western India Insurance Co. Ltd.*, 1938-6 I. T. R. 44 (Bom.) and *Commissioner of Income-tax, Bombay, Sind & Baluchistan* v. *Indian Life Insurance Co. Ltd.*, 1946-14 I. T. R. 347 (sind). Both the decisions were under the old R. 30, but that Rule was substantially the same as the present R. 3 (b).

[63] In the present case, although during the last valuation period, there was depreciation of some of the securities, appreciation of other securities was to a much larger extent so that the net result was a substantial increase of the money invested in securities. In the circumstances, there was no loss on securities, whether by depreciation or otherwise, and accordingly no reserve was required to be created "to meet depreciation of or loss on the realisation of securities." The sum of Rs. 50,081, taken to the Investment Reserve Fund, cannot, therefore, be said to be an amount reserved in the accounts for the purpose stated in R. 3 (b) and accordingly deduction of the amount was not allowable under the Rule. On general grounds too, it is clear that since the Schedule is concerned with the computation of the profits of the last valuation period, there is no reason why in R. 3 (b) it should provide for deduction of any amount as loss where in fact no loss occurred.

[64] In the result, the questions referred must, in my opinion, be answered as follows :

REFERENCE NO. 2 of 1946 :

Question (i) : By neither.

Question (ii) : NO.

REFERENCE NO. 4 of 1947 :

Question (i) : Yes.
Question (ii) : Does not arise.
Question (iii) : Does not arise, the facts assumed not being correct. On the correct facts, the answer is, NO.
Question (iv) : Yes, a part proportionate to the total amount utilised for the policy-holders.
Question (v) : NO.
Question (vi) : NO.

[65] As the two references were heard together, there will be only one set of costs and in view of the proportion of the divided success, the Commissioner will have three-fourths of them. He will also have the full costs of and incidental to the application on which the Rule Nisi, resulting in Reference NO. 4 of 1947, was issued. Certified for two counsel.

[66] **S. R. Das Gupta J.** — I agree.

B/D.H. *Order accordingly.*

A. I. R. 1953 Calcutta 74 *[Vol. 40, C. N. 21.]*

HARRIES C. J. AND G. N. DAS J.

Kamarhatty Co. Ltd. — *Petitioner* v. *Abdul Samad*—*Opposite Party.*

Civil Rule No. 2033 of 1951, D/- 7-12-1951.

(a) Workmen's Compensation Act (1923), S. 30 — Commissioner holding that accident had been proved—It is finding of fact and cannot be challenged before High Court. [Para 4]

Anno. Workmen's Compensation Act, S. 30 N. 3.

(b) Workmen's Compensation Act (1923), S. 10, Proviso — That some senior Officers in management had promised compensation is sufficient cause for not making claim within twelve months. *(Obiter).* [Para 7]

Anno. Workmen's Compensation Act, S. 10 N. 3.

(c) Workmen's Compensation Act (1923), S. 10, Proviso — Claim not filed within twelve months of accident — Reasonable cause — That he returned to work and earned more wages, is not sufficient cause.

Under S. 10 read with the proviso the circumstance that the workman returned to work after the accident which had caused serious injury and certain degree of permanent incapacity, and began to earn higher wages is not a sufficient cause for not filing the claim for compensation within twelve months of the date of accident : (1921) 1 K. B. 655, *Relied on.* [Para 11]

Anno. Workmen's Compensation Act, S 10 N. 3.

(d) Workmen's Compensation Act (1923), S. 10, Proviso — Sufficient cause established — Subsequent negligence and improper delay is immaterial.

Under S. 10 read with the proviso, if a sufficient cause for not filing claim for compensation within twelve months of the accident is established, it is immaterial if there had been subsequent negligence or improper delay in making the claim : (1921) 1 K. B. 655, *Ref.* [Para 13]

Anno. Workmen's Compensation Act, S. 10 N. 3.

Phanindra Kumar Sanyal—for Petitioner; *Jitendra Mohan Sen Gupta—for Opposite Party.*

REFERENCES : Courtwar/Chronological/ Paras.

('51) A. F. O. O. No. 99 of 1950 : (A. I. R. 1952 Cal, 752). 11

(1921) 1 K. B. 655 : (90 L. J. K. B. 290). 9, 10, 11, 13

Harries C. J.—This is a revision praying that an order of the learned Commissioner for Workmen's Compensation granting the opposite party compensation to the amount of RS. 283-8-0 together with RS. 10 costs be set aside.

[2] The opposite party Abdul Samad claimed a sum of RS. 882 as compensation from the petitioners, the Kamarhatty Jute Mills Co. Ltd., who were his employers. He alleged that sometime in the month of March 1925 he sustained an accident whilst on duty in the engine department of the petitioners' factory and as a result received personal injuries which resulted in a loss of capacity for work. The accident was concerned with some machinery in the factory and the opposite party's right hand, it is said was caught in this machinery and the thumb and index finger damaged. Eventually, it is said, the first phalanx of the thumb and half the index finger were removed by amputation.

[3] No claim for compensation was made in this case until 3-8-1950 over twenty-five years after the alleged accident. It was stressed on behalf of the petitioners that the applicant opposite party actually left their service on 1-1-1943, due apparently to the fear of bombing by the Japanese, later he rejoined and resigned his service on 24-3-1950 and as I have stated made his claim on 3-8-1950

[4] There was a dispute in the Court below as to whether there had been any accident and as to whether this man had a damaged hand when he first entered into service. The petitioners of course were at a very grave disadvantage having regard to this lapse of time. But the learned Commissioner held that the accident had been proved and as that is a finding of fact it cannot be challenged before us as there was evidence to support it.

[5] It was, however, urged that the claim for compensation was bound to be dismissed by reason of the fact that no claim for compensation had been preferred within twelve months of the date of accident. Admittedly, no claim was made, but it was contended on behalf of the opposite party that there was reasonable cause for not making such a claim. The learned Commissioner eventually held that there was reasonable cause for not making this claim within twelve months of the date of the accident and accordingly rejected the plea that want of claim within the stipulated period was a complete bar to the grant of any compensation.

[6] The point as to failure to make a claim within twelve months was a point of substance. The necessity for making prompt claims is clearly seen in cases of this kind. The management of these mills had changed since 1925 and it was quite impossible for the present management to deal with this claim.

[7] The opposite party endeavoured to make a case that he did not claim compensation as some senior officials in the management at the time of the accident had promised him compensation.

Had he been able to establish that, it might have been held that he had reasonable cause for not making his claim within twelve months. The learned Commissioner however rejected that explanation and I think rightly.

[8] The learned Commissioner, however, held that this workman had reasonable cause for not making a claim within twelve months because he had returned to work under the petitioners and had earned similar if not higher wages. He certainly had earned higher wages at a later stage of his employment. In those circumstances the learned Commissioner felt that he could be excused from making a claim within twelve months.

[9] Does the fact that an injured workman has returned to work and been able shortly after the accident to earn his pre-accident wages or even higher wages excuse him from making a claim within twelve months of the date of the accident? This matter was considered at considerable length by the English Court of Appeal in *Lingley* v. *Thomas Firth & Sons, Ltd.*, (1921) 1 K. B. 655. It is to be observed that the provision requiring notice of claim in the English Workmen's Compensation Act is very similar to that in the Indian Act. In *Lingley's case* a woman had received an injury on the toe which did not incapacitate her completely beyond a day. Her evidence however was that the toe pained her considerably and that she was unable to stand up during her work. The toe became worse and eventually after more than a year had elapsed from the date of the accident she made a claim. After she returned to work she earned higher wages as she had been promoted. But in spite of that fact the Court of Appeal in England held that there was no reasonable cause for failure to make a claim.

[10] In *Lingley's case*, (1921) 1 K. B. 655, it could not be said that the accident was a trivial one though she had only been away from work for a day or so. Her description of the pain she suffered whilst continuing with her work made it clear that the accident, if not a serious one, could not be described as a trivial one. The Court of Appeal appeared to have thought that if the accident had been trivial, there might have been reasonable cause for not reporting it, but as the accident was not trivial then the fact that she returned to work and even earned higher wages afforded no cause for not reporting the same. She knew that as a result of the accident she was suffering some degree of incapacity and she knew that she was not getting better by reason of the fact that her toe continued to give her pain and frequently made it impossible for her to stand up at her work. Such being the case, the accident could never have been regarded as trivial and notice should in the view of the Court of Appeal have been given.

[11] The present case appears to me to be a very much stronger case than *Lingley's case*, (1921) 1 K. B. 655. Here the accident caused very definite and serious injury and caused a certain degree of permanent incapacity because as a result of the accident the man had lost the first phalanx of the thumb and half the index finger of his right hand and there is nothing to suggest that this man was left-handed. The injury was a serious one and that would be obvious to the most illiterate and ignorant person. Yet no claim was made within the statutory period. All that can be said in extenuation of the conduct of the opposite party is that he returned to work and eventually, if not immediately, began to earn higher wages. That however has been expressly held in England not to amount to reasonable cause and that view has been taken by this Court in recent cases. As late as 28-8-1951, this Court held in the case of *Messrs. National Tobacco Co. (India) Ltd.* v. *Hardit Singh*, A. F. O. O. NO. 99 of 1950 (cal.) that mere returning to work and earning wages did not amount to reasonable cause for not making a claim. The authorities on this question are entirely against the opposite party, and that being so it must be held that the learned Commissioner was wrong in holding that the delay in making the claim should be condoned.

[12] Mr. Sanyal on behalf of the petitioners has contended that even if there was reasonable cause for not making a claim within the first twelve months, there was certainly no cause whatsoever for not making a claim shortly after 1-1-1943 when the workman actually left the petitioner's employment. The argument is that it must have been obvious to the workman then that a claim should be made. But no claim was made.

[13] It is, however, clear from the words of S. 10, Workmen's Compensation Act, and the proviso thereto that a Court may adjudicate upon a claim made more than twelve months after the accident, if there was reasonable cause for not making the claim within twelve months. If the failure to make a claim within the first twelve months is satisfactorily explained, then it matters not if there has been subsequent negligence or improper delay in making the claim. What the Court has to decide is whether there was sufficient cause for making the claim within twelve months, not whether there was sufficient cause for not making the claim within the period in which no claim was made. If there was sufficient cause in this case for not making a claim within twelve months, then the failure to make a claim on or shortly after 1-1-1943 when he left the petitioner's employment would be wholly immaterial. This question is discussed at length in *Lingley* v. *Thomas Firth & Sons*, (1921) 1 K. B. 655, the English case to which I have already made reference and that view has been followed in a number of cases of this Court. All that the workman is called upon to explain is his failure to make a claim within twelve months of the date of the accident.

[14] For these reasons the petition must be allowed and the order of the learned Commissioner for Workmen's Compensation set aside. The rule is accordingly made absolute. The amount of compensation deposited in the Court of the Commissioner for Workmen's Compensation must be returned forthwith to the petitioners.

[15] We make no order for costs of this rule.

[16] **G. N. Das J.**—I agree.

B/R.G.D. *Petition allowed.*

A. I. R. 1953 Calcutta 76 *[Vol. 40, C. N. 22.]*

CHAKRAVARTTI AND SINHA JJ.

Ram Dayal Tewari — Accused-Petitioner v. *Corporation of Calcutta—Opposite Party.*

Criminal Revn. No. 996 of 1951, D/- 26-2-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), S. 531—Notification that Municipal Magistrate might sit any time of day or night in any place in Calcutta is within the terms of the section.

Section 531 authorises the Local Government to prescribe the times and places at which the Magistrates shall sit for the despatch of business. If they are minded to prescribe all hours of the day and all places within Calcutta, as they well may under the wide terms of the section, it cannot be contended that a Notification that the Municipal Magistrates might at their discretion sit at any time of the day or night anywhere in Calcutta will not be appropriate for the purpose or will be contrary either to the letter or the spirit of the section. Consequently the trial of an accused by a mobile Court held in a motor van, in a place in Calcutta, not specifically mentioned by name in the Notification is not bad. (The purpose of the mobile Court indicated.) [Paras 4, 13 & 14]

(b) Municipalities — Calcutta Municipal Act (3 of 1923), S. 531 — Mobile Court of Municipal Magistrate held in Motor van in accordance with Notification under S. 531 — Accused told that if he wished to be defended by lawyers his case would be adjourned and sitting held in ordinary place of trial — Accused not availing of the opportunity and pleading guilty — It could not be said that the accused was denied his right to be defended by lawyer—(Criminal P. C. (1898), S. 340). [Paras 5, 15]

Anno. Cr. P. C., S. 340 N. 4.

(c) Criminal P. C. (1898), S. 208—Complaint on its face in order—It is for accused to bring facts on record to show that it was not in order—That the accused is illiterate is no reason.

Where to all appearance the petition of complaint is in order and is made by the person authorised, if the accused whether he be literate or illiterate, wants the Court to throw out the petition on the ground that it was not in order, it is for him to establish and bring on the record the necessary facts. [Para 6]

Anno. Cr. P. C., S. 208 N. 6.

(d) Municipalities — Calcutta Municipal Act (3 of 1923), S. 386/488 — Nuisance contemplated by section detected — Maximum or substantial penalty should be imposed — Possession of a licence to sell milk is no answer to charge under S. 386.

Section 386 provides for merely a monetary penalty and the nuisance which it provides against is nuisance of a kind which is likely to make a locality filthy, unhealthy and generally abnoxious to decent civic life. If the section has to serve its purpose, then where a nuisance of this kind is detected, it is proper to impose the maximum or a substantial penalty. Possession of a license to carry on the profession of milk-seller cannot be an answer to a charge under S. 386 since the section contemplates quite a different evil and a different remedy and to require a license of quite a different kind. [Para 7]

(e) Criminal P. C. (1898), Ss. 386 and 388—Section 388 applies to case where sentence is not only fine but also imprisonment in default — Breach of S. 386 (1), Calcutta Municipal Act — S. 488 of the Act provides for fine only and not imprisonment — S. 388, Criminal P. C. does not apply — Proper procedure is one under S. 386, Criminal P. C.—(Municipalities — Calcutta Municipal Act (3 of 1923), S. 386/488). [Para 8]

Anno. Criminal P. C., S. 386 N. 3 ; S. 388 N. 2.

Amaresh Chandra Roy — for Petitioner ; Bireswar Chatterji—for Opposite Party.

Chakravartti J. — The petitioner has been convicted under S. 386 (1) (c), read with S. 488, Calcutta Municipal Act, for having kept some cattle at NOS. 22A and 22B, Southern Avenue, without having a license therefor. The sentence passed upon him is the maximum provided for in the section, viz., a fine of RS. 250, but the learned Magistrate added that in default of payment he was to undergo simple imprisonment for 40 days. It appears that after recording the conviction the Magistrate purported to proceed under S. 388, Criminal P. C., but as the petitioner was not prepared to take advantage of the option provided for in that section, the learned Magistrate was prepared to send him to jail. But shortly thereafter a brother of his appeared and offered bail and on that bail he was released.

[2] It is not disputed that the petitioner did keep a few heads of cattle at the premises concerned and that at the relevant time he did not hold any license which would authorise him to use the place for keeping cattle. Even in the petition to this Court it has not been claimed that the petitioner held any license at the time or that the finding that he was keeping cattle at NOS. 22A and 22B, Southern Avenue, is not correct. In fact, at the trial he pleaded guilty. What was urged in support of the Rule were only certain legal objections in various forms.

[3] The first ground taken related to the circumstance that the trial of the petitioner took place near the Kalighat Park in a motor van. It appears that on that day, one of the Municipal Magistrates was out in the streets of Calcutta, holding a mobile Court and it was before that Court that the petitioner was produced for his trial. Mr. Roy, who appears on behalf of the petitioner, contended that the Kalighat Park had not been prescribed as a place where a Municipal Magistrate might sit for the despatch of business and that in the absence of a proper Notification to that effect under S. 531, Calcutta Municipal Act, the proceeding in which the petitioner had been convicted was utterly void.

[4] Mr. Chatterji who appears on behalf of the Corporation has, however, produced before us a Notification which is Notification NO. 7532-J, dated 19-12-1950, by which the Government of West Bengal directed that in addition to the times and places prescribed by earlier Notifications, the

Municipal Magistrates might, at their discretion sit at any time of the day or night anywhere in Calcutta, as defined in cl. 11 of s. 3, Calcutta Municipal Act. Mr. Roy contended that even this Notification did not meet his objection, because to declare in a general manner that the Municipal Magistrates might hold their sittings anywhere they liked and at any hour of the day they pleased, was not to prescribe the times and places for sittings of the Court, as contemplated by s. 531. I am unable to accept that contention as correct. The section authorises the Local Government to prescribe the times and places at which the Magistrates shall sit for the despatch of business. If they are minded to prescribe all hours of the day and all places within Calcutta, as they well may under the wide terms of the section, I cannot see how it can be contended that a Notification in the terms of the Notification before us will not be appropriate for the purpose or will be contrary either to the letter or to the spirit of the section. 'Times' must include all times and 'places' must include all places. It may be that if Courts are held indiscriminately at different places of the City at different times and the same accused is directed to appear at different places on different days, inconvenience may be caused. It may also be that if the proceedings are begun and terminated at a single sitting of the Mobile Court at some particular place in the City, a person who is tried by the Court at such a sitting, will be prejudiced in the matter of conducting his defence. Such objections, however, will be objections to the expediency of holding such trials or giving such directions for appearance at different places. They are not objections to the jurisdiction of the Court to hold its sittings anywhere it chose under the authority of the Notification.

Besides, the Notification does not say or intend that whenever a Mobile Court might have an accused person produced before it, it will proceed forthwith to call upon him to enter upon his defence and will dispose of the whole case all at once. As a matter of fact, as the learned Magistrate points out in his explanation, when he had the petitioner produced before him, he had also 10 other accused persons similarly produced and the latter having pleaded not guilty, their cases were adjourned and the trial will now take place in a proper manner and in the usual way. What the Mobile Court does in the first instance seems to me is merely that it receives complaints and also probably has the accused produced before it and takes the first step with regard to him. It is undoubtedly designed to mete out swift justice and will be able to do so when the case is a petty one and the facts are simple or when the accused pleads guilty, as the petitioner did in this case. But if the accused pleads not guilty and claims to be tried and offers to call defence witnesses, naturally the case will have to be adjourned to a future sitting at some definite place and if that is done, there can be no question of the accused being prejudiced. I cannot see, therefore, how it can be contended that the Notification on which the Corporation relies in the present case is not a Notification in accordance with s. 531, or how the terms of the Notification bring about a state of affairs which by themselves make the proceedings held by Mobile Courts invalid. In my opinion the first contention urged by the petitioner must be rejected.

[5] It was next contended that the petitioner had a fundamental right to be defended by a lawyer and such a right was denied to him. This contention was urged as a part of the main contention that the accused had a right to be tried at the place where the Municipal Court ordinarily held its sittings. It appears to us, however, from a reference to the record that the Magistrate asked the petitioner whether he wished to be represented by a lawyer and when the petitioner answered that he did not know how he could avail himself of the services of a lawyer, then the Magistrate informed him that he might go to the Court where services of legal practitioners would be available to him. Thereupon the petitioner replied, according to the record, with some impatience and emphasis that he did not wish to do anything of that kind and would rather plead guilty at once. In view of the fact that an opportunity was expressly offered to the petitioner to engage a lawyer if he desired to do so and that the Magistrate was prepared to adjourn the hearing of the case to the ordinary sittings of the Court at its usual place of sitting, I am of the opinion that there is no substance in the second point either.

[6] It was also contended that the proceedings in the present case were not founded on a proper complaint, inasmuch as the complainant was a Sanitary Inspector, named Dr. N. R. Chowdhury, and not the Chief Executive Officer of the Corporation of Calcutta, as required by the Act. The petition of complaint which is on the record, however, bears the signature of the Chief Executive Officer, Mr. R. S. Trivedi, in the form of a rubber stamp and on the face of it, the complaint was not by the Sanitary Inspector who actually handed over the document to the Magistrate but by Mr. Trivedi who had signed the petition of complaint. Mr. Roy, however, contended that the complaint was filed on the same date that the petitioner was produced before the Magistrate and tried and consequently it could not have been that before the institution of the proceedings, a complaint properly signed by Mr. R. S. Trivedi had been obtained from him. In support of this contention, Mr. Roy relied upon a statement contained in the second portion of para. 4 of the petition of his client in which it was stated that the complaint had not been properly made by the Corporation of Calcutta or any person lawfully authorised to lodge a complaint. The petition, however, is only affirmed by one Ramavatar

Choudhury who describes himself as a relative of the petitioner and the affirmation with regard to para. 5 is that the matters contained therein are matters of record which the declarant believes to be true. The affidavit, therefore, adds nothing to the record and the record, as we have it before us, shows on the face of it that the complaint was one signed by the Chief Executive Officer Mr. R. S. Trivedi. It is not impossible that the Sanitary Inspector had detected the presence of cattle at the premises concerned previously and that he had obtained the petition of complaint from Mr. Trivedi earlier in the day and that it was only thereafter that he actually filed the petition of complaint before the Magistrate and had the petitioner produced before him. If the petitioner was minded to establish that the sequence of events was not as I have stated, it was for him to elicit the real facts by cross-examination of the Sanitary Inspector or prove them in some other way. Mr. Roy's reply was that his client was an illiterate person and could not, therefore, be expected to take the course suggested. But whether a particular accused person is literate or illiterate can make no difference, when we are being asked to hold a petition of complaint to be invalid upon accepting a version of facts which he suggests. To all appearance, the petition of complaint is in order, and if the petitioner, whether he be literate or illiterate, expected the Court to throw out the petition, it was for him to establish and bring on the record the necessary facts. On the record, as it stands, there is nothing to show that the petition of complaint was not made by Mr. R. S. Trivedi as it purports to have been.

[7] It was lastly contended that, in any event, the sentence imposed on the petitioner was too severe and it was pointed out that the learned Magistrate had obviously erred in proceeding upon the view that the petitioner was in the habit of abusing his neighbours filthily. There was nothing, it was pointed out, in the record to show that the petitioner was in the habit of abusing people. That appears to be true and the particular reason given by the learned Magistrate for imposing the maximum penalty has undoubtedly no foundation in the evidence. Even so, however, I do not consider that the learned Magistrate acted improperly in imposing the maximum sentence on the bare facts of the case, as they were. It is to be noticed that the section provides for merely a monetary penalty and the nuisance which it provides against is nuisance of a kind which is likely to make a locality filthy, unhealthy and generally abnoxious to decent civic life. If the section has to serve its purpose it seems to me that where a nuisance of this kind is detected, it is proper to impose the maximum or a substantial penalty. Mr. Roy in aid of his contention informed us that since his conviction, the petitioner had applied for and obtained a license and he showed us the document which his client had obtained. The point he sought to make obviously was that the keeping of cattle at the premises concerned had certainly not affected the locality injuriously, since, otherwise, the Corporation of Calcutta would not have granted the petitioner a license after having prosecuted him. It appears, however, that the license which the petitioner has obtained is only a license to carry on the profession of a milk-seller. It has no reference at all to his keeping cattle at No. 22A Southern Avenue or at any other place. It does not appear to us that the license upon which Mr. Roy relies can ever be an answer to a charge under S. 386, Calcutta Municipal Act, since the section seems to us to contemplate, quite a different evil and a different remedy and to require a license of quite a different kind. In any event, since 7-9-1951, the date with which we are concerned, was not covered by any license of any kind, it is not necessary for us to pursue this matter further. In my opinion, even apart from the particular reason given by the learned Magistrate which, as I have stated, is not supported by evidence, the sentence imposed by the learned Magistrate is not one which is in excess of the necessities of the case.

[8] It must, however, be held that in so far as the learned Magistrate thought that s. 388, Criminal P. C., had any application, he was clearly in error. Section 388 applies only to a case where the sentence is not only a fine but also imprisonment in default of the payment of the fine. Section 488, Calcutta Municipal Act, provides only for a fine up to Rs. 250 in cases of a breach of S. 386 (1), but does not provide for any imprisonment in default. Nor are the general provisions contained in the Indian Penal Code applicable, since those provisions apply to sentences imposed in accordance with that Code. The present case, therefore, is one where only a sentence of fine but no sentence of imprisonment in default could be imposed and that being so, S. 388 (1), Criminal P. C., was clearly inapplicable. The direction of the Magistrate that the petitioner is to suffer 40 days' simple imprisonment in default of the payment of the fine imposed must, therefore, be set aside.

[9] I may add that in a case where the offender can be and has been sentenced only to pay a fine, the proper procedure for levying the fine is that laid down in S. 386, Criminal P. C., and, if necessary, it is that section which ought to be resorted to.

[10] In the result, the Rule is made absolute in part. The conviction of the petitioner and the sentence of a fine of Rs. 250 are upheld but the direction that the petitioner will suffer simple imprisonment for 40 days in default of the payment of the fine is quashed.

[11] Consequently, the petitioner must be discharged from his bail bond.

[12] **Sinha J.** — I agree and I would like to add a few words. This case raises an interesting

point as to whether it is possible to have 'Mobile Courts' presided over by a Municipal Magistrate appointed under the 'Calcutta Municipal Act,' moving about the City of Calcutta (as defined in the said Act) and trying offences on the spot. In this particular case, the petitioner was charged for the violation of the provisions of S. 386 (1) (c), Calcutta Municipal Act, inasmuch as he was keeping certain cows in an open place on Southern Avenue, without a license. He was tried by a 'Mobile Court' and convicted.

[13] It is argued that the entire proceedings involved in a trial by a Mobile Court of this description is illegal. It is said that the appointment of Magistrates, their jurisdiction and as to the places where they should sit for despatch of business, is governed by S. 531, Calcutta Municipal Act. Under that section, the State Government which is the appointing authority is empowered to prescribe the times, the places at which the Magistrate or Magistrates appointed under the Act should sit for the despatch of business. The formally constituted courts which have been prescribed are of course familiar. In the absence of any specific authorisation, it is certainly arguable that the 'Mobile Courts' were illegal institutions. But this has been remedied by a Notification No. 7532-J., dated 19-12-1951, issued by the Government of West Bengal. Under that Notification, the State in exercise of powers conferred by S. 531 of the Act has prescribed that Municipal Magistrates may, at their discretion, sit at any time during day or night anywhere in Calcutta (as defined in cl. 11 S. 3, Calcutta Municipal Act) for the despatch of business. It is argued that this Notification is not only not in conformity with the section but is in breach of both its tenor and spirit. It is said that where a particular place or time has to be prescribed it is not permissible to say that the Court may be held "Anywhere at any time." That it is said, is not to prescribe anything but to give a blank charter. I do not think that there is any thing in this argument.

[14] A 'Mobile Court' is intended to be mobile. It is intended to move from place to place and try offences on the spot. The idea is to try expeditiously petty infringements of the provisions of the Act, right in the proximity of the area where the offence has been committed. If it is to function at all, it is quite impracticable to prescribe a particular time and place for each trial and where it should take place. If, under the section, the Government could prescribe, according to its own discretion, any time or place I cannot see why it cannot say that the Magistrate should be entitled to sit anywhere at any time. If it is a case of jurisdiction there is nothing in the section itself to prevent the jurisdiction of the prescribing authority from prescribing to the uttermost extent of its powers. It may be said that such a wide authority given to the Magistrate would cause hardship to the ratepayers, but that is another matter altogether.

[15] The next point argued is as to the procedure adopted. It is argued that under Art. 22 of the Constitution, every citizen has got a fundamental right to be defended by a lawyer and if a Mobile Court goes about the City of Calcutta, a citizen is not likely to be afforded opportunities of conducting his case properly or appointing his own lawyers. Article 22 of the Constitution does not give a fundamental right of the description alleged. It is stated there that no person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such an arrest and should not be denied the right to consult his lawyers and to be defended by the legal practitioners of his choice. That has no bearing on the present question. The accused here was not arrested and detained in custody and, therefore, the Article had no application. As a rule of prudence, however, the learned Magistrate presiding over Mobile Courts should, and we are glad to say that it has been done in the present instance, afford an opportunity to the accused to have the services of a lawyer, if he so liked. In fact he took the precaution of asking the accused as to whether he would like to go to his formally constituted Court and there put in his defence through a lawyer but this the accused refused to do In a 'Mobile Court,' in my opinion, as long as a man is allowed to defend himself properly the learned Magistrate will have done his duty. Regard being had to the procedure adopted I do not think that the accused has made out a ground for our interference.

[16] With regard to the other points raised I agree with the conclusions arrived at by My Lord and have nothing to add.

B/R.G.D. *Rule made absolute in part.*

A. I. R. 1953 Calcutta 79 *[Vol. 40, C. N. 23.]*

HARRIES C. J. AND G. N. DAS J.

Nazir Hussain — Accused-Petitioner v. *The State.*

Criminal Revn. No. 932 of 1951, D/- 13-12-1951.

(a) Influx from Pakistan (Control) Act (1949), S. 5 — Permit allowing a person from Pakistan to stay in India for one specified year — Permit issued after expiring of period — Charge of overstaying in India, cannot be based on such permit. [Para 6]

(b) Influx from Pakistan (Control) Act (1949), S. 5 — Permit allowing person from Pakistan to stay in India for purposes of visiting place in Pakistan for one year — Permit held to be "balderdash" — No charge under S. 5 held could be based upon such permit — Language of permit criticised. [Para 9]

N. K. Basu with Joy Gopal Ghose and B. C. Mitter — for Petitioner; Sankar Banerji with Amaresh Chandra Roy — for the State.

Harries C. J.—This is an application to quash certain proceedings now pending before a Presidency Magistrate.

(2) The petitioner is one Nazir Hussain, a Mahomedan by birth. According to the prosecution he is a Pakistani national and was given a permit to visit India for one year. The permit it is said expired on 21-2-1951 and he was found living in Calcutta in April of this year. Overstaying this permit is claimed to be an offence under s. 5 Influx from Pakistan (Control) Act, Act XXIII of 1949.

(3) The whole prosecution is based upon the failure to return to Pakistan at the conclusion of the period permitted by this permit. The case for the defence apparently is that Nazir Hussain is an Indian national and required no permit at all to visit India and never asked for this permit which is the basis of this prosecution.

(4) In these proceedings I am not concerned with whether Nazir Hussain is an Indian or a Pakistani National and I express no opinion whatsoever upon the question. However, I am satisfied that no charge can possibly be made upon the basis of the permit which has been put forward in this case.

(5) The case has proceeded for sometime and the learned Presidency Magistrate has framed a charge to which the petitioner has pleaded not guilty. It will be convenient to set out the charge in extenso:

"Accused Nazir Hussain is charged under s. 5, Influx from Pakistan (Control) Act, (Act XXIII of 1949) for contravening after having entered India, the provision of r. 19 of the Rules regarding permit system introduced between Western Pakistan and India, by staying in India from 7-4-1951 to 14-4-1951 in violation of the permit (Ext. 2) issued to him by the High Commissioner for India in Pakistan and duly served on him on 7-4-1951".

(6) It is common ground that this permit was not served upon the petitioner until 7-4-1951. Yet it is suggested on behalf of the prosecution that it was a permit allowing the petitioner to visit India between 22-2-1950 and 21-2-1951. Of what use this permit was I cannot imagine if it was only served on April 5, (7?) 1951, that is a matter of over six weeks after the period of the permit had expired. One would have imagined that a permit given to a man to visit India for a year would at least be served upon him sometime before the commencement of the period for which he was permitted to visit India. This is a most extraordinary document which was served on the petitioner six weeks or so after the period for which he was permitted to reside in India had expired.

(7) The permit Ex. 2 is to say that least of it balderdash. No other word can express what this document really amounts to. It is headed as a temporary permit for entering the Indian dominion. There is in this printed document a space in which there is to be filled up the purpose of the visit and the place to be visited. What is written opposite the purpose of the visit and the places to be visited are these words: "Returning to business in Chiniot". The duration of the visit is said to be one year. This document purports to have been issued by the High Commissioner for India at Karachi. There is a line on the document on which the applicant for such a permit should sign. But this permit has no signature of the petitioner Nazir Hussain or indeed of any applicant. How therefore this permit came to be issued is a complete mystery. If any application had to be made for it then that application has not been produced.

(8) The permit on the face of it is a permit permitting Nazir Hussain to return to business in Chiniot and to remain there for one year. Everybody knows that Chiniot is a town in the Western Punjab in the Jung District, if I remember correctly. So this permit allows Nazir Hussain to spend a year at Chiniot. On the permit are printed these words "The applicant whose details are given above is permitted to stay in India for the purpose specified above from 22-2-50 to 21-2-51".

(9) Mr. Sankar Banerji, standing Counsel, has urged that, that shows clearly that this is a permit granting permission to stay in India. But the whole sentence has to be read together and when the whole thing is read together it means that this permit permits Nazir Hussain to stay in India for the purposes of visiting a town in Pakistan for one year. "Balderdash" appears to me to be a polite term for such a document. It is for breach of this permit that the petitioner is prosecuted. I do not know what the prosecution would have to prove to establish a breach of the terms of this document. It appears to me that they would have to show that the petitioner stayed in Chiniot in Pakistan for more than a year. But of what interest that can be to the State of West Bengal I cannot imagine. It would be no breach of this permit to show that he had stayed the whole of this period in Calcutta as it is alleged that he had.

(10) The petitioner's case is that he never asked for this permit & never received a permit to go to Chiniot and was never out of Calcutta throughout 1949, 1950 and 1951. However I am not deciding this case upon any statement of fact made by the petitioner. All I say is that on the face of this document it cannot possibly be said that there has been any breach of this Act or any rule by failing to leave India on 21-2-1951 or soon thereafter. In the body of the document the place he was called upon to leave after a year was Chiniot, but not Calcutta and reading the document as a whole it must be held that a permit was solemnly issued by the High Commissioner of India at Karachi permitting a person to stay in the Punjab for a year and year only which means that he would have to quit the Punjab after that time. How any officer of the Indian Government can grant permits permitting persons to reside in a foreign country I am unable to understand. But that is the document as it is written.

(11) In my view no charge can be framed on this document and as the charge as drafted is based upon it the whole proceedings must be quashed.

(12) If the petitioner is a Pakistani national, a point upon which I express no opinion whatsoever, then it would appear that he was residing in India without any permit at all. Such a case, even if established, could never be made on the charge as framed and therefore the charge must be quashed. What other proceedings can be taken is a matter which does not concern the Court at the present moment.

(13) In the result therefore the petition is allowed. The proceedings now pending before the Presidency Magistrate are quashed and the Rule is made absolute. The petitioner is discharged. He need not surrender to his bail and his bail is cancelled.

(14) G. N. Das J.: I agree.

B/R.G.D. Petition allowed.

A.I.R. 1953 CALCUTTA 81 (Vol. 40, C. N. 24)

G. N. DAS J.

On difference between SARKAR and P. N. MUKERJEE JJ.

Gour Gopal Mukherjee, Petitioner v. Chief Secretary to the Govt. of West Bengal and others, Opposite Party.

Misc. Case No. 289 of 1951, D/- 10-3-1952.

(a) Public Safety — Preventive Detention Act (1950), S. 3 — Past acts.

Where past acts form a chain with the later acts which might imperil the security of the State or the maintenance of public order and all the acts show the mental make-up of the would-be detenu at the relevant dates and are useful aids in finding out the potential activities of the would-be detenu, such past acts form the basis of the subjective satisfaction of the detaining authority. The degree of relevancy is not a matter which is justiciable. AIR 1951 SC 174 and AIR 1951 SC 481 Foll. (Para 10)

(b) Public Safety — Preventive Detention Act (1950) S. 3 — Past acts.

Where after the past acts the would-be detenu was enrolled as a member of the Volunteer Corps and given military training, this does not necessarily show that there was a radical change in the mental tendencies of the would-be detenu. (Para 11)

(c) Public Safety — Preventive Detention Act (1950) Ss. 3 and 7 — Power of Court to question vagueness of grounds.

The Court can only go into the question whether the grounds supplied to the detenu are irrelevant or vague and can afford a basis for the subjective satisfaction of the detaining authority. (Para 12)

(d) Public Safety — Preventive Detention Act (1950) S. 3 — Previous penal acts.

It is no doubt true that the object of a Preventive Detention Statute is mainly preventive but it does not follow that previous penal acts of the would-be detenu are irrelevant. The normal process of a criminal trial may be inappropriate or ineffective. Past acts even if they have gone beyond the stage of preparation or of attempts to commit penal offences & have even resulted in the commission of penal offences, are relevant for sustaining an order of detention. (Para 12)

(e) Public Safety — Preventive Detention Act (1950), S. 3 — Mala fides of detaining authority.

The onus of proving mala fides of detaining authority rests on the petitioner. The facts proved by the petitioner must be such as to amount to proof of mala fides. The Court cannot base its decision on suspicion. (Para 15)

(f) Public Safety — Preventive Detention Act (1950), Ss. 3 and 5 — Illegality of arrest — Detention not per se invalid.

The illegality of the arrest does not per se make the order of detention invalid. Where it is the propriety and legality of the detention within the jurisdiction of the State Government which is in controversy, there is no reason why the State Government cannot detain the detenu in a jail, which is within its jurisdiction on valid grounds. The fact that at the time the order was made, the would-be detenu was residing outside the territorial jurisdiction of the State of West Bengal, the Government whereof made the order is not material. (1329) 9 B & C 446; AIR 1944 PC 73 and 25 Cal 20 (PC) Rel. on. (Paras 19, 30)

(g) Interpretation of Statutes — Intention of Legislature — Civil Procedure Code (1908) Pre.

The cardinal rule for the construction of a statute is generally said to be that it should be construed according to the intention of the legislature that enacts it. The intention of the Legislature is legitimately ascertained from what it has chosen to enact, either in express words, or by reasonable and necessary implication. (1897) AC 22; (1831) 2 Dow and Cl. 480 and 1951-2 All ER 839 Ref. (Paras 37 & 38)

Anno: C.P.C., Pre. N. 7.

(h) Public Safety — Preventive Detention Act (1950) (As amended by Act IV (4) of 1951), Ss. 5, 3A and 4(a) and (b) — Construction of S. 5 — Constitution of India, Art. 245.

Section 5 plainly provides for passing an order of detention of the would-be detenu even though he is outside the territorial limits of the jurisdiction of the Government, which may mean either the Central or the State Government. This connotes the exercise of the power of detention of a "person to be detained" i.e. the would-be detenu even when he is in a foreign country. The section does not draw any distinction between deliberate and unintentional exercise of extra territorial powers. The use of the word 'merely' is not intended to restrict the exercise of extra-territorial powers. Sections 3A, 4(a) and 4(b) cannot be read as limiting the scope of section 5. The context does not therefore narrow down the plain meaning of section 5. The fundamental principles that (1) All legislation is prima facie territorial and should be so construed that (2) In a Federation of States no State has, under normal circumstances, extra-territorial powers", and that (3) No detaining authority is normally entitled to order detention outside its own territorial jurisdiction, are not conclusive of the matter. These principles admit the legislative competence to confer extra-territorial powers but lay down that to warrant an intention on the part of the legislature to enact legislation having extra-territorial effect, it is necessary that the intention must be clearly expressed. The unambiguous meaning of section 5 cannot be whittled down. Thus section 5 is not limited to cases of unintentional exercise, by the detaining authority, of extra-territorial powers. AIR 1951 Bom. 161 and AIR 1946 Cal. 459 disting. (1946) 1 All ER 79 and (1946) P 135 Rel. on. (Paras 36, 41, 42, 43, 47, 52, 54 & 55)

J. P. Mitter, Bireswar Chatterjee, for Petitioner; S. M. Bose, Advocate General, Nirmal Kumar Sen, Deputy Legal Remembrancer, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('97) 24 Ind App 137: (25 Cal 20 PC) 29

('44) 71 Ind App 75: (AIR 1944 PC 73: 46 Cri LJ 119 PC) 28, 29

('51) AIR 1951 SC 174: (52 Cri LJ 400) 10

('51) AIR 1951 SC 481: (52 Cri LJ 75) 10
('51) 52 Bom LR 711: (AIR 1951 Bom 161: 52 Cri LJ 62) 48
('46) 50 Cal WN 552: (AIR 1946 Cal 459: 47 Cri LJ 1020) 53
(1829) 9 B & C 446: (109 ER 166) 27
(1831-32) 2 Dow & Cl 480: (6 ER 806) 39
(1897) AC 22: (65 LJ Ch 35) 37
(1946) 1 All ER 79 52
(1946) P 135: (175 LT 469) 52
(1951) 2 All ER 839 40

G. N. DAS, J.: This case was heard by a Bench of this Court, Sarkar and P. N. Mookerjee JJ.

(2) The learned Judges having differed in their decisions, the matter was directed by the learned Chief Justice to be placed before me as the third Judge, to hear the case.

(3) On the prayer of the learned Counsel for the parties, the case was adjourned from time to time and finally came up before me for hearing on the 29th February 1952. Though the learned Judges differed on one point only, the whole case was open for discussion.

(4) Mr. J. P. Mitter, learned Counsel for the petitioner, however urged only the following points and did not press the other points which were agitated before the Division Bench. The grounds pressed were: (1) That the events in the remote past are not relevant grounds for detention in the facts of this case; (2) That the detention was in fact mala fide; and (3) That section 5 of the Preventive Detention Act, 1950 (Act IV of 1950) as amended by Act IV of 1951 does not justify the detention of the detenue as the order of detention was a deliberate assumption of extra-territorial jurisdiction by the State Government.

(5) On 30th August 1951 an order for detention of the would-be detenue Ram Chandra Chatterjee, was made by the Government of the State of West Bengal under section 3(1) (a) (ii) of the Preventive Detention Act, IV of 1950 as amended by Act IV of 1951. On the following date Ram Chandra Chatterjee was taken into custody in French Chandernagore and was removed to the Dum Dum Central Jail where he was detained.

(6) The case has proceeded on the footing that French Chandernagore where the would-be detenu was taken into custody is French Territory.

(7) Gourgopal Mukherjee, the petitioner, moved this court for the issue of a writ of Habeas Corpus for the release of the detenu and obtained the present rule.

(8) I have already said that the rule was heard by Sarkar and P. N. Mookerjee, JJ. who differed in their decisions. This case was directed to be placed before me.

(9) I shall now deal with the points pressed before me.

(10) The first ground taken was that the events in the remote past are not at all relevant grounds for detention in the facts of this case. It was contended that items (2) and (3) of the grounds supplied to the detenu related respectively to events which took place in March to July 1949 and August 1949 to February 1950. The order of detention was made in August 1951. Items (2) and (3) have to be taken along with items 4, 5 and 6 which relate to events which occurred in November 1950, March 1951 and August 1951. The acts mentioned in items 2, 3 and 4, 5 and 6 form a chain of acts which might imperil the security of the State or the maintenance of public order. All the acts referred to show the mental make-up of the would-be detenu at the relevant dates and are useful aids in finding out the potential activities of the would-be detenu. Such past acts if they are not wholly irrelevant form the basis of the subjective satisfaction of the detaining authority. The degree of relevancy is not a matter which is justiciable. The test of relevancy was thus stated by Kania C. J. in — Tarapada De v. State of West Bengal', AIR 1951 S. C. 174 at p. 177:

> "An irrelevant ground is a ground which has no connection 'at all' with the satisfaction of the Provincial Government which made the order of detention."

In a later decision — 'Bhim Sen v. State of Punjab', AIR 1951 S C 481, Kania C. J. observed that

> "instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the District Magistrate that the appellants are likely to indulge in objectionable activities." (page 483).

(11) It was further contended that the past acts mentioned in items 2 and 3 are irrelevant in the present case, as after the dates on which these events are alleged to have happened, the would-be detenu was enrolled as a member of the volunteer crops and given military training in August, September and October 1950. This fact does not necessarily show that there was a radical change in the mental tendencies of the would-be detenu. The later events stated in items 4, 5 and 6 show that there was no such change. The court can only go into the question whether the grounds supplied to the detenu are irrelevant or vague and can afford a basis for the subjective satisfaction of the detaining authority. In the above circumstance it is impossible for me to say that the past acts specified in the grounds supplied to the detenu were either vague or irrelevant.

(12) It was also argued that the acts referred to constitute offences under the Indian Penal Code and though they might have been the basis of punitive action by the State, they should not be regarded as relevant grounds for detention under the Preventive Detention Act, the sole object of which is prevention. This contention cannot be accepted. It is no doubt true that the object of a Preventive Detention Statute is mainly prevention but it does not follow that previous penal acts of the would-be detenu are irrelevant. The normal process of a criminal trial may be inappropriate or ineffective. As already stated, the court can only investigate into the question whether the acts of the would-be detenu were such as are vague or irrelevant and can form the basis of the subjective satisfaction of the detaining authority. In this perspective, past acts even if they have gone beyond the stage of preparation or of attempts to commit penal offences and have even resulted in the commission of penal offences, are relevant for sustaining an order of detention.

(13) For the reasons given above, the first ground taken by Mr. Mitter must be overruled.

(14) The second ground pressed by Mr. Mitter raises a question of fact viz., whether the allegations made and sworn to by or on behalf of the detenu prove mala fides on the part of the detaining authority which in the present context connotes the Joint Secretary to the State of

Government of West Bengal who according to the rules of business made the order of detention.

(15) The onus of proving mala fides rests on the petitioner. The facts proved by the petitioner must be such as to amount to proof of mala fides. The court cannot base its decision on suspicion.

(16) We have to appraise the materials on record in the light of the above principles. These materials consist of the three affidavits filed in support of the petition.

(17) The substance of the allegation is that the detenu and a certain Minister of the State Government were previously on good terms but subsequently fell out on certain matters; that in consequence thereof the latter was instrumental in getting the order of detention passed by th State Government and that as such the making of the order was a mere colourable exercise of the powers under the Preventive Detention Act 1950.

(18) The affidavit of the Joint Secretary who made the order stated that in making the order of detention, he was entirely guided by the materials placed before him by the Deputy Inspector General of Police, Intelligence Branch, Government of West Bengal, and was not influenced by the existence or otherwise of the alleged disputes between the detenue and the Minister concerned or by any extraneous consideration. The Minister concerned was not in charge of the department of State Government which ordinarily dealt with cases of preventive detention or dealt with the present case or of the department which supplied the materials on which the Joint Secretary acted. There is no specific averment that the Joint Secretary had any knowledge of the existence of those alleged disputes. The fact that the Joint Secretary did not traverse the allegations made about the said dispute is not relevant in view of the aforesaid facts. In my opinion, the materials on record fall far short of proving that the order for detention was made mala fide.

(19) The second contention of Mr. Mitter must therefore be overruled. The third ground urged by Mr. Mitter is that section 5 of the Preventive Detention Act 1950, as amended by Act IV of 1951 cannot justify the detention of the detenu in the facts of the present case. The facts relied on are that at the time the order was made, the would-be detenue was residing outside the territorial jurisdiction of the State of West Bengal, the Government whereof made the order.

(20) The learned Judges of the Division Bench differed in their opinion on this point.

(21) Sarkar J. held that section 5 of the Preventive Detention Act is a prima facie answer and that it was not contended before him that section 5 was invalid on any ground or that it should not for any reason have the plain meaning of the language used therein. The learned Judge therefore rejected the contention.

(22) P. N. Mookerjee J. while observing that prima facie the words of the section are in favour of the State, added that the section should be narrowly construed on certain principles stated by him in his judgment and that as such the section should not be made applicable to cases of deliberate assumption of extra-territorial jurisdiction. P. N. Mookerjee J. further observed:

"The present case appears to me to be one of deliberate assumption of extra-territorial powers and the impugned order cannot, therefore, claim the protection of Section 5 of the Act."

The learned Judge also gave the following reason in support of his decision:

"The State of West Bengal had no authority to pass this order under section 3 of the Preventive Detention Act and its validity cannot also be upheld merely on the strength of section 5 of the Act."

(23) I shall first deal with the second ground viz: that the State Government had no authority to pass the order of detention which was made under section 3(1) (a) (ii) of the Act. This ground was not specifically pressed by Mr. Mitter.

(24) As P. N. Mookerjee J. was of opinion that the order of detention was not valid on this ground also, I have to consider the point.

(25) By Notification No. 131-Enr. X dated May 1, 1950, issued by the Central Government in exercise of the powers conferred by section 4 of the Foreign Jurisdiction Act, 1947 (XLVII of 1947), the Central Government promulgated an order called the Chandernagore (Application of Laws) Order, 1950. Section 1(1) (3) of the Order read with the Schedule extended the Preventive Detention Act 1950, to the Free City of Chandernagore. The effect of Section 4 of the Order read with the Table had the effect of substituting the Central Government for the State Government in the Preventive Detention Act, 1950, when applicable to the Free City of Chandernagore. The result, according to P. N. Mookerjee J. was that the power of detention conferred by section 3 of the Act, could only be exercised by the Central Government and not by the State Government. P. N. Mookerjee J. repelled an argument advanced by the learned Advocate General appearing for the State that section 6 of the Order would justify a construction of Section 3 of the Preventive Detention Act 1950, as might be necessary or proper in the circumstances but not so as to affect the substance and that on such a construction, the words 'Central Government' should not be read as State Government in Section 3, as this would result in tautology and incongruity.

(26) It is not necessary, for the purpose of this case, to examine the correctness or otherwise of the view taken by P. N. Mookerjee J. The line of reasoning adopted by the learned Judge would, at the most, preclude the State Government from making an order of detention directing that a person in French Chandarnagore be detained in French Chandernagore.

(27) In the present case, the would-be detenu was arrested in French Chandernagore by virtue of an order passed by the State Government. If the view taken by P. N. Mookerjee J. be correct, the arrest would be illegal. The question, however, is whether the detention in West Bengal is justified. In — 'Ex parte Susannah Scott', (1829) 9 B and C 446 Lord Tenterden C. J. said at page 448:

"The question therefore is this, whether if a person charged with a crime is found in this country it is the duty of the court to take care that such a party shall be amenable to justice or whether we are to consider the circumstances under which she was brought here. I thought, I still continue to think that we cannot inquire into them."

(28) The above passage was quoted with approval in — 'Parbhu v. Emperor', 71 Ind App 75 (PC).

(29) In — 'Parbhu's case', 71 Ind App 75 PC Lord Macmillan also quoted the following observations of Lord Chancellor Halsbury made in the course of argument in — 'Muhammad Yusufuddin v. Queen Empress', 24 Ind App 137 (PC):

"It may well be that the procedure taken was irregular and improper and brought a person wrongfully within the jurisdiction, but if he is there and if he has committed an offence, whatever else may be said about it, it is no answer to the offence committed within the jurisdiction that he has been brought irregularly within the jurisdiction."

(30) Judged by the above principles which in my opinion, also apply to cases of preventive detention, the illegality of the arrest does not per se make the order of detention invalid. In this petition for the issue of a writ of Habeas Corpus we are concerned with the question whether an order should be made on the opposite parties directing a release of the detenu from the Dum Dum Jail where the detenu is under detention. It is the propriety and legality of this detention within the jurisdiction of the State Government which is in controversy. I do not see any reason why the State Government cannot detain the detenu at Dum Dum Jail which is within its jurisdiction on grounds which are neither vague nor irrelevant and which in the opinion of the State Government imperil the security of the State or the maintenance of public order.

(31) I am accordingly of opinion that the second ground does not render the detention invalid.

(32) I shall now deal with the first ground that the validity of the order of detention cannot be upheld merely on the strength of Section 5 of the Act.

(33) Section 5 of the Act is in these terms:

"No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or Officer making the order, or

(b) that the place of detention of such person is outside the said limits."

(34) The section therefore envisages the assumption of extra-territorial jurisdiction by the Central or the State Government or by officers authorised to make order of detention.

(35) The competence of Parliament to enact legislation conferring extra-territorial powers has not been questioned. Indeed the power is expressly conferred on Parliament by Article 245 of the Constitution which is in the following terms:

"1. Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State;

2. No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation".

P. N. Mookerjee J. was however of the opinion that the wide terms of section 5 must be construed in a narrow sense as limited to cases of unintentional assumption of extra-territorial jurisdiction by the Government. The reasons suggested for such a construction were that the court must be guided by "the golden rule of intention" and "by the rule of reason and common sense". It was also pointed out that in construing Section 5, the following principles should be borne in mind:

"1. All legislation is prima facie territorial and should be so construed",

2. "In a federation of states — and ours is admittedly a federal Constitution — no State has, under normal circumstances, extra-territorial powers", and

3. "No detaining authority is normally entitled to order detention outside its own territorial jurisdiction".

(36) In applying the "golden rule of intention" P. N. Mookerjee J. referred to the use of the word 'merely' occurring in section 5 and to the context viz. Sections 3A, 4 (a) and 4 (b) of the Act.

(37) The cardinal rule for the construction of a statute is generally said to be that it should be construed according to the intention of the legislature that enacts it. But as Lord Watson said in — 'Salomon v. Salomon & Co. Ltd.', (1897) A. C. 22 at p. 38.

"Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention..... embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact".

(38) The intention of the Legislature is legitimately ascertained from what it has chosen to enact, either in express words, or by reasonable and necessary implication.

(39) In the early case of — 'Warburton v. Loveland', (1831-32) 2 Dow & Cl 480 at page 489, it was observed that

"where the language of an Act is clear and explicit, we must give effect to it, whatever be the consequences, for in that case the words of the statute speak the intention of the Legislature".

(40) In the recent case of — 'Magor & St. Mellons v. New Port Corporation', (1951) 2 All E R 839 Lord Simonds observed:

"It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament — and not only of Parliament but of Ministers also — cannot by any means be supported. The duty of the court is to interpret the words that the Legislature has used. Those words may be ambiguous, but even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited."

(41) Section 5 plainly provides for passing an order of detention of the would-be detenue even though he is out-side the territorial limits of the jurisdiction of the Government, which may mean either the Central or the State Government. This connotes the exercise of the power of detention of a "person to be detained" i.e. the would-be detenue even when he is in a foreign country. The section does not draw any distinction between deliberate and unintentional exercise of extra-territorial powers.

(42) The use of the words 'merely' was not intended to restrict the exercise of extra-territorial powers. The word 'merely' was

used for an entirely different purpose viz. that a detention order, otherwise valid, cannot be challenged solely on the grounds specified in S. 5(a) and (b).

(43) Sections 3A, 4 (a) and 4 (b) cannot be read as limiting the scope of S. 5.

(44) The Amending Act IV of 1951 incorporated Section 3A and substantially amended old sections 4 and 5 of the Preventive Detention Act, 1950 (IV of 1950). The intention was to enlarge the extra-territorial power of the Central Government or the State Government or its officers to order detention.

(45) Section 3A provides for the mode of execution of an order of detention in India. It does not connote the absence of a power to order detention outside India. The execution of an order for detention outside India cannot be provided for in a statutory enactment. It will be regulated by agreement or treaty with the foreign state concerned.

(46) Section 4 Clauses (a) and (b) as amended confers on the appropriate Government the power to regulate the place of detention or removal from one State to another or the conditions of detention. The appropriate Government as defined in section 2 (c) means the Government, Central or State or the Officer making the order of detention. Section 4 Clauses (a) and (b) therefore clearly contemplates the exercise of extra-territorial powers.

(47) The context does not therefore narrow down the plain meaning of S. 5.

(48) P. N. Mookerjee J. referred to the Bench decision of the Bombay High Court in the case of — 'In re: S. V. Ghate', 52 Bom LR 711 in support of his view that a restricted interpretation of Section 5 was justifiable. In this case, the detenue was already under detention in Yeravada Jail, Poona, under the Bombay Public Security Measures Act, 1947, since May 1948. The detenue while under detention was again served with an order of detention passed by the Commissioner of Police, Greater Bombay, under the unamended Preventive Detention Act 1950. It was held that the Commissioner of Police had no jurisdiction to make an order against the petitioner who was not resident in Bombay and who was not within his jurisdiction.

(49) The 'ratio decidendi' of the above decision was that "in a Federal Constitution like ours", the State Government or its officers have no authority to exercise extra-territorial jurisdiction and that this view was supported by the provisions of the unamended Preventive Detention Act, 1950.

(50) It is not necessary to examine the correctness or otherwise of the above decision. Suffice it to say that the above decision was pronounced on July 11, 1950 and the Preventive Detention Act, was amended on February 2, 1951 by Act IV of 1951.

(51) The Amending Act recast Sections 4 and 5 of the Act of 1950 and inserted a definition of the words 'appropriate Government' and also added section 3A. The effect of the amendment was to express in clear terms the existence of extra-territorial powers of the Government.

(52) The "fundamental and well recognised principles" referred to are not conclusive of the matter before us. These rules admit the legislative competence to confer extra-territorial powers but lay down that to warrant an intention on the part of the legislature to enact legislation, having extra-territorial effect, it is necessary that the intention must be clearly expressed. See also — 'In re: Tolten', (1946) 1 All E R 79 affirmed on appeal (1946) P. 135.

(53) The Bench decision in — 'Radharani v. Rahim Sardar', 50 Cal W N 552 which was referred to by P. N. Mookerjee J. turned on a construction of section 531 of the Code of Criminal Procedure. I do not think that the above section is structurally similar to Sec. 5 of the Preventive Detention Act, 1950. The two sections are also dissimilar in their wording and object. It is, in my opinion, unsafe to put a restricted meaning on section 5 of the Preventive Detention Act by reference to a decision which turns on the construction of Section 531 of the Code of Criminal Procedure.

(54) In my opinion, the unambiguous meaning of section 5 of the Preventive Detention Act cannot be whittled down for the reasons suggested by P. N. Mookerjee, J. Section 5 should be interpreted in its ordinary sense.

(55) I am therefore unable to concur in the view taken by P. N. Mookerjee J. that section 5 is limited to cases of unintentional exercise by the detaining authority of extra-territorial powers.

(56) Assuming, however, that such is the meaning of Section 5, I can find no basis for the conclusion of the learned Judge that "the present case appears to me to be one of deliberate assumption of extra-territorial power".

(57) There is no foundation for this case either in the petition or in the affidavits filed in support thereof. The only allegation is that on the date of the order, the would-be detenu was in French Chundernagore and was arrested there. It lay on the petitioner to make the above allegations and place proper materials in support thereof. Sarkar J. pointed out in his judgment that the point was not argued by learned Counsel for the petitioner before the Division Bench.

(58) As a result of the above discussion, my conclusion is that the order of detention is not invalid. The petition must, therefore, fail.

B/D.H. petition dismissed.

A.I.R. 1953 CALCUTTA 85 (Vol. 40, C. N. 25)

HARRIES C. J. AND SARKAR J.

Pulin Krishna Paul, Accused-Petitioner v. Sishupati Chakravarty and another, Opposite Party.

Criminal Revn. No. 252 of 1952, D/- 1-5-1952.

Constitution of India, Art. 20(2) — 'Prosecution' and 'offence' — Meaning of — Imposition of fine by Rent Controller for contravention of Rent Control legislation — Subsequent prosecution on same facts before Criminal Court is barred — Houses and Rents — West Bengal Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 — (Criminal P.C. (1898), Ss. 4(1) (o) and 403).

In a proceeding under S. 34 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, a landlord was fined by the Rent Controller for his illegal act of not allowing the tenant to use a privy and a water tap. Subsequently, the landlord was prosecuted in a criminal Court under S. 41 of the Act on the same facts and was convicted.

Held that Art. 20(2), Constitution of India was a bar to the prosecution and punishment of the accused in the criminal Court and, therefore, the conviction was illegal. AIR 1952 Cal. 121, Disting. (Para 13)

When a statute gives the Rent Controller power to impose a penalty, that is, fine a person, it gives him a right to deal with the prosecution of an offence and to punish the commission of such offence. (Para 12)

The words "prosecution" and "offence" as used in the Constitution are not defined and they must be given their ordinary meaning. Going to the Rent Controller and asking him to fine a man for an act is really a prosecution of that man and the act is an offence against the statute and is a criminal offence because it is punishable by a fine which is a punishment of a criminal nature. (Para 16)

Anno: Cr. P. C., S. 4(1)(o) N. 2, 4; S. 403 N. 1, 2.

S. S. Mukherjee with Noni Coomar Chakravarti, for Petitioner; Satyendra Prosad Sen, for Opposite Party No. 1.

REFERENCE ..... /Para

('52) AIR 1952 Cal 121 15

HARRIES C. J.: This is a petition for revision of an order of a learned Presidency Magistrate convicting the petitioner under Sec. 41 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and sentencing him to one month's rigorous imprisonment and to pay a fine of Rs. 200/-. In default of payment he was to undergo a further period of six weeks' rigorous imprisonment.

(2) The complainant was the tenant of a room used as a shop which he held from the petitioner. The case for the complainant was that as the tenant of the shop he had a right to use a certain privy and water from a tap. It is said that the petitioner had not for about six months allowed him access to the privy or allowed him to take water from the tap. Therefore, it is said, an offence under S. 41 of the Rent Control Act, 1950 had been committed.

(3) It is clear that proceedings had been taken earlier in the court of the Rent Controller under S. 34 of the Rent Control Act, 1950 and the petitioner had been fined by the Rent Controller.

(4) Before the learned Magistrate it was contended that the offence with which he was charged in the criminal court was the same as that with which he was charged before the Rent Controller and that he could not be punished twice for the same offence. The learned magistrate rejected the plea and convicted the petitioner and sentenced him as I have indicated.

(5) Section 34 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 provides for penalties for the disturbance of easements. The section in so far as it is material reads:

"Whoever, in any case in which an order or decree for the recovery of possession of any premises is prohibited under section 12, without the previous written consent of the Controller, or save for the purpose of effecting repairs or complying with any municipal requisition, wilfully disturbs any easement annexed to such premises, or removes, destroys, or renders unserviceable, anything provided for permanent use therewith, or discontinues any supply or service comprised in the tenancy of such premises, shall on the complaint of the party aggrieved, be liable, on the first occasion, to a fine which may extend to five hundred rupees, and on a second or subsequent occasion in regard to the same or any other premises, to a fine which may extend to one thousand rupees to be imposed, after inquiry by the Controller."

(6) Section 41 of the Act is as follows:

"1. No landlord either himself or through any person purporting to act on his behalf shall without just or sufficient cause cut off or withhold any essential supply or service enjoyed by the tenant in respect of the premises let to him.

2. Any landlord who contravenes the provisions of sub-section (1) shall, on conviction in a Criminal Court, be punished with imprisonment for a term which may extend to six months or with fine or with both."

(7) To this section there is an explanation: "...essential supply or service includes supply of water, electricity, lights in passages and on stair cases, lifts and conservancy or sanitary service."

(8) Mr. Sudhansu Mukherjee in the first place has argued that there really was no evidence that the right to use this privy and water tap was included in the tenancy; and that would appear to be so. There was no attempt to prove an easement by long user and it is somewhat difficult to appreciate how the tenant had a right. He may have been allowed for some years but that would only make him a licensee. Of course if by the terms of the tenancy he was entitled to use the privy and the water tap different considerations would apply. But there does not seem to be any definite evidence of that. At most the evidence is that he used them. Mere user for a period less than the statutory period would not amount to acquisition of an easement. This aspect of the case does not appear to have been enquired into with any care. It seems to have been accepted that because the tenant used this tap and privy for some years it was part of his tenancy or it was an essential supply or service, which of course must be included in the tenancy.

(9) The other point taken by Mr. Mukherjee is that his client has been punished twice for precisely the same offence. He was fined Rs. 250 by the Rent Controller for preventing the tenant using the privy and the water tap and he now has been imprisoned and fined for the same thing.

(10) It would appear from the judgment of the learned Magistrate that the prosecution was brought on the very same facts as were placed before the Rent Controller and that being so, it appears to me that he cannot be punished twice for precisely the same offence. Quite apart from any difficulties which arise from the definition of the word 'offence' in the Code of Criminal Procedure, it is provided in the Constitution by Art. 20 (2) that no person shall be prosecuted and punished for the same offence more than once. If the allegations in both the courts were the same as the learned Magistrate's judgment suggests, then I think he has been prosecuted and punished twice for the same offence.

(11) Section 31 of the Rent Control Act, 1950 entitles a Rent Controller to impose a fine, and a fine is a punishment for a criminal offence. Whether it be an offence within the Code of Criminal Procedure or not is immaterial. The word fine is defined by Littleton in these words:

"'Fine' signifieth a pecuniarie punishment of an offence or a contempt committed against the King, and regularly to it imprisonment appertaineth. And it is called 'finis', because it is an end for that offence."

(12) It appears to me beyond all question that when a statute gives the Rent Controller power to impose a penalty, that is fine a person, it gives him a right to deal with the prosecution of an offence and to punish the commission of such offence. What else can these proceedings before the Rent Controller be? They are not civil proceedings. They are proceedings of a criminal nature resulting in a well known form of punishment for a crime, namely, the imposition of a fine.

(13) It is true that S. 41 allows proceedings to be taken for the very same sort of offence in the criminal court. But I find it impossible to hold that with regard to the very same facts a man can be dealt with and punished by the Rent Controller and the criminal court. If so, A could be punished by both the courts for cutting off the supply of water on March 1 of any year. If on March 2 and succeeding days the water still remains cut off, he could for each day be prosecuted and punished in both courts and that could go on until he saw fit to restore the connection. Surely that cannot be right. If the prosecution in the criminal court is upon the same facts as the proceedings in the Rent Controller's court, then a previous conviction and fine by the Rent Controller would bar any punishment being given by the criminal court by reason of the plain words of Art. 20 (2) of the Constitution of India.

(14) On the other hand, if the proceedings in the court of the Controller related, for example to cutting off the supply of water in the month of March and the proceedings in the criminal court for keeping the supply cut off in the month of April, then quite obviously the criminal court could punish because one punishment only would be imposed for the particular offence charged. But if, as the learned magistrate says, the charge made before him was based on precisely the same facts upon which the Controller found the petitioner guilty and fined him, then it appears to me that the criminal court could not possibly inflict any further punishment.

(15) Reliance was placed upon a Bench decision of this Court in the case of — 'Jhabermal Dudhwalla v. Govindram', AIR 1952 Cal 121, in which it was held that the fact that certain proceedings under S. 34 were taken before the Rent Controller and have been concluded cannot stand in the way of the proceedings started under S. 41 in the criminal court. S. 403 of the Code of Criminal Procedure has no application to such a case.

(16) It does not appear that in this case the proceedings in the criminal court related to the very same fact and period of time as the proceedings before the Rent Controller. In fact it seems clear from the facts that the proceedings in the criminal court related to some period after the proceedings before the Rent Controller had concluded. In such a case quite clearly the criminal court could proceed. Whether S. 403 of the Code of Criminal Procedure applies to a case of this kind is, I think not material because the Constitution makes two punishments impossible. It is to be observed that the words 'prosecution' and 'offence' as used in the Constitution are not defined and they must be given their ordinary meaning. Going to the Rent Controller and asking him to fine a man for an act is really a prosecution of that man and the act is an offence against the statute and is a criminal offence because it is punishable by a fine which is a punishment of a criminal nature.

(17) For these reasons this petition must be allowed, the order of the learned magistrate set aside and the petitioner acquitted. He need not surrender to his bail and his bail bond is cancelled. The fine if paid must be refunded.

(18) SARKAR J.: I agree.

B/K.S. Petition allowed.

A.I.R. 1953 CALCUTTA 87 (Vol. 40, C. N. 26)

CHAKRAVARTTI AND SINHA JJ.

Kartick Chandra and others, Petitioners v. The Corporation of Calcutta, Opposite Party.

Criminal Revn. Nos. 801 and 851 of 1951, D/- 11-2-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), S. 493 — Violation of building rules — Demolition, when can be ordered — Imposition of fines, propriety of.

If any structures are erected in violation of the building rules the objects of the rules will, in most cases, be defeated and whenever any offending structures are detected the obviously right course is to take steps for their demolition. It cannot be right to compound transgressions of this kind with the imposition of a mere fine. There may be exceptional cases where the infringement of building rules has been of so trivial and technical a character that the imposition of a small fine will meet the needs of the case; but, speaking generally, where substantial infringements have taken place and the Corporation has thought fit to institute proceedings for demolition, it cannot be right to allow the offending structures to stand and let the offender off with only a fine. It is a mistake to suppose that S. 493 does not contemplate demolition. That section provides for fines of two kinds, a fine of a lump sum and also a daily fine which is to be paid for each day during which the offence is continued after the first day. Obviously, the object of framing a provision for a double fine of that kind is to make it expensive for the offending builder to maintain the structures concerned and to compel him by the pressure of the monetary penalty to pull them down as quickly as possible. (Paras 8, 9)

(b) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 363, 493 and 536 — Sections 363 and 493 are mutually exclusive — Scope indicated — Proceedings under — Magistrate can impose fine and require owner to demolish.

The provisions of S. 363 and S. 493 are mutually exclusive, for the first section says that where the Corporation has instituted proceedings under S. 493, no application shall be made under that

section and similarly S. 493 provides that where an application has been made under Section 363 or Section 364, no proceedings shall be instituted under that section. It follows, that once the Corporation has started proceedings under S. 363 and where the proceedings under that section are before the Magistrate, it cannot be open to the Magistrate himself to convert the proceedings into proceedings under S. 493. So to do would clearly be to violate the provisions of the statute. On the other hand, while the Magistrate cannot substitute proceedings under S. 493 for proceedings under S. 363, he can both impose a fine and require the offending owner to demolish the structure concerned. That course is warranted by S. 536. (Para 9)

(c) Municipalities — Calcutta Municipal Act (3 of 1923), S. 363 — Section contemplates two kinds of notices, one by Corporation on owner and another by Magistrate on owner and occupier.

Section 363 does not, in terms, provide for the service of any notice and all that it says is that before applying to a Magistrate for a demolition order, the Corporation must give the owner an opportunity of being heard and, further, that the Magistrate shall not make any order without giving the owner and the occupier full opportunity of adducing evidence and of being heard in his defence. The only possible means of giving the opportunity contemplated by the section is service of a notice. The provisions of S. 363 contemplate two notices at two different stages. The first notice is notice of the proceeding before the Corporation itself and the only person entitled to that notice is the owner. The second notice is to be given by the Magistrate and that notice is to be given both to the owner and to the occupier. (Para 12)

(d) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 3 (48), 144 (3) and 363 — "Occupier" — Non-inclusion of name of person in physical occupation, in assessment book, does not put occupant out of definition of occupier — There is nothing in S. 144 (3) which disentitles such person to notice under S. 363 — True test is to find whether occupier is affected by demolition. (Para 14)

(e) Municipalities — Calcutta Municipal Act (3 of 1923), S. 363 — Entire building occupied by certain persons — Portion sought to be demolished — Tests to see who is occupier.

Where an entire building occupied by certain people is sought to be demolished there can be no question that the occupiers are affected. Where a portion is sought to be pulled down the test must always be whether the occupiers are likely to be affected in the enjoyment of the portion of which they are in occupation. If they are likely to be affected, they are clearly entitled to notice under S. 363. Simply because the occupiers of a building are not squatting on the staircase all the time, they are not to be regarded as not occupiers in respect of the staircase and are not to be held not to be entitled to any notice under S. 363, if the stairs are proposed to be demolished. (Para 15)

(f) Municipalities — Calcutta Municipal Act (3 of 1923), S. 504 — Section applies to notices to be given by Corporation — Magistrate may however issue general notice under Cl. (c) — But methods laid down in Cls. (a) and (b) should first be exhausted.

Section 504 (c) which appears in Chap. XXXVII of the Act which deals with procedure, refers to notice which is required by the Act to be given by the Corporation. Assuming that in a case where the Corporation after making the best efforts in that behalf cannot discover who the occupiers are or every individual occupier is or where the serving officer fails to effect service on each one of them, it may be permissible to issue a general notice by the Magistrate in the form of a notice under S. 504 (c), still, before a notice can be issued in that form, the methods laid down in Cls. (a) and (b) of the section must first be exhausted. (Para 19)

Jogesh Chandra Sinha, for Petitioners; Sunil Kumar Basu, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('44) 48 Cal WN 170: (AIR 1944 Cal 159) 14, 18, 19

('49) 53 Cal WN 813 20

CHAKRAVARTTI J.: These are two Rules one taken out by Dr. Kartick Chandra Bose who is admittedly the owner of premises No. 45 Amherst Street, and the other taken out by seven other persons who claim to be occupiers of the same premises. The Rules are directed against an order, dated the 29th of June, 1951, passed by the Third Municipal Magistrate of Calcutta, whereby the learned Magistrate directed certain structures to be demolished.

(2) It appears that on the 22nd of March, 1949, the Corporation received a letter from one D. K. Dutt who is the owner of premises Nos. 128 and 130 Keshab Sen Street, Calcutta, and by that letter the said D. K. Dutt complained that certain unauthorised structures had been put up at 45, Amherst Street with the result that the access of light and air to the adjacent premises owned by him had been materially affected. Prior to the receipt of this letter, however, the unauthorised structures had already received the attention of the inspecting staff of the Corporation and on the 21st of March, 1949, they had already made a report that certain unauthorised structures, some of which were still in the process of construction, had been detected. Thereupon on the same day, that is to say, on the 21st of March, 1949, a notice under section 365 of the Calcutta Municipal Act was served on the owner. A notice under section 363 of the said Act appears subsequently to have been served on the 13th of June, 1949 and the matter came up for discussion at a meeting of the Building Committee held on the 14th of June. Apparently, the matter was adjourned on the 14th of June and final orders by the Administrative Officer were passed on the 25th July. By that order the Administrative Officer directed four of the unauthorised structures to be demolished within three months and added that if that direction was carried out, the proceedings would be withdrawn. The direction was not carried out and consequently proceedings were instituted in the court of the Municipal Magistrate on the 11th of July, 1950.

(3) I may pause here to point out that although the order of the Administrative Officer was passed on the 25th of July, 1949 & only three months time was given to the owner to carry out the directions which would give

him time up to the 25th of October, yet the Corporation did not find it possible to institute any proceeding till after nine further months, I have had occasion to comment before on the degree of expedition with which the Corporation transacts public business and this is but another instance of its normal speed.

(4) It appears from the order sheet of the learned Municipal Magistrate that on the proceedings being instituted on the 11th July, 1950, he directed general and special notices to be given to the occupiers and to the owner respectively and he fixed the 29th of August, 1950 as the next date of hearing. The notices directed to be issued were notices under Secs. 363 of the Act. On the 29th of August, 1950, the owner appeared through his son and, according to the order recorded by the learned Magistrate, on that date some occupiers also appeared. A prayer was made on behalf of the owner for an adjournment till after the Puja holidays in order that he might have sufficient time to file his written statement and, in accordance with that prayer, the case was adjourned till the 14th of November, 1950. More time passed and ultimately a written statement on behalf of the owner was filed on the 3rd of January 1951, but the occupiers seem to have taken no further part in the proceedings. In due course, the parties before the learned Magistrate led evidence; the owner examined his son, whereas the Corporation examined the complainant D. K. Dutt and its building inspector. The learned Magistrate held that the structures were, in fact, unauthorised, as alleged, and that there had been infringements of the building rules. Accordingly, he directed the owner to demolish the same four structures that had been ordered to be demolished by the Administrative Officer and gave the owner one month's time to do so. It was added that in case the owner failed to demolish the structures within the time given, the Corporation would be entitled to demolish them at the expense of the owner within two months of the date of the order. It is against that order that the present Rules are directed.

(5) The owner and the occupiers were represented before us by the same learned Advocate and on their behalf four common grounds were taken. It was contended in the first instance that the order passed by the learned Magistrate was bad, inasmuch as no notice under section 363 of the Act had been served either on the owner or on the occupiers; secondly, that the learned Magistrate had clearly misread the evidence; thirdly, that the learned Magistrate had failed to consider, as he ought to have done, the propriety of applying the alternative provisions of section 493 of the Act and imposing a fine on the owner; and lastly, that in any event the proceedings were time-barred, inasmuch as the offending structures had been completed more than five years before the institution of the proceedings.

(6) I shall take these grounds in the reverse order.

(7) The plea that the proceedings were time-barred was taken for the first time before this Court. Nothing was said about it in the written statement filed on the 3rd of January, 1951, nor was anything said by the son of the owner who deposed in the case. Under the proviso to section 363 (2) of the Act, the onus of proving that the work concerned was done more than five years previously lies on the owner. Far from discharging that onus, in the present case the owner did not even take that plea at any stage of the proceedings before the learned Magistrate. Indeed, if his own statements in the petition before this court are to be accepted, the structures were completed in 1946 & even if they were completed on the first day of that year, the proceedings instituted on the 11th of July 1950 would be obviously within time. But it is not necessary to decide the matter as an issue of fact in the present Rules. Since the plea involves issues of fact and since under the provisions of the statute it has to be taken and established by evidence by the owner, it cannot possibly be open to him to take it for the first time in an application revision to this Court. The first ground taken in support of the Rules must accordingly fail.

(8) I have no hesitation in holding that the ground taken as regards the omission of the learned Magistrate to consider the provisions of section 493 of the Act is wholly unmeritorious and unsubstantial. Building rules framed by an urban Municipality are intended to secure a reasonable provision of light and air and of means of access to buildings which may newly be put up and to preserve such provision for old buildings in the proximity of which such new structures may be erected. They are further intended to ensure adequate facilities for sanitation and to achieve and maintain a certain degree of architectural harmony in the locality. If any structures are erected in violation of the building rules, these objects will, in most cases, be defeated and whenever any offending structures are detected, the obviously right course is to take steps for their demolition. It cannot be right to compound transgressions of this kind with the imposition of a mere fine, because once the authorities start making exceptions in applying the rules, they would not know where to stop and once the public come to know that the only consequence of erecting unauthorised structures would be a liability to pay a small fine, one might find this city, as I have said elsewhere, filled up with structures, indiscriminately built, under the notion that it was possible to buy up the right of infringing the building rules by paying a small fine. There may be, I concede, some very exceptional cases where the infringement has been of so trivial and technical a character that the imposition of a small fine will meet the needs of the case, but, speaking generally, where substantial infringements have taken place and the Corporation has though fit to institute proceedings for demolition, it cannot be right to allow the offending structures to stand and let the offender off with only a fine.

(9) Apart from that, it seems to me to be a mistake to suppose that section 493 of the Act does not contemplate demolition. That section provides for fines of two kinds, a fine of a lump sum and also a daily fine which is to be paid for each day during which the offence is continued after the first day. Obviously, the object of framing a provision for a double fine of that kind is to make it expensive for the offending builder to maintain the structures concerned and to compel him by the pressure of the monetary penalty to pull them down as quickly as possible.

Again, as it appears to have been pointed out in certain decisions and as is clear from the

Act itself, the provisions of sections 363 and 493 of the Act are mutually exclusive, for the first section says that where the Corporation has instituted proceedings under section 493 of the Act, no application shall be made under that section and similarly section 493 provides that where an application has been made under section 363 or section 364 of the Act, no proceedings shall be instituted under that section. It follows, to my mind, as clearly as possible that once the Corporation has started proceedings under section 363 of the Act and where the proceedings under that section are before the Magistrate, it cannot be open to the Magistrate himself to convert the proceedings into proceedings under section 493. So to do would be clearly to violate the provisions of the statute. On the other hand, while the Magistrate cannot substitute proceedings under section 493 for proceedings under section 363 of the Act, he can, it would appear, both impose a fine and require the offending owner to demolish the structure concerned. That course is warranted by section 536 of the Act which lays down that when under the Act or under any rule or by-law made thereunder, any person is liable in respect of any unlawful work—

(a) to pay a fine, and
(b) to be required to demolish the work,

the Magistrate may, in his discretion, and subject to the provisions of sections 363, 364 and 493 of the Act, direct the said person to pay the fine and also to demolish the work. What the true import of the qualification "subject to the provisions of sections 363, 364 and 493" is, I need not pause to consider in these Rules. Suffice it to say, that while the Act seems to authorise, 'prima facie' at least, both imposition of a fine and an order for demolition, it certainly does not authorise the substitution of proceedings under section 493 for proceedings under section 363 of the Act. This ground must also therefore fail.

(10) The next ground urged by the learned Advocate for the petitioners was that the learned Magistrate had clearly misread the evidence in the case. I am bound to say that the complaint of the petitioners in this regard is in a sense justified. In the course of his order the learned Magistrate states that the son of the owner had admitted that, except one or two items, all the structures were "unauthorised". What the witness had, in fact, stated, however, is that except one or two items' "all works are authorised". How the Magistrate could have fallen into that curious error, it is not easy to understand. I do not, however, think that this error has, in any way, prejudiced the owner or led to any failure of justice, because according to the evidence of the same witness, the structures had to be constructed hurriedly for giving shelter to refugees and therefore no sanction could be taken. A similar statement has been made in paragraph 8 of the owner's petition to this Court.

I may add that in the written statement filed on behalf of the owner it was not stated that any sanction had been taken for the structures objected to and all that was said was that those had to be constructed expeditiously and that in the course of the "speedy construction", there might have occurred "a little infringement of the building rules". The case thus made both in the written statement and in the petition to this Court is that the structures are unauthorised in the sense that no sanction therefor had been taken, but, on the other hand, no substantial infringement of the building rules had been committed. The case made in the written statement and that made in the owner's petition to this Court are the same except that "a little infringement" in the written statement has become "no infringement" in the petition. While, therefore, the petitioners are right in contending that the learned Magistrate had misread one part of the evidence of the owner's son, I do not think, in view of the case made by the owner himself, both in the written statement and in the petition to this Court and in the other part of the evidence of the son, that any miscarriage of justice has occurred by reason of that error alone.

(11) The last ground is to the effect that no notice under section 163 (363?) of the Act was served either on the owner or on the occupiers. It will be convenient to take the owner and the occupiers separately.

(12) So far as the owner is concerned, there cannot be the slightest doubt that all notices under section 363 of the Act were served upon him. Section 363 does not, in terms, provide for the service of any notice and all that it says is that before applying to a Magistrate for a demolition order, the Corporation must give the owner an opportunity of being heard and, further, that the Magistrate shall not make any order without giving the owner and the occupier full opportunity of adducing evidence and of being heard in his defence. It has, however, been held by this Court that the only possible means of giving the opportunity contemplated by the section is service of a notice. As has been seen from the provisions of section 363 of the Act to which I have already referred, two notices at two different stages are contemplated by the section. The first notice is notice of the proceeding before the Corporation itself and the only person entitled to that notice is the owner. The second notice is to be given by the Magistrate and that notice is to be given both to the owner and to the occupier.

So far as the first notice is concerned, there is on the file a return of service relating to that notice and it bears on it a signature of some one who had received the notice on behalf of the owner. The minutes of the meeting of the Corporation refer to the fact that the owner had been invited to attend and it is perfectly clear from the record of the proceedings that representations were made on the owner's behalf. There can thus be no doubt that the notice contemplated by the first part of section 363 of the Act and relating to the proceedings before the Corporation was, in fact, served on the owner, Dr. Kartic Chandra Bose. So far as the second notice is concerned, namely, the notice of the proceedings before the Magistrate, there can equally be no question that it was served, for the owner responded to the notice, appeared before the Magistrate, asked for an adjournment, duly filed a written statement and ultimately led evidence in his defence. How in those circumstances it could ever be contended or pleaded that no notice under section 363 of the Act had been served on the owner, it is impossible to see. The affidavit in support of the petition to this Court is affirmed by one Radha Kanta Banerjee who describes himself

as an officer of the owner. It is stated in paragraph 4 of the petition that no notice under section 363 of the Act was served upon the owner and the person affirming the petition states that the fact is true to his knowledge. As I have already pointed out, both the notices under section 363 were in fact served and it could not be a fact that no service of a notice under that section had taken place.

In any event, it is impossible to see how anybody except the owner himself could ever affirm truthfully that the fact that no notice under section 363 was served upon him was true to his knowledge. Surely, Radha Kanta Banerjee had not been sitting constantly by the side of the owner during all the 24 hours of the day from the time the proceedings were instituted up to the date that they came to an end. In answer to an enquiry from us, Mr. Sinha, the learned Advocate for the petitioner, stated that he had, in fact, received his instructions from the owner himself, but the officer who had affirmed the petition was present and that Mr. Sinha himself was responsible for the form in which the affirmation had been expressed. All that I need point out is that the result has been to make Radha Kanta Banerjee swear a false affidavit and once can only regret that greater care is not bestowed on drafting affidavits which are to be used in this Court.

(13) For the reasons I have already given, there is no substance in the complaint that no notice under section 363 of the Act was served upon the owner. The position with regard to the occupiers is, however, different. I have already pointed out that on the 29th of August, 1950, certain occupiers appeared before the learned Magistrate & joined with the owner in praying for an adjournment. The Corporation, therefore, had notice that some persons were claiming to be occupiers. In paragraphs 4 and 9 of the owner's petition to this Court, as also in other paragraphs, it is clearly stated that portions of the premises concerned are occupied by tenants.

The whole of the petition upon which the second Rule was issued is based on a claim made by seven persons that they have been in occupation of portions of the premises concerned on payment of rent since 1947. In spite of this clear notice that certain persons are claiming to be occupiers of the premises in question, the Corporation has not filed any affidavit in opposition, nor has it denied in any other way that the claim that certain portions of the premises are tenanted is unfounded. Broadly stated, the position is that there is a statement by the petitioners in both the Rules that there are some occupiers in portions of the premises and there is no denial by the Corporation. In those circumstances it is impossible not to hold that besides the owner, there are certain occupiers who are interested in resisting the proposed demolition and who are entitled to be heard in their defence under the provisions of section 363 of the Act.

(14) It was, however, contended on behalf of the Corporation that no one was entitled to a notice under section 363 of the Act, merely because he was in physical occupation of the premises concerned, if his name was not entered in the Assessment Register. Reference in support of that contention was made to S. 144 (3) of the Act which lays down that no owner or occupier, whose name is not entered in the Assessment Book, shall be entitled to object that any bill or notice or warrant etc., has not been made out in his own name.

The identical argument was advanced in the case of — 'Ashutosh Sarkar v. Corporation of Calcutta', 48 Cal W N 170 and it was repelled by a Bench constituted of two Judges, one of whom had very special experience of matters relating to the Corporation of Calcutta. Apart from authority, the section, in my view, is perfectly clear. It mentions the word 'occupier' 'simpliciter' and does not speak of an occupier whose name has been entered in the assessment book. Under the definition of 'occupier', as given in section 3(48) of the Act, 'occupier' includes any person for the time being paying or liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which the word is used. It is not necessary to quote the rest of the definition. According to the petitions in the present cases, the occupiers concerned are in occupation on payment of rent. They thus come clearly within the defintion, if their case is true and it is not possible to hold that they are not entitled to be heard for the reason that their names are not borne on the Assessment Register.

(15) It was next contended by the learned Advocate on behalf of the Corporation that the occupier contemplated by section 363 of the Act was "the occupier of the structure to be so demolished" and, consequently, the occupiers in the present case could not be entitled to a notice under the section in view of the fact that the structures to be demolished were, in some cases at least, mere staircases. Now, it is perfectly true that if a certain building is proposed to be demolished, occupiers of another building are not entitled to notice under section 363. What I understood the learned Advocate to say was that in the case of the staircases at least, it could not be said that anybody was in occupation. It is only necessary to point out that the offending structures are, according to the Corporation, six in number and the third item in the list is "a three-storied building and verandah with R. T. roof and gangway at first floor level". If the whole of the three-storied building was constructed without sanction and in infringement of the building rules and if there are occupiers in the premises, it is reasonable to presume that they, or some of them at least, are occupiers of that building. Besides, it appears to me that if the stairs of any building are proposed to be demolished, it is not possible to say that the occupiers of that building are not in occupation of the stairs and therefore they are not entitled to be heard under section 363 of the Act. It is in the very nature of things impossible that anybody should occupy the stairs in the sense of living on them.

But if the stairs are in a building which is occupied, the occupiers must necessarily use the staircase for reaching their rooms or for going out from them and they are obviously in possession or occupation of the stairs in the only form of occupation of which stairs are susceptible. I do not, therefore, think that it can rightly be contended that simply because the occupiers of a building are not squatting on the staircase all the time, they are to be regarded as not occupiers in respect of the staircase and are to be held not to be entitled to any notice under section 363 of the Act, if the stairs are proposed to be demolished. Where an entire building occupied by certain people is

sought to be demolished, there can be no question that the occupiers are affected. Where a portion is sought to be pulled down, the test must always be whether the occupiers are likely to be affected in the enjoyment of the portion of which they are in occupation. If they are likely to be affected, they are clearly entitled to notice under section 363 of the Act.

(16) I must add, however, that premises No. 45, Ahmerst Street seem to cover a fairly large area amounting to one bigha, ten cottas, twelve chhataks and three square feet of land. On the premises appear to stand a number of rambling structures connected by gangways or otherwise and it is not too clear to us which portion is in occupation of the occupiers and whether they are likely to be affected if, for example, items 1 and 2 which are stairs or item 4 which comprises re-inforced concrete posts and re-inforced concrete framework in the fourth storey or any other item is demolished. This is a matter which will have to be gone into by the learned Magistrate and one can only hope that adequate assistance from both the Corporation and the owner and the occupiers will be forthcoming.

(17) It was thirdly contended by the learned Advocate for the Corporation that certain of the occupiers having, in fact, appeared, it could not rightly be said that they had not been given an opportunity to adduce evidence or to be heard in their defence and that therefore the non-service of notice under section 363 of the Act could not be made a ground for challenging the learned Magistrat's order. Reference was made to the fact that, according to the learned Magistrate's note recorded on the 29th of August 1950, some occupiers appeared before him on that day. It is true that according to that note, some occupiers appeared, but there is nothing to show who they were or if any of the present occupiers appeared on that date. Even if some of them appeared, others did not and there is no material on which one can possibly hold that those who did not appear were represented by those who did. It is therefore not possible to throw out the objection of the occupiers merely on the ground that, according to the learned Magistrate's note, some occupiers who have not been identified appeared before him on the 14th of November 1950.

(18) It was lastly contended by the learned Advocate for the Corporation that a general notice to the occupiers had been given in the present case and that the service of that notice was sufficient compliance with section 363 of the Act. Reference was made to the decision in the case of — 'Ashutosh Sarkar v. Corporation of Calcutta', 48 Cal W N 170 to which I have already referred and it was contended that it was on the basis of the observations made in that decision that the Corporation had devised the form of a general notice which had been used in the present case. The service of such a notice, it was further contended, was authorised and justified by section 504(c) of the Act.

(19) I have no doubt in my mind that section 504(c) of the Act cannot be said to apply in terms to any notice to be given by the Magistrate. That section appears in Chapter XXXVII of the Act which deals with procedure and it is perfectly clear from the terms of the section itself that it refers to notice which is required by the Act to be given by the Corporation. For example, clause (a) refers to the service of a notice or a document on one or several owners or occupiers when "it is not in the opinion of the Corporation practicable to serve the document on every one of them". There are several other indications in different parts of the section as also in sections preceding and following it from which it is perfectly clear that what the whole chapter contemplates are notices to be given by the Corporation. Their Lordships in the case of — 'Ashutosh Sarkar v. Corporation of Calcutta', 48 Cal W N 170 did not say that a notice under section 504(c) could be given for the purposes of section 363 of the Act and were careful only to say that some notice in the manner of a notice under that section could at least be given.

Assuming that in a case where the Corporation, after making the best efforts in that behalf, cannot discover who the occupiers are or every individual occupier (is?) or where the serving officer fails to effect service on each one of them, it may be permissible to issue a general notice in the form of a notice under section 504(c), still, before a notice can be issued in that form, it is clear that the methods laid down in clauses (a) and (b) of the section must first be exhausted. There is nothing to show in this case, and indeed it is not claimed, that any attempt was made to serve the occupiers in the manner prescribed by either clause (a) or clause (b) of section 504 and that that attempt failed. In no view of the section or of general principles could it be said that the Magistrate would be justified in adopting at once and even at the beginning the method prescribed by clause (c) of section 504. I may further point out that even if the form of a notice under section 504(c) could be said to have been properly adopted in the present case, the notice itself was clearly insufficient, for in the column for "the unauthorised works complained of", all that was inserted was "erection of staircase from ground floor to first floor level on the north side etc."

As I have already stated, the offending structures complained of are six in number and at least four of them were proposed to be demolished. The general notice mentioned only one of them. It is thus clear that even the notice were not to be held defective for the reason that it was a general notice, it is bound to be held defective for the reason that on account of the limited nature of its contents, it could not serve as sufficient or adequate notice of the proposed demolition against which the occupiers were required to show cause. The issue of the general notice, such as was issued in the present case, cannot therefore be held to have been a sufficient compliance with section 363 of the Act.

(20) It is only fair to observe that section 363 seems to place the Corporation in an unenviable position, particularly in respect of large buildings or mansions which may be very populously tenanted. It appears to have been contended in certain cases that the section did not really intend a notice to be given to an occupier who was not the owner, because it spoke of giving an opportunity to the owner and the occupier of being heard "in his defence". The argument was that if two persons, namely, the owner and an occupier who was not the owner, were contemplated, the section could not have used the word 'his', but would

have used the word 'their'. This argument appears to have been advanced in the case of — 'Gobinda Charan v. Corporation of Calcutta', 53 Cal W N 813 but was not accepted, although the infelicitous language in which the section is expressed was commented on.

I may further point out that, grammatically, if two persons were intended, the correct mode of expression would be not "the owner and occupier" but "the owner and the occupier". At the same time, one cannot overlook the fact that in the first part of the section where the owner alone is contemplated, the section mentions him alone, for it is said there that the Corporation may proceed after giving "the owner" an opportunity of being heard. If the owner alone was contemplated even in the second part of the section which refers to the magisterial proceedings, it is not clear why the word 'occupier' should have been added there. In that state of the language in which the section is expressed, I am not prepared to depart from the construction already adopted in several cases decided by this Court and would prefer to follow the settled law that the section contemplates both the owner and the occupier. How in a case where hundreds of families occupy a mansion and where the name of not one of them is borne on the assessment book, the Corporation is to ascertain who the occupiers are, it is not for us to say. It may be that the Magistrate will be right in requiring the owner to state who the occupiers are. But, obviously, if the owner omitted to mention the name of any occupier, the person so left out would not be bound by the omission and would not lose his right to be heard in his defence, if he could make out that he was in fact an occupier. This is a matter to which legislative attention may have to be directed.

(21) So far as the present case is concerned, Mr. Sinha who appears for the petitioners in both the cases, that is to say, for both the owner and the occupiers, assures us on behalf of both that the only occupiers of the premises concerned are the seven petitioners in Criminal Revision Case No. 851 of 1951 namely 1. Narendra Nath Bose, 2. Aswini Kumar Das, 3. Jatindra Nath Bose, 4. Rampada Ghose, 5. Hirendra Nath Bose, 6. Bhaskar Roy and 7. Utpal Bose. Mr. Sinha further informs us on behalf of both the owner and the occupiers above named that there are no sub-tenants under the occupiers. This statement having been made on behalf of both the owner and the occupiers will be binding on all of them.

(22) We are further of opinion that it is unnecessary in the present case that the learned Magistrate should issue notices under section 363 of the Act at this stage. All that the section provides is that the occupiers are entitled to an opportunity of adducing evidence and of being heard in their defence. The occupiers are before us. They are aware that a proceeding is pending before the learned Magistrate and thus they have had notice of the proceeding. On their behalf Mr. Sinha very fairly agrees that it is unnecessary that formal and individual notices should any longer be served upon them and that they will be prepared to enter appearance before the learned Magistrate on a date fixed by us.

(23) In the result we set aside the order of the learned Magistrate, dated the 29th of June, 1951 and send the case back to him to be heard in accordance with the directions given below and in accordance with law, the directions being (here his Lordship gave certain directions, which are not necessary for the purposes of this report—Ed.).

(24) The Rules are accordingly made absolute and the learned Magistrate is directed to rehear the case from the stage reached by him at the conclusion of the evidence given at the original hearing, and complete the hearing after giving the occupiers an opportunity of adducing evidence and being heard in their defence in accordance with the directions given above.

(25) Let the record be sent down with the least possible delay so that it may reach the court below before the 28th February next.

(26) SINHA J.: I agree.

B/R.G.D. Rules made absolute.

A.I.R. 1953 CALCUTTA 93 (Vol. 40, C. N. 27)

HARRIES C. J. AND G. N. DAS J.

L. Bhupat Rai and Co., Petitioner v. Bhikhum Chand Sugan Chand, Opposite Party.

Civil Rule No. 1242 of 1951, D/- 22-6-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (1) (e) — Fixation of standard rent — Premises situate in business locality — Position of rooms let, how far relevant.

It is notorious that rents of business premises in the business quarters of Calcutta vary with the position of the rooms let. The first floor is very much more advantageous than the second-floor and the rent of a room on the second floor cannot be a reasonable guide for assessing the rent of a room on the first floor.

(Paras 5, 6)

Barun Kumar Roy Choudhury, for Petitioner; Bejoy Bhose, for Opposite party.

HARRIES C. J.: This is a petition for revision of an order of an appellate court in a matter relating to the fixation of standard rent.

(2) An application was made to the Rent Controller for fixation of standard rent of a room on the first floor of premises No. 14/2, Old China Bazar Street, Calcutta which was let at a monthly rental of Rs. 80/-.

(3) It seems clear that this room was not let separately on December 1, 1941 and therefore the provisions of S. 9 (1) (e) of the West Bengal Premises Rent Control (Temporary Provisions) Act applied. The Rent Controller had to ascertain the basic rent, that is, the rent which would have been reasonably payable for the premises if they were separately let on December 1, 1941.

(4) The tenant produced no evidence of rents of similar rooms on the first floor in the vicinity. He relied upon the rent payable for rooms on the second floor of these premises. These rooms were measured and the rent worked out at the rate of 1 anna 6 pies per square foot. The Rent Controller thought that that was a reasonable rate of rent for the first floor and he fixed the standard rent accordingly.

(5) It is notorious that rents of business premises in the business quarters of Calcutta vary with the position of the rooms let. The first floor is very much more advantageous than the second floor and the rent of a room on the second floor cannot be a reasonable guide for assessing the rent of a room on the first floor.

(6) On appeal the appellate Court was of opinion that the rent payable for rooms on the second floor could not be used as a true guide for ascertaining the rent payable for rooms on the first floor and with that view I entirely agree. There was no other evidence of any kind. That being so it appears to me that there was no material upon which the Rent Controller could arrive at a basic rent as required by S. 9 (1) (e). As the tenant had not produced any evidence the application should have been dismissed.

(7) That being so the view of the appellate court must be upheld, and the petition fails and is dismissed with costs.

(8) The Rule is discharged.

(9) DAS J.: I agree.

B/K.S. Rule discharged.

A.I.R. 1953 CALCUTTA 94 (Vol. 40, C. N. 28)

K. C. DAS GUPTA AND BACHAWAT JJ.

Hub Lal Show, Defendant-Appellant v. Prem Raj Lala, Plaintiff-Respondent.

A. F. A. D. No. 1150 of 1951, D/- 5-3-1952.

(a) Debt Laws — Bengal Money-lenders Act (X (10) of 1940) S. 38 — Scope — Nature of declaration contemplated by section.

The scheme of S. 38 Bengal Money-lenders Act is that an opportunity should be given to the borrower to have his accounts settled and if on such accounting something is found due, that is to be declared. If nothing is found due, that fact is also to be declared. The provision in sub-section (1) that the application is "for taking accounts and for declaring the amount due to the lender" clearly includes, the provision of declaring that nothing is due. That this is the scheme is also clear from the use of the words "if any" in sub-section 2.

Hence, an application under S. 38 of the Act praying for taking of accounts and declaring the amount found due if any, cannot be held to be not maintainable even though it contains an allegation that the loan together with interest has been fully satisfied. (Paras 4 & 5)

(b) Debt Laws — Bengal Money-lenders Act (X (10) of 1940) S. 38(3) — Order refusing to make a declaration under S. 38 — No appeal lies.

Where the Court refuses to make a declaration under S. 38 on the ground that the application is not maintainable, the order of refusal is not appealable under S. 38(3) of the Act. When the Legislature used the words "a declaration under this section shall be subject to appeal" in S. 38(3) it clearly contemplated the situation that a declaration has been made. Whether the declaration was that no amount was due or some amount was due did not matter but so long as the declaration was made an appeal was provided for. Where no declaration has been made, there is no provision for an appeal. (Para 7)

Nor can it be contended in such a case that an order refusing to make a declaration is appealable under the Civil Procedure Code because the ordinary Civil Courts deal with the matter. AIR 1948 PC 12 Ref. (Para 8)

(c) Civil P. C. (1908) S. 115 — Refusal to exercise jurisdiction — Debt Laws — Bengal Money-lenders Act (X (10) of 1940) S. 38.

Where the Court on a wrong view of law holds that an application under S. 38 Bengal Money-lenders Act is not maintainable it is a clear case of refusal to exercise jurisdiction and the High Court would interfere in revision under S. 115 Civil P.C. (Para 11)

Anno: C.P.C., S. 115 N. 11.

Hemendra Kr. Das and Sambhunath Banerji, for Appellant; Ranjit Kr. Banerjee and Ramesh Ch. Banerjee, for Respondent.

REFERENCE ..... /Para

('48) 74 Ind App 264: (AIR 1948 PC 12) 8

K. C. DAS GUPTA J.: The respondent Premraj Lala filed an application under S. 38 of the Bengal Moneylenders Act in the court of the Subordinate Judge, Howrah. In that application it was stated that the original loan of Rs. 500/- with all interest accrued thereon at the statutory rate had been fully satisfied from the income. The prayer, however, was that an account be taken of the loan described and a declaration of the amount, if due, if any, be made upon the loan. The present appellant having raised an objection to the maintainability of the application the learned Subordinate Judge decided that the applicant was not entitled to maintain the petition in view of his case made in paragraph 7 of the petition that the loan had been satisfied. He accordingly dismissed the case as not maintainable. Against this Premraj Lala, the applicant, preferred an appeal to the District Judge, Howrah. The learned District Judge was of opinion that the application was maintainable and in that view he allowed the appeal and remanded the case to the trial court for disposal on merits according to law.

(2) On behalf of the appellant two points have been raised. First, it was contended that the learned District Judge was wrong in his view of law that an application was maintainable. Secondly, it is contended that in any case, an appeal did not lie against the order passed by the learned Subordinate Judge, the District Judge acted without jurisdiction in hearing and allowing the appeal.

(3) On the first point, I am clearly of opinion that the appellant's contention cannot be accepted. Section 38 provides that any borrower may make an application to the proper court which is indicated in the section itself for taking accounts and for declaring the amount due to the lender. Such application has to be in the prescribed form and accompanied by a fee. It provides that thereafter a notice shall be issued by the Court on the lender and after this the Court shall take an account of the transactions and shall

'declare the amounts, if any, (a) payable and already due, (b) payable but not yet due by the borrower to the lender whether as principal or interest or both".

It was argued by Mr. Hemendra Kumar Das on behalf of the appellant that the scheme of the law here clearly is that the Court can give a declaration only of some amount which is payable and already due or which is payable but not yet due and that it cannot declare that no amount is due. The scheme of the law, as I understand it, is that an opportunity should be given to the borrower to have his accounts

settled and if on such accounting something is found due, that is to be declared. If nothing is found due, that fact is also to be declared. The provision in sub-sec. (1) that the application is "for taking accounts and for declaring the amount due to the lender" clearly includes, in my judgment, the provision of declaring that nothing is due. That this is the scheme is also clear from the use of the words "if any" in sub-sec. 2. Reading the section 38 as a whole, and giving the words used their plain meaning to understand the intention of the Legislature, I am of opinion that the intention was that on such an application being made the Court will have to take accounts and then declare either that no amount is due, or the sum that is due. To take any other view will be to defeat the scheme of the law without any justification for the same in the words used by the Legislature.

(4) It is important to mention in this connection that in the application that was actually made, though in the body of the application a statement was made as a submission by the petitioner that the loan with interest had been satisfied, the prayer was for an account to be taken and for "a declaration of the amount due, if any".

(5) My conclusion, therefore, is that the District Judge rightly held that the application was maintainable.

(6) It has, however, been contended that in any case the appeal should have been dismissed as incompetent. Section 38 has made some provision as regards appeals. In sub-sec. 3 of the section provision is made first that a proceeding under the section shall be deemed to be a suit for the purpose of sec. 11 of the Code of Civil Procedure. As the proceedings shall be deemed to be a suit for this limited purpose only, all the consequences that would have followed if the proceeding was a suit for all purpose do not follow. The Appeal is dealt with in the subsequent clause of the sub-section. It is in these words:

"A declaration under this section shall be subject to appeal, if any, as if it were a decree of the Court and every decision shall be subject to appeal to the High Court in the same manner as a decree passed in appeal."

(7) It has been contended by Mr. Das that where the Court refused to make a declaration in the view that the application is not maintainable, that order of refusal is not appealable. We are aware of the decisions in which, though under Order XLIII, rule 1, clauses r and s an appeal lies against an order under rules 2, 4 and 6 only of Order XXXIX of the Code of Civil Procedure, the courts have held that a refusal to make an order under those sections will also be subject to appeal. We find it difficult, however, to apply the reasoning on which such refusal to pass an order was held to be appealable, to the refusal to make a declaration. If the words in this sub-sec. 3 had been that an order under this section shall be subject to appeal, that reasoning would have been available. When the Legislature used the words "a declaration under this section shall be suject to appeal", it clearly contemplated the situation that a declaration has been made. Whether the declaration was that no amount was due or some amount was due did not matter but so long as the declaration was made an appeal was provided for. Where no declaration has been made, there is no provision for an appeal.

(8) Nor can it be argued that an appeal lies because the ordinary civil courts deal with the matter. As was laid down by their Lordships of the Privy Council in — 'Adaikappa Chetiar v. Chandrasekhar Thevar', 74 Ind App 264 (PC) where a legal right is in dispute and the ordinary courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto, and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal. In the present case, the statute gives an appeal against a declaration. It does not give an appeal against any other orders under Sec. 38. There is no scope for holding that the order amounts to a decree. Quite apart, therefore, from the fact that when the statute gives an appeal only against a declaration, it should be held that the statute by implication says that no appeal will lie against any other order under the section, no appeal will lie under the provisions of the Civil Procedure Code from an order refusing to make a declaration.

(9) In my judgment, it is impossible to escape the conclusion that refusal to make a declaration is not subject to appeal.

(10) It must, therefore, be held that the court of appeal below was wrong in allowing the appeal.

(11) After we have heard the arguments in the appeal, an application was filed on behalf of the borrower for exercise of our revisional jurisdiction under the provisions of section 115 of the Code of Civil Procedure. In the peculiar circumstances of the case we have condoned the delay in filing the application. Notice of the application was given on the other side and we have heard the learned Advocate in this matter also. We are of opinion that the Subordinate Judge clearly refused to exercise jurisdiction on a wrong view of law that the application was not maintainable. This is a proper case where we should interfere with that order under section 115 of the Code of Civil Procedure.

(12) Accordingly, we set aside the order passed by the learned Subordinate Judge and direct that the application be dealt with by him in accordance with law. The parties will bear their own costs.

(13) BACHAWAT J.: I agree.

B/K.S. Case remanded.

A.I.R. 1953 CALCUTTA 95 (Vol. 40, C. N. 29)

G. N. DAS J.

Bharat Chandra Maiti, Plaintiff-Petitioner v. Gour Chandra Adak, Defendant-Opposite Party.

Civil Rule No. 1123 of 1951, D/- 29-2-1952.

West Bengal Bargadars Act (2 of 1950), Ss. 9(2), 7(1) and 18 — Dispute not relating to matters referred to in S. 7(1) — Board not in existence — Order staying suit under S. 9 (2) read with S. 18 is illegal — (Constitution of India, Art. 14).

Section 9(2) of the Act only applies to cases of disputes referred to in S. 7(1) which require to be decided by a Board referred to in that sub-section. Where the

dispute in question does not relate to any of the matters referred to in S. 7(1) and when there is no Board established, the dispute, even if it comes within S. 7(1), cannot be said to be one which requires to be decided by a Board. An order staying a suit in such a case is without jurisdiction. (Para 1)

The discrimination, if any, will be between bargadars in an area where the Board had been established and bargadars in an area where no such Board had been established and as such it will not offend Art. 14 of the Constitution. (Para 2)

Panchanan Chaudhury and Nirmal Chandra Choudhury, for Petitioner; Sudhangsu Kumar Dey and Anil Kumar Sett, for Opposite Party.

ORDER: This Rule was obtained by the plaintiff against an order of Mr. J. C. Chakravartty, learned Munsif, staying the plaintiff's suit under Section 9 (2) read with Section 18 of the West Bengal Bargadars Act, 1950. The learned Munsif found negativing the defendant's contention that he was a Bhagchasi. It is not disputed that no Bhag Conciliation Board has been established in the area where these properties are situated. Section 9 (2) of the Act only applies to cases of disputes referred to in Section 7 (1) which requires to be decided by a Board referred to in that sub-section. The dispute which is now in question does not relate to any of the matters referred to in Section 7 (1) and as there is no Board established, the dispute, even if it came within Section 7 (1) cannot be said to be one which requires to be decided by a Board. In these circumstances, the order made by the learned Munsif staying the suit is wholly unauthorised.

(2) It was contended by Mr. Dey appearing for the opposite party that otherwise there will be a discrimination which will offend Article 14 of the Constitution. The discrimination, if any, will be between bargadars in an area where the Board had been established and Bargadars in an area where no such Board had been established. I do not think Article 14 of the Constitution can be of any assistance to the opposite party.

(3) The result therefore is that this Rule is made absolute. The order of the learned Munsif is set aside and the learned Munsif is directed to hear the suit as early as posible. The petitioner will get the costs of this Rule, hearing fee two gold mohurs.

B/K.S Rule made absolute.

A.I.R. 1953 CALCUTTA 96 (Vol. 40, C. N. 30)

G. N. DAS AND K. C. DAS GUPTA JJ.

Naba Kumar Saha, Petitioner v. S. Banerjee and another, Opposite Party.

Misc. Case No. 350 of 1951, D/- 11-12-1951.

Constitution of India, Art. 215 — What amounts to — Disobedience to order — Personal service of order when essential — Mandamus directing Government Officers to restore possession — Non-compliance — Personal service of order not effected — No contempt of Court — (Contempt of Courts Act (1926), S. 1).

Contempt of Court is either (1) Criminal contempt consisting of words or acts obstructing, or tending to obstruct, the administration of justice, or (2) contempt in procedure, consisting of disobedience to the judgments, orders, or the process of the Court, and involving a private injury. (Para 36)

But disobedience, if it is to be punishable as a contempt, must be wilful. Disobedience cannot be held to be wilful until the order is served. Hence the judgment or order must be shown to have been served on the party personally, except in the following cases (1) prohibitive orders, the drawing up of which is not completed; (2) orders embodying an undertaking to do an act by a named day; (3) orders to answer interrogatories or discovery or inspection of documents; (4) where an order for substituted service has been made; (5) where the respondent has evaded service of the order. (Para 3)

Personal service of the judgment or order may be dispensed with (1) if it be made to appear to the Court or a Judge that prompt personal service of judgment or order cannot be effected; in such a case substituted or other service of the order or merely giving notice of the order may be directed; (2) if it is shewn that the person to be served has evaded service. But the fact that the person ordered to do an act was actually in Court when the order was made is not a ground for dispensing with personal service of it. In the case of a breach of a prohibitory order, however, service on the party against whom committal is sought, is not necessary, (1) if the party concerned had notice of the order and knew that the order was intended to be enforced, (2) or if he consented to the order (3) or if he was present in Court when the order was pronounced or the motion was made although he may have left the Court before the order was pronounced. (Paras 39, 40 & 42)

Hence, where a mandamus issued by the High Court directs certain officers of the Government to restore possession of the land which had been acquired by the Government but the order is not personally served on the officers concerned, they cannot be committed for contempt for disobedience of the order. (Paras 43 & 44)

Anno: Contempt of Courts Act, S. 1 N. 3.

Ranjit Kumar Banerji and Anil Kumar Sen for Petitioner; Chandra Sekhar Sen and Smriti Kumar Roy Choudhury, for Opposite Party.

DAS J.: This rule was issued on 9-11-1951 by P. N. Mookerjee J.

"calling upon Mr. S. Banerji, Secretary to the Government of West Bengal, and the Collector of Howrah to show cause why they should not be committed for contempt of this Court for alleged non-compliance with the order dated 27-8-1951 and made in C. R. 436 of 1951, or such other or further order made as to this Court may seem fit and proper".

(2) The rule was made returnable on November 14, 1951, and it was directed that the matter might be put up before the learned Judge (P. N. Mukherji J.). On November 14, 1951 the learned Judge adjourned the hearing of the rule for one week on the prayer of the opposite parties which was not objected to by the learned Advocate for the petitioner.

(3) By an order dated 21-11-1951 passed by the learned Chief Justice, the case was directed to be placed before the Bench presided over by me.

(4) The case was thereupon heard by myself and Das Gupta J.

(5) I shall first state the facts which led up to this rule.

(6) On an application supported by an affidavit of the petitioner Naba Kumar Saha alias Rajendranath Saha, Bose J. issued a rule

"calling upon the opposite parties to show cause why a writ in the nature of Mandamus should not issue restraining them from further proceeding with the matter of acquisition of the lands of the petitioner mentioned in the petition or why such or further order or orders should not be made as to this Court may seem fit and proper".

(7) 'Ad interim' injunction restraining the opposite parties from inducting any further incumbrances and from cutting down any further trees or standing crops on the lands of the petitioner was granted pending the hearing of the rule.

(8) The only opposite parties to this rule were (1) Mr. S. Banerji, Secretary to the Government of West Bengal, (2) The Collector of Howrah.

(9) An affidavit, on behalf of the opposite parties was filed.

(10) The rule was heard and disposed of by me on August 27, 1951, by the following order passed in the presence of the learned Advocates for the parties:

"For the reasons given by me in Civil Revision Case No. 1678 of 1950 disposed of by me today, I make the rule absolute in terms similar to those of the said rule. The petitioner will be entitled to the costs of this rule, hearing fee being assessed at one Gold Mohur".

(11) In order to understand the above order, it it necessary to set out the relevant portion of the order passed in Civil Revision case No. 1678 of 1950 which runs as follows:

"I accordingly direct that the State do restore possession forthwith of the lands which are in their possession, to the petitioners after giving them notice of the date on which possession would be restored. I also direct that the State will supply to the petitioners within one month from this date the names of the persons to whom possession was made over by the State of the lands which are covered by notification, and the description of such lands as far as possible.

Liberty is given to the parties to mention this matter".

(12) At the time of the hearing of these rules, no point was made that the Relief and Rehabilitation Department was a necessary party.

(13) No petition or affidavit has been filed by the petitioner stating what had happened after I made the order.

(14) Mr. Banerji, learned Advocate for the petitioner has stated before us that he mentioned the matter before P. N. Mookerji J. on November 9, 1951, and filed plain copies of the petition on which Civil Rule No. 436 of 1951 was issued, the order passed in the said rule, the order passed in Civil Revision Case No. 1678 of 1950 and a notice dated October 22, 1951, addressed to the Land Acquisition Collector, Howrah with a note that copies were forwarded to (1) The Divisional Commissioner, Burdwan Division, (2) The Secretary, Land Revenue Department, Government of West Bengal, (3) The Director, Rehabilitation Department, Government of West Bengal.

(15) P. N. Mookerji J. thereupon issued the present rule.

(16) Three affidavits sworn to respectively by Mr. B. Lahiri Deputy Rehabilitation Commissioner to the Government of West Bengal, Mr. R. Roy opposite party No. 2 and Mr. S. Banerji opposite party No. 1 have been filed by the opposite parties.

(17) The learned Senior Government Pleader has submitted that the facts disclosed in these affidavits shew that the State had no intention of disobeying the order of this Court and the State has already complied with the order. The learned senior Government Pleader has accordingly contended that the rule should be discharged. No other point was urged before us.

(18) No affidavit in opposition has been filed on behalf of the petitioner; Mr. Banerji, learned Advocate for the petitioner has contended that as the order of this Court was not complied with, within the time limited by the order and as the opposite parties did not avail themselves of the liberty given to them by the order to mention the matter for further directions, this rule should be made absolute.

(19) As the rule involved a question of importance, we took time to consider our order.

(20) Having given our best attention to the matter, we have come to the conclusion that this rule should be discharged on the short ground that the order of this Court, non-compliance whereof is alleged, was not personally served on any of the opposite parties before the rule was issued by this Court.

(21) As the point was not canvassed before us, we have gone through the affidavits filed on behalf of the Appellants and the records of this Court.

(22) In his affidavit, Mr. S. Banerji opposite party No. 1 has stated that the order of this Court dated 27-8-1951 was communicated to him by this Court in its letter dated 13-11-1951. He has further stated that he immediately intimated the Department concerned (Refugee Rehabilitation Department) to take necessary action.

(23) In his affidavit, Mr. R. Roy, Opposite Party No. 2 has stated that prior to 24-9-1951, no intimation was received by his office about the order of this court, that on 24-9-1951 his office received an intimation from the Deputy Refugee Rehabilitation Commissioner to arrange for restoration of possession of the lands to the petitioner with the help of a Kanungo; that notice has been given to the petitioner to the effect that possession would be restored on 13-11-1951, that the delay was due to the intervention of the Puja holidays and to the fact that the Land Acquisition Collector had to attend to a number of Land Acquisition cases and that the deponent was also busy with election matters. It was submitted that the deponent had no intention of disobeying the orders of this Court.

(24) It appears from the High Court file of C. R. 436 of 1951 that after the disposal of the rule on 27-8-1951, note dated 1-9 to the following effect is recorded.

"Drafter Please see the note sheet in C. R. 1678/50 and do the needful".

"The file of C. R. 1678/51 shows that on 31-8 the office submitted a note stating inter-alia that only communication of the order to the Government will perhaps be sufficient: submitted for order".

(25) Then follows the following order

"As proposed at A

H. Ghosal
1-9-51".

(26) The Note sheet of C. R. 1678/51 then contains only the following entry.

"6-11-51 O. C. R. to D/S".

(27) The file of C. R. 1678/51 further shews that on 6/11 Mr. H. Ghosal, Assistant Registrar directed the copy of the judgment in this rule to be forwarded to (1) Secretary, Land & Land Revenue De-

partment, Govt. of West Bengal, Writer's Buildings, (2) Collector of 24 Parganas, (3) Commissioner of Presidency Division at Calcutta for information and guidance.

(28) The marginal note shows that the copies were issued on 13-11.

(29) The file of C. R. 436 of 1951 shews that on 5/11 Mr. H. Ghosal, Assistant Registrar directed that the copies of the judgment be forwarded to the Secretary Land and Land Revenue Department, Government of West Bengal at Writer's Building and Collector of Howrah, Commissioner of Burdwan Division at Chinsurah Hooghly. There is a further note that the copies were issued on 13/11.

(30) The facts stated above clearly shew that the copy of the order of this case did not issue before 13/11, i. e. after the present rule, giving rise to Misc. case 350 of 1951, was issued by P. N. Mookerji J.

(31) There is nothing on the record to shew that authenticated or even plain copies of the order of this Court dated August 27, 1951 were personally served on the Opposite parties.

(32) The petitioner has not filed any affidavit in this behalf. There is a denial by the opposite parties on oath. The denial is fully supported by the records of the cases referred to above.

(33) In these circumstances, I hold that copies of the relevant orders of this Court were not personally served on the opposite parties.

(34) I have set out the facts in some detail, because the jurisdiction of the Court in considering and dealing with contempt of Court, though extensive, should be exercised with caution and deliberation.

(35) The first question which requires our consideration is whether on the facts found above the opposite parties can be committed for contempt of this Court.

(36) Contempt of Court is either (1) criminal contempt consisting of words or acts obstructing, or tending to obstruct, the administration of justice, or (2) contempt in procedure, consisting of disobedience to the judgments, orders, or the process of the Court and involving a private injury: Halsbury, Laws of England (Hailsham Edition) Vol. 7 Part I, Section 1

(37) But disobedience, if it is to be punishable as a contempt, must be wilful. Disobedience cannot be held to be wilful until the order is served. Hence the judgment or order must be shown to have been served on the party personally, except in the following cases (1) prohibitive orders the drawing up of which is not completed; (2) orders embodying an undertaking to do an act by a named day; (3) orders to answer interrogatories or discovery or inspection of documents; (4) where an order for substituted service has been made; (5) where the respondent has evaded service of the order; Oswald on Contempt, 3rd Edition at page 199.

(38) The above exceptions are not attracted in the facts of the present case.

(39) Personal service of the judgment or order may be dispensed with (1) if it be made to appear to the court or a Judge that prompt personal service of the judgment or order cannot be effected, in such a case substituted or other service of the order or merely giving notice of the order may be directed; (2) if it is shewn that the person to be served has evaded service. It may be pointed out that the exceptions set forth above have no application in this case.

(40) Again the fact that the person ordered to do an act was actually in Court when the order was made is not a ground for dispensing with personal service of it: Oswald on Contempt, 3rd Edition pages 200-201.

(41) Though an affidavit was filed on behalf of the opposite parties in C. R. 436 of 1951 by Mr. S. K. Roy Choudhury learned Advocate, an inspection of the records shews that in fact Mr. Roy Choudhury filed a vakalatnamah on behalf of opposite party No. 2 only. The opposite party No. 1 never appeared. So far as opposite party No. 2 is concerned the fact that he appeared in court through an Advocate when the order was made, is not sufficient to commit him for contempt in view of what I have just stated.

(42) I may point out that the position is different in the case of a breach of a prohibitory Order. In such a case service on the party against whom committal is sought, is not necessary

1. If the party concerned had notice of the order and knew that the order was intended to be enforced

2. Or if he consented to the order

3. Or if he was present in Court when the order was pronounced or the motion was made although he may have left the Court before the order was pronounced: Oswald on Contempt 3rd Edition page 203.

(43) In the present case, the order of this Court was not a prohibitory order but was a mandatory order. The order was, as I have stated already, never personally served on the opposite party, before the present rule was issued by P. N. Mookerji J.

(44) This rule must therefore be discharged on this ground.

(45) The contention of the learned Senior Government Pleader was that the state could not comply with the order of this Court within the prescribed time, because of certain administrative difficulties and as such the rule should be discharged.

(46) In the present case, the order was made in the presence of learned Advocates who professed to have acted on behalf of the opposite parties.

(47) If the state found it difficult to comply with the order of this Court, it could have availed itself of the liberty to mention the matter to this Court, which was expressly reserved by the order of this Court. The above contention of the Senior Government Pleader cannot be accepted.

(48) As we are discharging the rule on the ground stated already, we have refrained from dealing with certain other aspects of this case, which might have required consideration; the more so as these points of view were not canvassed before us.

(49) Before we part with this case, we desire to add that this case discloses a lamentable lack of diligence on the part of the office of this Court. The order of this Court was dated August 27, 1951 and was an extremely urgent one. The order had to be complied with forthwith or within one month. The copies of this order of this Court were not issued by the office to the opposite parties till the 13th of November 1951.

(50) For reasons already given this rule is discharged. In the circumstances of this case, we direct the parties to bear their own costs.

(51) DAS GUPTA. J.— I agree.

B/K.S. Rule discharged.

A.I.R. 1953 CALCUTTA 98 (Vol. 40, C. N. 31)

BOSE J.

Nrisinha Kumar Sinha, Petitioner v. The Returning Officer, for the Constituency of Barwan Khargram, Opposite Party.

Civil Rules Nos. 2851, 2852, 2857, 2875, 2901, [illegible] and 2936 of 1951, D/- 6-12-1951.

(a) Constitution of India, Arts. 329 (b), 225, 226 and 227 — Proceedings disputing validity of election on ground of improper acceptance or rejection of nomination — Jurisdiction of High Court — Representation of the People Act (1951), Ss. 80, 81 and 100.

The words "Notwithstanding anything in this Constitution" in Art. 329 (b) make it clear that the jurisdiction vested in the High Court under Arts. 225, 226 and 227 to entertain any legal proceedings calling in question any election is ousted by this provision. (Para 11)

Sections 80 and 81 of the Act 43 (XLIII) of 1951 lay down the only method prescribed by law in which the validity of election can be impugned, which is by an election petition presented to the election commission after the date of publication of the names of the returned candidates and not earlier.

Under S. 100 of the Act 43 (XLIII) of 1951 one of the grounds on which an election can be declared void is that the result of the election has been materially affected by the improper acceptance or rejection of any nomination, and it is, therefore, a matter which has to be and can be determined by the election tribunal.

Election is one continuous process consisting of various steps or stages. All the steps are integral part of the election and are comprised in the connotation of the word "Election." The intention of the framers of the Constitution as expressed in Art. 329(b) is that none of the various stages in the election can be called in question except by an election petition presented to the prescribed authority in the prescribed manner under the appropriate law. AIR 1952 Trav-C 1 referred to (Paras 26, 27, 28 & 32)

(Desirability of suitable amendment of Act 43 (XLIII) of 1951 providing for a final decision of questions relating to rejection of nominal papers before the polling begins, suggested). (Para 44)

(b) Constitution of India, Art. 329(b) — Election — Meaning.

Part XV of the Constitution is headed and deals with "Elections". The word "Election" in Art. 329(b) refers to the entire procedure including the stage of Nomination of candidates, and not to the completed election after the declaration of the result of the election. (Para 35)

(c) Representation of the People Act (1951), S. 170 — Civil Court — Expression includes High Court also.

S. 170 does not use capital 'C' in the expression 'Civil Court'. It, therefore, refers to all the Courts of civil jurisdiction including the High Court and not only to subordinate courts exercising civil jurisdiction. AIR 1939 Cal 435 (FB) disting. (Para 38)

(d) Representation of the People Act (1951), S. 170 — Validity of — Constitution of India, Arts. 226, 327.

There is nothing in Art. 226 or in any other provision of the Constitution to show that the High Court has power expressly conferred on it to decide doubts and disputes concerning elections. S. 170 of the Act 43 (XLIII) of 1951 cannot, therefore, be held to be ultra vires to the extent it purports to affect the jurisdiction of the High Court under Art. 226 on the ground that powers of Parliament to make laws relating to election matters are only "subject to the provisions of the Constitution", under Art. 327. (Para 39)

(e) Representation of the People Act (1951), S. 170 — Bar of jurisdiction of Civil Courts — Extent of — Constitution of India, Art. 226.

Although S. 170 ousts the jurisdiction of the Civil Court, to deal with the matters mentioned in the section, there can be no doubt that if it can be shown that the Returning Officer has not acted within the four corners of the Representation of the People Act, or has acted in excess of his jurisdiction, or mala fide, the High Court has power to interfere under Art. 226, notwithstanding the bar created by S. 170. AIR 1940 PC 105 Relied on. AIR 1952 Cal. 103 Ref. (Para 40)

Santosh Kumar Basu and Nirmal Chandra Sen, for Petitioner; S. M. Bose, Advocate General, Chandra Sekhar Sen, Sr. G. P. and S. K. Roy Choudhury, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('40) 67 Ind App 222: (AIR 1940 PC 105) 40
('39) 43 Cal WN 613: (AIR 1939 Cal 435 FB) 38
('40) 44 Cal WN 485: (AIR 1939 Cal 599 SB) 38
('51) 55 Cal WN 528: (AIR 1952 Cal 103) 41
('46) AIR 1946 Lah 85: (224 Ind Cas 322) 31
Dr. John Mathai v. Fakhrudin Shah: (AIR 1952 Trav-C 1) 43
5 O'M & H 27 30
5 O'M & H 39 30

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ against the respondent for cancellation of an order of rejection of nomination papers of the petitioner and for a direction upon the respondent to hold the scrutiny of the nomination papers according to law.

(2) The petitioner is a resident of Ballia and is a duly recorded voter in Part A of original roll of Mouza Ballia in the constituency of Barwan-Khargram for the first general election of members to the West Bengal Legislative Assembly. The petitioner who was a candidate for election from the said constituency filed three nomination papers before the respondent on the 19th November, 1951. On the 21st of November, 1951, the respondent scrutinised the nomination papers of the petitioner but rejected the same on the ground that the nomination papers described the West Bengal Legislative Assembly as the West Bengal State Legislative Assembly. The respondent was of the opinion, that the West Bengal Legislative Assembly was incorrectly described in the nomination papers. It is alleged in the petition that the respondent had passed many other nominations as valid although the nomination papers described the West Bengal Legislative Assembly as the West Bengal State Legislative Assembly. It is stated in the petition that the alleged defect was at the most a technical defect and was not a defect of a substantial character and, therefore, the rejection of the nomination papers by the respondent was improper and in the circumstances the petitioner asks for the reliefs stated above.

(3) On behalf of the respondent the learned Advocate General has raised the question of jurisdiction. In fact this is the only point raised by him in this application.

(4) It is submitted by the Advocate General that the disputes arising out of elections can only be tried by election tribunals and the jurisdiction

of the Civil Courts is entirely ousted by the provisions of the Constitution and of the Representation of the People Act (Act XLIII of 1951).

(5) In order to examine the force of this contention, it is necessary to refer to certain Articles of the Constitution which are contained in part XV of the Constitution. The heading of this part is "Elections". Art. 324 (1) is as follows:

"The superintendence, preparation and control of the preparation of the electoral rolls for, and the conduct of all elections to Parliament and to the Legislature of every State and all elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

(6) Thus the power of superintendence and control of preparation of electoral rolls for elections and conduct of such elections and the power of appointing election tribunals for decision of election disputes is vested in the Election Commission. This Election has been set up and it is functioning as such.

(7) Art. 327 is as follows:

"Subject to the provisions of this Constitution, Parliament may from time to time by law, make provision with respect to all matters relating to, or in connection with elections to either House of Parliament, or to either Houses of the Legislatures of a State, including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

(8) This gives power to Parliament to make laws with respect to election matters but this power is made subject to the provisions of this Constitution.

(9) Art. 328 similarly empowers the Legislature of a State to make laws in connection to the House of the Legislature of the State in so far as provision in that behalf is not made by Parliament. This power is also made subject to the provisions of this Constitution.

(10) Article 329 (b) provides as follows:

"Notwithstanding anything in this Constitution, no election to either House of Parliament, or to the House, or either Houses of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

(11) The words "Notwithstanding anything in this Constitution" make it clear that the jurisdiction vested in the High Court under Arts. 225, 226 and 227 to entertain any legal proceedings calling in question any election is ousted by this provision. So far as calling in question any election is concerned, it can be done only by 'an election petition' presented to 'such authority' and 'in the manner' prescribed by a law of the appropriate Legislature.

(12) Now it appears that the Indian Parliament, pursuant to the power vested in it to make laws with regard to the election matters, has enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951.

(13) The preamble of the Act of 1951 states that the Act provides inter alia, for conduct of elections and the decision of disputes and doubts arising out of, or in connection with such elections. S. 2(d) defines Elections. In S. 2(1) Tribunal is defined. S. 17 provides for issue of notification calling upon the Assembly Constituencies to elect members according to the provisions of the Act. This is akin to the writ of elections in English Law.

(14) S. 30 deals with appointment of dates of nominations, scrutiny of nominations, date of withdrawal of candidature, the date of polls etc. This Part V is headed as Conduct of Elections.

(15) S. 36, which is in this part, provides for scrutiny of nominations, how it is to take place, who are entitled to be present at such nominations, the grounds on which nominations may be rejected and the duties of the Returning Officer.

(16) S. 38 provides for publication of the list of valid nominations.

(17) S. 53 shows that when scrutiny is taking place, the election is proceeding, and if, upon scrutiny, it is found that the number of validly nominated candidates had not exceeded the number of seats to be filled up, — the returning officer at once declares the candidates as duly elected. In other words, the election is over.

(18) S. 66 deals with declaration of the results of election in case where votes are taken.

(19) S. 67 deals with publication of the result of election.

(20) Part VI deals with disputes regarding election.

(21) S. 80 provides, — no election shall be called in question except by an election petition presented in accordance with the provisions of this part.

(22) This is the only method prescribed by law in which the validity of election can be impugned and in no other manner.

(23) S. 81 provides that the election petition has to be 'presented to the election commission', but such presentation cannot be done at any time 'earlier' than the date of publication of the name or names of the returned candidate or candidates.

(24) So the authority to whom the election petition is to be presented has been laid down by law and the time when it is to be presented has also been prescribed by the Statute.

(25) S. 86 provides for appointment of Election Tribunal.

(26) S. 100 provides for the grounds on which an election can be declared void. One of such grounds is that the result of the election has been materially affected by the improper acceptance or rejection of any nomination.

(27) It is clear from this provision that the propriety of acceptance or rejection of the nomination and that the improper acceptance or rejection has materially affected the result of the election are matters which have to be and can be determined by the election tribunal.

(28) The scheme of the various provisions makes it quite clear that Election is one continuous process consisting of various steps or stages and in my view all the steps are integral part of the election and are comprised in the connotation of the word "Election."

(29) In English law there is divergence of opinion as to when election commences. In fact, the judges have pointed out that no definite rule can be laid down as to when an election has begun. The question depends on the particular facts of each case. In some of the earlier cases, in England, it was held that an election commences when the writ of Election issues. Some later cases have held that that is not so. (Halsbury Vol. XII Para 493 page 237, and Parker on Election Agents, page 120, 5th Edition).

(30) There are other cases in which it has been held that when a person is invited to become a candidate and he accepts the candidature then from the time of acceptance the election begins — 'Bradshaw v. Fosten 5 O'M & H. 39'. Some of

the cases lay down that when a candidate starts 'nursing' his constituency, the election must be deemed to have commenced. In other words, as soon as a candidate begins to take measures to promote his election, the election commences. — e.g. Wolseley v. Fulford 5 O'M & H. 27'. Thus, for different purposes an election is deemed to commence at different points of time.

(31) It is thus clear from the analysis of the various provisions of the Representation of the People Act, 1951, and also from the trend of the English decisions that Election does not mean only the completed election or the final stage of the election, i.e. after the result of the election is declared and published. It means and includes the various steps or stages which have to be gone through in order to arrive at the final result. It means the entire process. In a decision of the Lahore High Court, to which Harries, C. J. and Mahajan J. were parties, it was held that the "Election" embraces the whole procedure whereby an elected member is returned, whether or not it be found necessary to take a poll. It was further held that a rejection of a nomination paper is a matter in the course of an election and can furnish a ground for election petition. The learned Judges were in that case interpreting the term "Election" as used in the Punjab Municipal Act. — 'Sat Narain v. Hanuman Parshad, AIR 1946 Lah. 85'.

(32) In my view, the intention of the framers of the Constitution as expressed in Art. 329 (b) is that none of the various stages in the election can be called in question except by an election petition presented to the prescribed authority in the prescribed manner.

(33) Mr. Santosh Kumar Basu, the learned Advocate for the petitioner, has drawn my attention to the words "matters relating to or in connection with election" in Arts. 327 and 328 and to the words "doubts and disputes arising out of or in connection with Elections" in Art. 324 and argues that the absence of such words in Art. 329 (b) shows that by the word "Election" in Art. 329, only the completed election (after the declaration of the result of the election) is referred to.

(34) In my opinion, this argument places too narrow a construction on the word "election" in Art. 329 (b). Words such as "matters relating to or in connection with" are common words which are used in connection with conferring of law-making powers on legislative bodies. They are words which indicate the circumstance of the Power. The framers of the Constitution did not introduce the difference in wordings in the different Articles of Part XV for the first time. They simply copied the words from previous legislations on the subject, both English and Indian. See, for example, S. 291 of the Government of India Act, 1935, and Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936). The clear object of the provisions in the Constitution and the provisions in the Representation of the People Act, 1951, is to place the matter of decision of doubts and disputes about Election matters within the exclusive jurisdiction of the Election Tribunals. As Art. 324 indicates, the whole object of setting up Election Tribunals is for decision of doubts and disputes arising out of or in connection with Elections. It could not have been the intention of the framers of the Constitution that only the completed election can be challenged by Election petition but the other stages thereof or the incidental matters can be canvassed before ordinary Courts of law and then again they can be made the grounds of an Election Petition as provided in S. 100 of the Representation of the People Act, 1951. It was suggested in argument that what the petitioner is challenging is the wrongful rejection of Nomination paper and not an election and so no election is being called in question. There can be no doubt, however, that the petitioner is calling in question a particular step or stage in the process of Election.

(35) Mr. R. Chaudhuri and other learned Counsel, appearing in other applications, referred to the meaning of the word "Election" as given in the various Law dictionaries, such as Stroud, Wharton, Osborne, Ayyar, and contended that it is only after polling that a real Election takes place and the word "Election" in Art. 329(b) should be construed in this sense and should not be given an extended meaning as comprising the various stages which lead to an Election. But this contention is, in my view, not sound. Part XV of the Constitution is headed and deals with "Elections" and, as I have pointed out before, the word in Art. 329(b) has reference to the entire procedure including the stage of Nomination of candidates.

(36) Mr. Choudhury and Mr. Apurbadhan Mukherjee also drew my attention to S. 75 of the Local Government Act, 1894, (56 & 57 Victoria Ch. 73) to show that Election does not ordinarily include Nomination within its connotation, and so "Election" was defined in the Local Government Act, 1894, as "including both Nomination and Poll." But this definition does not assist the argument of Mr. Chaudhuri at all. It is for the purpose of the Local Government Act that the word has been given a special meaning. According to Mr. Chaudhuri, the word "Election" in its strict sense has reference to the stage of Polling. If that is so then why is it that in the Local Government Act 'Election' is defined as 'including Poll'. It is clear that the definition in the Local Government Act leads to nowhere, and is not of assistance to the petitioner.

(37) The learned Advocate General has also placed reliance on S. 170 of the Representation of the People Act, 1951, and has contended that the jurisdiction of the Courts of Civil Jurisdiction, to entertain petitions questioning the legality of the decision of Returning Officers in connection with elections, is ousted by this Section.

(38) Mr. Santosh Kumar Basu has urged in answer to this point that the words "Civil Court" in S. 170 do not include High Court but subordinate courts, which exercise civil jurisdiction. Mr. Basu relies on the decisions of this Court reported in —'Narsing Das Tansukdas v. Chogemull', 43 Cal. W. N. 613 (F.B.) and —'Khirode Ç. Ghose v. Narendra N. Sanyal', 44 Cal. W. N. 485 (S.B.). But the considerations which led the learned Judges in that case to decide that "Civil Çourt" in the Bengal Agricultural Debtors Act did not include the High Court that if it was construed that the expression "Civil Court" included the High Court, then the Bengal Agricultural Debtors Act would have to be declared as ultra vires, being in contravention of S. 80A of the Government of India Act, 1915-1919, and so the expression was to be construed as not including the High Court, and as not affecting the jurisdiction of the High Court. Moreover, the expression "Çivil Court" was written in Capital letters (page 620 left hand column paragraph 3) i. e. with Capital "C", and so it was construed as referring to courts of that particular class as distinguished from High Court. But in S. 170 of the Representation of the People Act, 1951, Capital "C" has not been used with regard to the expression "Civil Court". So in S. 170 the reference is to all Courts of Civil Jurisdiction including the High Court. The decision in '43 Cal. W. N. 613 (F.B.)' is, therefore, of no assistance to the petitioner.

(39) It was further contended by Mr. Basu that S. 170 of the Representation of the People Act, 1951, is ultra vires inasmuch as under Art. 327 Parliament has powers to make laws relating to election matters only "subject to the provisions of the Constitution", and if S. 170 has purported to affect the jurisdiction of the High Court under Art. 226, the section must be declared as ultra vires to that extent. I am unable to accede to this contention. Art. 327 only confers power on Parliament to make laws on electoral matters and specines certain particular matters in respect of which it can make laws. It does not deal with power of Parliament to make laws affecting the jurisdiction of the High Court or any other Court. It is, however, clear from a reading of Art. 246 and Items 72 and 95 of List I (Union List) in the Seventh Schedule to the Constitution that the Parliament has exclusive power to make laws affecting the jurisdiction of the High Court in election matters. There is nothing in Art. 226 or in any other provision of the constitution to show that the High Court has power expressly conferred on it to decide doubts and disputes concerning elections. In the circumstances, S. 170 of the Representation of the People Act 1951 must be held to have been validly enacted.

(40) But although S. 170 ousts the jurisdiction of the Civil Court, to deal with the matters mentioned in the section, there can be no doubt that if it can be shown that the Returning officer has not acted within the four corners of the Representation of the People Act, or has acted in excess of his jurisdiction, or mala fide, the High Court has power to interfere under Art. 226, notwithstanding the bar created by S. 170. As observed by the Judicial Committee in the case of 'Secy. of State v. Mask & Co. 67 Ind. App. 222 (P.C.)':

> "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is excluded the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the Statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

(41) In the case of — 'Soorajmull Nagarmull v. Asst. Collector of Customs', I have referred to some cases dealing with this question and it is not necessary to repeat them here. See 55 Cal W. N. 528 at p. 538.

(42) It is thus clear that S. 170 does not create any absolute bar to the exercise of jurisdiction of this Court under Art. 226 of the Constitution. The real bar is created by Art. 329(b) of the Constitution.

(43) The Travancore-Cochin High Court in — 'Dr. John Mathai v. Fakhrudin Shah', has also taken the view that Art. 329(b) operates as a bar to the jurisdiction of the High Court under Art. 226: See Judgment, D/- 13-11-1951, delivered by Kunhi Raman C. J. and Subramonia J.

(44) In conclusion, I should, however, like to point out that inasmuch as in the case of a wrongful or improper rejection of Nomination papers of candidates, the election of the Returned Candidate is liable to be set aside by the Election Tribunal, it is eminently desirable that the provisions of the Representation of the People Act, 1951, be suitably amended so as to provide for the final decision of the questions relating to rejection of nomination papers before the polling begins, for otherwise the returned candidate will be deprived of the fruits of his success, after he has incurred considerable expense and suffered considerable worry in getting through the election, merely because the Returning Officer had come to an erroneous conclusion. Moreover the candidate whose nomination is rejected is also debarred from participating in the election concerned and is relegated to a future election, which may not be as advantageous to him as the present election.

(45) In the result, this petition fails and the Rule is discharged.

(46) This judgment will govern Civil Revision Cases Nos. 2852 of 1951, 2875 of 1951, 2936 of 1951, 2857 of 1951, 2922 of 1951 and 2901 of 1951.

B./D.R.R. Rule discharged.

A.I.R. 1953 CALCUTTA 102 (Vol. 40, C. N. 32)

ROXBURGH J.

Dhajadhari Chatterjee, Defendant-Petitioner v. Nitya Nanda Roy and another, Plaintiffs-Opposite Party.

Civil Rule No. 438 of 1951, D/- 30-5-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 (1) (as amended) — Scope — Application under, when to be made — Ss. 5 and 6 of Amending Act (62 of 1950) — Scope and effect of — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Amendment Act (62 of 1950), Ss. 5 and 6).

A consent order for possession was passed on 25-3-1950 in a proceeding against a tenant for his ipso-facto default under S. 12(3) of Act 38 of 1948. After Act 17 of 1950 came into force the tenant's application for relief under S. 18(1) of that Act was granted on 20-5-1950 by rescinding the order of 25-3-1950 but the order was set aside in revision by the High Court. After the Amending Act 62 of 1950 came into force the tenant again applied for relief under S. 18(1) as amended.

Held that (i) the application under S. 18(1) was not maintainable because S. 18 (1) even as amended requires an application to be made within 60 days of the coming into force of Act 17 of 1950, viz. 31-3-1950. (Para 4)

(ii) No relief could be given to the tenant under S. 5 of Act 62 of 1950 because that section only gives relief in cases where an application under S. 18(1) had been made under Act 17 of 1950 and was still pending when the amending Act came into force. It also gives relief in cases where no actual order for possession had been passed by March 31, 1950, and which were still pending when Act 62 of 1950 came into force.

(iii) S. 6 of the Amending Act had also no application as the order for possession was passed on 25-3-1950 and not in the interval specified in S. 6. The order of the High Court in revision setting aside the order of the trial judge passed under S. 18(1) on 20-5-1950 had not the effect of making the original order of possession of 25-3-1950, the order of the High Court passed at the later date. (Paras 5 & 6)

Pramatha Kumar Chakravarty, for Petitioner; Nilkantha Chatterjee, for Opposite Party.

ORDER:— This is a Rule against an order of a Judge of the Small Cause Court Calcutta, refusing an application purporting to be one under section 18(1) of the West Bengal Premises Rent Control Act, 1950, as subsequently amended for rescinding a decree for possession.

(2) The Original Order was passed on March 25, 1950, by consent in a proceeding in which the only defualt alleged under the Act of 1948 was one under section 12(3) of the Act, usually referred to as an ipso-facto defualt. On May, 20, after Act XVII of 1950 came into force, the tenant made an application under section 18(1) of that Act for relief. That was granted, although objection was taken by the landlord that the decree was a consent decree. On revision by this court, it was pointed out that the case was clearly one of ipso-facto default, and, in view of the interpretation put on section 18(1) at that time, it had no application to such cases. Therefore, in revision this court set aside the order of the learned Judge which had rescinded the original order of March 25, 1950. By the order of this Court the date of delivery of possession was extended till November 1.

(3) After the amending Act LXII of 1950 came into force, the tenant filed an application labelled as one under section 18(1) of the Act and it is the order rejecting this application which is the subject matter of the present Rule. The application has been rejected on the ground that the original order was made on consent.

(4) Strictly speaking, the tenant could not make any application under Section 18(1) as such. Section 18(1) even as amended requires that application be made within 60 days of the coming into force of Act XVII of 1950, that is to say, of March 31, 1950. The only section under which the tenant could conceivably apply is section 6 of Act LXII of 1950. Unfortunately although one may presume that it was intended by this Section to give relief in a case such as the present, it fails to do. It runs as follows:

"Where at any time between the commencement of the said Act (XVII of 1950) and of this Act an order or decree for recovery of possession of any premises has been made....."

an application may be made within 60 days of the commencement of Act LXII of 1950 and the order or decree may be rescinded. Section 6 cannot apply to the present case because the order in question for recovery of possession was made on March 25, 1950, not in the interval specified in Section 6.

(5) Section 5 of Act LXII of 1950 gives relief in cases where an application under section 18(1) had been made under Act XVII of 1950 and was still pending when the amending Act came into force. It also gives relief in cases where no actual order for possession had been passed by March 31, 1950, and which were still pending when Act LXII of 1950 came into force.

(6) The present type of cases however has been omitted. It has been urged before me that the result of the order of this Court in revision setting aside the order of the trial Judge originally passed under section 18(1) had the effect of making the original order of possession of March 25, 1950, the order of this Court passed at the later date. I am unable to accept the contention.

(7) If the learned trial Judge had taken, what must be deemed to be the correct view, the view taken by this Court in revision, and had refused the application under section 18(1) it could hardly have been suggested that as a result of that refusal to rescind or interfere with the order of March 25, 1950, it had in any way become an order of the later date. I do not think the position is in any way altered where the trial Judge erroneously has interfered with the previous order & his order of interference has in turn been upset in revision by this court.

(8) The result is that, although I do not agree with the reason given by the learned Judge for the order passed in this case, the order in itself is correct. The Rule is accordingly discharged. I make no order as to costs.

C/ R.G.D. Rule discharged.

A.I.R. 1953 CALCUTTA 103 (Vol. 40, C. N. 33)

HARRIES C. J. AND BANERJEE J.

Sm. Latikabala Dasi, Appellant v. Anil Behari Ghose, Respondent.

A. F. O. O. No. 131 of 1950, D/- 4-9-1951.

(a) Interpretation of Statutes — Consolidating Act.

In construing an Act which is a consolidating Act and does not profess to amend or alter the provisions of the Acts consolidated, prima facie, the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted. (Para 13)

Anno: C.P.C., Pre. N. 7.

(b) Hindu Law — Will — Son guilty of patricide — Property devolves on next reversioner.

Where a son is guilty of patricide, he cannot take any benefit under the will or inherit his father. In that case whatever properties the testator leaves will devolve on the next reversioner. (Paras 5 & 17)

(c) Succession Act (1925), S. 263 — Revocation of will — Power vested in Court as discretionary.

Section 50 of the Probate and Administration Act, 1881 (corresponding to S. 263, Succession Act, 1925) confers a discretion on the Court to revoke the grant on any of the grounds specified in the section. That discretion has to be exercised judicially on well-known principles. It does not follow that because there is a ground, the Court must revoke the probate. Thus, where a probate granted by the Court is sought to be revoked on the grounds that a party who ought to have been cited was not cited and that the will was revoked and the two issues are tried together, and it is proved that a necessary party was not cited, but the Court on the evidence before it, comes to the conclusion that the will was duly executed and has not been revoked, the Court will not revoke the grant. AIR 1928 PC 2 Foll. (Paras 18 & 19)

Anno: Suc. Act, S. 263 N. 15.

(d) Succession Act (1925), S. 70 — Intention to revoke does not revoke will.

A mere intention to revoke does not revoke a will. A man making a will may subsequently change his mind. He may think that he should change the will and make another will. But he may not do anything at all. Until he revokes the will, however strong the intention may be, the will is not revoked. (Para 23)

Anno: Suc. Act, S. 70 N. 6.

(e) Succession Act (1925), S. 263 — Revocation of grant of probate — Party entitled to controvert will standing by with knowledge — He should not be allowed to reopen case — (Evidence Act (1872), S. 115).

There is no specific time which limits a party, entitled to controvert the will to call the probate in and put the executors on proof. The Court can allow the probate to

be called in after a long time. That may be done with cause shown. But it cannot be held that it may be done under any circumstances. It would be contrary to reason and every principle of justice. Where a party interested to oppose the grant has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; e.g. if he had been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are strong reasons to show that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, the case is different. Case law Referred. (Para 31)

Anno: Suc. Act, S. 263 N. 8; Evid. Act, S. 115 N. 3(c), 5.

A. K. Sen and Gouri Mitter, for Appellant; Atul Gupta, P. N. Sen and Prabhat Sen, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('28) 55 Ind App 18: (AIR 1928 PC 2)	15
('15) 19 Cal WN 882: (AIR 1916 Cal 623)	30
(1846) 2 Phillips 117: (41 ER 886)	30
(1871) LR 2 P 327: (40 LJ P 57)	25
(1874) L R 5 PC 221	32
(1878) 3 AC 1218: (39 LT 269)	32
(1890) 25 QBD 183: (59 LJ QB 355)	13
(1905) AC 317: (74 LJ PC 82)	33
(1935) AC 243: (104 LJ KB 304)	27
2 Phill 230	31

BANERJEE J.: This is an appeal from an order made on 29-8-1950, by P. B. Mukharji, J. revoking the probate granted by this Court on 30-9-1921, which was extended on 16-9-33.

(2) Benode Lal Ghose, a wealthy inhabitant of Baranagar in the suburbs of Calcutta, acquired by dint of his own labour properties moveable and immoveable of considerable value. He, having no son, adopted a boy of the name of Charu, and made his last will and testament, bearing date 29-7-1912. It appears that the relationship between the adopted son and the father was not good; and in 1917 he intended to change his will. He desired to place his estate to the value of Rs. 75,000/- in the hands of the Administrator-General of Bengal for the purpose of a hospital to be built at Baranagar. He wrote on 29-6-1917, to the Administrator-General to send a man to assist him to make a will. There is a draft agreement of 1917 on the records, which shows that it was prepared for the purpose of enabling the Administrator-General to take possession of certain properties of Benode.

(3) On 5-3-1920, Benode was murdered. Charu was tried for the murder, was convicted and sentenced to transportation for life. He served the sentence and came back in 1933.

(4) Probate of the will was granted by this Court on 30-9-1921, to the three executors who applied for it, namely Sm. Latikabala Dasi, wife of Charu, Sm. Muktakesi Dasi and Sri Anil Kanto Ghosh, father of Latika. At the time of the conviction of Charu, Benode's wife was living. She died before the probate was granted. The managing executor was Anil.

(5) If Charu was guilty of particide, he could not take any benefit under the will or inherit his father. In that case whatever properties Benode left would devolve on his cousin Girish, who was the next reversioner.

(6) Probate having been granted, the executors entered into possession of and managed the estate. It appears that no citation was issued to Girish, the probate being granted on the same date the application for probate was made.

(7) Girish died in 1940, without taking any step for revocation of the probate, leaving four sons, the youngest of whom is Anil, who on 14-9-1949, made the application for revocation of the probate. In the petition the petitioner recites the facts I have already shortly stated, and adds that from the correspondence set out in the petition, it would appear that the testator revoked his will and made arrangements for handing over the estate to the Administrator-General, for a charitable purpose; but the purpose did not mature. The petitioner further adds that the testator did not make any will in place of the will that was revoked. He submits that as Benode had revoked his will without making a fresh one, he should be deemed to have died intestate, and the petitioner and his three brothers being the nearest male-relations of the testator, were entitled to the estate of the deceased. The petitioner further adds that Girish did not take any steps for the revocation of the probate as he was more or less a retired sort of man, having a religious frame of mind and not inclined to engage himself in litigation for the purpose of recovering the property of his cousin, the said Benode Lal Ghose.

(8) The petitioner, therefore, proceeds on the footing that Benode had revoked his will and died intestate. In the petition, no date is given as to when the previous will according to the petitioner, was revoked, and there is an implied admission that Girish knew of the will and of the probate. It it suggested that he did not take any step to revoke the probate, as being of a religous frame of mind, he had no desire to take the property of his cousin.

(9) In the affidavits that were filed in opposition to the petition, it is definitely said that Girish and/or the petitioner and his brothers were well aware of all the material facts; the records that were placed before the Court in the revocation petition, were available to them from 1921: that with full knowledge, Girish and/or the petitioner allowed the executors to obtain probate and proceed with the administration of the estate. It is definitely stated that Girish was fully aware of the probate proceedings.

(10) These allegations are not specifically denied by the petitioner, though there is a general denial.

(11) The petitioner asks for revocation of the probate on the following grounds: (1) no citation was issued to Girish who was the nearest male relation alive at the death of the deceased; (2) the grant was obtained fraudulently on untrue allegation of a fact essential to justify the grant; (3) the grant was obtained by making a false allegation as to the value of the property left by the deceased; (4) no account was filed by the executors; (5) the grant was obtained by concealing the fact that the testator had intended to revoke the will; (6) the grant was useless and inoperative. Indeed all the grounds mentioned in the section for revocation are relied upon.

(12) On these pleadings, the matter came up for hearing before the learned Judge. A number of witnesses were called. The learned Judge has made the order revoking the probate from which this appeal has been taken.

(13) It is common case that no citation was issued to Girish. The citation, therefore, was defective. What is the position then? The matter must be governed by the Probate and Administration Act, 1881, and not by the Indian Succession Act, 1925, though there is no difference between the two Acts on the point under consideration. The probate was granted in 1921 and the Succession Act came into force in 1925. It is an Act which has consolidated the law applicable to intestate & testamentary succession in India. In construing an Act which is a consolidating Act and does not profess to amend or alter the provisions of the Acts consolidated, prima facie, the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted. — 'Mitchell v. Simpson', (1890) 25 Q.B.D. 183.

(14) The law which governs the case is to be found in Section 50 of the Probate and Administration Act, 1881 (S. 263 of the present Act). That section, so far as it is relevant, runs as follows:

"The grant of probate.....may be revoked or annulled for just cause. Explanation — Just cause is: 1st. That the proceedings to obtain the grant were defective in substance; 2nd. That the grant was obtained fraudulently by making a false suggestion, or by cancelling from the Court something material to the case".

The relevant illustrations to the section are:

"(b) The grant was made without citing parties who ought to have been cited. (c) The will of which probate was obtained was forged or revoked."

In this case the petitioner sets up two grounds for revocation. The first comes within illustration (b), and the second within (c). The first is that the probate was obtained without citing a party who ought to have been cited. The second is that the will of which probate was obtained had been revoked.

(15) In — 'Ramanandi v. Kalawati', 55 Ind. App. 18 (PC), which was also an application for revocation of probate, two grounds were taken: (1) the grant was made without citing parties who ought to have been cited, and (2) the will was a forgery. Lord Sinha delivering the judgment of the Board observed: (p. 24).

"It is apparent that the plaintiff in this case set up both these grounds for revocation. The first issue as framed comes under illustration (b) and the second issue under illustration (c);

If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate, but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand.

If on the other hand the plaintiff failed on the first issue, that would not preclude her from proceeding to prove her second ground — namely, that the will was forged, and the probate would stand or fall, according to the result.

It is obvious that the question of onus of proof is therefore of great importance in this case, and the District Judge as well as the High Court on appeal rightly lay stress as to the onus on each of these two issues, which might have been tried separately but were not so in fact, as evidence was given by each party in support of their respective cases on both issues together and not separately. Their Lordships agree with the Courts below, that in the circumstances of this case neither party was prejudiced by the procedure adopted."

In the case before us also the same procedure has been adopted. Both the issues have been tried together. We do not think, however, that any prejudice has been caused to the parties.

(16) The learned Judge instead of coming to a finding as to whether the will had been revoked or not, has found that the testator had intended to revoke the will. The relevant portion of the judgment is as follows:

"The true scope of an application for revocation under Sec. 263 of the Succession Act should always be borne in mind. It is not an application to prove that the will in fact was revoked. Nor does any question of genuineness of Will arise for consideration until the Court has decided that the probate must be revoked on one or more of the grounds specified in that section. In my view the only matter for consideration upon an application for revocation of probate is, whether the applicants have made out a just cause for revocation and the application cannot be thrown out on the ground that the evidence adduced by the applicant was not sufficient to prove actual revocation of the will or throw doubt on the genuineness of the will. I hold on the facts of this case and on the evidence already adduced that the grant was obtained fraudulently by concealing from the Court the material fact of the intention of the testator to revoke or alter the terms of the will. Whether in fact the will was revoked or its terms were altered will be a matter for final determination when on revocation of this grant, fresh proceedings are instituted for grant after due citation."

(17) In this case the petitioner has succeeded in proving — nay, it is admitted by the parties concerned — that Girish was not cited. It is common case that Charu, being guilty of patricide, could not take any benefit under the will nor could he succeed to the property of his father. Charu being left out of consideration, if the testator is considered to have died intestate his properties would devolve on Girish subject to the life interest of Benode's widow, which of course ended with her death. If, on the other hand, the will had not been revoked, Charu could not take any benefit under the will and to that extent there would be intestacy, and Girish would be entitled to the benefit which was reserved for Charu in the will.

(18) There can be no doubt, therefore, that Girish was entitled to citation and this is conceded by the Counsel for the appellant. The proceeding to obtain the grant, therefore, by reason of non-citation of Girish was defective. The probate may be revoked on this ground. But does it follow that the Court must revoke the probate? The Section says that the grant of probate..... may be revoked for 'just cause'. This section confers a discretion on the Court to revoke the grant on any of the grounds speci-

fied in the section. That discretion has to be exercised judicially on well-known principles. It does not follow that because there is a ground, the Court must revoke the probate. Take an illustration. A, a necessary party is not cited. He comes to Court for revocation of the grant. He admits that the will was duly executed and is a genuine will. Here there is ground for revocation; because the necessary party was not cited. But will the Court revoke the grant? Certainly not. It would be a farce to revoke the grant and call upon the executor to prove the will — a will which is admitted by the person who asks for revocation of the probate, to be a genuine will, duly executed.

(19) It seems to me on the authority of the Privy Council case that where the two issues are tried together, and it is proved that a necessary party was not cited, but the Court on the evidence before it, comes to the conclusion that the will was duly executed and has not been revoked, the Court would not revoke the grant. Such revocation would be worse than unprofitable.

(20) In the case before us all that has been said, proved, and found is that the testator had intended to revoke the will. Even there we entertain a genuine doubt as to whether the learned Judge arrived at a correct finding. In the letter dated 29-6-1917, of which I have made an earlier reference, the deceased no doubt expressed an intention to make a new will, but the subsequent letters do not prove the continued existence of that intention: On the contrary, prove the reverse.

(21) Let us assume, however, (for the sake of argument) that the testator had the intention to revoke the will. Did he revoke it? The answer must be in the negative.

(22) Section 57 makes provision for revocation of an unprivileged will. Section 59 provides for the revocation of a privileged will. Under Sec. 57 there are four modes in which an unprivileged will or codicil, or any part thereof, may be revoked: (1) by marriage, (2) by another will or codicil duly executed. (3) by writing declaring an intention to revoke, and duly executed, (4) by the burning, tearing, or otherwise destroying the will or codicil by the testator, or by some other person in his presence and by his direction, with the intention of revoking the same.

(23) In this case there is no evidence at all that the will in question was revoked by any of these methods. All that is said and proved is that Benode had an intention to revoke the will. But the mere intention to revoke does not revoke a will. A man making a will may subsequently change his mind. He may think that he should change the will and make another will. But he may not do anything at all. Until he revokes the will, however strong the intention may be, the will is not revoked. In this case the deceased after he had thought of making a new will had at least three years time to revoke his earlier will. He was murdered on 5-3-1920. But he did not do anything to revoke the will. There is nothing to shew that he adopted any of the modes by which a will is revoked.

(24) The allegation in the petition and the evidence before us make it quite clear that the will which is alleged to have been revoked was a genuine will, duly executed and registered. The allegation in the petition that the will was revoked implies that the will had been duly executed. On the evidence, the learned Judge would have been justified, and we would be right in holding that there was a duly executed will and it has not been revoked. If that is so, there is no point in revoking the grant. In a case like this it would be a perverse exercise of discretion to revoke the grant. Nothing is gained by revoking it and asking the executors to prove the will anew, the genuineness and the execution of which are admitted by the person who wants the will to be proved in his presence.

(25) On this consideration alone, we would be prepared to set aside the order of the learned Judge. But there is another point on which we think the learned Judge has gone wrong. On the pleadings, it would not be unreasonable to hold that Girish had knowledge of the probate and of the executors being in possession of the estate of Benode. There is an allegation in the affidavit of Achinta (para 9) that Girish was fully aware of the probate proceedings. The petitioner, though he deals with the affidavit of Achinta, does not specifically deny this allegation. If, therefore, we hold that Girish knew of the probate proceedings and did not intervene, Girish could not challenge the grant. In — 'Wytcherley v. Andrews', (1871) L. R. 2 P. 327, Lord Penzance said:

> "if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity....."

If Girish knew what was passing, and stood by, he should not be allowed to reopen the case.

(26) But as the probate was granted on the day the petition for probate was presented to the Court, we will assume that Girish did not know at any material time, that a petition had been made for the grant of probate. But there is absolutely no doubt that Girish in 1933 and thereafter fully knew that the probate had been granted. That is proved on the admission made in the petition; that is proved on the pleadings and Exs. 1 and 2; on the evidence of Pannalal Chatterjee, an advocate of this Court and of Bhutnath Kerr, a son-in-law of Girish. It appears from the evidence of Panna Lal Chatterjee that after Charu had come out of the jail, he had a talk with Girish regarding the latter's right in the property of the deceased. In Ex. 2 which is the draft of an agreement made by Panna Lal under instructions of Girish, and which was intended to be executed by Girish, and the two ladies who were given life interest in the estate of the deceased by this will, there are recitals to show that Girish knew at least at that time that probate had been granted and the executors were in possession of the estate.

(27) The learned Judge has not accepted the evidence of Pannalal Chatterjee. (His Lordship discussed his evidence and concluded:) His evidence seems to us to be that of a truthful witness and is corroborated on the material points by other evidence on record. We are not unaware that the Judge of first instance should not ordinarily be upset on a question of fact, because first and last and all

the time, he has the great advantage, which is denied to the Court of appeal, of seeing the witnesses and watching their demeanour. But he is not the possessor of infalliability &, like other tribunals there may be occasions when he goes wrong on a question of fact and there is certainly jurisdiction in the Court of appeal to reconsider the facts in the way they do reconsider them and to come to an opposite conclusion from that arrived in the Court below. — 'Powell v. Steatham Manor Nursing Home', (1935) A. C. 243. After a careful consideration of the probabilities, we are unable to agree with the learned Judge that Pannalal Chatterjee's evidence should not be believed.

(28) Look at the probabilities. Girish was a cousin of Benode. Girish's wife was a cousin of Benode's wife. After Benode's death it is quite natural that Girish would call upon the widow of Benode. That is common practice amongst the Hindus. There must have been some Sradh of Benode. He was a rich man. There is no reason why Girish should not know of it. The probability is Girish attended the Sradh. There is no evidence before us to show that Girish was on inimical terms with the deceased or on such terms that invitation would be impossible. Girish further knew that Charu had been convicted of the murder. Girish knew that he was the next reversioner. He knew that the executors were in possession of the estate of the deceased. He knew that the probate of the will had been granted. In 1933 he himself was negotiating for the sale of his interest in the property of the deceased to the ladies who took life interest in the estate under the will. He had also the means of knowledge of the records in the probate proceedings. He died in 1940. He did not take any step to revoke the will during all those years. It is alleged he was a retired sort of man. He did not care for the property. But he knew all right how to negotiate for sale of his interest in the estate of the deceased. We cannot accept the petitioner's story that his father was such a religious man that he would not care for money.

(29) Girish did not take any step and allowed the executors to remain in possession of the estate of the deceased. Neither the petitioner took any step before 1949. What is the position? Has the petitioner lost his right by acquiescence?

(30) In — 'Shyama Charan v. Prafulla Sundari', 19 Cal W N 882, a distinction has been made between a case where the acquiescence alleged occurs while the act acquiesced in is in progress and another where the acquiescence takes place after the act has been completed; reliance is placed for the distinction on the observation of Lord Cottenham in — 'Duke of Leeds v. Earl of Amherst', (1846) 2 Phillips 117. The observation was made in connection with a claim for compensation for equitable waste by a tenant for life while in possession and is as follows:

> "If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. In that sense, however, there is no acquiescence here, for the act was done when the present duke was a minor, and when, if he had knowledge or means of knowledge — and he does not appear to have been of an age for that —nothing of acquiescence can be imputed to him. The defence, therefore, which is really intended to be set up, is not acquiescence, but release or abandonment of the party's right. For that purpose, however, it is not only necessary to show that the plaintiff knew of the acts of waste having been committed, but that he knew of the rights which they gave him against his father, and that having such knowledge, he did some act amounting to a release of that right."

In that case Lord Cottenham has not said that there is acquiescence after the act has been completed. He said acquiescence was not the term which ought to be used.

(31) There can be no doubt that in this case Girish was entitled to controvert the will; and, to call the probate in and put the executors on proof. There is no specific time which limits a party. There are many instances in which the Court has allowed the probate to be called in after a long time. That may be done with cause shown. But it cannot be held that it may be done under any circumstances. It would be contrary to reason and every principle of justice. Where a party interested to oppose the grant has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; e.g., if he had been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to show that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, the case is different. See — 'Hoffman v. Norris and White', 2 Phill. 230.

(32) Those who require the active interposition of the Court to revoke the probate, should use due diligence after there has been such notice or knowledge as to make it inequitable to lie by. In — 'Erlanger v. New Sombrero Phosphate Co.', (1878) 3 A. C. 1218 at pp. 1279-80, Lord Blackburn made the following observation:

> "And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party 'in mora', than a similar change before he was 'in mora' should do. In — 'Lindsay Petroleum Co. v. Hurd', (1874) L R 5 PC 221 at p. 239 it is said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon merely delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two cir-

cumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as (?) relates to the remedy." I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injutice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry".

(33) In — 'Watt v. Assets Co. Ltd.', (1905) A. C. 317, where a company was wound up and contributories were discharged from further liability on a composition and a period of twenty years supervened, it was held that every intendment must be made in favour of what was done twenty years before as having been lawfully and properly done. Lord Halsbury at p. 329 said:

"It appears to me that the matter rests not upon any question of technical law, but upon broad common sense, and especially upon these two principles — that at this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done, and that the persons who are now insisting upon these rights have lain asleep upon their rights so long as a matter of fact we know that witnesses have perished, and the opportunities which might have been had if the question had been earlier raised, have passed away. We are asked at a distance, in the one case of twenty years, and in the other case of twenty two years, to rip up a transaction which had apparently been completely disposed of."

Again at p. 333 his Lordship observed:

"I should be content to rest my judgment on the language of the Lord Ordinary himself, in which, on both occasions, he has pointed out, I think with great force and accuracy, the result that ought to follow from the absence of evidence which has been the fault of those who are the pursuers here — that is to say, they have lain by upon their supposed rights all this time, during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away."

(34) It is unnecessary to refer to the other cases cited at the Bar. Where a matter is left to the discretion of the Court, it is impossible to lay down any hard and fast rule. The Court has to exercise the discretion on the facts of the case and the Court in exercising the discretion must follow sound principles of law. I have quoted the observations of the masters not because each single observation applies to the facts of the case; but to get at the principle on which the case should be decided. It is well known that observations made in a case have reference to the facts of the case; but the observations that I have set out above are of universal application. They are based on broad principles of justice and commonsense.

(35) We are satisfied that in the circumstances of the case it would be unjust to set aside the grant after such a lapse of time. It is quite true that there is no special limit of time as to laches. But the determination of a case must depend upon the circumstances of each particular case and the conduct of the person who seeks to set aside a transaction after a long period is a circumstance which must be taken into account. In this case we do not find any reason why Girish did not make an application for setting aside the grant. No reason has been given as to why the petitioner did not take any step before. The attesting witnesses are all dead. The managing executor is dead. He probably, would have been able to give valuable evidence as to the conduct of Girish and as to whether Girish knew about the petition which was then intended to be or was filed, etc. etc. It seems to us that it will be extremely inexpedient as a matter of law and administration to allow this thing to be ripped up at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away.

(36) On these considerations, we are unable to hold that in this case the Court should exercise its discretion and revoke the grant, though initially the probate proceedings were defective. The appeal is allowed and the petition for revocation of the probate dismissed with costs here and below. Certified for two counsel.

(37) HARRIES C. J.: I entirely agree and have nothing to add.

B/V.S.B. Appeal allowed.

A.I.R. 1953 CALCUTTA 108 (Vol. 40, C. N. 34)

K. C. CHUNDER J.

A. E. Platts, Accused Petitioner v. The State.

Criminal Revn. Case No. 434 of 1952, D/- 8-7-1952.

Dock Labourers Regulation (1948), Regs. 44, 2, 55 and 54 — Conviction for breach of Regulations — Hatch on boat engaged in loading and unloading ship not properly secured — Boat owned by company — Conviction and sentence of Manager qua Manager — Dock Labourers Act (1934), Ss. 2(a) and 5(3).

The work of loading and unloading a ship from a boat alongside the ship falls within the definition of "process" contained in S. 2(a) Dock Labourers Act and Reg. 2 read with Regs. 55 and 54 of the Indian Dock Labourers Regulations, 1948. In such a case even though the boat itself is not a 'ship', within the definition of that word, failure to secure its hatch would create a liability under Reg. 44 read with Reg. 55 by reason of its falling within the definition of "process." The liability would primarily be upon the owners of the boat and secondly upon their agent or employee performing the work of loading and un-

loading. Where the owners are a company the manager of the company qua manager cannot be convicted and sentenced for the breach of the regulation unless it is established that the manager represented the Company in the work of loading and unloading in the particular instance in which the breach complained of took place. (Para 2)

S. C. Talukdar, Tulsi Charan Nath, for Petitioner; Nirmal Chandra Sen, for the State.

ORDER: This Rule was issued at the instance of the Manager of the Calcutta Landing and Shipping Co. Ltd. against a conviction and sentence under Regulation 5 of the Indian Dock Labourers Regulation, 1948, for beach of Regulation 55 read with Regulation 44. The learned Magistrate found that the Company's Cargo Boat No. 2 was placed alongside S. S. Rebeverett on 18-6-51 when the athwart iron beam of the hatch of the boat got displaced as the sling of gunny bales heaved up by the ship's derrick struck the beam. Two workers of the Co. working in the hatch were injured as a consequence. It is alleged that the beam of the hatch of the boat was not adequately secured.

(2) Mr. Talukdar has taken us through the evidence on the point whether the boat was alongside the ship and whether the beam in the hatch was adequately secured. In view of the order I am going to pass, it is undesirable that I should express any opinion on the facts. Mr. Talukdar has contended that the word 'boat', namely Corgo Boat No. 2, did not come within the definition of a ship. The learned Magistrate has himself definitely stated that it is not within the definition of a ship. He has pointed out that the liability depends upon the definition of 'process' in the Act and Regulation 2 read with Regulations 55 and 54 of the Regulations. Clearly, anything like a boat from which work of loading and unloading a ship is going on will come within the definition of process if it is alongside the ship and the hatch has not only got to be secured in the ship but also anything so working alongside the ship. Therefore, the learned Magistrate was right in law in holding that if the beam in the hatch was not adequately secured then liability would fasten upon the person responsible for the same.

Under Regulation 44 responsibility is first of the Company. Indeed, Mr. Sen points out to me that the petition of complaint was filed actually against the Company. Secondly, the responsibility is that of the Agent or the employee performing the work of loading and unloading. In the present case Mr. Platts is not made responsible either as an Agent or as an employee of the Company performing any work. His responsibility, if any, depends upon his being a representative of the Company in the present case who shoulders the liability of the Company. The Manager 'qua' Manager is not under the Companies Act a representative. The question whether Mr. Platts represented the company for the particular purpose of this liability should have been determined by the learned Magistrate and as this has not been done, the order of the learned Magistrate must be set aside and the case sent back to him so that the point may be decided and, if necessary, for the decision of the point he may take further evidence. It may be pointed out that if the learned Magistrate finds that Mr. Platts is not a representative then the present proceedings must fail and the learned Magistrate will be at liberty to take fresh proceedings against such person as may be shown to be the proper representative.

(3) The Rule is made absolute and the case is remanded to the learned Magistrate for further action in the light of this judgment.

B/M.K.S. Rule made absolute

A.I.R. 1953 CALCUTTA 109 (Vol. 40, C. N. 35)

P. B. MUKHARJI AND GUHA JJ.

Tulsibala Rakhit and another, Petitioners v. N. N. Khosal, Opposite Party.

Criminal Revn. Case No. 266 of 1951, D/- 31-3-1951.

(a) Criminal P. C. (1898), Ss. 107 and 112 — "In manner hereinafter provided."

The words "in the manner hereinafter provided" in S. 107 are essential words and the Magistrate cannot discover a manner of his own. The manner provided is clearly laid down in S. 112. Issue of a preliminary notice to show cause apart from what is provided under S. 112 is not a justified course permitted by the law. (Paras 12, 13)

Anno: Cr. P. C., S. 107 N. 2; S. 112 N. 2.

(b) Criminal P. C. (1898), S. 107 — Power to call for police enquiry and report.

The magistrate can make any enquiry before he issues the notice for showing cause. It is the responsibility of the Magistrate to see that public peace or public tranquillity is maintained. The Magistrate therefore and for that purpose is competent to use the administrative machinery to call for a public enquiry and report before issuing the order to show cause. (Para 14)

Anno: Cr. P. C., S. 107 N. 14.

(c) Criminal P. C. (1898), S. 107 — "Is informed" — Information not complaint.

A petition under S. 107 is not a complaint and therefore the Magistrate cannot proceed under S. 202 or S. 204. A Magistrate under S. 107 is not required to examine the complainant, far less to examine the person informed against until at a much later stage when he proceeds to act under Section 117. The proceedings before the Magistrate under S. 107 become judicial only from the stage of enquiry under S. 117. But before that stage is reached and before any notice to show cause is issued under S. 112 all that is required under S. 107 is that the Magistrate must be "informed" that a person is likely to commit breach of the peace. No hard and fast rule can be laid down about the quality and character of information on which the Magistrate should or should not act. The Magistrate must be left free with a wide discretion in the matter and it is undesirable to fetter the hands of the Magistrate in this respect. (Para 15)

Anno: Cr. P. C., S. 107 N. 3, 6.

(d) Criminal P. C. (1898), Ss. 107, 112 — Police enquiry and notice — Distinction.

The Magistrate's power to call for a police enquiry and a police report should not be mistaken for his power to issue a notice to show cause without complying with S. 112. AIR 1932 All 670, Disting. (Para 17)

Anno: Cr. P. C., S. 107 N. 14, 15; S. 112 N. 2.

(e) Criminal P. C. (1898), Ss. 107 and 192 — 'Case' — Meaning of — Proceedings under S. 107.

Proceedings under S. 107 come within the meaning of the word "case" as used in S. 192. Section 192 does not concern only offence. The language of S. 192 does not use the word "offence" deliberately but uses the far more general word "case". Section 192 does apply in a proper case to proceeding under S. 107 and can be used to exercise the right to transfer the proceedings under S. 107. AIR 1949 Cal 637, Dissent; Cri. Revn. No. 721 of 1950 (Cal) and AIR 1941 Cal 185, Rel. on.

(Paras 21, 22, 25)

Anno: Cr. P. C., S. 192 N. 6.

(f) Criminal P. C. (1898), Ss. 192 (2) and 529 (f) — Magistrate not taking cognizance of case — Transfer by — Effect.

The Statutory condition which must be satisfied before any District Magistrate may empower any Magistrate of the First Class under sub-s. (2) of Section 192 is that Magistrate of the First Class must be one "who has taken cognizance of any case". It is not any and every Magistrate of First Class who can be empowered by the District Magistrate in this respect. Section 529 (f) contemplates a case where the Magistrate who is empowered is a competent Magistrate under the Code to receive the power but who in fact has not been so empowered by the District Magistrate. There the defect would be cured if the proceedings are questioned merely on the ground of his not being so empowered by the District Magistrate. Where the Magistrate has not taken cognizance of the case, this defect of jurisdiction cannot be cured by the application of S. 529 (f). Case law discussed. (Paras 26, 27, 28)

Anno: Cr. P. C., S. 192 N. 8; S. 529 N. 3.

(g) Criminal P. C. (1898), S. 529 — "Erroneously in good faith".

The words "erroneously in good faith" in S. 529 do not protect deliberate negligence and wilful disregard of the clear provisions of the Code and the binding decisions of the High Court. (Para 31)

Anno: Cr. P. C., S. 529 N. 5.

(h) Criminal P. C. (1898), S. 529 — "Merely" — Meaning of.

Section 529 makes it quite clear that the proceedings mentioned therein shall not be set aside "merely" on the ground of the Magistrate not being empowered by law. Where there are other grounds on which the proceedings are questioned S. 529 cannot be availed. (Para 33)

Anno: Cr. P. C., S. 529 N. 1.

Nalin Chandra Banerjee, for Petitioners; S. C. Talukdar with Bibhuti Bhusan Das Gupta, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('33) 34 Cri LJ 42: (AIR 1932 All 670) 17
('95) 22 Cal 898 23
('09) 36 Cal 370: (9 Cri LJ 399) 29
('09) 36 Cal 869: (10 Cri LJ 557) 29
('12) 39 Cal 1041: (13 Cri LJ 484) 29
('38) 42 Cal WN 246: (AIR 1938 Cal 195: 39 Cri LJ 417) 29, 31
('41) ILR (1941) 1 Cal 67: (AIR 1941 Cal 185: 42 Cri LJ 490) 24
('50) 54 Cal WN 228: (AIR 1949 Cal 637: 51 Cri LJ 205) 22
('51) Cri. Revn. No. 721 of 1950, D/- 7-2-1951 (Cal) 23

P. B. MUKHARJI, J.: This is an application in revision against the order of the Magistrate dated the 10th March 1951 drawing up proceedings under section 107, Cr. P. C. against the petitioners who were the second party and directing the petitioners to show cause why they should not execute the Bond for keeping peace for a period of one year.

(2) The opposite party is a tenant of the petitioners. There are many disputes between them as landlords and tenant. Quarrels are going on regarding supply of water and electricity. Then there are proceedings before the Rent Controller for standardisation of rent. The petitioners have also brought a suit for damages before the Third Court of the Munsif at Alipur and another Title Suit before the same Court.

(3) Against this background of litigation and dispute the allegation of the opposite party before the Magistrate was that the petitioners were creating nuisance and were abusing and insulting the opposite party with filthy language and were threatening him with acts of violence.

(4) There was a Police enquiry finally resulting in the proceedings under section 107 against the petitioners.

(5) The main point urged before us is one of law. The Magistrate's order of the 10th March 1951 passed by Mr. F. M. Sanyal, First Class Magistrate at Alipur, drawing up proceedings against the petitioners is challenged on the ground of being illegal and unjustified under the Criminal Procedure Code. It is contended also that Mr. Sanyal did not take cognizance of these proceedings under section 107, Cr. P. C. and therefore had no jurisdiction to make the order of the 10th March, 1951. That order of the 10th March 1951 apart from directing the petitioners to show cause transferred the case to Mr. S. L. Banerjee another First Class Magistrate before whom the cause was to be shown. Such transfer is contended to be also illegal under the Criminal Procedure Code.

(6) In order to appreciate these points it is necessary to examine and set out certain facts in this connection because the substance of the argument rests on the nature and character of the procedure that should be followed under section 107, Cr. P. C. and the right to transfer cases by Magistrates under section 192, Cr. P. C

(7) The petition by the opposite party was filed on the 28th September 1950. An order was made by Mr. S. K. Ghosh, S. D. O., Alipur, on the 21st November, 1950, and by that order a notice was issued directing the petitioners

"To show cause on 20-12-50 as to why they should not be bound down under section 107, Cr. P. C. to keep peace."

That bears the title as a "Notice under section 107, Cr. P. C." It recites the petition of the opposite party and the report of the Metiabruz Police as well as the apprehension that there may be a serious breach of peace at any moment and finally gives directions to show cause in the terms indicated above. After adjournment on the 20th December 1950 the matter came up on the 10th March 1951 when as I have indicated above Mr. F. M. Sanyal the First Class Magistrate at Alipur again passed an order directing the petitioners to show cause why they should not be ordered to execute a Bond of Rs. 100/- each with one surety of the like amount for keeping peace for the period of one year. By this order not only was cause asked to be shown but as I have said the case

was also transferred to Mr. S. L. Banerjee another First Class Magistrate before whom the cause was to be shown and who was asked to dispose it of.

(8) The argument now will become clear on these facts.

(9) It is said that the first notice of Mr. S. K. Ghosh, S. D. O. Alipur, dated the 21st November, 1950 having been issued to show cause there is no procedure which justifies a further order on the 10th March 1951 by Mr. Sanyal the First Class Magistrate to show cause again. That is said to be a procedure not recognised under section 107, Cr. P. C. Then the order of transfer of the case by Mr. Sanyal to Mr. Banerjee is said to be illegal under the Criminal Procedure Code.

(10) The argument raises questions of considerable importance.

(11) Section 107, Cr. P. C. provides that when the specified Class of Magistrates is informed that any person is likely to commit a breach of peace or disturb public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity that Magistrate if in his opinion there is sufficient ground for proceeding may in the manner provided in the Statute require such person to show cause why he should not be ordered to execute a Bond with or without sureties for keeping peace for a period not exceeding one year as the Magistrate thinks fit to fix. If the Magistrate proceeds then he may proceed "in the manner hereinafter provided". The manner that is provided is laid down in Section 112, Cr. P. C. That section provides that when a Magistrate acting under section 107, Cr. P. C. deems it necessary to require any person to show cause under such section shall make an order in writing setting forth the substance of the information received, the amount of the Bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

(12) Judged by that test the notice issued by Mr. S. K. Ghosh, S. D. O., Alipur, directing the petitioners to show cause is clearly illegal. It does not state the amount of the Bond to be executed, the term for which it is to be in force or the number, character and class of sureties if any required.

(13) In order to get round this difficulty it was contended on behalf of the opposite party that this notice of Mr. S. K. Ghosh, S. D. O., Alipur, dated the 21st November, 1950, was not a notice under section 112, Cr. P. C. but a kind of a preliminary notice under section 107, Cr. P. C.- To my mind Section 107, Cr P. C. does not contemplate issue of any preliminary notice to show cause. The Magistrate may proceed in the manner laid down by the Code. The words are

> "The Magistrate if in his opinion there is sufficient ground for proceeding may in the manner hereinafter provided require such person to show cause why he should not be ordered to execute a Bond with or without sureties and keeping the peace for such period."

The words "in the manner hereinafter provided" are essential words and the Magistrate cannot discover a manner of his own which he has done in this case. The manner provided is clearly laid down in Section 112, Cr. P. C. Issue of a preliminary notice "to show cause" apart from what is provided under section 112, Cr. P. C. does not appear to me to be a justified course permitted by the law. Section 107, Cr. P. C. does however give a discretion to the Magistrate in the sense that he "may" require the person to show cause. He may choose to exercise his discretion to require such person to show cause or he may not. But when he does exercise that discretion and does decide that he will issue a notice to show cause then that notice to show cause must be a notice which satisfies the requirements of Section 112, Cr. P. C.

(14) The procedure under section 107, Cr. P. C. should be clearly understood. The Magistrate on receipt of information may in the manner provided call upon the person informed against to show cause. That can only be done under section 112, Cr. P. C. The Magistrate can make any enquiry before he issues the notice for showing cause. It is the responsibility of the Magistrate to see that public peace or public tranquillity is maintained. The Magistrate therefore in my view and for that purpose is competent to use the administrative machinery to call for a police enquiry and report before issuing the order to show cause. When he does issue the order, that order must satisfy the tests of Sections 107 and 112, Cr. P. C.

(15) A petition under section 107, Cr. P. C. is not a complaint and therefore the Magistrate cannot proceed under section 202 or Section 204, Cr. P. C. A petition under section 107, Cr. P. C. is not to be treated as a complaint. A Magistrate under section 107, Cr. P. C. is not required to examine the complainant far less to examine the person informed against until at a much later stage when he proceeds to act under section 117, Cr. P. C. The proceedings before the Magistrate under section 107 Cr. P. C. become judicial only from the stage of enquiry under section 117, Cr. P. C. But before that stage is reached and before any notice to show cause is issued under section 112, Cr. P. C. all that is required under section 107, Cr. P. C. is that the Magistrate must be "informed" that a person is likely to commit breach of the peace. No hard and fast rule can be laid down about the quality and character of information on which the Magistrate should or should not act. The Magistrate must be left free with a wide discretion in the matter and it is in my opinion undesirable to fetter the hands of the Magistrate in this respect.

(16) To pursue the procedure that is laid down by the Code it is necessary to observe that the order under section 112, Cr. P. C. should be served in the manner laid down in Section 115, Cr. P. C. Then the Magistrate is to hold an enquiry as to "the truth of the information upon which action has been taken" and to take such further evidence as may appear necessary as laid down in Section 117, Cr. P. C. This is the stage of judicial enquiry under Section 107, Cr. P. C. and the procedure then approximates to conduct of trials and recording of evidence in Summons Cases. The final stage is reached when the Magistrate directs the person to give security under section 118, Cr. P. C. if it is proved that it is necessary for keeping the peace that the person in respect of whom the enquiry is made should execute a Bond. The Magistrate shall make an order if it is so necessary to discharge such person under section 119, Cr. P. C. when he thinks that

it has not been proved that it is so necessary. That in brief is the simple and clear procedure laid down under the Criminal Procedure Code.

(17) The Magistrate's power to call for a police enquiry and a police report should not be mistaken for his power to issue a notice to show cause without complying with Section 112, Cr. P. C. The decision of the Allahabad High Court in — 'Laxshmi Narain v. Emperor', 34 Cri. L. J. 42 (All) is not an authority for the proposition that a Magistrate if he decides to issue a notice to show cause then that notice to show cause can be given in utter disregard of the provisions of Section 112, Cr. P. C.

(18) I am therefore bound to hold that the notice to show cause by Mr. S. K. Ghosh under section 107, Cr. P. C. dated the 21st November 1950 does not satisfy the requirements of the Statute. I hold therefore that such notice is illegal and must be set aside.

(19) Then the question arises does the subsequent order of Mr. Sanyal of the 10th March 1951 to show cause, which does satisfy the requirements of Section 112, Cr. P. C. cure that initial defect. This question involves the consideration of the extent of the right to transfer a case under section 192, Cr. P. C. There is a good deal of confusion on this branch of the subject and it appears to me to be necessary to refer to certain decisions on this point.

(20) The main argument of the petitioner on this branch of the case is that Section 192, Cr. P. C. does not at all apply to proceedings under section 107, Cr. P. C. The refrain of this argument is that Section 192, Cr. P. C. refers to cases of which the Magistrate has taken "cognizance for enquiry or trial". It is said that the proceeding under section 107, Cr. P. C. may be a "Case" but there can be no cognizance for enquiry or trial for such a proceeding.

(21) But enquiry has a very wide connotation under the Criminal Procedure Code and includes every enquiry other than a trial conducted under the Code by a Magistrate or a Court. That is the meaning given to "enquiry" under section 4 (1) (k), Cr. P. C. I am of the opinion that proceedings under section 107, Cr. P. C. do come within such meaning of the word "enquiry". In fact Section 117, Cr. P. C. in this connection does use the word "enquiry". It is quite true that the word used in Section 192, Cr. P. C. is "case" and not "offence". There can in my view be no doubt that proceedings under section 107, Cr. P. C. come within the meaning of the word "case" as used in Section 192, Cr. P. C.

(22) Then the attack is made on the basis of the word "cognizance". It is argued that cognizance can only be taken of an offence and not of a case. Reliance is placed on the observation of Sen J. in — 'Pran Krishna v. Shamsundar', 54 Cal W N 228 where the learned Judge was dealing with proceedings under section 133, Cr. P. C. At page 231 of the report of that case the learned Judge observes:

> "Apart from the title of these parts of the Code the wording in Section 190 itself makes it clear. It deals with a case of which cognizance has been taken. Now cognizance can only be taken of an offence. Section 190 is one of the sections which deal with the manner in which cognizance may be taken of an offence. It is clear therefore that Section 192 concerns offence."

With great respect to the learned Judge we are unable to agree with the view that Section 192, Cr. P. C. concerns only offence. The language of Section 192 does not use the word "offence" deliberately but uses the far more general word "case".

(23) A Division Bench (K. C. Das Gupta J. and P. N. Mukherjee J.) of this Court in the unreported decision in — 'Jubbar Mondal v. Tarak Chandra Ghosh', Cri. Revn. No. 721 of 1950 (Cal) where judgment was delivered on the 7th February 1951 came to the conclusion that the question whether section 192, Cr. P. C. authorises transfer of proceedings under section 145, Cri. P. C. was well settled by the authority of the decision in the case of — 'Satish Chandra v. Rajendra Nath', 22 Cal 898. On the decision of Sen J. that Bench observed:

> "The learned Judge did consider Section 192, Cr. P. C. and hold that Section 192, Cr. P .C. deals with transfer only of offences. His attention however was not drawn to the several Division Bench decisions following the decision in the case in — '22 Cal 898' referred to above. We are bound to follow the decision in the case reported in — 22 Cal. 898' which as already stated has been followed in a number of cases and has settled the law in a particular way."

I respectfully agree with this view of the Division Bench of Section 192, Cr. P. C.

(24) In my judgment Section 192 refers not only to taking cognizance of offences but of cases of which cognizance has been taken. The language used in Section 192, Cr. P. C. is much wider in its character in respect of cognizance than that which has been employed in Section 190, Cri. P. C. It appears to me that it will be anomalous to give to the word "cognizance" in Section 192, Cr. P. C. any technical and narrow significance and to confine it only to what are known as "offences." The context of S. 192 having used the word "case" justifies wider meaning being given to the word "cognizance". It must be observed that the expression "cognizance" has not been defined in the Criminal Procedure Code. It is quite true that Section 190(1) of the Code refers to cognizance of offences. But I do not see how that can be taken to mean that wherever the word "cognizance" is used in the Code it should only mean cognizance in respect of offences specially when the context of Section 192, Cr. P. C. uses the word "case" and not "offence". This view that I take also finds support from the decision of Edgley J. in — 'Hafizar Rahman v. Aminal Haque', ILR (1941) 1 Cal 67 where the learned Judge has exhaustively dealt with the previous authorities on the point. It is unnecessary for me to repeat them here.

(25) I am therefore of the opinion that Sec. 192 Cr. P. C. does apply in a proper case to proceeding under section 107 Cr. P. C. and can be used to exercise the right to transfer the proceedings under section 107 Cr. P. C. I therefore overrule the argument put forward on behalf of the petitioners that Section 192 Cr. P. C. does not at all apply to proceedings under section 107 Cr. P. C.

(26) But the difficulty of the petitioners does not end there. Mr. Sanyal is not Magistrate who had taken cognizance of this case. Now sub-section 1 of section 192 Cr. P. C. permits a Subdivisional Magistrate to transfer such

case to any Magistrate subordinate to him. But here Mr. S. K. Ghosh, S. D. O., Alipur did not make such a transfer to Mr. Sanyal. In fact it was Mr. S. K. Ghosh who had taken cognizance of this case under section 107 Cr. P. C. Then it is contended on behalf of the respondent that Mr. Sanyal was empowered by the District Magistrate under subsection 2 of Section 192 Cr. P. C. That in my opinion is quite an untenable argument on the facts of this case. In my view, one of the statutory conditions which must be satisfied before any District Magistrate may empower any Magistrate of the First Class under subsection 2 of section 192 Cr. P. C. is that Magistrate of the First Class must be one "who has taken cognizance of any case". It is not any and every Magistrate of First Class who can be empowered by the District Magistrate in this respect. Mr. Sanyal is no doubt a Magistrate of the First Class but he is not that Magistrate who took cognizance of this case.

(27) On the facts of this case it does not appear that this defect of jurisdiction can be cured by the application of Section 529 (f) Cr. P. C. There it is provided that if any Magistrate not empowered by law to transfer a case under section 192 "erroneously in good faith" does so transfer the proceedings shall not be set aside "merely" on the ground of his not being so empowered.

(28) The present case is not one of a Magistrate not being empowered by law to transfer. Here the District Magistrate under sub-s. 2 of section 192 Cr. P. C. who undoubtedly had the necessary power did purport to empower the Magistrate of the First Class but what has happened is that this power was exercised in favour of a Magistrate who had not taken cognizance of the case. Section 529 (f) contemplates in my view a case where the Magistrate who is empowered is a competent Magistrate under the Code to receive the power but who in fact has not been so empowered by the District Magistrate. There the defect would be cured if the proceedings are questioned merely on the ground of his not being so empowered by the District Magistrate.

(29) The decision in — 'Ram Krishna Sinha v. Emperor', 42 Cal W N 246 does refer to this question at p. 250 where it is observed:

"there are some cases in which it has been held that Section 529 applies only when a Magistrate who might have been empowered to do the particular thing in question is not actually so empowered and not with cases of irremediable want of jurisdiction."

The learned Judge also observed at page 251 "We cannot say that this is an unreasonable interpretation of the scope and effect of Sec. 529". That decision however went on to say that

"so far as Clause (f) of this Section is concerned there are decisions of this Court in which this clause has been held to apply to cases where orders of transfer purported to be made under section 192 Cr. P. C. by Magistrates who are not competent to do so as not being Magistrates who had taken cognizance".

The decision there arrived at however is based on the following observation at page 251:

"but on matters of this kind which are really matters of procedure we do not think we would be justified in laying down a different Rule."

Three cases were referred in that decision. One is of — 'Kishorilal v. Srinath', 36 Cal. 370, at p. 373: the second is — 'Dasarath Rai v. Emperor', 36 Cal 369 and the last one is — 'Bhika Hossain v. Emperor', 39 Cal 1041. — 'Kishorilal Roy's case' apparently proceeded on the assumption that the Magistrate had the necessary power. In — 'Dasarath Rai's case' the point was not raised in the form that has been raised here as the observations of the learned Judges at page 252 of the Report show. The case really proceeded on the right of the Joint Magistrate to hear appeal from the Sub-Deputy Magistrate and on the basis that in such appeal the point was not taken. The case of — 'Bhika Hossain' in 39 Cal 1041 rather said that section 529 (f) did not in that case confer jurisdiction on the Deputy Magistrate to make the order. The authority of — 'Ram Krishna Sinha v. Emperor', 42 Cal W N 246 clearly points out that such a case "is undoubtedly a defect of jurisdiction which may not unreasonably be said to be outside the scope of Section 529 (f) Cr. P. C."

(30) I consider it improper on the part of the Magistrates where they are told by the authoritative decisions of this Court that a certain step is illegal that they would still continue to follow that illegal procedure which goes to the curative provision of Section 529 (f) Cr. P. C., on the ground of having done it "erroneously in good faith". Such a course will permit the criminal administrative machinery of the land to be abused without regard to the correct legal procedure laid down in the Criminal Procedure Code and by the interpretation of this High Court. It is the duty of the Magistrates and the Criminal Courts of this State to follow the procedure prescribed by law and there is no law not even Section 529 (f) Cr. P. C. which in a case like this can be said to sanction deliberate and intentional departure from that procedure. It is also their duty to inform themselves on the law which they are expected to administer and the decisions of this Court thereupon.

(31) The words "erroneously in good faith" in Section 529 Criminal Procedure Code do not protect deliberate negligence and wilful disregard of the clear provisions of the Code and the binding decisions of this Court. In this case the Magistrate himself quotes and relies on the decision of — 'Ram Krishna Sinha v. Emperor', 42 Cal W N 246 to say that his illegal order is cured by Section 529 (f) Cr. P. C. This Court does not countenance such open and intentional violation of the law and subsequent invocation of Section 529 (f) Cr. P. C. to cure it when the Magistrate knows what the correct position in law and procedure is. That is not "erroneously in good faith" and therefore cannot be cured and protected by Section 529 (f) Cr. P. C.

(32) But for the two grounds namely first that this case does not come within the words "erroneously in good faith" and secondly the proceedings here are questioned not "merely" on the ground of the Magistrate not being empowered I was inclined to refer to a Full Bench for a fuller consideration of the point whether Section 529 (f) Cr. P. C. can at all be invoked to cure such defect of jurisdiction in a case like this. Reference to a Full Bench

however is unnecessary in this case. Here the proceedings are questioned on other grounds also and that is whether Mr. S. K. Ghosh the S. D. O. of Alipur having already issued a notice to show cause on the 21st November 1950 which is illegal, Mr. Sanyal who had not taken cognizance of the case could issue again another notice on the 10th March 1951 to show cause.

(33) Section 529 Cr. P. C. makes it quite clear that the proceedings mentioned therein shall not be set aside "merely" on the ground of the Magistrate not being empowered by law. Where there are other grounds on which the proceedings are questioned as here, Section 529 Cr. P. C. cannot be availed.

(34) I therefore hold that Section 529 (f) Cr. P. C. cannot be attracted on the ground that the Magistrate in this case has not acted "erroneously in good faith" nor are the present proceedings questioned "merely" on the ground of the Magistrate not being empowered by law.

(35) In the view that I take and for the reasons I have stated the entire proceedings in this case after cognisance was taken by Mr. S. K. Ghosh, S. D. O., Alipur and from the stage he issued the illegal notice under S. 107 Cr. P. C. on the 21st November 1950 to show cause are illegal and unjustified and must be set aside.

(36) In the result I make the Rule absolute. The petition of the opposite party under Section 107 Cr. P. C. should be dealt with according to law as indicated above, unless the Magistrate considers that there is now, about a year after the petition, no likelihood of breach of peace in which case he will refuse to issue notice under section 112 Cr. P. C. to show cause and to take any further steps on the petition.

(37) GUHA J.: I agree.

B/D.H. Rule made absolute.

A. I. R. 1953 CALCUTTA 114 (Vol. 40, C. N. 36)

BOSE J.

Amarendra Chandra, Petitioner v. Narendra Kumar Basu and others, Opposite Party.

Civil Rule No. 3185 of 1951, D/- 28-3-52.

(a) Constitution of India, Art. 226 — Writ of 'quo warranto' — Offices of members of Managing Committee of school — Writ does not lie in respect of such offices.

Even though a small section of the public, viz. the students and their guardians are interested as such in the school that fact does not bring the offices of the members of the Managing Committee of the school within the category of offices which can be described as offices of a public nature and, therefore, the offices held by the members of the Managing Committee are not offices in respect of which a writ of 'quo warranto' lies. (Para 5)

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 N. 14.

(b) Constitution of India, Art. 226 — Parties — Application for writ of 'quo warranto' against members of Managing Committee of school — Object of application to get declaration that approval given to Committee by University is invalid — Application is not maintainable without University being party to it. (Para 7)

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 N. 14.

Kalyan Kumar Bose, B. Das and Kamjit Mukherjee, for Petitioner; Binayak Banerjee with Anil Kumar Das Gupta, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
(45) 49 Cal WN 658: (AIR 1945 Cal 249) 5
(1863) 8 LT 458 4
(1851) 17 QB 149: (117 ER 1238) 5

ORDER: This is an application under Art. 226 of the Constitution for a Writ in the nature of 'Quo Warranto' calling upon the respondents to exhibit the authority under which they are functioning and acting as the members of the Managing Committee of a school in South Calcutta known as the Chakraberia High School and for an injunction restraining them from functioning as such.

(2) The petitioner is the father and guardian of two students of the said Chakraberia School which is located at 93, Bakulbagan Road and at 23/1 Chakraberia Road, South Calcutta. It is alleged in the petition that at a meeting of the guardians of the students of the said school held on 14th May 1950 a Managing Committee of the school was constituted in accordance with the Revised School Code which it is said was framed by the Calcutta University under the Indian Universities Act (Act VIII (8) of 1904). It is alleged that the respondents have constituted themselves into a rival Managing Committee and have wrongfully obtained the approval of the University in terms of Rule 6 of the Revised School Code although the conditions precedent which must exist before the University can validly grant its approval did not in fact exist.

The petitioner challenges the rights of the respondents to be in office as members of the Managing Committee on the ground that the approval granted by the University has not been validly given in accordance with Rule 6 of the Revised School Code. It appears that the Managing Committee constituted by the respondents was formed on the 3rd September 1950, the approval of the University was asked for on or about the 13th September 1950 and the University granted its approval on the 18th September 1950. It appears further that the Managing Committee of this school is constituted not according to the provisions of the Revised School Code but the members of the Managing Committee are elected by the General Committee of the South Suburban School, another well-known School in South Calcutta, and the members of the Committee formed by the respondents were so elected by the General Committee of the South Suburban School.

(3) Mr. Binayak Banerjee, the learned Advocate for the respondents has contended that the offices held by the respondents not being statutory offices nor being offices of a public nature this application for a writ of 'Quo Warranto' is not maintainable.

(4) In Halsbury's Laws of England, Vol. 9, Paragraph 1374, page 805 it is pointed out that formerly the remedy of 'Quo Warranto' was confined to cases of usurpation upon the Crown directly but later cases have extended the remedy in respect of offices of a public and substantive nature which are created by or under a statute or under Charter granted by Crown. It is further pointed

out that a Writ refused in respect of the office of a master of a hospital and free school, which institution was a private charitable foundation and the right of appointment to offices therein was in governors who were private and not public functionaries and it was immaterial that a Charter of Incorporation for the Institution had been granted by the Crown. The writ also does not lie for the purpose of trying the validity of an election to a fellowship of a college nor does it lie in respect of the office of a Surgeon or Physician of a hospital founded by private persons and afterwards incorporated by Act of Parliament, (Footnote (d), page 805) nor in respect of the office of a committeeman of the Licensed Victuallers' Association. — 'Ex parte Abel Smith', (1863) 8 LT 458.

(5) Reliance has been placed on behalf of the petitioner on the case of — 'R. v. Guardians of St. Martin', (1851) 17 QB 149 to show that if the office is one in which the public has an interest, a writ will lie, no matter whether the office is created by Statute or not. In the case of — 'Ashgar Ally v. Birendra Nath', 49 Cal WN 658 at p. 670, Gentle J. considered the case of — 'R. v. St. Martin's Guardians' and referred to certain passages in the judgments of Lord Campbell C. J., Patterson J. and Erle J. to show what is meant by an office of a public nature. He came to the conclusion that the office of the Chief Engineer who was appointed under the provisions of the Calcutta Municipal Act which conferred power on the Calcutta Corporation to make appointments of some of its officers, satisfied the tests laid down in the case of — 'R. v. St. Martin's Guardians' and so a Writ would lie in respect of the office of the Chief Engineer. Mr. Justice Gentle referred to certain other cases where the writ was issued but pointed out that the offices in the cases concerned were prescribed by statutes.

It may be pointed out that in the case of — R. v. St. Martin's Guardians', the office in question was prescribed in the Act of Parliament though not actually created by the Statute. The Chakrabaria High School is a Private Institution which imparts education to students of that school and receives fees from the students for imparting such education. The Managing Committee of the school is not the creature of any Statute but it is constituted by the General Committee of the South Suburban School according to certain rules framed for the purpose of constituting such Committee. The rules have no statutory force but are domestic rules governing the internal affairs of the school. Even the Revised School Code, which does not appear to have any statutory force, has no application to the constitution of the Managing Committee of this school. It is true that a small section of the public viz., the students and their guardians are interested as such in the school but that does not bring the office of the members of the Managing Committee within the category of offices which can be described as offices of a public nature. It appears to me that the offices held by the respondents are not offices in respect of which a writ of Quo Warranto lies.

(6) Mr. K. K. Basu, the learned Counsel for the petitioner contended that the respondents are not properly in office as the approval granted by the University is not in accordance with Rule 6 of the Revised School Code. It appears to me that there is no substance in this contention. The respondents have been elected by the General Committee of the South Suburban School and rightly or wrongly the University has approved of the Managing Committee composed of the respondents. If there had been in fact no approval even then the election of the respondents would not be rendered invalid, but only the acts of the Managing Committee might not have been recognised by the University so long as approval was not actually granted. The Circular No. s/355/ M.C. which is printed at page 30 of the Handbook containing the Revised School Code indicates that the granting of approval is not a condition precedent to the Managing Committee functioning as such. If the approval is given at a future date there is sufficient compliance with Rule 6 of the Code.

If the University had refused to grant its approval to this Managing Committee there might have been some force in the argument that the respondents had no right to be in office but when the fact remains that the University did grant its approval to this Committee but the approval turns out to be defective or invalid, I fail to see how it can be said that the respondents have no right to be in office. It appears to me that so long as the University does not refuse to approve of this Committee and pending such approval the respondents have every right to remain in office.

(7) The whole attack of the petitioner is upon the validity of the approval granted by the University. The petitioner's case is that the University had no grounds or materials and could have no materials before it for judging whether the Committee composed of the respondents was efficiently discharging its duties or not as the Committee had only come into existence only a fortnight before the granting of approval. The University, which could have placed all materials to meet the case of the petitioner and could perhaps have satisfied the court that there were materials before it which justified it in granting the approval, has not been made a party. It may be that the University Authorities made enquiries and were satisfied that although the Committee had come into existence only a fortnight before the date of the approval, whatever acts were done by the Committee indicated that the Committee had discharged its duties efficiently. The object of the petition is really to get a declaration from the court that the approval of the University is invalid and in my view this application is not maintainable without the University being a party to it.

(8) It was submitted by Mr. Banerjee that this is not a bona fide application but has been made at the instance of the members of the rival Committee who have been repeatedly frustrated in their attempts to get a hold on the management of the school after ousting the committee of the respondents. As there are not sufficient materials on record I do not express any opinion on this point.

(9) In my view this petition must fail. The Rule is accordingly discharged. The petitioner must pay the costs of the present proceedings. Hearing fee is assessed at 3 gold mohurs.

A/V.R.B. Rule discharged.

A. I. R. 1953 CALCUTTA 116 (Vol. 40, C. N. 37)

P. B. MUKHERJI J.

Ajayananda Paul and others, Plaintiffs v. The Indian Homoeopathic Medical Association, Defendant.

Original Suit No. 3680 of 1949, D/- 26-3-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948) S. 12(3) — Chief Judge in appeal fixing increased rate of rent — Revision to High Court — Operation of order of Chief Judge stayed — High Court ultimately holding that it has no jurisdiction — Stay order held nullity — Tenant not making deposit of rent at increased rate according to order of Chief Judge — There is ipso-facto determination of tenancy.

The Chief Judge of the Small Cause Court by his order dated 19-4-1949 increased the standard rent fixed by the Rent Controller. The tenant moved the High Court in revision and obtained an ad-interim order on 13-5-1949 for stay of the operation of order fixing the standard rent. The stay order continued till 16-12-1949 when the High Court ultimately discharged the rule on the ground that it had no jurisdiction to entertain the revision. In the meanwhile on 13-9-1949 the landlord gave notice to the defendant tenant to vacate forthwith on ground that the tenancy had determined ipso-facto by reason of defendant's failure to pay or deposit rent for three consecutive months (viz. April, May and June 1949) in accordance with S. 12(3) of the W. B. Act, 38 of 1948. The landlord brought a suit for ejectment on 15-9-1949.

Held that (1) the ad-interim stay was not an order made in the illegal exercise of Court's jurisdiction but it was a case where there was no jurisdiction at all. (Distinction between two classes of cases pointed out). (Para 13)

(2) The only limitation on the doctrine, that every order of a Court passed without any jurisdiction is void, is that the Court is given the power to decide whether it has that jurisdiction or not and an order so deciding is not void even though the decision is that the Court has no jurisdiction. (Para 14)

(3) The order of 16-12-1949 was an order which must have retrospective effect, because the decision that the Court had no jurisdiction must mean that any order made prior to the decision was also without jurisdiction. (Para 16)

(4) The defendant chose a procedure which was without any jurisdiction. A party before a Court whether he takes a point of law or a point of fact does so at his peril. It was on the defendant's petition that the interim order was obtained and then finally it was found that the whole proceeding by revision which the defendant had invoked was one without jurisdiction. The defendant could have deposited the higher rent as standardised by the Chief Judge even when it had filed the petition for revision and thus avoided the statutory forfeiture. (Para 22)

(5) But even assuming that an interim stay was valid, then the plaint would not be regarded as presented even on 15-9-1949 and could only be treated as a plaint instituted on the 16-12-1949. In that event also the defendant had no defence, because on 16-12-1949, the statutory forfeiture had worked itself out and was complete as pleaded in the plaint, on the very day the Court declared itself without jurisdiction. (Para 23)

(6) The tenancy must be regarded as determined ipso-facto under S. 12(3) of the Rent Act of 1948. (Para 25)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948) Ss. 12(1)(c) and 2(2) — "Controller" in S. 12(1)(c) does not include Chief Judge — S. 12(1)(c) has no application when order fixing standard rent is one passed by Chief Judge, Small Cause Court. (Para 23)

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) S. 20(2) — Applicability — Essentials.

In order to attract sub-sec. (2) of S. 20, it is not enough to show that the statement in the tenant's application was made designedly or with gross negligence. It must also be shown that the statement was calculated to prevent the landlord from receiving payment from the Controller. (Para 30)

A misstatement in the tenant's application for deposit of the rent will not make the deposit invalid under the Act but will entail the special consequences as are attached to it by the specific provisions of the statute. There should be no more penalty than the express penalty specified in the statute. (Para 30)

S. Burman, for Plaintiffs; R. Bagchi, for Defendant.

REFERENCES: Courtwar/Chronological/ Paras

('12) 16 Cal WN 447: (14 Ind Cas 380)	20
('15) 19 Cal WN 84: (AIR 1915 Cal 49)	19
('21) 48 Cal 138: (AIR 1921 Cal 34 FB)	13
('25) AIR 1925 Cal 907: (53 Cal 166 FB)	20
('37) 41 Cal WN 396: (AIR 1937 Cal 88)	19
('39) 43 Cal WN 659: (AIR 1939 Cal 430)	19
('43) 47 Cal WN 186: (AIR 1943 Cal 319)	13
('50) 54 Cal WN 389: (AIR 1950 Cal 263)	10
('42) AIR 1942 Mad 675(2): (ILR (1943) Mad 217)	21
('42) AIR 1942 Pat 146: (197 Ind Cas 651)	17
(1816) 1 Mer 361: (35 ER 707)	18
(1840) 10 Sim 617: (59 ER 755)	18
(1841) 4 Beav 1: (49 ER 237)	18
(1844) 7 Beav 514: (49 ER 1165)	18

JUDGMENT: This is a suit instituted on the 15th day of September, 1949, against the defendant for the recovery of possession of premises No. 63, Upper Circular Road, Calcutta, and for certain other reliefs by way of arrears of rent and mesne profits. The suit was originally instituted by one Kanai Lal Paul against the Indian Homoeopathic Medical Association which is a society registered under Societies Registration Act. The case of the plaintiff was that the defendant was a monthly tenant of premises No. 63, Upper Circular Road at a monthly rent of Rs. 178/4/6 inclusive of taxes from December, 1948, which was increased to Rs. 326/9/- by an order of the Chief Judge of the Small Cause Court, Calcutta.

(2) The cause of action pleaded in the plaint for eviction is ipso-facto determination of this tenancy under sec. 12(3) of the West Bengal Premises Rent Control Act, 1948. In order to

appreciate the point of ipso-facto determination in this case it is necessary to set out the fact of increase of rent made by the Additional Rent Controller and thereafter by the Chief Judge of the Small Cause Court. By an order of the 30th November, 1948, the Additional Rent Controller increased the rent to Rs. 196/- per month with effect from August, 1948. There was an appeal by the landlord against that order to the Chief Judge of the Small Cause Court, Calcutta. The Chief Judge by his order, dated the 19th April, 1949, increased the rent still further and standardised it at Rs. 275/- per month with effect from August, 1948 and Rs. 326/9/- per month with effect from December 1948. The main and only cause of complaint of the plaintiff is that the defendant failed to pay rent at the increased rate ordered by the Chief Judge.

(3) The plaintiff's case is that a sum of Rs. 979/11/- became due as arrears of rent for three consecutive months of April, May and June, 1949 by reason of the order of the Chief Judge increasing the rent. The plaintiff on the 13th September, 1949, through his solicitors gave notice to the defendant to vacate forthwith as the tenancy had been determined ipso-facto by reason of the defendant's failure to pay or deposit rent for three consecutive months in accordance with the provisions of the West Bengal Premises Rent Control Act, 1948.

(4) The original plaintiff died on the 31st October, 1950, and the present plaintiffs, the executors under the will of the deceased plaintiff, have been substituted by an order of this Court, dated the 15th March, 1951.

(5) The written statement of the defendant association contends that there has been in fact no ipso facto determination as alleged or at all. The defendant also pleads that on the 13th May, 1949, the defendant moved this Court on the Appellate Side in its revisional jurisdiction against the order of the Chief Judge and obtained a Rule and an ad-interim order staying operation of the Chief Judge's order. In those circumstances, the defendant submits in the written statement that the plaintiff has no cause of action against the defendant. The written statement was filed on the 3rd November, 1949.

(6) The issues raised by counsel for the defendant and accepted by counsel for the plaintiff are:

1. Has the defendant failed to pay or deposit in accordance with the provisions of the Rent Control Act of 1948 the rent payable by it for three consecutive months of April, May and June, 1949?

2(a) If so, has the tenancy been determined ipso-facto within the meaning of sec. 12 (3) of the Rent Act of 1948?

(b) If so, is the defendant entitled to any relief under the Rent Act of 1950?

3. To what reliefs, if any, are the plaintiffs entitled?

(7) On behalf of the plaintiffs Jagadindu Paul, one of the plaintiffs, has given evidence. On behalf of the defendant association its Secretary, Manindra Chandra Laha has given evidence. There is an admitted brief of documents, marked as Ex. A in these proceedings. The rent challans also have been exhibited in this suit on behalf of the defendant.

(8) It is common ground that rents at Rs. 196/- per month had been deposited with the Rent Controller regularly throughout the period in dispute. The rate of Rs. 196/- was fixed by the order of the Rent Controller on the 30th November, 1948, taking effect from August, 1948. After the date of the institution of the suit on the 15th September, 1949, the defendant has regularly and throughout paid or deposited with the Rent Controller rent at this rate of Rs. 196/- per month. No objection on that ground is taken by or on behalf of the plaintiffs. What is said is that the defendant failed to pay the standard rent as fixed by the Chief Judge on appeal and that failure continued for the three consecutive months mentioned in the plaint leading to the statutory forfeiture under sec. 12(3) of the Rent Act, 1948.

(9) The order of the Chief Judge of the Small Cause Court was made on the 19th April, 1949. That order fixed the standard rent at Rs. 275/- per month from August, 1948 and Rs. 326/9/- per month from December, 1948. So, the failure was to pay at the rate of Rs. 326/9/- per month for April, May and June, 1949.

(10) The defence put forward is that on the 13th May, 1949, the defendant association moved in the Civil Revisional Jurisdiction on the Appellate Side of this Court under sec. 115 of the Code of Civil Procedure against this order of the Chief Judge of the Small Causes Court, dated the 19th April, 1949. On that very day, i.e., on the 13th May, 1949, the defendant obtained a Rule calling upon the plaintiffs to show cause why the Chief Judge's order complained against should not be set aside. Pending the hearing of the Rule the defendant also obtained on this day, the 13th May, 1949, an "ad-interim stay of the operation of the said order". This stay order continued until the 16th December, 1949, when the Court discharged the Rule on the ground that the Court had no jurisdiction to entertain that application under sec. 115 of the Code of Civil Procedure. The judgment delivered on that occasion will be found reported in the 'Indian Homoeopathic Medical Association v. Kanai Lal', 54 Cal W N 389. The Bench in delivering judgment said:

> "A reasonable view to take of the matter is to hold that sec. 32(6) and (7) of the Act by necessary intendment has taken away the powers of this Court to interfere in revision under sec. 115 of the Code with an order passed by the Rent Controller or by the Chief Judge or the District Judge or the appointed Judge.
>
> "The preliminary objection, therefore, succeeds.
>
> "As the question involved was in a state of uncertainty parties will bear their own costs in these Revision cases.
>
> "The Rules are accordingly discharged."

(11) Between the 13th May 1949 and the 16th December 1949, therefore, there was this ad-interim stay of the operation of the order of the Chief Judge standardising the rent at Rs. 326-9-0 per month for the period in suit. The central point of the defence is that by reason of the stay of the operation of the order of the Chief Judge the forfeiture pleaded in the plaint and on which the plaintiffs claim their ground for eviction has not taken place. The forfeiture operates in this case only if the order of the Chief Judge is allowed to operate during the time pleaded in the plaint. Because the default on which reliance is placed by the plaintiffs is the default under the order of the Chief Judge and because the defendant had paid during that

period the rent at Rs. 196/- per month as standardised by the order of the Rent Controller & not as finally standardised by the Chief Judge. It is, therefore, argued on behalf of the defendants that on the 15th September 1949 when the suit was instituted the operation of the stay order being there no forfeiture had occurred as claimed in the plaint &, therefore, the plaintiff had no cause of action at the date when the suit was instituted.

(12) The answer on behalf of the plaintiffs is that whatever may have been the effect of an interim stay of the operation of the order of the Chief Judge at the time when it was made, it is now quite clear that by reason of the finding of the Court on the 16th December 1949 discharging the rule that it had no jurisdiction whatever in the matter, this order for interim stay was a mere nullity and void ab-intitio being an order passed without any jurisdiction. Therefore the 'ad-interim' stay of the operation of the order of the Chief Judge could not prevent the forfeiture under the statute.

(13) It is necessary to refer to certain authorities which have been placed before me in order to decide this controversy. In the case of — 'Jatis Chandra v. Kshirode Kumar', reported in 47 Cal W N 186 an observation is made to the effect that an action taken by the lower court in a suit in which further proceedings have been stayed by the Appellate Court in ignorance of such stay order, is not a nullity and that such action must be set aside by appropriate proceedings either by the Appellate Court or by the lower Court itself and, if not set aside, it cannot be totally ignored in another suit or other independant proceeding particularly if the stay order was ultimately discharged. On behalf of the defendants particular reliance has been placed on the cases observed at page 192 of that report. But in this case Mitter J. at page 193 was careful to observe:

> "The case would not in any way be analogous to the case where a Court having no jurisdiction, either territorial or pecuniary or over the subject-matter, assumes jurisdiction and passes a decree or order and does any other act. There is no analogy between a case where a Court passes an order in contravention of the stay order of the Appellate Court and the case, for instance, where the Small Cause Court Judge passes a decree for possession of immoveable property. An order passed by a Court or an act done by it in contravention of the stay order would be an irregular one and may even be regarded as illegal but it would only be an order passed or an act done in the illegal exercise of its jurisdiction and so would not in our judgment be a nullity. It will have to be set aside by appropriate proceedings."

That in my view is the crux of the problem in this suit. In this case the 'ad-interim' stay was not an order made in the illegal exercise of Court's jurisdiction but it is a case where there was no jurisdiction at all. The distinction between these two classes of cases is material to be observed and it leads to different results. In the Full Bench decision of this Court in — 'Hriday Nath v. Ramchandra', reported in 48 Cal 138 (FB) Mookerjee A. C. J. observes at page 148:

> "But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. We must not thus overlook the cardinal position that in order that jurisdiction may be exercised there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by Court without jurisdiction is void subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it."

The question between the parties in this suit today can be no longer be agitated whether the this Court has jurisdiction to revise the order of the Chief Judge under section 115 of the Civil Procedure Code or not. That point has been settled so far as the parties to this suit are concerned, and is 'res judicata'. I, therefore, proceed as I consider it is the true correct legal position, that this Court had no jurisdiction at all in the matter under section 115 of the Civil Procedure Code to revise the order of the Chief Judge.

(14) The question then is that the only way the interim stay can be interpreted to prevent the operation of the order of the Chief Judge so as to avoid the statutory forfeiture, is to say that this interim order was necessary for the Court to determine the very point whether it had jurisdiction or not. The only limitation on the doctrine that every order of a Court passed without any jurisdiction is void, is that the Court is given the power to decide whether it has that jurisdiction or not and an order so deciding is not void even though the decision is that the Court has no jurisdiction. It is not possible in my view to contend that except that particular decision of the Court any other decision where there exists no jurisdiction in the Court will not be void and not regarded as a nullity. Can the 'ad interim' stay be regarded as a valid order within jurisdiction on the ground that it is in aid of the Court finally determining against its jurisdiction? The order for stay was to prevent the operation of the Chief Judge's order. That was not necessary for the purpose of deciding the point of jurisdiction. It can be described as necessary only for the purpose of maintaining the 'status quo' during the time that the Court had to take to come to a decision on the question of jurisdiction. An order maintaining 'status quo pendente lite' is not an order deciding the point of jurisdiction. The maintenance of status quo was not essential in this case as its absence would not have rendered the position of any of the parties so irreparable as could not have been repaired by restoration and/or considerations of money. If the stay order were not granted, the defendant would have had to pay at the rate fixed by the Chief Judge and if the Court had held that it had jurisdiction to revise the order and in fact did so revise reducing the rate of rent, then the only question would have been either one of refund or of credit for the excess payment made during that time by the defendant. That, however, is a question which involves considerations of money and money alone.

(15) That being the position of the 'ad interim' order for stay, it must be regarded as void without jurisdiction. It is true that during such

stay the suit was filed. The filing of the suit may have been a violation of the ad interim order for stay. A violation of such order would ordinarily be ground for (a) proceeding in contempt, (b) or such steps as could be taken by the defendant by injunction or otherwise to restrain such violation. But in any of such proceedings it was open to challenge by the plaintiffs so violating the interim order to contend that the order was without jurisdiction, a nullity and not observable at all.

(16) The order of the 16th December, 1949, is an order which in my opinion must have retrospective effect, because the decision that the Court has no jurisdiction must mean that any order made prior to the decision is also without jurisdiction. Otherwise one has to reach the rather insensible conclusion that the Court had no jurisdiction in the final order but the Court had jurisdiction in the interim order. The only way that the Court could have jurisdiction in the interim order would have been an order of such nature which would be necessary to the determination of the point of jurisdiction itself. As I have said, such is not the nature of the interim order in this case.

(17) In a recent case of the Patna High Court in — 'Mohonlal Mahato v. Shibdhari Chaube', reported in AIR 1942 Pat 146, Harries C. J. as Chief Justice of the Patna High Court observes at page 148:

"Mr. Sinha, however, has contended that even assuming that the order was without jurisdiction, yet it would have been obeyed by the learned Munsiff had he received it in time. Doubtless the learned Munsiff would have obeyed the order out of loyalty to the superior court. It is not for the Munsiff to question the validity of these orders. Fortunately, however, for the appellant in this case the order was not transmitted to the learned Munsiff and the sale took place. We are now asked to say that when the sale took place there was in existence an order prohibiting it and that being so, it was a sale without jurisdiction. The order purporting to prohibit the sale was, as I have said, an order without jurisdiction. In short it was no order at all. And that being so, when the sale took place, there was no valid judicial order prohibiting it. It, therefore, took place in accordance with law and was a sale with jurisdiction."

There are a number of other decisions on this point, but it is unnecessary for me to refer to them as I feel the Full Bench decision of this Court is enough on the point.

(18) On behalf of the defendant reliance has been placed on a statement of the law at page 1344 in Vol. II of the 8th Edn. of Daniell's Chancery Practice. That statement is made in these terms:

"An order made by a branch of the Court which has not proper jurisdiction over the cause must till discharge be treated as a valid order and the party affected by such order is not at liberty to treat it as a nullity or obtain another order inconsistent with it from the proper branch of the Court."

The learned editor in support of this statement cites some cases. The first case cited is of — Boddy v. Kent', reported in (1816) I Mer. 361. But there the question was one of irregular exercise of jurisdiction. That is a case where it is said that an order to dismiss for want of prosecution after an abatement, although irregular, is not to be regarded as a nullity and consequently that order must be discharged before the plaintiff can obtain an order to revive the suit. I am not concerned here with an irregular order or an illegal exercise of jurisdiction but a total lack of jurisdiction altogether. The next case cited in Daniell's Chancery Practice is — 'Fennings v. Humphery', reported in (1841) 4 Beav 1. There again the question arose in this way. 'A' agreed to grant a lease of a vault to 'B' and also to erect a crane, etc., and do within a given time certain other acts which the Court could not decree to be specifically performed. 'A' having made default, 'B' sued in the court of the Master of Rolls for a specific performance but did not ask that the stated acts should be specifically performed. Pending that suit 'B' also commenced an action at law against 'A' for damages suffered in consequence of the non-performance of the acts. There it was held that the suit and action were not for the same matter and an order to elect obtained by the defendant was discharged. The point, therefore, in that case was entirely different from the problem that I have to decide. The Master of Rolls in fact at page 7 of that report observes:

"But it has been argued that even if the order were not originally valid, the plaintiff by her proceedings at law, after the order was served upon her, has lost the right of applying to discharge it. It is clear that a party who is served with an order, may be guilty of contempt for disobedience, in a case in which the order 'ought not to have been made'. He is not to determine by himself, but ought to come to the Court for relief, if advised that the order is invalid."

Here again, as I said, it is not a case before me where the order "ought not to have been made"; the order was made without any jurisdiction altogether. Here was a case where the order 'could' not have been made. The next case cited in Daniell's Chancery Practice is — 'Blake v. Blake', reported in (1844) 7 Beav. 514. That was a case where an order alleged to have been irregularly obtained was held not to be a nullity and that it operates until by a proper application it is discharged. There the Master of Rolls at page 514 says:

"I should feel great difficulty in treating the order to amend as a nullity. It may or may not be regular, but it must remain in operation until, upon a proper application, it is discharged."

I am here in this case not concerned with an irregular order but a void order which, as I read the authorities, is to be regarded as a mere nullity as though it was never made. The next case cited in Daniell's Chancery Practice is of — 'Wilkins v. Stevens', reported in (1840) 10 Sim. 617. That also was a case of an irregular order, not an order passed completely without jurisdiction.

(19) It is, therefore, clear that these authorities referred to in Daniell's Chancery Practice are only in support of the proposition that an order made wrongly or irregularly is not to be treated as a nullity but must be held to be operative until properly discharged in a properly constituted proceeding. But that only goes to show that an order which is without jurisdiction and not merely irregular or illegal is void and a nullity. The decision referred to on behalf of the defendant in — 'Birajmohini Dassi

v. Sarala Debi', 41 Cal W N 396, does not help the defendant. That case, if anything, is an authority for the proposition that it is open to a Court to determine whether it has jurisdiction or not to entertain a suit or a proceeding and if there is a judicial determination, the judicial determination assuming jurisdiction cannot be collaterally attacked. I am not concerned here at all with any judicial determination assuming jurisdiction; it is a case where there is judicial determination saying that the Court had no jurisdiction in the matter.

The other case relied on by Mr. Bagchi for the defendant is — 'Haripada v. Krishna Binode Roy', reported in 43 Cal W N 659. I should have thought that this was an authority which supports the conclusion I have stated and at which I have arrived. It says where there is no inherent lack of jurisdiction in a Court but the Court passes a decree on the erroneous view of the law which may be pleaded as a bar to the assumption of jurisdiction, such a decree is not a nullity. The case proceeded on the assumption that a decree or an order made where there is inherent lack of jurisdiction of the Court is nullity. The same point is illustrated also by the case of — 'Rashmoni Dasi v. Gunada Sundari Dasi', reported in 19 Cal W N 84. It will be found from the observations of Mookerjee, J. at page 87.

(20) On behalf of the plaintiffs Mr. Burman has referred me to the case of — 'Sahodra Koer v. Dhajadhari Goswami', reported in 16 Cal W N 447 to illustrate the principle that even in the case of disobedience to an injunction it must first be ascertained that the Court had jurisdiction over the subject matter in controversy and that even in that respect a clear distinction between an order erroneously made with jurisdiction and an order made absolutely without jurisdiction is observed. Mr. Burman has even referred me to the principle that in such cases where the Court's order is completely without jurisdiction, it is regarded as a nullity even to the extent that the executing Court can refuse to enforce the decree and for that purpose has drawn my attention to the Full Bench decision of this Court in — 'Gorachand Haldar v. Profulla Kumar', reported in AIR 1925 Cal 907 (FB).

(21) Lastly on behalf of the defendant Mr. Bagchi relied on the case of — 'Nageswara Ayyar v. Ganesa Ayyar', reported in AIR 1942 Mad 675 (2). In that case it is held that if the question which is alleged to create the want of jurisdiction is one which the Court itself is bound to decide, surely the matter is not one relating to jurisdiction. It is a fact like any other fact which the Court has to decide and if there is an error in the decision, it can only be remedied by an appeal or any other procedure known to law. I do not see how this proposition at all helps the defendant. If the question of jurisdiction depends on a question of fact such as residence, in that case then that question of fact must be determined by the Court and in determining such fact even if the court comes to a wrong decision that is not a case of inherent lack of jurisdiction in the Court but only a decision erroneous in law or in fact.

(22) There is also another consideration arising out of this problem. That is that the defendant obtained this ad-interim order ex parte without notice to the plaintiffs. The defendant chose a procedure which is without any jurisdiction. In my opinion a party before a Court whether he takes a point of law or a point of fact does so at his peril. That is exactly what has happened in this case. It was on the defendant's petition that the interim order was obtained and then finally it was found that the whole proceeding by revision under sec. 115 of the Code of Civil Procedure which the defendant had invoked was one without jurisdiction. The defendant could have deposited the higher rent as standardised by the Chief Judge even when it had filed the petition for revision under sec. 115 of the Code of Civil Procedure. The defendant association chose to do very much more and obtain that interim order for stay. If it had taken the benefit of that order it is common justice that it should take all the risks as well. When the court found later on that it had no jurisdiction, the statute, namely the Rent Control Act of 1948 had operated to create the statutory forfeiture provided therein. On this basis also and on this consideration I do not see why to allow the statutory forfeiture to operate in these circumstances would create any hardship or would be based on any unjust principle of law. It was a situation which was within the power of the defendant to avoid by taking no risk and putting in the standard rent with the Rent Controller as fixed by the Chief Judge. If it does not to do so and gamble in law, it will have to bear the loss which that gamble has produced.

(23) Finally assuming that the ad-interim order for stay was a good and valid order and within the jurisdiction of the Court in supposed aid of its decision about jurisdiction then the presentation of the plaint on the 15th September, 1949, was not a valid presentation at all, because the stay order was operative at that time. Then there is nothing in law to prevent me treating this plaint as being properly presented on the very first day that the ad-interim order was discharged, that is on the 16th December, 1949. The defendant cannot have it both ways. Either the ad-interim stay was void or it was not. My opinion is that it was void being completely without jurisdiction and is a mere nullity. But even assuming that it is valid, then the plaint would not be regarded as presented even on the 15th September, 1949 and can only be treated as a plaint instituted on the 16th December, 1949. In that event also the defendant has no defence, because on the 16th December, 1949, or on the 17th December, 1949, the statutory forfeiture had worked itself out and was complete as pleaded in the plaint, on the very day the Court declared itself without jurisdiction. The defendant had taken the risk and the risk had gone against it.

In order to get out of this situation Mr. Bagchi for the defendant has argued that the defendant will have a month's more time from the 16th December, 1949 with a view to avail of the deposit of rents by the defendant on the 15th January and 16th January, 1950. In my judgment the time for one month which Mr. Bachi claims is not permissible under the Rent Act of 1948. S. 12(1) (c) of the Rent Act 1948 provides that in the case where the Controller fixes the standard rent then in that case if his order does not mention the time within which the rent is to be paid, then such rent could be paid within one month from the date of such order. The 'Controller' is defined by sec. 2(2) of the Rent Act, 1948, to mean Controller ap-

pointed under sec. 28(1) and includes an Additional Controller and a Deputy Controller appointed under sub-sec. (2) of that section. Therefore, 'Controller' under sec. 12(1) (c) of the Rent Act, 1948, cannot mean the Chief Judge. Therefore, one month's time from the order of the Chief Judge after the 16th December can under no circumstances be allowed. At the best Mr. Bagchi's point would have been that one month's time from the 19th April, 1949 when the Chief Judge made the order could be allowed. Even that I am not convinced that it can be under the Act. But even then that would expire within a month after April or at the most a month after June, 1949. Even that does not help the defendant. On any view of the matter whether on the Act or on the specific time permissible thereunder, I find it impossible to justify grant of one month's time after the 16th December, 1949 when the High Court in its Revisional Jurisdiction discharged its Rule & vacated the interim stay order. Mr. Bagchi has also contended that the Rent Controller's order merged in the Chief Judge's order and, therefore, the time that would have been available from the Rent Controller's order would be available from the Chief Judge's order. I consider this argument to be fundamentally unsound because the effect of the Chief Judge's order was to completely replace the order of the Rent Controller and does not relate back to the latter order but itself specifies the time from when to come into effect. But here again even assuming this argument to be correct, it does not save the defendant on the facts of this case, because the time on that basis also had expired.

(24) On these grounds and for these reasons I hold that there has been defendant's failure to pay or deposit in accordance with the provisions of the Rent Control Act of 1948, the rent payable for three consecutive months of April, May and June 1949. I, therefore, answer the first issue in the affirmative.

(25) That being so, the tenancy must be regarded as determined 'ipso facto' under section 12(3) of the Rent Act of 1948, and Issue No. 2(a) must be answered also in the affirmative.

(26) Then comes the question whether the defendant is entitled to any relief under the Rent Act of 1950 as amended. By section 18 (5) of Rent Act of 1950 as amended relief is given to tenants against whom suits were pending in the trial court and where no decree for ejectment could be passed except on the ground that the interest of the tenant in such premises had been 'ipso-facto' determined under section 12(3) of the Rent Act of 1948. It is clear on the pleadings and on the facts in this case that section 18(5) of the Rent Act of 1950 as amended is attracted. It follows, therefore, that this Court shall exercise the powers of granting reliefs against ejectment given by section 14 of the Rent Act of 1950 following the provisions and procedure of that section as far as may be necessary.

(27) On this point certain facts may be stated briefly, and fortunately they are admitted. It is admitted that since January 1950 upto date all rents at the standard rent fixed by the Chief Judge have been paid and there are no arrears of rent. It is also admitted by Counsel Mr. Burman for the plaintiffs that he does not rely on any pre-Act default in order to deprive the defendant of the benefit of section 14 of the Rent Act of 1950.

(28) The only point on which Mr. Burman on behalf of the plaintiffs argued that the defendant is not entitled to any reliefs is that for the period from November 1950 up to date the deposit by the defendant with the Rent Controller, although made, in fact, was not validly made in accordance with the Rent Act of 1950. The point that he makes is this. The original plaintiff Kanai Lal Pal died on the 31st October, 1950. By a letter the plaintiffs' solicitor informed the defendants' solicitor of the death of Kannai Lal Pal. That letter is dated the 18th November, 1950 and marked Exhibit C. The chalans that have been tendered and exhibited in this suit show that all these deposits have been made in the name of the dead man Kanai Lal Pal in spite of the knowledge of the defendant that the man was dead. According to Mr. Burman the deposit, therefore, in the name of the dead man Kanai Lal Pal was not a deposit within the meaning of the Rent Act of 1950 and this non-observance continued from at any rate the 15th March, 1951 until date. The date 15th March, 1951 is taken as being the safest date for Mr. Burman because it was on that date the order for substitution was made in this suit to which the defendant was a party and where the grant of probate and the plaintiffs being the executors were recited. Therefore, it is argued by Mr. Burman that at any rate from the 15th March 1951 until today there has been a default within the meaning of the proviso to section 14 of the Act so as to exclude the defendant from the benefit of section 14. He says that although the 18 months have not expired, the three occasions with two months each, that is, six months, had expired with the deposit in the wrong name. Therefore it is argued that there has been no valid deposit in accordance with S. 19 of the Act of 1950 as laid down in Cl. (1) of proviso to sub-section (1) of S. 12 of that Act.

(29) A determination of this point depends on the construction of sections 19 and 20 of the Rent Act of 1950. On behalf of the plaintiffs reliance is placed on sub-section (2) of S. 20 of the Rent Act of 1950 which provides that deposit shall not be considered to have been validly made if any statements in the tenant's application depositing the rent whether made designedly or with gross negligence were calculated to prevent the landlord from receiving payment from the Controller. The design and gross negligence, according to Mr. Burman, are apparent from the answers of his client in the box Jogindra Nath Pal from questions 10 to 15. On behalf of the defendant, Manindra Chandra Laha has said in answer to question 41 that the defendant had taken it that, it was a question of estate and it would not involve any legal technicality.

(30) The only question here is that in order to attract sub-section (2) of section 20 it has to be established that a statement is made in the tenant's application designedly or with gross negligence and which was calculated to prevent the landlord from receiving payment from the Controller. It is not enough under this section that the statement was made designedly or with gross negligence. It must also be shown that the statement was calculated to prevent the landlord from receiving payment from the Controller. I will assume and accept for the time being Mr. Burman's

suggestions that there was design or gross negligence in this case. But that is of very little assistance to Mr. Burman. He has to show further that this deliberate insertion of the dead father's name was calculated to prevent the present plaintiffs, the executors and the sons of the deceased plaintiff, from receiving payment from the Controller. Mr. Burman appeared to suggest that the name mentioned being that of a dead person, the notices from the Rent Controller of the deposits of such rents would go to the dead person and, therefore, his clients would not be able to know whether any deposits were made or not, and the absence of this knowledge or information would prevent the plaintiffs from receiving the payment from the Controller. But the situation is not so helpless as this argument implies. The Rent Controller also would not know that the person was dead. That being so, the Rent Controller would send the notices addressed to the dead person. But what is the address? It is the same address where the present plaintiffs live. That appears from the cause title to the plaint; and the only amendment was an amendment of substitution of the present plaintiffs, but the address remained the same as the address of the deceased plaintiff. It requires more than a little strain on my imagination to think that the present plaintiffs would not know about the notices addressed by the Rent Controller to the father at the same house where the plaintiff's sons are living now and that they will thus be prevented from receiving the rents from the Rent Controller. Apart from this even, any enquiry at the Rent Controller's office would have revealed if any rents were being deposited &, if so, how. I am convinced that this is not a conduct or such a misstatement in the facts of this case which can be regarded as "calculated to prevent the landlord from receiving payment from the Controller".

The easiest thing in such circumstances would be for the plaintiffs to state to the Rent Controller that they are the present owners and that they are the executors and have succeeded to the deceased landlord, the plaintiff in whose name the rents have been deposited, and as such they are entitled to the rent. Provision is made in sub-sections (6) and (7) of section 19 of the Rent Act of 1950. Formerly under section 20 of the Act of 1948 a wrong name or address of the landlord meant only a penalty for Rs. 500/-. In the present law under sub-section (9) of Section 19 of the Rent Act of 1950, the landlord may complain to the Controller that the statements in the tenant's application of the reasons and circumstances which led him to deposit the rent are untrue, and the Rent Controller after giving the tenant opportunity of being heard can even now levy a fine on the tenant which may extend to Rs. 500/- and there is provision even for paying that fine to the landlord as compensation. I would therefore follow the well-known principle that there should be no more penalty than the express penalty specified in the Statute. It only means this that in the circumstances such a mis-statement in the tenant's application for deposit of the rent will not make the deposit invalid under the Act but will entail the special consequences as are attached to it by the specific provisions of the statute. I hold that the mis-statement in this case was not in fact "calculated to prevent the landlord from receiving payment from the Controller."

(31) I, therefore, answer Issue No. 2 (b) in the affirmative and hold that the defendant is entitled to relief under the Rent Act of 1950.

(32) This leaves the last issue which is about the reliefs of the plaintiffs.

(33) The relief that the defendant is entitled to under section 14 in this case has to be considered. It is an admitted fact that no rent is due, and it is also admitted that all rents at the proper rate stand deposited with the Rent Controller up to date. That being so, it is not called for to make an order within the meaning of the sub-section (1) of section 14 of the Rent Act of 1950 which requires the Court to determine the amount of rent legally payable by the tenant and also the amount of interest. But under S. 14 (1) the question of costs remains to be determined.

(34) On the question of costs I have heard at length the Counsel on either side. I think it is necessary to state my conclusions clearly on the point. The present plaintiffs got themselves substituted, as I have said, by the order of the Court on the 15th March 1951. By that date the amendment of the Rent Act of 1950 had already come into force. The original plaintiff died on the 31st October, 1950 before the amendment of the 1950 Act came into force. The suit might have been allowed to abate but was not. The present plaintiffs got themselves substituted in March, 1951. When they got themselves substituted as such plaintiffs and they pursued the suit, it seems to me to be quite clear that the plaintiffs could never have succeeded in their claim for ejectment because at the time of the order of the 15th March 1951, having regard to the amendment of Section 18 (5) of the 1950 Act, relief had to be given in the same manner as I have done today. The position was exactly the same as now. On that day also, the 15th March 1951, it is an admitted fact that all rents, even the rents fixed by the Chief Judge, had been deposited with the Rent Controller. So whether the 'ipso facto' determination of tenancy was there or not, the plaintiffs could never succeed in ejectment. If there was no 'ipso facto' determination, the plaintiffs' suit would have failed 'in limine' because there was no notice to quit to determine the tenancy. If there was 'ipso facto' determination, even in that case the plaintiffs' suit for possession failed. Therefore, I think the proper order for costs would be that the plaintiffs should be entitled to the costs until the 15th March 1951. Mr. Burman put forward Rs. 1,000/- as the reasonable costs with which he would be satisfied on behalf of the plaintiffs, Mr. Bagchi for the defendants has agreed to accept that sum.

There will, therefore, be an order for costs for the sum of Rs. 1,000/- against the defendant. This particular order for costs is by consent of both counsel for the plaintiff and the defendant.

(35) This is the only order that I will and can make under section 14 (1) (2) and (3) of the Rent Act of 1950. A sum of Rs. 250/- is already lying with the plaintiffs' solicitor towards the costs. Giving credit for that sum, the balance of Rs. 750/- is payable by the defendants under this order. I fix the 15th day from the date of this order excluding the date of the order, as the day on which the payment of this cost should be made. It is agreed between counsel that this sum of Rs. 750/- will

be paid by the defendants' solicitor to the plaintiffs' solicitor. If, within the time so fixed, the defendant pays the sum of Rs. 750/-, then the suit for possession shall be dismissed. In default, the Court will proceed with the hearing of the suit. Liberty to the plaintiffs' solicitor to pay to the plaintiffs all amounts deposited with them under order dated 20th December 1949 and also liberty to the plaintiffs to withdraw all monies deposited with the Rent Controller. I, therefore, answer the third and last issue in these terms just stated.

B/R.G.D. Order accordingly.

A. I. R. 1953 CALCUTTA 123 (Vol. 40, C. N. 38)

CHAKRAVARTTI AND P. B. MUKHARJI JJ.

Udaychand Mahatab, Appellant v. Rammoy Hajra and others, Respondents.

A. F. O. O. No. 6 of 1950, D/- 30-11-1950.

(a) Tenancy Laws — Bengal Tenancy Act (8 of 1885), Ss. 163, 164 and 165 — Absence of bidders — Nothing whatever done by way of holding sale — S. 164 is not complied and there must be a fresh sale proclamation.

Under S. 163, if all the formalities of holding a sale are gone through, then only the question whether the absence of bidders prevents S. 164 being complied with would arise. But in a case, where, nothing whatever by way of holding the sale is done and as soon as the absence of any likely bidders is noticed, the sale is adjourned, even the minimum compliance with S. 164, which must in any event be required, is absent and there should be a fresh sale proclamation under S. 163 on the ground that S. 164 had not been complied with. (Para 7)

(Obiter): It is not necessary under S. 165 that there must in all cases be some actual bidding. A case where no bidders appear is also a case where the bidding does not reach a sum sufficient to liquidate the amount of the decree and costs, because there being no bidding, no sum is offered as the price of the property and necessarily there is no amount which is sufficient to liquidate the decree-holder's dues. (Para 6)

(b) Tenancy Laws — Bengal Tenancy Act (8 of 1885), Ss. 163 to 165 and 168-A — Rent sale must be of entire holding — Joint decree for rent against several judgment-debtors — Court has no power to order sale of a portion of holding at instance of judgment-debtors who have paid their share of decretal dues.

In execution of a joint decree for rent against several judgment-debtors, some of them deposited their half share of decretal dues corresponding to their interest in the holding. In a subsequent execution, the judgment-debtors who had paid their share of decretal dues prayed that the share of the other judgment-debtors who had not paid their share of the decretal dues should be put up to auction in the first instance and that if the bidding did not liquidate the decretal amount then the entire holding including their share should be put up for sale.

Held that the prayer of the judgment-debtors could not be granted. The whole scheme of Chapter XIV of the Act, in which Ss. 163 to 165 occur, is to provide for the sale of an entire tenure or holding for its own arrears of rent and while, previously, the landlord could sell less, if he was prepared to be content with a money sale, it is doubtful if he can do so now, in view of the provisions of S. 168-A. In any event, he could not be compelled even previously and cannot be compelled now. If that be so, to hold that in a particular case the court may direct under S. 163 that what shall be offered for sale in the first instance will not be the entire tenure or holding but the share of one or more of many co-judgment-debtors will be to import into the section provisions which are not there and which run counter to the clear language and intent of the section. The clear implication of the sections is that if a sale under their provisions is to be held, the offer and the sale must both be of the entire tenure or holding, the only condition being that the first offer must be for a sale subject to incumbrances and the second offer, if necessary, for a sale with power to avoid them. AIR 1949 Cal 228. Doubted. (Para 11)

Chandra Sekhar Sen and Prafulla Kumar Chatterjee (Jr.), for Appellant; Hemendra Kumar Das, S. N. Banerjee (Sr.) and Purushottam Chatterjee, for Respondents.

REFERENCE..... Para.
('49) AIR 1949 Cal 228 10

CHAKRAVARTTI J: Two points have been urged in support of this appeal. The first is that the executing court was not right in directing that the eight annas share of judgment-debtors Nos. 4 and 5 in the tenure concerned should be put up to auction in the first instance and that "if the bidding did not liquidate the decretal dues," the entire tenure, including the other eight annas share of judgment debtors Nos. 1 to 3, should then be put to auction. The second ground urged is that the executing court was not right in holding that there must be a fresh sale proclamation under section 163 of the Bengal Tenancy Act for the reason that there had been no bidding at the previous attempt at a sale.

(2) The facts, broadly stated, are that the appellant obtained a rent decree on January 13, 1948, against a number of judgment debtors, of whom only five need now be considered. It is stated, and there is no dispute on the point, that judgment-debtors Nos. 1 to 3 who are respondents Nos. 1 to 3 in this appeal, have already paid up a half share of the decretal dues by way of a deposit made in court in a previous execution case. In the present execution, a proclamation of sale was first issued under section 163 of the Bengal Tenancy Act, but on the date fixed for the sale, which was to be a sale subject to encumbrances, there were no bidders. It appears that thereafter the decree-holder asked for the issue of a fresh proclamation of sale, with power to annul encumbrances, and that prayer was allowed by an order passed on November 9, 1949. Subsequently, the order under appeal was passed and the order of November 9, 1949 was set aside, because the learned Judge thought that the stage of section 163 had not been passed, inasmuch as the tenure had not actually been put up for auction and necessarily there had been no actual bidding.

(3) I shall deal with the second point first.

(4) Section 163 of the Bengal Tenancy Act provides that in addition to the particulars mentioned in Order XXI, r. 66 of the Code of Civil Procedure, the proclamation of sale shall announce that the tenure or holding will first be put up to auction, subject to encumbrances, and will be

sold subject to those encumbrances if the sum bid is sufficient to liquidate the amount of the decree & the costs, and that otherwise, it will, if the decree-holder so desires, be sold on a subsequent date, of which due notice will be given with power to annul all encumbrances. Section 164 of the Bengal Tenancy Act lays down the manner in which the tenure or holding is actually to be put up to sale. The next section is section 165 which provides for the issue of a fresh sale proclamation, announcing a sale with power to avoid all encumbrances,

"if the bidding for a tenure or a holding at fixed rates put up to auction under section 164 does not reach a sum sufficient to liquidate the amount of the decree and costs."

(5) The contention of Mr. Sen was that it was not necessary under the section that there must in all cases be some actual bidding. If it were necessary to decide this point, I should be prepared to agree with Mr. Sen, because unless it was held that a case where, in spite of all the preliminary steps having been correctly taken, no bidders appeared, was a case where section 164 had been complied with, it might in certain cases become wholly impossible to hold any sale at all where in the first, or the second, or the third attempt, no bidders might ever appear. If it is to be held that as a matter of law the parties cannot proceed to the stage of section 165 unless at some attempted sale, subject to encumbrances, some bidding has taken place, it is clear that in a case where there is a perfectly bona fide absence of bidders even though repeated attempts at a sale have been properly made, the property cannot be brought to sale, with power to annul encumbrances, at all.

(6) Mr. Das, who appears on behalf of the respondents, admitted the cogency of this consideration but his suggestion was that the section should be so construed as to mean that there should at least be a second attempt. It appears to me that either the section must be construed in a literal sense and it must be held that some actual bidding is always essential, or it must be held that even a single attempt, though no bidders may appear, is sufficient, provided the sale is otherwise in order. There can be no excuse or reason for drawing a line at the second sale rather than at the first, or any subsequent sale. The only practical way, it seems to me, of construing the section is to hold that a case where no bidders appear is also a case where the bidding does not reach a sum sufficient to liquidate the amount of the decree and costs, because there being no bidding, no sum is offered as the price of the property and necessarily there is no amount which is sufficient to liquidate the decree holder's dues. In a case of no bidding, the amount expected to be realised by the sale is nil and the insufficiency to meet the decretal dues is not a mere deficiency but a total absence of any amount which could be applied to the satisfaction of the decretal amount & costs. A case where there is no amount at all, available for application to the satisfaction of the decree-holder's dues, obviously includes a case where there is some amount, but it is insufficient. The greater includes the less.

(7) It is, however, not necessary to decide this point finally in this appeal, because the learned Judge has not only held that there was actually no bidding but also that the tenure "was not actually put up for auction". The second finding can only mean that even the process of offering the tenure for sale and doing all things incidental thereto was not gone through. I am of opinion that if all the formalities of holding a sale are gone through, then only the question whether the absense of bidders prevents section 164 being complied with would arise. But in a case, like the present one where according to the record, nothing whatever by way of holding the sale was done and as soon as the absence of any likely bidders was noticed, the sale was adjourned it seems to me that even the minimum compliance with section 164 which must in any event be required, was absent. I am accordingly of opinion that on the facts of the present case, the learned Judge was right in holding that there should be a fresh sale proclamation under section 163 on the ground that section 164 had not been complied with.

(8) The first point arises in the following way. I have already stated that judgment-debtors Nos. 1 to 3 have paid up a half-share of the decretal amount which corresponds to their interest in the tenure. Judgment-debtors Nos. 4 & 5 have, so far as it appears from the record, paid nothing. In those circumstances judgment-debtors Nos. 1 to 3 made a prayer before the learned Judge which can be best set out in his own words.

"Their case is", observes the learned Judge, "that the judgment-debtors 4 and 5 who have eight annas share in the tenure in arrears have not paid up their share of decretal dues. So their prayer is that the entire tenure should be advertised for sale but eight annas share of the judgment-debtors 4 and 5 should be put up to auction in the first instance and if the bidding does not reach a sum sufficient to liquidate the decretal dues, the entire tenure shall, thereafter, be put up to auction. The judgment-debtors 1 to 3 are willing to bear costs of service of fresh sale proclamation and publication."

The learned Judge allowed this prayer and has directed the issue of a sale proclamation in terms which I have already set out at the beginning of this judgment.

(9) The ground upon which the learned Judge made this order is as stated by him, that the prayer of the judgment-debtors Nos. 1 to 3 was not either unreasonable or inequitable and it was fit to be allowed, inasmuch as the decree-holders would not be prejudiced in any manner whatsoever. On behalf of the appellant Mr. Sen contended that there was no authority in law for splitting up the property offered for sale in the manner the learned Judge had done, however equitable such splitting up might in the circumstances of a case be. Mr. Das, on the other hand, contended on behalf of judgment-debtors Nos. 1 to 3 that while he could point to no specific provision of law authorising the course which the learned Judge had adopted, there was no express bar contained anywhere in any law and that the circumstances of the case were such that the order made by the learned Judge was an eminently fit and proper order. In support of this part of his contention, Mr. Das pointed out that judgment-debtors Nos. 4 and 5 were people in affluent circumstances and there was no reason why the entire burden of the decretal dues should be made to fall on judgment-debtors Nos. 1 to 3 and no good reason why the decree-holder should desire to cast it on them to the complete relief of their fellow judgment-debtors. If the sale was not held in the form directed by the learned Judge, Mr. Das's clients would have put in the balance of the decretal dues as well.

(10) In elaborating his contention Mr. Sen submitted that a decree-holder might conceivably refrain from proceeding against a part of the property, or the share of one or some of several judgment-debtors, but judgment-debtors under a

joint decree could not insist that the liability under the decree should be distributed as between them according to their choice. With reference to the option which, he said, the decree-holder might probably have, he referred to clause (a) of section 168A(1) of the Bengal Tenancy Act, as interpreted by a decision of this Court in the case of — 'Ramdas Mukhopadhya v. Uday Chand, AIR 1949 Cal. 228'. There it was held by Blank and Chunder JJ. that within the limit of the tenure or holding, there was nothing to prevent a decree-holder from further limiting the sale to the interest or interests of the judgment-debtor or judgment-debtors against whom he was proceeding, as this would be for the protection of tenants and would save tenants from harassment. Mr. Sen contended that he was not concerned with disputing that proposition which might be correct; but, according to him, the principle could not be extended to judgment-debtors who were under a joint liability in respect of the entire decretal amount.

(11) As at present advised, I doubt whether section 168A(1) (a) does imply that even the decree-holder has the option which the Bench decision cited by Mr. Sen found in its provisions. As is well known, the primary concern of that section is to provide that a landlord decree-holder cannot execute a decree for rent, whether it be a rent decree or money decree, against any property other than the entire tenure or holding to which the decree relates except where the tenancy has ceased to exist in other than certain ways. The property which is made liable to execution under that section is the entire tenure or holding and nothing less, and if the object of the section be to limit the rights of the landlord and the liability of the tenant to the tenure or holding concerned, it is difficult to concede that the section yet leaves room for some internal permutation and combination as between the different judgment-debtors at the option of the decree-holders. Such attempts at adjustment of the respective liabilities of the judgment-debtors will give rise to extremely complicated questions and, as far as I can see, the equality of the common liability of all the co-judgment debtors under a joint decree will be very seriously disturbed. Nor is it easy to see how it will be possible to work out the effect of a sale, limited to the interests of some of the judgment-debtors, if it is to operate as a rent-sale and, particularly, if it becomes necessary to sell with power to annul encumbrances.

It is, however, not necessary for us to record a formal dissent from the proposition laid down in the case cited, because we are concerned in the present case with the rights of judgment-debtors. As I have already stated, the contention of Mr. Das was that if there was no express provision of law, authorising such distribution of the decretal liability as the learned Judge had made, equally there was no provision forbidding such distribution. I feel constrained to hold that there is a provision forbidding such distribution which is contained in section 163 of the Bengal Tenancy Act itself. Sub section (2) of that section states what shall be offered for sale and sections 164 and 165 state what shall be sold. Under section 163 the proclamation must announce that "the tenure or holding" will be put up to auction and since the proclamation relating to a sale under section 165 must be in the same terms, there must be a similar announcement in respect of a sale under that section as well. Again, proceeding to the actual sale, section 164 says that "the tenure or holding" shall be sold in the case of sales, subject to encumbrances and the same provision is repeated in section 165 in the case of sales with power to avoid all encumbrances.

It is thus clear that what the Act contemplates is that the property offered for sale must be the tenure or holding and that the property which should be sold must also be the tenure or holding. Indeed, the whole scheme of Chapter XIV of the Act, in which sections 163 to 165 occur, is to provide for the sale of an entire tenure or holding for its own arrears of rent and while previously, the landlord could sell less, if he was prepared to be content with a money sale, it is doubtful if he can do so now, in view of the provisions of section 168A. In any event, he could not be compelled even previously and cannot be compelled now. If that be so, to hold that in a particular case the court may direct under section 163 that what shall be offered for sale in the first instance will not be the entire tenure or holding but the share of one or more of many co-judgment-debtors will be to import into the section provisions which are not there and which run counter to the clear language and intent of the section. The only alternatives which sections 163 to 165 contemplate are sale subject to encumbrances and sale with power to avoid encumbrances. No other alternative in the form of a sale of anything less than the entire property such as the sale of a share or the sale of a demarcated portion, is within the purview or contemplation of any of those sections. The clear implication of the sections appears to me to be that if a sale under their provisions is to be held, the offer and the sale must both be of the entire tenure or holding, the only condition being that the first offer must be for a sale subject to encumbrances and the second offer, if necessary, for a sale with power to avoid them.

(12) If that be the clear import of the sections, hard cases can be no justification for making bad law, — bad in the sense of being contrary to the provisions of the Statute. All that Mr. Das said as regards the obvious inequity of throwing the entire burden on judgment-debtors Nos. 1 to 3 may well be true. Indeed, Mr. Sen, when asked specifically why his client was not accommodating judgment-debtors Nos. 1 to 3 in some way, could only say that his instructions were to press for what the law allowed. I feel constrained to hold that the law does allow what Mr. Sen's client presses for, although the course adopted in insisting on his legal rights in the form chosen by him may not be very meritorious.

(13) For the reasons given above, I am of opinion that the appeal ought to succeed on the first ground taken by the appellant.

(14) The appeal is accordingly allowed. The judgment and the order of the learned Judge are set aside and he is directed to give proper directions as regards the terms of the next sale proclamation in the light of the observations contained in this judgment.

(15) There will be no order as to costs in this appeal.

(16) P. B. MUKHARJI, J.: I agree.

B/K.S. Appeal allowed.

A. I. R. 1953 CALCUTTA 125 (Vol. 40, C. N. 39)

HARRIES C. J.

Sm. Chitra Devi and others, Petitioners v. Badri Bisal Bhakat and others, Opposite Party.

Civil Rule No. 175 of 1949, D/- 11-2-1952.

Evidence Act (1872), S. 115 — Estoppel by mistake — Decree-holder putting up his own property, by mistake, to sale in execution — He cannot subsequently apply under S. 151, C.P.C. to set aside sale on this ground — (Civil P. C. (1908), S. 151, O. 21 Rr. 89 and 90).

Where in execution of his decree, the decree-holder represents, in putting up a certain property to sale, that it was the property saleable in execution, which can be purchased by any person as the property of the judgment-debtor and acting on this representation the auction-purchaser purchases the property and thus changes the whole of his position, it is not open to the decree-holder subsequently to say that what he put up to sale was not the property of the judgment-debtor but his own property, that is, what he represented was not the true state of facts. In such a case his application under S. 151, C.P.C. for setting aside the sale on this ground will not lie. (Paras 4 & 6)

Anno: Civil P. C., S. 151 N. 2; O. 21 R. 89 N. 12; O. 21 R. 90 N. 2; Evidence Act, S. 115 N. 4, 7.

Syama Charan Mitter, for Petitioners; Lala Hemanta Kumar, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
(1900) 4 Cal WN 533: (27 Cal 407 PC) 4
('22) AIR 1922 Mad 63 (1): (70 Ind Cas 569) 4

ORDER: This is a petition for revision of an order of an appellate court upholding an order of a learned Munsif made under Sec. 151 of the Code of Civil Procedure.

(2) The decree-holder respondent put up a property for sale in execution of a decree which he held against a judgment-debtor. That property was purchased by the petitioner and the sale was duly confirmed by the court. Later an application was made by the respondent under Sec. 151 asking that this sale be set aside on the ground that by a mistake the decree holder had sold his own property in execution of the decree. The courts held that such was the case and have set aside the sale.

(3) A point was taken that the proceedings were misconceived and could not take place under sec. 151. That I think would be a good objection. But it is pointed out by the court that these proceedings are in the nature of a review of an order made in execution. However it is unnecessary to pursue this point because I am satisfied that the respondent is estopped from putting forward the present contention.

(4) In putting up this property for sale in execution of his decree the respondent represented that the property was property saleable in execution which could be purchased by any person as the property of the judgment-debtor sold in execution. There was a clear representation to that effect and the petitioner acted on that representation and changed the whole of her position by purchasing the property. It appears to me that it is not open to the respondent now to say that what he represented was not the true state of facts. It seems to me that this case is very similar to a Madras case — 'Ramasami Konan v. Kulandaivelu Pillai', AIR 1922 Mad 63 (1). The lower appellate court distinguished that case on the ground that here the error appeared on the face of the proceedings & relied upon a Privy Council case in 'Taralal Singh v. Sarobar Singh', 4 Cal W. N. 533. If of course it appeared on the face of this execution that the respondent was selling his own property, no question of estoppel would arise. But it does not appear on the face of the execution proceedings. On the contrary the execution proceedings showed that the respondent was selling the judgment-debtor's property. It seems to me quite clear that the respondent is estopped from now alleging the true state of affairs.

(5) The courts below also appeared to have thought that the respondent was illiterate and did not know Bengali. But they have overlooked the fact that the respondent had signed a number of documents in Bengali script and verified them. In any event it appears to me quite clear that the respondent is estopped from contending that the property sold was his and that being so, the orders of the courts below cannot be maintained.

(6) The orders of the courts below are therefore set aside and the application which was made under sec. 151 of the Code of Civil Procedure to set aside this sale is dismissed with costs here and in the courts below.

B/R.G.D. Application dismissed.

A. I. R. 1953 CALCUTTA 126 (Vol. 40, C. N. 40)

K. C. DAS GUPTA AND LAHIRI JJ.

Mafazzal Hossain and others, Tenants-Petitioners v. Mt. Ayesha Bibi, Landlord-Respondent.

Civil Revn. No. 1104 of 1951, D/- 4-12-1951.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32(3) — Local inspection by appellate Court — Effect on hearing of appeal — (Civil P.C. (1908), S. 107, O. 18 R. 18).

Where, in order to understand the report of the Inspector who was appointed by the Rent Controller for the purpose of holding a local inspection, the appellate Court held a local inspection; but as a result of the local inspection no new evidence was admitted in the case.

Held that the local inspection held by the appellate court did not in any way vitiate the hearing of the appeal. AIR 1933 Cal. 475, Disting. (Para 20)

Anno: C. P. C., S. 107 N. 9, O. 18 R. 18 N. 1.

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9(e) — Whole of premises not let out on 1-12-41 — Basic rent.

Where the whole of the premises were not let out on 1-12-1941, the court is justified under S. 9(e) in taking the rent which would have been reasonably payable for the premises if let out on 1-12-1941, as the basic rent. (Para 2)

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 31 — Report of Inspector — Consideration of — Inspector not examined as witness — Value of report — (Civil P.C. (1908), O. 26 R. 10).

The Rent Controller is empowered to take into consideration the report submitted by the Inspector. The value of the report submitted by the Inspector is certainly open to question if the Inspector is not called as a witness in the case, but the report itself does not become inadmissible because the Inspector has not been examined as a witness. (Para 3)

Anno: C.P.C., O. 26 R. 10 N. 4, 5.

Nirmal Chandra Sen, for Petitioners; Bejoy Bhose, for Opposite Party.

REFERENCE ..... /Para
('33) 37 Cal WN 143: (AIR 1933 Cal 475) 2

LAHIRI J.: This is an application in revision at the instance of the tenant and it is directed against an order fixing the standard rent in respect of the premises held by the tenant. It appears that the tenant was holding the premises in question at a monthly rent of

Rs. 268-2-0 and on the 6th of February the tenant instituted Case No. 136/13 of 1950 for fixation of the standard rent under the Act of 1948. Under the order of the Rent Controller a local inspection was held by an Inspector. The Inspector submitted his report on the 14th of March, 1950. After considering the evidence in the case and the report of the Inspector the Rent Controller fixed the standard rent at Rs. 247-4-0 with effect from March, 1950. Against that decision both the tenant and the landlord filed two appeals, the tenant's appeal being Appeal No. 1056 of 1950 and the landlord's appeal being Appeal No. 1147 of 1950. The appellate court allowed landlord's appeal and dismissed the tenant's appeal. As a result of the decision of the appellate court the rent of the premises in question has been fixed at Rs. 291-3-9 pies with effect from May, 1950. Against that decision the tenant has obtained the present Rule.

(2) It appears from the judgment of the appellate Court that the appellate Judge personally inspected the premises and heard arguments of parties. Mr. Sen appearing in support of the Rule has argued that under the Act of 1950 the appellate Judge had no jurisdiction to hold local inspection and therefore the judgment of the appellate court has been vitiated by what he saw in the course of his personal inspection of the premises in question. Sec. 32(3) of the West Bengal Premises Rent Control Act of 1950 provides that the powers and procedure of the court in entertaining and hearing the appeal shall be the same as in appeals from orders under the Code of Civil Procedure, 1908. In the present case there was before the appellate court a report made by the Inspector who was appointed by the Rent Controller for the purpose of holding a local inspection and it appears that the appellate court held the local inspection for the purpose of understanding that report which was submitted by the Inspector.

As a result of the local inspection no new evidence has been admitted in the case and we cannot say upon the materials on the record that the local inspection held by the appellate court has in any way vitiated the hearing of the appeal. Mr. Sen has also relied upon the decision of this Court in the case of — 'Amulya Kumar v. Annada Charan Das', 37 Cal. WN 143. This case however deals with the powers of the Court under O. XXVI, R. 4 C.P.C. That case has no application to the facts of the present case because here the powers are to be regulated by sec. 31 and sec. 32 of the West Bengal Premises Rent Control Act. It cannot be said that the court in holding an inspection under the Rent Control Act in the present case is exercising any of the powers conferred by O. XXVI, R. 4 of the Code of Civil Procedure.

Upon the materials on the record the appellate court has come to the conclusion that the tenancy consists of three parts; one part comprising an area of 298 square feet was let out on the 1st of December, 1941, at a rent of Rs. 175/- per month. Besides this there are two other parts which were subsequently added to the tenancy and the subsequent additions consisted of a corridor portion comprising an area of 86 square feet and a rear portion which was known as Suite No. 6. The appellate Court has arrived at the rent of the corridor portion of the tenancy at the rate which was paid in respect of the original portion on the 1st of December, 1941. In doing this the appellate court has presumably acted under cl. (e) of sec. 9 of the West Bengal Premises Rent Control Act of 1950.

We are of the opinion that this clause does apply to the circumstances of the present cases because here the whole of the premises were not let out on the 1st of December, 1941 and therefore under the last clause the appellate court was justified in taking the rent which would have been reasonably payable for the premises if let out on the 1st day of December, 1941, as the basic rent. After making the calculations on this basis the appellate court has added ten per cent according to the provisions of schedule A of the Act. We do not think that there is any material irregularity or any material failure of justice in this case within the meaning of sec. 32(4) of the Act.

(3) Mr. Sen has further argued that the report of the Inspector which was submitted on the 14th of March, 1950, is not admissible in evidence in this case because the Inspector himself was not examined as a witness. We do not think that there is any substance in this contention. Sec. 31 of the Act empowers the Rent Controller to authorise any officer subordinate to him to enter and inspect any premises or to hold the inspection himself. If the Rent Controller is empowered to authorise a subordinate officer to inspect the premises we think that he is also empowered to take into consideration the report submitted by the Inspector. The value of the report submitted by the Inspector is certainly open to question if the Inspector is not called as a witness in the case, but we cannot go to the length of saying that the report itself becomes inadmissible because the Inspector has not been examined as a witness. In this case the courts below have relied upon the report submitted by the Inspector upon a consideration of the other evidence and circumstances of the case and we do not think that there is any illegality or irregularity in this procedure.

(4) For the aforesaid reasons, we think that the decision arrived at by the court of appeal below must be affirmed and this Rule must be discharged with costs hearing fee being assessed at two gold mohurs.

(5) K. C. DAS GUPTA J.: I agree.

B/V.R.B. Rule discharged.

A.I.R. 1953 CALCUTTA 127 (Vol. 40, C. N. 41)

CHAKRAVARTTI AND P. B. MUKHARJI JJ.

Commissioner of Income-tax, West Bengal, Appellant v. International Industries Ltd, Calcutta, Respondent.

Reference No. 3 of 1950, D/- 20-11-1951.

Income-tax Act (1922), S. 24(2) — Same business — Meaning — Same company carrying on different businesses — Set off not allowed.

Chakravartti J.: The question as to whether various business activities of an individual or a firm or a Company constitute one business or are in fact distinct and separate businesses may, at times, prove to be one of extreme difficulty. But where there is a clear finding that the business carried on by certain Company in the year 1945-46 was different from the business carried on by it in the year 1944-45, the loss sustained in the course of the

latter business cannot, under the terms of S. 24(2), be set off against the profits of the former. (Paras 7 & 8)

Mukharji J. The language used in sub-section (2) of S. 24 is "same business" and not the 'same company'. Business and company are words of different categories of connotation in this textual context of the Statute. The same company may have more than one business but to be entitled to set-off under sub-S. (2) the business must be the same and not merely the Company. (Para 12)

Anno: I. Tax Act, S. 24 N. 5.

Meyer with Balai Lal Paul, for Appellant; S. Mitra with C. M. Saraf, for Respondent.

REFERENCES: Courtwar/Chronological/, Paras
(1915) AC 1022: (84 LJ KB 1772) 11
(1927) 13 Tax Cas 83: (138 LT 331) 11

CHAKRAVARTTI J.: This is a reference under S. 66(1) of the Indian Income Tax Act at the instance of the Commissioner of Income Tax, West Bengal, on a question of law relating to a claim made by the assessee for a set off of its loss, carried forward from the previous year, against the profits and gains of the year of account. It appears that the reference came up for hearing on a previous occasion, but the Bench dealing with it felt that the statement of case submitted by the Tribunal was not adequate. Accordingly, it directed the Tribunal to submit a further statement which has since been done. In making the order of remand, however, the High Court dealt with the basis of law upon which the Tribunal had decided the question and pronounced it to be wrong.

(2) The assessee is a public limited company and is authorised by its Memorandum of Association to engage in diverse types of business. Among the business activities so authorised, it is necessary to mention, for the purposes of this case, only manufacture and sale of celluloid articles, Managing Agency, Commission, Share transactions and what is described as "joint ventures". Although the Company was authorised by the Memorandum of Association to undertake and carry on various lines of business, in actual fact it did only celluloid business upto the year 1944. In that year, the celluloid business was closed down and it appears that the Company switched over to other lines of business, such as Managing Agency, Commission, share dealings and joint ventures. In the accounting year 1944-45, when the Company was carrying on the celluloid business, it suffered some loss in business, the amount of which, however, has not been stated. It was this loss which the Company carried forward and wanted to set off against the profits derived from the new lines of business in the accounting year 1945-46. I have already stated that in the year of account 1944-45 when the loss was sustained, the Company was carrying on only the business of manufacture and sale of celluloid articles and no other business; in the year 1945-46, against the profits of which that loss was sought to be set off, the Company was no longer carrying on celluloid business but was carrying on other types of business which I have already mentioned.

(3) On those facts it was held by the Income-tax officer and the Appellate Assistant Commissioner that the Company was not entitled to set off its loss of the previous year against the profits of the year 1945-46, because the profits had not been derived from the same business, as required by S. 24(2) of the Income-tax Act. Before the Tribunal, it appears to have been contended that it was not necessary under S. 24(2) that the profits, against which the loss carried forward from the previous year could be set off, must be the profits derived from the same business. That contention was accepted by the Tribunal and the assessee Company was allowed the set off claimed. Thereupon the Commissioner of Income-tax asked for and obtained a reference to this Court on the following question of law:

"Whether in the facts and circumstances of the case and upon a proper construction of sub-section (2) of S. 24 of the Indian Income-tax Act, 1922, the loss in the celluloid business in the assessment year 1945-46 can be carried forward and set off against the profits of the other businesses in the assessment year 1946-47 when the Assessee ceased to carry on the celluloid business during the assessment year 1946-47."

It will be seen that the question presupposes that the loss which had been sustained in the accounting year 1944-45 was the loss suffered in the celluloid business, whereas the profits of the year 1945-46 against which the loss was sought to be set off were profits derived from "other business". In other words, the question presupposes that the business in which the loss was sustained and the business against the profit of which that loss was sought to be set off were not the same business.

(4) It is not surprising that when the reference came to be heard by this Court, My Lord the Chief Justice and Mr. Justice Sinha had no difficulty in holding that the view of S. 24 (2), on which the Tribunal had proceeded, was utterly wrong. They, however, found themselves unable to dispose of the question finally, inasmuch as the Tribunal had not recorded any clear finding as to whether in the accounting year 1944-45 the assessee Company had carried on any business other than the celluloid business. Neither had the Tribunal found whether the various activities of the assessee Company in the next year were such as could be said to have been inter-linked and dovetailed into each other or with the celluloid business carried on up to the year 1944-45. They accordingly directed the Tribunal to submit a further statement of case in which it was to find whether the business carried on in the year 1945-46 was in fact the same business as that carried on in 1944-45.

(5) The finding now recorded by the Tribunal and sent up to this Court in the additional statement of the case is expressed in the following words:

"We have no hesitation in coming to the conclusion that the celluloid business was entirely different from the other activities of the Assessee Company. The other activities were started only after the celluloid business was closed. The accounts of the other activities were no doubt written up in the same books, but all it comes to is that the same set of books were continued after the close of the celluloid business. When the other activities were started, there was no celluloid business."

(6) The Tribunal has also pointed out that after March 1944, the Company actually sold off the celluloid business and took to other lines of business such as Managing Agency, Commission and Share dealings. It had been pointed out to the Tribunal that there was one

cash book, one Ledger, one Office, one set of office staff and one bank account for the new lines of business and for the celluloid business previously carried on. But the Tribunal pointed out that those circumstances did not, in the facts of the present case, indicate that the same business had been continued or that the celluloid business and the other lines of business were, in the sum, parts of one undertaking, but what it meant was that, after the closing down of the celluloid business, the services of the same staff were utilised as also the blank pages of old books were made use of.

(7) On the facts now finally found by the Tribunal, there can be little doubt as to what the answer to the question referred ought to be. As a matter of fact Mr. Mitra, who appeared for the assessees, very fairly conceded that besides pointing out that all the various types of businesses were authorised by the Memorandum of Association, he could hardly urge any other contention which might induce us to return an affirmative answer to the question referred. Mr. Mitra made no attempt to support the view of S. 24(2) on which the Tribunal had proceeded and, in any event, that matter is now closed by reason of the previous decision of this Court rendered on the occasion when the reference was first heard by My Lord the Chief Justice and Mr. Justice Sinha. The only question which can possibly be urged at the present stage is whether the Tribunal was right in law in holding that the business activities of the petitioner Company in the year 1945-46 were different from those in the year 1944-45. That is primarily, if not wholly, a question of fact and Mr. Mitra was unable to point out any error which the Tribunal had committed in applying the principles upon which questions of that type ought to be decided. The question as to whether various business activities of an individual or a firm or a Company — constitute one business or are in fact distinct and separate businesses may, at times, prove to be one of extreme difficulty, but in the present case there is no difficulty whatever, inasmuch as, according to the finding of the Tribunal, the celluloid business was sold off after March, 1944, and nothing of it was left in the year 1945-46, against the profits of which the loss suffered in the previous year could be set off. Indeed, I shall be doing no injustice to Mr. Mitra if I say that he did not seriously contend that the finding of fact recorded by the Tribunal was wrong.

(8) If then the business carried on by the Company in the year 1945-46 was different from the business carried on by it in the year 1944-45, the loss sustained in the course of the latter business could not, under the terms of S. 24(2), be set off against the profits of the former. The section is perfectly clear and its true meaning has been laid down in cases, too numerous to mention, including the judgment delivered by My Lord the Chief Justice in this very case on the previous occasion.

(9) For the reasons given above, the answer to the question referred must, in my opinion, be in the negative. The Commissioner of Income-tax, West Bengal, will have the costs of the Reference, including the costs of today's hearing as also the costs of the previous hearing before My Lord the Chief Justice and Mr. Justice Sinha.

(10) P. B. MUKHARJI J.: I entirely agree with the conclusion and the reasons given in the judgment just delivered by My Lord. I will add however a few observations of my own.

(11) Loss in one business cannot be set-off against the profit of another business under sub-section (2) of S. 24 of the Indian Income Tax Act, even though it is the same company which carries on these different businesses and even though such different businesses are permitted by the Memorandum and Articles of the Company. A good many legal hares have run on this trace of income-tax law but in my judgment it is quite unnecessary to pursue them here to explain the legal meaning of what is the "same business" within the meaning of this sub-section or what facts will constitute inter-connection and unity in business. Many felicitous phrases like "dovetailing" and "inter-lacing" have become familiar in this branch of the law. Such well known decisions on the point as — 'Mitchell v. Egyptian Hotels Ltd.', (1915) AC 1022 and — 'Scales v. George Thompson & Co. Ltd.', (1927) 13 Tax Cas 83 are only a few among the many judicial attempts to seek a pattern or a test when a business can be regarded as the "same." I am satisfied that by the tests laid down in these cases the assessee's contention must fail.

(12) But quite apart from the wealth of judicial learning on the point, I reach the same conclusion in this case on a short point of construction of S. 24(2) of the Income Tax Act. The language used in this sub-section of the Statute is "same business". It is not the same company. Business and company are words of different categories of connotation in this textual context of the Statute. The same company may have more than one business but to be entitled to set-off under sub-section (2) of S. 24 of the Income Tax Act, the business must be the same and not merely the Company.

(13) I concur in the conclusion that the question raised in this Reference must be answered in the negative.

B/D.R.R. Reference answered.

A.I.R. 1953 CALCUTTA 129 (Vol. 40, C. N. 42)

HARRIES C. J. AND G. N. DAS J.

Ananda Sankar and others, Petitioners v. Chief Secretary to the Government of West Bengal and others, Opposite Parties.

Criminal Misc. Cases Nos. 6, 9; 11 to 20; 24 to 27; 29 to 35; 40, 42, 63, 66, 78, 86, 93, 94, 96 to 101, 105, 108, 120, 132, 134, 137, 138, 144, 150 and 177 of 1951; D/- 18-6-1951.

(a) Constitution of India, Art. 22(5) — "As soon as may be" — Supplementary grounds — Preventive Detention Act (1950) S. 7.

The detenus were detained in February 1950 and did not receive the particulars of the grounds served in the middle of March until towards the end of July 1950. The so-called supplementary grounds or particulars did not state any new grounds for the orders of detention. They were in the nature of particulars of the rather general grounds given earlier. They merely amplified those grounds giving specific instances to support the general statements made earlier.

Held that the detenus had been given the grounds of detention "as soon as may be" and had been given "the earliest opportunity of making representations." The State of Bombay v. Atmaram and Tarapada De v. The State of West Bengal, Foll. (Para 23)

(b) Public Safety — Preventive Detention Act (1950) S. 7 — Grounds of detention — Detenu being member of Communist Party.

The orders of detention are not invalid because of the statement in the grounds that the organisation to which the detenus belong has been declared an illegal organisation and therefore is an illegal organisation. It has never been held by the Supreme Court that an order declaring the Communist Party to be an illegal organisation is illegal. This particular ground has been before the Supreme Court on a number of occasions and no suggestion has ever been made that it is an improper and a bad ground. Further the gravamen of the allegation made in this ground is that the detenu belongs to an organisation which is committed to violent and subversive acts and which has as its main objects the overthrow of the State by violence. Such being the case it is of little importance whether such an organisation has or has not been declared to be illegal. On a fair reading of the ground it would appear that the detenu is regarded as dangerous not because he is a member of an illegal organisation but because he is a member and assists in the activities of an organisation whose objects are said to be a danger and a menace to the maintenance of public order and the security of the State. Amulya Banerjee v. State of West Bengal (SC) and AIR 1951 SC 174 Foll. (Paras 30, 31 & 32)

(c) Public Safety — Preventive Detention Act (1950) S. 7 — Facts in grounds of detention — High Court's power to question them.

The High Court is not entitled to go into the question whether the statements made in the grounds and in the particulars served later were untrue. The High Court cannot sit as a court of appeal and hold that the facts alleged are not true or have not been established. (Para 33)

(d) Public Safety — Preventive Detention Act (1950) S. 3 — Mala fide orders — Order of detention after release in Criminal case.

Where persons are detained in prison upon criminal charges it would be unnecessary to make any orders of detention, because whilst they were in prison they would be safe and would be unable to commit any acts of a subversive nature. Once an order for their release was passed whether by way of a discharge or by granting bail, different considerations would arise. Such persons would be at large, and if they were dangerous, the fact that they were discharged in some criminal case or the fact that they had been granted bail would in no way prevent them from carrying dangerous activities. The very circumstances would by themselves justify the making of the order for detention which up to then would have been unnecessary if it was honestly believed that the person detained under the order was dangerous. It cannot be inferred that the orders were mala fide merely because they were made when it became clear that the detained person would be released from custody. To hold that the orders were mala fide, something more than these mere circumstances would have to be established. (Paras 34 & 35)

(e) Constitution of India, Art. 226 — Habeas Corpus — Writ of — Successive applications.

Quaere: Whether successive applications for writs in the nature of habeas corpus on the same facts can be made? (Para 45)

(f) Constitution of India, Art. 226 — Habeas Corpus — Writ of — Applications under different circumstances.

Applications were made under Art. 226 after the Act of 1951 was passed amending the earlier Preventive Detention Act of 1950. In these applications it was contended that the later amending Act was ultra vires and further that if it was intra vires, certain new rights were granted to the detenus:

Held that a decision under the Preventive Detention Act of 1950 could never prevent an application made when that Act had been amended in the manner in which it was amended by the 1951 Act. The fact that an application had been dismissed under the 1950 Act might afford no answer whatsoever to the contentions of the detenu under the Act as amended in 1951. That being so the High Court was bound to hear these applications even if the law prohibited successive applications. (Para 46)

(g) Public Safety — Preventive Detention Act (1950) S. 9 — Late representation.

Though Government is technically correct in not accepting the representation sent by the detenu after the period prescribed under S. 9, yet it would be far better if the technicalities are waived and the representation is placed before the Advisory Board. (Para 43)

Arun Kumar Dutt; S. Acharyya; Sadhan Gupta; Arun Prokash Chatterjee; Hemendra Nath Banerjee and Anil Kumar Sen, for Petitioners; S. M. Bose with N. K. Sen, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('51) State of Bombay v. Atma Ram Shridhar Vaidya: (AIR 1951 SC 157: 52 Cri LJ 373) 8, 9, 19
('51) Tarapada De v. State of West Bengal: (AIR 1951 SC 174: 52 Cri LJ 400) 8, 13, 17, 22, 29
('51) S. Krishnan v. State of Madras: (AIR 1951 SC 301: 52 Cri LJ 1103) 2, 4
Amulya Banerjee v. State of West Bengal (SC) 29
Ram Prasad Rabha v. The State of Assam (SC) 2
('51) Misc Case No. 120 of 1951 (Cal) 36
('44) AIR 1944 Lah 373: (46 Cri LJ 203) 34

HARRIES C. J.: These are applications for writs in the nature of habeas corpus filed by persons detained under the Preventive Detention Act, 1950 as amended by the Preventive Detention Act of 1951. A number of the detenus were detained under orders made in February 1950 and in the cases of these detenus what are called supplementary grounds were served in July, 1950 and in some instances additional supplementary grounds were served later in the same month. In other cases the grounds served contained very detailed particulars, and in those cases the grounds were served either at the time the orders were made or very shortly afterwards.

(2) These applications were made after the Act of 1951 amending the Preventive Detention

Act of 1950 was passed and it was contended on behalf of all the detenus that this Amending Act was ultra vires the Constitution. We heard a full argument on this question before the Supreme Court delivered judgment in the cases of — 'S. Krishnan v. State of Madras', A I R 1951 S C 301 and — 'Ram Prasad Rabha v. The State of Assam (SC)'. After hearing an argument on this point all the cases were adjourned to enable them to be placed before the Advisory Board as the detenus were apprehensive that an adverse decision by this Court might affect their chances before the Advisory Board.

(3) The Advisory Board have now dealt with all the cases and released about thirty detenus. We have only heard the cases which were dismissed by the Advisory Board.

(4) It is now unnecessary to consider the argument that the Amending Act of 1951 is ultra vires because the Supreme Court in the case of — 'S. Krishnan v. The State of Madras', AIR 1951 S C 301 have expressly held that this Act is intra vires. It must therefore be held that there is no force whatsoever in this first contention made on behalf of all the detenus.

(5) On behalf of the detenus against whom orders were made in February 1950 it was contended that the supplementary grounds or the particulars which were delivered in July, were delivered too late and therefore these detenus were entitled to be released.

(6) The so-called supplementary grounds or particulars did not state any new grounds for the orders of detention. They were in the nature of particulars of the rather general grounds given earlier. They merely amplified those grounds giving specific instances to support the general statements made earlier. It was not seriously contested that if these particulars or supplementary grounds could be regarded as having been served on the detenus within time such would not be sufficient to maintain the orders of detention made in each case.

(7) With regard to the other class of cases where detailed grounds were served either with the order or within a matter of a week or fourteen days after the order, it has not been seriously suggested that the grounds, if honestly believed in, were not sufficient to sustain the orders. In fact only in a few cases was it contended before us that the orders made were mala fide and with those cases I shall deal later in this judgment.

(8) With regard to the cases in which orders were made in February 1950 and further particulars or supplementary grounds delivered in July 1950, the cases would appear to be governed by the decision of the Supreme Court in the cases of — 'State of Bombay v. Atma Ram Shridhar Vaidya', AIR 1951 SC 157 and — 'Tarapada De v. The State of West Bengal', AIR 1951 S C 174.

(9) In the case of — 'The State of Bombay v. Atma Ram Shridhar Vaidya', AIR 1951 S C 157 it was contended on behalf of the applicant that the grounds for detention which were served upon the detenu shortly after the order was made were too vague and that further particulars which were served on the detenu some months later were served too late and could not be looked at to support the order of detention in that case. The High Court of Bombay had expressed the opinion that if these particulars had been served on the detenu at or about the time when the grounds for the order were served upon him such would have been sufficient to maintain the order for detention, but that as they were served some months later the State of Bombay could not rely upon these grounds to justify the continued detention of the detenu.

(10) In the Bombay case the detenu was arrested on April 21, 1950 under the Preventive Detention Act of 1950 and on April 29, 1950 the grounds for his detention were served upon him in compliance with Art. 22 (5) of the Constitution of India. These grounds were somewhat vague and on August 9, 1950 the detenu filed a petition for a writ in the nature of habeas corpus in the High Court of Bombay. Notice was issued to the Commissioner of Police and pending the disposal of the Rule the Commissioner of Police on August 26, 1950 delivered certain particulars or supplemental grounds on the detenu. On August 30, 1950 the Commissioner of Police filed an affidavit in which certain facts were stated and eventually the High Court of Bombay directed the release of the detenu. The State of Bombay appealed and the Supreme Court allowed the appeal and held that the detention of the respondent detenu was valid.

(11) It had been contended before the Supreme Court that the original grounds served upon the detenu were too vague and did not comply with the fundamental right given to the detenue by Art. 22 (5) to have the grounds of the order served upon him as soon as may be so that he could have the earliest opportunity of making a representation.

(12) The Supreme Court held that the grounds of the order could be supplemented or further particulars of the grounds could be given at some later date and in that particular case the Supreme Court were of opinion that the requirements of Art. 22 (5) had been met.

(13) In the case of — 'Tarapada De v. The State of West Bengal', AIR 1951 S C 174 the actual order of detention was made on February 26, 1950 and the grounds of detention were served upon the detenus about the middle of March. Particulars on the supplementary grounds were later served on the detenus on or about July 22, 1950 and that was a day after the Rules had been issued in the cases by this Court.

(14) Again it was contended on behalf of the detenus that the original grounds served upon the detenus were too vague and that the particulars delivered in July could not be taken into consideration as they were not delivered in time and therefore it could not be said that the earliest opportunity had been given to the detenus to make their representations. The Supreme Court however held that the requirements of Art. 22 (5) had been substantially met by serving a copy of the grounds for the order in the middle of March and by service of the further particulars on or about July 22.

(15) It was strenuously argued before us that the delivery of particulars either in one document or two documents towards the end of the month of July was far too late and that those particulars could not be taken into consideration to justify the continued detention. These further particulars in the cases before us were delivered roughly between July 22 and July 26, that is round and about the time in which the particulars were delivered in the cases which were dealt with by the Supreme Court. It might

be said that the detenus could not possibly be said to have been given the earliest opportunity of making a representation if the particulars, which were necessary before a proper representation could be made, were not delivered with despatch. It was urged that particulars delivered a fortnight or so after the grounds of the order of detention had been served would be too late, because the detenu should be given the earliest opportunity of making his representation. Delay in providing particulars, if they were necessary, would only allow the detenu to make a belated representation.

(16) On the other hand it was contended by the learned Advocate General on behalf of the State that the decisions of the Supreme Court in the Bombay and Calcutta cases compelled us to hold that particulars delivered in July of the grounds delivered in the middle of March were sufficient to comply with the requirements of Art. 22(5). The learned Advocate General pointed out that in the Bombay case the particulars were not delivered until practically four months had elapsed from the time the original grounds were delivered and further these particulars were not delivered until a considerable time had elapsed after a habeas corpus petition had actually been presented. Nevertheless the Supreme Court held that the grounds for making the order for detention had been served as soon as may be and that the detenu had been given the earliest opportunity of making his representation.

(17) The learned Advocate General further pointed out that the dates of the delivery of the grounds of the orders and of the particulars in the present case are the same as the dates in the cases of — 'Tarapada De v. The State of West Bengal', AIR 1951 SC 174 which were considered by the Supreme Court. In these particular cases now before us the orders were made towards the end of February and they appear to belong to a batch of cases some of which were considered by the Supreme Court in — 'Tarapada De's case.' There can be no doubt that the facts of these cases are indistinguishable from the facts in the cases of — 'Tarapada De' and that being so the Advocate General contends that we are bound to follow the decision of the Supreme Court and hold that these further particulars must be looked at and the orders of detention upheld.

(18) It has been frequently contended that a case is only an authority for what it actually decides. It is certainly an authority for that and it appears to me that the decisions of the Supreme Court cannot possibly be questioned and must be followed. There have been express decisions of the Supreme Court that in cases precisely similar to those now before us the delivery of the grounds by the middle of March and particulars towards the end of July complied with the Constitution.

(19) Reliance was placed upon certain observations in judgment of Kania C. J. in — 'Atma Ram's case', (AIR 1951 S C 157) which would suggest that the particulars should be delivered without loss of time. Dealing with this aspect of the case the learned Chief Justice observed:

> 'This detailed examination shows that preventive detention is not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. This is, of course, subject to the limitations prescribed in clause 5 of Article 22. That clause, as noticed above, requires two things to be done for the person against whom the order is made. By reason of the fact that clause (5) forms part of Part III of the Constitution, its provisions have the same force and sanctity as any other provision relating to fundamental rights. As the clause prescribes two requirements, the time factor in each case is necessarily left fluid.
>
> While there is the duty on the part of the detaining authority to furnish grounds and the duty to give the detained person the earliest opportunity to make a representation which obligations, as shown above, are co-related, there exists no express provision contemplating a second communication from the detaining authority to the person detained. This is because in several cases a second communication may not be necessary at all. The only thing which emerges from the discussion is that while the authorities must discharge the duty in furnishing grounds for the order of detention 'as soon as may be' and also provide 'the earliest opportunity to the detained person to make the representation', the number of communications from the detaining authority to the detenu may be one or more and they may be made at intervals, provided the two parts of the aforesaid duty are discharged in accordance with the wording of clause (5).
>
> So long as the later communications do not make out a new ground, their contents are no infringement of the two procedural rights of the detenu mentioned in the clause. They may consist of a narration of facts or particulars relating to the grounds already supplied. But in doing so the time factor in respect of the second duty, viz., to give the detained person the earliest opportunity to make a representation cannot be overlooked."

(20) In the concluding portion of his judgment the learned Chief Justice observed:

> "Having regard to the principles mentioned above, we have to consider whether the judgment of the High Court is correct. We have already pointed out that the summary rejection by the High Court of the later communication solely on the ground that all materials in all circumstances must be furnished to the detenu when the grounds are first communicated, is not sound. We have indicated the circumstances and conditions under which the later communication may or may not be considered as falling within the purview of Art. 22(5) of the Constitution.
>
> In dealing with the position when the grounds were first communicated, the High Court held as follows: "this is not a ground which would enable the detenu to make a representation to which he is entitled both under the Act and under the Constitution". In this case the later communication of the 26th August, 1950, was made after the respondent filed his petition and it appears to have been made to controvert his allegation that he was never in Bombay between January and April 1950, as alleged in his affidavit. After taking into consideration this communication it was observed by Chagla C. J. that if these particulars were furnished on 29th April 1950, very likely the Court would have rejected the petition. The Court set the respondent free only because of its view that after 29th April no further communication was permissible. In

our opinion, this view is erroneous. We think that on the facts of the present case therefore the respondent's petition should have been dismissed."

(21) It appears to me from these observations that the Court was clearly of opinion that the detenu had been given the earliest opportunity to make his representation though the particulars were not delivered until nearly four months after the order had been made and until after the detenu had filed habeas corpus petition.

(22) Again in — 'Tarapada De's case', (AIR 1951 S. C. 174) Kania C. J. in his judgment observed:

"As regards the grounds furnished by the Government in each case in its first communication, it is sufficient to notice that while the first ground is common to all the appellants, the second ground is different in most cases. The High Court has considered the case of each appellant in respect of the communication dated the 14th of March, 1950 sent to him. In their opinion those grounds are not vague. They have held that the procedural requirement to give the detained person the earliest opportunity to make a representation has not been infringed by the communication of the grounds of the 14th of March and by the subsequent communication made to the appellants in July. This point was not seriously pressed before us. After hearing counsel for the appellants we see no reason to differ from the conclusion of the High Court on this point."

(23) From these observations it is clear that the Supreme Court were of opinion in the Calcutta cases that where the orders had been made on or about February 26, 1950 and grounds served in the middle of March and supplementary grounds served towards the end of July, the detenus had been given the grounds of detention "as soon as may be" and had been given "the earliest opportunity of making representations". That being so we are bound to hold that there is no force in the contention made on behalf of the detenus who were detained in February 1950, and who did not receive the particulars of the grounds served in the middle of March, until towards the end of July 1950. There has, as I have already said, been an express decision upon these facts and that decision must be followed.

(24) As I have said earlier in the other class of cases the detailed grounds were served either when the order of detention was served or shortly afterwards. In that class of cases there can be no question that the grounds of the orders were served as soon as may be and the detenus were given the earliest opportunity of making their representation.

(25) The first ground for detention given in all the cases is that the person detained was a member of the Communist Party which has as its objects the commission of violent crime and the overthrow of the State by violence. It is also stated in this somewhat general ground that the Communist Party has been declared an illegal organisation in this State.

(26) It was urged on behalf of all the detenus that the order declaring the Communist Party an illegal organisation in the State of West Bengal was illegal as it was made under the provisions of section 16 of the Indian Criminal Law Amendment Act a provision which is ultra vires the Constitution of India as it offends against the fundamental right of freedom of association guaranteed to citizens by Article 19(1)(b). It has been held by a Full Bench of the Madras High Court that such an order is illegal and therefore it is said that in each and every case the detenus have been detained upon a ground which cannot be regarded as a valid ground to found an order for detention. The orders it is contended were made on an erroneous belief that the Communist Party in this State was an illegal organisation whereas in fact it was not. This erroneous belief might well, it is urged, have affected the mind of the Authorities making the orders and the orders might never have been made if the Authorities had appreciated the true position namely that the Communist Party was a perfectly legal organisation.

(27) It was further argued that once it is held that one of the grounds for detention was not a valid or proper ground then the orders made must be held to be invalid though they might be supported by other grounds which were good and valid grounds. When a number of grounds for making an order are given it is contended it is impossible for any Court to say with certainty what were the determining factors for making such order. The Authority might have made the order on one or more of the grounds but on the other hand it might not. It might well be it was urged that the order would not have been made except for the existence of all the grounds stated and that being so if one ground is shown to be no ground at all, it cannot be said with certainty that the order would ever have been made if it had been realised that such a ground was not a proper and valid ground.

(28) This view has been taken by Sen and Chunder JJ. in cases now under appeal to the Supreme Court but in my judgment this view though entitled to great respect cannot be followed as the Supreme Court has dealt with this particular ground in a number of cases and in no judgment of that Court has it ever been suggested, much less held, that the ground is not a proper ground to support an order for detention.

(29) In the case of — 'Amulya Banerjee v. The State of West Bengal', the Supreme Court expressly held that the particular ground together with a further ground in which details of the detenus' communistic activities were stated were sufficient to support a valid order for detention. In — 'Tarapada De v. The State of West Bengal', (AIR 1951 S. C. 174) this ground appeared in each of the hundred cases before the Court. The orders of detention were all held to be valid and if the view of Sen and Chunder JJ. be the correct view all the detenus should have been released and also Amulya Banerjee.

(30) It may be contended that as the Supreme Court did not deal specifically with this point it might have been overlooked. Court bound by the decisions of the Supreme Court should not make such an assumption too readily. It must be remembered that it has never been held by the Supreme Court that an order declaring the Communist Party to be an illegal organisation is illegal. As this particular ground has been before the Supreme Court on a number of occasions and as no suggestion has ever been made that it is an improper and a bad ground, I am unable to agree that the

presence of this ground in all the cases vitiates each and every one of the orders of detention now before us.

(31) Further it appears to me to be immaterial whether the Communist Party has or has not been declared to be an illegal organisation. The gravamen of the allegation made in this ground is that the detenu belongs to an organisation which is committed to violent and subversive acts and which has as its main objects the overthrow of the State by violence. Such being the case it appears to me to be of little importance whether such an organisation has or has not been declared to be illegal. Assuming the party has the objects stated in this ground a member of it would be equally dangerous whether the organisation had or had not been declared to be illegal. On a fair reading of the ground it would appear that the detenu is regarded as dangerous not because he is a member of an illegal organisation but because he is a member and assists in the activities of an organisation whose objects are said to be a danger and a menace to the maintenance of public order and the security of the State.

(32) For these reasons I must therefore hold that the orders of detention are not invalid because of the statement in the grounds that the organisation to which the detenus belong has been declared an illegal organisation and therefore is an illegal organisation.

(33) It was not seriously contended, except in a few cases, that these orders were mala fide. It was suggested on behalf of various detenus that the statements made in the grounds and in the particulars served later were untrue. But this Court is not entitled to go into that question. If the detaining authorities honestly believed these grounds to be true then no question of mala fides can arise. We cannot sit as a court of appeal and hold that the facts alleged are not true or have not been established. If these facts, stated in the grounds and in the particulars, where particulars were delivered, are accepted then there was abundant material in each case upon which the detaining authority could be satisfied that the person detained was a dangerous person and likely to do great mischief.

(34) It was however contended in a few cases that the orders must be mala fide because they were only made after the detenus had either been discharged in criminal cases or had been released on bail. Where persons are detained in prison upon criminal charges it would be unnecessary to make any orders of detention, because whilst they were in prison they would be safe and would be unable to commit any acts of a subversive nature. Once an order for their release was passed whether by way of a discharge or by granting bail, different considerations would arise. Such persons would be at large, and if they were dangerous, the fact that they were discharged in some criminal case or the fact that they had been granted bail would in no way prevent them from carrying dangerous activities. Making orders for detention, where persons had been discharged by a criminal court or had been released on bail, does give rise to suspicion. The orders might be made, for example, to defeat the order for bail and I myself held in a case at Lahore — 'S. Dilbagh Singh v. Emperor', AIR 1944 Lah 373 that an order detaining a person had been made mala fide and solely for the purpose of assisting the police in the investigation of certain charges in respect of which bail had been granted to the detained person.

(35) In the present case however there is nothing to suggest that these orders were not honestly made beyond the fact that they were made when it was clear that the detenu would be set at liberty. The fact that the prisoner would be at large might well compel the authorities to make an order if they honestly believed him to be dangerous. I cannot infer that the orders in these cases were mala fide merely because they were made when it became clear that the detained person would be released from custody. To hold that the orders were mala fide, something more than these mere circumstances would have to be established because, as I have said, the very circumstances would by themselves justify the making of the order which up to then would have been unnecessary if it was honestly believed that the person detained under the order was dangerous.

(36) In — 'Sureswar Bhattacharjee v. The State', Misc. Case No. 120 of 1951 it was suggested that the particulars given were not particulars of the ground originally served, but contained entirely new material forming new grounds. The order of detention was made on February 26, 1950 and the grounds were served on March 7, 1950. The first of those grounds is that the detenu had been assisting the operations of the Communist Party of India which had for its objects the commission of serious crimes and thus had been acting in a manner prejudicial to the maintenance of public order. In this ground it was also stated that the Communist Party had been declared unlawful by the State Government under S. 16 of the Indian Criminal Law Amendment Act.

(37) The second ground was in these terms:

> "That as a member of C. P. I. on its labour front and as a member of the Union of Post and Telegraphs Workers Union, you fomented trouble against the Postal Employees, tampered with their loyalty and incited them to resort to illegal actions leading to disturbances."

(38) In the particulars served on July 16, 1950 it was stated that the detenu was a prominent and active worker of the C. P. I. being on the Executive Committee of the U. P. T. W. and that on or about August 21, 1949 he incited certain employees to stage demonstrations in front of the office of the Post Master General and also to assault high officials. Further, that he participated in the disturbances created by communist members at a meeting on August 18, 1949 addressed by Sri Jai Prakash Narain and at another meeting on September 19, 1949 convened by the U. P. T. W.

(39) It was contended that these were not particulars in the true sense of the word and that they related rather to maintenance of supplies and services essential to the community than to maintenance of the security of the State and the maintenance of public order. If they applied to matters concerning the maintenance of supplies and services essential to the community the detenus could not have been detained, without obtaining the opinion of the Advisory Board, for more than three months from their detention, whereas such had not been obtained. It seems to me however that these grounds and the particulars really related to the maintenance of public order, because

what is suggested is that this man fomented trouble against the postal employees, incited them to illegal action which led to disturbance and in the particulars one example is given of staging a demonstration in front of the office of the Post Master General and inciting men to assault officials, presumably of the department of the Post Master General. I do not think it can be said that the particulars given were not particulars of the grounds originally served and further that this was not an order made because a person was likely to act in a manner prejudicial to the security of the State or the maintenance of public order.

(40) In two cases—Miscellaneous Case No. 63 of 1951 (Sripati Bhowmick) and Miscellaneous Case No. 66 of 1951 (Kishori Mohan Patra) it was contended that the representations of these detenus had not been placed before the Advisory Board. Sripati Bhowmick was detained by an order of December 17, 1950 and on December 23, 1950 very detailed grounds were served on him. Kishori Mohan Patra was detained by an order of November 27, 1950 and equally detailed grounds were served on him on December 1, 1950.

(41) The Act amending the Preventive Detention Act came into force on February 22, 1951 and the cases of both these detenus had to be sent to the Advisory Board by April 6, 1951 and the papers were actually sent to the Advisory Board before that date. In fact they were submitted in both the cases on March 16, 1951. Section 9 of the Amending Act provides that the appropriate Government must within six weeks from the date the Act came into force in the case of orders of detention made before the Amending Act was passed, place before the Advisory Board the grounds on which the order of detention had been made and the representation, if any, made by the detenu.

(42) No representation had been made by these two detenus up to April 6, 1951 which was the last day for forwarding the papers to the Advisory Board. On April 7, however, Sripati Bhowmick wanted fourteen days time to make a representation and he was informed by Government that the papers had been forwarded to the Board and that he could make his representation direct to the Board. He appears to have sent a representation on April 20 to Government. But Government returned it to him and said that they could not forward it to the Board and that the detenu himself should send it to the Board. On April 28 the Board apparently made an order upholding the detention of Bhowmick.

(43) Technically Government was possibly correct in the attitude they took because they had to send all the necessary papers to the Advisory Board before April 6, 1951 and there is nothing in the statute expressly empowering them to send any subsequent representations to the Advisory Board. However it appears to us that the representation when it was received on April 20, 1951, should have been sent to the Board and not returned to the detenu with an intimation that he should if he desired, send it direct to the Board. The Advocate-General on behalf of the State contended that the State had no right to forward any representation received after April 6, 1951, but he agreed that Government should forward this representation to the Board and that the Board should consider the case in the light of this representation. Though as I have said the Government may have been technically correct, it would have been far better if these technicalities had been waived and the representation placed before the Advisory Board who could have dealt with it as they deemed proper.

(44) In the case of Kishori Mohan Patra the papers were sent to the Board on March 16, 1951 and the order of the Advisory Board in his case was made on March 30, 1951 before any request was received from him for permission to make a representation. That being so, no representation could be forwarded. But again the Advocate-General on behalf of the Government has agreed that Kishori Mohan Patra's case should be sent to the Board to be considered by them if they think proper.

(45) A number of detenus had made previous applications to this Court for writs in the nature of habeas corpus and such applications had been dismissed by various Benches of this Court. It was contended on behalf of the State that as previous applications had been dismissed this Bench had no jurisdiction to consider subsequent applications. Whether successive application for writs in the nature of habeas corpus would lie is unnecessary to decide in this case. It might well be argued that there is nothing in law to prevent successive applications. In civil matters there is the rule of res judicata and in criminal matters the rules of autre fois convict and autre fois acquit. But these proceedings are neither civil nor criminal and it is contended that there is no express provision prohibiting successive applications even based on the same facts. In my view however even if successive applications would not be permissible, if based on the same facts, which as I have said it is unnecessary to decide in this case, these applications were proper applications which this Court was bound to entertain, because the circumstances in which they were made were entirely different from the circumstances in which the earlier applications were made.

(46) These applications now before us were made after the Act of 1951 was passed amending the earlier Preventive Detention Act of 1950. In these applications it was contended that the later amending Act was ultra vires and further that if it was intra vires, certain new rights were granted to the detenus. It appears to me that a decision under the Preventive Detention Act of 1950 could never prevent an application made when that Act had been amended in the manner in which it was amended by the 1951 Act. The fact that an application had been dismissed under the 1950 Act might afford no answer whatsoever to the contentions of the detenu under the Act as amended in 1951. That being so, this Court was bound to hear these applications even if the law prohibits successive applications. Whether successive applications are prohibited must be considered when an appropriate case arises.

(47) I do not think that it is necessary to consider each case individually because as I have said earlier, unless these general contentions are acceded to, it is conceded that the original grounds together with the further particulars in one class of cases and the original grounds in the other class of cases are sufficient to maintain the order of detention in each case.

(48) The result therefore is that these petitions fail and are dismissed.

(49) G. N. DAS, J.: I agree.

A/D.H. Petitions dismissed.

A. I. R. 1953 CALCUTTA 136 (Vol. 40, C. N. 43)

HARRIES C. J. AND BANERJEE J.

United Commercial Press Ltd., Appellant v. Satyanarain Chamaria, Respondent.

A. F. O. D. No. 168 of 1951, D/- 9-1-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 (LXII) of 1950) S. 5 — Meaning of — Provisions of original Act applicable to pending suits — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 (XVII) of 1950) S. 18 (5)).

S. 5 must be read as meaning that such portion of the Act of 1950 as was amended by the amending Act of 1950 shall apply to suits pending when the 1950 Act came into force and shall be deemed always to have applied to such suits. What the Legislature clearly had in mind were the original provisions of S. 18(5) and they were not concerned with the other portions of the Act of 1950. Section 5 of the amending Act provides that S. 18(5) of the 1950 Act as amended would apply to all pending suits and would always be deemed to have applied and there was intention whatsoever to make applicable to such suits any other provisions of the 1950 Act. (Para 20)

(b) Interpretation of statutes — Too literal constructions leading to absurdity — Liberal construction.

It is a legitimate method of construction to give an Act a meaning if that can be done reasonably. Too literal a construction should not be followed when it leads to an absurdity if a somewhat more liberal construction would lead to an effective application of the Act. (Para 20)

Anno: C. P. C. Preamble N. 7 Pts. 117 and 118.

(c) Interpretation of statutes — Retrospective effect.

The Court leans against giving an Act retrospective effect and will only give it such effect if it is compelled to do so by express words in the statute or where retrospective effect is clearly to be implied from the words of the statute. (Para 24)

Anno: C.P.C., Preamble N. 3 Pt. 1.

(d) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 (XVII) of 1950) Ss. 12 and 18(5) — Retrospective operation of Act.

The opening words of S. 12 do not suggest that the Act should be given retrospective effect. The existence of S. 18(5) in the Act makes it clear that the Act was never intended to be retrospective and was only to have such retrospective effect as was expressly given to it in the statute itself. (Paras 24 & 25)

(e) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 (XVII) of 1950), Ss. 14 (1) and (3) Proviso and 18(5) (as amended by West Bengal Act 62 (LXII) of 1950) — Applicability of S. 14 to pending suits.

S. 14 in terms only applies to suits brought after the Act came into force and, therefore, the section cannot be applied strictly and literally to any suits filed before the Act came into force, that is to suits pending when the Act came into force. What was intended was that the Court under S. 18(5) of the 1950 Act should apply those principles as far as possible to a case to which S. 14 could not in terms apply. (Para 30)

Thus, if a suit was brought after the 1950 Act came into force and the tenant had been in default in the payment of rent for eleven or twelve consecutive months after the Act came into force and before the suit was instituted no relief could possibly be given to him under S. 14. That rule must be applied as far as possible to suits filed before the Act came into force and, therefore, when it is found that in such suits there was default for eleven or twelve consecutive months before the suit was brought then the result should be the same if those defaults had occurred after the 1950 Act had come into force and were relied upon in a suit under that Act. (Para 30)

E. R. Meyer with S. Roy, for Appellant; Shankar Banerjea with A. K. Sen, for Respondent.

REFERENCE ..... /Para

('50) 86 Cal LJ 46: (54 Cal WN 756) 7, 12, 18

HARRIES, C. J.: This is an appeal from a judgment and decree of P. B. Mukharji J., dated September 6, 1951 made in favour of the plaintiff in a suit for ejectment.

(2) The suit was brought by the plaintiff-respondent to recover possession of portions of certain premises known as No. 32 Sir Harriram Goenka Street on the ground that the tenancy of the said premises had been 'ipso facto' determined by reason of the provisions of S. 12(3) of the West Bengal Rent Control Act of 1948.

(3) It appears that the tenancy commenced on April 1, 1944, the rent then being Rs. 525/- per mensem. Later in the year 1948 the rent was increased in circumstances which we know nothing of to a sum of Rs. 840/- per mensem. But no point is taken that this increase was in any way illegal.

(4) In November 1948 there appears to have been some quarrel between the parties and in that month the tenant refused to pay his rent and never paid any rent for the premises thereafter right up until the date of the decree, namely, September 6, 1951.

(5) A suit was filed on November 29, 1949 claiming to eject the tenant-appellant. At that time the Rent Control Act of 1948 was in force and admittedly the tenant was a defaulter for three consecutive months or more and by reason of S. 12(3) of that Act his tenancy had been 'ipso facto' determined.

(6) During the pendency of the suit the West Bengal Rent Control Act of 1950 was passed which came into operation on March 31, 1950. Section 18(5) of this latter Act made applicable certain provisions of the 1950 Act in so far as may be to suits pending at the date when the Act came into force.

(7) By a decision of this Court — 'S. B. Trading Co. Ltd. v. Satyendra Chandra Sen', 86 Cal. L. J. 46, a Bench of this Court held that S. 18(5) of the West Bengal Rent Control Act, 1950 had no application to suits for ejectment based on the ground that the tenancy had been 'ipso facto' determined by failure to pay three months' consecutive rent as provided by S. 12(3) of the Rent Control Act of 1948. The result of this decision was that a very large number of tenants against whom suits were pending were deprived of the relief contemplated in S. 18(5) of the Rent Control Act of 1950.

(8) To remedy this the Legislature passed an amending Act—The West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act, 1950 which came into force on November 30, 1950. By this amending statute the term "tenant" was amended and was re-defined as meaning

"any person by whom rent is, or but for a special contract would be payable for any premises, and includes — (i) any person who is liable to be sued by the landlord for rent; and (ii) any person whose interest in the premises has been 'ipso facto' determined under sub-section (3) of section 12 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948."

(9) This new definition was to be deemed always to have been substituted for the original definition in the 1950 Act.

(10) Section 4 of this amending Act provided 'inter alia' for the amendment of sub-s. (5) of S. 18 and the words

"on the ground of default in payment in such premises has been 'ipso facto' determined under the provision of sub-section (3) of section 12"

were substituted for the words

"on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948."

(11) By S. 5 of the Amending Act it was provided:

"In all applications made under sub-section (1) of section 18 of the said Act (meaning the 1950 Act) which are pending at the commencement of this Act and in all suits referred to in sub-section (5) of the said section which are pending at such commencement, the said Act as amended by this Act shall apply and shall be deemed always to have applied."

(12) As I have stated earlier in the case of — 'S. B. Trading Co., Ltd. v. Satyendra Chandra Sen 86 Cal L J 46 cited above this Court had held that relief under S. 18(5) of the 1950 Rent Control Act could only be given to two classes of tenants, that is tenants who had been given by the statute an opportunity of paying the arrears of rent and had not paid the same within the time allowed. The Court had held that S. 18(5) had no application to tenants whose tenancies had been 'ipso facto' determined by reason of default in paying three consecutive month's rent. What the Legislature did in the amending Act was to give relief only to persons whose tenancies had been 'ipso facto' determined. The other classes of tenants which this Court had held were entitled to relief under S. 18(5) of the 1950 Act as drafted were excluded by the amending Act from any relief. After the amending Act, therefore, the position was that the only persons who could claim relief under S. 18(5) of the 1950 Act were persons whose tenancies had been 'ipso facto' determined under S. 12(3) of the Rent Control Act of 1948.

(13) As I have said the suit which gave rise to this decree was pending when the 1950 Act came into force and was still pending when the amending Act of 1950 came into force on November 30, 1950.

(14) Before P. B. Mukharji J. who heard the suit it was contended on behalf of the tenant appellant that by reason of the amending Act no decree for ejectment at all could be made against him. On behalf of the landlord respondent it was urged that no relief could be given under S. 18(5) of the 1950 Act as amended, though by the amendment that section was made applicable to tenants whose tenancies had been 'ipso facto' determined. On behalf of the landlord it was contended that the tenant was guilty of such default and that no relief could be given to him under S. 18(5) of the 1950 Act which in terms referred to S. 14 of that Act.

(15) P. B. Mukharji J. came to the conclusion that S. 18(5) of the Act of 1950 as amended was applicable to cases of suits brought against persons whose tenancies had been 'ipso facto' determined. He, however, held that by reason of certain defaults S. 14 of the Act could not be applied to give the defendant any relief whatsoever and he accordingly decreed the suit.

(16) Before us Mr. Meyer on behalf of the tenant appellant has contended that by reason of the amending Act of 1950 no decree could be passed against his client on the ground that his tenancy had been 'ipso facto' determined by default in payment of arrears of rent for three consecutive months. His contention is that by reason of the amending Act of November 1950 the whole of the 1950 Act was made to apply to pending suits and as the 1950 Act did not permit of ejectment on the ground of 'ipso facto' determination of the tenancy no decree for ejectment could be made against the tenant in this case.

(17) Mr. Meyer relied on S. 5 of the amending Act of 1950 and stressed the words

"in all suits referred to in sub-section (5) of the said section which are pending at such commencement, 'the said Act as amended by this Act' shall apply and shall be deemed always to have applied."

Mr. Meyer's argument is that to the suits referred to in sub-s. (5) of S. 18 of the 1950 Act, that is suits pending when that Act came into force, the 1950 Act as amended by the amending Act was to apply and was to be deemed always to have applied. In short his argument is that after the amendment of the 1950 Act by the amending Act of November 1950, the whole of the 1950 Act as amended was made applicable to pending suits and no decree could be passed against the tenant on the ground of 'ipso facto' determination, but could only be passed against him on the grounds provided in the 1950 Act as amended.

(18) There can be no doubt whatsoever that S. 5 of the amending Act of 1950 is not very happily worded and is capable of the construction placed upon it by Mr. Meyer. However, if that construction is placed upon S. 5, then it would defeat the whole purpose of that section

and indeed of the amending Act. The purpose of the amending Act was to nullify the effect of the decision in — 'S. B. Trading Co., Ltd. v. Satyendra Chandra Sen', (86 Cal. L. J. 46) cited above and to enable the courts to grant relief to tenants whose tenancies had been 'ipso facto' determined by reason of default in payment of rent for three consecutive months. If Mr. Meyer's contention be accepted then the amending Act is wholly unnecessary because no decree could be made at all against such defaulting tenants.

(19) It seems to me that a construction must be given to this section which would give effect to the amending Act rather than render it wholly useless verbiage, if such a construction can reasonably be given to the words in S. 5. It seems to me that on a true construction of S. 5 of the Amending Act all that was intended was that the amended definition of "tenant" and the substitution of the words in S. 18(5) were to apply to all suits pending at the time when the original 1950 Act came into force. There was possibly no need for the concluding words of the section, namely, "and shall be always to have applied" unless they were put in to meet a possible argument that the amendment would have no effect during any period before the date when the amending Act came into force, namely, November 30, 1950. The words "and shall be deemed always to have applied" make it abundantly clear that the Act as amended shall apply as if the amendment was in the original Act as passed on March 31, 1950.

(20) When the Court sees the purpose of the amending Act and sees from the earlier sections what the Legislature intended to do, it seems clear that S. 5 must be read as meaning that such portion of the Act of 1950 as was amended by the amending Act of 1950 shall apply to suits pending when the 1950 Act came into force and shall be deemed always to have applied to such suits. It is true that we are cutting down the full meaning of the words "the said Act as amended shall apply and shall be deemed always to have applied". But it seems to me we are bound to do that to give the amending Act any meaning and purpose whatsoever. It is a legitimate method of construction to give an Act a meaning if that can be done reasonably. Too literal a construction should not be followed when it leads to an absurdity if a somewhat more liberal construction would lead to an effective application of the Act. What the Legislature clearly had in mind here were the original provisions of S. 18(5) and they were not concerned with the other portions of the Act of 1950. Section 5 of the amending Act provides that S. 18(5) of the 1950 Act as amended would apply to all pending suits and would always be deemed to have applied and there was no intention whatsoever to make applicable to such suits any other provisions of the 1950 Act.

(21) The view which I take was the view taken by the learned Judge in the court below and I have no hesitation in holding that the learned Judge arrived at a correct conclusion on this matter.

(22) Mr. Meyer also endeavoured to argue that after the 1950 Act came into force and even before the amending Act of 1950 no suit could be brought against a person whose tenancy had been 'ipso facto' determined under S. 12(3) of the Rent Control Act of 1948. He urged that the opening words of S. 12 of the 1950 Act showed that it was the intention of the Legislature that that Act should be retrospective. Mr. Meyer placed reliance on the words:

> "Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant, including a tenant whose lease has expired:
>
> Provided that nothing in the sub-section shall apply to any suit for decree for such recovery of possession"

where certain facts exist.

(23) Mr. Meyer's contention was that the words "notwithstanding anything to the contrary in any other Act or law" show that this Act was intended to govern all cases whether such had been filed or decided before or after the Act came into force and that the Act was clearly made retrospective and would, therefore, apply to pending cases. The 1950 Act admittedly did not allow a suit to be brought on the ground of 'ipso facto' determination of a tenancy. Therefore, it is said that the suit before the learned Judge was bound to be dismissed.

(24) I can see nothing in the words relied upon by Mr. Meyer as suggesting that this Act should be given retrospective effect. The Court leans against giving an Act retrospective effect and will only give it such effect if it is compelled to do so by express words in the statute or where retrospective effect is clearly to be implied from the words of the statute.

(25) So far from the provisions of this statute suggesting that they should have retrospective effect, the provisions I think clearly suggest the contrary. Why should it have been necessary to enact S. 18(5) if the whole Act was to have retrospective effect? The Act would have applied to these suits and applied with full force; S. 14 of the Act which provides for relief would have been applicable. Yet we find that S. 18(5) was enacted which expressly provides that a limited relief will be given to tenants in suits pending when the Act came into force. It is provided that in such cases the Court shall exercise the powers of granting relief against ejectment given by S. 14 of the Act following the provisions and procedure of that section as far as may be necessary for the said purpose. The court is enjoined to give effect to S. 14 as far as possible in such suits. But if the Act had been retrospective the court would have been bound to give full effect to S. 14 in all such suits. It appears to me that the existence of S. 18(5) in the Act of 1950 makes it clear that the Act was never intended to be retrospective and was only to have such retrospective effect as was expressly given to it in the statute itself. That being so there is no force in this contention.

(26) Mr. Meyer then contended that if the Act of 1950 applied to suits based on 'ipso facto' determination of the tenancy under S. 12(3) of the 1948 Act then he should be granted relief. The learned Judge in the court below had held that the tenant was not entitled to relief because even after the amending Act came into force on November 30, 1950 he had defaulted for over six consecutive months. According to the learned Judge's view such default

prevented the court from giving him any relief under S. 14 of the Act and it will be remembered that in giving relief in pending suits the Court must apply S. 14 as far as it can. Section 14 of the Act provides for granting relief to tenants. But there is a proviso to sub-s. (3) which is in these terms:

"Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months."

(27) The learned Judge's view was that as the Act of 1950 was only made applicable to persons whose tenancies had been 'ipso facto' determined by the amending Act which came into force on November 30, 1950 the only default of the tenant which could be regarded was default after November 30, 1950. He held, however, that after that date no rent whatsoever had been paid or tendered up until the date of the decree namely September 6, 1951. There was, therefore, at least eight consecutive months' rent in arrear and in the view of the learned Judge the proviso to sub-s. (3) of S. 14 made it quite impossible for him to afford any relief.

(28) Before the learned Judge it had been argued on behalf of the landlord that the Court could look not only at what occurred after the amending Act came into force, but could look at what occurred before the suit was ever filed. When this suit was filed the tenant had admittedly defaulted for a matter of eleven or twelve consecutive months and it was urged on behalf of the respondent that the default of eleven or twelve consecutive months before the suit made it impossible for any relief to be granted. The learned Judge as I have said, took the view that the default must occur after the amending Act came into force and that he could not take into account any defaults before the date of the amending Act.

(29) I am not satisfied that the view of the learned Judge is right on this question. Admittedly S. 14 of the Act of 1950 cannot be literally applied in suits filed before the 1950 Act came into force. The opening words of S. 14 make it clear that it can only apply to suits filed after that Act came into force. The opening words of sub-s. (1) are:

"If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of section 12 the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof upto the date of the order mentioned ....."

(30) It is quite clear that the section in terms only applies to suits brought after the Act came into force and, therefore, the section cannot be applied strictly and literally to any suits filed before the Act came into force, that is to suits pending when the Act came into force. That appears to me to be the reason why in S. 18(5) of the Act the Court is enjoined to exercise the powers of granting relief against ejectment given by S. 14 following the provisions and procedure of that section as far as may be necessary and for the said purpose. It was realised by the draftsman of S. 18(5) that S. 14 of the Act as drafted could not apply and, therefore, the Court is enjoined to apply the provisions of S. 14 as far as possible to give relief.

What was intended I think was that the Court under S. 18(5) of the 1950 Act should apply the principles underlying S. 14 of the Act and apply those principles as far as possible to a case to which S. 14 could not in terms apply. One of the principles upon which S. 14 is built is that there are certain defaults (sic) no relief can be given: It is quite clear that thus if a suit was brought after the 1950 Act came into force and the tenant had been in default in the payment of rent for eleven or twelve consecutive months after the Act came into force and before the suit was instituted no relief could possibly be given to him under S. 14.

It seems to me that that rule must be applied as far as possible to suit filed before the Act came into force and, therefore, when it is found that in such suits there was default for eleven or twelve consecutive months before the suit was brought then the result should be the same as if those defaults had occurred after the 1950 Act had come into force and were relied upon in a suit under that Act. It appears to me that what the Court has to do is to apply the provisions of Section 14 as far as it can to a suit to which the provisions cannot literally apply. If that be so it appears to me that the default in this case is fatal because a similar default, if the suit was really governed by the 1950 Act, would have been fatal and no relief could have been given under S. 14. That is in my view sufficient to dispose of this question of relief.

(31) However, if the view that I am inclined to take is not the correct view and the view of the trial court which is also supported by a single Judge decision of Roxburgh J., is the correct view the result will be the same. Assuming that all that the court could regard was any default after the date of the amending Act then as I have already pointed out, there was default in the payment of eight or nine consecutive months' rent and that would be sufficient to bar any relief under the proviso to S. 14(3), applying that proviso strictly.

(32) Mr. Meyer, however, contended that he could not possibly be held to have defaulted in the payment of rent because the case against his client was that his tenancy had been 'ipso facto' determined and, therefore, no question of rent could arise. However, by the amending Act of 1950 he was given certain relief provided that he did not default in the payment of rent. Mr. Meyer urged that he could not pay rent because the landlord treated him as a trespasser and that there was no provision at all which would have allowed him to deposit the rent in court after the amending Act came into force.

(33) Mr. Meyer has overlooked the provisions of S. 19 of the 1950 Act. The moment the amending Act came into force Mr. Meyer's client could have deposited the rent in the court of the Rent Controller. There is no force in his contention that the landlord no longer treated him as a tenant and would not accept rent. He could have tendered the rent to the landlord and if the latter had refused to accept it he could then have deposited the rent in the Court of the Rent Controller. That is clear

from sub-s. (1) of S. 19 of the 1950 Act. The moment the 1950 amending Act gave him a right to relief if he was not guilty of certain defaults he could have tendered rent and then deposited the rent with the Rent Controller if the tender had been refused. Had he done that there would have been no default if the view of P. B. Mukharji J. is the right view as to the applicability of the proviso to sub-s. (3) of S. 14.

However, he tendered nothing and deposited nothing. So even if the view of P. B. Mukharji J. be right there is still a default which debars the Court from giving the tenant any relief under S. 18(5) read with S. 14 of the 1950 Act. It follows, therefore, that it is immaterial which view is accepted as to what defaults can be taken into account. On either view the defendant was guilty of such default as debarred him from any relief under S. 18(5) read with S. 14 of the Act. That being so the suit of the landlord was rightly decreed by the learned Judge.

(34) The appeal, therefore, must fail and is dismissed with costs. Certified for two Counsel.

(35) BANERJEE, J.: I agree.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 CALCUTTA 140 (Vol. 40, C. N. 44)

R. P. MOOKERJEE AND LAHIRI JJ.

Harinarayan Shaw and another, Defendants-Appellants v. Gobardhandas Shroff and others, Plaintiffs-Respondents.

A. F. O. D. No. 186 of 1949, D/- 16-8-1951.

(a) Societies Registration Act (1860), Ss. 5, 6 — Property held by trustees of unregistered Society becomes property of society after its registration.

The property which was vested in the trustees of an unregistered society before registration of the Society becomes as from after the registration of the Society the property "belonging to the society" and must be deemed to be the property of the society. As a matter of fact, and strictly speaking, there is no transfer of ownership. That which belonged to an unregistered Society continues after the change in status of that Society on being registered, as belonging to the registered Society. (Para 28)

Anno: Soci. Reg. Act, S. 6 N. 2.

(b) Societies Registration Act (1860), S. 6 — By R. 15(h) of Society, Executive Committee of Society empowered to delegate, to office-bearers or trustees, power to institute, conduct, defend, compound etc., legal proceedings for or against Society — Sub-rule held not ultra vires — Delegation to one of trustees and suit as framed, held in order. (Paras 37, 39)

Anno: Soci. Reg. Act, S. 6 N. 1.

Hiralal Chakravarti and Shyamadas Bhuttacharjya (Sr.), for Appellants; Girija Prosanna Sanyal, Bireswar Chatterjee and Smriti Kumar Roy Choudhury, for No. 1; Amarnath Rai Choudhury and Subodh Kumar Bhattacharyya, for No. 3, for Respondents.

R. P. MOOKERJEE J.: The plaintiff respondent filed the suit out of which this appeal arises for recovery of possession of a particular property after declaration of title and also for damages. The plaintiff's case was that the property in suit belonged to the Srinagar Dharmasala Trust Fund which had been let out in tenancy. On 30-7-1942, possession was obtained after a decree in ejectment had been passed against the tenant. About May, 1946, defendant 1 unlawfully took possession of the land, illegally constructed certain temporary sheds and let out the same to defendants 3 and 4. Defendant 2 had also raised a platform in one portion of the land in collusion with defendant 1 without the knowledge of the plaintiff.

(2) The principal defence was raised on behalf of defendant 1 who denied the plaintiff's title, claimed that he was not a trespasser, but his father had been in possession since 1939 with the consent of the plaintiff. Defendants 3 and 4 were claimed as tenants.

(3) Defendant 3 claimed to be a tenant, and was ready to pay rent either to defendant 1 or to the plaintiff whoever was entitled to the same. Defendant 4 also claimed to be a tenant under defendant 1.

(4) Defendant 2 Kripal Das alias Sadhu Baba raised various defences about the frame of the suit. Defence as to misjoinder of parties also was raised as Iswar Kripaleswar Thakur, a Deity alleged to have been consecrated on a portion of the land, had not been impleaded. He also denied the title of the plaintiff and claimed right by adverse possession.

(5) The suit had originally been filed by Srinagar Dharmasala Trust Fund, a Society registered under Act XXI of 1860. Subsequently, the cause title was allowed to be amended and the plaintiff is now described as:

"Gobardhan Das Shroff, authorised Trustee, Srinagar Dharmasala Trust Fund, a society registered under Act XXI of 1860 having its registered office at 184, Cross Street, Calcutta."

(6) Various Issues had been raised in the Lower Court. It is not necessary for our present purposes to refer to all of them, as on behalf of the appellants only a few points have been pleaded. The Trial Court decreed the plaintiff's suit. The Society's alleged title to the land was declared with a direction that the said Society was to recover 'khas' possession by evicting the defendants therefrom. If the defendants did not remove the structures and other things from the land in suit within a particular date fixed, the plaintiff would recover 'khas' possession by removing the structures in execution of the decree. Mesne profits were decreed from May, 1946 against defendant 1 alone till the date of recovery of possession.

(7) The only points urged in support of this appeal preferred by defendants 1 and 2 are (1) that the plaintiff Society has no right, title and interest in the disputed property, (2) that Gobardhandas Shroff alone describing himself as trustee of the Srinagar Dharmasala Trust Fund is not entitled to maintain the present suit, and (3) that defendant 2 has acquired title by adverse possession.

(8) The first and principal question raised in this appeal as to whether the property in suit now belongs to the Srinagar Dharmasala Trust Fund, as a registered Society, depends for its decision on an interpretation of the provisions contained in the Societies Registration Act 1860 (Act XXI of 1860). Before we refer to the provisions of that Act it is necessary that the relevant facts of the present case may be shortly stated.

(9) The property in suit was purchased in October, 1918, by one Haribux from the Trustees Calcutta Improvement Trust. The succes-

sors in interest of Haribux transferred the property on 30-8-1937, in favour ot three persons, viz., Lachmi Narayan Shroff, Shewram Shroff and Durga Prosad Shroff, as trustees of Srinagar Dharmasala Trust Fund. On the 7th October following, these three purchasers along with four other persons formed themselves into a Society and got it registered under Act XXI of 1860. The Society was described as the Srinagar Dharmasala Trust Fund. According to the plaintiff, the Srinagar Dharmasala Trust Fund had been in existence from before. It is not necessary for our present purpose to come to a decision whether there had been such a trust before 30-8-1937, when the property in suit was purchased by the three persons in their capacity as Trustees of the said Fund. Although it is conceded that the property in question was vested in those three persons as Trustees, it is contended that the Registered Society could not have any right over the said property as there had been no conveyance executed in favour of the Society. It is urged that unless there be a regular deed of conveyance in favour of the registered Society, the latter has no 'locus standi' to maintain the suit or to claim any relief in respect of that property.

(10) It is accepted that when the property was transferred on 30-8-1937, in favour of the three persons as trustees, title had vested in the latter. The right, if any, of the registered Society in respect of the property has been derived, if at all, by the fact of that Trust Fund having been registered under Act XXI of 1860.

(11) It is, therefore, necessary to examine the provisions of the Societies Registration Act (XXI of 1860) as also the terms of the Memorandum of Association and the Rules and Regulations filed along with the Memorandum.

(12) It appears from exhibit 2, the Memorandum of Association of Srinagar Dharmasala Trust Fund, that the object of the Society includes (as stated in cl. 3(a) of the Memorandum) taking

> "... over and manage the properties if any movable and immovable belonging to the Trust Fund and standing in the names of Luchminarain Shroff, Sewaram Shroff and Durga Prosad Shroff or any of them as Trustee or Trustees of the said Trust or in the name of any other person or persons on behalf of the Trust Fund."

(13) Clause 3(h) of the Memorandum further specifies another object of the Society being

> "To hold and manage the movable and immovable properties already acquired by the Society and purchase, acquire or take on lease and manage all lands and buildings necessary for the society ..... or lease any property belonging to the Society with the sanction of the executive committee."

(14) Rule 17 of the Rules and Regulations of Srinagar Dharmasala Trust Fund provides:

> "The Society shall have three trustees in whom the fund and properties of the Society both movable and immovable shall be vested accordingly as the Committee may decide from time to time."

(15) The properties referred to in R. 17, include No. 18 Pal Street, Calcutta the property in dispute in the present case.

(16) Under cl. 3(1) of the Memorandum of Association it is competent for the Society,

> "From time to time to appoint Trustees to take charge of and manage the Trust Funds and properties movable and immovable of the Society and to perform and carry out its objects."

(17) Under cl. 5 of the Memorandum read with R. 8, of the Rules and Regulations it is provided that the first trustees shall be the same three persons in whom the property in suit had been vested at least from 30-8-1937, if not from before, as trustees of the Srinagar Dharmasala Trust Fund.

(18) It is, therefore, clear from the Memorandum of Association and the Rules and Regulations of the registered Society that what had been the principal object of the unregistered Society continued to be one of the objects of the registered Society also, namely, among other as in cl. 3(b) of the Memorandum —

> "To erect Dharmasalas at different places of pilgrimage and there to arrange for the accommodation of pilgrims, and when necessary, to provide for their food as well."

(19) It also appears that the same body of persons has continued to function after the registration of the Society as trustees.

(20) Now, the question is whether by the fact of the Society being registered, the latter has now become entitled to hold the property subject to the Trust and powers of the Trustees.

(21) On reference to the Preamble to the Societies Registration Act, 1860, it would appear that the Legislature was making provision,

> "for improving the legal condition of societies established for the promotion of ..... charitable purposes."

(22) The various provisions contained in the Act itself make it clear that by registration, an unregistered Society acquires a status only to make it more convenient for the carrying out the purposes for which the unregistered society had existed.

(23) Sections 17 and 18 of the Act make specific provisions for pre-Act unregistered societies, — as to how they are to be registered.

(24) It was contended on behalf of the appellants that by the registration of a society no title in any property is affected.

(25) Section 5 of the Act makes specific provision as to how the property of the society is vested. This section is in the following terms:

> "The property, movable and immovable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title."

(26) Mr. Chakravarti, on behalf of the defendants appellants, contends that under this section there is no automatic transfer of title from the original owners, members of an unregistered society, to the Registered Society. It is overlooked that whatever may be the position in respect of property owned by individuals personally, and we are not called upon to decide that question in the present appeal, in the case of properties which are vested in trustees from before the registration of a Society, such registration only gives a legal status to the Institution and makes it convenient for the due performance of the objects of the Society.

(27) In the present case there had been no pre-existing Deeds of Trust. There were no detailed rules governing the Trust and, therefore, no question of any conflict between the terms of a pre-existing Trust and the Rules and Regulations of the Registered Society arises. When the old three trustees joined with

four others to be registered as a society, the same three persons continued to be the trustees, and they bring themselves under the provisions contained in the Memorandum of Association and the Rules and Regulations. By operation of the provisions contained in S. 5 of the Act, and the very purposes for which Registration is provided in the Act the registered society automatically obtained rights over the property. The property is at the disposal of the Society, subject, no doubt, to the Trust. The property continues to be vested in the Trustees as before. Under S. 5 of the Act, a property, whether "vested in trustees" or be "deemed to be vested in the Governing Body of such Society" may still belong to a Society registered under the Act.

(28) It must, therefore, be held that the disputed property which was vested in the trustees before registration of the society, became, as from after the registration of the Society, a property "belonging to the society" and be deemed to be the property of the Society. As a matter of fact, and strictly speaking, there is no transfer of ownership. That which belonged to an unregistered Society continues after the change in status of that Society on being registered, as being belonging to the registered Society. The first point raised on behalf of the appellants must, therefore, be overruled.

(29) Once it is found that the property in suit belongs to the Registered Society and the Rules and Regulations attached to the Memorandum of Association, when the Society was formed, apply to the property in suit, the next objection raised must also be negatived. On behalf of the Appellants it is contended that there could be no delegation to Gobardhandas Shroff as the sole trustee on behalf of the registered Society to file a suit on behalf of the Society. It is not the Appellant's case now, whatever might have been the attitude taken up in the trial Court, that the Managing Committee of the Society had not passed resolution authorising Gobardhandas Shroff to file the present suit. Reference may be made to Exhibits 7(a) and 7(b) for the relevant resolutions of the Committee in this connection.

(30) On behalf of the appellants, the objection is put in this way. Under R. 32, the Secretary alone has the power, among other things,

"...to institute and defend suits or proceedings for and on behalf of the Society."

(31) Rule 15 provides that without prejudice to the generality of powers conferred by the Rules, the Executive Committee of the Society will have powers 'inter alia',

"(g) to institute, conduct, defend, compound, refer to arbitration or abandon any legal proceeding for or against the Society.

(h) to delegate the above or any of the above powers to the office bearers or trustees or any one of them."

(32) It is argued that when the Secretary is specifically authorised under R. 32 to represent the Society in legal proceedings, it is not competent for the Society to delegate under R. 32, some person other than the Secretary, to file a suit on behalf of the Society. Rule 15 being a general provision must be read subject to the limitations contained in R. 32.

(33) It is not necessary for us to consider whether the general proposition relied upon by Mr. Chakravarti making R. 15, subject to the provisions contained in R. 32, is well founded or not, inasmuch as, we cannot accept the interpretation put by him on the latter Rule. It will not be correct to interpret the last few words of R. 32, as being a general provision authorising the Secretary to institute and defend all suits and proceedings. It is significant that this authority to institute and defend suits is part of a sentence which reads as follows:

"The Secretary shall have the power to open in the name of the Society current accounts with such Bank or Banks as the Committee may direct for monies not vested in the Trustees and issue, draw, sign, accept, endorse and negotiate all cheques and drafts and institute and defend suits or proceedings for and on behalf of the Society."

(34) We have to take the sentence as a whole and the authority given to the Secretary under this, the last sentence of R. 32, must be read as limited to such acts and particular transactions as are referred to in the earlier part of that sentence. If we refer to R. 32, as a whole also, it is significant that all the powers and directions given to the Secretary not only in the last sentence quoted above, but in the earlier part of that Rule also, relate to the opening of accounts in Banks and dealing with monies and securities, belonging to the Society, and not vested in Trustees.

(35) In the first place, therefore, we must hold that the authority given to the Secretary in R. 32, is limited to those particular types of transactions as are referred to in that Rule. Moreover, the property now in suit is admittedly a property vested in Trustees, and therefore, R. 32 will not be attracted at all. Rule 32 does not vest any authority in the Secretary to deal with such property and to represent the Society in all suits and litigations in respect of such property vested in Trustees. On reference to R. 32, it will appear that repeated references are made to exclude properties vested in Trustees, from the operation of that Rule.

(36) The authority, therefore, under which a person may represent the Society in a suit, whether in respect of a property vested in Trustees or relating to matters not covered by R. 32, can only be delegated to a person as under Sub-R. (h) of R. 15. This is exactly what has been done in the present case.

(37) Provisions contained in S. 6, Societies Registration Act, do not, therefore, make sub-R. (h) of R. 15, ultra vires. We have held that R. 32 has no application in the present case and that also there is no specific provision in the Rules as to who will represent the Society in such a litigation. The second part of S. 6 of the Act authorises the Governing Body to appoint the delegate as to who would represent the Society. Sub-rule (h) of R. 15 also does the same thing. It is not the case of the appellants that apart from the provisions contained in R. 32, which we have held as inapplicable in the present case, there was any separate resolution passed by the Committee authorising the Secretary to institute the present suit.

(38) Reliance was placed on behalf of the appellants on the fact that the Secretary had presumably under R. 32 of the Rules represented the Society in a suit in ejectment brought by the Society in respect of the property in suit. No attempt was, however, made to prove that the Secretary had not, on that occasion, been specially authorised to institute that suit as one of the Trustees had been in the present case. No question about the competence of the Secretary to file the earlier suit had been

raised in the defence in that suit. In the absence of relevant evidence, it is not open to the defendants in the present case to assume that it is the Secretary and Secretary alone who could and did represent the Society in respect of suits brought relating to the property now in suit and that also without any specific resolution of the Committee.

(39) It is competent for the Governing Body, that is the Executive Committee, under sub-r. (h) of R. 15, to delegate such powers to the office bearers or trustees or any one of them. The delegation made by the Committee to Gobordhandas Shroff one of the Trustees, to institute the present suit was, in order and the suit as framed is legally maintainable.

(40) Both the questions of law raised on behalf of the appellants, therefore, fail.

(41) A faint attempt was made to contest that defendant 2 has not proved his title by adverse possession.

(42) With regard to the question of adverse possession the learned Subordinate Judge has found, on an examination of the evidence in the case, that the alleged Sivalingam standing on a platform in one part of the disputed property was never consecrated, and in any view was not shown to have been put there beyond twelve years. Apart from the question whether there was any Sivalingam, the case as made by the defendant 2 is that the portion of the property which was being possessed by him was by and on behalf of the Deity. Defendant 2 did not claim any personal right. The claim of defendant 2 cannot, therefore, be in assertion of his personal right over any portion of the property. As stated already, on the strength of the plan attached to the Sale Deed of 1918, the learned Subordinate Judge was justified in coming to the conclusion that there was no platform in existence in 1918. We do not see any reason to disbelieve the definite statement made by Chandi Prosad Maitra, plaintiff's witness 5, that the platform was constructed after the ejectment suit and that the alleged Sivalingam was put up thereafter. The finding reached is that the platform together with the alleged Sivalingam did not come into existence before 1946. No question of adverse possession can, therefore, arise on the facts.

(43) The decision reached by the learned Subordinate Judge on the question of misjoinder of parties was not pressed before us. The conclusion by the lower Court that there was no Sivalingam at all remains unchallenged and accordingly it is not open to the appellants to press the question of adverse possession at all in the present appeal.

(44) All the points raised on behalf of the appellant fail.

(45) The learned Subordinate Judge had allowed the defendants time till the end of September, 1949, for removing the structures and other things from the suit lands. In modification of that order, the defendants will be allowed time till 30-11-1951.

(46) Subject to the modification indicated above, the decree of the Court below is affirmed and this appeal is dismissed with costs to the plaintiff-respondent.

(47) LAHIRI J.: I agree.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 CALCUTTA 143 (Vol. 40, C. N. 45)

HARRIES C. J. AND G. N. DAS J.

National Iron and Steel Co. Ltd., Appellants v. Monorama Dassi, Respondent.

A. F. O. O. No. 85 of 1950, D/- 28-8-1951.

Workmen's Compensation Act (1923), S. 3 — "Arising out of and in the course of his employment".

A boy was employed by the appellants in a canteen or tea shop and it was part of his duty to take tea from the tea shop which was outside the factory gates to various persons in the factory. On 28-4-1949, late in the afternoon the boy was returning to the tea shop after having served tea to certain persons in the factory when he had to pass a mob of workmen who were leaving the factory. This mob was attacking the police and the police had to fire in self-defence. Unfortunately a bullet struck this boy and he was severely wounded. He was taken to hospital, but unfortunately died the following day:

Held that clearly the accident arose in the course of the employment. It was not necessary for the respondent, the mother of the boy, to establish that the death resulted from some special risk to which the boy was exposed. What had to be decided was whether death was caused as the result of a risk to which the boy's employment in fact exposed him. The boy was specially exposed to the risk in this case. His employment specially exposed him to the risk which anybody is exposed to who has to pass an unruly mob with which the police are endeavouring to deal. As this boy was approaching the mob the police fired. In short his employment required him to pass a dangerous spot or place and in passing such a place he received injury. That being so it could be said in truth and in fact that the accident arose out of his employment. Case law discussed.

(Paras 7, 9, 17)

Anno: W. C. Act, S. 3 N. 2.

Phanindra Kumar Sanyal, for Appellants; Jitendra Mohan Sen Gupta, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

(1912) AC 35: (81 LJKB 45)	14
(1917) AC 127: (86 LJPC 102)	10
(1917) AC 479: (86 LJKB 1074)	14
(1933) AC 669: (102 LJPC 170)	12
(1908) 1 BWCC 194	12
(1911) 4 BWCC 295	14
(1904) 2 KB 32: (73 LJKB 510)	14

HARRIES C. J. This is an appeal from an order of the learned Commissioner for Workmen's Compensation awarding the applicant respondent a sum of Rs. 1200/- as compensation together with certain costs.

(2) The applicant was the mother of a boy who, it is said, died as the result of an accident arising out of and in the course of his employment. The boy admittedly was employed by the appellants in a canteen or tea shop and it was part of his duty to take tea from the tea shop which was outside the factory gates to various persons in the factory. On 28-4-1949, late in the afternoon the boy was returning to the tea shop after having served tea to certain persons in the factory when he had to pass a mob of workmen who were leaving the factory. This mob, it transpired, was attacking the

police and the police had to fire in self-defence. Unfortunately a bullet struck this boy and he was severely wounded. He was taken to hospital, but unfortunately died the following day.

(3) These proceedings were brought for compensation and it was alleged that the death was due to an accident arising out of and in the course of the boy's employment.

(4) The employers filed a written statement and the point made by them was that the death was not due to accident. They also claimed that the wages of the boy were not correctly stated.

(5) The only issue which the learned Commissioner had to try was whether the accident arose out of and in the course of the employment. He found that the accident did not (sic) arise and he accordingly awarded the mother of the boy as a dependent of the deceased workman the compensation which I have already stated.

(6) Mr. Sanyal on behalf of the appellants has taken a point that there was no evidence that this boy was a workman within the meaning of that term as used in the Workmen's Compensation Act. It is to be observed that this point was never raised before the learned Commissioner and indeed the point was not taken in the written statement. On the contrary the written statement proceeds on the basis that the deceased boy was a workman, but that his monthly wages were not properly stated. There was no issue framed on this and it appears to me that we cannot allow the employers at this stage to raise this point for the first time. It was in effect conceded in the court below that he was a workman and the whole case proceeded upon that basis. Once there was in fact an admission that the boy was a workman, no further evidence to establish that was required. It would indeed be most unjust to allow the point to be taken for the 1st time at this stage & to hold that the evidence did not establish that the boy was a workman. It was obviously conceded and, therefore, the point cannot be raised now.

(7) Mr. Sanyal then contended that the accident did not arise out of and in the course of the boy's employment. Clearly the accident arose in the course of the employment because the boy had been delivering tea to persons in the factory as it was his duty to do and was returning with a tea tray and tea-pot thereon to the canteen or tea shop as he was bound to do. Whilst so returning he received this bullet wound and it is clear that he received it in the course of his employment, that is, whilst he was actually doing what he was employed to do.

(8) Mr. Sanyal is prepared to concede that the accident was in the course of the employment, but he contends that the accident did not arise out of the employment. His argument is that death was not due to any special risk of the employment. He has urged that it could not possibly be said that receiving a bullet fired by the police in self-defence can never (sic) be regarded as a special risk of employment of anyone in a canteen.

(9) I do not think that it was necessary for the respondent to establish that the death resulted from some special risk to which the boy was exposed. What has to be decided is whether death was caused as the result of a risk to which the boy's employment in fact exposed him.

(10) It was at one time thought that an accident arose out of and in the course of the employment if it was established that a person was injured at a place where he was injured because his employment required that he should be at that place. No further connection it is said was necessary. That view, however, has not been accepted and there must be some connection between the employment and the risk causing the injury. The matter was considered by the House of Lords in the case of — Mrs. Margaret Thom or Simpson v. Sinclair', (1917) A.C. 127. There a woman employed by a fish-curer, while working in a shed belonging to her employer, was injured by the fall of a wall which was being built on the property of an adjoining proprietor, with the result that the roof of the shed collapsed and the woman was buried under the wreckage.

(11) It was contended that the falling of a wall on some third party's property could not possibly be regarded as a risk of the woman's employment in the fish-curing shed. The House of Lords however held that the accident arose out of her employment because the fall of the wall on the third party's property damaged the roof of the shed and that was the direct cause of the injury.

(12) The question was again considered by their Lordships of the Privy Council in the case of — 'Brooker v. Thomas Borthwick and Sons (Australasia), Ltd.', (1933) A. C. 669. In that case building at Nelson, New Zealand, having collapsed owing to a severe earthquake, debris therefrom fell upon three men who were "workers" within the provisions of the Workers' Compensation Act, 1922, two of them being at work on the premises where they were employed, and the third being in the public street in the performance of his duty as an hotel porter; a further worker while working lost his balance owing to the earth-quake and fell down a steep incline on the premises where he was employed. The Judicial Committee of the Privy Council held in each case that the accident to the worker was one "arising out of the employment" within the meaning of S. 3, sub-s. 1, of the Act above mentioned without it being shown that by reason of his employment he was specially exposed to risk incidental to earthquakes.

(13) The phrase "arising out of the employment" occurred in the New Zealand Act as it does in English Act and the Indian Act, and has the same meaning.

(14) Dealing with risks of employment Lord Atkin who delivered the judgment of the Board observed at page 676:

> "In the course of the discussion the House of Lords had been referred to four cases of injury by natural forces, the two cases of lightning; — 'Andrew v. Failsworth Industrial Society Ltd', (1904) 2 KB 32 and—'Kelly v. Kerry County Council', (1908) 1 B W C C 194, and the two cases of 'Frostbite: Karemaker v. Owners of S. S. Corsican', (1911) 4 B W C C 295 and — 'Warner v. Couchman', (1912) A C 35, where the principle had been adopted that where the injury was directly caused by such a natural force it has to be shown that the workman was especially exposed by reason of his employment to the incidence of such a force. Lord Haldane's

exposition was obviously intended to compromise those decisions. The principle which emerges seems to be clear. The accident must be connected with the employment; must arise 'out of' it. If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with the employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the premises, there is no need to make further inquiry as to why the accident happened.

This principle appears to be the foundation of the street risk decision. — 'Dennis v. A. J. White & Co.', (1917) A C 479, which finally decided that a workman employed to go into the streets on his master's business who is injured by a risk of the streets establishes an accident arising 'out of' the employment though the risk was shared by all members of the public using the streets in like circumstances."

(15) Later at page 678 Lord Atkin observed: "Their Lordships' attention was drawn to the various decisions in cases in which workmen were injured by bomb and shells from bombardment during the war. They do not refer to them in detail, for they appear to confirm the conclusions which their Lordships have reached. Neither bombs nor shells have ordinarily anything to do with a workman's employment. It is, therefore, necessary to show special, exposure to injury by them. They represent exactly for this purpose the operation of such forces as lightning, heat and cold. It is said, how capricious is the working of the law. If the bomb injures a workman directly he must show special exposure; if it injures him indirectly by bringing the roof down on him he can recover unconditionally. It is almost impossible to give statutory protection in any case in which the line of distinction may not appear narrow; but the dividing principle adopted is authoritative and appears to their Lordships to be logical, and they feel bound to adopt it."

(16) Mr. Sanyal's argument on behalf of the appellants is that the injury here was similar to an injury caused to a man by a bomb or a shell dropped by some hostile aeroplane or fired by some hostile gun. In such a case as Lord Atkin has pointed out in the observations last quoted, it would be necessary to show special exposure to injury from such bomb or shell. Mr. Sanyal contends that it was necessary in this case to show some special risk of exposure and unless such was shown no compensation could be granted.

(17) It appears to me that the boy was specially exposed to the risk in this case. He had been sent into the factory to deliver tea to certain employees. In the meantime the police had appeared and had attempted to arrest what they considered to be a notorious absconder. The workmen leaving the factory had intervened and a mob had collected which had become unruly, if not riotous. That mob stood between the boy returning from the factory and the gateway and the tea shop and it was part of his employment to return the tea pot and tray once he had poured out tea to the tea shop. His way brought him past this unruly mob which was at the moment attacking some police officers. His employment specially exposed him to the risk which anybody is exposed to who has to pass an unruly mob with which the police are endeavouring to deal. As this boy was approaching the mob the police fired. It seems to me that having regard to the circumstances the boy's employment exposed him to that risk, and that being so his death can be said to arise out of and in the course of his employment. The bomb and shell cases referred to by Lord Atkin are cases where persons were injured by shells dropping at or near where these persons were working. This, however, is a different case. The shots were fired because an unruly mob were attacking the police. That unruly mob stood between this boy and the canteen to which his employment demanded that he should return the tea things. His employment required him to pass this mob which had become dangerous. In short his employment required him to pass a dangerous spot or place and in passing such a place he received injury. That being so it appears to me that it can be said in truth and in fact that the accident arose out of his employment. The view of the learned Commissioner, therefore, was right.

(18) The appeal fails and is dismissed with costs, the hearing-fee being assessed at four gold mohurs.

(19) G. N. DAS J.: I agree.

B/D.H. Appeal dismissed.

A.I.R. 1953 CALCUTTA 145 (Vol. 40, C. N. 46)

K. C. DAS GUPTA AND LAHIRI JJ.

Amal Krishna Basu and others, Petitioners v. Chandi Charan Banerjee, Opposite Party.

Civil Rule No. 281 of 1952, D/- 25-4-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 14 (1) — Order held was not one under S. 14 (1).

On an application by the defendant under S. 14 (1) the Court passed the following order: "On the defendant's prayer but without prejudice to the plaintiff, all arrears of rent up to February 1951 with legal interest, costs of the suit and half pleader's fee are determined at Rs. 2920/4/-. Defendant is permitted to deposit this amount within 15 days from date. This order is made without prejudice to the plaintiff and to the decision of the question of admissibility of relief under S. 14 (1) at the time of hearing of the suit".

Held that in view of the saving words used by the Court that the order was without prejudice to the determination of the question whether S. 14 (1) was applicable or not, the Court did not decide whether S. 14 (1) was applicable and did not purport to pass an order under the provision of that section. (Para 2)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 14(3), Proviso — "Within a period of 18 months" — Meaning of.

The period of 18 months that has to be considered for the purpose of proviso to S. 14 (3) is the period of 18 months preceding the date of the institution of the suit. (Para 5)

Sitaram Banerjee, Arun Kumar Dutt and Bejoy Bhose, for Petitioners; Ajit Kumar Dutt and Rameswar Saha, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras
('51) Civil Revn. Case No. 769 of 1951 4
('51) Civil Revn. Case No. 877 of 1951 (Cal) 4
('51) S. A. No. 1031 of 1951 (Cal) 4

K. C. DAS GUPTA J.: This Rule was obtained by the plaintiffs landlords in a suit for ejectment against an order passed by the Sixth Judge of the Court of Small Causes, Calcutta, directing under s. 14 (1), West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, the tenant defendant to pay Rs. 5057/14/- by 28-1-1952. This was the amount which the learned Judge found due on account of arrears and interest on calculation in accordance with the provisions of s. 14 (1). The suit was filed by the plaintiffs on 10-10-1950 on the allegation that prior to that date there had been defaults in the payment of arrears of rents from May. On 5-12-1950, the defendant appeared and filed an application for an order under S. 14 (1). This application was disposed of by the learned Judge on 17-3-1951 by an order which is in these words·

"On the defendant's prayer but without prejudice to the plaintiff, all arrears of rent up to February 1951 with legal interest, costs of the suit and half pleader's fee is determined at Rs. 2920/4/-. Defendant is permitted to deposit this amount within 15 days from date. This order is made without prejudice to the plaintiff and to the decision of the question of admissibility of relief under S. 14 (1) at the time of hearing of the suit."

(2) The amount was not deposited, and the hearing of the suit proceeded. Finally on 11-1-1952 the learned Judge being of opinion that the defendant was entitled to an order under provisions of S. 14 (1), passed an order as mentioned above. The first ground on which this order is challenged is that there having been already an application under s. 14 (1), on 5-12-1950 on which an order was actually passed on 17-3-1951, the Court had no jurisdiction to pass a further order in terms of S. 14 (1) of the Act. Whatever might be said for the proposition of law that once an order is passed under S. 14 (1), the Court has no power to pass, after that order has been disobeyed a further order under the provisions of the same Section, it is not necessary for us to consider that question here. The position here is that the Court did not in fact pass an order under S. 14 (1). Mr. Banerjee has contended that the terms of the order were in substance under the provisions of S. 14(1). If there had been no saving words used by the learned Judge that the order was without prejudice to the determination of the question whether S. 14(1) was applicable or not, we might have accepted this contention. In view of the clear words used by the learned Judge, we have come to the conclusion that he did not decide whether S. 14 (1) was applicable and did not purport to pass an order under the provision of that section. The first ground, therefore, fails.

(3) This brings us to the next contention urged by Mr. Banerjee. This is that as at the date the present order was passed, the tenant had been in default in payment of rent from May 1950 to December 1951, the proviso to S. 14 (3), is a bar to the defendant getting any benefit under the provision of S. 14. The proviso is in these words:

"Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months."

The question really is from what date this period of 18 months has to be calculated. If the 18 months are calculated from the date of the suit, there has been in this case no such default on three occasions but only defaults on two occasions. If on the other hand the 18 months are to be calculated as from the date of the order that is passed, there have been defaults on many more than three occasions.

(4) This question came up for consideration in several cases before this Court by Judges sitting singly. Chunder J. decided in a case which has not been reported — 'Civil Revision Case No. 877 of 1951 (Cal)' that

"the six months' default that would be necessary to deprive the tenant of his protection would be before the suit is filed as that is when the cause of action had arisen".

In this view Chunder J., finding that in that case not more than 4 months' rent was in arrear before the suit was filed, discharged the Rule obtained by the landlord. When the question came up before Roxburgh J. in — 'Krishna Gopal v. Banerjee Mukherjee & Co.', Civil Revn. Case No. 769 of 1951 (Cal), he rejected the contention that the relief provided in S. 14 is not open to the tenant because during the suit he has failed to continue to pay or deposit the rent and held that only defaults from before the suit could be considered for the purpose of this proviso.

My learned brother Lahiri J. had to consider the same question in — 'Second Appeal No. 1031 of 1951 (Cal)' and came to the same view that the defaults that have to be considered for the purpose of this proviso to S. 14, were the defaults prior to the date of the suit. He observed:

"The proviso to section 14 takes away the right of the defendant to claim protection from eviction under the Act of 1950 and this right must in my opinion be determined by the state of things as they existed on the date of institution of suit."

(5) With great respect I think that this is the only possible view that can be taken on the language used in the Statute. It is also helpful to consider in this connection the words used in S. 14 (1). They, in my judgment, cast a duty on the court to take action under s. 14. The words of sub-s. (1) may usefully be set out here:

"If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for cl. (i) of the proviso to sub-section (1) of Section 12. the Court shall determine the amount of rent

legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the order mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eighths per centum per annum from the day when the rents became arrears upto such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff-landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before a date fixed in the order."

This sub-section does not say that this is to be done by the Court only on an application. It is interesting to notice that in sub-s. (4), on the other hand, there is definite provision for an application by the landlord and an order thereupon. The omission in sub-s. (1) of the provision of any requirement for an application by the tenant cannot but be considered to be deliberate. In my judgment the legislature made it the duty of the Court to determine as soon as possible after the suit was filed, the amount of rent legally payable, any arrears the amount of interest and the costs and then to make an order on the tenant for paying the aggregate of the amounts before a fixed date. If the view pressed on behalf of the petitioners by Mr. Banerjee that for the purpose of the proviso, all defaults during the 18 months preceding the date of the order has to be considered is to be accepted, it would mean that by the mere fact of the court's delay in considering the matter, the tenant might be deprived of the valuable right.

It seems to me entirely unreasonable to hold that the question whether the tenant would get the benefit of this provision under s. 14 would depend on such a variable factor as the date when the Court finds it convenient to consider the matter. If the Legislature had not cast any duty on the court to determine this matter, other considerations might have arisen. As, in my judgment, there is clearly a duty cast on the Court to determine the amount due and to pass an order under s. 14 (1) and as obviously this duty must be carried out as soon as possible after the date of the institution of the suit, the period of 18 months that can be considered by the Court must be the period of 18 months preceding the date of the suit. On all these considerations I have come to the conclusion that the correct position in law is that the period of 18 months that has to be considered for the purpose of proviso to s. 14 (3), West Bengal Premises Rent Control Act, is the period of 18 months preceding the date of the institution of the suit. Both the objections taken on behalf of the petitioners fail.

(6) I would, therefore, discharge the Rule with costs.

(7) LAHIRI J.: I agree.

B/D.H. Rule discharged.

A.I.R. 1953 CALCUTTA 147 (Vol. 40, C. N. 47)

K. C. DAS GUPTA AND BACHAWAT JJ.

Durjendra Krishna, Petitioner v. K. Shaw, Opposite Party.

Civil Revn. Case No. 2610 of 1951, D/- 6-3-1952.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII (17) of 1950), S. 9 — Applicability to licensee — (Transfer of Property Act (1882), S. 105) — (Easements Act (1882), S. 52).

Regard must be had to the substance of the transaction and not to its form in order to determine whether there is a license. The transaction is a transfer of a right to enjoy the property and a lease if there is a grant of the right to use the property coupled with exclusive possession and it matters not that this right is subject to reservations and restrictions. On the other hand, the grant of a bare right to use the property unaccompanied by the grant of a right of exclusive possession is a license. The licensee of course has such right of occupation as will make the grant of the license effective. But the licensee has no right of exclusive possession and he is not entitled to exclude the grantor from using the property without derogating from his grant. If exclusive possession of the property is not given to the grantee, the transaction though described as a lease will not operate as a lease but will operate as a license.

Where the evidence read as a whole showed that there was a grant, by the owner of the premises, of a right to display advertisements in a hoarding in the space of the outer wall between two gates coupled with a right to rest the hoarding on the parapet and a right to fix pillars on the roof for the purpose of securing the hoarding, the grant of such right is not a transfer of any known interest in land. There is no transfer of exclusive possession of any portion of the premises to the grantee. The transaction in substance amounts to the grant of a bare license or privilege to do on the premises something which in the absence of such privilege would have been unlawful. A licensee cannot apply for fixation of standard rent under S. 9. No premises has been let to him either in whole or separately and he is not a tenant entitled to apply under that section. Case law discussed.

(Paras 8, 9, 10, 11)

Anno: T. P. Act, S. 105 N. 13, 14; Easements Act S. 52 N. 4.

Atul Chandra Gupta and Provas Chandra Basu, for Petitioner; P. C. Mallick; T. Dastidar and Kanti Charan Basu, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

(1916) 2 AC 54: (85 LJPC 229) 3
(1950) AC 493 3, 4
(1901) 1 Ch D 578: (70 LJCh 263) 3
(1904) 1 KB 713 3

K. C. DAS GUPTA J.: The opposite party K. Shaw filed an application before the Rent Controller for standardisation of rent for what he claimed was held by him as a tenant under the present petitioner, viz., a portion of the roof and parapet of 1 R. G. Kar Raod, Calcutta, where admittedly the opposite party displayed an advertisement by fixing a hoarding on a portion of the roof and the parapet. The petitioner raised an objection that this was no case of lease but that the opposite party K. Shaw was a mere licensee and not a lessee and accordingly the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 were not available to him.

The learned Rent Controller accepted this contention and rejected this application on this

ground. On appeal the learned Subordinate Judge held that this was not a case of mere license and that the paramount intention of the parties was to create a tenancy in respect of the roof and that the grantee was in the position of a tenant. He accordingly allowed the appeal and remanded the case to the Rent Controller with a direction for disposing of the application for standardisation of rent in accordance with law.

(2) It is contended before us by Mr. Atul Chandra Gupta on behalf of the petitioner that on a proper interpretation of the documents that are produced and the evidence on the record it should be held that there was no demise and that only a license was granted to the opposite party and that the opposite party K. Shaw was not a tenant within the meaning of the Transfer of Property Act or within the meaning of the West Bengal Premises Rent Control Act, 1950.

(3) There is no dispute before us as regards the principle to be applied in deciding whether a person is a lessee or a licensee. The principles were laid down recently by their Lordships of the Privy Council in — 'H. E. Wijesuriya v. Attorney General for Ceylon' in (1950) A. C. 493. In that case their Lordships had to consider whether the provisions in a permit to be given to the appellant to tap and take the produce of the rubber trees on certain Crown lands created a lease or a license.

Their Lordships observed:

"The decisive test is whether on its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit; and, adopting this test, they are of opinion that all that is granted by the document is the right to tap and take the produce of the rubber trees within a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering on, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee."

This test, it may be mentioned, has been applied in a large number of English cases and on the basis thereof it has been held that an agreement to allow advertisement to be displayed or hoardings to be fixed on a part of a building does not create a lease but only grants a license. In — 'Wilson v. Tavener', (1901) 1 Ch. D. 578, there was an agreement in writing by which the defendant agreed to let the plaintiff erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a bill-posting station at a yearly rent payable on the usual quarter-days from the then ensuing quarter day. Joyce J. held that there was no demise or lease and that the relationship of landlord and tenant was never created between them. The effect of the document was to give the plaintiff a license.

In — 'Frank Warr & Co. Ltd. v. London County Council', (1904) 1 K. B. 713, the Court of Appeal held, on the construction of a contract made between the lessees of a theatre and the plaintiffs by which it was agreed that the plaintiffs should have the exclusive right for a term of years to supply refreshments in the theatre and for that purpose should have the necessary use of the refreshment rooms, bars and wine cellars of the theatre and that they should have an exclusive right to advertise, and let spaces for advertisements, in certain parts of the theatre, that the contract did not confer on the plaintiffs an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845. Collins M. R. pointed out that though the word "let" was used, the subject-matter of the letting was so defined as most carefully to exclude the idea that any interest in land was to be given.

Romer L. J. referring to certain parts of the agreement which related to the use of the cellars and the right to advertise and let space for advertisement in certain parts of the theatre stated,

"To my mind it is clear that they create nothing more than a licence properly so-called. The agreement for use of the cellars does not necessarily involve that the possession of them is given to the plaintiffs, and therefore does not amount to the grant of an interest in the cellars. Similarly, I think the agreement for the use of parts of the premises for advertisements does not import a grant of the walls or any part of the premises."

In — 'King v. Allen & Sons, Billposting Ltd', (1916) 2 A. C. 54, where by an agreement in writing the defendants gave the plaintiffs permission to affix posters and advertisements to the flank walls of a picture house proposed to be erected on his property for a period of 4 years, the House of Lords held that the agreement did not create an interest in land but created merely a personal obligation on the part of the licensor to allow the licensees the use of the wall for advertisement.

(4) Mr. Mullick appearing for the opposite party did not challenge the correctness of the view that if the right he obtained from the present petitioner was nothing more than the righ to fix hoardings for the purpose of advertisements he was a mere licensee. Mr. Mullick has argued, however, that in this case the documents clearly show that he did obtain something more than the right to affix hoardings for advertisement and in fact he obtained exclusive possession of a portion of the roof. We have examined carefully the documents and the evidence given by his client and are unable to accept the argument. There is no agreement in writing as regards what rights were created. The earliest document is the letter dated the 29th December 1939.

There, giving reference to a previous letter of Mr. Shaw, the Receiver of the estate wrote in these words:

"The roof of premises No. 1, R. G. Kar Road, (Shambazar Market) between the two gates on both side of the Nahabatkhana is let out to you from 15-1-1940 to 14-1-1941 at a rent of Rs. 200/- (Rupees two hundred) only to be paid before the 15th January next."

It mentioned also that the receipt was being enclosed. Looking at the receipt which is exhibit 2, we find it mentioned there that the amount was being received at an annual rent "being the part payment for allowing him to put up advertisement on the roof of 1, R. G. Kar Road, Calcutta". A later receipt is dated 1-2-1941 and has been marked Exhibit 2 A.

There also it is said that the amount was received for allowing him to put up advertisement on the roof of 1, R. G. Kar Road, Calcutta. In both these receipts there is a statement, "The space let out is between the two gates on either side of the Nahabatkhana", and the receipt dated 18-1-1943 is also in almost exactly similar words.

The opposite party in his own evidence in court stated in examination-in-chief that he took the advertisement space from 15-1-1940 though in cross-examination he improved on it by saying that he "occupied" the roof and parapet between the two gates. Reading the oral evidence and these documents carefully I have come to the conclusion that no right was granted to the opposite party, of exclusive possession of any portion of the roof or the parapet and all that he obtained was the right to fix hoardings for displaying advertisement. Applying the principles laid down by the Privy Council in — 'H. E. Wijesuriya v. Attorney General for Ceylon', (1950) A C 493. I hold, therefore, that the opposite party K. Shaw was a mere licensee and not a tenant.

(5) The question next arises is whether the provisions in the West Bengal Premises Rent Control Act, 1950 as regards standardisation of rent are available to such a licensee. Mr. Mullick has drawn our attention to the definition of the word 'premises' and 'tenant'. In S. 2 of the Act, the tenant is defined as any person by whom rent is or but for a special contract would be payable for any premises. The relevant portion of the definition of "premises" is in these words, "Premises means any building or part of a building or any hut or part of a hut let separately." It is argued by Mr. Mallick that the word "rent" should be taken to have been used not in the strict sense of payment for a demise but in the sense of payment for the grant of any right whether it is in the nature of a license or a demise.

While we are conscious that the word "rent" is sometimes used in a loose sense to include payments for grants other than demise, there seems nothing in this Act to indicate that the word "rent" has been used here in that wider or loose sense. On the contrary the definition of the word "premises" gives reason to think that unless there has been a demise, the provisions of standardisation of rent will not apply. The important word to notice here is the word "let". It was concluded by Mr. Mallick that the ordinary use of the word "let" is in the sense of demise. I think it is not at all usual to speak of a building or part of a building being let, merely because something is allowed to be done on the premises. After careful consideration I am unable to accept Mr. Mallick's argument that the provisions of standardisation of rent are available to a licensee, like the opposite party K. Shaw who has obtained a mere right to do something on the premises without obtaining any interest in the premises.

(6) I have accordingly come to the conclusion that the opposite party's application for standardisation of rent is not maintainable in law.

(7) Accordingly I would set aside the order order passed by the learned Rent Controller. The petitioner will get his costs of this Court and the court of appeal below—the hearing fee being assessed at two gold mohurs.

(8) BACHAWAT, J.: Section 105, T. P. Act, shows that a lease of immovable property is a transfer of a right to enjoy such property, on the other hand S. 52, Easements Act, shows that a license is the grant of a right to do or continue to do in or upon the immovable property of the grantor something which would in the absence of such right be unlawful where such right does not amount to an easement or an interest in the property. Regard must be had to the substance of the transaction and not to its form in order to determine whether there is a license. The transaction is a transfer of a right to enjoy the property and a lease if there is a grant of the right to use the property coupled with exclusive possession and it matters not that this right is subject to reservations and restrictions. On the other hand the grant of a bare right to use the property unaccompanied by the grant of a right of exclusive possession is a license. The licensee of course has such right of occupation as will make the grant of the license effective. But the licensee has no right of exclusive possession and he is not entitled to exclude the grantor from using the property without derogating from his grant.

(9) If exclusive possession of the property is not given to the grantee, the transaction though described as a lease will not operate as a lease but will operate as a license.

(10) The evidence in this case read as a whole shows that there was a grant by the owner of the premises to the respondent of a right to display advertisement in a hoarding in the space of the outer wall between two gates coupled with a right to rest the hoarding on the parapet and a right to fix pillars on the roof for the purpose of securing the hoarding. The grant of such right is not a transfer of any known interest in land. There is no transfer of exclusive possession of any portion of the premises to the grantee. The transaction in substance amounts to the grant of a bare license or privilege to do on the premises something which in the absence of such privilege would have been unlawful.

(11) There is no doubt that a licensee cannot apply for fixation of standard rent under S. 9, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. No premises has been let to him either in whole or separately and he is not a tenant entitled to apply under that section.

B/D.H. Appeal allowed.

A.I.R. 1953 CALCUTTA 149 (Vol. 40, C. N. 48)

HARRIES C. J. AND G. N. DAS J.

Kali Prosad, Petitioner v. Jagadish Pada, Opposite Party.

Civil Rule No. 914 of 1951, D/- 19-12-1951.

(a) T. P. Act (1882), S. 105 — Agreement conferring exclusive right to enjoyment of premises.

A, who had been carrying on business in cinema shows, entered into an agreement with B, in respect of certain premises for carrying on the cinema business. The agreement entitled B to the use of the premises. It also entitled him to the use of the furniture, the machines and other fittings on the premises. The agreement did not provide that B must carry on the business. The agreement required B to pay a lump payment per month and all taxes and

rates. It entitled B to spend money for the improvement of the premises, the sum to be advanced being treated as loan to be set off against the premium on certain conditions.

Held that a perusal of the terms of the document clearly indicated that what was granted was a right to a furnished cinema house. An exclusive right to the enjoyment of the premises was conferred on B in consideration of a lump sum per month. Thus there was letting of the premises. (Para 2)

Anno: T. P. Act, S. 105 N. 5.

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 2(8) — Premises — Meaning — Cinema premises — (Words and Phrases — Premises).

The word "building" used in S. 2(8) is not restricted in any way as being confined to residential houses. S. 2(8) of the Act is wide enough to include a case where premises on which a cinema was being carried on are let out. The word "premises" is wide enough to include any building including any furniture and fittings therein. It cannot be said that the furniture and fittings in S. 2(8) cannot include the furniture as also machines which are used for the carrying on of a cinema business. (Paras 3, 4)

N. C. Sen Gupta with Nani Coomar Chakravarti, for Petitioner; Atul Chandra Gupta with Bijan Behari Das Gupta and Ashutosh Ganguly, for Opposite Party.

G. N. DAS J.: This is an application in revision. The question in controversy between the parties is what is the nature of the relationship between the parties by virtue of an agreement which was entered into by them. The appeal court has held that there was letting within the meaning of the Rent Control Act. Dr. Sen Gupta appearing for the petitioner contends that on a true construction of the terms of the agreement the opposite party cannot be regarded as a lessee and the provisions of the Rent Control Act for fixing the rent would not be attracted. It would appear from the terms of the lease that the first party named therein who had been carrying on a business in cinema shows entered into an agreement with the second party who is the opposite party in this revision case, for the carrying on of the cinema business. According to Dr. Sen Gupta the arrangement merely provided for the further carrying on of the cinema business on a premium of Rs. 3000/-.

(2) The contention of the opposite party, however, is that on a true construction of the agreement it was a lease of the premises on which the cinema business was being run. It would appear that the agreement entitled the second party to the use of the premises. It also entitled the opposite party to the use of the furniture, the machines and other fittings on the premises. An exclusive right to the enjoyment of the premises was conferred on the second party, in consideration of a lump payment per month. The agreement does not provide that the second party to the document must carry on the business. The agreement requires the second party to pay all taxes and rates. It entitles the second party to spend money for the improvement of the premises, the sum to be advanced being treated as loan to be set off against the premium on certain conditions. In my opinion, a perusal of the terms of the document clearly indicates that what was granted was a right to a furnished cinema house. An exclusive right to the enjoyment of the premises was conferred on B in consideration of a lump sum for month. Thus there was letting of the premises.

(3) The question then arises whether, assuming it was a grant of a right to the use of a furnished cinema house, it would be regarded as letting within the meaning of the Act. Dr. Sen Gupta contends that this is not included in the definition of "Premises" as defined in S. 2(8), Rent Control Act. The word "Premises" includes the use of any furniture or fittings affixed in the building. The word "building" used in S. 2(8) is not restricted in any way as being confined to residential houses. In my opinion S. 2(8) of the Act is wide enough to include a case where premises on which a cinema was being carried on are let out. The question as to the basis on which the rent of such premises will be standardized is not a matter with which we are now concerned. The only question now is whether on a true construction of the agreement it can be said that there was a letting of the premises and secondly, whether the letting was included within the meaning of the word "Premises" as defined in S. 2(8) of the Act.

(4) I have already stated that there was a letting of the premises, the second party being entitled to the exclusive use and possession of the premises on which the business was being run. I have also held that the word "premises" is wide enough to include any building including any furniture and fittings therein. It cannot be said that the furniture and fittings in S. 2(8) cannot include the furniture as also machines which are used for the carrying on of a cinema business.

(5) In this view the court below was right in its conclusion and this Rule must accordingly be discharged with costs.

(6) Let the affidavit in reply filed in court today be kept on the record.

(7) HARRIES C. J.: I agree.

B/V.B.B. Rule discharged

A.I.R. 1953 CALCUTTA 150 (Vol. 40, C. N. 49)

LAHIRI AND P. N. MOOKERJEE JJ.

Nirmal Chandra Dutta, Petitioner v. Gopal Chandra Dey, Opposite Party.

Civil Rule No. 1746 of 1950, D/- 3-8-1951.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII (17) of 1950), S. 9(1)(g) — Premises constructed after 1941 but before 31-12-1949 — Standard rent — Clause applicable.

Under the Act of 1950 the standard rent is fixed under S. 9 and where the premises in question were constructed after 1-12-1941, but before 31-12-1949, the only relevant part of S. 9 applicable is cl. (g) of sub-s. (1) thereof. (Para 9)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), Ss. 3(1), 7(1)(c) and 17(1) — Adjustment of excess payment with effect from before commencement of Act.

The Act of 1950 does not sanction or authorise any refund and/or adjustment with effect from before the date of its commencement, namely, 31-3-1950, or in respect of the rent of any month prior to April 1950, and accordingly, a tenant would

not be entitled to adjustment for any period prior to 1-4-1950. (Para 14)

Refund and/or adjustment would be allowable only with regard to amounts which are irrecoverable under the provisions of the Act and which have been paid or deposited on or after the commencement of the Act (vide S. 7(1)(a), that is only with regard to excess payments over 'standard rent', made on or after 31-3-1950, on account of rents from April 1950, (vide Ss. 3(1) and 17(1)) if the tenancy be in accordance with the English calendar month. (Para 15)

A. K. Dutta and N. D. Roy, for Petitioner; Ajoy K. Basu, for Opposite Party.

REFERENCE ..... /Para

('50) 54 Cal WN 205: (AIR 1949 Cal 681) 13

ORDER: This Rule has been obtained by the tenant petitioner and it arises out of a proceeding started by him for standardisation of rent and adjustment of excess payments, made on account of rent, against future rents. In the said proceedings the tenant-petitioner also claimed refund of selami, alleged to have been paid by him to the landlord opposite party, and prayed also for imposition of penalty upon the latter for accepting such selami.

(2) The tenancy in question was in respect of a shop room on the ground-floor of Premises No. 1 Sadananda Road in the south suburbs of Calcutta and the contractual rent was Rs. 120/- p.m. The premises were constructed in June 1949 and the disputed shop-room was first let out in July 1949.

(3) On 20-9-1949, the tenant filed his application before the Rent Controller, Calcutta, for standardisation of rent and the other reliefs mentioned above, and the said application was registered as Case No. 2433C of 1949. There followed the usual inspection by the Inspector and, thereafter, there was also a personal inspection by the Rent Controller himself and, eventually, the Rent Controller by his order, dated 21-1-1950 found against the applicant on the question of the alleged payment of selami and, upon such finding, dismissed his claim for refund and rejected his prayer for imposition of penalty on the landlord. The Rent Controller, however, by his aforesaid order, gave relief to the tenant-petitioner by fixing the standard rent at Rs. 45/- per month and by giving effect to it from September 1949 and allowing consequential adjustment of all excess payments, made by the tenant, against future rents.

(4) From the above decision of the Rent Controller two appeals were taken — one (No. 186 of 1950) by the tenant, filed on the 6-2-1950, and the other (No. 220 of 1950) by the landlord, filed on the 18-2-1950, — to the learned District Judge of 24-Parganas. The landlord's appeal was directed against the reduction of rent and the granting of adjustment of alleged excess payments; the tenant's appeal challenged the refusal of reliefs in the matter of the alleged selami.

(5) The learned Subordinate Judge, who heard both the above appeals, dismissed the tenant's appeal in toto, holding, inter alia, that the alleged payment of selami had not been proved. The landlord's appeal, however, was allowed in part on the finding that, upon the materials on record, the standard rent should be fixed at Rs. 51/10/- per month under S. 9(1)(g), West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, read with S. 17(3), thereof with effect from 1-4-1950 and adjustment of excess payments should be made on that basis "at the rate not exceeding Rs. 10/- per month" against future rents. Against this decision of the learned Subordinate Judge the tenant-petitioner has obtained the present Rule.

(6) On behalf of the tenant-petitioner three contentions have been urged by Mr. Dutta, namely:

(1) that the finding of the learned Subordinate Judge on the question of selami is erroneous,

(2) that the learned Subordinate Judge is wrong in fixing the standard rent under S. 9(1)(g) of the Act of 1950 and in fixing the amount thereof at Rs. 51/10/- per month, and

(3) that the learned Subordinate Judge's order giving effect to the standard rent only from 1-4-1950 and allowing adjustment of excess payments on that basis is wrong.

(7) The first contention raises a pure question of fact, not usually open to this court for consideration in revision. But, even apart from that, the conclusion of the Rent Controller on this point, which has been affirmed by the learned Subordinate Judge on appeal, appears to us to be the only reasonable conclusion on the materials produced in this case. That conclusion must, therefore, stand and this contention of the petitioner must fail. The petitioner's first contention is, accordingly, overruled.

(8) Before proceeding to deal with the petitioner's other two contentions we deem it necessary to make certain preliminary observations. Upon the facts in the present case, it is quite clear that when the Rent Controller pronounced his decision, the Act of 1948 was still in force. The Rent Controller, therefore, very rightly applied the Act of 1948 to the matter of standardisation of rent and gave effect to the 'standard rent' from September 1949 under S. 10 of the said Act, and, under the law then in force, no legitimate objection could have been taken to the appointment of such date as the date from which the 'standard rent' would take effect. The order, however, of the Rent Controller, allowing adjustment of excess payments from Sept. 1949, was not correct, inasmuch as Ss. 3 and 7 of the Act of 1948 had no application to the present case where there was no increase of rent at any time. This part of the Rent Controller's order was, therefore, open to criticism and liable to revision and, in the landlord's appeal before the learned District Judge, referred to above, the amount of the standard rent, fixed by the Rent Controller, as also his decision on the question of adjustment had, as noticed above, been specifically challenged. Shortly thereafter, the Legislature passed the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, and this new Act came into force on the 31-3-1950. On that date the appeals before the learned District Judge were pending and, therefore, under S. 17(3) of the said Act of 1950 the proceeding for fixing standard rent had to be decided in accordance with the provisions as laid down by that Act.

(9) Judged in the above back-ground, the petitioner's second contention is also bound to fail. Under the Act of 1950 the standard rent is fixed under S. 9 and, as in the present case the Premises in question were admittedly constructed after 1-12-1941 but before 31-12-1949 the only relevant part of S. 9 applicable hereto is cl. (g) of sub-s. (1) thereof. The learned Subordinate Judge, therefore, rightly applied the said S. 9(1)(g) to the present case and, as,

upon the materials on record, we are satisfied that the rent has been correctly standardised at Rs. 51/10/- per month, we are unable to give effect to the petitioner's second contention. That contention, therefore, must also fail and is, accordingly, overruled.

(10) So far, however, as the petitioner's third contention is concerned we are of the opinion that the tenant-petitioner is entitled to succeed, though only in part.

(11) It cannot be disputed — and it has not been disputed that, upon the admitted facts of this case, namely, that the present proceedings were started under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, and were pending when the Rent Control Act of 1950 came into force, the standard rent has to be fixed, as already noticed above, in accordance with the provisions, as laid down by the Act of 1950 (vide S. 17(3)). In our opinion, fixation of the 'standard rent' "in accordance with the provisions as laid down by the Act of 1950, involves or comprehends within its scope fixation or appointment of the date from which the said 'standard rent' is to take effect. This is clear from the provisions of S. 10 of the Act which deals with the question of fixation or appointment of such date. Sub-S. (3) of that section lays down that

> "in fixing the standard rent the Controller shall, in every instance, specify in his order the time from which the rent so fixed shall become payable."

This specified time, again, is to be in accordance with sub-ss. (1) and (2) which, in terms, provided for the specification (appointment) of such time (date) in all cases where 'standard rent' is fixed under the Act, that is, under S. 9 which is the only provision there for fixation of the 'standard rent.' The position therefore, is that, in cases where S. 17(3) applies, the 'standard rent' is to be fixed in accordance with the provisions of S. 9 of the Act of 1950 and in so fixing the standard rent, the date of its commencement is to be specified under S. 10(3) in accordance with the provisions of S. 10(1) or S. 10(2), as the case may be.

(12) The date, therefore, in the present case, from which the standard rent is to take effect, falls to be determined under S. 10 of the Act of 1950 and, as the standard rent is now fixed under S. 10(1)(g) and is fixed at a lower figure than the contractual rent, that is, the rent which was being paid at the time of the application for standardisation of rent, the relevant provision for appointment of the date would be either S. 10(1)(i) or S. 10(2)(c) but whichever of these two clauses applied, the result in this respect would be the same. According to either of the said two clauses, the date of commencement of the standard rent would normally be the month next after the date of the application, that is, the month next after 20-9-1949, in the present case. This leads us to October 1949 as the month from which the standard rent would take effect, there being in the present case no exceptional circumstances justifying any alteration of this normal date. This part of the learned Subordinate Judge's decision has, therefore, to be revised and the standard rent of Rs. 51/10/- per month is to be given effect to as from October 1949 and we order accordingly.

(13) There remains now the question of adjustment of excess payments. It is clear, as already indicated above, that if the Act of 1948 had been applicable, no question of refund and/or adjustment would have arisen in the present case, where there was no increase of rent at any time so as to exceed the 'standard rent'. In the Act of 1948 the only provision for refund and/or adjustment was contained in S. 7 which by its terms was dependent on S. 3. This latter section, as already noticed above, could not apply to the present case where the rent has not been increased at any time and, therefore, no refund and/or adjustment could have been available to the tenant-petitioner under the Act of 1948. A similar view was expressed by Sen J. in — 'Sobharani v. S. N. Guha Roy', 54 Cal WN 205 where he dealt with a similar case under the Calcutta Rent Ordinance of 1946. The reasonings given by Sen J., appear to us to be correct and, upon a parity of reasonings, we hold that if the Act of 1948 had been applicable in this matter, no question of refunds and/or adjustment would have arisen in the present case.

(14) It appears, however, that, at a crucial stage of the present proceedings, the Act of 1950 intervened to create a new situation. Having regard to the frame and scheme of the said Act of 1950 the question of refund and/or adjustment of excess payments cannot, it seems to us, be altogether dissociated from the question of fixation of 'standard rent' and appointment of the date of its commencement and, in our opinion this question of refund and/or adjustment of excess payments in the case before us, also, falls within the purview of the Act of 1950 and the rights of the parties with regard to the same have to be determined under the said Act. This Act of 1950 does not, however, appear, as we shall presently show, to sanction or authorise any refund and/or adjustment with effect from before the date of its commencement, namely, 31-3-1950, or in respect of the rent of any month prior to April 1950 and, accordingly, the tenant-petitioner would not be entitled in the present case to adjustment for any period prior to 1-4-1950.

(15) On this question of refund and/or adjustment the relevant provisions requiring consideration are Ss. 3(1), 7(1)(a) and 17(1) of the Act of 1950. Section 7(1)(a) provides for refund and/or adjustment of any sum paid or deposited on or after the commencement of the Act of 1950 on account of rent when such sum is irrecoverable under the provisions of the said Act. Section 3 (1) lays down the bar of irrecoverability as being in excess over the 'standard rent' but the said S. 3(1) is, by its opening words, subject to the provisions of the Act which includes S. 17(1). Under S. 17(1) the bar of irrecoverability attaches to excess over the 'standard rent' only from the month of the tenancy next after the month in which the Act comes into force. The Act came into force on 31-3-1950 and, therefore, no excess payment in respect of rent of any period prior to April 1950 can be irrecoverable under the Act of 1950.

The nett result, therefore, is that refund and/or adjustment would be allowable only with regard to amounts which are irrecoverable under the provisions of the Act and which have been paid or deposited on or after the commencement of the Act (vide S. 7(1)(a)), that is only with regard to excess payments over 'standard rent', made, on or after 31-3-1950, on account of rents from April 1950, (vide Ss. 3(1) and 17(1)), if the tenancy be in accordance with the English calendar as is the case before us; in other words, the 'standard rent' in the present case would take effect for purposes of

refund and/or adjustment under the Act of 1950 from 1-4-1950. The learned Subordinate Judge's order, therefore, regarding adjustment of excess payments would stand subject only to a minor variation as regard to the rate of such adjustment namely, that the adjustment would be at the rate of Rs. 10/- per month which rate of adjustment, is in our opinion quite fair and reasonable instead of the uncertain and indefinite rate of 'not exceeding Rs. 10/- per month', fixed by the learned Subordinate Judge.

(16) In the result, this Rule is made absolute in part and the decision of the learned Subordinate Judge is modified but to this extent that the 'standard rent', fixed at Rs. 51/10/- per month is given effect from October 1949 except for purposes of refund and/or adjustment under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (for which purposes it will have effect from 1-4-1950, as indicated above), and excess payments are ordered to be adjusted at the rate of Rs. 10/- per month against future rents. In other respects, the decision of the learned Subordinate Judge will stand.

(17) There will no order for costs in this Rule.

B/V.B.B. Order accordingly

A.I.R. 1953 CALCUTTA 153 (Vol. 40, C. N. 50)

ROXBURGH J.

Mrityunjoy Chakravartti, Accused-Petitioner v. Provat Kumar Pal, Complainant-Opposite Party.

Criminal Revn. No. 509 of 1951, D/- 12-7-1951.

(a) Companies Act (1913), Ss. 179 and 237 — Prosecution of officers of bank — Direction by Company Judge is not always necessary.

Where the Court gives unrestricted power to the official liquidator under S. 179 (a), then the liquidator is entitled, without any further reference to the Court, to institute any prosecution such as one under S. 409, Penal Code against the officers of the Bank. Neither in S. 179 nor in S. 237 is there anything to indicate that if the liquidator takes action without a direction of the Court, this action would be in any way illegal or invalid. Neither Section in express terms limits the liquidator's power which he has in common with any other citizen, to file in Court a complaint that another person has committed a criminal offence. AIR 1937 All 714, Rel. on. (Para 4)

Anno: Companies Act, S. 179 N. 11; S. 237 N. 1.

(b) Companies Act (1913), S. 237 — Scope — Section 237 is not restricted only to offences punishable under Companies Act. (Para 3)

Anno: Companies Act, S. 237 N. 1.

N. K. Basu and Sisir K. Basu, for Petitioner; Mihir Kumar Sarkar, for Opposite Party.

REFERENCE..... Para.

('37) ILR (1937) All 779: (AIR 1937 All 714: 39 Cri LJ 38) 5

ORDER: This is a Rule against an order of Mr. A. Mukherjee, Magistrate, First Class, Nadia, rejecting a contention by an accused, who has been prosecuted under S. 409, Penal Code, that, as the provisions of S. 237, Companies Act, had not been observed, the complaint by the liquidator was not valid and the complaint should be dismissed.

(2) This matter was before me on a previous occasion. A complaint had then been filed by another person, and an objection had been taken to his complaint. On that occasion I found it not necessary to pass any specific order, as it was stated that there would be no difficulty in getting a complaint filed by the Official Liquidator of the Bank in question, namely, the Bengal Bank Ltd., who had been appointed after the order of winding up had been passed. The present complaint, therefore, was filed by the Official Liquidator who has been given by the Court general power under S. 179, Companies Act, by an order, dated 16-1-1951. The power includes power "to institute any suit or prosecution or other legal proceeding civil or criminal in the name and on behalf of the said Bank."

(3) It is contended that this power relates only to prosecution of what may be called outsiders, and that S. 237, Companies Act, relates to offences committed by officers of the Bank. It is further contended that under S. 237, no prosecution can be made unless the court has given a direction, for one to be started. In my opinion, this contention is not valid. I cannot, however, agree with the view expressed by the learned Magistrate, which is to the effect that S. 237 relates only to offences punishable under the Indian Companies Act.

(4) In my opinion, the power that can be given under S. 179, and apparently the power given in the present case, is unlimited, and covers all prosecutions which might have been conducted by the Bank before winding up. The Official Liquidator has been invested with the powers which were the powers of the Bank before the winding up. He can now institute proceedings in the name of and on behalf of the Bank. A court might pass a restricted order and say that such prosecutions should only be instituted after explicit sanction had been given in each case, or the court might limit the power given under S. 179, to the prosecutions of all persons other than managers and directors of the Bank. The discretion as to what powers are to be given to the Official Liquidator is entirely with the court. If the court, as in the present case, gives an unrestricted power under that section, then, in my opinion, the liquidator is entitled, without any further reference to the court, to institue any prosecution such as the present. I may add that if any person is of opinion that the action of the liquidator is not proper, there is nothing to prevent him from moving the court which has control over the acts of the liquidator and having a suitable order made by the court in the matter. This appears to be provided for in S. 183(5), of the Act. I would point out further that neither in S. 179, nor in S. 237, is there anything to indicate that if the liquidator takes action without a direction of the Court, this action would be in any way illegal or invalid. It might mean, however, that any costs incurred in such a proceeding might have to be paid by the liquidator personally. At any rate, neither Section in express terms limits the liquidator's power which he has in common with any other citizen, to file in court a complaint that another person has committed a criminal offence. Whether a Court should on its discretion take cognizance in such a case is another matter.

(5) A similar view with regard to the effect of Ss. 237 and 179 was taken in the case of —

'Emperor v. Bishan Sahai Vidyarathi', ILR (1937) All 779.

(6) The result is that this Rule is discharged.

B/V.B.B. Rule discharged.

A.I.R. 1953 CALCUTTA 154 (Vol. 40, C. N. 51)

R. P. MOOKERJEE AND LAHIRI JJ.

Rajlakshmi Devi, Accused-Petitioner v. The State.

Revn. No. 227 of 1951, D/- 24-7-1951.

Criminal P. C. (1898), S. 205 — Accused, a purdanashin lady — Exemption from personal appearance — Considerations.

Simply because the accused in a criminal case is a purdanashin lady, she is not as a matter of right entitled to be exempted from personal appearance. The screen must not be used to defeat the ends of justice. At the same time the discretion vested in Court under S. 205, must be reasonably exercised. After due consideration of all the attendant circumstances including the social status, custom and practice of the accused as also the nature of the offence it is to be decided whether personal presence is essential. Moreover, if her personal attendance is dispensed with the Magistrate has the authority and jurisdiction, at any later stage of the future proceedings, to direct under Sub-S. 2 of S. 205 her personal attendance.

It is not possible to lay down a very strict test as to when the accused is to be considered to be a purdanashin lady. Merely because a Hindu lady goes from one house to another in a village with the veil on or if she attends religious festivals or goes to a temple or to a river to bathe, these would not be ordinarily considered as sufficient to prove that she is not a purdanashin lady whose application for exemption from appearance in Court is to be refused on that ground alone. Even if the accused do not very strictly observe the purda it does not follow that they should on every occasion be dragged into Court of law. The Court has to remember the habits and customs of the country and the social stigma that attaches to a purdanashin lady appearing in open Court.

No general rule can be laid down. The allegations and counter-allegations, if any, in each particular case must be taken into consideration before the Court disposes of an application by an accused for dispensing with personal attendance in Court upon the allegation that she is a purdanashin lady. Case law Ref. (Paras 6, 7 & 9)

Anno: Criminal P. C., S. 205 N. 6.

Abinash Chandra Majumdar, Barindra Kumar Ghosh and Aditya Kumar Roy, for Petitioner; Nirmal Kumar Sen, Deputy Legal Remembrancer and Bibhuti Bhusan Das Gupta, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('83) 6 All 59: (1883 All WN 207) 4

('13) 17 Cal WN 1248: (23 Ind Cas 489: 15 Cri LJ 281) 5

('17) 21 Cal WN CLXVIII 5

('50) AIR 1950 Cal 350: (51 Cri LJ 1325) 6

('51) Cri Revn. No. 916 of 1950, D/- 22-3-1951 (Cal) 3

('22) 45 Mad 359: (AIR 1922 Mad 79(1): 23 Cri LJ 266) 4, 5

R. P. MOOKERJEE J.: The only question for decision in this case is whether there are sufficient grounds to dispense with the personal attendance in court of the accused, a purdanashin Hindu lady, and to permit her to appear through a Pleader.

(2) There is no doubt that merely because the accused is a purdanashin woman, she is (not?) entitled in a criminal case as a matter of right to be exempted from personal attendance at Court. The screen must not be used to defeat the ends of justice. At the same time the discretion, vested in Court under S. 205, Criminal P. C., where a purdanashin lady is an applicant for dispensing with the personal attendance in Court, must be reasonably exercised. After due consideration of all the attendant circumstances including the social status, custom and practice of the petitioner accused as also the nature of the offence it is to be decided whether personal presence is essential.

(3) As for instance if there be a question of identification of any person by the accused it is very essential that the Court should not until there is a very strong case and there are cogent reasons given to exempt even a purdanashin woman from attending the Court — 'Aswini Kumar v. Binapani Dasi', Cr. Revn. No. 916 of 1950, D/- 22-3-51 (Cal). It may be noticed that in the case just referred to there was an affidavit in opposition stating that the petitioner was not a purdanashin lady at all and her movements were specifically referred to allegations which were not seriously challenged before this Court.

(4) It is now well settled that where summons is issued against a purdanashin lady who is found to be of good social position and who does not appear in public places the Magistrate should ordinarily dispense with her personal attendance and allow her to be represented by a lawyer until such time as the Magistrate has before him clear, direct and reliable prima facie proof that the person exempted has a real charge to answer; the Magistrate may then take such other steps as may appear to him proper and necessary. 'In the matter of Rahim Bibi', 6 All 59, Re :— 'Kandamani Devi v. Emperor', 45 Mad 359.

(5) In — 'Rajrajeswari Devi v. Emperor', 17 Cal WN 1248 a Division Bench of this Court directed that (?) the accused, who were purdanashin ladies and had been placed on trial under S. 326, Penal Code, them (?) to appear by pleaders before the Magistrate as also in the Court of Sessions in case of committal to that Court subject to the accused being directed to hear the sentence in case of conviction. Similar observations were also made in Re: — Kandamani Devi', supra. (45 Mad 359). See also — 'In re Sukhalata Gupta', 21 Cal WN 168n.

(6) It is not possible to lay down a very strict test as to when an accused is to be considered to be a purdanashin lady. Merely because a Hindu lady goes from one house to another in a village with the veil on or if she attends religious festivals or goes to a temple or to a river to bathe, these would not be ordinarily considered as sufficient to prove that she is not a purdanashin lady whose application for exemption from appearance in court is to be refused on that ground alone. Even if the accused do not very strictly observe the purda it does not follow that they should on every occasion be dragged into Court of Law.

The Court has to remember the habits and customs of the country and the social stigma that attaches to a purdanashin lady appearing in open Court. The observations in another Bench decision of this Court — 'Anilabala Devi v. Chairman, Kandi Municipality', AIR 1950 Cal. 350 may in this connection be also referred to.

(7) No general rule can be laid down. The allegations and counter allegations, if any, in each particular case must be taken into consideration before the Court disposes of an application by an accused for dispensing with personal attendance in Court upon the allegation that she is a purdanashin lady.

(8) In the present case the statement made by the petitioner before the Magistrate remained uncontradicted. An affidavit sworn to in this Court by the husband of the petitioner, who is an Advocate, definitely supports the statement that the petitioner is a respectable purdanashin Hindu lady and both by practice and custom she is unable to appear in Court. There is no affidavit in opposition.

(9) There is no suggestion that the presence of the accused is necessary at this stage of the proceedings to have a question of identification settled. It has been overlooked that if her personal attendance is dispensed with the Magistrate has the authority and jurisdiction, at any later stage of the future proceedings to direct under Sub-S. 2 of S. 205, Criminal P. C., the personal attendance of the accused. No material has been placed before us justifying an order for the personal presence of the accused in Court at this stage.

(10) The result, therefore, is that the order passed by the Sub-Divisional Officer on 28-2-1951 is set aside and it is directed that the accused be allowed to appear through a lawyer until the Court finds it necessary to direct otherwise under Sub-S. 2 of S. 205, Criminal P. C.

(11) LAHIRI J.: I agree.

B/R.G.D. Order accordingly.

A.I.R. 1953 CALCUTTA 155 (Vol. 40, C. N. 52)

P. N. MOOKERJEE J.

Monjur Mondal, Defendant No. 1, Appellant v. Ahammad Mondal and others, Respondents.

A. F. A. D. No. 2059 of 1947, D/- 25-1-1952.

† **Civil P. C. (1908), S. 11 — Res judicata against 'pro forma' defendant.**

A decision in a former suit can operate as res judicata against a person who was a 'pro forma' defendant in that suit and against whom no relief was claimed therein. Case law discussed. (Para 16)

Anno: C.P.C., S. 11 N. 12 Pt. 4.

Apurbadhan Mookerjee, for Appellant; Satya Priya Ghose, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('93) 17 Bom 341: (20 Ind App 1 PC) 13
('02) 29 Ind App 196: (29 Cal 707 PC) 16
('29) 33 Cal WN 1061: (AIR 1929 PC 228) 7, 8, 9
('31) 58 Ind App 158: (AIR 1931 PC 114) 11, 13, 14
('32) 59 Ind App 247: (AIR 1932 PC 161) 11,13, 14
('35) 62 Ind App 224: (AIR 1935 PC 139) 11, 13, 14
('49) AIR 1949 PC 143: (ILR (1949) Bom 110 PC) 17
('90) 14 Bom 408 13, 19
('01) 25 Bom 589: (3 Bom L R 179) 10
('47) AIR 1947 Bom 217: (ILR (1948) Bom 1) 10
('67) 8 W R 366 (Cal) 18
('86) 12 Cal 580 (FB) 10
('15) 19 Cal W N 1280: (AIR 1915 Cal 629) 16
('35) 39 Cal W N 938 10
('36) 40 Cal W N 1205 10
('36) 40 Cal W N 1208 10
('42) AIR 1942 Cal 1: (ILR (1941) 2 Cal 434) 11, 13, 16
('49) AIR 1949 E P 213: (50 Pun L R 294) 10
('17) 38 Ind Cas 184: (AIR 1918 Mad 967) 16
('42) AIR 1942 Pat 120: (196 Ind Cas 837) 10

JUDGMENT: This appeal is by defendant 1 and it arises out of a suit brought by the plaintiff respondent for declaration of his title to the lands in suit described in schedules 'Kha' and 'Ga' of the plaint, and for recovery of possession of the 'Kha' schedule lands, and for confirmation of possession in the 'Ga' Schedule lands. The material facts lie within a short compass and they are given below.

(2) Admittedly, the suit lands originally belonged to one Ketabdi. In the year 1916 Ketabdi died leaving him surviving as his heirs three sons Ahammad, Abdul and Makbul and three daughters. Ahammad is the plaintiff in the present suit, wherein Abdul is defendant 2 and Mokbul is 'pro forma' defendant 4, and their three sisters are 'pro forma' defendants 5 to 7. Defendant 1 is Abdul's son, but he claims title to the suit lands not as a member of Ketabdi's family but on the basis of a purchase from a previous stranger auction purchaser Nur Mahammad, 'pro forma' defendant 3 in the present suit.

(3) According to the plaintiff, there was a partition amongst the abovenamed heirs of Ketabdi after the latter's death, and, as a result thereof, the plaintiff got the 'Kha' schedule lands and Mokbul the 'Ga' schedule lands of the present plaint. It is the plaintiff's case that after the above partition the plaintiff got also the 'Ga' schedule lands from the said Mokbul by exchange with other lands and that, when, subsequently, in the year 1925, the holding comprising 'inter alia' the suit lands was sold at a rent sale the same was purchased by the heirs of Ketabdi in the 'benami' of Nur Mahammad who is 'pro forma' defendant 3 in the present suit, and the said heirs continued to be in possession as before.

The plaintiff complains that, in or about March 1943, defendant 2 Abdul got a collusive 'kabala' from Nur Mahammad in the name of his son Monjur who is defendant 1 in this suit, and, on the strength of that 'kabala', dispossessed the plaintiff from the 'Kha' schedule lands during the latter part of 'Falgoon 1349 B. S. and threatened to dispossess him from the 'Ga' Schedule lands also. In the above circumstances the plaintiff brought the present suit on 6-6-1944 for declaration of his title to the suit lands and for recovery of possession of the 'Kha' Schedule lands and for confirmation of his possession in the 'Ga' schedule lands of the present plaint.

(4) The suit was contested by defendants 1 and 2; and their defence 'inter alia' was that the disputed holding which was recorded in the landlord's 'sherista' in the name of Mokbul alone was purchased at the rent sale by Nur Mahammad on his own behalf & not as 'benamdar' of anybody and that Nur Mahammad took

delivery of possession through Court and the plaintiff's suit was barred by limitation. It is further the defence case that when Ketabdi's mortgagee Taradas Das after getting a mortgage decree in his mortgage suit against Ketabdi's heirs, that is, against the present plaintiff and his brothers and sisters, was seeking to execute it against 'inter alia' the disputed property, Nur Mahammad, the auction purchaser at the rent sale, brought a title suit (viz., Title Suit No. 116 of 1939 of the Court of the Munsif at Rampurhat) for declaration of his own title to the said property and for a permanent injunction, restraining the mortgagee Taradas Das from executing his decree against the said property.

In that suit the plaintiff and his brothers and sisters were 'pro forma' defendants and the suit was dismissed by the trial Court but was finally decreed on appeal (Title Appeal No. 21 of 1946) by the learned Subordinate Judge, Birbhum, after overruling the plea raised by Taradas that Nur Mahammad was benamdar of his (Taradas') judgment-debtors, i.e., benamdar of the present plaintiff and his brothers and sisters. The defence, accordingly contended 'inter alia' that the plaintiff's present suit was barred by 'res judicata'; the other material defence that was pleaded in this suit was that the suit was barred under S. 66, Civil P. C., as, admittedly, Nur Mahammad had made his purchase at a Court sale.

(5) On the above pleadings several issues were framed, of which issue 1 related to the question of 'benami' and issue 2 to the question of the plaintiff's title; and in issue 4 the question of maintainability of the suit was raised which included within its scope consideration of the bar of 'res judicata' as also the bar under S. 66, Civil P. C., pleaded by the defence.

(6) The trial court dismissed the plaintiff's suit holding, 'inter alia', that it was barred by 'res judicata' and also under S. 66, Civil P. C., that Noor Mohammad was not a 'benamdar', that defendant 1's 'kabala' was a genuine and valid document, and that the plaintiff's case of amicable partition and exchange was not true. The trial Court also appears to have disbelieved the plaintiff's story of adverse possession. Curiously, however, the learned Munsif observed in one part of his judgment that the plaintiff's suit would have been decreed on the ground of adverse possession but for the bars of 'res judicata' and S. 66, Civil P. C.

(7) Against the above decision of the trial Court, the plaintiff took an appeal which was heard by the learned Subordinate Judge, Birbhum. This learned Judge reversed the decision of the learned Munsif and decreed the plaintiff's suit holding, 'inter alia', that the suit was not barred by 'res judicata', and, further, that S. 66, Civil P. C., also was no bar to its maintainability as the plaintiff had, according to the learned Subordinate Judge, acquired title by adverse possession, thus making S. 66 inapplicable to this case on the authority of the Judicial Committee's decision in the case of — 'Mahammad Abdul Jalil Khan v. Muhammad Obaid Ullah Khan', 33 Cal. W. N. 1061 (PC). Against this decision of the learned Subordinate Judge, the present appeal has been preferred by defendant 1.

(8) Before me two questions have been raised by Mr. Mookerjee who appears on behalf of the appellant. It is contended in the first place that the finding of the learned Subordinate Judge on the question of adverse possession is not a proper finding in law, and that, accordingly, the decision of the Judicial Committee reported in — 'Mahammad Abdul Jalil Khan v. Muhammad Obaid Khan', 33 Cal W N 1061 (PC), upon which the learned Subordinate Judge has relied for holding that the bar of S. 66, Civil P. C. would not be attracted to the present case, has no application. In the second place it has been contended that, upon the materials on record, the suit is clearly barred by 'res judicata'.

(9) In my opinion, both the above contentions raised by Mr. Mookerjee are correct and ought to prevail. As I have already said, the finding of the learned Munsif on the question of adverse possession was apparently against the plaintiff, though the learned Munsif made a curious statement in one part of his judgment that but for the bars of 'res judicata' and S. 66, Civil P. C. the plaintiff would have succeeded in his suit on the ground of adverse possession. The learned Subordinate Judge in coming to the conclusion that the plaintiff's case of adverse possession has been proved has missed the above finding of the learned Munsif on the point and does not appear to have considered any of the relevant materials on record or any of the reasons given by the learned Munsif for the latter's said finding against the plaintiff on the question of adverse possession.

The learned Subordinate Judge has based his conclusion on this part of the case upon a misconception that the learned Munsif found as a fact that Nur Mahammad did not take actual possession and that the plaintiff had acquired title by adverse possession. As, however, I read the learned Munsif's judgment, there is really no finding that Nur Mahammad did not take actual possession, though, at one place, the learned Munsif refers to the plaintiff's alleged 'admission' that Nur Mahammad took possession through Court but did not take actual possession. There is also no real finding of the learned Munsif in favour of the plaintiff on the question of adverse possession, his apparent finding being as indicated above, just the other way, though there is undoubtedly, the curious observation hardly fitting with the trend of discussion in the learned Munsif's judgment to which reference has already been made by me.

In these circumstances the case will have to go back to the lower Appellate Court for a proper consideration of the question of adverse possession and decision on the plea of bar, raised under S. 66, Civil P. C., unless the appellant succeeds in his other contention, viz., his plea raising the bar of 'res judicata'. It has to be stated here that Mr. Mookerjee has not contended that even if the finding on the question of adverse possession be in the plaintiff's favour the suit would still be barred under S. 66, Civil P. C., and he has, in fact, conceded, that, if the plaintiff's case of adverse possession is proved, the suit would not be barred under S. 66, Civil P. C. on the authority of the Privy Council decision, reported in — 'Mahammad Abdul Jalil Khan v. Muhammad Obaid Ullah Khan', 33 Cal W N 1061 (PC), already cited.

There is no complaint that the learned Subordinate Judge has misread that decision, but the grievance is that he has misapplied it against the present appellant on an improper finding in favour of the plaintiff on the ques-

tion of adverse possession. Unless, therefore, the plea of 'res judicata' succeeds, the case will have to go back to the lower appellate Court for a proper decision of the two questions of adverse possession and the bar under S. 66, Civil P. C.

(10) The plea of 'res judicata' has now to be considered. There is no dispute here as to the material facts. It is admitted on both sides that Nur Mahammad brought his suit (T. S. 116 of 1939) against the mortgagee Taradas alone as principal defendant and that the plaintiff and his brotners and sisters were impleaded in that suit as 'pro forma' defendants. It is also admitted that that suit was for declaration of Nur Mahammad's title to the disputed property and for injunction restraining the mortgagee Taradas from executing his decree against the same.

It is also not disputed that the suit was dismissed by the trial Court but decreed on appeal on a finding that the disputed property had been purchased by Nur Mahammad at the rent sale for himself and on his own behalf and not as 'benamdar' of the present plaintiff and his brothers and sisters and that Nur Mahammad was entitled to 'khas' possession of the said property against the other parties in that suit which included also the present plaintiff, though as a 'pro forma' defendant. It is, however, contended by Mr. Ghose, appearing for the plaintiff respondent before me, that in the said previous suit his client was only a 'pro forma' defendant and no relief was claimed against him there in the prayer portion of the plaint and that, accordingly, the decision in that previous suit cannot operate as 'res judicata' against him.

This argument requires careful examination. Mr. Ghose has very naturally relied, amongst others, upon the decisions of this Court reported in — 'Nibaran Chandra v. Matilal Shaha', 39 Cal W N 938; — 'Gajanan Agarwala v. Hamidar Rahaman', 40 Cal W N 1205; — 'Rakhal Das v. Haridas Sarcar', 40 Cal W N 1208; — 'Brojo Behari v. Kedar Nath', 12 Cal 580 (FB) and also upon the decisions of the other High Courts reported in — 'Ramdass v. Vazirsaheb', 25 Bom 589; — 'Bhudeb Chandra v. Bhikshakar Pattanaik', AIR 1942 Pat 120; — 'Official Assignee, Bombay v. Madholal Sindhu', AIR 1947 Bom 217 and — 'Firm Daulat Ram Vidya Parkash v. Sodhi Garbaksh Singh', AIR 1949 E P 213 which are apparently, at least, in favour of his contention: and he has argued that unless all these decisions are held to be wrong or distinguishable from the present case the plea of 'res judicata', raised by the defence, must fail. He has further submitted that on principle also this plea cannot succeed against his client. Mr. Mookerjee, in his turn, has contended that all the said decisions cited by Mr. Ghose, are either wrong or distinguishable, and he has invited me to hold in his favour on this question of 'res judicata'. He has further argued that on principle also the defence plea of 'res judicata' ought to be accepted.

(11) The point, thus raised, is indeed of great importance and has often given rise to serious divergence of judicial opinion. In my opinion, however, the pronouncements of the Judicial Committee in the cases of — 'Munni Bibi v. Triloki Nath', 58 Ind App 158 (PC), — 'Maung Sein Done v. Ma Pan Nyun', 59 Ind App 247 (PC) and — 'Kedar Nath Goenka v. Ram Narain Lal', 62 Ind App 224 (PC) must be taken to have settled the controversy and I venture to think that in the light of these three decisions of the Judicial Committee the law of 'res judicata' applying to the case of a person who was a 'pro forma' defendant in the earlier suit and against whom no relief was claimed therein has now been clearly and correctly laid down in the Bench decision of this Court reported in — 'Hafiz Mohammad v. Swarup Chand Hukum Chand, Firm', AIR 1942 Cal 1.

This latter decision contains, in my opinion, a clear and sufficient answer to all the contentions raised by Mr. Ghose on behalf of the plaintiff-respondent for avoiding the bar of 'res judicata' and the decisions, cited by him are of no avail to his client in view of the Judicial Committee's decisions, referred to above, as explained by the said Bench decision of this Court in — 'Hafiz Mohammad's case', AIR 1942 Cal 1 which is binding upon me and with which I also respectfully agree. Accordingly, the contentions of Mr. Ghose on the plea of 'res judicata' must be rejected and the plaintiff's suit must be held to be barred by res judicata.

(12) I have just stated above my final conclusion and I shall now briefly discuss the reasons therefor in the light of the important judicial pronouncements.

(13) It will be well to point out at the outset that a study of the legal position germane to the problem raised convinces me that, although the idea of a 'pro forma' defendant is not unknown in law, the mere fact that a person is described as a 'pro forma' defendant or that no relief is claimed against him in the plaint will not necessarily exempt him from the operation of the rule of 'res judicata'. This proposition appears sufficient from the three Privy Council cases reported in — 'Munni Bibi v. Triloki Nath', 58 Ind App 158 (PC), — 'Maung Sein Done v. Ma Pan Nyun', 59 Ind App 247 (PC) and — 'Kedar Nath Goenka v. Ram Narain Lal', 62 Ind App 224 (PC) and the decision of this Court in the case of — 'Hafiz Mohammad v. Swarup Chand Hukum Chand, Firm', A. I. R. 1942 Cal 1,—all cited before, and its soundness can hardly be questioned now.

Clearly also, there is nothing against it in the Bombay case of — 'Rahmubhoy Hubibbhoy v. C. A. Turner', 14 Bom 408, affirmed on appeal by the Privy Council in — 'Rahimbhoy Habibhoy v. Charles Agnew Turner', 17 Bom 341 (PC) that case being plainly distinguishable as there the party concerned who was impleaded in the earlier suit "expressly for the purpose of discovery only" was held to be not "a party to the former suit", Vide — '14 Bom 408 at p. 416 or, as the Privy Council put it, "was not treated as a party" Vide—'17 Bom 341 (PC)' at page 348 to "that suit". This Bombay case therefore, would not be relevant to the issue before me and may safely be put on one side. The other cases, cited in this paragraph, are, however, clearly relevant and, as already indicated, they contain in themselves a true and sufficient exposition of the principles of 'res judicata' arising for consideration in the present appeal.

(14) The decision of the Judicial Committee in — 'Munni Bibi v. Triloki Nath', 58 Ind App 158 (PC) which, according to me, has, along with the other two Privy Council decisions cited, namely, — 'Maung Sein Done v. Ma Pan Nyun', 59 Ind App 247 (PC) and — 'Kedar Nath

Goenka v. Ram Narain Lal', 62 Ind App 224 (PC) settled the law, applicable to this part of the case, contains the following passage at page 166 of the report, viz.,

"It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by..... it could not affect her legal position."

The words are clear and the passage cited needs no elaboration or elucidation. In simple but firm language the Judicial Committee repelled —& repelled authoritatively—the possible contention that to be affected or bound by 'res judicata' a person must have been a "necessary party to the former suit". They also emphasised broadly the well-known rule of constructive 'res judicata'. The effect of the observations quoted is plainly discernible in the two later cases reported in — '59 Ind App 247 (PC)' and — '62 Ind App 224 (PC)' and, apparently again, it was these observations which were referred to with approval by their Lordships of the Privy Council in the passage occurring at the bottom of page 233 of 62 Indian Appeals where their Lordships proceeded to observe that:

"it was immaterial whether K, one of the two defendants had entered appearance or contested the suit for she was a proper party and had a right to be heard if she so desired."

In the same case — '62 Ind App 224 (PC)' the Judicial Committee also sufficiently indicated that the mere fact that no relief was claimed against a party in the earlier suit is not enough to prevent the application of the doctrine of res judicata. The relevant passage occurs at p. 231-2 of the Report where their Lordships observe that

"The Subordinate Judge held that the issue as to the validity of the sale was not 'res judicata' between the plaintiff who was the first defendant and the 'mohant' who was the second defendant in these suits because the plaintiffs who were the auction purchasers of other properties at the Court sale had not sought for any relief against the 'mohant' who was the second defendant but this ruling was given before the recent decisions of this Board as to 'res judicata' between co-defendants which will be referred to later."

It is clear again from p. 233 of the above Report that one of the decisions contemplated in the passage, just quoted, was the case of — 'Maung Sein Done v. Ma Pan Nyun', 59 Ind App 247 (PC) where the person sought to be bound by 'res judicata' was a "formal" or 'pro forma' defendant in the earlier suit and against whom no relief had been claimed therein. The position is thus well established that the mere fact that the party sought to be bound by the doctrine of 'res judicata' was a 'pro forma' defendant in the earlier suit or that no relief had been claimed against him therein would not be sufficient to exclude the application of that doctrine.

(15) It may be conceded that in the above cases their Lordships were considering the doctrine of 'res judicata' as applicable between co-defendants; but that, in my opinion, is hardly of any material consequence. In the ultimate analysis the basic principles of 'res judicata' applicable in cases of co-defendants are the same as in any other case. The law of 'res judicata' is contained in s. 11, Civil P. C. and in the recognised general rules bearing upon the subject, and one of the essential ingredients of that law is that the matter in issue in the subsequent suit or proceeding must have been directly and substantially in issue or must be deemed to have been directly and substantially in issue in the earlier suit or proceeding. It was this aspect of the matter which was stressed by their Lordships of the Judicial Committee in the three cases, just cited, and there its implication was elaborated and explained and the considerations there employed are applicable to all cases of 'res judicata'. Viewed in the above light, the doctrine will not, in any way, be basically different in its application between co-defendants from any other cases. The observations of the Judicial Committee, quoted above, will, therefore, be of general application and each case has to be decided in the light thereof.

(16) What I have said above does not, in my view, conflict with the decision of the Judicial Committee in — 'Gokul Mandar v. Pudmanund Singh', 29 Ind App 196 (PC), that the Code of Civil Procedure is exhaustive so far as it goes (Vide the observation at p. 202 of the Report that "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law") or with Explanation III of S. 11 of the said Code which, on its own terms, is clearly satisfied when there is even an implied admission of the plaintiff's allegations by the other party, which may well include a 'pro forma' defendant. I would, accordingly, hold that a decision in a former suit cannot be avoided by a party merely on the plea that he was a 'pro forma' defendant therein and that no relief was there claimed against him.

This view is clearly supported by the Madras decision reported in — 'Sethurama Iyer v. Ramachandra Iyer', 38 Ind Cas 184 (Mad) and by the decisions of this Court in the cases of — 'Mohendra Nath v. Mt. Shamsunnessa Khatum', 19 Cal W N 1280 and — 'Hafiz Mohammad v. Swarup Chand Hukum Chand, Firm', AIR 1942 Cal 1, already cited, and, above all, by the authority of the Judicial Committee in the three decisions, sufficiently discussed above; and I am not inclined to subscribe to the broad proposition laid down in the cases, cited by Mr. Ghose, that against a person who was impleaded as a 'pro forma' defendant in the former suit and/or against whom no relief was claimed therein the plea of 'res judicata' is not available. It seems to me that in these latter cases the position was laid down rather too widely and to that extent at least, although some of them may well be distinguished on facts, they must be deemed to be bad law in view of the pronouncements of the Judicial Committee in the three cases, above cited.

(17) It is necessary at this stage to refer to one other decision of the Judicial Committee which may not, at first sight, appear to be quite consistent with the view which I have expressed above. That decision which is reported in — 'Government of the Province of Bombay v. Pestonji Ardeshir', AIR 1949 P C 143 was really on the rule of constructive 'res judicata', embodied in Explanation IV of S. 11, Civil P. C. As, however, the rule was sought to be applied there with regard to a matter, admitted in the previous suit, and such attempt failed it might

be argued that in that case — 'AIR 1949 P C 143' the Judicial Committee laid down that when a matter is admitted the rule of constructive 'res judicata' would not be attracted in relation to it in a later proceeding.

Such an argument, however, would be clearly opposed to the express terms of Explanation III of S. 11 of the Code and it is, therefore, no wonder to find that to this argument no real support is available from the above Privy Council decision — 'AIR 1949 P C 143' when the same is examined a little carefully. The Judicial Committee, as is clear from the language used at page 147 of the Report, expressly guarded themselves against lending colour to any such inference when they stated in clear and unambiguous terms that

"if the Government chose to admit certain facts for the purpose of getting a decision on an important question of law it is impossible to say that that suit involves a decision as to the facts."

The portion quoted above is strikingly suggestive and limits the scope of the Judicial Committee's decision. The trend of the relevant discussion at pages 146 and 147 of the report also runs counter to the argument, envisaged above, and, besides, the other significant observation at the end of the first paragraph at page 147 that

"the non-agricultural assessment claimed in the present suit is subsequent to the period claimed in the suit of 1918"

may well indicate that that case is distinguishable and does not militate with the view expressed by me on the question of 'res judicata' in the preceding paragraphs of this judgment.

(18) Before concluding my discussion on this part of the case, I may just as well refer to one old decision of our Court which is a very near approach to this case on the question of 'res judicata'. That decision which is reported in — 'Deokee Nundan Roy v. Kalee Pershad', 8 W R 366 (Cal) was given in the year 1867 by a Bench of this Court (Bayley and Phear JJ.) and clearly supports the view which I have taken above on the question or 'res judicata' and which, in my opinion, represents the correct position in law in the light of the high authorities, cited and discussed in the course of this judgment. Phear J. who delivered the judgment of the Court in — 'Deokee Nundan Roy's Case', 8 W R 366 (Cal) observed 'inter alia' as follows:

"The only question before us is this, namely, whether or not the decree which Kalee Pershad obtained in declaration of his right to be paid by the Collector the share of Mt. Eden and Syud Uzamut Hossein in the surplus proceeds of the revenue sale is binding on the present defendant. It is urged that it is not so; because although he was a defendant in that suit, he was not a principal defendant, but was only made a defendant (as the plaint termed it) "ikhteatun" (literally "by way of precaution"); and that the whole tenor of the plaint shows that the claim was made against the principal defendants, and not at all against the precautionary defendants.

We are of opinion that this contention cannot be upheld. The decree in any suit must be treated as an adjudication of right as between the plaintiff on the one side, and the defendants collectively and severally on the other, except only so far as the decree itself contains any modification or reservation in regard to any of the individual defendants. If the claim which the present plaintiff now makes against Kalee Pershad be well-founded, it would have constituted a good defence to the action which Kalee Pershad formerly brought against him and others. It is his own fault that he did not set up that defence at that time. The necessity of putting some term to litigation is the foundation of the rule that any issue which is material to the rights of the parties in the matter of suit between them, whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties. And in this respect, a defendant brought in 'pro forma' is in exactly the same situation as any other defendant whatever may be the case with regard to his costs." Vide 8 W R 366 (Cal) at p. 367.

The observations in the passage cited on the question of 'res judicata', though made in the year 1867, bear quoting even to this day and have not, in my opinion, been affected by the legislative changes made during the intervening period. They still represent in my view, the correct position in law on the aspect of 'res judicata', relevant to the present case.

(19) As a result of the above discussion, I feel bound to hold that the present suit is barred by 'res judicata' by reason of the previous decision in Title Suit No. 116 of 1939, referred to in the plaint. In that suit there was an express issue and, there were in the plaint thereof, the necessary averments of Nur Mahammad's, that is, the present appellant's predecessor's title to the suit property, the present plaintiff was a party to that suit, though in the category of a 'pro forma' defendant, the issue of title was expressly decided in favour of the present appellant's predecessor that is, his vendor Nur Mahammad who eventually got a decree there at the appellate stage declaring his title to the suit property and declaring him entitled also to 'khas' possession thereof, and such decision was necessary to give relief to the said Nur Mahammad who was the plaintiff in that suit. That decree could not have been passed unless it was found that Nur Mahammad was not a 'benamdar' but a real purchaser at the rent sale and it was "as a result of that finding" that the said suit (T. S. No. 116 of 1939) was ultimately decreed.

There is no charge of fraud or collusion — at least nothing has been established — in regard to that suit and it has not been even sufficiently alleged, far less proved, that the decree therein had been obtained or allowed to be passed fraudulently or collusively. It appears further that, unlike the Bombay case of — 'Rahmubhoy Hubibbhoy v. C.A. Turner', 14 Bom 403 above cited, the said decree was made with the present plaintiff on record as a proper party—may be in the category of a 'pro forma' defendant—who had the right to be heard if he so desired. Clearly also, that decree was based on a finding plainly destructive of the plaintiff's present claim. In such circumstances, it is, in my opinion, idle to contend that to the present suit the bar of 'res judicata' will not apply. I would, therefore, uphold the defence plea of 'res judicata' and dismiss the plaintiff's suit. But for this finding a remand would have been plainly necessary. As matters stand, however, the suit must fail on the defence of 'res judicata'. This

appeal must, therefore, succeed and the plaintiff's suit must be dismissed straightway.

(20) In the result, therefore, this appeal is allowed. The judgment and decree of the court of appeal below are set aside and the decree of dismissal passed by the trial Court is restored. The parties, in the circumstances of this case, will bear their own costs throughout.

B/V.R.B. Appeal allowed.

A.I.R. 1953 CALCUTTA 160 (Vol. 40, C. N. 53)

P. B. MUKHARJI J.

Tulsiram Shaw, Plaintiff v. R. C. Pal Ltd., Defendant.

Civil Original Suit No. 1801 of 1948, D/-29-1-1952.

(a) Evidence Act (1872), S. 154 — Hostile witness — Testimony against party calling him — Witness is not necessarily hostile on this ground alone — Section does not say anything regarding declaring witness hostile.

A witness is not necessarily hostile if in speaking the truth as he knows and sees it, his testimony happens to go against the party calling him. There is no proposition in the law of evidence that a witness who is not partial or partisan in favour of the party calling him is on that ground alone to be treated as hostile. The Court always aspires to find if the witness desires to tell the truth. That aspiration is the yardstick which measures the appreciation of the evidence of a witness. It is with that object that the Court is given the discretion to permit the person who calls a witness to put any question to the witness which might be put to him in cross-examination. That provision is enacted in S. 154 of the Evidence Act. Section 154 says nothing about declaring a witness hostile. It allows a party with the permission of the Court at its discretion to cross-examine his own witness in the same way as the adverse party. Ordinarily a party calling his witness is not allowed to ask him these questions but this ordinary rule is relaxed in S. 154. The purpose of such relaxation can only be to find out if the witness is one of truth and can be relied on, because cross-examination is the most powerful and effective instrument for bringing out and testing truth. But that is far from saying that a witness is hostile whether his testimony is such that it does not support the case of the party calling him. Such a view would seriously undermine the independence, integrity and dignity of a witness in a Court of law. AIR 1922 PC 409, Ref. (Para 12)

Anno: Evid. Act, S. 154 N. 1, 3.

(b) Municipalities — Calcutta Municipal Act (3 of 1923), S. 3 (7) — Definition of "building" is limited for the purposes of Act only and cannot be extended to find out whether actual land let out to tenant is vacant or not. (Para 13)

(c) Interpretation of Statutes — Interpretation clause — Definitions given in statute are limited to that particular statute and cannot be extended to define those words used in another statute, specially when those statutes are not pari materia. (Para 13)

(d) Houses and Rents — Calcutta Rent Ordinance (1946), S. 2 (5) — "Building" — Whether land is vacant is question of fact — Vacant land bounded by wall with corrugated tin gate held vacant land. (Paras 5, 14)

(e) T. P. Act (1882), S. 111 — Notice to quit — Limited company tenant — Notice to person who was managing director — Notice treated as notice to company — Notice held valid notice on company tenant.

Each case must be taken by itself and one decision on the meaning of a notice to quit in one context does not afford much guidance for interpretation of a notice in different words in a different context. It is necessary to look at the intention of the landlord, and when language is used which leaves the effect of the notice open to doubt, the rule of construction is to make it sensible and not insensible. Where instead of addressing the quit notice to a limited company which was the tenant it was addressed to a person who was the managing director himself and the name of the company was written after the name of the managing director with a "Limited" appended after the name, and the notice was treated by the addressee and the company as a notice to the company itself:

Held that the notice was valid notice to the tenant. (1946) KB 280; AIR 1918 PC 102 and (1900) 1 QB 23, Rel. on; (1897) AC 22 and (1807) 8 East 228, Ref. (Paras 21, 23, 27, 28, 29)

Anno: T. P. Act, S. 111 N. 23.

B. K. Ghose, for Plaintiff; R. K. Ghose, for Defendant.

REFERENCES: Courtwise/Chronological/ Paras

('18) 45 Ind App 222: (AIR 1918 PC 102)	17
('23) 27 Cal WN 797: (AIR 1922 PC 409)	12
(1897) AC 22: (66 LJCh 35)	18
(1806) 6 Esp 70: 170 ER 833	22, 25
(1807) 8 East 228: (103 ER 329)	20
(1942) 2 KB 326: (111 LJKB 711)	25
(1946) KB 280: (1946-1 All ER 296)	25
(1900) 1 QB 23: (69 LJQB 17)	23

JUDGMENT: This is an action in ejectment instituted on 13th May 1948.

(2) In this suit the plaintiff is suing as the trustee of a trust estate known as debutter estate of Sri Purushottamdas Bhagwan. A vacant plot of land on the premises No. 17, Bolai Singhee Lane, Calcutta, was let out to the defendant company at a rent of Rs. 40/- per month. It is the plaintiff's case that such tenancy was terminated by notice to quit, dated 28th December 1945. The plaintiff claims possession and mesne profits.

(3) The written statement on behalf of the defendant company was filed and verified by R. C. Pal or Ramesh Chandra Pal, who has described himself as the Managing Director of the defendant company.

(4) On the pleadings, the following issues were settled: (1) Was the land vacant land? (2) Is the notice to quit valid in law? (3) To what relief, if any, is the plaintiff entitled?

(5) ISSUE NO. 1: This issue is a question of fact. According to the defendant company, the land that was let out was not vacant land. That is the plea in the written statement. In giving particulars in para 4 of the written statement on this point, the defendant says that there is upon the said portion a building consisting of walls completely enclosing the said portion with a corrugated iron gate. This

case of the written statement improved in evidence and I shall presently deal with the testimony of a witness produced on behalf of the defendant company and also suggestions made in the cross-examination of the plaintiff.

(6, 7 and 8) (His Lordship considered the oral evidence and continued:) On the evidence of the plaintiff, I must hold that this was a vacant land. On the evidence of the solitary witness Kali Charan Jaiswal who was produced by the defendant company, only the same conclusion can be reached that the land is vacant land and bustee land. The conclusion is re-inforced by the fact that no one from the defendant company has come to say that it was otherwise. This much on the oral evidence.

(9) The evidence on the documents bears out the same conclusion that the land when let to the defendant was vacant land.

(10) That this was bustee land is apparent from the Deed of Settlement which has been exhibited in this suit where this portion of the land in Sch. "D" to that Deed is described as "bustee land measuring one bigha eight cottahs fifteen chittacks more or less." Then again in the notice to quit dated 28th December 1945 the plaintiff's solicitors make it distinctly clear that the defendant company was in occupation of only " a portion of the land" at No. 17, Bolai Singhee Lane as a monthly tenant. The defendant company replied on the 26th January 1946 to this notice. In this reply the defendant company far from contending that it is not vacant land expressly refers to "portion of land" and plot. Not a word was suggested in the reply that it was anything other than vacant land.

(11) On this evidence I hold that the land let out to the defendant was vacant land in fact.

(12) Mr. R. K. Ghose, learned counsel for the defendant company finding the defendant's witness Kali Charan Jaiswal proving unhelpful to the defendant's case, wanted to declare him hostile. There was, however, no material on the basis of which the witness Kali Charan Jaiswal could be declared hostile. There is no evidence that the testimony of this witness contradicts any proof given by him. No reason or occasion is shown why he should bear any animus or prejudice against the defendant. Nothing on record, his testimony and his demeanour show that he was not desirous of telling the truth as he knew it. A witness is not necessarily hostile if in speaking the truth as he knows and sees it, his testimony happens to go against the party calling him. I do not consider that there is any proposition in the law of evidence as I understand it, that a witness who is not partial or partisan in favour of the party calling him is on that ground alone to be treated as hostile. The Court always aspires to find if the witness desires to tell the truth. That aspiration is the yardstick which measures the appreciation of the evidence of a witness. It is with that object that the Court is given the discretion to permit the person who calls a witness to put any question to the witness which might be put to him in cross-examination. That provision is enacted in S. 154, Evidence Act. As Sir Lawrence Jenkins delivering judgment of the Privy Council in — 'Baikuntha v. Prasannamoyee', 27 Cal. W. N. 797 (P. C.) at p. 799 observes that this section 154 of the Evidence Act says nothing about declaring a witness hostile. It allows a party with the permission of the Court at its discretion to cross-examine his own witness in the same way as the adverse party. Such cross-examination means he can be asked (a) leading questions (Section 143, Evidence Act), (b) questions relating to his previous statements in writing (S. 145, Evidence Act) and (c) questions which tend to test his veracity, to discover who he is and what is his position in life or to shake his credit (S. 146, Evidence Act). Ordinarily a party calling his witness is not allowed to ask him these questions but this ordinary rule is relaxed in Section 154, Evidence Act. The purpose of such relaxation can only be to find out if the witness is one of truth & can be relied on because cross-examination is the most powerful & effective instrument for bringing out and testing truth. But that is far from saying that a witness is hostile whenever his testimony is such that it does not support the case of the party calling him. Such a view would seriously undermine the independence, integrity and dignity of a witness in a Court of law. Reference may be made in support of my view to the statement of the law on this point as stated by the learned editor of Phipson's Law of Evidence, 8th Edn., at p. 461—

> "A witness is not hostile merely because he gives evidence to a different effect from that expected by the party calling him.'

(13) The next argument of the counsel for the defendant company on this issue requires to be noticed. It is contended that the presence of a boundary wall on the road side of the land, makes it "premises" and not "vacant land." His argument is that according to the definition in S. 3(7), Calcutta Municipal Act, "building" includes a wall. As there is the boundary wall, therefore it must be a "Building". The next step in his argument is that when it is a building, it must be within S. 2(5), Calcutta Rent Ordinance, 1946, which Ordinance according to Mr. Ghose is the Ordinance to be applied to this case. In that section of the Ordinance, "premises" means a "building". Therefore, by the double operation of the Calcutta Municipal Act and the Rent Ordinance of 1946, Mr. Ghose wants me to hold that although I have found that the land was vacant in fact, it must be held to be a "building" within the meaning of these two statutes. I am unable to accept that argument and come to such an insensible conclusion. The definition of a "building" in the Calcutta Municipal Act must be read subject to the opening words of S. 3: "For the purposes of this Act" and therefore is only limited for the purpose of the Calcutta Municipal Act and cannot be applied for the purpose of finding out whether an actual land let out to a tenant is vacant or not. The definition section of a particular statute should, in my view, be confined as a general rule to explain and define the meaning of words used in that statute and cannot be extended to define those words used in other statutes. The main reason for my view is that each statute is designed to meet a distinct and particular purpose and words used in each Statute must be read and interpreted in the context of that Statute and in aid of its purpose and object. Words are not necessarily used in the same sense in different Statutes. The learned editor of the 9th Edn. of Maxwell's Interpretation of Statutes gives at page 41 numerous illustrations on the point such as the word "goods' used differently in Bankruptcy

Acts and Sale of Goods Act and the word "bicycle" although a carriage for the purpose of furious driving is not a carriage under the Turnpike Act for the purpose of attracting the toll on carriages. I consider it is erroneous on principle and dangerous in practice to construe words used in one Statute in the light of and with reference to the definition of these words provided in another Statute. That is more so when the two Statutes are not in 'pari materia'. The Calcutta Municipal Act and the Rent Ordinance of 1946 are not Statutes which can be said to be 'pari materia'.

(14) I, therefore, answer the first issue in the affirmative, holding that the land let out to the defendant was vacant land.

(15) ISSUE NO. 2: The major attack was made under this issue on the validity of the notice to quit. The notice to quit appears as one of the admitted documents in Ex. A in these proceedings. It is dated 28th December 1945. In this notice the addressee at the top is described as "R. C. Pal Esquire, 1, Jadu Pandit Road". In that notice it is described:

> "You are in occupation of a portion of the land comprised in the above premises as a monthly tenant at a rent of Rs. 40 per month, the month of the tenancy being according to the English calendar. You are a defaulter in respect of the payment of the rent".

The notice therefore proceeded to ask that the land should be vacated on the expiry of the month of January 1946. In fact the exact language is

> "We give you notice which we hereby do to quit and vacate the portion occupied by you on the expiry of the month of January 1946."

This letter was replied to on 26th January 1946. The reply came from R. C. Pal Ltd. signed by R. C. Pal, the Managing Director. In that reply it is said:

> "We are in receipt of your letter of 28th December 1945 and are surprised to note that your client instructed you to give us notice to quit the above plot for being defaulter in respect of the payment of the rent."

(16) The argument against the validity of this notice can now be summarised briefly. It is said that the defendant is a limited company and as such a juristic entity by itself, and therefore notice to quit addressed to R. C. Pal Esquire was a bad notice and cannot be said to have terminated the tenancy of the defendant company.

(17) On behalf of the plaintiff Mr. B. K. Ghose, learned counsel, relied on the well-known decision of the Judicial Committee in — 'Harihar Banerjee v. Ramshashi Roy', reported in 45 Ind App 222 (PC). Lord Atkinson delivering the judgment of the Board observed at p. 225:

> "It has not been suggested, and could not, their Lordships think, be fully contended that the principles they lay down are not equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed 'ut res magis valeat quam pereat'".

That is the classic observation of the Privy Council on this point.

(18) Mr. R. K. Ghose, appearing on behalf of the defendant company, contended that these observations, although made in wide terms, should not be extended to cover cases where the notice to quit was addressed to the wrong person and not to the tenant at all. Put in that way the problem is misinterpreted. There can be no doubt that the law requires notice to quit to be given to the tenant and the Privy Council decision as I read it does not say otherwise. There is equally no doubt that the limited Company is a body corporate and a distinct legal entity apart from its directors — 'Salomon v. Salomon & Co.', (1897) A C 22. But the whole question in this case is to determine whether the notice in this case was in fact to the tenant and understood and treated as such. It is unnecessary to repeat, but I think it will bear repetition that every case should be decided on its own facts and on its own merits, and the broad principle which to my mind should be applied in these cases is that, although a notice to quit is a technical document, it need not be read and construed more technically than it must be.

(19) Now, in this particular case, before I reach a conclusion, there are one or two other authorities which it is necessary to consider.

(20) On behalf of the defendant company the case of — 'Deo v. Woodman and Forster', (1807) 8 East 228 has been referred to. There the Earl of Carlisle brought an ejectment action to recover certain pasture lands in Morpeth and Mitford, in the county of Northumberland which had for many years before been demised by him to the Corporation of Morpeth as tenants from year to year, at an annual rent. There the notice to quit was directed only to the two bailiffs of the Corporation, and in fact the defendant in the action was not the Corporation but the two bailiffs only. Lord Ellenborough C. J. delivering judgment said:

> "The bailiffs, as such, not being a distinct Corporation cannot have the possession; whatever they enjoy as bailiffs must be in the right of the Corporation at large. There is no evidence at all to affect these defendants; for the bailiffs are no Corporation of themselves, and therefore can have no possession; and consequently cannot, as bailiffs, be affected by the receipts for rent given to their predecessors."

(21) I do not think this case helps the defendant. In the first instance, there is no observation here as to what the position in law is when instead of addressing the notice to a limited company or a corporation it is addressed to a person who happens in this case before me to be the managing director himself and where the name of the company is itself after the name of the managing director with a "Limited" appended after his name.

(22) On the other hand, on behalf of the plaintiff Mr. B. K. Ghosh relies on the case of — Deo v. Spiller', (1806) 6 Esp 70: 170 E R 833. In that case the notice to quit was addressed to the tenant by a wrong Christian name. The tenant kept the notice and it was held that that was a waiver of the misdirection, and the lessor could recover on that notice to quit, if

there was no other tenant of that name. Here again Lord Ellenborough delivered judgment for the plaintiff.

(23) On the broad principles of interpretation of a notice to quit it is unnecessary to say much. It is common learning that each case must be taken by itself and that one decision on the meaning of a notice to quit in one context does not afford much guidance for interpretation of a notice in different words in a different context. It is necessary to look at the intention of the landlord, and when language is used which leaves the effect of the notice open to doubt, the rule of construction is to make it sensible and not insensible. Reference in this connection may be made to the observations of Ridley J. in — 'Wride v. Dyer', (1900) 1 QB 23.

(24) The latest position in law appears to me correctly expressed in Foa's Landlord and Tenant, edited in 1947, by Forbes J. at p. 598. According to the learned Editor, on the question of notice to quit the position is stated to be:

"It must be addressed to the proper person. A notice to a corporation should be addressed to the corporation; but a notice addressed to "the directors" of a limited company is good. In the case of joint tenants, it seems that it may be addressed to any one of them. An omission, however, to address a notice to quit is cured if notice be proved to have been delivered to the proper person. In the same way, a mistake in the Christian name of the person to whom it was given was held to be cured by his having kept the notice without objection, there being no other tenant of the name of the property of which the premises demised formed part."

(25) The decision which is nearest to the problem for solution in this case is in — 'Hawtrey v. Beaufront Ltd.', reported in (1946) KB 280. There Croom-Johnson J. reviewed all the leading authorities on the point. The point before that learned Judge was that a notice to quit was bad because the addressee of the notice to quit was the director of Beaufront Limited & not the company Beaufront Limited. That was the very question that was raised in that case, and at p. 287 the learned Judge poses the question: "Is a notice in that form a good notice or not?" He proceeds to observe — and it will bear quotation because I consider each of the observations made by the learned Judge to be relevant on the decision that I propose to take in this case. These observations appear at pp. 287 to 289. They are:

"Notices of this sort are documents of title. They are unilateral and not consensual documents. They have the object of bringing to an end a term in the land enjoyed by the tenant, and they have to be looked at with strictness in order to see whether they are in compliance with the rule illustrated by the decision of the Court of Appeal in — 'Hankey v. Clavering', (1942) 2 KB 326. In the course of his judgment in that case Lord Greene M. R. said: 'It is perfectly true that in construing such a document, as in construing all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter, such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particulars because it appears that the error was inserted by a slip.' The question which I have to determine is primarily a question of construction. There is no doubt that a notice to quit, when given by a landlord, should be given to the proper person."

Thereafter the learned Judge quotes the passage which I have already quoted from Foa on Landlord and Tenant. The learned Judge dealt also with the case of—'Doe v. Spiller'. (1806) 6 Esp 70 and described that case to be a case of 'falsa demonstratio'.

(26) The question then turned upon the construction of the notice in that case which the learned Judge discusses at p. 288, where the same argument was made that the address being to the individual directors who were described to be in occupation, the notice was wrong and defective. Finally, what weighed with the learned Judge appears at p. 289 of the Report. Croom-Johnson J. observes:

"A limited company must, of course, act through agents. If it had been addressed to Beaufront Ltd., the document would still have had to be delivered to an agent or sent through the post to the registered office of the company, where it would have been dealt with by an agent. I think that within the rule referred to by Lord Greene M. R. in the case I have mentioned, that in a case of ambiguity the Court will favour the reading of the document in such a way as to give it validity, I ought to construe this notice as a notice to terminate the tenancy of the limited company..... It was obviously so treated by the defendants' solicitors. They knew all about it."

(27) Here also, although the letter was written to R. C. Pal Esq., it was treated as notice to the company because the reply of January 26, 1946, indicates that. The reply itself says: "to give us notice to quit." Written by the limited company and signed by the managing director, this reply is proof enough to show that the notice to quit addressed to R. C. Pal Esqr., was understood and treated as notice to the company. That in my judgment is enough to hold that the notice in this case was in fact a notice to the tenant.

(28) The next reason which I think is decisive on the point is that this notice addressed to R. C. Pal, Esqr., was not only addressed to No. 1 Jadu Pandit Road, which is described in the cause title as the place where the defendant company has its registered office, but that R. C. Pal, Esqr., was, at the time when the written statement was filed, the managing director of the defendant company. It will, therefore, be "insensible", to use the language of Ridley J., to say that this address in the notice to quit to R. C. Pal, Esqr., was being only to R. C. Pal individually in his individual capacity and not as a director, especially as managing director of the defendant company. This R. C. Pal was the duly authorised agent as Managing Director to receive notices on behalf of the defendant company. A company can only receive notice through the hand of a human agency and who could be better than the company's Managing Director himself. It is not necessary, in my opinion, for the validity of the notice to say when a letter is addressed to R. C. Pal, Esqr., that it should also have been stated that it was only in his capacity as direc-

tor or the managing director of the company. That it was so understood is evident and indisputable from the reply which the company gave through R. C. Pal, the managing director, on January 26, 1946.

(29) On a fair construction, therefore, and on the authorities I am satisfied that this notice is valid in law. I therefore answer the second issue in the affirmative.

(30) ISSUE NO. 3: The reliefs follow as a matter of course. The notice terminated the tenancy with January 1946. In other words, from 1st February 1946, the possession became wrongful. That is the claim of the plaintiff.

(31) There will, therefore, be judgment for the plaintiff for possession of the land, for mesne profits at the rate of rent from 1st February 1946, until delivery of possession, and for costs. The plaintiff will be at liberty to withdraw such deposits which may be lying with the Rent Controller and appropriate the same towards the dues under this judgment.

B/R.G.D. Suit decreed.

A.I.R. 1953 CALCUTTA 164 (Vol. 40, C. N. 54)

MOOKERJEE AND LAHIRI JJ.

Makhan Lall Bose and others, Defendants, Appellants v. Sm. Sushama Rani Basu and others, Plaintiffs, Respondents.

A. F. O. D. No. 49 of 1949 D/-27-2-1952.

(a) Partition Act (1893), S. 4 — "Member of such family" — Wife of member of joint family owning dwelling house is such member.

The word "family" appearing in section 4 should be given a liberal interpretation so as to give effect to the basic principles enunciated in that section. The object of this provision is to prevent a transferee who is an outsider to the family itself from forcing his way into a dwelling house in which other members of the transferor's family have a right to live. The word "family" is to be held to include not merely a body of persons who originate from a common ancestor, but also a group of persons related by blood and living in one house or under one head of management. The expression "such family" in S. 4 should not be read as having reference to the members of an undivided family who are the owners of the dwelling house; first, because the members of the undivided family need not themselves be descended from one common ancestor as indicated and secondly, because according to the Hindu Law and the social structure of the Hindu society the wife or a member of the joint family is for all practical purposes a member and part of the joint family who cannot be regarded as strangers.

Wife of one of the members of the joint family owning the dwelling house is therefore a member of "such family" within the meaning of S. 4. Case law Ref. (Paras 15, 16, 23 & 24)

Quaere: Whether outsider who has no right either of maintenance or of residence, but is kept by way of charity by some member or other of the joint family is himself to be regarded as a member of the undivided family for the purpose of attracting the provisions of s. 4. (Para 21)

Per Lahiri J.: Section 4 is not attracted to a case where the transfer is to a member of the undivided family who is not a co-sharer of the dwelling house. The wife of a co-sharer has a right to live in the house as much as any other co-sharer. Section 4 cannot, therefore, be applied where the transfer is in her favour to prevent her from possessing a share of the house. Section 4 requires that the application for pre-emption must be by a member of the undivided family, who must also be a share-holder, but it does not require that in order to take a case out of the operation of s. 4, the transferee should also be a share-holder besides being a member of the family. (Paras 68, 69)

Anno: Partition Act, S. 4 N. 2.

(b) Civil P. C. (1908), S. 35 — Partition suit — Question of title raised — Principle governing costs.

The ordinary rule is that in a suit for partition the parties would bear their respective costs up to the preliminary decree. Costs incurred thereafter till the final decree is to be apportioned according to the shares each party has in the joint family properties. There is, however, an exception. If a question of title is raised by one of the parties as against any other or more of the other parties and that by itself is raised in issue for decision before the preliminary decree is passed the Court takes the result on the issue into consideration for determining whether costs are to be made payable by one party to the other. 3 Ind Cas 247 (Cal) and 40 Cal WN 1237 Relied on (Para 26)

Anno: C. P. C., S. 35 N. 21.

(c) Hindu law — Succession — Dayabhaga School — Right of father over ancestral and self-acquired property — Son living separate from father during latter's life-time and at time of latter's death — No separation between father and son — His right to succeed to estate of father after his death is not affected.

Under the Dayabhaga School of Hindu law there is no scope for the sons getting on partition any portion of the ancestral property, not to speak of the self-acquired property in the hands of their father so long as the latter is alive. The test, therefore, which is applied in the case of Mitakshara family to differentiate between a joint and a separated member of the family so far as the sons are concerned is inapplicable in the case of a family governed by the Dayabhaga School of Hindu law. Under the Mitakshara School the sons as they are born become members of the coparcenary with some interest in the coparcenary property. If is, therefore, possible for a separation and partition by a son from the father during the life-time of the latter even without the father's consent or his agreeing to partition. When a son is thus separated from the coparcenary in respect of coparcenary property he acquires a status which is distinct and different from the status of his other brothers who may continue to remain joint with their father or even after partition become reunited in a joint family. This state of things is an impossibility under the Dayabhaga School of Hindu law. The test which is applied in some of the cases coming under the Mitakshara school is not whether a son is living separate in mess from the coparcenary, but whether he has become separated in status from the other

members including his father and other brothers. If the same tests were to be applied to cases coming under the Dayabhaga School of Hindu Law, the only test that would be possible is where a son who has no present interest in the properties held by the father is living away from the father — there being no partition possible between himself and his father and his other brothers in respect of the property held by the father. (Paras 43, 44, 45)

The law as interpreted gives an absolute right to the father in Bengal over ancestral and self-acquired properties. He may make unequal distribution and no objection can be raised thereto. If in the exercise of his right he gives a portion of the property to one of his sons and he separates him from the family that is tantamount to a declaration by him that what he intended to give to such a son so separated had already been decided upon by him. After his death the other sons who continue to live with him would divide among themselves the property left by the father. If on the other hand, one of the sons lives separate from the father's family for some reasons or other and if the father had not during his life-time given that son any portion of his estate, the right which the sons have to succeed to the estate of his father cannot in any way be affected merely by the fact that he was living separate from the father's family. Texts and case law considered. Observations in Mulla, 10th Edn., Ss. 43 and 341, held not correct exposition of law. (Paras 53, 54)

(d) Evidence Act (1872), S. 114 — Document in possession of plaintiff's husband — Husband giving evidence but not asked to produce the document — Adverse inference cannot be drawn against plaintiff — (Per Lahiri J.). (Para 66)

Anno: Ev. Act, S. 114 N. 10.

Hiralal Chakravarti and Monomohan Mukherjee, for Appellants; Syama Charan Mitter and Ranajit Ghose, (for Nos. 1 and 9 to 13) and Radhakanta Bhattacharjya, (for No. 8), for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('08) 30 All 324: (5 All LJ 352 FB) 13
('42) ILR (1942) All 759: (AIR 1942 All 201 FB) 33
('98) 22 Bom 101 33
('94) 18 SDA 6 (Cal) 41
('99) 1 SDA 27 (Cal) 41
2 SDA 45 (Cal) 42
Morton 90 (Cal) 42
('73) 20 WR 189: (11 Beng LR 397) 36
('09) 10 Cal LJ 503: (3 Ind Cas 247) 26
('10) 12 Cal LJ 525: (7 Ind Cas 436) 16, 68
('10) 12 Cal LJ 173: (7 Ind Cas 118) 18, 19
('10) 37 Cal 1: (1 Ind Cas 945) 19
('28) AIR 1928 Cal 539: (109 Ind Cas 67) 17, 24, 68
('33) 58 Cal LJ 174: (AIR 1934 Cal 202) 16, 18
('36) 40 Cal WN 1237 26
('50) AIR 1950 Cal 111: (54 Cal WN 660) 68
('30) 53 Mad 417: (AIR 1930 Mad 561) 17
('32) 55 Mad 577: (AIR 1932 Mad 361) 33
('37) AIR 1937 Nag 4: (ILR (1937) Nag 73) 24
('30) 5 Luck 649: (AIR 1930 Oudh 77) 33
('42) 17 Luck 72 33
('41) AIR 1941 Pat 4: (190 Ind Cas 117) 14
('43) AIR 1943 Pesh 79: (209 Ind Cas 557) 14, 67
Morton 90 42

MOOKERJEE J.: This is an appeal on behalf of defendants 1 to 4 and is directed against a preliminary decree for partition. The parties to the suit are descendants of one Tinkari Basu. The plaintiff Sushama is the wife of one of the grandsons of Tinkari and is the transferee of the interest which another grandson of Tinkori had in the joint family estate. The defendants are the other descendants of Tinkori who have an interest in the joint family property.

(2) The plaintiff prayed for partition of the share purchased by her. Various defences were raised by the different sets of defendants, but in view of the limited points raised in the present appeal it is not necessary to refer in detail to the divergent cases as made by the parties in the lower Court. The two questions raised in the present appeal are whether there had been a previous partition as between the parties, and whether on the facts of the present case the provisions of S. 4 of the Partition Act can be invoked.

(3) The learned Subordinate Judge held that the plaintiff had her alleged title to and possession of the disputed properties. The story of a previous partition as set up by the defendants was not true and that the defendants were not entitled to the benefits of S. 4 of the Partition Act in respect of the residential house. Certain other points discussed by the lower Court will be referred to when the cross-objection filed by the plaintiff and some of the defendants is considered.

(4) With regard to the question as to whether there was a previous partition or not, it was stated in the plaint that in 1933 a deed of reference to arbitration had been executed by the then co-sharers. Arbitrators were appointed, but they did not file any award, and the Arbitrators became 'functus officio' though a plan had been prepared by a surveyor appointed by the arbitrators. No steps were taken for ascertaining the valuation of the separate parcels indicated in the said plan or for the equalisation of value of the shares indicated in the said plan. The parties entered into separate possession of some of the items of property, but there was no full and complete partition. The allotments indicated in the surveyor's plan were characterised as inequitable. Accordingly it was prayed that a preliminary decree might be passed for partition by metes and bounds of the 1/5th share claimed by the plaintiff.

(5) Some of the defendants supported the plaintiff and prayed for separate allotments. Portions of the property which were being possessed by one or other of the parties were either improved or reconstructed at the costs of the party in possession.

(6) Defendants 1, 2 and 7, however, maintained that though the arbitrators referred to by the plaintiff had not filed any award in writing, the surveyor appointed by them had prepared a map which made separate allotments in accordance with the respective shares of the parties. All the parties thereafter accepted the allotments so made and took possession according to the demarcation made. The said defendants further stated that

"Only the heirs of late Hiralal Basu did not approve of the pathway in front of their house and the proposal for the said pathway was not carried into effect."

The parties were also alleged to have made various improvements to the properties in the

demarcated allotments in their share, constructed structures thereon. The parties have been in separate possession thereof. Pannalal Basu, father of defendants 11 to 15, had filed written statements in various suits admitting that the said partition had been a completed one. It was further alleged that the share alleged to have been purchased by the plaintiff Sushama was really a purchase by Pannalal himself and the plaintiff had no present interest or possession. Pannalal had purchased the said share with his own money in the 'benami' of his daughter-in-law.

(7 and 8) The learned Subordinate Judge has referred to the evidence as led, and on a consideration thereof came to the conclusion that there had been no previous completed partition and that the plaintiff's purchase was for her own benefit and it was not a 'benami' transaction. (His Lordship reviewed the evidence and continued).

(9) I do not think that the learned Subordinate Judge was in error in coming to the conclusion that the defendants had failed to prove that there had been any completed partition.

(10) The plea of 'benami', as raised by the defendants in the lower Court which was not accepted by the learned Subordinate Judge, has not been pressed in this Court. The only other question in the appeal that remains for consideration is, therefore, whether the purchase by the plaintiff Sushama from one of the cosharers is to be deemed to be a sale to an outsider attracting the provisions of S. 4 of the Partition Act.

(11) It is contended that the learned Subordinate Judge was in error in not applying the provisions of S. 4 of the Partition Act. He should have held that the plaintiff Sushama who was the wife of one of the co-sharers, viz. Gopal, defendant 12, could not be regarded as a member of the joint family, and the transfer to her was one to an outsider and not a member of the joint family.

(12) Sub-section (1) of S. 4 of the Partition Act (4 of 1893) provides:

"Where a share of dwelling-house belonging to an undivided family has been transferred 'to a person who is not a member of such family', and such transferee sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf."

(13) It is argued that in the first part of this sentence the undivided family referred to is the owner of the dwelling house. Immediately thereafter, where the transferee is referred to, the provisions of the section are to be attracted if such transferee "is not a member of such family". It is contended that the use of the word "such" qualifying "family" clearly indicates that the transferee must be one other than a person to whom the dwelling house belongs, as a member of the undivided family. There is no scope for giving an extended meaning to the expression "member of such family", but it must be limited only to such members of the undivided family to whom the dwelling house belongs.

(14) The learned advocate appearing for the appellant adopted as his argument the reasons given in — 'Mian Jaffar Shah v. Mt. Bibi Gulla', AIR 1943 Pesh 79, purporting to follow the decision of — 'Seodhar Prasad v. Kishun Prasad', AIR 1941 Pat 4. In the first place, the transferees defendants 7 and 9 in that case were not like the plaintiff and defendants 1 and 2, the descendants of a common ancestor. As to defendant 8 he was not even descended from the same common ancestor, but was descended from an ancestor of the said common ancestor. Both these defendants had no interest in the joint family homestead and were not residents therein. They could not be regarded as members of the family. There are, no doubt, certain observations in the judgment emphasising the implications of the words "such family" appearing in S. 4 of the Partition Act. But those observations, for reasons given below, are not well founded.

(15) It has been repeatedly held by this Court that the word "family" appearing in S. 4 of the Partition Act should be given a liberal interpretation so as to give effect to the basic principles enunciated in S. 4 of that Act.

(16) Reference may, in this connection, be made to — 'Latifannessa Bibi v. Abdul Rahaman', 58 Cal L J 174. The dwelling house in this case belonged to a Mahomedan daughter's daughter and a son. Following the observations in a Bench decision and the leading case on the point, — 'Khirode Chandra v. Saroda Prosad', 12 Cal L J 525 the word "undivided" appearing in the first part of sub-s. (1) of S. 4 of the Partition Act was to be construed liberally; the word "family" is to be held to include not merely a body of persons who originate from a common ancestor, but also a group of persons related by blood and living in one house or under one head of management. As was observed by Mitter, J. in — 'Latifannessa v. Abdul Rahaman', 58 Cal L J 174 at p. 178, it was not necessary to constitute an undivided family that the members of a family be constantly residing in the dwelling house nor was it necessary that they be joint in mess.

(17) In — 'Sivaramayya v. Venkata Subbamma', 53 Mad 417, it was held:

"Where a purchaser of a share in a dwelling house from a member of a Hindu family whose members although divided in status, occupy the house in common, sues for partition of the house against the other members of the family, one who is a defendant in the suit is competent to apply for the benefit of S. 4 of the Partition Act."

See also — 'Nilkamal v. Kamaksha Charan', AIR 1928 Cal 539; — 'Sultan Begum v. Debi Prosad', 30 All 324 (FB).

(18) In — 'Latifannessa v. Abdul Rahaman', 58 Cal L J 174, the transferee was a son-in-law of one Samsuddin, a member of the undivided family to whom the dwelling house belonged. Ordinarily a son-in-law would not be regarded as a member of the family. When, however, a son-in-law who actually resides in the family of his father-in-law for a number of years and has practically taken up his house with his father-in-law, he is regarded as a member of the family of the father-in-law — 'Gobinda Rani Dassi v. Radhaballabh Das', 12 Cal L J 173.

(19) In the case now before us the transferee is the wife of one of the members of the joint family owning the dwelling house. Under normal condition of things contemplated in a Hindu society and under Hindu law the resi-

dence of the wife is the home of her husband. Reference may in this connection be made to the various original authorities on Ritual and Law quoted in—'Churamon Sahu v. Gopi Sahu', 37 Cal 1 defining the duties of a wife in the home of her husband. The reasons which were assigned in — 'Gobinda Rani Dassi v. Radha ballabh Das', 12 Cal L J 173 in support of a right of maintenance in favour of a son-in-law so long as he resides as a member of the family of his father-in-law apply with greater force when considering the wife of a member of the joint family as she is herself a member of that family.

(20) To a wife or minor children of the members of a joint family, the members of the joint family owe certain duties and the former having the right of residence and/or maintenance under certain circumstances make it abundantly clear that such relations must be deemed to be members of the undivided family. In accordance with the notions of a Hindu family infant children are considered to be members of the family.

(21) It is not necessary for us to consider in the present case whether an outsider who has no right either of maintenance or of residence, but is kept by way of charity by some member or other of the joint family is himself to be regarded as a member of the undivided family for the purpose of attracting the provisions of S. 4, of the Partition Act.

(22) It cannot be contended that because under the Dayabhaga sons do not on birth get an interest in the joint family property, they are not to be regarded as members of the joint family.

(23) The emphasis which was laid on the expression "such family" as having reference to the members of an undivided family who are the owners of the dwelling house is not justified; first, because the members of the undivided family need not themselves be descended from one common ancestor as indicated already, and secondly, because according to the Hindu law & the social structure of the Hindu society the wife or a member of the joint family is for all practical purposes a member and part of the joint family who cannot be regarded as strangers.

(23a) The learned Subordinate Judge was, therefore, correct in refusing to entertain the application of the defendants to invoke the provisions contained in S. 4 of the Partition Act on the ground that the plaintiff purchaser was not a stranger to the family.

(24) The same view was taken in — 'Laksman Dhondopant v. Mt. Lahana Bai', AIR 1937 Nag 4. A widow of a member of a Hindu joint family herself was a member of that joint family in its strictest sense. She is 'a fortiori' a member of an undivided family within the meaning of S. 4 of the Partition Act. The object of this provision in the Partition Act is to prevent a transferee who is an outsider to the family itself from forcing his way into a dwelling house in which other members of the transferor's family have a right to live. (See also — 'Nil Kamal v. Kamaksha Charan', AIR 1928 Cal 539. A cross-objection has been filed jointly by the plaintiff and defendants 12 to 16. So far as the plaintiff is concerned the cross-objection is directed against defendants 1, 2, 7 and 11 against the decision of the learned Subordinate Judge disallowing costs in favour of the plaintiff even though the pleas of 'benami' raised by defendants 1, 2, 7 and 11 had been overruled.

(25) The cross-objection filed by defendants 12 to 16 is against their brother defendant 11 alone. One of the points raised in the written statement by defendants 12 to 15 was that their eldest brother, Keshab, defendant 11, was separate from the joint family and was living separate from before the death of their father Pannalal. Keshab, defendant 11, was not accordingly entitled to get any share from out of the properties left by their father Pannalal.

(26) The question of costs raised by the plaintiff may be shortly disposed of. No doubt, the ordinary rule is that in a suit for partition the parties would bear their respective costs up to the preliminary decree. Costs incurred thereafter till the final decree is to be apportioned according to the shares each party has in the joint family properties. There is, however, an exception. If a question of title is raised by one of the parties as against any other or more of the other parties and that by itself is raised in issue for decision before the preliminary decree is passed the Court takes the result on that issue into consideration for determining whether costs are to be made payable by one party to the other. — 'Satya Kumar v. Satya Kripal', 10 Cal L J 503, 516; — 'Harey Harey Sinha v. Hari Chaitanya Sinha', 40 Cal WN 1237, 1246.

(27) In the present case as it appears from the trend of evidence led by the parties and the judgment, the most important Issue raised and fought in the Lower Court was whether the title alleged to have been acquired by the plaintiff Sushama from one of the co-sharers Birendra by exhibit 2 was a purchase for her own benefit or was really a conveyance in favour of Pannalal in the benami of Sushama. The learned Subordinate Judge has on a consideration of the evidence in the case reached the conclusion that the purchase by the plaintiff was for her own benefit and the story of benami set up by some of the defendants was not proved.

(28) The learned Advocate appearing on behalf of the defendants appellants in this Court did not contend that the decision on the question of the plaintiff's title was not correct. As indicated already the appeal has been limited on other grounds. In this view it is not understood why the learned Subordinate Judge did not direct the contesting defendants 1, 2, 7 and 11 to pay at least some portion of the costs to the plaintiff. It is no doubt true that the question of the payment of costs is in the discretion of the Court, but in the circumstances as stated above it was up to the learned Subordinate Judge to refuse costs in favour of the plaintiff stating some reason or other which in his view justified such an order. The learned Subordinate Judge, however, merely stated that considering every thing it seems proper that the parties should bear their own costs up to the stage of the preliminary decree. We have not been able to find out any circumstance which would justify the Court refusing the plaintiff to realise some portion of the costs inasmuch as the real right between the parties in the lower Court was limited to the question of the plaintiff's title and whether she held the property as a 'benamidar' of her father-in-law Pannalal.

(29) In our view, defendants 1, 2, 7 and 11 should be directed to pay Rs. 200/- (Rupees two hundred only) as consolidated costs incurred by the plaintiff in the lower Court up to the stage of the preliminary decree.

(30) With regard to the next point raised in the cross-objection the question whether defendant 11 Keshab was separated from his father Pannalal, and if so, whether he was entitled to get any share in the property left by his father was specifically raised in the pleadings as also in Issue 8 as settled by the Court below. The learned Subordinate Judge came to the conclusion that in view of the clear admission made by Keshab in the original written statement wherein it had been stated that he had separated from his father and continued to remain separate till the last days of his father, it must be held that Keshab was separate and continued to be so till the death of his father. An additional written statement was subsequently filed by Keshab where he modified the statement originally made and it was alleged that though he had separated during his father's life time, a month or two before the latter's death there had been reconciliation and he became reunited with his father. There being no satisfactory evidence to show that Keshab was reunited with his father before his death this story was rightly rejected by the learned Subordinate Judge.

(31) The learned Subordinate Judge next proceeded to consider whether the separation of Keshab from his father disqualified him from getting a share in his father's property along with his other brothers after the father's death.

(32) The family is admittedly governed by the Dayabhaga School of Hindu Law, and the question is whether sons living in joint mess with their father at the time of the latter's death and to inherit the paternal property in preference to the son who was living in separate mess from the father from before the latter's death.

(33) Under the Mitakshara School of Hindu Law all the members of the coparcenary have some interest in the coparcenary property. The trial Court had been called upon to consider if a member of the coparcenary died leaving self acquired property does the undivided sons succeed to such property to the exclusion of the divided sons. There had been a sharp conflict of opinion in the different Courts. According to the Allahabad, Bombay and Madras view — 'Ganesh Prasad v. Hazarilal', ILR (1942) All 759 (FB); —'Narasimha Rao v. Narasimhan', 55 Mad 577; — 'Fakirappa v. Yellapa', 22 Bom. 101 the undivided sons are entitled to succeed as heirs to the exclusion of the divided sons and their branches. The Lucknow Court on the other hand held that all the sons inherit together as partition does not destroy rights of inheritance to the self-acquired property of a separated member — 'Badrinath v. Hardeo', 5 Luck 649; — 'Ambika v. Jamuna Prasad', 17 Luck 72.

(34) There is no direct decision on this point in respect of parties governed by the Dayabhaga School of Hindu Law

(35) On behalf of the cross-objectors defendants 12 to 16 it is contended that the principles applicable in the case of succession to self acquired property left by a Mitakshara coparcener is applicable to cases of succession under the Dayabhaga School to all properties left by a father.

(36) In the case of self-acquired property held by a member of a Mitakshara coparcenary the person who is the holder is the absolute owner thereof, and he is not required to consult any other member of the coparcenary in regard to the disposal of such self-acquired property. Such self-acquired property as soon as it devolved on the next generation it becomes joint family property, and as observed in — 'Rajah Ramnarain Singh v. Pertum Singh', 20 W R 189 (Cal) such self-acquired property as soon as it comes

> "into the hands of some one in the next generation it becomes joint family property of several persons united together as a joint family with regard to it, — the property of a new joint family property springing from a new root and it continues to go down by one rule of descent only."

(37) Mulla in his Hindu Law, tenth edition, S. 43 taken with S. 341 has laid down the law about divided and undivided sons in respect of self-acquired properties under the Mitakshara schools as indicated above. While dealing with the order of succession under the Dayabhaga School of Hindu Law, he notes that amongst the 'sapindas' the sons, grandsons and great grandsons succeed in the same manner as under the Mitakshara referring to the statement of law as contained in S. 43 of his book.

(38) In our opinion, this is not a correct exposition of law so far as the Dayabhaga School of Hindu Law is concerned. It is now wellknown that the sons have no co-ownership in their father's wealth. Reference is made in this connection to paras. 14 and 18 of Chap. I of the Dayabhaga.

> "14. That is not correct; for it contradicts Manu and the rest. After the death of the father and the mother the brethren being assembled, must divide equally the paternal estate; that they have no powers over it while their parents are alive."
>
> "18. Devala too expressly fix the right of sons in their father's. When the father is deceased let the sons divide the father's wealth; for sons have no ownership while the father is alive and free from defect."

(39) Reference may further be made to para. 8 in Chap. I of the Dayabhaga which provides:

> "Thus there are two parts of partition: one, when the father's property ceases; the other by his choice while the right to property endures."

(39a) Later on in the same Chapter in para 50 Jimutabahana further observes:

> "It is thus established by reasoning, as well as by positive law, that two parts exist for the partition of wealth appertaining to a father whether acquired by himself or inherited from ancestors."

(40) If partition is effected during the lifetime of the father and under his direction and by his choice he has got absolute rights of ownership over all properties held by him, whether ancestral or self-acquired, and partition made by the father in spite of certain injunctions in the Smritis against unequal divisions (which have been held to be mere moral precepts).

(41) From the very earliest times it has been held by this Court that sons share equally the estate left by the deceased father when governed by the Dayabhaga School — 'Gadadhar v.

Ajodhyaram', 18 S. D. A. 6; — 'Bhairabchand v. Rasamoy', 1 S. D. A. 27; — 'Iswar Chandra v. Govinda Chand', — Mc. Naughten's Institute of Hindu Law, page 74.

(42) It is not necessary for us at this stage to consider whether the view taken by the Sadar Dewani Adalat in 1812 in — 'Ram Kumar v. Kishen Kunker', 2 S. D. A. 45, that in a family governed by the Dayabhaga school of Hindu Law father was legally entitled to make a gift of the entire estate, ancestral or self-acquired, as also real and personal, to one of his sons was laying down a correct proposition of law or not. When again a reference was made by the Supreme Court of Bengal, the Sadar Dewani Adalat recorded their opinion that consistently with the decision of the Court and the custom and usages of the people a father governed by the Dayabhaga School of Hindu Law could without the consent of his sons transfer immovable ancestral property and that without the consent of the sons he could by will prevent, alter or affect their succession to such property — 'Juggomohan v. Neemoo', Morton 90. Ever since, the rights of a father in Bengal over the ancestral property have been accepted as good law, Jimutabahana was interpreted as having expressed the view in Dayabhaga Chapter 2,28 that the text of Vyasa prohibiting a sale of gift or ancestral immovable property was only intended to inculcate a moral offence without in any way invalidating the transfer if actually made. It is now too late in the day for the Court to consider this position, but we ought to keep in mind the observations of Jimutavahana at this place when reference is made to other texts which are to a certain extent coloured by similar expressions of opinions discouraging if not disapproving the wide and absolute power of disposal by a father in Bengal.

(43) It is clear that under the Dayabhaga School of Hindu Law there is no scope for the sons getting on partition any portion of the ancestral property, not to speak of the self-acquired property in the hands of their father so long as the latter is alive. The test, therefore, which is applied in the case of Mitakshara family to differentiate between a joint and a separated member of the family so far as the sons are concerned is inapplicable in the case of a family governed by the Dayabhaga School of Hindu Law. Under the Mitakshara School the sons as they are born become members of the coparcenary with some interest in the coparcenary property. It is, therefore, possible for a separation and partition by a son from the father during the life-time of the latter even without the father's consent or his agreeing to partition. When a son is thus separated from the coparcenary in respect of coparcenary property he acquires a status which is distinct and different from the status of his other brothers who may continue to remain joint with their father or even after partition become reunited in a joint family. This state of things is an impossibility under the Dayabhaga School of Hindu Law.

(44) The test which is applied in some of the cases coming under the Mitakshara school is not whether a son is living separate in mess from the coparcenary, but whether he has become separated in status from the other members including his father and other brothers.

(45) If the same tests were to be applied to cases coming under the Dayabhaga School of Hindu Law, the only test that would be possible is where a son who has no present interest in the properties held by the father is living away from the father,—there being no partition possible between himself and his father and his other brothers in respect of the property held by the father.

(46) There are no authorities under which the rights of an heir can be defeated merely because such an heir is living away from and was separate in mess from the last owner.

(47) The only case to which reference may be made is to certain precedents referred to by Shyama Charan Sarkar in Vyvastha Darpana, third edition, pages 659 to 660.

(48) In a case where one of three sons having separated himself from the family and taken a share during his father's life time, such a son was held not to have any further claim on the father's estate. It was made clear that mere living apart does not exclude one of the sons from inheritance.

The first question which was put to the Court-Pundits was:

"A person had three sons the eldest of whom having been separated from his father lived apart. Afterwards the father died. In this case, are only those sons who lived with him entitled to succeed him; or have all his sons an equal right of succession?"

(49) Relying on the following texts of Narada and Brihaspati cited in the Dayabhaga:

"Shares which have been assigned by a father to his sons, whether equal, greater or less, should be maintained by them; also they ought to be chastised."

"If such as have been separated by their father with equal, greater or less allotment of wealth that is a lawful distribution: for the father is lord of all."

The reply which was given was in the following terms:

"Supposing the father, by mutual free will and consent to have given some wealth out of his self acquisition to his eldest son and separated him from his family; in this case, on the death of the father, the eldest son has no right to get any additional portion of his father's acquisition from his brother."

The second querry as made by the Court was in the following terms:

"If there had been no separation from the father, and the eldest son had left the family on account of a dispute which had taken place between his wife and the other members of the family; in this case has the eldest son any right to share his father's estate?"

The reply given was thus recorded:

"Supposing the father not to have given any property to his eldest son, or to have made any division of it, and the eldest son who has lived apart then on the death of the father all his sons share the inheritance."

(50) The questions as noted and the replies are recorded by McNaughten in his Hindu Law, Volume II Chapter I, page under Case No. 5 and are reproduced by Shyama Charan Sarkar in the Vyvashtadarpan, third edition, pages 660 to 661.

(51) Under the first question above referred to the son who was living apart from his father was declared not to be entitled to any additional portion of the father's estate after the latter's death dependant on two primary conditions: (i) The father had given the son some wealth

out of his self acquisition, and (ii) he had separated him from his family.

(52) Under the second question where a son living separate is found to be entitled to a share along with his brothers the estate left by his father is made contingent on—(i) the father not having given any property to the son the father ought not to have made any division of his estate during his life time and (ii) that the son was living apart from the father, and not that the father had separated the son from the family.

(53) The law as interpreted gives an absolute right to the father in Bengal over ancestral and self-acquired properties. The expressions of opinion by Jimutavahana in paragraphs 38 and 50 of Chapter I of the Dayabhaga quoted above merely make a reference to an option which may be exercised by the father partitioning his estate during his life time. He may make unequal distribution and no objection can be raised thereto. If in the exercise of his right he gives a portion of the property to one of his sons and he separates him from the family that is tantamount to a declaration by him that what he intended to give to such a son so separated had already been decided upon by him. After his death the other sons who continue to live with him would divide among themselves the property left by the father.

(54) If on the other hand, one of the son lives separate from the father's family for some reasons or other and if the father had not during his life time given that son any portion of his estate, the right which the sons have to succeed to the estate of his father cannot in any way be affected merely by the fact that he was living separate from the father's family.

(55) In the case now before us the only fact which has been found by the Court below is that Keshab, defendant 11, was living away from his father's family and it is not the case of any one of the parties that he was separated by the father. Further, it is not the case of any one of the parties that Keshab had been given by his father Pannalal any portion of his estate when he began to live separately. The two conditions, therefore, under which it may be presumed that a father had separated one of his sons disentitling him to get the normal inheritance after the former's death are not proved. There is no ground, therefore, in the present case for limiting the distribution of the estate of Pannalal to his sons other than Keshab. This objection against defendant 11 must, therefore, be overruled.

(56) This appeal is accordingly dismissed and the cross-objection is allowed in part only in respect of the plaintiff's claim for costs against the contesting defendants 1, 2, 7 and 11 who raised a plea of 'benami' against her to the extent that the plaintiff will get Rs. 200/- (Rupees two hundred only) as consolidated costs up to the preliminary decree in the trial Court from defendants 1, 2, 7 and 11.

(57) Each party will bear his own costs in the appeal and in the cross-objection in this Court.

(58) LAHIRI, J.: I agree and desire to add a few words.

(59) This is an appeal by defendants 1 to 4 against the preliminary decree in a suit for partition. The subject-matter of the dispute is the ancestral homestead situated at village Barisa and some agricultural lands and tanks adjoining thereto.

(60) It is admitted that the parties are the descendants of one Tinkari Basu who left six sons named Hiralal Basu, Chunnilal Basu, Pannalal Basu, Nanilal Basu, Manilal Basu and Benodelal Basu. Defendants 1 to 10 are the descendants of Hiralal. The plaintiff Susama Rani Basu is the wife of defendant 12 Gopal Lal Basu who is one of the sons of Pannalal. By a conveyance, dated 29-1-1941, the plaintiff Susama purchased the interest of Birendra, son of Manilal, and instituted the present suit for partition.

(61) The suit was contested by the present defendants on three grounds viz., that Susama was the 'benamidar' of Pannalal; that the suit was not maintainable because there had been a previous partition; and that the defendants were entitled to pre-empt the interest of the plaintiff under S. 4 of the Partition Act. The learned Subordinate Judge overruled the defence and made a preliminary decree for partition against which defendants 1 to 4 have filed the present appeal. There is also a cross-objection by the plaintiff (respondent 1) and defendants 12 to 16 (respondents 9 to 13).

(62) Mr. Chakravarti appearing in support of the appeal has not raised the question of 'benami', but has confined his arguments to the other two points. It has been argued in the first place that there had been a completed partition between the parties, and, therefore, the present suit was not maintainable. In paras 7, 8 and 9 of the plaint, the plaintiff alleged that by an 'achalnama', dated 29-9-1933, the then co-sharers with a view to effect an amicable partition of the properties appointed three arbitrators named Jagindra Nath Mukherjee, Chandi Charan Ganguli and Susil Kumar Chatterjee, and it was agreed that the arbitrators should publish their award within six months. The arbitrators appointed a surveyor to prepare allotments. The said surveyor prepared a plan in accordance with the possession of the parties, but nothing was done in the matter of equalisation of shares on the basis of valuation or owelty money, and the arbitrators never published their award. The parties have been in possession of different parts of the property for convenience and enjoyment, but a completed partition was not effected thereby. The plaintiff accordingly alleged that there was no regular and complete partition amongst the parties and prayed for partition by metes and bounds.

(63) In para 10 of the written statement on behalf of defendants 1, 2 and 7, it was alleged that though the arbitrators did not publish their award, all the parties accepted the plan prepared by the surveyor, and only the heirs of Hiralal Basu did not approve of the pathway in front of their house, and the proposal of the said pathway was not carried into effect.

(64) The appellants before us are the heirs of Hiralal Basu. In the written statement filed by them they allege that they did not accept the pathway in front of their house. If that be so, it is difficult to see how the remaining portion of the surveyor's plan could be agreed upon by all the co-sharers.

(64a) Mr. Chakravarti has relied upon the recitals in the plaintiff's 'Kobala', exhibit 2 to prove that there had been a completed partition. It is true that in the earlier portion of the 'kobala'

reference is made to the appointment of arbitrators and the preparation of the plan by the surveyor, and there is also an assertion that the vendor Birendra Kumar Basu was the sole owner of the properties sold by the 'kobala', but towards the end, there is also a recital to the effect that if the amicable partition is not considered to be effective, the vendee will get the vendor's ancestral three annas and four gandas share in the properties. The recitals of the 'kobala', therefore, do not prove that there was a completed partition.

(65) Turning to the oral evidence adduced by the defendants, we find that defendants' witnesses 2 and 3, Subodh Kumar Banerjee and Jagat Jouti Banerjee, have admitted in their cross-examination that the cosharers are in occupation of some of the rooms of which they were in occupation before partition. It is clear from this evidence that the possession of the co-sharers was not effected by the partition plan prepared by the surveyor. There is no evidence that the allotments made by the surveyor were in accordance with the respective shares of the cosharers or that any provision was made for owelty money for adjusting the inequality of the allotments.

(66) Mr. Chakravarti has further urged that a presumption should be drawn against the plaintiff for non-production of the surveyor's plan which is in the possession of the plaintiff's husband Gopal Lal Basu. Gopal has said in his evidence that he does not remember whether he brought the plan from Naba Kumar Pal (Surveyor). There is nothing to show that this plan was called for from Gopal during the trial. In these circumstances, and particularly in view of the allegations made in paragraph 10 of the written statement, we are not prepared to draw any adverse inference against the plaintiff. The first point raised by the appellants accordingly fails.

(67) The second point urged by the learned Advocate for the appellants is that section 4 of the Partition Act applies to the case, and as such, the appellants are entitled to pre-empt the interest purchased by the plaintiff. The learned Subordinate Judge has rejected this claim on the ground that section 4 applies only when a stranger to the family purchases the share of a member of the undivided family to which the homestead belongs, and as the plaintiff in the present case is the wife of a cosharer, she must be said to belong to the undivided family, and, therefore, section 4 has no application. Mr. Chakravarti has argued that in order to take a case out of the operation of S. 4 the transfer must be to a person who is not only a member of the undivided family, but must also have a share in the dwelling house. In other words, the expression 'such family' occurring in the first half of the section means the undivided family which owns the house. Reliance has been placed upon the decision of the Judicial Commissioner of Peshawar in the case of — 'Mia Jaffar v. Mst. Bibi Gulla', AIR 1943 Pesh 79 for this view. In that case, there was a transfer to the wife of a co-sharer, and the application under S. 4 of the Partition Act was allowed upon the view that the transferee wife was not a co-sharer of the dwelling house and was not, therefore, excluded from the operation of S. 4. With great respect to the learned Judge who decided that case, we cannot accept that view as correct.

(68) The view expressed in the case reported in AIR 1943 Pesh 79 is opposed to the observations made in the case of — 'Kshirode Chandra v. Saroda Prosad', 12 Cal L J 525; at p. 532 Sir Ashutosh Mookerjee observed as follows:

> "The phraseology of S. 4 makes it clear that there may be members of the family who have no share in the dwelling house, and that S. 4 makes it essential that the member of the family who undertakes to buy the share of the stranger transferee should be a share-holder in the dwelling house which implies that there may be members of the family who are not such share-holders."

Again in the case of — 'Boto Krishna v. Akhoy Kumar', AIR 1950 Cal 111, another Division Bench of this Court made the following observations:

> "The section itself appears to us to recognise that a person may be a member of the family although he may not be owning a share in the dwelling house. It confers the right to apply on 'any member of the family being a share-holder', the additional qualification of being a share-holder would not be necessary if the intendment of the section was that membership of the family was equivalent to co-ownership of the house."

We respectfully agree with the observations made in these two last decisions, and hold that S. 4 is not attracted to a case where the transfer is to a member of the undivided family who is not a co-sharer of the dwelling house. It has been uniformly held that the object of S. 4 is to prevent an outsider from forcing his way into a dwelling house where the other members of the family have a right to live. See the cases of — 'Khirode Chandra v. Saroda Prosad', 12 Cal L J 525, and — 'Nil Kamal v. Kamakshacharan', AIR 1928 Cal 539.

(69) The wife of a co-sharer to whom the transfer has been made in the present case has a right to live in the house as much as any other co-sharer. Section 4 of the Partition Act cannot, therefore, be applied to prevent her from possessing a share of the house. In our opinion S. 4 requires that the application for pre-emption must be by a member of the undivided family, who must also be a share-holder, but it does not require that in order to take a case out of the operation of S. 4, the transferee should also be a share-holder besides being a member of the family. This is evident from the fact that though the expression "being a share-holder" is used as a qualifying expression of the applicant for pre-emption, it is not so used in the case of the transferee. The second point urged in support of the appeal must also be overruled.

(70) As all the points urged in the appeal fail, this appeal must be dismissed.

(71) There remains the cross-objection by the plaintiff and by the defendants 12 to 16.

(72) The cross-objection by the plaintiff is directed against defendants 1, 2, 7 and 15, and it relates to costs. For the reasons given by my learned brother, I agree that the plaintiff should get the consolidated amount of Rs. 200/- as costs in the trial Court up to the preliminary decree.

(73) The cross-objection by defendants 12 to 16 is directed against defendant 11 and it raises two points. In the first place, it is said that defendant 11 having separated from his father Pannalal Basu during the latter's life time is not entitled to any share of the inheritance. I have

had the advantage of reading the judgment which has been delivered by my learned brother on this point, and I fully agree with the reasons given by him for rejecting this point, raised by defendants 12 to 16, and I have nothing more to add.

(74) The second point raised in the cross-objection of defendants 12 to 16 is that they spent a sum of Rs. 4722/- on account of the funeral expenses and medical expenses of Pannalal Basu, and also a substantial amount for the reconstruction of that portion of the house in which Pannalal lived and that defendant 11 is not entitled to possession of any portion of the 4/15ths share of Pannalal Basu without payment of the proportionate amount payable by him. This point was the subject-matter of Issue 9 before the learned Subordinate Judge, and by his judgment, the learned Subordinate Judge left this Issue open in the present suit. Mr. Mitter appearing in support of the cross-objection has, however, pressed this point and has argued that his clients do not desire this Issue to be left open. We have accordingly thought fit to give our decision on this Issue.

(75) Assuming the allegations made by defendants 12 to 16 in their written statement to be true, it is difficult to understand on what principle they can claim contribution or reimbursement in respect of these amounts. With regard to the amount spent for the reconstruction of the house, reliance has been placed on certain entries in the account book, exhibit 7(a) which show that certain sums were received by Pannalal Basu through defendant 12 Gopal Lal Basu. It is argued that the amounts covered by these entries were advanced by Gopal as loans to Pannalal. The entries, however, do not prove that the amounts were advanced as loans. The amounts spent for the funeral and medical expenses of Pannalal Basu cannot also be regarded as advances made to Pannalal Basu on any account. For these reasons, the second point raised in the cross-objection of defendants 12 to 16 must also be overruled.

(76) I, therefore, agree with my learned brother that the appeal and the cross-objection of defendants 12 to 16 should be dismissed, and the cross-objection of the plaintiff should be allowed in part and she should get the consolidated amount of Rs. 200/- as costs in the trial Court up to the preliminary decree. I also agree that the parties should bear their own share of the costs in the appeal and the cross-objections in this Court.

B/R.G.D. Order accordingly.

A.I.R. 1953 CALCUTTA 172 (Vol. 40, C. N. 55)

BOSE J.

Samarendra Prosad Chakravarty and another, Petitioners v. The University of Calcutta, Respondent.

Matter No. 2 of 1951, D/- 7-3-1951.

(a) Evidence Act (1872), S. 115 — Estoppel as cause of action — Estoppel does not furnish any cause of action. (Para 15)

(b) Constitution of India, Art. 226 — Mandamus proceedings — Questions of title to property and complicated questions of fact.

It is an elementary principle that the title to property will not be tried in mandamus proceedings, and the writ will not issue when it is necessary to try or decide complicated or extended questions of fact. 38 Cal 553; AIR 1915 Cal 91 Rel. on. (Para 17)

Anno: C.P.C., App. III; Constitution of India, Art. 226 N. 11.

(c) Constitution of India, Art. 226 — Petitioners aggrieved by acts of Calcutta University Syndicate — Prerogative writs against Calcutta University.

It is true that the Syndicate being a statutory body vested with the executive government of the University the persons constituting it become 'ipso facto' holders of a public office and can be proceeded against by an application under S. 45, Specific Relief Act. This, however, does not mean that any application for the issue of prerogative writs against the Calcutta University which is a body corporate and a statutory body and which is responsible for the acts of the Syndicate is necessarily bad. The acts of the Syndicate are the acts of the University and an application for a prerogative writ against the University should not be thrown out on such a highly technical ground although, no doubt, the appropriate thing would be to proceed against the Syndicate where its specific acts are complained of. AIR 1918 Mad 763, Ref. (Para 20)

Anno: C.P.C., App. III; Constitution of India, Art. 226 N. 1.

(d) Constitution of India, Art. 226 — Parties to proceedings.

An application under Art. 226 is not a regular suit, and merely because certain questions will have to be determined incidentally in giving or not giving the reliefs asked for in the application does not make each and every person interested in such questions as necessary parties to those proceedings. (Para 21)

Anno: C.P.C., App. III; Constitution of India, Art. 226 N. 1.

I. P. Mukherjee, for Petitioners; A. K. Sen, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('11) 38 Cal 553: (10 Ind Cas 253) 17
('14) 41 Cal 518: (AIR 1915 Cal 91) 18
('17) 40 Mad 125: (AIR 1918 Mad 763) 20, 23
(1950) 2 All ER 741: (66 TLR 584) 23

ORDER: This is an application under Art. 226 of the Constitution for an order directing the respondent to withdraw or recall its decision that only such students of Class X of the Chakraberia H. E. School who pass the Test Examination conducted by one Subal Chandra Pal, officiating Head Master of the School and are sent up for the Matriculation Examination in 1951 by him will be admitted to the examination by the University and also for an order on the respondent calling upon it to issue the necessary forms and take other necessary steps for the admission of the petitioners to the ensuing Matriculation Examination.

(2) The petitioners are two out of 100 students of Class X of a well-known school in South Calcutta known as Chakraberia High English School now located at 93, Bakul Bagan Row and 23/1, Chakraberia Road South. The said school was originally started in 1857 and was run as a Middle English School until the year 1938 when it was converted into a High English School and it was recognised by the respondent University in terms of the Univer-

sity Act, 8 of 1904, as a school entitled to send up candidates for the Matriculation Examination and the students who have passed the Test Examination held by the said school are entitled to sit for such examination.

(3) The respondent University was established and incorporated by Act 2 of 1857 which was passed on 24-1-1857. The object for which the University was established is stated in the Preamble of the said Act to be as follows:

"Whereas for the better encouragement of Her Majesty's subjects of all classes and denominations within the Presidency of Fort William in Bengal and other parts of India in the pursuit of a regular and liberal course of education, it has been determined to establish a University at Calcutta for the purpose of ascertaining by means of examination the persons who have acquired proficiency in different branches of literature, Science and Art and of rewarding them by academical degrees as evidence of their respective attainments and marks of honour proportioned thereunto etc....."

(4) By Act No. 8 of 1904 which came into force on 1-9-1904 the constitution and powers of the Indian Universities including the respondent University were defined and the Senate of the University was given power to frame regulations for matters relating to the University with the sanction of the Government under S. 25 of the said Act including the regulations with regard to conditions to be complied with by schools describing recognition for the purpose of sending up pupils as candidates for the Matriculation Examination and the conditions to be complied with by candidates for Matriculation Examination whether sent up by recognised schools or not.

(5) Pursuant to the said power contained in S. 25 aforesaid certain regulations were framed for conducting the Matriculation Examination. In Chap. 30, Regulation 2 it is provided as follows:

(i) Ordinarily only pupils who have been educated for at least one school year previous to the date of the Matriculation Examination at a School recognised by the Calcutta University for such purpose, shall be admitted to Matriculation Examination.

In regulation 4 it is provided that the Head Masters of recognised schools shall submit to the Controller of Examinations within such date as may be prescribed by the Syndicate the applications of those pupils and private candidates who have passed the Test Examination together with the necessary fees prescribed in regulation 5.

It is provided in Chap. 10 of the Revised School Code sanctioned by the University of Calcutta that case of late admission of students in the matter of Matriculation class, i.e., cases of first admission after the 15th of February or of admission after the 15th of July, should be reported to the University within a certain time and the University may sanction such late admission if there are exceptional circumstances in support of the application for sanction.

(6) It appears that the case of admission of petitioner 1 to the Chakraberia High English School was a case of late admission but it has been sanctioned by the respondent University. Petitioner 2, however, has been educated in the said school for over one school year previous to the examination due to be held in 1951. Both the petitioners have passed the test examination held by the said school between 7 and 12-12-1950 in the usual course and they have been recommended to be sent up for the ensuing Matriculation examination by the Head Master Sri Ganendra Nath Sanyal. The petitioners have deposited with the authorities of the said school the necessary fees prescribed by the regulations of the University.

(7) After the publication of the result of the test examination held on 7-12-1950 the Head Master of the school pursuant to the enquiries made by the Controller of Examinations sent a representative to bring from the office of the University the necessary forms required to be filled up by the intending candidates for the Matriculation examination. The said representative applied for delivery of the forms but no such forms were delivered on the ground that the same had already been delivered to some other person.

(8) On 18-12-1950 the University through its Assistant Registrar, Mr. P. Banerjee, issued a notice to Mr. Someswar Mukherjee, the Secretary of the Chakraberia School, to the effect that the University had decided that only such students of Class X of the School who passed the test examination conducted by Subal Chandra Pal, the officiating Head Master and are sent up for the Matriculation Examination in 1951 by him will be admitted to the examination by the University. It is stated in the petition that Someshwar Prosad Mukherjee is not the Secretary nor is he entitled to function as such and the said Subal Chandra Pal was only a teacher in the said school and never was or is the officiating Head Master nor had any right or power to hold any test examination of the school. The case of the petitioners is that Ganendra Nath Sanyal has been at all material times the Head Master of the said school and the direction or decision by the University given by their notice of 18-12-1950 is illegal and ultra vires and is mala fide.

(9) In order to appreciate this attitude taken up by the respondent University as expressed in the letter of 18-12-1950 it is necessary to state a few facts about the past activities of the Chakraberia School and the part played by the University in relation thereto. It appears that on 17-5-1947 certain persons including the said Someswar Mukherjee constituted themselves into a Managing Committee of the Chakraberia School under the auspices of the South Suburban School Committee. It may be noted that this committee was constituted not in accordance with Cls. 2, 3, 4 and 5 of Chap. I of the Revised School Code approved and published by the University. According to Cl. 10 of Chap. I of the School Code the members of the managing committee other than the Head Master hold office for three years from the date when the composition of the committee is completed by election or nomination. It appears that on 23-12-1949 certain charges were framed against Ganendra Nath Sanyal, the Head Master for arrogant, unmannerly and disorderly conduct particularly insubordination and insult showed to the managing committee of the school and for mal-administration of the school, for irregular attendance at school, for failure to keep discipline in the school and for joining the strike of the teachers on 15 & 16-9-1949, for non-compliance with the instructions of the managing committee and so on. On 26-12-1949 a copy

of these charges was sent to the Head Master and he was called upon to submit his explanation to these charges. The Head Master, however, on 7-1-1950 instead of submitting any explanation wrote to the Secretary as follows:

"With reference to your letter of 26-12-49 forwarding a copy of a resolution of the managing committee dated the 23rd of December last, I beg to inform you that the charges against me are so palpably unfounded and flimsy that they need no explanation."

It is thus clear that the Head Master treated the resolution of the managing committee with scant respect. The result was that on 15-1-1950 the services of the Head Master were terminated by a resolution of the managing committee. But in spite of such dismissal Mr. Sanyal continued to function as the Head Master being backed by some of his supporters. On 18-1-1950 one Biswanath Bagchi was set up by Mr. Sanyal and his supporters to file a suit in the Court of the Fourth Munsiff at Alipore, being suit No. 143 of 1950 against the members of the Someswar Mukherjee managing committee including the Head Master Mr. Sanyal. On 22-1-1950 a new managing committee was constituted with Mr. R. M. Sen, Solicitor and certain other persons as members thereof including Mr. Sanyal, the Head Master, and it continued to function as such. On 31-3-1950 the University issued a circular to all the schools for electing committee in terms of the Revised School Code. On 14-5-1950 the election at Chakraberia School was held and the said Ad Hoc Committee formed in January, 1950 was elected as the managing committee at such election with Sanyal the Head Master as the ex-officio member. On 21-5-1950 the newly elected committee applied to the Syndicate of the University for approval of the committee. As the University did not communicate their approval or disapproval for some time, reminder was sent to the University. On 21-7-1950 the Syndicate passed a resolution approving the old committee constituted by Someswar and others and did not approve the new committee.

On 26-1-1950 the suit at Alipore was compromised on certain terms. One of such terms was that the Head Master would render accounts of all receipts and disbursements from 15-1-1950 supported by vouchers and other papers. Another term was that the salaries drawn by the Head Master and the staff till date would be deemed to have been paid as their salaries. There was a further term that things done by the Head Master in good faith would be ratified. On 31-7-1950 the University by a letter communicated to Someswar Mukherjee that the Vice Chancellor and the Syndicate desired to inform him that the managing committee constituted on 14-5-1950 was not approved of by the University and the old managing committee should continue to function until further orders.

(10) As Mr. Someswar Mukherjee asserted his rights to interfere with the management of the school a second suit was filed at the instance of the new committee constituted by R. M. Sen and others in the Alipore Court being suit No. 705 of 1950 on 2-8-1950. On 7-8-1950 Mr. Sen the Secretary of the new committee wrote to the Registrar of the University enquiring why no approval of the new committee by the University was forthcoming. On 8-8-1950 Mr. Sen received a reply from the Assistant Registrar that his letter was receiving attention. On the 10th of August Mr. Sen asked for an interview with the Vice Chancellor and on the 24th of August he was granted an interview by the Vice Chancellor. In the meantime on 11-8-1950 certain criminal proceedings under S. 144, Criminal P. C. were started before the District Magistrate at the instance of Someswar Mukherjee and his supporters and an ex parte injunction was obtained. But in view of the pendency of the civil suit before the Munsiff the injunction made by the District Magistrate was withdrawn by him on 31-8-1950.

It appears that thereafter on 3-9-1950 the general committee of the South Suburban School re-elected the old committee constituted by Someswar Mukherjee and others. On 7-9-1950 the Munsiff granted an interim injunction in the second suit restraining the old committee from interfering with the R. M. Sen Committee. On 11-9-1950 the District Judge granted a stay of the operation of the injunction order passed by the Munsiff. On 18-9-1950 the University approved of the old managing committee reconstituted on 3rd of September as aforesaid. On 21-9-1950 the Vice Chancellor wrote a letter to Mr. R. M. Sen in reply to a letter written by Mr. Sen to him on the previous date. The learned Vice Chancellor pointed out that Mr. Sen did not mention before him on the date that he had interview with the Vice Chancellor the fact that his committee formed on 14-5-1950 was not approved by the Syndicate and by the order of the Syndicate the old committee was allowed to function; and the Vice Chancellor made it clear that he was not going to override the decision of the Syndicate, and the committee approved by the Syndicate would function.

On 6-10-1950 the University acting upon the complaint received from some teachers of the school to the effect that Mr. Sanyal was still wrongfully interfering with the management of the school, passed a resolution calling upon Mr. Sanyal to show cause by 10-11-1950 why he should not be debarred from working in any school as a teacher. On the same date a third suit was filed at the instance of the R. M. Sen committee in Alipore being suit No. 841 of 1950 and the University was made a party to this suit. It may be noted that the university was not a party to the previous suits. Although the new R. M. Sen committee was not approved by the University and although the University disapproved of the interference with the management of the school by the Head Master Mr. Sanyal, the latter held a test examination between 7-12-1950 and 12-12-1950 in which the petitioners and certain other students of the school appeared and sat for the examination. On 12-12-1950 Mr. R. M. Sen wrote a letter to the University intimating that there was a rumour that the test examination held by Mr. Sanyal, the Head Master, would not be acceptable to the University and pointed out that if that was so then such thing would be most improper. Thereafter it appears that the University issued the Notice dated 18-12-1950 to the effect that only such students who passed the test examination held by Subal Chandra Pal the officiating Head Master would be allowed to sit for the Matriculation Examination of the University to be held in 1951.

(11) It is not quite clear as to when this Subal Chandra Pal was appointed as Head

Master of the school. Mr. Pal has filed an affidavit in these proceedings but he does not mention any date as to when he began to function as Head Master of the school. The paragraphs 9, 15, 17, 22 and 25 of the affidavit of Mr. Banerjee, the Assistant Registrar leave the matter in a state of utter confusion. He makes conflicting statements as to the date of appointment of Mr. Pal as Head Master in these various paragraphs. This much is clear however that before Mr. Pal held the test examination on 18th December his status as a Head Master was recognised by the University and by the Committee approved by the University.

(12) It is noticeable that Chakraberia School is not governed in the matter of constitution of the managing committee of the school by the Revised School Code but by special rules framed by the general committee of the South Suburban School. This fact appears from the letter of Mr. Sanyal dated 24-8-1943 and also from other documents which have been filed in these proceedings before me.

(13) It has been contended by Mr. I. P. Mukherjee the learned counsel for the petitioners that the facts stated above show clearly that the Vice Chancellor and the Syndicate have acted mala fide in arriving at the decision expressed in the letter of 18-12-1950 and instead of dealing with the situation in a spirit of detachment they have taken sides in matters of party politics and have expressly displayed partiality towards the Committee constituted by Someswar Mukherjee and his supporters.

(14) I am unable to view the facts in the lights suggested by Mr. Mukherjee. The Calcutta University is the supreme head of the educational institutions of the State of West Bengal. The Senate of the University is responsible for framing regulations relating to the conditions to be complied with by schools desiring recognition for the purpose of sending up pupils as candidates for the Matriculation examination and the conditions to be complied with by candidates for matriculation whether sent up by recognised schools or not. The Senate has framed regulations. According to Regulation 4 of Chap. 30 the Head Masters of recognised schools have to submit to the Controller of examinations the applications of pupils and private candidates who have passed the test examination together with necessary fees prescribed in Regulation 5. The syndicate of the University which is vested with the executive government of the University (S. 15 of Act 8 of 1904) has to see that the regulations are complied with. If it is brought to the notice of the University that a particular Head Master who has purported to hold a test examination and to forward applications of pupils desirous of appearing in the Matriculation examination is not really the Head Master but some body else is the Head Master it becomes the duty of the Syndicate to take notice of the fact and to decide the course of action it should pursue in the matter.

In the present case the University was kept informed about the course of events happening in the school. The Syndicate had granted its approval to the Someswar Committee and so it knew which Committee was the validly constituted Committee and which not. Before the reconstitution of the Someswar Committee on 3-9-1950 this Someswar Committee was functioning as the Managing Committee since 17-5-1947. It was this Committee which had dismissed the Head Master Mr. Sanyal on 15-1-1950. The Committee formed by Mr. R. M. Sen and his supporters on 14-5-1950 had not been approved by the Syndicate. Having been in possession of all the facts the Syndicate decided to recognise the Head Master who came to be in office by virtue of an appointment made by the proper Managing Committee. I do not see anything capricious or malicious or any want of good faith in the action of the Syndicate or the Vice Chancellor.

Under Rule 6 of the Revised School Code, the constitution of the committees of all schools shall be subject to the approval of the Syndicate which retains the power in special cases or classes of cases to approve of Committees efficiently discharging their duties, although not constituted in accordance with the rules of the revised code. The Someswar Mukherjee Committee was approved by the Syndicate pursuant to this rule. It may be that Mr. Someswar Mukherjee whose conduct as an Examiner was censured by the Investigation Committee appointed by the Chancellor of the University should not have received the support of the Syndicate but it appears that for some reason or other the Syndicate has readily extended its support to Mr. Someswar Mukherjee and his supporters when they asked for such support. It may be that the reason was that Mr. Mukherjee had some hold or influence on the Syndicate or it may be that the Syndicate viewed the conduct of Mr. Sanyal as to his insubordination and insult to the Managing Committee and of his joining the teachers' strike with such disapproval that the Syndicate thought it prudent to leave the management of the school even in the hands of the Committee formed by Someswar Mukherjee and his group rather than leave it in the hands of Jnanendra Nath Sanyal and his group. It is not within the province of this Court, however, to speculate as to the real reasons and in the absence of definite proof I am unable to come to any finding that the conduct of the Syndicate or the Vice Chancellor in arriving at the decision as embodied in the letter of 18-12-1950 was tainted with any sinister motive or with want of good faith.

(15) It was contended by Mr. I. P. Mukherjee that the acts of Mr. Sanyal having been ratified by the Someswar Committee by the compromise of the suit at Alipore and being otherwise accepted by the said Committee as also by the University, the University and the Someswar Committee are estopped from challenging the validity of the acts of Mr. Sanyal including his act of holding the test examination. I am unable to accept the contention. The terms of compromise in the first suit are far from clear and I do not find in the conduct of the University any indication that the University accepted Mr. Sanyal as the Head Master properly in office or that he had the right or authority to hold the test examination of the school. Moreover it is an elementary principle that estoppel does not furnish any cause of action.

(16) Beyond making the remarks aforesaid which I think are sufficient to dispose of this application I do not propose to enter into any detailed investigation as to the title or respective rights of the Someswar Mukherji Committee or the R. M. Sen Committee with regard to their control and management of the school. I understand that there is a suit pending in

which such questions are intended to be agitated and adjudicated upon. It may be that when the parties have adduced all the evidence in their possession both oral and documentary, some facts will come to light which will make it more easy for the Court to come to a definite finding on the issues involved in the case. I want to make it clear that the observations made by me in this application are made for the limited purpose of deciding this application and I am not deciding the title or rights of the two rival Committees who are not parties to this application and such questions are left open.

(17) It has been stated in — 'Kesho Prosad Singh v. Slacke', 38 Cal 553 which was an Original Side matter decided by a Bench of two Judges that

"It is an elementary principle that the title to property will not be tried in mandamus proceedings and the writ will not issue when it is necessary to try or decide complicated or extended questions of fact." (page 557)

(18) Although this proposition is based on some American decisions it appears to me to be a sound and salutary principle and I see no reason to differ from it. (See also — 'Rasul A; In the Matter of', 41 Cal 518 at p. 527).

(19) It was contended by Mr. A. K. Sen the learned Counsel for the respondent University that the application is defective inasmuch as the proper respondent should have been the Syndicate whose acts and authority are challenged in these proceedings and not the University of Calcutta which is a wider body of which the Syndicate is only a part or a member.

(20) It may be noted that in the case of — 'In Re Natesan', 40 Mad 125 it was pointed out that the Syndicate being a statutory body vested with the executive government of the University the persons constituting it become ipso facto holders of a public office and can be proceeded against by an application under S. 45, Specific Relief Act (page 143). In that case it was the Syndicate which was proceeded against and the application against the Syndicate succeeded. The case is, however, no authority for the proposition that any application for the issue of prerogative Writs against the University which is a body corporate and a statutory body and which is responsible for the acts of the Syndicate is necessarily bad. The acts of the Syndicate are the acts of the University and I do not think that the application is to be thrown out on this highly technical ground although no doubt the appropriate thing would have been to proceed against the Syndicate whose specific acts are complained of in these proceedings. In Cl. (1) of Act 2 of 1857 it is provided that the University of Calcutta "in such name shall sue and be sued, implead and be impleaded and answer and be answered into in every court of justice."

(21) It was also contended by Mr. A. K. Sen although this point is not taken in the affidavit on behalf of the respondent University that the application is bad as Subol Chandra Pal, Jnanendra Nath Sanyal and the members of the rival committees have not been made parties to these proceedings. I do not think that there is much force in this contention. The petitioners are aggrieved by the act or decision of the University and their object is to compel the University to do certain acts which they think they are entitled to demand performance of from the University. This is not a regular suit, and merely because certain questions will have to be determined incidentally in giving or not giving the reliefs asked for in this application does not make each and every person interested in such questions necessary parties to these proceedings. It may be noted that though Mr. Sanyal and Mr. Pal are not formally parties to these proceedings they filed affidavits in these proceedings. I hold that the application is not defective by reason of non-joinder of the members of the two managing committees or Mr. Sanyal and Mr. Pal as parties to these proceedings.

(22) It was further contended by Mr. A. K. Sen that the application is not made in good faith but for an indirect purpose. It is really made on behalf of some third party, viz., Jnanendra Nath Sanyal. Mr. Sen relies on Halsbury Vol. 9 para. 1306 in support of his contention. This argument of Mr. Sen appears to me to be without substance. One of the objects of this application is no doubt to get a decision as to the status of Mr. Sanyal as Headmaster of the School and as to the validity or otherwise of the constitution of the two rival committees squabbling for power and control over the management of the school but I do not think that that is the whole object of this application. The petitioners' first and foremost object is to get themselves and some of their fellow students allowed to appear at the ensuing Matriculation examination and incidentally to have the other questions decided. There are suits pending in which the status of Mr. Sanyal and Mr. Pal and the question of the validity of the constitution of the two rival committees are directly and substantially in issue. The petitioners' cause of action, if any, if I may be allowed to use that expression, has arisen after the filing of the third suit by reason of the decision of the Syndicate embodied in the letter of 18-12-1950 and as they are vitally affected by the said decision they have moved this Court for speedy redress of their grievances. I am unable to hold, therefore, that the application is for the benefit of third party or is not actuated by good faith.

(23) It was also contended by Mr. Sen that the Court has no power to interfere with decisions of domestic tribunals such as the University of Calcutta, and reliance is placed on the decision reported in — 'R. v. Dunsheath (1950) 2. All. E. R. 741. The conditions prevailing in England differ materially from the conditions prevailing in this country. The System of Visitors obtaining in England is not prevalent in India. It has been held in clear and unambiguous terms in — 'In re Natesan', 40 Mad 125 at p. 143 that the Syndicate of the University is amenable to the jurisdiction of the Court and it is compellable to do acts which it is enjoined to do by Statute by an application under S. 45, Specific Relief Act. This contention of Mr. Sen must, therefore, be rejected.

(24) Mr. I. P. Mukherjee has contended that the letter of 18-12-1950 shows that the Syndicate or the vice-Chancellor in arriving at the decision as embodied in that letter has taken into consideration extraneous matters and has thus exceeded the jurisdiction conferred by the Statutes and the Regulations framed thereunder. The only ground disclosed in the letter of arriving at the decision is the pendency of a suit. It is not at

all clear from the letter itself what the Syndicate or the Vice-Chancellor wanted to convey by referring to the pending suit and how far they actually made this fact the ground of their decision as expressed in the letter. The laconic language employed in the letter whether it was intentional or unintentional makes it difficult for this Court to any definite opinion on the point. But if the language of this letter is considered in the background of all the facts that have been set out in the earlier part of this judgment, the matter of reference to the pending suit cannot, in my view, be considered really as an extraneous matter. It is a link in the chain of events and the Syndicate or the University could not possibly or properly ignore it or belittle the importance of it. The decisions cited by Mr. Mukherjee turned on their special facts and are distinguishable from the facts of the present case.

(25) In my view the Syndicate or the University was quite competent to come to the decision complained of and it has acted within the four corners of the powers committed to it by the Statutes and the Regulations. I am further unable to hold as indicated already that the Syndicate or the University has acted mala fide.

(26) In the result the petition fails and the Rule must be discharged with costs.

B/V.B.B. Rule discharged.

A.I.R. 1953 CALCUTTA 177 (Vol. 40, C. N. 56)

R. P. MOOKERJEE AND GUHA JJ.

Nanda Dulal Dey, Petitioner v. Bisseswar Chakravarty, Opposite Party.

Civil Rule No. 2039 of 1950, D/- 15-3-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 9, 31 and 47 — Rules under S. 47 — Rule 9 — Fixation of standard rent — Proper procedure — Matters to be taken into account — Civil P. C. (1908), O. 26 Rr. 9 and 10 and O. 18 R. 18.

In a proceeding for fixation of standard rent the law provides not only for an opportunity to be given to the parties concerned to adduce relevant evidence before the authority for fixing the standard rent, but under rule 9 framed under S. 47 of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950, the Rent Controller and the Court of Small Causes are to follow the procedure laid down in the Code of Civil Procedure for the regular trial of suits, subject to certain modifications about the recording of evidence.

(Paras 3 and 4)

Prima facie therefore, the provisions contained in O. 26 R. 9, Civil P. C. are attracted and it is competent for the Controller and the Appellate authority to pass necessary directions for local investigation. Section 31 (1) (a) of the Act also authorises the Controller to enter into and inspect, or authorise any officer subordinate to him to enter into and inspect any premises at any time between sunrise and sunset.

(Paras 4, 5)

(Procedure as to the manner in which such report is to be used and its clarification if necessary, laid down.)

(Paras 6, 7, 8)

While settling the standard rent of a premises, the Court has got to exercise a judicial discretion and take all relevant matters into consideration. The average rent which is paid for similar premises in the locality is considered to be a good guide. The Rent Controller has to be very careful in determining the average rate of rent for similar premises as very seldom two premises are exactly similar. It is to this matter that the Rent Controller and the Court of Small Causes should direct their attention specifically when fixing the standard rent which is fair and in accordance with the principles laid down by the Act.

(Para 10)

Binayak Nath Banerjee and Sushil Kumar Biswas, for Petitioner; Siddheswar Chakravarty, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('07) Kessoji v. G. I. P. Rly. Co., (31 Bom 381) 8
('23) AIR 1923 Cal 311: (67 Ind Cas 302) 8
('46) 50 Cal WN 682: (AIR 1946 Cal 444) 8
('16) 39 Mad 501: (AIR 1915 Mad 1214(1)) 8

MOOKERJEE J.: This Rule was obtained on behalf of the tenant and is directed against an order passed by the Court of Small Causes under section 32 (4) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. The learned opposite party made an application before the Rent Controller, Calcutta for fixing the standard rent in respect of the premises in question under the provisions of section 9 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, and claimed Rs. 250/- per month as the fair rent of the premises. The Rent Controller had the premises inspected by an Inspector under S. 31 of the said Act, read with Rule 9 framed under section 47 of the said Act. After the submission of the inspection report the Additional Rent Controller personally inspected the premises, but he did not himself take any measurement or make any record of the result of his inspection. The Additional Rent Controller assessed the standard rent at Rs. 126/8 as per month with effect from April 1950 on the basis of his own inspection. Against this order, the tenant moved the Court of Small Causes and the standard rent fixed was modified. It was fixed at Rs. 115/8 as. per month. It is against this order by the Court of Small Causes that the present Rule has been obtained.

(2) The principal question which has been raised in this case before us is as to what is the proper procedure to be followed in fixing the standard rent by the Rent Controller or by the Court of Small Causes.

(3) The law provides not only an opportunity to be given to the parties concerned to adduce relevant evidence before the authority for fixing the standard rent, but under rule 9 framed under S. 47 of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950 which runs as follows the court may direct a local inspection:

"In making inquiries under the Act, the Controller, the Chief Judge of the Court of Small Causes, Calcutta, the District Judge or the Judicial Officer to whom the case may be transferred under the provisions of clause (a) or clause (b) of sub-section (1) of section 32 shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits, the substance only of the evidence being recorded

as in unappealable cases and shall record in brief the reasons for his findings."

(4) The Rent Controller and the Court of Small Causes are to follow the procedure laid down in the Code of Civil Procedure for the regular trial of suits, subject to certain modifications about the recording of evidence.

(5) 'Prima facie' therefore, the provisions contained in rule 9 of Order 26 of the Code of Civil Procedure about the appointment of commissioners for local investigation are attracted. It is competent for the Controller and the Appellate authority to pass necessary directions for local investigation.

(6) Clause (a) of sub-section (1) of section 31 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 also authorises the Controller to enter into and inspect, or authorise any officer subordinate to him to enter into and inspect any premises at any time between sunrise and sunset. It is not contested before us that the officer who was deputed to hold the inspection was an officer who was appointed for such specific purpose and was so acting under the Rent Controller, Calcutta. The Inspector in the present case may, therefore, be taken to be an officer subordinate to the Rent Controller. The report submitted by the Inspector is to be taken to be a report by a commissioner for local investigation as under rule 9 of Order 26 of the Code of Civil Procedure. Under sub-rule (2) of Rule 10 of O. 26 of the Code of Civil Procedure the report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the court or, with the permission of the court, any of the parties to the suit, may examine the commissioner personally in open court, touching any of the matters referred to or mentioned in his report, or as to the manner in which he has made the investigation. It is also open to the Rent Controller or the Appellate authority to direct such further enquiry as may be deemed fit and necessary, if for any reason the Rent Controller or the Appellate authority be dissatisfied with the proceedings of the Inspector.

(7) In the present case, the report submitted by the Inspector did therefore, form part of the record. The Rent Controller was justified in referring to the same. It does not appear from the order-sheet whether any opportunity was given to the parties for calling the Inspector to be examined in the case. From the manner in which the report submitted by the Inspector had been criticised before the Court of Small Causes and also before us, it is apparent that the report as submitted was not sufficiently clear and self-explanatory. This was a case where, even if the parties did not choose to call the Inspector, the Rent Controller should have called the Inspector for clarification and explanation of the different items included in the report. As a matter of fact, the report not being deemed to be sufficiently clear, the Rent Controller himself had to inspect the premises. We have not in the record any note kept by the Rent Controller as to the result of his inspection and inquiry and to what extent he agreed with the figures and calculations as made by the Inspector. The omission to examine the Inspector in the present case has left the court in a very unfortunate position. This by itself would have been sufficient to set aside the order passed by the Rent Controller and the Court of Small Causes and direct re-hearing of the matter.

(8) There is however another point which has been raised before us, and that is about the inspection held by the Rent Controller himself. As indicated already, under rule 9 of the Rules framed under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 the Controller and the Chief Judge of the Court of Small Causes shall follow the procedure laid down in the Code of Civil Procedure for the regular trial of suits. Under R. 18 of order 18 of the Code of Civil Procedure, a court may at any stage of a suit inspect any property or thing concerning which any question may arise. The Rent Controller is, therefore entitled to hold an inspection. It is, however, well settled that it is not open to a court to base its findings solely on the result of local inspection without giving opportunities to the parties to let in counter evidence or to explain what is recorded after inspection. Vide — 'Syed Ahmed Sahib Shutari v. Magnesite Syndicate Ltd.', 39 Mad 501, and—'Abdul Huq v. Mahammaddin', AIR 1923 Cal 311. There is no provision for making a memorandum of local inspection apart from the record. Vide — 'Bhola Nath v. Momina Khatun', 50 Cal W N 682. The Judicial Committee had also laid down in — 'Kessoji v. G. I. P. Rly. Co.', 31 Bom 381 that a Judge is not entitled to put his own view or impression after inspection of a place because the Judge is not available for cross-examination as to the opinion which may be recorded. The Judge can only make notes of inspection which he finds on inspection and the notes should be confined to the facts observed without recording impressions or opinions.

(9) In the present case, as already stated, the parties had no opportunity of knowing the result of the inspection by the Rent Controller as no note whatsoever was kept by him. This was not proper. On this ground also, the decision reached by the Rent Controller, as modified by the Court of Small Causes, must be set aside.

(10) Before we leave this case, it is necessary that we should point out that while settling the standard rent of a premises, the court has got to exercise a judicial discretion and take all relevant matters into consideration. The average rent which is paid for similar premises in the locality is considered to be a good guide. Such average rate of rent is generally stated with reference to the average rate for covered floor space. In determining the average floor space in what manner the portions used as passages, water closets or servants quarters etc. are to be taken into consideration varies according to the particular location of the premises or the nature of the building. There may be one standard for an area like the Chowringhee, another for a purely residential quarter where small houses are in demand and still another for business quarters like the Burra Bazar area. In the present case, the Inspector's report gives no indication as to what had been in his mind in determining the average rate for units of floor area of the two different portions of the premises which were being compared for assessing and determining the standard rent. One has accordingly to be very careful in determining the average rate of rent for similar premises as very seldom two premises are exactly similar. It is to this matter that the Rent Controller and the Court of Small Causes

should direct their attention specifically when fixing the standard rent which is fair and in accordance with the principles laid down by the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950.

(11) This Rule is accordingly made absolute. The orders passed by the Court of Small Causes and the Rent Controller are set aside. The case will go back before the Rent Controller for proceeding according to law from the stage after the submission of the report by the Inspector. This may be placed before the Rent Controller other than the particular officer who has already expressed his views at the previous stage.

(12) There will be no order as to costs in this Court.

(13) GUHA J.: I agree.

C/K.S. Rule made absolute.

A.I.R. 1953 CALCUTTA 179 (Vol. 40, C. N. 57)
(FULL BENCH)

CHAKRAVARTTI C. J., G. N. DAS, BANERJEE, K. C. DAS GUPTA AND S. R. DAS GUPTA JJ.

Sm. Nihar Kumari Debi and others, Appellants v. Commissioner of Police, Respondent.

A. F. O. O. No. 47 of 1951, D/- 10-9-1952, from judgment of Bose J., D/- 2-2-1951.

(a) Specific Relief Act (1877), S. 45 — Application for orders under S. 45 and writs of Mandamus dismissed by Single Judge of High Court — Appeal lies — 57 Cal WN 25 (SB), Rel. on. (Para 2)

Anno: S. R. Act, S. 45 N. 1.

(b) Specific Relief Act (1877), S. 46 — Application under S. 45 — Affidavit — Requirements.

(Per Majority, S. R. Das Gupta J. Contra): Plots of land were purchased in the names of three ladies. In the application under S. 45 the applicants were the three ladies and one G. The only affidavit by which it was supported was an affidavit of G. Subsequently the three ladies and G affirmed a joint affidavit in which the ladies stated that the allegations contained in the petition were true.

Held that the application was not properly affirmed and must fail for that reason. It may be that when there are a number of applicants who have a common interest and have suffered a common injury, an affidavit of one of them will be sufficient, but it was impossible to regard G as a person interested or injured. The application was not founded on the affidavit of the person injured. The subsequent affidavit of the ladies, affirmed after the 'rule nisi' had been issued, could be of no assistance. (Para 9)

Anno: S. R. Act, S. 46 N. 1.

(c) Constitution of India, Art. 226 — Application not mentioning Art. 226 in cause title and asking for writ of mandamus.

The application had been instituted in the matter of writs of mandamus, and not for writs in the nature of mandamus:

Held that the High Court should not be justified in not treating the application as an application under Art. 226 on such technical ground. The application was in substance an application under Art. 226 of the Constitution. Merely because in the cause title Art. 226 had not been specifically mentioned and the proper writ or direction had not been prayed for it would not be said that the application was not one under Art. 226. AIR 1951 SC 41, Foll. (Paras 10, 25)

(d) Municipalities — Calcutta Municipal Act (3 of 1923), S. 391 — Sanction for construction of cinema house and also to use it as cinema house.

(Per Chakravartti C. J., Das, Banerjee and K. C. Das Gupta, JJ.): The applicants wanted not only sanction for the construction of a cinema building but also sanction to use it as a cinema house:

Held that the case for a sanction to use the building, when constructed, as a cinema house was wholly untenable. That sanction could be given under S. 391 and could be asked for only after the building had been constructed, when its suitability for use as cinema house and the propriety of allowing any one to keep open a place of amusement and public resort at the site and locality concerned could be considered. The section does not contemplate a license in advance of even the construction of the building which will be used as a cinema house. (Para 12)

P. P. Ginwalla, for Appellants; K. K. Basu, for Corporation of Calcutta, Advocate General of West Bengal with A. K. Sen, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('51) AIR 1951 SC 41: (ILR (1951) Hyd 461) 25
('52) A. O. O. No. 77 of 1951, D/- 10-9-1952: (57 Cal WN 25 SB) 2

CHAKRAVARTTI C. J.: This is an appeal from a judgment and order of Bose J., dated 2nd February 1951 by which the learned Judge dismissed an application made by the appellants for certain orders under S. 45, Specific Relief Act and writs of Mandamus against the Commissioner of Police, Calcutta and the Corporation of Calcutta.

(2) It has been held in the case of — Chairman, Budge Budge Municipality v. Mangru Mia', A. O. O. No. 77 of 1951 which was heard along with this case, that an appeal lies. Of the two respondents in the appeal, the appellants abandoned their case against the Commissioner of Police. Only the case against the Corporation of Calcutta therefore requires to be considered.

(3) Briefly stated, the facts are that two plots of land, situated at the junction of Gariahata Road and Ekdalia Road, were purchased in the names of three ladies, Nihar Kumari Debi, Sunayana Debi and Smriti Kana Debi. Who the actual purchasers were, whether the ladies themselves or they and Ganga Gobinda Mukherjee, the husband of Smriti Kana or the joint family, it is not very clear. Be that as it may, after the purchase of the plots, Ganga Gobinda approached the Commissioner of Police for permission or a license to build a cinema house on the site and after a third contiguous plot had been purchased in order to satisfy the requirements of the Traffic Regulations of the Police, the Commissioner informed Ganga Gobinda on 6th February 1945 that there was no objection from the Police point of view to the construction of a cinema house on the proposed site. It appears that the third plot also was purchased in the names of the three ladies. About three weeks before the Commissioner of Police gave his approval, on 14th January 1945, the three ladies, as the recorded owners of the plots, applied to the

Corporation of Calcutta for sanction for the construction of a cinema house on the lands and submitted building plans along with their application.

Soon, however, some opposition to the project from a certain section of the inhabitants of the locality began to assert itself. The Corporation did not dispose of the application and at one stage had some local enquiries made by some of its Councillors. In the meantime, supporters and opponents of the project appear to have both been active. About three years passed in that way and on 14th August 1948, the Commissioner of Police withdrew the permission given by him on the grounds that the area had by then become a residential locality and that someone other than those who were applicants before the Corporation had applied for the permission of the Police. The Corporation has not yet given its sanction.

(4) The application out of which the present appeal arises was made on 4th July 1950. The applicants were the three ladies and Ganga Gobinda Mukherjee and they alleged that although the plans submitted by them substantially complied with all building rules and regulations and although the construction of a cinema house at the proposed site was recommended by the Councillors who had made a local inspection and although sanction was recommended by the Corporation's own Law Officer, the Corporation was withholding sanction illegally and arbitrarily. It was also alleged that the area concerned was a commercial area and the majority of the local residents were enthusiastic supporters of the project. It is unnecessary to refer to the allegations made against the Commissioner of Police.

(5) The application was headed "In the matter of the Specific Relief Act (1 of 1877) and In the Matter of Writs of Mandamus." The only affidavit by which it was supported was an affidavit of Ganga Gobinda Mukherjee. The prayers, so far as the Corporation was concerned, were for an order that the Corporation do grant forthwith sanction to build the cinema house on the site selected for the purpose and for a writ of mandamus, directing the performance of the said Act.

(6) On 21st August 1950, the three ladies and Ganga Gobinda Mukherjee affirmed a joint affidavit in which the ladies stated that the allegations contained in the petition were true and that their fundamental right to carry on a cinema business and to raise a building and obtain necessary licenses and/or sanction therefor had been infringed.

(7) Bose J. overruled some of the technical objections raised on behalf of the Corporation, but gave effect to two. He held that the application, as an application under the Specific Relief Act, was bound to fail, because it had not originally been affirmed by the three ladies at all and even subsequently it had not been properly affirmed by them. The learned Judge treated the affidavit of Ganga Gobinda as to no consequence, as he was merely an agent of the persons interested in the property. He also upheld the objection that the application could not be treated as an application under Art. 226 of the Constitution and could not be allowed to be converted into an application under that Article so as to avoid the defect of the absence of proper affidavits.

(8) On the merits, the learned Judge held that so far as sanction for the construction of the building was concerned, the application was unnecessary, since under Rule 58 of Schedule 17 of the Calcutta Municipal Act, sanction could be assumed to have been given and so far as sanction to run a cinema house was concerned, the application was premature, since no such sanction could be given before the building was constructed.

(9) I am inclined to agree with the learned Judge that the application, as an application under the Specific Relief Act, was not properly affirmed and must fail for that reason alone. Section 46, Specific Relief Act provides that

> "every application under S. 45 must be founded on an affidavit of the person injured."

It may be that when there are a number of applicants who have a common interest and have suffered a common injury, an affidavit of one of them will be sufficient, but it is impossible to regard Ganga Gobinda as a person interested or injured. The lands, as I have already said, were purchased in the names of the ladies. In all dealings with the Corporation, it was they who were put forward as the persons who wanted sanction to construct a cinema house. Even in the solicitor's letter of 27th May 1947, the ladies are referred to as the persons "desirous of erecting a cinema house." It is true that an application for a building sanction could only be made by the recorded owner of the land, but in his letter the solicitor is not speaking merely of sanction to erect a building but also of a license to run a cinema house. It is, therefore, difficult to proceed, on the materials on record, on any other basis than that the ladies were the real and only owners.

It is again true that para. 3 of the application says that the "petitioners", including thereby Ganga Gobinda, purchased the lands, but it is impossible to attach any value to that statement, since para. 8 of the application states that the "petitioners, being the recorded owners of the plots, applied", although Ganga Govinda is admittedly not a recorded owner. In view of these confused statements, it seems reasonable to hold that whenever the word "petitioners" is used in the application, only the three ladies are meant and when para. 4 states that Ganga Gobinda approached the Commissioner of Police as the agent of the petitioners, it is meant that he did so as an agent of the ladies. In any event, it is impossible to feel satisfied that the application is founded on the affidavit of the person injured. The subsequent affidavit of the ladies, affirmed after the 'Rule nisi' had been issued, can be of no assistance to the appellants. It is also not, as the learned Judge has pointed out, a proper verification.

(10) I would not, however, decline to treat the application as an application under Art. 226. It is true that the Article is not mentioned and what is asked for is a writ of mandamus which is not exactly what Art. 226 provides for and which the Court has no power otherwise to issue at all. But I think what was intended to ask for was a writ in the nature of mandamus under Art. 226. It is proper to remember that the application was made early in July 1950, only five months after the Constitution had come into force and in those circumstances allowance may legitimately be made for incomplete familiarity with a new enactment. If the appellants had a good case on the merits, I would not throw out their application for the formal defect.

(11) But the appellants, it appears to me, have no case on the merits. The materials in the paper-book make it perfectly clear that the whole trouble was caused, because the appellants would not do one thing at a time, but wanted two things to be done together. It is useless for them to say that they made a proper application for sanction for the construction of a building and submitted a proper plan and yet the Corporation was perversely delaying the sanction. They wanted not only sanction for the construction of a cinema building but also sanction to use it as a cinema house and it was because of the second demand that complications arose. The whole purport of the letter from the appellants' solicitor to which I have already referred is to make out a case for running the proposed building as a cinema house and he leaves nothing in doubt when he says that his clients are "perfectly willing to accept the license with all reasonable safeguards as to the prevention of pubic nuisance or otherwise". It must be said that the Corporation also was considering the question of licensing the building as a cinema house, but it can plead at least this much as an excuse that it was invited to do so. Its affidavit-in-opposition, however, discloses what strange and apparently not very straightforward reasons sometimes influence its decisions, for it quotes an order of the Adminstrative Officer in which that officer is saying that no sanction for building cinema houses will be granted, because such sanction must inevitably lead to the purchase of steel in the black market. However, it is abundantly clear from the letters of the appellants, from the notes of the Corporation's Law Officer and from the proceedings of the meeting of the Corporation held on 23rd July 1947 that both parties were thinking not of the building, as such, but of the use of the building as a cinema house.

(12) In my opinion, the learned Judge has taken the correct view, both as to the sanction for the building and the sanction for using the building as a cinema house. If the appellants wanted only to construct the building which they asked for sanction to build, they could take the sanction as granted as soon as fifteen days elapsed without the Corporation either granting or refusing sanction. On that point, the provisions of Rule 58 of Sch. 17 to the Act are clear. There is therefore no reason why the Court should make a superfluous order, directing the Corporation to do something which need not be done. The case for a sanction to use the building, when constructed, as a cinema house is wholly untenable at the present stage. That sanction can be given under S. 391 and can be asked for only after the building has been constructed, when its suitability for use as cinema house and the propriety of allowing any one to keep open a place of amusement and public resort at the site and locality concerned can be considered. The section does not contemplate a license in advance of even the construction of the building which will be used as a cinema house. It is not difficult to understand the anxiety of the appellants to assure themselves of liberty to run the building as a cinema house before incurring the heavy expenditure of its construction. But the Court cannot intervene to relieve them of that anxiety and force the hands of the Corporation when in law the license cannot possibly be given at the present stage.

(13) For the reasons given above, this appeal fails and is dismissed with costs.

(14) DAS J.: I agree.

(15) BANERJEE J.: I agree.

(16) K. C. DAS GUPTA J.: I agree with my Lord the Chief Justice.

(17) S. R. DAS GUPTA J.: On the merits this appeal, in my opinion, should be allowed as against the Corporation of Calcutta. The appellants have not pressed their appeal as against the Commissioner of Police.

(18) The case of the appellants, so far as it is relevant for the present appeal, as made in their petition filed in the Court below is as follows: Petitioners 1 to 3 are the wives of Subodh Kumar Mukherjee, Amarendra Mukherjee and Ganga Gobinda Mukherjee respectively Petitioner 4 is the said Ganga Gobinda Mukherjee. The said Subodh Kumar, Amarendra and Ganga Gobindo are brothers and they along with their said wives are members of a family. Sometime in January 1940 it was agreed between the petitioners and the members of their family that a Cinema house would be started within the municipal limits of Calcutta and for that purpose plots of land would be purchased in the names of petitioners 1, 2 and 3 and the necessary licence would be taken in the name of petitioner 4. Pursuant to the said agreement the petitioners purchased two plots of land at the junction of Gariahat Road and Ekdalia Road, Calcutta. The petitioners being the recorded owners of the said plots duly applied and submitted a plan on 14-1-45 to the Corporation of Calcutta for sanction to erect the Cinema House and substantially complied with all building rules and regulations.

The Corporation of Calcutta visited the site twice through their Chief Executive Officer and referred the matter to their Estates and General Purposes Committee consisting of several commissioners who also visited the site on 25-1-47 and gave recommendation for sanction by their reports dated 4-2-47 and 13-2-47 respectively. Despite the said recommendation the matter was referred to the Chief Law officer for opinion who also recommended such sanction. Thereafter although repeated demands were made by the petitioners through their agent the said Ganga Gobindo Mukherjee the Corporation by their dilatory and arbitrary methods arbitrarily withheld the sanction up to date. In the premises the petitioners have been injured in their rights 'inter alia' to build the aforesaid Cinema House. The acts complained of consisted 'inter alia' of the withholding of the sanction by the Corporation of Calcutta to build the Cinema house. The petitioners, therefore, prayed amongst others for an order that the Corporation of Calcutta do grant forthwith sanction to build the Cinema house on the site selected and for an order that writs of mandamus do issue directing the performance of the said Act.

(19) In answer to the said petition an affidavit was filed by Dinesh Chandra Banerjee, City Architect. The Corporation of Calcutta, as it appears from the said affidavit made different cases. In the first place, it is said that the permission to erect a Cinema house cannot be granted unless the site is considered to be suitable. In the next place it is said that the matter was placed before the Estates and General Purposes Committee. The site was inspected by only two members of the Committee and

their report was placed before the Estates and General Purposes Committee. A dispute having been raised as to the authority of the said Committee to deal with the matter the said Committee on 13th March 1947 referred the matter to the Corporation for their decision. The Corporation having considered the opinion of the Chief Law Officer referred the matter to the then Chief Executive Officer requesting him to deal with it according to law.

Then it is said that the said plan contravened important building rules and regulations as laid down in the Calcutta Municipal Act and/ or rules and regulations made thereunder. Thereafter it is stated that in view of the objection to the construction of a Cinema house having been received by the Corporation from a large number of local residents it could not come to a final decision as to the suitability of the site for construction of a Cinema house at the place. Lastly it is urged that the then Chief Executive Officer was considering the various objections received from local residents and before he came to a final decision the papers and files were called for by the Administrative Officer and the Administrative Officer, in view of the Government prohibiting grant of permit for cement or steel for construction of Cinema House and as the site was unsuitable, kept the matter pending for further consideration. Then the deponent makes a surprising statement in his said affidavit which does little credit either to himself or to the Administrative Officer or to the Corporation. He quotes an order of the Administrative Officer regarding sanction of a Cinema house made in another case in which it is stated that there is a current order of the Government under which no permit for cement or steel would be given and

> "under the circumstances sanction of a building plan must inevitably result in the party's purchasing cement and steel from the black market to construct their building."

This is in substance the defence taken by the Corporation.

(20) It is evident that the conduct of the Corporation in dealing with the matter in question has not only been contrary to the provisions of the Municipal Act and the rules framed thereunder but also high handed and arbitrary. The Corporation has contravened the provisions of the Calcutta Municipal Act and the rules made thereunder. It has in dealing with the matter allowed itself to be influenced by extraneous consideration which it had no right to do. It has kept the matter pending since January 1945 i.e. for long seven years without giving any decision either way. The rules framed under the Calcutta Municipal Act have made provisions for expeditious disposal of all applications for sanction of building plans. The Corporation in this case does not seem to have paid the slightest attention to the same. Under rule 52 of Sch. 17 every person who intends to erect a new building is required to send to the Corporation an application for that purpose together with a site plan, plan of the building, separate plans of each floors, elevations and sections and specification of the ward. Rule 56 provides that all informations and documents which may be required and all objections which may be found necessary to make shall be required and made in one requisition and the applicant shall be apprised thereof at the earliest possible date. In fact sub-rule (2) of the said rule specifies a period of 15 days after receipt of the application under Rule 52 within which the Corporation may require the applicant to furnish him with any information on matters referred to in that rule or any document prescribed by that rule or to satisfy them with any objection that may have been taken under Rule 56.

Under sub-rule (3) of Rule 56 it is provided that if any further information or document becomes necessary the same must also be asked for within 15 days from the receipt of the original information and document. Rule 57 provides as follows:

> 57.(1) within fifteen days after the receipt of any application made under Rule 52 for permission to execute any work or of any information or documents or further information or documents required under this schedule, or within fifteen days after the Corporation have been satisfied that there are no objections which may lawfully be taken to the grant of permission to execute the work, the Corporation shall, by written order, either—
>
> (a) grant permission conditionally or unconditionally to execute the work, or
>
> (b) refuse, on one or more of the grounds mentioned in Rule 59 or Rule 63, as the case may be, to grant such permission.
>
> (2) When the Corporation grant permission conditionally under cl. (a) of sub-rule (1), they may in regard thereto impose such conditions, consistent with this Act, as they may think fit.
>
> (3) Notwithstanding anything contained in sub-rules (1) and (2), in any case in which it appears to the Corporation that any public improvements which may render necessary the acquisition of the site of a proposed building or any part thereof are desirable and expedient they may withhold sanction to the building plans submitted in respect of such building for a period not exceeding three months from the date of such submission.

This rule makes it incumbent on the Corporation either to grant or refuse permission as the case may be by a written order within the period mentioned therein. The provisions made in the said rule are mandatory. It is true that Rule 58 of the said schedule provides that if within the period prescribed by Rule 57 the Corporation has neither granted nor refused permission such permission shall be deemed to have been granted and the applicant may proceed to execute the work but not so as to contravene any of the provisions of this Act or any of the rules or bye-laws made thereunder. But the said rule only permits the applicant to proceed with the construction but at his own risk, that is to say, he must not violate any of the provisions of the Act or the rules or bye-laws made thereunder. The mandatory provisions of Rule 57 still remain and under the said rule it is incumbent on the Corporation to give its decision within the period mentioned. Rule 58 does not in any way affect the obligations imposed on the Corporation by Rule 57 and if the Corporation fails to discharge that obligation the same can be enforced in a Court of law.

(21) The only grounds on which the Corporation may refuse sanction to erect a building

are those contained in Rules 59 and 63 of Sch. 17 of the Act, which are as follows:

59. The only grounds on which permission to erect a new building (other than a hut) may be refused are the following, namely:

(1) that the work, or any of the particulars comprised in the site-plan, building-plans, elevations, sections or specifications would contravene some specific provision of this Act or some specific order, rule or by-law made thereunder.

(2) that the application for such permission does not contain the particulars or is not prepared in the manner prescribed in this schedule,

(3) that, in the case of a new building (other than a hut) falling within the street alignment or building-line of the public street projected under S. 63 of the Calcutta Improvement Act, 1911, the permission of the Chairman of the Board of Trustees for the Improvement of Calcutta has not been obtained,

(4) that any of the documents referred to in Rule 52 have not been signed as prescribed in rule 54;

(5) that any information or documents required by the Corporation under this schedule have not been duly furnished; or

(6) that the applicant has not satisfied the Corporation in regard to any objections which may have been taken under these rules to the grant of the said permission.

63. Notwithstanding anything contained in Rule 59—

(a) if any street shown in the site-plan is an intended private street, the Corporation may, in their discretion, refuse to grant permission to erect a masonry building or to convert one or more huts or temporary structures into a masonry building until the street is commenced or completed, and

(b) the Corporation may, for special reasons grant permission to erect a masonry building, or to convert one or more huts or temporary structures into a masonry building, or any site without reference to its position in relation to any street.

Thus the Corporation has no jurisdiction to take into consideration any other matter—be it the objections raised by the residents of the locality or the possibility of the party purchasing cement and steel from black market to construct the building. Those are extraneous matters which the Corporation has no right to take into consideration in deciding whether sanction should be given or refused to construct a building. Again the Corporation, as I have already indicated, must act promptly in the matter of granting or withholding such licence. It cannot keep matters pending beyond the periods mentioned and certainly not for a period of seven years as in this case. It must decide one way or other and communicate its decision in writing. In my opinion, therefore, the Corporation of Calcutta has behaved in a manner which is not warranted by law and it should be set right by an order of the Court.

(22) I shall now deal with the preliminary objections raised against the appellant by the respondent.....It has been urged that requirement of S. 46, Specific Relief Act, has not been complied with, because, petitioners 1, 2 and 3 who are the owners of the properties in question and as such are the persons injured have not affirmed the affidavit on which the application is founded. Bose J. has accepted that contention and has dismissed the application on that ground.

(23) As against that contention it has been urged on benalf of the appellants that the petition filed in this case has been verified by an affidavit of one of the petitioners being petitioner 4 Ganga Gobindo Muknerjee and Ganga Gobindo Mukherjee is one of the owners of the properties in question which has been purchased in the names of petitioners 1 & 2 and 3 and therefore is a person who has been injured within the meaning of S. 46, Specific Relief Act.

(24) Thus the questions which arise for our consideration are: (1) Is the petitioner Ganga Gobindo Mukherjee a person injured within the meaning of S. 46, Specific Relief Act; (2) even if that be so, is the affidavit of Ganga Gobindo alone on which the present petition is founded sufficient for the purpose of the said section? As I have already indicated, the petnrs.' case as made in their petition 'inter alia' is that it was agreed by and between the petitioners and the members of their family that the plots in question would be purchased in the names of petitioners 1, 2 and 3 and in para 1 of the petition a pedigree of the petitioners' family has been set out which shows that petitioner 1 is the wife of one Subodh Mukherjee, uncle of the said Ganga Gobindo, petitioner 2 is the wife of one Amarendra Nath Mukherjee, brother of the said Gobindo Mukherjee and petitioner 3 is the wife of the said Ganga Gobindo Mukherjee himself. Thus it appears that the said brother and uncle of Ganga Gobindo and Ganga Gobindo himself are also the owners of the said property although purchased in the names of petitioners 1 to 3.

It is true that the petition has been somewhat clumsily drawn and in paras. 3 and 8 it is stated that the petitioners purchased the plot and that the petitioners are the recorded owners, but from the averments made in paras. 1 and 2 it appears that the real position was that the purchases were made in the names of petitioners 1, 2 and 3 although all the members of the family were the owners thereof and in any event the petitioner Ganga Gobindo is one of such owners. If that be so, then in my opinion, Ganga Gobindo is a person who is injured by the conduct of the Corporation. It has been urged before us by the Advocate General that it is only the persons who are the recorded owners i.e. whose names are registered in records of the Corporation as owners, who can be said to be persons injured and the real owners whose names are not so recorded cannot be said to be such persons. I am unable to accept that contention. In my opinion the person who is the real owner of a property in respect of which sanction has been withheld by the Corporation is as much a person injured, if not the only person injured, as the person whose name is recorded as the owner with the Corporation.

If the recorded owner is only a benamdar then I cannot see how it can be said that it is his rights which have been interfered with or he is the person injured. On this point, I accept the contention of the appellants. But the difficulty of the appellants, if this application be treated as purely an application under S. 45, Specific Relief Act, still remains. In the first place the affidavit on which the petition is founded is the affidavit of one of the owners.

In the second place all the persons injured i. e. all the owners have not been joined or made parties to this application and that is a more serious difficulty in the way of the applicants. Rule 5 of Chapter 29 of the Rules of the High Court O. S., which are Rules made u/s. 51, Specific Relief Act, provides that unless otherwise ordered, every rule under S. 46 of the Act shall call not only on the public servant, Corporation or inferior Court, but also on any person other than the applicant who may be affected by the act to be done or forborne, to show cause. The other owners of the properties in question are certainly persons who may be affected by the act to be done and therefore should have been served with the Rule. This not having been done I am of opinion that on technical grounds this application as an application under S. 45, Specific Relief Act, is not maintainable.

(25) The learned counsel for the appellants then contended before us that this application is not merely an application under S. 45, Specific Relief Act; it is also an application under Art. 226 of the Constitution. If that is so, then the technical rules of procedure which are applicable to an application under S. 45, Specific Relief Act, would not be applicable to an application under Art. 226 and would not stand in the way of the appellants in getting reliefs on this application. The question therefore is can we treat this application as an application under Art. 226 of the Constitution? It appears that the application has been instituted both 'In the matter of the Specific Relief Act and also in In the Matter of Writs of Mandamus.' In paragraph 19 of the petition the petitioners stated quite clearly that they make the application for relief under (a) the Specific Relief Act, S. 45 and (b) for relief under the writ of mandamus. In their prayers the petitioners ask amongst others for an order that the Corporation do grant forthwith sanction to build the Cinema house and they also ask that writs of mandamus do issue directing the performance of the said act. Thus not only in the cause title but also in the body of the petition and in their prayers the petitioners have made it clear that they are not only asking for reliefs under S. 45, Specific Relief Act but also for writs of mandamus.

It is urged on behalf of the respondents that the petitioners have not specifically mentioned Art. 226. It is also urged that what they should have asked for was writs in the nature of Mandamus and not writs of mandamus. But I do not think we should be justified in not treating the application as an application under Art. 226 on such technical ground. The application is, in substance an application under S. 45, Specific Relief Act as well as under Art. 226 of the Constitution. Merely because in the cause title Art. 226 has not been specifically mentioned and the proper writ or direction has not been prayed for, it cannot be said that the application is not one under Art. 226 of the Constitution. In this connection I would refer to the following observations of Mukherjea J. made in the case of — 'Charanjitlal v. Union of India', AIR 1951 S C 41 at p. 53 while dealing with the question of powers of the Supreme Court under Art. 32 of the Constitution.

"In any way Art. 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for."

The High Courts, to my mind, possess the same powers under Art. 226 and an application cannot be thrown out simply on the ground that proper writ or direction has not been prayed for.

(26) I am, therefore, of opinion that the learned Judge should have treated this application as an application under Art. 226 and allowed the same. This appeal as against the Corporation should be allowed.

A/D.H. Order accordingly.

A.I.R. 1953 CALCUTTA 184 (Vol. 40, C. N. 58)

HARRIES C. J. AND G. N. DAS J.

Ramchandra Sha, Petitioner v. Sachindra Kumar and others, Opposite Parties.

Civil Rule No. 147 of 1952, D/- 3-3-1952.

Municipalities — Bengal Municipal Act (XV (15) of 1932), S. 38 — Rejection of nomination paper due to clerical mistake — Result of election is necessarily affected.

Where the nomination paper of a candidate is wrongly rejected owing to a clerical mistake the effect is that the voters are precluded from exercising their right to return that person at the election. It is difficult to say that in a case like this the result of the election is not affected as the petitioner might have been one of the successful candidates. One must, therefore, infer that the absence of a candidate at the election necessarily affected the result of the election which was held. (Para 3)

Nani Coomar Chakravarti, for Petitioner; Apurbadhan Mukherjee with Gopal Chandra Narayan Choudhury, for Opposite Parties.

DAS J.: This Rule was obtained by the petitioner, Ram Chandra Sha, against an order of a Subordinate Judge, Alipore, dismissing his suit for setting aside an election held in Ward No. 1 of the Kamarhati Municipality.

(2) The ground on which the election was sought to be set aside was that the nomination paper filed by the petitioner was wrongly rejected. The defect in the nomination paper which was relied on by the learned Subordinate Judge in support of his judgment is that against the name of the candidate, the name of the proposer and the name of the seconder the word "mill" was used instead of word "male". In the Kamarhati Municipality there are only two rolls kept one for male voters and another for female voters. There is no roll kept in the Kamarhati Municipality of "mill" voters. The numbers in the electoral roll of the candidate, the proposer and the seconder were correctly given. It is obvious that the word "mill" was a clerical mistake for the word "male". There could be no doubt about the identity of the candidate, of the proposer and of the seconder. The ground therefore on which the learned Subordinate Judge upheld the rejection of the nomination paper cannot be sustained.

(3) Mr. Apurbadhan Mukherjee appearing for the opposite parties contended that under S. 38 of the Municipal Act the petitioner has got to show that the result of the election

was materially affected by reason of the erroneous rejection of the nomination paper of the petitioner. Mr. Mukherjee submits that what the petitioner is required to do was to submit a list of persons who would have voted for him. If this were the rule, the result would be that the secrecy of the ballot would be affected. When a person's nomination paper is rejected the effect is that the voters are precluded from exercising their right to return that person at the election. It is difficult to say that in a case like this, the result of the election was not affected, as the petitioner might have been one of the successful candidates. In cases like the present, one must infer that the absence of a candidate at the election necessarily affected the result of the election which was held. I see no force in the contention raised by Mr. Mukherjee.

(4) The result therefore is that this Rule must be made absolute. The order of the learned Subordinate Judge is set aside and a fresh election in Ward No. 1 of the Kamarhati Municipality should now be held after due formalities, as required by the Act, have been issued.

(5) The Rule is accordingly made absolute with costs.

(6) HARRIES C. J.: I agree.

B/D.R.R. Rule made absolute.

A.I.R. 1953 CALCUTTA 185 (Vol. 40, C. N. 59)

K. C. CHUNDER AND P. N. MOOKERJEE JJ.

Sm. Nagendra Bala Debi and others, Appellants v. Provash Chandra and others, Respondents.

A. F. O. D. No. 248 of 1936, D/- 29-1-1952.

Civil P. C. (1908), O. 1, R. 3 and O. 2, R. 3 — Multifariousness.

For the application of O. 1, R. 3 and O. 2 R. 3, Civil P. C. there must be some "common question of law or fact" and also "the same act or transaction or the same series of acts or transactions" in respect of which or out of which the alleged right to relief arises. Some common link or 'nexus' must be found in order that the requisite as to there being the same act or transaction or the same series of acts or transactions may be satisfied. AIR 1947 Cal 374; AIR 1950 Cal 479; AIR 1928 Cal 199; AIR 1918 Cal 858; Civil Revn. Case No. 1134 of 1950, D/- 16-5-1951 (Cal), Ref. to. (Para 7)

The plaintiffs and the defendants were the proprietors in a touzi and each of them held a separate account in the touzi. Default having been made in payment of the March kist of the Revenue in respect of the separate accounts of the defendants, the plaintiff deposited the entire amount under S. 9, Bengal Land Revenue Sales Act, in order to avert a revenue sale of the touzi. The plaintiff then brought a suit for reimbursement and contribution against the several defendants.

Held that the suit was bad for multifariousness as the defaults were separate and made by separate individuals in respect of different separate accounts the payments made by the plaintiff under S. 9, Revenue Sales Act, against those defaults must be treated as distinct, separate and unconnected with each other. The mere fact that all the payments were made on the same day or that all the separate Accounts were really separate accounts of the same parent touzi would not materially alter the position and would not be sufficient to supply the requisite 'nexus' for holding that the acts or transactions evidenced by these payments formed one or the same series of acts or transactions or that these payments were parts of one or the same act or transaction. (Para 8)

Anno: C. P. C., O. 2 R. 3 N. 1, 8, 13.

Sitaram Banerji, Jajneshwar Majumdar, with Mihir Kumar Sarkar, for Appellants; Rabindra Nath Bhattacharjya, Benoyendra Deb Rai Mahassai, Pannalal Chatterji, for Dy. Regr. and Amiya Chandra Mukherji, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('18) 45 Cal 111: (AIR 1918 Cal 858) 5
('28) 55 Cal 164: (AIR 1928 Cal 199) 5
('47) 51 Cal WN 295: (AIR 1947 Cal 374) 5, 7
('50) AIR 1950 Cal 479 5
('51) Civil Revn. Case No. 1134 of 1950, D/- 16-5-1951 (Cal) 6

P. N. MOOKERJEE J.: The principal point that arises for consideration in this appeal is whether the suit in the present instance is bad on the ground of multifariousness, that is, misjoinder of parties and causes of action and is liable to be dismissed on that ground. The learned Subordinate Judge framed several issues in this case but the only effective decision that he has given is on the issue of multifariousness and he has dismissed the suit on that ground expressly stating that it was unnecessary for him in the circumstances of this case to "discuss" the other issues. In our opinion, the learned Subordinate Judge is right in his decision that the suit is bad on account of multifariousness and, accordingly, this appeal is liable to be dismissed subject to the observations which will be made below. The reasons for our view will be found in the discussions which will presently follow.

(2) The material facts leading up to the present appeal are as follows: The plaintiffs-appellants were the proprietors of Separate Accounts Nos. 314/1 and 314/2/1 of the parent Touzi No. 314 of the Collectorate of 24 Parganas at the relevant time. Defendants Nos. 1 to 4 were the proprietors of Separate Accounts Nos. 314/5 and 314/8, Defendant No. 5 was the proprietor of Separate Account No. 314/7, Defendant No. 6 was the proprietor of Separate Account No. 314/9, Defendants Nos. 7 to 9 were the proprietors of Separate Account No. 314/10, defendant No. 10 was the proprietor of Separate Account No. 314/11, Defendants Nos. 11 and 12 were the proprietors of Separate Account No. 314/12, Defendants Nos. 13 to 16 were the proprietors of Separate Account No. 314/14, Defendants Nos. 17 and 18 were the proprietors of Separate Account No. 314/15 and Defendant No. 19 was the proprietor of the residuary Separate Account of the parent Touzi (No. 314) which was numbered as 314/R. S. According to the plaintiffs, they also acquired subsequently Separate Accounts Nos. 314/7, 314/9 and 314/15, but that is not material for our present purpose as this acquisition took place after the relevant point of time involved in the present case.

(3) There was default in the payment of the March kist of revenue for the year 1932 of the Separate Accounts mentioned above as belonging to the Defendants. On the 2nd June 1932,

there was a gazette notification for sale of those Separate Accounts for default in the payment of revenue. On the 27th June 1932, sales were held but as there were no bids the sales were stopped and on the very same day the plaintiffs applied for permission to make deposits of the amounts in default in respect of the said Separate Accounts and the Collector granted them permission to make the deposits under S. 9, Revenue Sales Act. The total amount thus deposited by the plaintiffs was Rs. 4691/14/3 and the present suit was brought on the 26th June 1935 for recovery of the said sum of Rs. 4691/14/3 pies with costs and interest, the total claim amounting to Rs. 5551/7/3 pies. In the suit, all the defaulting proprietors of the Separate Accounts mentioned above were made parties as principal defendants and the other co-proprietors of the parent Touzi No. 314 were also made parties as pro forma defendants and relief in the shape of reimbursement and contribution was claimed in the suit against the principal defendants. The suit was contested by a number of defendants amongst the defaulting proprietors and one of the common defences which was raised was that the suit was bad on account of multifariousness, that is, misjoinder of parties and causes of action. There were other defences also to the effect that the material allegations made by the plaintiffs were not true and, in any event, in the circumstances of this case, the plaintiffs were not entitled to re-imbursement or contribution in respect of the payments alleged to have been made by them.

(4) The learned Subordinate Judge came to the conclusion that the suit was bad for multifariousness and, although he made certain observations with regard to the other issues arising on the facts of this particular case, he did not, as already stated, "discuss" — and, therefore, did not decide — any of the said other issues in the case. Having regard to his finding that the suit was bad for multifariousness, the suit was dismissed by the learned Subordinate Judge and against that decision the present appeal has been taken by the plaintiffs.

(5) On behalf of the appellants, Mr. Banerji contended that the learned Subordinate Judge was wrong in holding in the circumstances of this case that the suit was bad for multifariousness and he submitted that, under the provisions of O. 1, R. 3 and O. 2, R. 3, Civil P. C., the suit was a good suit and was not hit by any defect of multifariousness. Mr. Banerji contended that as there was one parent Touzi and as it was upon the fact of payment made by the plaintiffs that the cause of action for the present suit, — though different against different defendants, — was based, the ingredients necessary for attracting O. 1, R. 3 and/or O. 2, R. 3, Civil P. C., namely, that there must be the same act or transaction or the same series of acts or transactions and that there must be some common question of law or fact involved in the case, were both satisfied and the present suit was protected by the said provisions against any challenge on the ground of defect of multifariousness. Mr. Banerji in this connection drew our attention to three decisions of this Court reported in — 'Ramendra Nath v. Brojendra Nath', 45 Cal 111; — 'Harendra Nath v. Purna Chandra', 55 Cal 164, and — 'Shew Narayan Singh v. Brahmanand Singh', AIR 1950 Cal 479, and he submitted on the basis of those decisions that there was no defect of multifariousness in the present suit. On examining the said decisions, however, we find that in all these cases there was a common or connecting link—or, as it has been put in the case in — 'Anukul Chandra v. Province of Bengal', 51 Cal WN 295, "Some nexus" — and on that ground the suits in those cases were held to be not bad on the ground of multifariousness. In the case of — 'Ramendra Nath v. Brojenra Nath', 45 Cal 111, the common link was the allegation of fraud against B. N. Dass. In the case of —'Harendra Nath v. Purna Chandra', 55 Cal 164, also, there was the death of the widow Tarini — out of which the plaintiff's right to relief was alleged to have arisen — which supplied the "nexus". In the remaining case, namely, that reported in — 'Shew Narayan Singh v. Brahmananda Singh', AIR 1950 Cal 479, Sen J. who delivered the main judgment and discussed the law on the question of multifariousness in great detail observed at p. 483 of the Report as follows:

> "It is true that the claim against defendant No. 1 is based on the breach of a contractual right while the claim against the other defendants is based on the breach of a common law right, but the right to relief is available in respect of both sets of defendants 'because the contractual right has been infringed. If it had not been infringed, no question of tort would arise'. In such a case, one suit against all is, in my opinion, permissible."

The learned Judge also proceeded to observe at page 484 of the Report as follows:

> "The plaintiff has one grievance viz., that the contract has been broken and he alleges that all the defendants have joined or conspired together in causing this breach."

It is clear, therefore, that the learned Judge relied upon the breach of contract and to some extent also upon the allegation of conspiracy — as the common link binding all the defendants — in other words, as supplying the "nexus" so as to satisfy the tests laid down under O. 1, R. 3 and O. 2, R. 3, Civil P. C.

(6) The only other decision to which any reference need be made is a decision of this Court in the case of — 'Nripendra Nath v. Sm. Nistarini Dassi', Civil Revn. Case No. 1134 of 1950, D/- 16-5-1951 (Cal), where also the law as laid down in O. 1, R. 3 and O. 2, R. 3, Civil P. C. was discussed in some detail but in that decision too there was one common link found, namely, the 'will' in that case and on that ground this Court held that there was the requisite 'nexus' for the purpose of attracting O. 1, R. 3 and O. 2, R. 3, Civil P. C.

(7) It is clear, therefore, that for the application of the above provisions of the Code there must be some "common question of law or fact" and also "the same act or transaction or the same series of acts or transactions in respect of which or out of which the alleged right to relief arises. It is clear also on the authorities that some common link or 'nexus' must be found in order that the requisite as to there being the same act or transaction or the same series of acts or transactions may be satisfied. That this is so appears plain from what has gone before and the relevant discussion in —'Anukul Chandra v. Province of Bengal', 51 Cal WN 295, above cited, where the defence plea of multifariousness was upheld.

(8) In the present case, the defaults were separate and made by separate individuals in respect of different Separate Accounts. The payments which were made by the plaintiffs were

payments not under S. 14, - because that stage had not been reached on the findings of the learned Subordinate Judge, - but under S. 9, Revenue Sales Act, so that the payments were made by the plaintiffs against the several individual defaults and in respect of the different Separate Accounts separately - in other words, the payments made were distinct, separate and unconnected with each other. The mere fact that all the payments were made on the same day or that all these Separate Accounts were really separate accounts of the same parent Touzi No. 314 would not, in our opinion, materially alter the position and would not be sufficient to supply the requisite 'nexus' for holding that the acts or transactions evidenced by these payments formed one or the same series of acts or transactions or that these payments were parts of one or the same act or transaction. In such circumstances, it is not possible to give effect to Mr. Banerji's contention and, in our view, the learned Subordinate Judge was right in deciding the issue of multifariousness against the plaintiffs.

(9) There is, however, one matter which requires to be noticed at this stage. The learned Subordinate Judge gave the plaintiffs an opportunity to make an election to proceed against some of the defendants so as to avoid the plea of misjoinder of parties and causes of action. This the plaintiffs refused to do but before us Mr. Banerji made a prayer that if the suit was liable to be dismissed on the ground of multifariousness, his clients should be given, in the particular circumstances of this case, an opportunity to make an election to proceed against the holder of the residuary share (Defendant No. 19) in this suit so far as their claim against her was concerned. Having given the matter our best consideration, we are inclined, in the circumstances of this case, to accept Mr. Banerji's prayer.

(10) We, accordingly, hold that the present suit so far as it is constituted against all the defendants on record is bad for multifariousness and is liable to be dismissed on that ground but Mr. Banerjee having made the prayer for election, as stated above, we grant the prayer and we dismiss the suit against all defendants except defendant No. 19 and we give leave to the plaintiffs to make suitable amendments in the court below and proceed with his claim in this suit against defendant No. 19. Against the other defendants, the present suit must be dismissed on the ground of multifariousness, leaving it open to Mr. Banerji's clients to proceed against them, if they are so advised, in separate appropriate proceedings in accordance with law.

(11) Subject to the above observations, this appeal is dismissed except with regard to defendant No. 19 against whom alone the suit will now proceed in the trial court as above indicated. So far as this latter Defendant (No. 19) is concerned, the case is remanded to the learned Subordinate Judge for a proper hearing of the suit according to law and in accordance with the directions given above. In the circumstances of this case, the contesting respondents will be entitled to their costs of this appeal from the appellants. There will, however, be one set of hearing fee to be divided equally between the said respondents.

(12) CHUNDER J.: I agree.

B/K.S. Order accordingly.

A.I.R. 1953 CALCUTTA 187 (Vol. 40, C. N. 60)

LAHIRI AND GUHA RAY, JJ.

Anumati Sadhukhan, Plaintiff-Appellant v. Assistant Regional Controller, Procurement, Alipur, Defendant-Respondent.

A. F. O. O. Nos. 101 to 105 of 1951, D/- 27-11-1952.

(a) Constitution of India, Art. 226 — No existing grievance, no writ.

In an application under Art. 226 the High Court is not required to grant a declaration in favour of the applicant unless that declaration is necessary for the exercise of the applicant's rights. If there be no existing grievance, no declaration can be given. AIR 1951 SC 41 and AIR 1952 SC 12, Rel. on. (Paras 6, 7)

(b) Constitution of India, Art. 19 (1) (g) — Unreasonable restriction.

The fact that the imposition of a control renders the running of the applicant's rice mills uneconomical cannot be said to be an unreasonable restriction of the appellant's fundamental rights within the meaning of Art. 19 (1) (g): AIR 1951 SC 118, Disting. (Para 8)

(c) West Bengal Rice Mills Control Order (1949), Para. 15 — Apprehension of abuse of power — Validity of law.

The fact that the power conferred by Para. 15 is liable to be abused is not sufficient to declare it invalid. AIR 1950 SC 211, Foll. (Para 9)

S. Das, Benode Behari Haldar, for Appellant; Jajneswar Majumdar, Mihir Kumar Sarkar, and Smriti Kr. Roy Choudhury, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('50) 1950 SCJ 328: (AIR 1950 SC 211: 52 Cri LJ 550 SC) 9

('51) AIR 1951 SC 118: (ILR (1951) Hyd 221) 4, 8

('51) AIR 1951 SC 41: (ILR (1951) Hyd 461) 6

('52) 1952 SCR 28: (AIR 1952 SC 12) 7

LAHIRI J.: In these five appeals the appellants challenge the validity of Para. 15 of the West Bengal Rice Mills Control Order, 1949. The appellants are owners of Rice Mills in Baraset Sub-Division in the District of 24-Perganas and carry on the business of husking paddy. By an order, dated 12-10-1950, the Assistant Regional Controller of Procurement, Alipore, granted permits to the appellants restricting the quantity of paddy to be husked by them and by another order, dated 7-12-1950, he directed that the husking mill owners would be authorised to husk half of their previously permitted quantities upto 14-12-1950, and that no husking mill should be run after that date without obtaining further orders.

(2) The appellants applied under Art. 226 of the Constitution of India and obtained Rules upon the Assistant Regional Controller of Procurement, Alipore, requiring him to revoke his order, dated 7-12-1950, and to forbear from giving effect to the said order and also to show cause why a writ in the nature of a Mandamus should not issue directing the Assistant Regional Controller not to impose any restriction as regards the quantity of paddy to be husked by the appellants.

(3) Bose J. who heard the Rules set aside the order of the Assistant Regional Controller of Procurement, dated 7-12-1950, holding that the said order was illegal and gave liberty to the appellants to apply for fresh licenses and

directed the Assistant Regional Controller of Procurement to deal with the applications according to law. Bose J., however, refused to issue the writ in the nature of a Mandamus directing the Assistant Regional Controller of Procurement not to impose any restriction upon the quantity of paddy to be husked by the appellants and it is against that part of the judgment that the appellants have filed the present appeals.

(4) Mr. Das, appearing in support of these appeals, has argued that restrictions on the quantity of paddy to be husked are imposed under Paragraph 15 of the West Bengal Rice Mills Control Order, 1949 and that this paragraph is invalid, inasmuch as it imposes an unreasonable restriction on the exercise of the appellants' fundamental right guaranteed by Art. 19(1)(G) of the Constitution of India. It is argued that the imposition of these restrictions would render the running of the appellants' rice mills uneconomical and it is also argued that the power conferred by Paragraph 15 of the West Bengal Rice Mills Control Order, 1949, may be abused. Reliance has been placed by Mr. Das upon the decision of the Supreme Court in the case of — 'Chintamon Rao v. State of Madhya Pradesh', AIR 1951 SC 118.

(5) Before dealing with the merits of the arguments of Mr. Das, it is necessary to point out that by Memo No. 19121 (75) AP/VIT-244 (51), dated December 27, 1951, issued by the Assistant Regional Controller of Procurement, it was directed that from that date onwards no permits for husking paddy would be necessary. Mr. Das himself placed this notification before us and in view of the fact that no permits are now necessary for husking paddy it must be held that the appellants have at present no grievance in respect of their fundamental rights.

(6) Mr. Das has argued that so long as Paragraph 15 is there, there is a potential threat to the exercise of the appellants' fundamental rights. In an application under Art. 226 of the Constitution of India, we are not required to grant a declaration in favour of the applicant unless that declaration is necessary for the exercise of the applicant's rights. In the well known case of — 'Charanjit Lal v. Union of India', AIR 1951 SC 41 at pp. 52-53, Mukherjea J. made the following observations with regard to Art. 32 of the Constitution of India :

> "To make out a case under this Article it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular legislature ..... but that it affects or invades his fundamental rights guaranteed by the Constitution, of which he could seek enforcement by an appropriate writ or order. ... A proceeding under this Article cannot really have any affinity to what is known as a declaratory suit."

(7) The power of issuing writs granted to the High Court by Art. 226 of the Constitution of India is wider, as the High Court is authorised to issue a writ not only for the enforcement of fundamental rights but also "for any other purpose"; but if the appellants on their own showing have no existing grievance, I cannot give the declaration asked for. See the decision of the Supreme Court in the case of — 'State of Orissa v. Madan Gopal', 1952 SCR 28 at p. 33.

(8) Turning now to the merits of the appellants' arguments, it is to be noticed that in the case of — 'Chintamon Rao v. State of Madhya Pradesh', AIR 1951 SC 118, it was decided that a statute which arbitrarily or excessively interferes with the running of private business by a citizen cannot be said to contain the element of reasonableness. In that case an Act was passed imposing total prohibition on carrying business of bidi manufacture in a particular season and the Supreme Court came to the conclusion that this was an unreasonable restriction of the applicant's right under Art. 19(1)(G) of the Constitution of India. In the case before us, however, there is no total prohibition of the carrying on of the appellants' business. All that is sought to be done is to control the husking of paddy by issuing permits and the object of the imposition of this control is to guard against unauthorised movement of paddy and rice, smuggling and black-marketing. The fact that the imposition of the control has rendered the running of the appellants' mills uneconomical cannot, in my opinion, be said to be an unreasonable restriction of the appellants' fundamental rights.

(9) Mr. Das has further argued that the power conferred by Paragraph 15 of the West Bengal Rice Mills Control Order, 1949, is liable to be abused, and it must therefore, be held to be invalid. On this point the Supreme Court held in the case of — 'Dr. N. B. Khare v. State of Delhi', 1950 SCJ 328 at p. 332 as follows :

> "Abuse of the power given by a law sometimes occurs; but the validity of the law cannot be contested because of such an apprehension."

(10) In the cases before us, the appellants have produced in Court certain permits granted to the rice mill owners. Mr. Das states that these permits are granted under Paragraph 15 of the West Bengal Rice Mills Control Order, 1949. Reading Paragraph 15, however, I find that there is nothing in it to authorise the granting of permits to mill owners. That paragraph merely authorises the issue of permits to persons to whom the husked paddy is to be delivered by the owners of the mills who have obtained licenses for the running of their mills. We are told that this practice of granting permits to mill owners have now been discontinued by the authorities.

(11) For the reasons given above, I see no reason to interfere with the judgment of Bose J. These appeals must accordingly fail, but in the circumstances of these cases, I think that the parties should bear their own costs. The cross-objections are not pressed and they are, therefore, dismissed without costs.

(12) GUHA RAY J. : I agree.

A/V.S.B. Appeals dismissed.

A.I.R. 1953 CALCUTTA 188 (Vol. 40, C. N. 61)

DAS AND P. N. MOOKERJEE JJ.

Ramesh Chandra, Plaintiff-Appellant v. State of West Bengal, Defendant-Respondent.

A. F. O. D. No. 70 of 1948, D/- 27-8-1952.

(a) Indian Independence (Rights, Property and Liabilities) Order (1947), Arts. 10 (2) (b) and 12(2) — "Liability in respect of actionable wrong" — Declaration as to illegality of order of discharge — Suit by discharged Government servant against Province of Bengal dismissed — Appeal— Respondent in appeal.

Where the subject-matter of the appeal filed after 15-8-47 against the Province of Bengal as the sole respondent was the right to a declaration that the order of discharge of the plaintiff appellant who was a Government servant was illegal and that the plaintiff must be deemed to be still in service and the appeal had arisen out of a suit filed before 15-8-47 against the respondent,

Held that the liability of the Province of Bengal which was the basis of the plaintiff's claim was a 'liability in respect of an actionable wrong other than breach of contract' as envisaged in Art. 10(2), that the combined effect of Arts. 12(2) and 10 (2)(b) was that as from 15-8-47 the Province of West Bengal must be deemed to have been substituted for the Province of Bengal, and since the Constitution, the words 'Province of Bengal' must be adapted so as to read 'State of West Bengal' for the 'Province of West Bengal' and that, therefore, the State of West Bengal must be regarded as the sole respondent in the appeal. AIR 1951 SC 23 Foll. (Paras 19, 20 & 21)

(b) Government of India Act, (1935), S. 240(1) — "Civil Post under the Crown".

All officials and servants of the State are servants of the Crown. A Rationing Officer, Supply Department, Government of Bengal, therefore, holds a civil post under the Crown in India. (Para 28)

Anno: Govt. of India Act, S. 240 N. 1.

(c) Government of India Act (1935), S. 240 (2) and (3) — Dismissal includes discharge.

The word 'discharge' has the same connotation as 'removal' and should be construed so as to be included within the term 'dismissal.' (Para 53)

Anno: Govt. of India Act, S. 240 N. 1.

(d) Government of India Act (1935), Ss. 240(1) and (3) and 241(2) — "Every person who holds under the Crown" — Expression includes all civil servants whether permanent or not — Scope of S. 240(1) is not controlled by S. 241.

The expression 'person as aforesaid' in S. 240(3) refers back to S. 240(1) and thus includes 'every person who holds a civil post under the Crown in India.' The last expression is widely worded and on a plain construction, includes all holders of Civil Office, whether permanent or not. No contrary intendment can be gleaned from sub-s. (2) of S. 241. S. 241 itself, was inserted for a different purpose and sub-s. (2) of the section is relevant on the question of applicability of the Civil Service Regulations. The rules framed under S. 241 are irrelevant in obtaining redress by an action in Courts, and they merely provide for redress of grievances by administrative process. It would not, therefore, be apposite to control the scope of the above-quoted expression in S. 240(1) by spelling out a contrary intent on a reference to section 241 which has a different destination. (Para 55)

Anno: Govt. of India Act, S. 240 N. 1.

(e) Government of India Act (1935), S. 240 (2) and (3) — Non-compliance with section — Compliance with Civil Services Rules — Effect — (Civil Services (Classification, Control and Appeal) Rules).

Mere compliance with the Civil Services Rules does not justify either a dismissal or discharge of a Civil servant where the mandatory provisions of S. 240(2) and (3) have not been complied with. (Para 57)

Anno: Govt. of India Act, S. 240 N. 1.

(f) Specific Relief Act (1877), S. 42 — Discretion of Court — Court has discretion in granting declaratory reliefs — Plaintiff, Government servant, discharged from service without complying with S. 240(3), Govt. of India Act — Suit for declaration that order of discharge was illegal and that plaintiff must be deemed to be still in service — On facts of case held that no declaration should be made — (Government of India Act (1935), S. 240 (3)). (Paras 66 and 68)

Anno: Specific Relief Act, S. 42 N. 6; Govt. of India Act, S. 240 N. 1.

Apurba Dhan Mukherji and Tarak Nath Roy, for Appellant; H. K. Das, Senior Govt. Pleader and Anil Das Gupta, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('37) 64 Ind App 40: (AIR 1937 PC 27) 36, 43, 63, 66
('37) 64 Ind App 55: (AIR 1937 PC 31) 36, 38, 55, 57, 76
('48) 75 Ind App 225: (AIR 1948 PC 121) 45, 48, 50, 53, 57, 65, 67, 69
('48) 75 Ind App 343: (AIR 1949 PC 112: 50 Cri LJ 383) 57
('47) 52 Cal WN (FR) 2: (AIR 1947 FC 23) 77
('51) 1951 SCR 1: (AIR 1951 SC 23) 16
('40) 44 Cal WN 79: (71 Cal LJ 95) 64
(1895) AC 229: (64 LJP 119) 32, 33
(1896) AC 575: (65 LJPC 82) 31, 35
(1839) 5 Bingh NC 262: (8 LJ (NS) CP 193) 77
(1930) 1 Ch 566 77
(1896) 1 QB 116: (65 LJQB 279) 31

DAS J.: This is an appeal by the plaintiff and is directed against the judgment and decree of Sri J. P. Mukherjee, learned Subordinate Judge 6th Court, Alipur, Dt. 24 Parganas, dated 3-2-1948.

(2) The suit out of which this appeal has arisen, was instituted on 18-12-1945 against the respondent, the Province of Bengal. The material allegations in the plaint were that the plaintiff was appointed a Rationing Officer by the Province of Bengal on a salary of Rs. 400/- per month, that his appointment was duly notified in the Calcutta Gazette by an order of the Governor, that by a letter dated 22-1-1944 the Deputy Controller of Rationing notified to him, his appointment as Rationing Officer, that he was posted at Panihati and acted as such till 5-6-1944, when he was transferred to Garulia, that on 9-7-1944, he received a copy of an order dated 6-7-1944, passed by the Controller of Rationing, to the effect that he was discharged from service.

The plaintiff submitted that the order of discharge was illegal, arbitrary and 'mala fide', that the plaintiff was not informed about the charges laid against him, that no inquiry was made and no formal proceedings were drawn up as required by the Civil Service Rules and Regulations, that the order purported to have been made on the basis of confidential inspection notes, that the plaintiff sent petitions to the Minister, Civil Supply Department and a memorial to the Governor but to no effect. The plaintiff then served a notice under section 80, Civil Procedure Code. The plaintiff prayed for a declaration that the order of discharge was

'ultra vires' and illegal, and that his service as a Rationing Officer still continues and that the plaintiff be reinstated in his posts as Rationing Officer with pay from the date of his discharge. In the alternative.....the plaintiff claimed damages to the extent of Rs. 6906 annas 10 pies 8 for his wrongful discharge.

(3) The Province of Bengal filed a written statement and 'inter alia' pleaded that the plaintiff was discharged with the approval of the Government on the ground that his work was unsatisfactory, that the plaintiff was not entitled to the declarations prayed for or to any damages.

(4) The learned Subordinate Judge negatived the allegation as to 'mala fides' on the part of the Deputy Controller of Rationing. The learned Judge however, held that

> "the plaintiff was discharged without proper inquiry as to his competence, and without being allowed any opportunity to explain the charges of incompetence levelled against him."

(5) The learned Subordinate Judge was, however, of the opinion that even if the plaintiff be a permanent Civil servant under the Crown and a Gazetted officer, non-compliance with S. 240, Government of India Act, did not entitle the plaintiff to the declarations prayed for.

(6) The learned Subordinate Judge seemed to hold that "as the rationing itself was a temporary measure" and the plaintiff was an old retired officer, the plaintiff's appointment was a temporary one.

(7) The learned Subordinate Judge further held that in case of temporary servants, an order of discharge could be made under S. 241 (2)(b), Government of India Act, 1935; but as no notice had been given, the plaintiff was entitled to one month's salary viz., Rs. 400/-.

(8) The learned Subordinate Judge further held that the plaintiff was not entitled to damages for wrongful dismissal.

(9) In the result, a decree for Rs. 400/- was passed in favour of the plaintiff.

(10) The decision under appeal was pronounced on 3-2-1948. Against this decision the plaintiff filed this appeal making the Province of Bengal as the sole respondent. While the suit was pending in the Court below, on 15-8-1947, India was partitioned. By virtue of S. 3, Indian Independence Act, (10 & 11, Geo VI C 30), the old Province of Bengal ceased to exist as from 15-8-1947, and in lieu thereof two new Provinces, to be known as West Bengal and East Bengal, were constituted.

(11) A question, therefore, arises as to whether the appeal is properly constituted, because the respondent is still described as Province of Bengal which, in law, is now defunct.

(12) In order to provide for contingencies which would arise in consequence of the above provision, the Indian Independence (Rights, Property and Liabilities) Order, 1947, was promulgated. The relevant provision is Art. 12(2) of the Order which reads as follows:

> "Where any Province from which property rights or liabilities are transferred by this order is, immediately before the transfer, a party to legal proceedings with respect to that property, rights or liabilities, the Province which succeeds to the property rights or liabilities in accordance with the provisions of this order, shall be deemed to be substituted for the other Province as a party to those proceedings, and the proceedings may continue accordingly."

(13) The above automatic substitution of one Province or another, for the defunct Province of Bengal, therefore, depends on the question as to which Province has inherited the property, rights, or liabilities which form the subject-matter of the pending legal proceedings.

(14) The subject-matter of the appeal is the right to a declaration that the order of discharge is illegal and that the plaintiff must be deemed to be still in service. The alternative relief viz. a claim for damages for wrongful discharge, is not the subject-matter of the appeal.

(15) Articles 4 to 9 of the Order, it is conceded on both sides, do not apply.

(16) The question is whether Art. 10(2) applies. The Article provides for the initial transfer of the liability of the Province of Bengal "in respect of an actionable wrong other than breach of contract." In the present case the liability, if any, of the Province of Bengal, on the appointed date i.e., 15-8-1947 was not founded on a breach of contract. It has thus to be seen if it was a liability 'in respect of an actionable wrong'. The meaning of the expression 'actionable wrong' fell to be decided in the case — 'State of Tripura v. Province of East Bengal', (1951) S C R 1. Patanjali Sastri J. who delivered judgment of Kania C. J., Chandrasekhara Aiyar, J. and of himself, observed that the learned Judges of this Court, whose judgment they reversed, had placed "much too narrow a construction on the phrase 'liability in respect of an actionable wrong' ", and dissented from the view of this Court that the phrase connoted "only a liability for damages for a completed tortious act".

(17) At page 12, Patanjali Sastri, J. said as follows:

> "We consider that the words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorised act already commenced."

(18) Mukherjee J. who agreed with the above conclusion, made the following pertinent observations:

> "The plain language of the provision read in the light of the context would demand and justify a wider and more liberal interpretation. In my opinion, there can be an actionable wrong which does not arise out of breach of contract and at the same time does not answer to the description of a 'tort' as it is understood in English law.....The word 'wrong' in ordinary legal language means and signifies 'deprivation of right'. An act is wrongful if it infringes the legal right of another. The word 'actionable' means nothing else than that it affords grounds for action in law." (page 45)

(19) Judged by the above principles, there can be no escape from the conclusion that the liability of the Province of Bengal which was the basis of the plaintiff's claim was a 'liability in respect of an actionable wrong other than breach of contract' as envisaged in Art. 10(2). As the cause of action in the present case arose wholly within the territories which, as from the appointed day (i.e. 15-8-1947) are the territories of the Province of West Bengal, that

liability is by force of Art. 10(2)(b) the liability of the Province of West Bengal.

(20) The combined effect of Arts. 12(2) and 10(2)(b), therefore, is that as from 15-8-1947, the Province of West Bengal must be deemed to have been substituted for the Province of Bengal. Since the Constitution, the words 'Province of Bengal' must be adapted so as to read 'State of West Bengal' for the 'Province of West Bengal'.

(21) The result, therefore, is that the State of West Bengal must be regarded as the sole respondent in this appeal, and any decision which we may come to, must be regarded as a decision binding on the State of West Bengal.

(22) The memorandum of appeal must be amended by formally substituting the 'State of West Bengal' for 'The Province of Bengal'.

(23) Mr. Mukherjee learned Advocate for the plaintiff-appellant relied on S. 240, Government of India Act, 1935 (25 & 26 Geo V, Ch 42), and contended that the discharge of the plaintiff was illegal.

(24) It was first contended that the discharge of the plaintiff without giving him the requisite opportunity of showing cause as provided in S. 240(3) was illegal.

(25) It was further urged that the plaintiff was appointed by the Governor and his discharge by the Controller of Rationing, an officer subordinate to the Governor, was invalid, being in contravention of S. 240(2).

(26) On behalf of the State, the learned Senior Government Pleader contended that S. 240 had no application on the following grounds:

(1) The section did not apply as the plaintiff was not 'dismissed' but merely discharged from service.

(2) The section had no application to a temporary Civil servant like the plaintiff.

(3) The plaintiff was governed by the Conditions of Service as laid down in the Civil Services (Classification, Control and Appeal) Rules framed under S. 96B(2), Government of India Act, 1919, since replaced by S. 241(2), Government of India Act, 1935.

(27) In 1946 when the plaintiff was discharged from service, S. 240 read as follows:

"240(1) Except as provided by this Act, every person who is a member of a Civil Service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority Subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed from service or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him

Provided that this sub-section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) omitted.

(28) In the eye of law, all officials and servants of the State are servants of the Crown. The plaintiff was the Rationing Officer, Supply Department, Government of Bengal. He therefore held a Civil post under the Crown in India.

(29) The answer to the contentions of the learned Advocates depends on the true scope of S. 240 and S. 241, Government of India Act, 1935.

(30) The matter may well be looked at from a historic perspective.

(31) At Common Law, no Government or State official or Crown servant can sue the Crown or bring any proceedings against the Crown for wrongful dismissal; even although the express terms of their engagement provided for a definite term of employment they are always dismissible by the Crown at its pleasure: — 'Dunn v. The Queen', (1896) 1 QB 116. The above rule can be modified by Statute. 'Gould v. Stuart', (1896) A. C. 575.

(32) In — 'Shenton v. Smith', (1895) A. C. 229, the Judicial Committee held that a Colonial Government did not stand on a different footing from the Crown in England in the matter of employment and dismissal of public servants (p. 234).

(33) In — 'Shenton's case, (1895) A C 229, Lord Hobhouse said:

"They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their office during the pleasure of the Crown, not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit but by an appeal of an official or political kind." (pp. 234-235).

(34) In dealing with the contention that the published regulations must be deemed to have formed part of the contract between the Crown and the public servant Lord Hobhouse further said,

"As for the regulations, their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants" (p. 235)

(35) The special cases envisaged in the first quoted passage, refer to express Statutory provisions inconsistent with the implied term of employment of Crown servants that they hold office during the King's pleasure and not during good behaviour. Such a special case, it may be pointed out, formed the subject of decision in — 'Gould v. Stuart', (1896) A C 575.

(36) In this country similar questions fell to be decided and cleavage of judicial opinion manifested itself. The question ultimately came to be decided by the Privy Council in two appeals from Madras: — 'Venkata Rao v. Secretary of State', 64 Ind. App. 55 (P. C.) — 'Rangachari v. Secretary of State', 64 Ind. App. 40. (P. C.)

(37) Both the above cases turned on the construction of S. 96 B, Government of India Act, 1919 (9 & 10 Geo V, C. 101). Section 96B (1) expressly provided that every Civil servant holds office during His Majesty's pleasure, "Subject to the provisions of this Act and the rules made thereunder" and then specified certain

safeguards regarding dismissal of public servants. Section 96 B (2) empowered the Secretary of State to make rules regarding condition of service etc. In pursuance of such power Civil Service Classification Rules were framed.

(38) In — 'Venkata Row's Case', (64 Ind. App. 55 P. C.) the plaintiff appellant (i. e. the Civil servant) complained that his dismissal was contrary to the statute inasmuch as it was not preceded by any such inquiry as was prescribed by R. 14, Civil Service Classification Rules, made under S. 96 B (2).

(39) The courts in India were of the opinion that such non-compliance did not afford any valid ground for an action against the Crown and concurred in dismissing the suit.

(40) On appeal before the Privy Council counsel for the plaintiff appellant contended that the Statute gave the appellant a right enforceable by action to hold his office in accordance with the rules and that he could not be dismissed except in accordance with the procedure prescribed therein.

(41) In repelling the contention Lord Roche observed as follows:

"Sec. 96B, in express terms, states that the office is held during pleasure... The argument for a limited and Special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far reaching to commend itself for acceptance."

(42) It was further observed that

"S. 96 B & the rules make careful provision for redress of grievances by administrative process".

and that

"Such redress is not obtainable from the Courts by an action".

(43) In — 'Rangachari v. Secretary of State', 64 Ind App 40, (P.C.), their Lordships of the Judicial Committee of the Privy Council were of opinion that the purported dismissal of the appellant which emanated from an official lower in rank than the person who appointed the appellant to his office, was by reason of its origin bad and inoperative.

(44) Section 96 B, Government of India Act, 1919, was repealed by the Government of India Act, 1935. In lieu thereof, Ss. 240 & 241 were enacted.

(45) I have already quoted the relevant portion of S. 240. The effect of the section came to be considered by the Privy Council in the case of — 'the High Commissioner for India and Pakistan v. I. M. Lall', 75 Ind App 225 (P.C.). It was held that the provision in s. 240(3) as to a reasonable opportunity of showing cause against the action proposed is mandatory and necessarily qualifies the right of the Crown under s. 240(1) to dismiss its Civil servants at pleasure. It was further pointed out that Subss. (2) and (3) of s. 240 are prohibitory in form, which is inconsistent with their being merely permissive.

(46) In their conclusion, their Lordships substituted the declaration that

"the order of 10-8-1940, purporting to dismiss the respondent from the Indian Civil service was void and inoperative, and that the respondent remained a member of the Indian Civil service at the date of the institution of the present action on 20-7-1942",

for the declaration made by the Federal Court "that the plaintiff Mr. I. M. Lall was wrongly dismissed from the Indian Civil service on 4-6-1940".

(47) It may be pointed out that Art. 311, Constitution of India, embodies provisions similar to ss. 240 and 241, Government of India Act, 1935.

(48) The present case however falls to be decided by the provisions of ss. 240, 241, Government of India Act, 1935, as finally explained in I. M. Lall's case 75 Ind App 225 (P.C.), just cited.

(49) In the present case the finding of the learned Subordinate Judge was that the plaintiff was not allowed any opportunity to show cause against his discharge and that there was also no proper inquiry as to the plaintiff's competence. The evidence on record fully justifies the finding. In fact no attempt was made on behalf of the respondent to controvert the finding. In this case the evidence shows that there was no notification of the action proposed as also of the grounds on which the authority was proposing that action should be taken, that no reasonable time was given to the plaintiff to make his representation against the alleged grounds, and that no further opportunity was given to the plaintiff to show cause against his purported discharge.

(50) Mr. Mukherji accordingly contended that the above finding justified a declaration in the plaintiff's favour, on the terms set forth in — 'I. M. Lall's case', 75 Ind App 225 (PC) just cited. Mr. Mukherji pointed out that it was not disputed that the provisos to S. 240(3) were not attracted in this case.

(51) In answer, the learned Senior Government Pleader first contended that sub-ss. (2) & (3) of S. 240 use the word 'dismissed' or 'reduced in rank' and did not apply as the plaintiff was not 'dismissed' but merely 'discharged'. In Murray's Oxford Dictionary, the word 'discharge' is defined to include 'dismissal from service' (p. 413) and the word 'dismissal' is defined to include 'discharge from service' (p. 470).

(52) Sub-section 3 of S. 240, it may be pointed out, uses the words 'dismissed' or 'reduced in rank' and specifies the same safeguards in either case. If the contention that 'dismissal' does not include 'discharge' be accepted, the incongruous result will be that a person who is merely reduced in rank, will enjoy the immutable protection conferred by S. 240(3) but a person who is subjected to a more serious penalty by way of a 'discharge' will be deprived of the protection.

(53) It may also be pointed out that in — 'I. M. Lall's case', 75 Ind App 225 (PC) the purported 'removal' of the Civil servant was held to be synonymous with 'dismissal' so as to attract S. 240(3). The word 'discharge' has the same connotation as 'removal' and should be construed so as to be included within the term 'dismissal'. There is thus no ground to hold that the word 'dismissal' in S. 240 does not include "discharge". The first contention of the learned Senior Government Pleader must accordingly be overruled.

(54) The learned Senior Government Pleader further contended that S. 240 does not include the case of a Civil servant who has been appointed for a temporary period.

(55) The expression 'person as aforesaid' in S. 240(3) refers back to S. 240(1) and thus includes 'every person who holds a Civil post under the Crown in India'. The last expression

is widely worded and on a plain construction, includes all holders of Civil office, whether permanent or not. No contrary intendment can be gleaned from Sub-s. 241(2). That sub-section lays down that

> "it shall not be necessary to make rules regulating the conditions of service of persons employed temporarily on the terms that their employment may be terminated on one month's notice or less".

Section 241 itself, as pointed out in the cases already cited was inserted for a different purpose and Sub-s. (2) of the section is relevant on the question of applicability of the Civil Service Regulations. As held in — 'Venkata Row's case', 64 Ind App 55 (P C) the rules framed under S. 241 are irrelevant in obtaining redress by an action in Courts, and they merely provide for redress of grievances by administrative process. It would not, therefore, be apposite to control the scope of the above-quoted expression in S. 240 (1) by spelling out a contrary intent on a reference to section 241 which has a different destination. In my opinion, there is no force in the contention raised on behalf of the respondent.

(56) The learned Senior Government Pleader further contended that the plaintiff was governed by the Civil Services (Classification, Control and Appeal) Rules and that the only redress he can get is a month's notice or wages for one month in lieu of such notice, as provided in Chap. 15 S. II, R. 352 (b) of the Rules.

(57) The argument founded on the Rules has been incidentally dealt with already. The argument was negatived by the Privy Council in — 'Venkata Row's case', 64 Ind App 55 (PC) which related to the interpretation of S. 96B, Government of India Act, 1919. In — 'I. M. Lall's case', 75 Ind App 225 (PC) the Privy Council, on a construction of S. 240, Government of India Act, 1935, reached a similar conclusion and declared the order of removal to be invalid as being in contravention of S. 240 (3)..... In the later decision — 'North West Frontier Province v. Suraj Narain Anand', 75 Ind App 343 (PC) where the order of dismissal was in violation of S. 240 (3), the Privy Council held the order of dismissal to be bad and resting on unsound foundations. There is thus force in the contention that mere compliance with the Rules does not justify either a dismissal or discharge of a Civil servant where the mandatory provisions of S. 240 (2) and (3) have not been complied with.

(58) The result of the above discussion is that assuming that the plaintiff was not a permanent Civil servant, his discharge was invalid being in contravention of S. 240 (3), Government of India Act, 1935.

(59) Mr. Mukherji further contended that the plaintiff having been discharged by an officer subordinate to the appointing authority the order of discharge was in contravention of S. 240 (2) and was inoperative.

(60) The point was not specifically taken in the plaint and was not properly discussed at the hearing of the suit. Certain relevant materials have no doubt trickled through but, in my opinion, it is not desirable to base any conclusion on this important point, solely on such incomplete and inconclusive evidence.

(61) The question then is whether the Court should in its discretion give the plaintiff any declaration and if so, what should be the form of the declaration.

(62) It is not disputed that the Court has a discretion in the matter of granting declaratory reliefs. It is, however, urged that such discretion should be exercised judicially.

(63) In — 'Rangachari's case', 64 Ind App 40 (PC) already cited, the Privy Council did not give the appellant the declaration to which he was entitled on the ground that a declaration would have no greater effect than the decision and that in view of the state of health of the appellant and the long delay, no purpose would be served by restoring him to his office, and that the responsibility in this regard does not rest with the Court but with the Government.

(64) In the case of — 'Province of Bengal v. Bhupendra Kumar Roy Chowdhury', 44 Cal WN 79 Henderson J. refused to make a declaration. The learned Judge opined that the declaration would not entitle the plaintiff to get reinstatement, that it would be misleading if the declaration was intended to be used as a lever, that the declaration might not be conducive to justice in cases where the public servant was incompetent or undesirable.

(65) In — 'I. M. Lall's case', 75 Ind App 225 (PC) the Courts in India and the Privy Council did make the declaration, though the form of the declaration was differently worded by the Privy Council.

(66) In the facts of this case, the discharge was made in 1944, the plaintiff was then a retired officer. The plaintiff is now fairly old being aged about 70 years. His service was under the Province of Bengal, and was a war-time appointment. 8 years have passed since his discharge. The war has ended. Great political changes have taken place. The old Province of Bengal is now defunct. It is doubtful if the present Supply Department can be regarded as a continuation of the old war-time department. The responsibility of reinstatement rests with the State. There were allegations of incompetence which were not properly investigated. The decision of this Court is a sufficient indication of the effect of the order of discharge, and has the same force as an express declaration. In a similar state of facts, the Privy Council in — 'Ranga Chari's case', 64 Ind App 40 (PC) was disinclined to give the public servant any declaration.

(67) In — 'I. M. Lall's case', 75 Ind App 225 (PC) the circumstances were different. The Courts in India did exercise their discretion. Before the Privy Council, no argument seems to have been advanced by the Government that the Court should not make the declaration.

(68) In my opinion, no declaration should be made by the Court in the facts of this case.

(69) The above finding renders it unnecessary to state the form of the declaration. The form was specifically stated in — 'I. M. Lall's case', 75 Ind App 225 (PC).

(70) Mr. Mukherji learned Advocate for the plaintiff appellant also contested the propriety of the finding of the learned Subordinate Judge that the plaintiff was a temporary servant.

(71) The order of appointment Ex. 2 as communicated to the plaintiff merely stated that the plaintiff had been appointed a Rationing Officer. The order was passed in January 1944 during the continuance of the war. The plaintiff was a retired officer. The inference which can legitimately be drawn from the above facts is that the appointment was understood by both

parties to be for an indefinite period though not permanent. In the view taken by me, this question is however, not of much moment.

(72) In the alternative Mr. Mukherji contended that if the plaintiff is not given the declaration to which he is legally entitled, his claim for damages for wrongful dismissal should be decreed. Such a prayer was allowed to be raised in the plaint by order No. 10 dated 10-6-1946. An express issue, issue No. 5, was framed.

(73) The learned Subordinate Judge disposed of this issue by the following observation:

"From all these I find that the plaintiff is entitled to Rs. 400/-, in lieu of one month's notice, which amount may also well be regarded as compensation, considering the plaintiff's position and other circumstances of the present case."

(74) In the memorandum of appeal, the plaintiff expressly limited his appeal to the prayer for declaration only and paid Rs. 20/- as Court Fees on that basis. It was expressly stated that "the alternative prayer for damages being given up in this appeal."

(75) I may add, in fairness to the learned Advocate, that the claim was properly abandoned in this appeal.

(76) It is well settled that the right to bring an action for wrongful dismissal is merely illustrative of the rule that an action will lie for unjustifiable repudiation of a contract. A Civil servant holds his office during the King's pleasure. As such, remedy by suit against the Crown for breach of the contract of service is hardly available to a Civil servant. In England, breach of contract by the Crown can be raised by a petition of right. The above view is in consonance with the opinion of the Privy Council in — 'Venkata Row's case', 64 Ind App 55 (PC) already cited. It is not, however, necessary to decide this point for the purpose of this appeal.

(77) In view of the course of proceedings, we are also relieved from the duty of considering whether the rule of English law enunciated as far back as 1839 in — 'Gibson v. East India Co.', (1839) 5 Bingh N C 262 that pay cannot be recovered by action against the Company but only by petition, memorial or remonstrance, and followed in later cases: See — 'Nixon v. Attorney General', (1930) 1 Ch 566, should be applied in a case like the present where the order of discharge is altogether void. I may refer in passing to the decision of the Federal Court in the case of the — 'Punjab Province v. Tarachand', 52 Cal W N (F R) 2. I refrain from expressing any opinion on this question, as it is not necessary for the purpose of the decision of this appeal.

(78) In view of our finding on the different points raised in this appeal, this appeal must fail. It is accordingly dismissed but in the circumstances of this case parties will bear their own costs in this appeal except as indicated below. The decree for full costs made by the Court below in plaintiff's favour was not challenged in this Court on behalf of the respondent and must stand.

(79) The sum decreed in favour of the plaintiff on account of claim and costs, as made by the Court below must be paid within 3 months from date, if the same has not been already paid.

(80) In view of the finding contained in our judgment, the memorandum of appeal must be formally amended by substituting 'State of West Bengal' for 'The Province of Bengal'. As the respondent opposed this prayer, the substituted respondent must pay the appellant a part only of the costs of the hearing, which I assess at 5 gold mohurs, and this payment must also be made within 3 months from date.

(81) P. N. MUKHERJEE J.: I agree.

A/V.R.B. Order accordingly.

A.I.R. 1953 CALCUTTA 194 (Vol. 40, C. N. 62)

K. C. CHUNDER J.

Abinash Chandra and others, Plaintiffs-Appellants v. Shree Sree Iswar Dharamraj Thakur and another, Defendants-Respondents.

A. F. A. D. No. 797 of 1948, D/- 18-7-1952.

Hindu Law — Will — Construction — Limited Estate — Words of enlargement — Bhogdakhal — Power of appointment not exercised — There is intestacy of death of widow.

Ordinarily a Hindu Will will be construed as giving only a limited interest to a Hindu widow unless there is anything in the Will to show that there was an enlargement of that interest. The enlargement may be shown by such words as "malik", "generation to generation", "to so and so and sons etc.", but the words of enlargement must be present. (Para 5)

The words "Bhogdakhal" would ordinarily mean in the case of a Hindu widow that she has been given a limited interest, or life interest, or a Hindu widow's estate. (Para 5)

The testator gave the property to his wife using only the words "Bhogdakhal", that is, enjoy and possess. He then proceeded to say that his wife shall have the power to give away the property on her death to any one in the family of his father or of his wife who would tend or nurse her. He made provision that in case his wife proved unchaste or did not live in his own house, then the property would be taken away from her and that the respectable villagers would have the power to make it over to anybody else they considered fit. The widow during her life time made a debuttar of the property appointing an absolute stranger as a shebait. She did not exercise the power given to her under the Will in the manner laid down in the Will: (Paras 2 & 3)

Held that as widow had only a limited interest and as she had not exercised the power of appointment, there was intestacy after her death. AIR 1929 Cal 801 Relied. (Para 5)

J. Mazumdar, for Appellants; Sudhansu Bhusan Sen and Sachindra Nath Chakravarty, for Respondents.

REFERENCE..... Para.

('29) 56 Cal 790: (AIR 1929 Cal 801) 5

JUDGMENT: This is an appeal against an appellate decree of the Subordinate Judge, Burdwan, reversing that of the Munsif, Additional Court of the same place. The plaintiffs are the appellants.

(2) It is not disputed that the plaintiffs who were substituted in place of the step-brother of one Becharam, were the reversioners of Becharam. Becharam died leaving him surviving his widow Jugal Bala and his brother whose heirs are now the appellants before me.

He executed a Will in which he made these provisions for his wife. He gave the property to his wife using only the words "Bhogdakhal" that is, enjoy and possess. He then proceeded to say that his wife shall have the power to give away the property on her death to any one in the family of his father or of his wife who would tend or nurse her. The testator, it seems, did not contemplate a case in which there may be no such exercise of the power. He made provision that in case his wife proved unchaste or did not live in his own house, then the property would be taken away from her and that the respectable villagers would have the power to make it over to anybody else they considered fit.

(3) The Munsif construed the will as giving the widow a life estate. The widow during her life time made a debuttar of the property appointing an absolute stranger as shebait. It is, therefore, clear that she did not exercise the power given to her under the Will in the manner laid down in the Will.

(4) First of all, the Will did not entitle her to make a debuttar at all. A deity is not one of the persons in whose favour under the Will the appointment can be made. Further the stranger, who is appointed shebait, if he was intended to be the person in whose favour the power had been exercised, did not belong either to the testator's family or to his wife's family, though he might have nursed or tended her. The Bengali expression is "Shushusha". (It really means nursing and not tending in her old age. In any case it has been translated as nursing and tending). The trial court construed the words "Bhogdakhal Karibar Janya", as giving only a life interest. The appellate court, holding that there was no gift over after the lady's death in case she failed to exercise the power of appointment, came to the conclusion that the lady had an absolute interest. The ordinary rule of law is that if an estate is undisposed of after a particular limited interest, then it reverts to the estate of the testator and his heir at that time inherits under the ordinary rule of Hindu law. Therefore no question of gift over, as learnedly but irrelevantly discussed by the Subordinate Judge, arises in the present case. Both the courts failed to see the real point in this case.

(5) The real point is that since the decisions of the Judicial Committee, ordinarily, a Hindu Will will be construed as giving only a limited interest to a Hindu widow unless there is anything in the Will to show that there was an enlargement of that interest. The enlargement may be shown by such words as 'malik', 'generation to generation', 'to so and so and sons etc.', but the words of enlargement must be present. The case of — 'Bipradas Goswami v. Sadhan Chandra', 56 Cal 790, which deals with the case of a daughter, contains the words 'to her sons' etc., showing that the estate of inheritance which was given conferred an absolute estate. Therefore, that decision has no application to the present case. The words "Bhogdakhal" would ordinarily mean in the case of a Hindu widow that she has been given a limited interest, or a life interest, or a Hindu widow's estate. The subsequent words in this Will are in favour of a limited interest than of any enlargement of it. The power to appoint would ordinarily go to show that an absolute estate was not intended and the estate given was a limited one; otherwise there will be no question of appointing an heir. Then again the defeasance clause, by which the right to the property would be defeated by unchastity or leaving the house, in the present case are words which go more to limit than to enlarge any interest she possessed. In the circumstances, as there are no words of enlargement the ordinarily construction of a Will in case of gift by a Hindu to his wife will naturally prevail and the Will has to be interpreted as conferring only a limited interest. As she had only a limited interest, and as she had not exercised the power of appointment, there was intestacy after her death and the appellants are entitled to succeed.

(6) The result, therefore, is that the decree of the Subordinate Judge is set aside and that of the Munsif restored with costs in both the courts.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 CALCUTTA 195 (Vol. 40, C. N. 63)

HARRIES C. J. AND SARKAR J.

Soshi Kumar Banerjee and others, Petitioners v. A. W. Hill and others, Opposite Party.

Civil Rule No. 3189 of 1951, D/- 9-5-1952.

Debt Laws — Bengal Money-lenders Act (10 of 1940), S. 30(1)(a) and (b) — Suit instituted before Constitution — Questions whether section is ultra vires — Transfer of records to High Court — (Constitution of India, Art. 228).

Assuming that the provisions of S. 30 (1)(a) and (b) have become ultra vires by reason of the Constitution that cannot affect the rights of the parties to a suit which was instituted long before the Constitution. (Para 4)

It cannot, therefore, be said that a constitutional point arises in the case and there is no necessity to transfer the records to the High Court. (Para 4)

Anno: C. P. C. Appendix III, Constitution of India, Art. 228 N. 1.

Apurbadhan Mukherjee and Manomohan Mukherjee, for Petitioners; Bankim Chandra Banerjee and Jagannath Gangopadhyay, for Opposite Party.

HARRIES C. J.: A Rule was issued calling upon the opposite parties to show cause why the records of a certain suit should not be transferred to this Court for the decision of a constitutional point involved in the suit namely whether S. 30(1)(a)(b) of the Bengal Money Lenders Act is ultra vires the Constitution.

(2) I do not think that the records should be transferred because though a constitutional point might arise in a proper case, I do not think it can be said to arise in this case.

(3) The proceedings giving rise to this application were instituted many years ago. They were dismissed by the trial Court which held that the suit was not maintainable. That decision was reversed by this Court and the view of this court was upheld by the Federal Court and the trial court was directed to proceed to hear the suit on its merits. All this occurred long before the Constitution came into force.

(4) Even assuming that these provisions of the Bengal Money Lenders Act have become ultra vires by reason of the Constitution, I do not think that that could affect the rights of

the parties in this suit which was instituted long before the Constitution came into force. If these provisions have been repealed, it would not have affected the rights of the parties and I do not think that the petitioners in this case are in a stronger position because the provisions might have since the Constitution become ultra vires. It is unnecessary to consider whether or not there is a constitutional point or point of substance. All we need say in this case is that the point does not arise having regard to the facts and history of this particular case. That being so, the Rule is discharged with costs, the hearing fee being assessed at five gold mohurs.

(5) SARKAR J.: I agree.

A/V.R.B. Rule discharged.

A.I.R. 1953 CALCUTTA 196 (Vol. 40, C. N. 64)

K. C. DAS GUPTA AND LAHIRI JJ.

Probhat Kumar Chatterjee and another, Appellants v. Sm. Latika Debi and others, Respondents.

A. F. O. O. No. 66 of 1950, D/- 27-6-1952.

Civil P. C. (1908), O. 9, R. 13 — Minor described as major is not party to litigation — He is not "defendant" to suit — Application by him under O. 9, R. 13 is not maintainable. Observations in AIR 1917 Cal 844 held obiter.

(Para 3)

Anno: Civil P. C., O. 9 R. 13 N. 15.

Binayak Nath Banerjee, Sudhir Kr. Acharya, Paritosh Sarkar and Sushil Kr. Biswas, for Appellants; Benoy Krishna Ghose and Mihir Kumar Sarkar, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('09) 36 Ind App 168: (31 All 572 PC) 3
('17) 44 Cal 627: (AIR 1917 Cal 844) 3

K. C. DAS GUPTA J.: This appeal is directed against an order of the learned Subordinate Judge, 24-Parganas, dismissing an application under O. 9, R. 13, Civil P. C. The application was filed by two persons, Provat Kumar Chatterji and Krishna Kumar Chatterji, both minors. The decree which was sought to be set aside was passed in a suit brought by their father's brother's widow Latika Debi for partition, for return of certain ornaments and for accounts as a pauper. Both Krishna and Provat were impleaded in that suit as major persons and so there was no arrangement for their representation through any guardian. The learned Subordinate Judge gave as the main reason of dismissing the application under O. 9, R. 13 of the Code of Civil Procedure his conclusion being that in law these two petitioners could not be regarded as parties to the suit and consequently the decree was a nullity.

(2) It has been contended before us that when the parties were, in fact, impleaded as defendants, the omission to describe them as minor did not affect the fact that they were defendants and that there was really a duty on Court to arrange for their representation.

(3) Whatever might have been said on this question, if it was 'res integra', I am of opinion that we are compelled by the authority of the decision of the Judicial Committee in the case of Mt. Rashid-un-nisa v. Muhammad Ismail Khan', 36 Ind App 168 (P.C.) to hold that the two petitioners who, though in fact minors, were described as major and so were not legally represented in Court, were not, in any proper sense, parties to the litigation and consequently the application by them under O. 9, R. 13, Civil P. C., is not maintainable. In that case, a suit was brought by a minor for a declaration that two decrees and three sales in execution affecting her share in her father's estate were invalid as against her as not properly represented in the proceedings from which they resulted. There the plaintiff had been described as a minor but the person who was appointed as guardian was disqualified by the provisions of the Civil Procedure Code from such appointment. The Subordinate Judge passed a decree in the suit. The High Court in appeal set aside his decree and dismissed the suit upon the ground that the decrees upon which those execution proceedings were founded were not in any way impeached in the suit nor could they be. The impeached transactions were proceedings in execution of those decrees, and this being so it was the proper course for the plaintiff, if she had any objection to make to the execution of the decrees, to raise these objections under the provisions of s. 244, Civil P. C. and not by a separate suit. This decision was overruled by the Privy Council and their Lordships of the Privy Council dealt with matter in these words:

> ".....With all respect to the learned Judges of the High Court, their Lordships are unable to agree with this conclusion. Sec. 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term....."

There have been a large number of cases in the courts where, though a person had been properly represented by a guardian, applications under O. 9, R. 13, Civil P. C., were entertained on the ground that the guardian who had been appointed had been negligent or fraudulent. There is no case of our Court in support of the proposition that an application by a minor person who had been legally represented by a guardian was maintainable. Our attention was drawn to certain observations by their Lordships Mookherjee and Cumming JJ. in the case of — 'Kalipada Sirkar v. Hari-Mohan Dalal', 44 Cal 627. That was a case in which a decree for costs was sought to be executed against a lunatic plaintiff who had been represented in the proceedings by his wife who was herself a minor. The objection under s. 47 Civil P. C., to the execution of this decree was rejected by this Court, relying on the authority of Rashid-un-nisa's case 36 Ind App 168 (P.C.). Certain observations were made indicating that the decree for costs might have been challenged by a review or revision. I do not see how these observations which were not really necessary for the purpose of the case can in any way affect the legal position that these minors were not in law parties to the suit and consequently there was no legal decree against them and they not being in law 'defendants' to the suit could not make an application under O. 9 R. 13, Civil P. C., to set aside a decree which had no legal force against them.

(4) Mr. Banerjee presses for our consideration the fact that fraud had really been practised by the plaintiff on the Court. He has in this connection drawn our attention to her ap-

plication in which she stated, after a report was made by the peon entrusted with the service of processes on these two petitioners, that they were minors, that she had known them since their infancy and so knew that they had attained majority. Assuming that the plaintiff made deliberate false statements to the Court, we do not think that it will be proper for us to make any order in these proceedings to set aside the decree in the inherent jurisdiction of the Court.

(5) The appeal is accordingly dismissed, but in the circumstances of the case we order that the parties will bear their own costs in this appeal.

(6) No order is necessary on the application under S. 115, Civil P. C.

(7) LAHIRI J.: I agree.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 CALCUTTA 197 (Vol. 40, C. N. 65)

HARRIES C. J. AND S. R. DAS GUPTA J.

Kanai Hizra and others, Accused-Petitioners v. Golap Hizra, Opposite Party.

Criminal Revn. No. 1017 of 1951, D/- 26-3-1952.

(a) Criminal P. C. (1898), S. 403 — Acquittal under S. 352, Penal Code — Trial on same facts under S. 323, Penal Code.

A person acquitted under S. 247 on a charge of using criminal force under S. 352, Penal Code, cannot be tried in respect of the same criminal matter on a charge under S. 323, Penal Code. 7 Beng LR App 25, Foll. (Para 6)

Anno: Cr. P. C., S. 403 N. 5 Pt. 7.

(b) Criminal P. C. (1898), Ss. 247 and 403 — Acquittal under S. 247 is acquittal within S. 403.

The procedure under S. 247, at whatever stage of the proceedings it may be applied, whether before or after the summons has been served or the accused has appeared or the particulars of the offence have been stated to him, is a "trial" within the meaning of S. 403. Hence, an acquittal under S. 247 is an acquittal which bars a further trial under S. 403. AIR 1929 Cal 189 and AIR 1935 Cal 491, Rel. on. (Para 7)

Anno: Cr. P. C., S. 403 N. 8 Pt. 1.

S. S. Mukherjee with Kishore Mokerji, for Petitioners; Gurudas Bhattacharjee, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras
('71) 16 WR Cr 3: (7 Beng LR App 25) 6
('29) 33 Cal WN 260: (AIR 1929 Cal 189: 30 Cri LJ 585) 7
('35) 39 Cal WN 919: (AIR 1935 Cal 491: 36 Cri LJ 1238) 7

S. R. DAS GUPTA J.: This is an application for revision of an order passed by a learned Sessions Judge affirming the order of the Sub-Divisional Officer and a Magistrate, First Class, Chinsurah, issuing process under S. 323, Penal Code, against the petitioners.

(2) The matter arises in this way. On 4-6-1951 one Golap Hizra filed a petition of complaint before the Sub-Divisional Officer, Hooghly. The allegations in the petition of complaint are as follows: On 29-5-1951 the complainant was requested by some of the accused to attend a 'salish' to have a case, pending in the criminal court of Alipore between Kanai and himself, compromised. As such on that date the complainant proceeded from Howrah to Baidyapur by train to attend this 'salish'. While he got down from the compartment of the train at Bandel station all the three petitioners hit the complainant with an iron rod, brickbat and a broomstick. On this complaint a process was issued by the Sub-Divisional Officer, Chinsurah, before whom the complaint was made, and the petitioners were summoned under S. 352, Penal Code, and the case was fixed for examination of the complainant on 3-7-1951. On that date, that is on 3-7-1951, the complainant did not turn up and thereupon the learned Magistrate directed the accused to be acquitted under S. 247, Criminal P. C.

Thereafter on 4-7-1951 another complaint was made on the self-same facts on which the previous complaint was made and his plea was that when the case was called on, on the previous day, he had just been away from the court premises and he asked for process against the accused. That petition came up for hearing before Mr. N. R. Banerjee, Magistrate, Chinsurah, who was at that time taking the files of the Sub-Divisional Officer. He examined the complainant, but in his opinion a complaint was made on the same occurrence as was filed before the Sub-Divisional Officer on 4-6-1951 and on which the accused were summoned under S. 352, Penal Code, and subsequently acquitted under S. 247, Criminal P. C., and the present complaint was a duplication of the complaint dated 4-6-1951 and cannot be entertained according to law. He however did not make any order but put up the matter before the Sub-Divisional Officer for his orders. The learned Sub-Divisional Officer on 9-7-1951 took a rather strange view of this matter. Although the previous complaint was dismissed and the accused was acquitted, yet he held that in the previous case process had been wrongly issued under S. 352, Penal Code, and that it should have been issued under S. 323, Penal Code, and he consequently issued a process on the self-same facts under S. 323, Penal Code.

(3) Against that order of the learned Magistrate the petitioners preferred an appeal to the Sessions Judge, but the learned Sessions Judge took the view that the order of the learned Magistrate was in order and he affirmed it. The petitioners have made the present application before us in revision against the said order of the learned Sessions Judge affirming the order passed by the Sub-Divisional Officer, Chinsurah.

(4) It seems to us that both the learned Magistrate and the learned Sessions Judge have taken an entirely erroneous view of the matter. The petitioners were acquitted under S 247, Criminal P. C., which provides:

"If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

(5) The Sub-Divisional Officer, Chinsurah, purported to act under this section and the complainant not having been present, he acquitted the accused. But once an accused is acquitted he is not liable to be tried again for

the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, Criminal P. C. or for which he might have been convicted under S. 237, Criminal P. C. This is laid down in S. 403, Criminal P. C. Section 403 provides as follows:

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under Section 237."

Sections 236 and 237, Criminal P. C. provide as follows:

S. 236: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

S. 237: "If, in the case mentioned in Sec. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged."

(6) In this case the facts on which the two petitions of complaint were presented are identical. When the first petition of complaint was presented process was issued under S. 352, Penal Code. It appears to us that on those facts process might have been issued and the petitioner might have been charged for an offence under S. 323, Penal Code. It also appears to us that the facts alleged in the said two petitions of complaint make it doubtful which of the said offences namely S. 352 and/or S. 323 the facts when proved will constitute. In our opinion he might have been charged either under S. 323 or S. 352 or both or in the alternative. In this case, as I have indicated, the same facts have been alleged in both the petitions of complaint and the matter clearly falls under S. 236, Criminal P. C. That being so, under S. 403, Cr. P. C., no fresh processes could be issued against the petitioner under S. 323, Penal Code, on the second petition of complaint. In the case of — 'Kaptan v. G. M. Smith', 16 WR Cr 3, a Bench of this Court has also held that a person tried and acquitted on a charge of using criminal force under S. 352 cannot be tried in respect of the same criminal matter on a charge of hurt.

(7) It appears that the learned Sub-Divisional Officer as well as the learned Sessions Judge have taken the view that the acquittal as contemplated in S. 403, Criminal P. C., means an acquittal after a trial. In other words, the view they have taken is that an acquittal on a preliminary ground would not bar a fresh trial under S. 403, Criminal P. C., on the same facts or for the same offence. In our opinion that view is entirely erroneous and is contrary to the definite views which have been expressed in this Court in two decisions: one in the case of — 'Suku Ram Koch v. Krishna Dev Sarma', 33 Cal WN 260 and the other in the case of — 'Bhupati Bhusan v. Amio Bhusan', 39 Cal WN 919. In those cases, their Lordships have made it perfectly clear that an acquittal under S. 247, Criminal P. C., is an acquittal which would bar a further trial under S. 403, Criminal P. C. Lort-Williams J., has further observed that the procedure under S. 247, at whatever stage of the proceedings it may be applied — whether before or after the summons has been served or the accused has appeared or the particulars of the offence have been stated to him — is a "trial" within the meaning of S. 403, Criminal P. C. There seems to us to be no room for doubt that that is the position both on the plain meaning of the S. 403 as also on the authority of the two decisions to which I have just now referred.

(8) It is difficult to see how the Sub-Divisional Officer or the Sessions Judge could come to a contrary conclusion.

(9) In our opinion, therefore, the proceedings which have been started as a result of the fresh petition of complaint made on 9-7-1951 cannot go on and must be quashed.

(10) The result, therefore, is that the Rule is made absolute and the proceedings before the Sub-Divisional Officer, Chinsurah should be quashed. The petitioners, if on bail will be released from their bail bonds.

(11) HARRIES C. J.: I agree.

B/V.S.B. Proceedings quashed.

A.I.R. 1953 CALCUTTA 198 (Vol. 40, C. N. 66)

SEN J.

Bhupesh Chandra Dutta, Petitioner v. Dr. M. N. Bose and others, Opposite Party.

Civil Rule No. 783 of 1952, D/- 30-7-1952.

(a) Houses and Rents — W. B. Premises Rent Control Act (17 of 1950), Sec. 13(2) — Ejectment decree in favour of landlord against tenant — Landlord applying under O. 21, R. 97, Civil P. C., for delivery of possession from sub-tenant — Objection by sub-tenant under S. 13(2) of W. B. Premises Rent Control Act claiming to have acquired tenancy directly under landlord — Application of sub-tenant not entertained by Judge proceedings being summary — Held on revision, that while the sub-tenant could not file independent application under S. 13(2) in the summary proceedings for delivery of possession, his objection to the landlord's application under O. 21, R. 97 could be heard and determined in those summary proceedings — (Civil P. C. (1908), O. 21 R. 97) 88 Cal LJ 105 Followed. 87 Cal LJ 181 Not followed, (Para 2)

Anno: Civil P. C., O. 21 R. 97 N. 1.

(b) Civil P. C. (1908), S. 115 and O. 21, R. 97 — Mistake of law — (W. B. Premises Rent Control Act (17 of 1950), Sec. 13(2)).

Failure to entertain sub-tenant's objection under S. 13(2) of W. B. Premises Rent Control Act in a summary proceeding under O. 21, R. 97, Civil P. C., is a mistake as to the provisions of law and is also against all ideas of justice and hence High Court can intervene in revision un-

der S. 115, Civil P. C. AIR 1949 PC 156 (Para 3)
Ref.
Anno: Civil P. C., S. 115 N. 13; O. 21 R. 97 N. 8.

Manindranath Ghose and Anil Kumar Sett, for Petitioner; S. Mitra and Samarendra Krishna Deb, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('49) 76 Ind App 67: (AIR 1949 PC 156) 3
('50) 87 Cal LJ 181 2
('51) 88 Cal LJ 105 2

ORDER: This is a revisional application under S. 115, Civil P. C., from the order of the learned Judge, 6th Bench of the Small Cause Court, Calcutta dismissing an application under S. 13(2), Rent Control Act, 1950, on the ground that such an application is not maintainable in a summary proceeding for delivery of possession and allowing an application under O. 21 R. 97, Civil P. C., and directing that the plaintiff decree-holder be put in possession of the premises with police help, if necessary. The premises in question, viz., 28A Mohan Bagan Lane, belonged to the opposite parties Nos. 1 and 2, Dr. M. N. Bose and another. Opposite party No. 3 Sasti Charan Sen was a direct tenant under the landlords opposite parties Nos. 1 and 2. The petitioner Bhupesh Chandra Dutt is a sub-tenant in respect of a portion of the premises in question. The landlords obtained an ejectment decree against the tenant opposite party No. 3 in Suit No. 493 of 1951 of the 6th Bench of the Small Cause Court, Calcutta. The grounds on which the ejectment was sought and granted were, firstly, that the tenant was in arrears, and secondly, that he had sublet a considerable portion of the premises to sub-tenants who had been in occupation for more than seven months. When the landlords tried to obtain possession of the premises they were resisted by the petitioner Bhupesh Chandra Dutt who claimed to have acquired a tenancy directly under the landlord under the provisions of sub-s. 2, S. 13, Rent Control Act, 1950. The landlords accordingly filed an application under O. 21, R. 97, Civil P. C. and the petitioner filed an application under S. 13(2), Rent Control Act, pleading that he was a lawful sub-tenant and therefore should be deemed to be a tenant directly under the landlord, and so the landlord could not obtain delivery of possession against him. The learned Judge held that the sub-tenant was to obtain relief by a properly framed suit in a court of competent jurisdiction and that the application under S. 13(2) did not lie in a court of summary jurisdiction for delivery of possession. He allowed the application under O. 21 R. 97, Civil P. C. Against that order, the sub-tenant Bhupesh Chandra Dutt has filed this revisional application, contending that the court below acted illegally and with material irregularity in the exercise of its jurisdiction by refusing to go into the question of the right of the sub-tenant under S. 13(2), Rent Control Act. This is the only point for consideration in this revisional application.

(2) Under S. 13(2), Rent Control Act, 1950 "where any premises or any part thereof have been or has been sublet by a tenant of the first degree and the sub-lease is binding on the landlord, if the tenancy of such tenant is lawfully determined otherwise than by virtue of a decree in suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the provision to sub-section (1) of Section 12, the sub-lessee shall be deemed to be a tenant in respect of such premises or part of premises holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenancy if the tenancy of the latter had not been so determined."

On the strength of this provision, the petitioner alleged that he had acquired a valid title as tenant directly under the owners of the premises, that is, opposite parties Nos. 1 and 2. It was of course for him to prove that he had so acquired the right of tenancy by fulfilling the conditions laid down in the sub-section quoted above. The learned Judge below held that an application under S. 13(2), Rent Control Act, could not be entertained in a summary proceeding for delivery of possession. This decision is based on High Court rulings, e.g., in the case of — 'Thakurdas Pushpraj v. Dwarka Prasad', 87 Cal LJ 181 and therefore that decision must be held to be correct. But while the sub-tenant cannot file an independent application under S. 13(2), Rent Control Act, in a summary proceeding for delivery of possession, it appears that the learned Judge below was wrong in holding that the objection could not be heard even as an objection to the landlord's application under O. 21, R. 97, Civil P. C. In this connection, I may refer to the ruling in the case of — 'Debendra Nath v. Parul Bala', 88 Cal LJ 105 where it was held that although a sub-tenant was not entitled to make an application for forbidding the landlord from taking possession on the ground of sub-lease, yet he was perfectly entitled to draw the attention of the court that he had a claim under the Rent Control Act to ask the court not to give every assistance to the landlord in carrying out the court's order in respect of possession of the premises occupied by the sub-tenant, but to insist that the landlord made an application under O. 21, R. 97 so that the question of the sub-tenant's right might be determined. In other words, in the application filed by the landlord under O. 21, R. 97, of Civil P. C. the sub-tenant's right under S. 13(2), Rent Control Act, may and should be determined and the court below was wrong in not doing so.

(3) The learned Advocate appearing for the opposite parties has urged that even if the court below has made a mistake of law the mistake cannot be remedied in the revisional application, because there is nothing to show that the court acted beyond its jurisdiction, or did not exercise the jurisdiction lawfully vested in it. As to the scope of S. 115, there are contradictory rulings one of the latest on the point being — 'Venkatagiri Ayyangar v. Hindu Religious Endowment Board', Mad, 76 Ind App 67 (P.C.) wherein it was held that where a court below has gone wrong in respect of an established provision of law the High Court under s. 115, Civil P. C., may always intervene. In this case also, the Court below has made a mistake as to the provision of law, and it is also against all ideas of justice that a sub-tenant who has a right to remain in a part of the premises should first be turned out and then be compelled to file a suit for establishing his right. Accordingly this Rule is made absolute and the order of the court below is modified; while the order dismissing the independent application under s. 13(2), Rent Control Act, 1950, is affirmed, the order allowing the application of the landlord under O. 21,

R. 97, Civil P. C. is set aside and the court below is directed to dispose of the application according to law after giving the petitioner an opportunity to contest the application by proving his right, if any, under S. 13(2), Rent Control Act.

(4) There will be no order as to costs.

B/H.G.P. Order accordingly.

A.I.R. 1953 CALCUTTA 200 (Vol. 40, C. N. 67)

K. C. CHUNDER J.

Surja Kumar Sardar, Plaintiff-Appellant v. Manmatha Nath Naskar and others, Respondents.

A. F. A. D. No. 919 of 1951, D/- 11-7-1952.

(a) Hindu Women's Rights to Property Act (1937), S. 3 — "Property" — Act does not apply to agricultural property. (Para 5)

Anno: Hindu Women's Rights to Property Act, S. 3 N. 1.

(b) Hindu Women's Rights to Property Act (1937), Ss. 2 and 3 — Non-agricultural property — Widow unchaste — Right to inherit — (Hindu Law — Inheritance).

Provision in the Hindu Law of a widow being deprived of her inheritance because of unchastity is done away with by S. 2. Therefore, as regards non-agricultural property, the Hindu widow has now a statutory right to succeed to her husband's properties in the limited interest of a Hindu widow even though she had been unchaste during her husband's life. (Paras 5, 6)

Anno: Hindu Women's Rights to Property Act, S. 3 N. 1.

(c) Hindu Law — Inheritance — Agricultural property — Right of unchaste widow to inherit.

As regards agricultural property, there is a distinction between unchastity condoned by the husband and unchastity subsequent to such condonation but during the lifetime of the husband. The Hindu law is clear that if unchastity during the lifetime of the husband is condoned by the husband, such unchastity does not deprive a widow of her inheritance. (Para 7)

Jitendra Kumar Sen Gupta and Narendra Nath Biswas, for Appellant; Anil Kumar Sett and Ashutosh Ganguly, for Respondents.

JUDGMENT: This is an appeal against an appellate decree of the Subordinate Judge, Sixth Court, 24 Parganas, reversing that of the Munsif, Second Court, Baruipore.

(2) It appears that the plaintiff who is a purchaser from a Hindu widow, one Bhudimoni Dassi, claimed the property in suit alleging that Bhudimoni inherited the property from her husband Debendra and the plaintiff purchased the same from Bhudimoni. Bhudimoni is still alive. Debendra left also a daughter Mangala who died leaving a son and the son is also dead.

(3) The Principal contesting defendant is Manmatha, the husband of Mangala. His only defence was that Bhudimoni having been unchaste during the life of the husband, she did not inherit and therefore Mangala inherited and after Mangala, Mangala's son and Manmatha is now the owner as the only heir of the son.

(4) Therefore the only pertinent questions were the question of unchastity prior to the death of the husband and secondly a question, which had not been considered by either Court, namely Bhudimoni's rights under S. 3, Hindu Women's Right to Property Act, i.e. her statutory right of inheritance, notwithstanding the Hindu Law, even if she was unchaste.

(5) Debendra died long after the passing of that Act and the parties belong to the Dayabhag school of Hindu law. It seems though I am surprised to find that this has never come up for decision before in this Court, that a great inroad has been made into the Hindu law of inheritance of her husband's property by a Hindu widow by S. 3 of the Act. The Hindu widow now succeeds in virtue of S. 3, not because she is a Hindu widow under the Hindu Law entitled to succession, so long as the property is not agricultural. As regards the agricultural property, it has been already decided that the Hindu Women's Right to Property Act does not apply. So what we are now saying must be taken to refer to the non-agricultural property only. By S. 2 it is said that S. 3 will apply notwithstanding anything in the Hindu Law, or any custom to the contrary. Therefore the provision in the Hindu Law of a widow being deprived of her inheritance because of unchastity is done away with by this S. 2.

(6) Therefore in the present case it should have been noticed by the Courts below that a Hindu widow was entitled to succeed to non-agricultural properties under the Statute after her husband's death, whether she was or was not chaste before such death. Of course, it may be pointed out that the law under S. 3 gives the Hindu widow a limited interest even now in the husband's estate. Under the circumstances, what the Courts should have done was first to decide which of the properties were agricultural and which were not so, as it appears from the evidence and the other materials on record that the properties perhaps were of both kinds. Then as regards the non-agricultural properties, the defence should have been negatived, because the Hindu widow has now a statutory right to succeed to her husband's properties in the limited interest of a Hindu widow even though she had been unchaste during her husband's life. The plaintiff should have been given, therefore, a decree straight off as regards the non-agricultural properties to be enjoyed by him so long as the widow lived, unless he could prove subsequently that the sale was for legal necessity. If the widow did not inherit no question of legal necessity can arise and so it cannot be decided. If the widow inherited according to law, then a son-in-law is not the reversioner at the time of her death and the proper party is not now before the court and therefore the question of legal necessity cannot be decided now.

(7) As regards the agricultural properties, the lower appellate Court should have distinguished between unchastity condoned by the husband and unchastity subsequent to such condonation but during the life time of the husband. The Hindu law is clear that if unchastity during the life time of the husband is condoned by the husband, such unchastity does not deprive a widow of her inheritance. The lower appellate Court should also have tried to sift the evidence, because there appears to be some variation from the pleadings in the evi-

dence and further the story of unchastity subsequent to condonation was not accepted by the trial Court. In the written statement it is definitely stated that the widow left the village with her paramour 23 or 24 years before during the life time of the husband and never returned. In the cross-examination of the widow, she was not asked about her elopement with one Fani. Subsequently seven defence witnesses tried to make out that she had lived with such a person and the husband had brought her back and condoned her unchastity, and she lived with the husband. The eighth witness suddenly gave a different version namely that after the husband brought her back and condoned her unchastity and before the husband died she left again. The Munsif did not believe the story of unchastity. No question arose of giving the widow an opportunity of giving her version of this alleged unchastity. She was a defendant in the case, being defendant 1 and she was examined as a witness. The learned Subordinate Judge without trying to discriminate between two different stories namely, that given by the first seven witnesses and that given by the last witness and the relative credibility of the same and without giving any opportunity to the widow for explanation certainly reversed the finding of the trial Court. If the learned Subordinate Judge acts upon the evidence of these defence witnesses, an opportunity should be given by him to the widow to explain and he will have then additional evidence taken on the point of the widow herself.

(8) As I have pointed out, the case has been muddled in the Court below. Therefore I have no other option but to set aside the decree of the Subordinate Judge and remit the appeal to him for re-hearing in the light of this judgment.

(9) Costs will abide the result.

A/V.R.B. Case remanded.

A.I.R. 1953 CALCUTTA 201 (Vol. 40, C. N. 68)

SEN J.

Panchanan Das Adhikary, Petitioner v. Jagannath Prasad Shaw and others, Opposite Parties.

Civil Revn. No. 2262 of 1951, D/- 4-7-1952.

(a) Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), S. 27 — Appeal lies from order of controller which need not be final — Order of controller under S. 29 relating to question affecting his jurisdiction — Order is not mere interlocutory order — Appeal lies. (Para 4)

(b) Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), S. 29 — Rules under Act, R. 4(3) — Re-transfer of case to Munsif by controller.

It is true that in the Calcutta Thika Tenancy Act, there is no express provision for retransfer of case from the file of the Controller back to the file of the Munsif. But if in fact the Controller finds that the suit does not relate to the Thika tenancy at all and that he has therefore no jurisdiction to try it, he can retransfer the case to the file of the Munsif. Civil Revision Cases Nos. 1272 and 1273 of 1950 Ref. (Paras 4, 5)

Nilkantha Chatterjee, for Petitioner; Sushil Chandra Dutt, for Opposite Parties.

ORDER: This is a revisional application under the provisions of Art. 227, Constitution of India, from an order of the District Judge of the 24 Parganas dismissing summarily an appeal under S. 27(1), Calcutta Thika Tenancy Act 1949, from an order of the Controller, Sealdah.

(1a) The petitioner landlord instituted Title Suit No. 816 of 1948 in the first court of the Munsif of Sealdah for ejectment of the tenant opposite party from a parcel of bastu land measuring 4 cottas held at the monthly rent of Rs. 12/-. The hearing of the suit was stayed when the Thika Tenancy Ordinance came into force on 26-10-48. After the Thika Tenancy Act, 1949, had been passed the suit was transferred to the file of the Controller on 4-4-50 under the provisions of S. 29 of the Calcutta Thika Tenancy Act of 1949.

On 15-9-50 the petitioner filed an application before the Controller for re-transferring the suit to the file of the Munsif on the ground that the tenancy was not a thika tenancy within the meaning of the Calcutta Thika Tenancy Act, 1949, in accordance with various rulings of the Calcutta High Court on the point. The Controller rejected such application on 28-4-51 finding that the tenancy was a Thika Tenancy within the meaning of the Act and therefore the Controller had jurisdiction. This order was passed on 28-4-51.

From that order, the landlord petitioner filed an appeal under the provisions of S. 27 (1) of the Thika Tenancy Act to the District Judge. The learned District Judge of 24 Parganas dismissed the appeal summarily on 18-6-51 holding that though S. 27(1) provides an appeal to the District Judge from an order of the Controller, the words "an order of the Controller" must mean, a final order, because if any other meaning was given to the words, an appeal would lie even from an order refusing an adjournment which would be absurd.

(2) In this revisional application, it is urged that the District Judge, acted illegally and with material irregularity in dismissing the appeal summarily. It is also urged that the order of the Controller was bad in law in view of the decisions of the Calcutta High Court. It should be noted however that the revisional application is mainly directed against the order of the learned District Judge dismissing an appeal summarily. The point for decision is whether the learned District Judge was wrong in holding that an appeal lay only from a final order of the Controller.

(3) Section 27(1) of the Calcutta Thika Tenancy Act, 1949, provides that any person aggrieved by an order of the Controller may within 30 days from the date of the order present an appeal in writing, in respect of any holding in the Presidency Town of Calcutta to the Chief Judge of the Court of Small Causes, Calcutta and in respect of any holding elsewhere, to the District Judge of the district in which the holding concerning which such order is made is situated. There is nothing in this section to show that an appeal lies only from a final order. The learned Advocate for the opposite party has argued on the analogy of an appeal u/s. 299 of the Succession Act, 1925, that an appeal lies only from an order of the Controller made in exercise of the powers conferred upon him by the Thika Tenancy Act and not from any interlocutory order or order passed in the exercise of inherent jurisdiction. I do not however think that the analogy of S. 299, Succession Act, applies, because in S. 299, Succession Act, it is provided

that every order made by a District Judge "by virtue of the powers hereby conferred upon him" shall be subject to appeal in accordance with the provisions of Civil P. C. applicable to appeals. In other words, S. 299 itself provides that an appeal lies from an order of the District Judge passed under the powers conferred upon him by the Succession Act.

In S. 27(1), Calcutta Thika Tenancy Act, 1949, the words "order of the Controller" are not so limited as to indicate that only an order of the Controller made under the provisions of the Thika Tenancy Act would be subject to an appeal. There is no doubt the difficulty pointed out by the learned District Judge that if an appeal lies from every order, an appeal would lie even from an order refusing an adjournment and this would lead to an absurd position. But this difficulty can be remedied only by amendment of the words of S. 27(1). Further in the present case the order of the Controller cannot be regarded as a mere interlocutory order. The order related to a question affecting his jurisdiction, because if the tenancy is not in reality a thika tenancy within the meaning of the Thika Tenancy Act of 1949, the Controller would have no jurisdiction at all to proceed with the suit and the suit must go back to the file of the Munsif.

(4) The learned Advocate for the opposite party has also urged that under the provisions of the Calcutta Thika Tenancy Act, 1949, the Controller has no power to retransfer a suit to the file of the Munsif. Section 29, Thika Tenancy Act, 1949, provides for the transfer to the Controller of cases relating to Thika tenancy and not for retransfer of cases from the Controller to the ordinary civil Court. It is true that in the Calcutta Thika Tenancy Act, 1949, there is no express provision for retransfer of cases from the file of the Controller to the ordinary Civil Court; but if in fact it is found that a suit does not relate to a thika tenancy, it is clear that the Controller can have no jurisdiction and the case must go back to the Civil Court.

(5) It is finally urged on behalf of the opposite party that it is only the District Judge who could retransfer the case back to the file of the Munsif under the provisions of S. 24, C.P.C. and the Controller himself could not do so, because the Controller has to be governed by the provisions of Civil P. C. In this connection, the learned Advocate has referred to Rr. 4(3) and 12 of the Rules framed under the Calcutta Thika Tenancy Act. This is a point however that I need not finally decide as I propose to send back the case to the file of the learned District Judge, 24 Parganas, for disposal of the appeal on merits and the point therefore can be considered by him. I may note however in passing that in an unreported case, Civil Revision Cases Nos. 1272 and 1273 of 1950 Roxburgh J. approved of a retransfer by the Controller to the file of a Munsif on the ground that the Munsif should first decide whether the tenancy was in fact a thika tenancy.

(6) The Rule is therefore made absolute, and the case is sent back to the court of the learned District Judge of 24 Parganas for disposal of the appeal under S. 27(1), Thika Tenancy Act, on merits.

(7) In the circumstances the parties will bear their own costs in this Rule.

B/R.G.D. Rule made absolute.

A.I.R. 1953 CALCUTTA 202 (Vol. 40, C. N. 69)

R. P. MOOKERJEE AND LAHIRI JJ.

Corporation of Calcutta, Defendant-Appellant v. Sailendra Nath Ghosh and others, Plaintiffs-Respondents.

A. F. O. O. No. 77 of 1950, D/- 7-4-1952.

(a) Municipalities — Calcutta Municipal Act (III (3) of 1923), Ss. 124 and 127 and 131 and 363 and 364 — Assessment on unauthorised structures.

Sections 363 and 364 are not of much assistance in determining the rateability or otherwise of unauthorised structures. 37 Cal 833 and 37 Cal 837, Ref. (Para 11)

Sections 124, 127 and 131 make no distinction between structures which are lawfully raised and those which have been raised without any permission or requisite sanction, and the Corporation is entitled to assess rates on structures which had been constructed without obtaining the sanction of the Corporation. (Paras. 3, 16)

No question of public policy arises in a case of this description. The liability to rates, so far as the Calcutta Municipal Act is concerned, is on the basis of the annual value. Clause (a) of S. 127 is attracted when there is an income arising from the property by letting it out. If the assessee makes a building without getting a sanction of the Corporation, he reaps advantage arising therefrom by using it himself, or by having an income by letting it out, and if a rule of public policy is at all to be introduced that would be against the assessee who is liable to pay the rates on the income which that property yields. Under no rule of public policy can the owner and the occupier be allowed to use the building without payment of rates until, it may be after years, an order for demolition is obtained. (1895) AC 117 and (1882) 10 QBD 267, Rel. on. (Paras 12, 13)

(b) Municipalities — Calcutta Municipal Act (III (3) of 1923), Ss. 131 and 138 — Defective notice — Effect.

Section 131 makes it absolutely clear that if any reassessment becomes necessary that can be done only on intimating the party concerned that the Corporation is proceeding to revise the valuations. The procedure to be followed is exactly the same whether the assessment be made for the first time or for an increased valuation. A special notice is to be given under S. 138 and if there be some defect or irregularity in the notice or in the substance of the notice, the facts of each particular case will have to be taken into consideration for determining whether that notice satisfies in substance the provisions contained in S. 138. If the ground of increase is not correctly or fully stated that will not take away the jurisdiction of the corporation to fix an annual value for the purpose of the rates if the notice did not mislead the assessee and it will be a sufficient and valid notice under the law. (Para 19)

(c) Municipalities — Calcutta Municipal Act (III (3) of 1923), S. 131 — Interpretation.

It cannot be contended that where the intermediate revaluation is under either clause (c) or clause (d) of S. 131 (2) on

the basis of substantial alteration and improvement or the erection of new buildings giving rise to the intermediate revaluation, the new building or the building which has been substantially altered and improved has to be revalued and such revaluation should be according to the relevant provisions of either clause (a) or clause (b) of S. 127 dependent upon the fact whether such improved structures or new buildings are meant to be let out or are not ordinarily let out or are not erected for letting purposes. Clauses (c) and (d) of sub-section (2), S. 131 cannot be interpreted in this way. All that these two clauses provide is that it is not the entire valuation as under the original general revaluation which is to be scrapped, but that only such portion of the original valuation as is necessitated by the changed circumstances be modified or added to. (Para 17)

Sunil Kumar Bose and Ranajit Ghose, for Appellant; Benoyendra Prosad Bagchi, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('10) 37 Cal 833: (6 Ind Cas 800) 11
('10) 37 Cal 837: (8 Ind Cas 654) 11
(1895) AC 117: (64 LJMC 113) 14
(1882) 10 QBD 267: (1883-9 AC 61) 14

R. P. MOOKERJEE, J.: This is an appeal on behalf of the Corporation of Calcutta and arises out of proceedings initiated by the assessees under S. 141, Calcutta Municipal Act, against the decision of the Deputy Executive Officer about intermediate valuation in respect of premises No. 92, Beltoia Road, Calcutta, with effect from the third quarter of 1948-49.

(2) The objections raised by the assessees before the learned Judge, Court of Small Causes, Sealdah, were accepted and it was ordered that the assessment made by the First Deputy Executive Officer be cancelled and vacated.

(3) The principal point raised in this appeal is whether the Corporation is entitled to assess rates on structures which had been constructed without obtaining the sanction of the Corporation and they came within the category of unauthorised buildings. Two other points which also were raised will be considered later on.

(4) To appreciate the first point raised it is necessary to refer to some of the relevant facts. Premises No. 92, Beltola Road, was assessed during the last general revaluation with effect from the fourth quarter of 1945-46 under clause (a) of S. 127, Calcutta Municipal Act. The total area was 9 cottas with a few structures, one of them being a brickbuilt one and another being a shed. In December, 1946, four out of the nine cotta vacant plots were let out to a tenant by the owner at Rs. 40/- per mensem. It appears from the evidence that in or about 1947 the tenant raised certain structures on practically the entire portion of the four cotta plot taken on lease without obtaining any sanction from the Corporation as required under the building regulations. When these structures were completed steps were taken by the assessment department of the Corporation to serve notice for an intermediate revaluation with effect from the third quarter of 1948-49. It is in respect of this intermediate revaluation that objection was raised by the assessees before the Chief Executive Officer. After the hearing of the objections, the annual value was raised from Rs. 757/- as under the previous general revaluation to Rs. 819/-. It may be mentioned that the original annual value as proposed by the department was Rs. 1630/- which was reduced to this figure on objection raised by the assessees.

(5) It appears further that the building department of the Calcutta Corporation had been taking steps for bringing the question of the raising of the structures without previous sanction before the competent authority. Ultimately after the matter had been disposed of by the learned Judge of the Court of Small Causes and the appeal had been presented to this Court by the Corporation, an order was obtained from the Municipal Magistrate of Calcutta for the demolition of these structures. This fact was brought to our notice by both the parties at the time of the hearing of the appeal.

(6) On behalf of the assessees, .. is contended that the raising of the unauthorised structures could not entitle the Corporation to have an intermediate valuation fixed. This objection has been given effect to by the lower Court. It is necessary in this connection to consider the relevant provisions of the Calcutta Municipal Act as to whether the circumstances under which the structures had been raised could be taken into consideration for assessment of rates and also whether as a question of public policy rates should or should not be assessed on such unauthorised structures.

(7) Section 124, Calcutta Municipal Act, is the charging section which authorises the Corporation to impose a consolidated rate "upon all lands and buildings in Calcutta for the purpose of this Act." It will be noticed that the language used in this section is all inclusive and 'all lands and buildings' situated in Calcutta become assessable to rates. We may refer in this connection to clause 7, S. 3 of the Act which defines a building. A building includes different kinds of structures referred to in that clause, but does not include "a 'bogla' or other similar kind of temporary shed erected on ceremonial festive occasions." It is not contended that the structure raised in the present case comes within the exception mentioned in this case. The various items referred to in the earlier portion of this clause are merely descriptive of the nature of the structures without any reference to the circumstances under which such structures had been raised.

The exception, on the other hand, makes a reference to the occasion or the circumstances under which these temporary sheds are raised. There are certain other exceptions introduced by S. 126 of the Act which disentitles the Corporation for levying rates in certain cases or under certain circumstances. We need not refer to the details of this section as it is not contended before us that the circumstances arising in the present case can bring the structures within the purview of the exceptions mentioned therein.

(8) Section 127, Calcutta Municipal Act, lays down how the annual value of land and/or building has to be ascertained for determination of the rates. As stated already, the assessment made in the present case is under clause (a) of S. 127. The relevant portion of that section so far as this point is concerned is as follows:

"For the purpose of assessing land and buildings to the consolidated rate—

(a) the annual value of land and the annual value of any building erected....."

A certain procedure laid down in that clause is to be followed. There are no qualifying words appearing before the expression "land and buildings" in the opening phrase. On the other hand, where reference is made to the annual value of a building, the Legislature takes care to include the annual value of 'any building'. There is no indication from this clause that any differentiation was intended to be made between structure raised with the previous permission of the Corporation and one put up without obtaining such sanction. On the other hand, the expression "any building" used in that clause makes it abundantly clear that all kinds of buildings subject to the provisions contained in clause 7 of section 3 defining buildings are liable to be assessed on the basis of annual value to be fixed under S. 127, Calcutta Municipal Act.

(9) The assessment in the present case was an intermediate one occasioned by circumstances which are detailed in S. 131, Calcutta Municipal Act. Here also, the opening words of clauses (c) and (d) of sub-section (2) of S. 131 make specific reference to "any substantial alteration and improvement made in any building" (in clause c) and "if.....'any' new building is erected" (in clause d) and they point unmistakably to the implications of these clauses. Whether it be a substantial alteration or improvement to any existing building, or whether it be the erection of any new building, the buildings referred to answer the description which would attract the provisions contained therein. No differentiation is contemplated in either of the two cases between a building erected, with the sanction or otherwise from the Corporation, by a tenant or by a trespasser. It is not open to the party to ask us to consider the circumstances under which the buildings were erected. The only test to be applied is whether there has been a new building or any substantial alteration or improvement to any building.

(10) Reference was made by both the parties before us as to the effect of the provisions contained in Ss. 363 and 364 of the Calcutta Municipal Act. These two sections appear in Chapter XXIII of the Calcutta Municipal Act which deals with the "demolition, alteration and stopping of unlawful work". Reference may be made to the provisions contained in these two sections which lay down that notwithstanding any valuation of any unauthorised structure having been made by the Chief Executive Officer, the jurisdiction of the Corporation to take action against such unauthorised structure will not in any way be affected.

(11) So far as the Corporation is concerned, it was contended that the provisions in these two sections indicate that there is a right to assess unauthorised structures. We cannot accept this contention. This is not a charging section, and on the other hand, the exception made in these two sections is for the purpose of retaining the authority of the Corporation to proceed against an improper and illegal act done by a rate-payer. There is no indication in either of these two sections that the Corporation was authorised under the provisions to levy rates on those unauthorised structures. Reference may in this connection be made to the earlier decisions of this Court wherein these provisions under Chapter 23 of the Act came up for consideration. The decisions were under S. 449 of the repealed Act of 1899 where there was no such explicit provision about the saving of the authority of the Corporation to proceed against unauthorised structures after rates have once been assessed on them.

It was argued in these cases that the acceptance of rates by the Corporation was a waiver of the right to get a demolition order of the unauthorised structures. Vide — 'Lachmi Narayan v. Corporation of Calcutta', 37 Cal 833 and — 'Bholaram v. Corporation of Calcutta', reported in the same volume at p. 837, foot note. When the 1923 Act was passed this line of argument was made impossible by the provisos above mentioned following the decisions referred to above. In our view, these two sections are not of much assistance in determining the rateability or otherwise of unauthorised structures.

(12) It is next urged on behalf of the assessees that as a matter of public policy the Corporation ought not to be allowed to assess rates on illegal erections of buildings, and thereby to a certain extent reap the benefit of illegal acts by members of the public. We do not think that any question of public policy arises in a case of this description.

(13) The liability to rates, so far as the Calcutta Municipal Act is concerned, is on the basis of the annual value. Clause (a) of S. 127 is attracted when there is an income arising from the property by letting it out. If the assessee makes a building without getting a sanction of the Corporation, he reaps advantage arising therefrom by using it himself, or by having an income by letting it out, and if a rule of public policy is at all to be introduced, that would be against the assessee who is liable to pay the rates on the income which that property yields. Under no rule of public policy can the owner and the occupier be allowed to use the building without payment of rates until, it may be after years, as in the present case, an order for demolition is obtained.

(14) Our attention has not been drawn to any case where such a claim had been made in the past. But that does not mean that if such a claim is sustainable it is not to be allowed. Reference may, however, be made to a discussion of an analogous matter in the English Courts. As is well known, in England assessment of rates depends on a basis altogether different from that laid down under the Calcutta Municipal Act. Under the statute of Elizabeth I, the occupier is to be the person who is to be rated. The Courts have endeavoured and struggled to explain what is meant by occupation and who is to be considered to be a ratepayer. There is no statutory definition of the term "occupier". Occupation as used in connection with the law of rating in England is to be decided on first principles. Can the question of title be looked into for determining who the occupier is?

Lord Herschell, L. C., observed in — 'Holywell Union v. Halkyn District Mines Drainage Co.', (1895) A. C. 117 at p. 125:

> "The question whether a person is an occupier or not within the rating law is a question of fact and it is not dependent upon legal title."

Lord Macnaghten observed in the same case at page 127 of the report:

> "Liability to rates is not a matter of title. The question in each case must be whether there is in fact such an occupation as, according

to the statute of Elizabeth and a course of decisions which have been recognised and established at law, carried with it liability for rating purposes."

If a person in 'de facto' possession of land were to claim to show that his possession was that of a trespasser, and on this ground to escape rateability, he would be taking advantage of his own wrong — 'Coomber v. Berks JJ.', (1882) 10 Q B D 267 at p. 282. No such result follows where a person produces evidence of title to show that his acts which may or may not amount to an exercise of the right to occupy are lawfully done under a title which comes under such a right.

(15) In England, therefore, when attempts were made to escape liability to rates by occupiers on the ground that they had come into occupation illegally or improperly, they were not allowed to do so. One of the principles as noted above, is that a person is not to take advantage of his own wrong and reap the benefit himself, while he will refuse to pay the public dues which a person occupying the premises is liable under the law.

(16) On an examination of the provisions contained in the Calcutta Municipal Act to which reference has already been made, it is clear that those provisions make no distinction between structures which are lawfully raised and those which have been raised without any permission or requisite sanction. This contention on behalf of the assessees should, therefore, be overruled.

(17) The next contention which had been raised on behalf of the assessees was that the structures had been raised by the lessee not for letting purposes but for his own use. It is contended that as regards the right to make an intermediate revaluation, the Corporation is to assess it under S. 127(b) and not under S. 127(a), Calcutta Municipal Act. It is, however, overlooked that the premises had originally been assessed under clause (a) of S. 127, and that the intermediate revaluation is of an assessment which had so been made previously on a rental basis under clause (a). It is, however, contended that where the intermediate revaluation is under either clause (c) or clause (d) of S. 131(2) on the basis of substantial alteration and improvement or the erection of new buildings giving rise to the intermediate revaluation, the new building or the building which has been substantially altered and improved has to be revalued.

Such revaluation, it is contended, should be according to the relevant provisions of either clause (a) or clause (b) of S. 127 dependent upon the fact whether such improved structures or new buildings are meant to be let out or are not ordinarily let out or are not erected for letting purposes. We do not think that clauses (c) and (d) of sub-section (2) of S. 131 can be interpreted in this way. All that these two clauses provide is that it is not the entire valuation as under the original general revaluation is to be scrapped, but that only such portion of the original valuation as is necessitated by the changed circumstances be modified or added to. That is exactly what has been done in the present case. On reference to the details of the basis of assessment of the general valuation and to those of the intermediate valuation, it becomes unquestionable that portion of the land on which the structures have been raised and the value of the new structures have been taken into consideration under clause (a) of S. 127 of the Act, and that is on the same basis as the original valuation had been made. There has been no defect whatsoever, & none of the directions contained in clauses (c) and (d) of sub-s. (2) of S. 131 have been violated. This objection also cannot, therefore, be entertained.

(18) The next objection raised was with reference to the notice which had been issued under S. 138, Calcutta Municipal Act. The ground of increase, as noted in this notice, exhibit 2, was stated to be

"Increase in the estimated yearly rental value less statutory allowance for repairs due to substantial alteration and improvement made in the building."

On behalf of the assessees, it is argued that on the evidence it appears that no substantial improvement or addition had been made to the structures which had originally been in existence when the general revaluation was given effect from the fourth quarter of 1945-46. It was on the four cotta vacant plot which had been leased out by the owner that a new structure had been raised. So this would be a case falling within Cl. (d) and not Cl. (c) of sub-s. (2) of S. 131, Calcutta Municipal Act. The notice, however, as issued indicated that the intermediate revaluation had been occasioned not owing to new structures having been raised, but to substantial alteration and improvement. It was not, therefore, open to the Corporation on issuing such a notice to assess the new structures under Cl. (d) of sub-s. (2) of S. 131.

(19) On behalf of the Corporation, an extreme position has been taken that no notice need be issued. We do not think that we can give effect to such a contention. Section 131, Calcutta Municipal Act, makes it absolutely clear that if any reassessment becomes necessary that can be done only on intimating the party concerned that the Corporation is proceeding to revise the valuations. The procedure to be followed is exactly the same whether the assessment be made for the first time or for an increased valuation. Section 138 of the Act makes it abundantly clear. A special notice is to be given. Such a notice was given in the present case, but the mention of the ground of increase was not quite accurate. On behalf of the assessees, reference is made to the last part of the sentence appearing in S. 138 of the Act where it is laid down that the notice shall contain a statement of the grounds for such an increase. If the ground is not correctly or fully stated will that take away the jurisdiction of the Corporation to fix an annual value for the purpose of the rates? We do not think that in the special facts of this case, the mistake in the notice can affect the legality of the assessment. The party concerned had not been misled at all, and on the other hand, had in the objection filed by them, exhibit 4(a), referred to all the circumstances under which the structures had been raised.

The assessees were given a full hearing and they had further the fullest opportunity of making their case on the basis of Cl. (d) of sub-s. (2) of S. 131, Calcutta Municipal Act, and they have not been put to any disadvantage because of the particular statement contained in the notice. A notice has to be given, and if there be some defect or irregularity in the notice or in the substance of the notice, the facts of each particular case will have to be taken into consideration for determining whether that

notice satisfies in substance the provisions contained in S. 138, Calcutta Municipal Act. In the special circumstances of this case we hold that the notice did not mislead the assessees, and that it was a sufficient and valid notice under the law.

(20) All the objections raised by the assessees fail, and the appeal filed by them under S. 141, Calcutta Municipal Act, before the Court of Small Causes, Sealdah, must be dismissed.

(21) This appeal is accordingly allowed with costs of this Court, the hearing fee being assessed at three gold mohurs. The order of the lower Court is set aside and the objections of the assessees are rejected. The original assessment made by the Deputy Executive Officer stands.

(22) LAHIRI, J.: I agree.

B/D.H. Appeal allowed.

A.I.R. 1953 CALCUTTA 206 (Vol. 40, C. N. 70)

HARRIES C. J. AND S. R. DAS GUPTA J.

Arabinda Dey, Appellant v. The State.

Criminal Appeal No 181 of 1951, D/- 12-3-1952.

(a) Evidence Act (1872), S. 133 — Case of rape on girl of 7 years depending on her evidence — Her evidence changing from time to time — Her evidence must be corroborated: AIR 1952 SC 54, Relied on — (Penal Code, S. 376). (Para 6)

Anno: Evid. Act, S. 133 N. 6; Penal Code, Ss. 375, 376 N. 4.

(b) Evidence Act (1872), S. 33 — Death of witness must be established.

Where a witness had died before a Sessions trial, the evidence given by him in the Court of the enquiring magistrate is admissible in evidence under S. 33, Evidence Act. But before that deposition can be put in, strict proof must be given of the death of the witness. (Para 7)

Anno: Evid. Act, S. 33 N. 4.

(c) Evidence Act (1872), S. 33 — Adverse party must have had right to cross examine witness.

The evidence is only admissible under S. 33 if the accused had a right to cross-examine him and if he had no right then it does not become admissible because there was cross-examination.

In a case proceeding as a warrant case by reason of S. 256, Criminal P. C., and the preceding sections the accused has no right to cross-examine witness until the charge has been framed. The fact that he was cross-examined, does not make his evidence, admissible under S. 33. (Para 12)

Anno: Evid. Act, S. 33 N. 11.

(d) Evidence Act (1872), S. 33 — Issues in case in which witness was examined and in case in which his evidence is sought to be admitted under S. 33 must be same. (Obiter, per Harries C. J.). (Para 13)

Anno: Evid. Act, S. 33 N. 12.

(e) Criminal P. C. (1898), S. 297 — Evidence of witness admitted under S. 33 — It is duty of Judge to warn jury, that though such evidence was treated as substantive evidence, yet it was for them to consider whether they could accept the evidence in the deposition having regard to the fact that they had not had the advantage of seeing and hearing the witness — Failure amounts to non-direction — (Evidence Act (1872), S. 33). (Para 14)

Anno: Evid. Act, S. 33 N. 1; Cr. PC, S. 297 N. 12.

Sudhansu Sekhar Mukherji, Ajit Kumar Dutt; Jnanendra Mohan De and Kishore Mokerji, for Appellant; J. M. Banerjea, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('46) AIR 1946 PC 1: (ILR (1945) Lah 451 PC) 10
('52) 1952 SCJ 46: (AIR 1952 SC 54: 1952 Cri LJ 547 SC) 6
('50) Cri Appeal No 236 of 1949, D/- 3-3-1950 (Cal) 12

HARRIES, C. J.: The appellant was tried by a learned Sessions Judge and a jury upon a charge of rape. He was found guilty by a majority of 3 to 2. The learned Sessions Judge accepted the verdict of majority, convicted the appellant under S. 376 and sentenced him to five years' rigorous imprisonment and also five stripes.

(2) The appellant being dissatisfied with the verdict, conviction and sentence, has preferred an appeal to this Court and the appeal is confined to questions of law, namely, whether there were any misdirections in the charge of the learned Judge to the jury. Before discussing the charge it will be convenient shortly to set out the facts which gave rise to the prosecution. The girl said to be raped was of the name of Dulali. She was about seven years of age and went about with her father, Gangasadhan Ghatak, earning their living by begging. It is said that they came to the town of Burdwan about two months previous to the incident which led to this charge. They were accustomed to sleep at night on the verandah of a Thakurbari which was owned by the appellant and actually adjoined his house. On 17-11-1950, the prosecution alleged that the little girl and her father were sleeping on the verandah of this Thakurbari when at or about midnight the appellant came there and enquired who they were. On the father replying that they were beggars, Arabinda is said to have asked them if they had taken any food. They replied that they had, but Arabinda it is said insisted that they must take something from him. Arabinda then sat beside the little girl passed his hand over her body and pulled down the pyjama she was wearing. He then it is said inserted something into her private parts which caused her intense pain whereupon she cried out. Arabinda, it is said, then went into the house and hurriedly brought out some sweetmeats and offered them to both the father and the child. Shortly after, persons came by including one Sivada Mukherjee, carrying a powerful light and as he approached the appellant ran back into his house.

(3) The father and the girl went to the thana which was nearby and made a first information report & it is interesting to note that in that first information report no allegation of rape is made. Investigation was made by the police and a charge-sheet was submitted to the Court. In that charge-sheet all that was suggested against the appellant was the crime of outraging this little girl's modesty. Upon that charge the case proceeded.

(4) It seems that on the following morning the little girl was medically examined and a swab was taken. This swab it is said was sent to

the Chemical Examiner on 3-3-1951 and later in the morning the report of the Chemical Examiner was received suggesting that the swab showed signs of spermatozoa. When this report was received by the Court of the Magistrate, the latter appears to have converted the case which was proceeding as a warrant case to an enquiry into the charge of rape. He eventually committed the appellant to stand his trial in the court of session on the charge of rape.

(5) In the court of session the little girl gave evidence but her father it is said had died in the meantime. The evidence given by him in the court of the magistrate was tendered and accepted as substantive evidence in the Court of Session. The evidence of other witnesses was taken and eventually the Jury, as I have said by a majority of 3 to 2 found the appellant guilty.

(6) Mr. Sudhansu Mukherji on behalf of the appellant had contended that the girl's evidence in this case was not corroborated and that it would be dangerous in a case of this kind to convict solely upon the little girl's statement. In a recent case in the Supreme Court — 'Rameshwar v. State of Rajasthan', 1952 S C J 46 that Court has held that corroboration in cases of this kind is desirable though not essential. For reasons which will appear later, I think that this is a case where corroboration is essential. There are features in the case that would make it practically impossible for any court to act on the little girl's evidence unless it was corroborated.

(7) The only corroboration suggested in (is?) the evidence of the girl's father, Gangashadhan Ghatak, given in the court of the magistrate. Mr. Mukherji has urged that deposition was inadmissible for a number of reasons. Where a witness had died before a Sessions trial the evidence given by him in the court of the enquiring magistrate is admissible in evidence under S. 33 of the Evidence Act. But before that deposition can be put in strict proof must be given of the death of the witness. The order-sheet shows that the learned Judge accepted the evidence merely because it was tendered by the Public Prosecutor and the only evidence of the death of the father is the evidence of the little girl who said that he died four months before the date on which she gave evidence at some place called Galsi. Can the uncorroborated testimony of this little girl as to the death of her father be regarded as strict proof of death which is necessary to permit the deposition in the court of the committing magistrate being accepted as evidence?

(8) The father in this case would have been a very difficult witness for the prosecution. The little girl's story, to say the least of it, is amazing. She alleges that she was raped in the presence of her father who apparently was ignorant of it until the little girl cried out. In her examination-in-chief she tried to make out that her father was asleep when the rape was committed. But in cross-examination she admitted that he was awake throughout, and the first information report made by the father makes it clear that he was awake throughout. Is it conceivable that this little girl would be raped in the presence of her father? The father would have been met with cross-examination on those lines had he been alive and gone into the witness box.

(9) Further it had been suggested that this case had been brought against the appellant by his arch enemy, one Jagabandhu. The father in a petition which he filed in court on November 21 stated that the appellant was not the person guilty, but that it was Jagabandhu, though on December 11 he filed another statement withdrawing his allegation against Jagabandhu and stating that the appellant was the guilty person. If the father had been alive and given evidence he would have been severely cross-examined on these matters. Further there was evidence that when the father went to the thana, Jagabandhu, the appellant's arch enemy, also appeared and was with the father, though how he came to join the party it is impossible to say. That is a matter which the father might have found difficult to explain.

(10) There were therefore cogent reasons why the father, if alive, should be kept out of this case and one may well suspect that the story of his death was introduced in order to avoid cross-examination. Having regard to these factors it was I think incumbent on the prosecution to bring cogent evidence to prove that the father was dead and, as I have said, the evidence of this little girl which is very vague and wholly uncorroborated is not such cogent proof as the law requires. The necessity of strict proof was stressed by their Lordships of the Privy Council in — 'Chainchal Singh v. Emperor', AIR 1946 P C 1.

(11) Having regard to the matters which I have indicated there was special need for strict proof in this case and it was not forthcoming. Therefore the deposition given by Gangasadhan in the court of the committing magistrate was wrongly admitted in evidence and once that is held it follows that there was no corroboration whatsoever of the little girl's story.

(12) Mr. Mukherji has further pointed out that even if the father was dead his deposition in the court of the committing Magistrate was still inadmissible. Section 33, Evidence Act, makes the deposition admissible provided in the first place that the proceeding was between the same parties or their representatives in interest. Such was the case here. It is also admissible provided that the adverse party in the first proceeding had the right and opportunity to cross examine in such proceeding. The father Gangasadhan was cross examined in the first proceeding, but Mr. Mukherji has urged that the defence had no right to cross-examine as the case was proceeding as a warrant case when Gangasadhan gave evidence. That it was proceeding as a warrant case at that stage admits of no doubt and it is clear that by reason of S. 256, Criminal P. C., and the preceding sections the accused had no right to cross examine until the charge had been framed. It has been held by a Bench of this Court in Cri. Appeal No. 236 of 1949, D/- 3-3-1950 that it is immaterial whether the witness was cross-examined or not. The evidence is only admissible if the accused had a right to cross examine him and if he had no right then it does not become admissible because there was cross-examination. It seems to me, following that decision, that we must hold that in the present case, though there was cross-examination, the accused had no right to cross examine and therefore the deposition would not be admissible under S. 33 of the Evidence Act.

(13) Lastly, to make the deposition admissible the questions in issue in the two courts must

be substantially the same. When the father was cross-examined the matter in issue was far less serious, namely, outraging this girl's modesty by an act which at most would amount to an indecent assault. In the Sessions Court the issue was grave, namely, rape and I have very grave doubts whether the issues can be said to have been substantially the same in both courts. However it is unnecessary to stress the point because it appears to me that there was no strict proof of the death of the father and that being so, the deposition could not be admitted.

(14) But even if this deposition was admissible it appears to me that the learned Sessions Judge was guilty of a grave non-direction. If the deposition was admissible he of course would have to tell the jury that the deposition was a piece of substantive evidence. But he would also have to warn the jury as to the weight which they should attach to such evidence. He would have to tell the jury that as regards other witnesses they had had the advantage not only of hearing them, but seeing them and observing their demeanour, whereas with regard to the father's evidence all that they had before them was cold hard print. They ought to have been told that it would be for them to consider whether they could accept the evidence in the deposition having regard to the fact that they had not had the advantage of seeing and hearing Gangasadhan. The learned Judge made no reference whatsoever to that aspect of the case.

(15) Mr. Mukherji also contended that the learned Judge had misdirected the jury on the admissibility of the first information report. At page 38 of the paper book the learned Judge in his charge does make it clear that the first information report is not substantive evidence. But in an observation he makes at page 42 he seems to suggest that the first information report is very much substantive evidence. He told the jury:

> "In the F. I. R. the miscreant was described as a Babu of the house. His appearance was described and it was also specifically stated that he had a tuft of hair (Chaitan) which he has got even now. Dulali and her father identified him in Court as the man referred to."

(16) There he seems to suggest that the first information report is evidence in itself and not merely a document corroborating the informant, the father. At page 43 it is stated that the witness Shivada Mukherjee was named in the first information report as having been told of the occurrence and that he supplied the name of the accused. His name appears in the first information report as present when it was recorded. There again the suggestion is that the first information report is substantive evidence. Further there is another misdirection in this charge because Shivada Mukherjee denied that he ever gave the name of the accused to the father. That I think should have been stated by the learned Judge when dealing with this aspect of the case.

(17) For the reasons which I have given the verdict of the jury cannot be sustained. This deposition was in my view inadmissible and therefore the jury were asked to consider evidence which should not have been placed before them. That in itself would be enough to vitiate the verdict. Further, once this deposition is eliminated there is no evidence at all corroborating the evidence of the little girl. Further it seems to me that some of the observations of the learned Judge concerning the first information report also amount to a misdirection.

(18) The verdict of the jury must therefore be set aside and so must the conviction and sentence. The question arises what course should this Court pursue. The court can direct a retrial or it can in a proper case acquit the appellant. It appears to me that in this case the state of the evidence is such that it would be both a waste of public time and money to order a retrial of this appellant, because once the deposition of Gangasadhan is excluded there is no evidence at all corroborating the little girl's story and for the reasons which I have given the jury would have to be told that it would be highly dangerous to convict upon the little girl's evidence standing by itself. Further it appears to me that the story is far too improbable to be true. How could this little girl be raped or even interfered with in the presence of her father and who would dare to do it? Is it likely that a man of the position of Arabinda Dey would conduct himself in this fashion in the very presence of the little girl's father?

(19) Another very suspicious feature in this case is the evidence relating to taking a swab. That it is said was done on November 19 but for some reason it was not sent to the Chemical Examiner until March, 1951. Much can happen to swabs in the meantime and therefore the evidence of the Chemical Examiner as to the examination of this swab is really worthless. In my judgment the case is so improbable and the evidence so unsatisfactory that no jury properly directed could possibly convict.

(20) Again a very valuable piece of evidence for the prosecution is that the witness Mukherjee came shortly after the occurrence carrying a strong light and he recognised and named the accused. But Mukherjee denies that. How could a jury in the circumstances convict the appellant of this crime when the prosecution version is so extraordinary. It appears to me that the only course that this Court can follow upon this evidence is to acquit the appellant.

(21) In the result therefore this appeal must be allowed. The verdict of the jury and the conviction and sentence are set aside and the appellant is acquitted. He need not surrender to his bail and his bail bond is discharged.

(22) S. R. DAS GUPTA J.: I agree.

B/R.G.D. Appeal allowed.

A.I.R. 1953 CALCUTTA 208 (Vol. 40, C. N. 71)

P. B. MUKHARJI J.

Nityananda Ghose, Applicant v. Rajpur Chhaya Bani Cinema Ltd., Respondent.

Suit No. 202 of 1952, D/- 30-5-1952.

(a) Transfer of Property Act (1882), Ss. 58 and 96 — Equitable mortgage — Nature of.

By the combined operation of Ss. 96 and 58(b) an equitable mortgage must be held to be a mortgage where the mortgagor binds himself personally to pay the mortgage-money. (Para 7)

Anno: T. P. Act, S. 58 N. 39 Pt. 87.

(b) Transfer of Property Act (1882), S. 68(1)(a) — Equitable mortgage — Right of mortgagee to recover mortgage-money from mortgagor.

In an equitable mortgage, the mortgagee has a right to sue for the mortgage-money within the meaning of S. 68(1)(a) and further under such an equitable mortgage the mortgagor binds himself to repay the mortgage-money within the meaning of S. 68(1)(a). (Para 7)
Anno: T. P. Act, S. 68 N. 2.

(c) T. P. Act (1882), S. 68(2) — "Stay the suit" — Application for stay when can be refused.

In order to stay the proceedings in a suit under S. 68(2) the suit must be a suit by the mortgagee for the mortgage-money. The word "mortgagee" and the words "mortgage-money" on a proper construction of S. 68(1) indicate that the "right to sue" mentioned in that section is the right which belongs to the mortgagee only in his capacity as a mortgagee and not in a totally different capacity. The language used in S. 68(1)(a) that "mortgagor binds himself to repay" should be read as a term of the mortgage itself. These words refer to the personal liability that inheres in the mortgage.

But if the mortgagor chooses to create a personal liability by independent transaction like a promissory note, a cheque or other independent engagement completely dissociated from the mortgage, then he does not come within the scope of S. 68(1)(a) nor within the principle that security should be called up first before personal liability is enforced. In such a case as the personal liability to repay a loan arises independently of any existing mortgage, the suit is not one by the mortgagee for mortgage-money. Section 68(1)(a) is not attracted and the defendant to such a suit is not entitled to pray for stay of suit under S. 68(2). 41 Ind App 142 (PC) and (1895) 1 QB 108, Ref. (Paras 8, 9, 11, 12)
Anno: T. P. Act, S. 68 N. 2, 18.

(d) Transfer of Property Act (1882), S. 68(2) — "Stay of suit" — Mortgagor denying mortgage cannot ask to stay suit.

A mortgagor who wishes to avail of the benefit of S. 68(2) can only do so on the tacit assumption that there is a valid mortgage. He cannot deny the mortgage and at the same time invoke to apply the discretionary relief under S. 68(2). (Para 15)
Anno: T. P. Act, S. 68 N. 18.

A. C. Sircar, for Applicant; Sambid Das, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('14) 41 Ind App 142 (PC) 12
('23) 50 Ind App 283: (AIR 1923 PC 211) 7
('38) 17 Pat 737: (AIR 1938 Pat 585) 7
(1895) 1 QB 108: (64 LJ QB 1) 12

JUDGMENT: On this notice of motion taken out by the defendant Company, the application is made to stay the suit and all proceedings herein until the plaintiff has exhausted all his available remedies against the mortgaged property or until he abandons his mortgage security. The application is made under S. 68 (2), T. P. Act read with sub-s. (1) and cl. (a) thereof.

(2) In order to appreciate the point advanced by the applicant and in order to determine the point raised, it is necessary to refer to the nature of pleadings in this suit which the applicant wants to stay.

(3) This suit was instituted by the plaintiff on or about 9th January 1952. In para. 1 of the plaint the claim against the defendant company is made only on the basis of its alleged liability as drawer of a Promissory Note dated 11th January 1949 for the sum of Rs. 40,000/- carrying interest at the rate of 6 per cent. per annum payable on demand to the plaintiff or order. That is the only claim made in the plaint. In para 3 of the plaint the plaintiff pleads that the defendant also created an equitable mortgage by deposit of title deeds in respect of a cinema house situate at Rajpur outside the jurisdiction of this Court but that is only pleaded to ask for leave under O. 2, R. 2, C. P. C. to file a separate suit to enforce the mortgage if and when necessary. In this suit the plaintiff asks for a decree for a sum of Rs. 47,200/- inclusive of interest due on the promissory note. That is the only decree claimed by the plaintiff on this plaint.

(4) In the written statement the defendant company takes the defence of complete denial of the promissory note, denying that it drew the promissory note or it authorised the drawing of the promissory note. What is more the defendant company pleads further to deny the creation of any equitable mortgage and has particularly denied that it deposited or authorised anybody to deposit the title deeds in respect of the cinema house with intent to create any security. The written statement proceeds in the defence by the submission that if it is held contrary to the pleading that there has been a mortgage then this Court should stay all proceedings in this suit until the plaintiff has exhausted his remedy against the mortgaged property or abandons his claim for the mortgage security. Even a momentary reflection will show that this submission is pointless because this Court cannot determine the validity of the mortgage in this suit in which the mortgage is not in issue and which suit again the applicant himself wants to stay. The applicant, therefore, is in the paradox of wanting to stay this suit and at the same time wants this Court to determine in this suit the validity of the mortgage first. The effect of this paradox will be of importance when I discuss the question of discretion under S. 68 (2), T. P. Act.

(5) The defendant now applies to stay this suit under S. 68 (2), T. P. Act on these materials. The only ground on which the application is made is that this suit is one under S. 68 (1)(a), T. P. Act. No question under cls. (b), (c) or (d) of Section 68(1), Transfer of Property Act is involved in this case. The defendant company can only succeed if it satisfies in the first instance that it comes within the meaning of S. 68 (1) (a), T. P. Act and secondly if it satisfies me that I would, in my discretion, given to me under sub-s. (2) of that section, stay the proceedings.

(6) I propose to deal first with the argument advanced on behalf of the applicant that the requirements of S. 68 (1) (a), T. P. Act are satisfied in this case. It is argued that this is a case where the mortgagor company has bound itself to repay the mortgage-money and therefore it comes within the meaning of this section. This argument raises a very important question of law and requires careful analysis.

(7) On behalf of the respondent some argument was advanced that an equitable mortgage does not carry with it any personal liability of the mortgagor to pay the mortgage-money. I

have no hesitation in rejecting that argument. An equitable mortgage by deposit of title deeds is by the Indian law placed on a similar footing as a simple mortgage. The rights and liabilities of a mortgagor and a mortgagee under such an equitable mortgage are the same as far as may be as those under the simple mortgage. That is plain from the clear provision made in S. 96, T. P. Act. The necessary consequence is that a mortgagor under an equitable mortgage must be regarded as having personal liability to pay the mortgage-money. If it is necessary for me to be more explicit on this point I will put my reasons in this way, without referring to the cases cited at the bar to establish mortgagor's personal liability in an equitable mortgage. I consider it quite unnecessary to refer to such cases because in my view S. 58 (b), T. P. Act in defining a simple mortgage expressly says that in a simple mortgage the mortgagor binds himself personally to pay the mortgage-money. Therefore by the combined operation of Ss. 96 and 58 (b), T. P. Act an equitable mortgage must be held to be a mortgage where the mortgagor binds himself personally to pay the mortgage-money. It has been contended on the authority of the Patna decision in — 'Raj Kumar Bharathi v. Surajdeo Sahi', reported in 17 Pat 737 that the personal covenant to repay the loan contemplated in S. 68 (1) (a), T. P. Act refers to an express contract in contradistinction to a contract implied by law. That case concerned a usufructuary mortgage & it turned on the construction of the particular deed before that Court, and cannot be taken as an authority on equitable mortgage. I do not wish to express any opinion on the point whether S. 68 (1) (a), T. P. Act must mean an express contract and not a contract implied by law as Wort A. C. J. in that Patna case seems to suggest. I consider that point will in future in a proper case require a more careful and intensive consideration, and all that need be said now is that the word "express" is not used in S. 68 (1) (a), T. P. Act. But so far as equitable mortgage is concerned I have no doubt in my mind that a mortgagor in such an equitable mortgage does personally bind himself to repay the mortgage-money within the meaning of S. 68 (1) (a), T. P. Act and that in my view is the irresistible consequence of the joint operation of Ss. 96 and 58 (b) of that Act. In the case of equitable mortgage the Statute imports personal liability. It is equally no answer as against such clear statutory provision to put forward English legal notions of the differences between legal and equitable mortgages. It is settled law, as I understand it, after Lord Dunedin's observation in — 'the Imperial Bank of India v. U Rai Gyaw Thu and Co. Ltd.', 50 Ind App 283 (PC), that a mortgage by deposit of documents of title is a good and valid mortgage and there is no distinction in India between legal and equitable mortgages as in English law. I, therefore, hold that in an equitable mortgage, the mortgagee has a right to sue for the mortgage-money within the meaning of S. 68 (1) (a), T. P. Act. I also hold that under such an equitable mortgage the mortgagor binds himself to repay the mortgage money within the meaning of S. 68 (1) (a), T. P. Act.

(8) The real difficulty, however, on the way of the applicant in this case is the nature of the suit. In order to stay the proceedings in a suit under S. 68 (2), T. P. Act, the suit must be a suit by the mortgagee for the mortgage-money. The real question is then, is the present suit a suit by the mortgagee for the mortgage-money and, therefore, a suit of the nature contemplated in S. 68 (1), T. P. Act?

(9) On a construction of S. 68 T. P. Act it appears to me that the words and the context in which the words are used indicate a suit which the mortgagee prosecutes qua mortgagee for the recovery of this mortgage-money. Sec. 68 occurs in Chap. 4, T. P. Act marked "of mortgages of immovable properties and charges" and this particular section appears with a group of sections under a sub-heading marked "Rights and liabilities of mortgagee". The context, therefore, circumscribes the subject of this section to the mortgage and the rights and liabilities of the mortgagees. The word "mortgagee" and the words "mortgage-money" must in my view on a proper construction of S. 68 (1), T. P. Act indicate that the "right to sue" mentioned in that section is the right which belongs to the mortgagee only in his capacity as a mortgagee and not in a totally different capacity such as a payee of a promissory note as in this case. Equally to my mind the words "mortgage-money" on a proper construction having regard to the definition contained in para 2 of S. 58 (a), T. P. Act mean the money secured by the mortgage and not a promissory note. The other words "the mortgagor binds himself to repay" in S. 68 (1) (a), T. P. Act can in that context only mean that this binding is with reference to the mortgage and its terms. In order, therefore, to find out whether the mortgagor binds himself to repay the mortgage-money within the meaning of S. 68 (1) (a), T. P. Act, the terms of the mortgage itself are the only indicia. In other words the personal liability must be discovered to arise on the mortgage itself and not dehors the mortgage. This construction is enforced also by reference to cls. (b), (c) and (d) of S. 68 (1), T. P. Act. A perusal of these clauses unmistakably points out that in each one of the eventualities mentioned there the reference is invariably to the mortgage security. In cl. (b) it is the whole or partial destruction or insufficiency of mortgage property, in cl. (c) it is the deprivation in whole or in part of the mortgage security and in cl. (d) the reference is to delivery of possession of the mortgaged property. This analysis leads to the conclusion that when in cl. (a) of S. 68 (1), T. P. Act the language used is "mortgagor binds himself to repay" that should be read as a term of the mortgage itself, and refers to the personal liability that inheres in the mortgage.

(10) One more word before I leave the topic of construction of S. 68, T. P. Act. A suit under S. 68, T. P. Act is a suit for money due on a mortgage and the only decree that can be passed under this section is a decree for money, unlike a suit on the mortgage itself under S. 67, T. P. Act. Under sub-s. (2) of S. 68 of that Act only a particular type of suit can be stayed. Before S. 68 (2), T. P. Act can at all be applied the suit must answer the description of a suit by a mortgagee for the recovery of the mortgage-money. No other class or type of suit is intended to be stayed. That therefore is the fundamental postulate which must be satisfied and it is only when it is such a suit, then alone further enquiry is necessary under cl. (a) or (b) or (c) or (d) of S. 68 1 (1), T. P. Act. Sec. 68 first confers a right on the mortgagee to sue for the mortgage-money. Clauses

(a), (b), (c) and (d) of sub-s. (1) specify the instances where the mortgagee has the right to sue for such mortgage-money. It also provides that in no other cases the mortgagee shall have such right to sue for the mortgage-money. The Court's power to stay such a suit under sub-s. (2) of S. 68, T. P. Act is limited again only to the two instances mentioned in cls. (a) and (b) and in no other.

(11) Reverting now to the nature of the plaint in this suit before me I find that this is a suit on the promissory note and not on the mortgage at all. The promissory note is a distinct cause of action, independent of and apart from the mortgage. No doubt the equitable mortgage in this case carries with it a personal liability of the mortgagor to repay the mortgage-money. Had it therefore been a suit to recover money due on that equitable mortgage then the argument made on behalf of the applicant for stay might have prevailed. But the position here is entirely different. The suit before me is not a suit where the mortgagee is suing qua mortgagee for his mortgage-money. In this suit the plaintiff is suing only as a payee of the promissory note and nothing else. Such a suit in my opinion and on the construction that I have arrived at is not within S. 68 (1) (a), T. P. Act. If the personal liability to repay a loan arises independently of any existing mortgage and the suit is not by the mortgagee for mortgage-money, then in my view S. 68(1)(a), T. P. Act is not attracted.

(12) The argument that the consideration of the promissory note is the same as the consideration for the mortgage cannot in my view, make a difference in the construction of S. 68 (1) (a), T. P. Act or in the result of this application. Every mortgage represents both a loan and a security. The nature and terms of the security must be considered in each case in order to find out whether they support or negative the personal liability for repayment of the loan. In my view as I have already expressed, the personal liability referred to in S. 68 (1) (a), T. P. Act is a personal liability inherent in the mortgage and not dehors the mortgage or independent of the mortgage. The principle behind this statutory provision, as I understand it, is the law's reluctance to make the mortgagor personally liable so long as his security is there to answer for the debt. But if the mortgagor chooses to create a personal liability by independent transaction like a promissory note, a cheque or other independent engagement completely dissociated from the mortgage, then he is not within the meaning of S. 68 (1) (a), T. P. Act as I construe it nor within the principle that security should be called up first before personal liability is enforced. The reason is that by engaging into an independent contract for a debt as evidenced by a promissory note the debtor indicates to the creditor by such a contract that he brings an independent personal liability to answer the loan apart from what inheres in a mortgage with personal liability. To repeat what I have already said the promissory note in this case on which alone the suit is based is an independent and distinct cause of action apart from the mortgage. The juristic difference in this respect is as similar as the difference between a suit on the promissory note and a suit on the original consideration. Although the consideration is the same for the promissory note and the original loan they are regarded in law as distinct and separate causes of action, so that although a suit on the promissory note has failed a suit on the original loan may be competent as pointed out by the Privy Council in — 'Payana Reena v. Pana Lana', 41 Ind App 142 (PC). The English Court of Appeal decided the same principle in — 'Wegg Prosser v. Evans', (1895) 1 QB 108 in respect of a cheque & a guarantee, although the consideration for both was the same. Therefore although the consideration is the same both for the promissory note as well as the mortgage the debtor in such a suit on the note, cannot turn round and say that creditor must exhaust the security first before enforcing the personal liability which he has created independently of the terms of the security. To allow him to do that will be to confound one cause of action with another independent and distinct cause of action.

(13) I am, therefore, of the opinion that the applicant on the plaint in this suit cannot invoke the principle provided in S. 68, T. P. Act.

(14) I have another reason why this application must in any event fail. That is founded on my construction of sub-s. (2) of S. 68, T. P. Act. In sub-s. (2) the power to stay the suit is entirely discretionary with the Court. The language used in this sub-section is "the Court may at its discretion". This discretion of the Court has undoubtedly to be exercised on cogent grounds and not arbitrarily. I will presently state the cogent grounds on which in this case I should refuse to exercise my discretion in favour of the applicant. But before I do so it is necessary to observe that the Court's power to stay the suit at its discretion is "notwithstanding any contract to the contrary." Any contract, therefore, between the mortgagor and the mortgagee excluding the relief conferred on the mortgagor under S. 68 (2) cannot override or fetter the discretion of the Court if the Court is of the opinion that in spite of such contract to the contrary the suit should be stayed. In that case the discretion of the Court will prevail over any such contract to the contrary.

(15) Now I propose to state the reason why the discretion in this case should never be exercised in favour of the applicant by staying the suit even if the applicant were able to come within S. 68 (1) (a), T. P. Act. In the written statement the applicant takes the plea of denying the mortgage altogether. The defendant company who is the applicant before me denies in para 3 of its written statement that it created any equitable mortgage or deposited or authorised anybody to deposit title deeds in respect of the said cinema house with intent to create a charge. In my view the applicant cannot have it both ways. If the mortgagor choose to deny the mortgage altogether, he cannot be heard to say that he will invoke the statutory relief under S. 68 (2), T. P. Act by asking the mortgagee to exercise his remedies first against the disputed security before proceeding to enforce the personal liability of the mortgagor. In my judgment a mortgagor who wishes to avail of the benefit of S. 68 (2), T. P. Act can only do so on the tacit assumption that there is a valid mortgage. He cannot deny the mortgage and at the same time invoke to apply the discretionary relief under S. 68 (2), T. P. Act relating to the mortgage. On this ground I would, therefore, in any event, refuse to exercise my discretion in favour of the applicant.

(16) For these reasons I dismiss this application with costs.

B/V.S.B. Application dismissed.

A.I.R. 1953 CALCUTTA 212 (Vol. 40, C. N. 72)

K. C. DAS GUPTA AND LAHIRI JJ.

B. C. Das Gupta and another, Appellants v. Bijoyranjan Rakshit and others, Respondents.

A. F. O. O. Nos. 101 to 119 of 1952, D/- 27-6-1952, from judgment of Bose J. in Civil Revn. Cases Nos. 2295, 2433 etc. of 1951, D/- 4-2-1952 and 13-2-1952 respectively.

(a) Constitution of India, Art. 226 — Parties — Larger body made party — Component part need not be made party.

The Governing Body is a part of the State Medical Faculty. When the State Medical Faculty has been made a party, it is neither necessary nor proper that any part of it should be separately made a party. A command on the State Medical Faculty will, in law, amount to a command on all its component parts — the Governing Body, the Fellows, the Members and the Licentiates. If therefore the State Medical Faculty has been properly made a party, the Governing Body is also before the Court and the omission to make the Governing Body a distinct party is no obstacle to the success of the application. (Para 10)

(b) Constitution of India, Art. 226 — Application against corporate body like State Medical Faculty by its name is legal — State Medical Faculty as such is a person against whom direction and order or writ can issue. (Para 11)

(c) Constitution of India, Art. 226 — Domestic Tribunal — State Medical Council — Jurisdiction to cancel examination of candidates found using unfair means — Must act in good faith and fairly — Mandamus, when can issue.

When the Governing Body of the State Medical Faculty decides that 51 candidates had used unfair means in answering questions and that the proper punishment was that the examination should be cancelled, it acts within jurisdiction. (Para 18)

The law requires that the State Medical Faculty or the Governing Body, in performing its duty of deciding whether the candidates have been guilty of unfair means and what punishment should be inflicted, must not only act in good faith, but also fairly and reasonably and without violation of the principles of natural justice. (Para 30)

Where the Governing Body gave no notice at all to the candidates of the charges against them and no opportunity whatsoever of showing that the allegation was not true or that even if the allegation was true, the punishment should not be what the Governing Body proposed, and there was not a fair consideration of the cases, as the cases of the different candidates were not individually considered:

Held that the order cancelling their examination was bad in law. (Paras 31, 32)

(d) Constitution of India, Art. 226 — Demand for justice and refusal — Candidates whose examinations were cancelled going individually in deputation to the Faculty — Denial by Head Assistant of Faculty that such demand was made — Denial held not by proper person — It should be either by Secretary to the State Medical Faculty or President of the Governing Body, both of whom were made parties. (Para 34)

Hemendra Kr. Das, Jajneswar Majumdar and D. N. Basu, for Appellants; Priti Bhusan Burman and Jnanendra M. De, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('39) AIR 1939 Bom 35: (180 Ind Cas 685)	29
('47) 51 Cal WN 612	29
('17) 40 Mad 125: (AIR 1918 Mad 763)	11
(1885) 10 AC 229: (54 LJMC 81)	22
(1911) AC 179: (80 LJKB 796)	21, 22
(1943) AC 627: (112 LJKB 529)	21
(1879) 11 Ch D 353: (49 LJ Ch 11)	26, 27
(1880) 13 Ch D 346: (41 LT 638)	27
(1880) 14 Ch D 471: (49 LJ Ch 268)	27
(1881) 17 Ch D 615: (44 LT 557)	28
(1874) 9 Ex 190: (43 LJ Ex 153)	27
(1914) 1 KB 160: (83 LJKB 86)	23

K. C. DAS GUPTA J.: The respondents in these 19 appeals are students of different medical schools who appeared at the Intermediate Licentiateship Examination of the State Medical Faculty of West Bengal in June, 1951, at the Burdwan Centre. Of them, some appeared only in the Anatomy paper and the rest in all the three subjects, Anatomy, Physiology and Pharmacology. The written examination was held on the 7th June 1951, and the oral examination on the 18th June 1951. On the 28th June 1951, one of the three examiners in Physiology sent a report to the Secretary, State Medical Faculty, in which he stated that while correcting answer papers of questions Nos. 1 and 2 he found that almost all the answer papers were the same in language and content, that when the same questions were put to these candidates in the oral examination not a single student could answer them, that some of them could not follow the meaning of the answer paper when the contents were read to them and that in his opinion unfair means were taken by the candidates in the written examination either copying from slips of loose paper inside the examination hall or the answer papers were collected by the candidates from outside. The report concluded with the recommendation that the examination be cancelled. On the same date, one of the examiners in Anatomy submitted a report that on examination of written papers of the Burdwan Centre he found that three sets of answers were in exactly the same language, that many of the students could not answer the same questions in oral examination and that there was a strong suspicion that the written papers were copied from three sets of slips brought from outside.

(2) These reports were considered by the Board of Studies of the State Medical Faculty on that very date the 28th of June 1951, and finally after a further report of the examiners the Board came to the conclusion that a large number of candidates must have had with them either cut-out pages of certain portions of Gray's Anatomy and Chakravarti's Aids to Human Physiology or written copies of the same when writing their answers and used them in answering their questions. The Board of Studies sent this report to the 'Governing Body' and this Body agreed with the above conclusion of the Board and resolved (1) that the examination of the term in all the subjects thereof of the 51 candidates be cancelled, (2) that the candidates may be allowed to appear at the

"next usual half-yearly examination due in November 1951, subject to their satisfying the Superintendent by their conduct and attendance during the interval and payment of the usual fees."

(3) In accordance with this resolution, a notice signed by the Secretary to the Medical Faculty to the effect that the examination of the 51 candidates, whose names were mentioned, had been cancelled for taking unfair means, was given.

(4) The Governing Body also decided that such of these students who had at a previous examination passed in the other two subjects — i. e. Physiology and Pharmacology — will have to appear in those subjects also.

(5) Aggrieved by this order of cancellation of the examination, the 19 respondents applied to this Court for writs or orders under Art. 226 of the Constitution directing withdrawal of the order of cancellation of the examination and publication of the results of the examination.

(6) In all the applications (1) Mr. B. C. Das Gupta, (2) Mr. M. N. Gupta, Secretary, (3) The State Medical Faculty of West Bengal and (4) the Board of Studies were made opposite parties.

(7) Bose J. who delivered one judgment on the application of Bejoyranjan Rakshit and others and another judgment on all the other applications came to the conclusion that the Governing Body had not exercised their powers reasonably and with due care and caution and had violated the first principle of natural justice by failing to give the candidates an opportunity to explain. He also rejected the contention that the applications should fail as the Governing Body had not been made a party or that the State Medical Faculty could not be properly made a party, and further the contention that there had not been a proper demand for justice before the opposite parties. Accordingly, he allowed the applications in part. The final order on Bejoyranjan Rakshit's application is in these terms:

".....the Rule is made absolute to the extent that the opposite parties are directed to revoke the order of cancellation of the entire examination in Anatomy held in June, 1951, and the order that the petitioner is to appear in all the three subjects at the ensuing examination. The opposite parties will be at liberty to enquire into the individual case of the candidate concerned and after such enquiry they will take such steps as they are entitled to take in accordance with law....."

On the other applications the final order is in these terms:

"So far as the Civil Revision Cases Nos. 2433 of 1951, 2762 of 1951, 2771 of 1951, 2501 of 1951, 2504 of 1951 and 2508 of 1951 were concerned, these rules are made absolute to the extent that the opposite parties are directed to revoke the order of cancellation of the entire examination in Anatomy held in June 1951, and the order that the petitioners in these cases are to appear in all the three subjects at the ensuing examination".

"So far as the Civil Revision Cases Nos. 2763 of 1951, 2764 of 1951, 2765 of 1951, 2766 of 1951, 2768 of 1951, 2769 of 1951, 2770 of 1951, 2502 of 1951, 2503 of 1951, 2505 of 1951, 2506 of 1951, and 2507 of 1951 are concerned these rules are made absolute to the extent that the opposite parties are directed to revoke the order of cancellation of the entire examination in all the three subjects viz. Physiology, Pharmacology and Anatomy, held in June, 1951".

There was a further order to the following effect:

"The opposite parties are to enquire into the individual case of each of the candidates concerned in the Civil Revision Cases which are being disposed of today and after such enquiry they will take such steps as they are entitled to take in accordance with law".

(8) These appeals have been preferred by the President of the Governing Body and the Secretary to the State Medical Faculty.

(9) The first contention of the appellants is that the Governing Body which passed the resolution for cancellation of the examination was a necessary party to the application and the Governing Body not having been made a party the applications should have been rejected.

(10) The argument overlooks the fact that the Governing Body is a part of the State Medical Faculty which was impleaded. The State Medical Faculty was established by a resolution of the Government of Bengal, which was published on the 11th of August, 1914. The Statutes and bye-laws of the Faculty were published immediately below the resolution. The first section of the Statute says that there shall be established a State Medical Faculty and mentions the purposes. Section 2 of the Statute is in these words:

"The State Medical Faculty shall consist of (a) A Governing Body, (b) Fellows, (c) Members, and (d) Licentiates".

The fact that certain duties have been assigned to the part of the Faculty mentioned in clause (a) does not alter the fact that it is a part of the Faculty. When the State Medical Faculty has been made a party, it is neither necessary nor proper that any part of it should be separately made a party. A command on the State Medical Faculty will, in law, amount to a command on all its component parts, — the Governing Body, the Fellows, the Members and the Licentiates. If therefore the State Medical Faculty has been properly made a party, the Governing Body is also before the Court and the omission to make the Governing Body a distinct party is no obstacle to the success of the application.

(11) This brings us to the question whether the impleading of the State Medical Faculty by its name is in accordance with law. It has been argued that as it is not a body corporate, it cannot be made a party by name and the only way to make the Faculty a party is to implead by name its members. As has been pointed out by Bose J., "person" includes under the General Clauses Act "any company or Association or body of individuals, whether incorporated or not". Art. 226 of the Constitution gives this Court power to issue directions, orders or writs to any person or authority. This would be sufficient to justify the conclusion that the State Medical Faculty as such is a "person" against whom a direction, order or writ can issue. It may be mentioned in this connection that the reports of the English Courts mention innumerable cases of writs of mandamus being issued against unincorporated bodies. It was pointed out by Kumarswamy Sastri J. in the passage quoted by Bose J. in the case of — 'In Re Natesan', 40 Mad. 125:

"The practice in English courts seems to be that where the application is to compel public officer or body to perform a public duty the persons are not named but are proceeded against under their official title. For example, writs of mandamus have been issued to Justice of a County, inhabitants of a Parish, a Church warden, overseers, inhabitants and bailiffs of a town, keepers of the common seal of a University, the assessment committee of a borough, the Registrar of

the British Pharmaceutical Society etc. There has been, so far as I can see, no objection taken in any of the reported cases on the ground that except in the case of corporations, all other public bodies or officers should be proceeded against in the individuals' names of the members composing them".

(12) I asked the learned Government Pleader to show me instances where any such objection appears to have been raised in the English Courts and he could not show any. My conclusion is that the State Medical Faculty being the public body entrusted with the duty of examining candidates for the purpose of ascertaining whether they have attained certain standard of training and proficiency, has rightly been made a party by the name "State Medical Faculty" and that the part of the State Medical Faculty to which the Statutes assign the duty of holding the examinations, namely, the Governing Body, could not properly be impleaded as a separate party.

(13) It is now necessary to consider the question whether in performing its duty the State Medical Faculty has been guilty of such dereliction that a writ of Mandamus should issue to ensure that it performs its duties properly. It is necessary, therefore, to have a clear idea of the duty which the State Medical Faculty, through its Governing Body, had to perform in the circumstances of these cases.

(14) I think it proper to mention that neither the bye-laws nor the rules of the State Medical Faculty contain any specific provision as regards what should be done on such reports from examiners. Rule 16 of the Rules for the guidance and conduct of candidates during examinations which, according to the appellants, applies to such cases provides first for cases of detection in the examination hall of a candidate "in helping another or attempting to obtain unfair assistance in answering a question". It says also that candidates are not permitted to have in their possession while in the examination hall any book, memorandum, pocket book, notes or papers whatsoever even if these are in no way connected with the subject under examination, except for the question paper, the Secretary's receipt or the admit card and the books provided by the Faculty for writing out the answers and a sheet of blotting paper, and then lays down that candidates disregarding this caution are liable to the same penalty as those using unfair means. Reading the rule as a whole, I think it is clear that it contemplates cases of detection in the examination hall and does not provide for cases where the fact that unfair means were used is discovered after the candidate has left the examination hall.

(15) The absence of any specific rule in this matter does not however affect the power of the State Medical Faculty as a whole, or its Governing Body, to take proper action if and when it received a report that unfair means were used by a candidate.

(16) From the resolution establishing the Faculty and the Statutes thereunder it is clear that the State Medical Faculty has the duty of examining the candidates and that for administrative convenience this duty of examination is assigned to a part of the Faculty — the Governing Body. The duty of examination necessarily involves the duty of deciding in a proper case whether the examination of any particular candidate should be cancelled when it is alleged and proved that he took unfair means in answering some or all questions. It is hardly necessary to point out that allegation is not proof nor that proof of use of unfair means need not necessarily result in the decision that an examination should be cancelled.

(17) The crux of the matter is that the State Medical Faculty and its Governing Body have in performing the duty of 'examining the candidates' to decide, when a charge of use of unfair means is made against a candidate, whether the charge has been established and if so, what the proper punishment should be.

(18) I have no doubt therefore that when the Governing Body decided that 51 candidates had used unfair means in answering questions and that the proper punishment was that the examination should be cancelled, it acted with jurisdiction. The question we have to decide is whether there was such defect in the exercise of jurisdiction that Mandamus would lie to cure the same.

(19) It has been contended on behalf of the appellants that the Governing Body is a domestic tribunal set up by the Government and unless it appears to have acted in bad faith the Courts will not interfere with the action taken.

(20) The authorities are clearly against this contention.

(21) In the case of —'General Medical Council v. Spackman', (1943) A. C. 627 the House of Lords had to consider the question of proper exercise of the statutory jurisdiction conferred on the General Medical Council, — which was a domestic forum established by Parliament —, to remove from the medical register a practitioner who was co-respondent in a divorce suit and had been found by the Divorce Court to have committed adultery with the respondent therein to whom he stood in professional relationship. The General Medical Council gave him notice that a meeting of the Council would be held to decide whether his name should be removed from the medical register for infamous conduct in a professional respect. At the hearing he desired to call on the issue of adultery evidence which had not been called on the hearing of the petition although it was then available. The Council declined to hear the fresh evidence but accepted the decree nisi as prima facie proof of adultery and directed that the petitioner's name should be erased from the register. It was held that the Council was bound to hear any evidence tendered by the petitioner and that having refused to hear such evidence it had not made "due enquiry" under s. 29, Medical Act, 1858. In dealing with the question how the Council should proceed, Lord Simon, L. C. observed,

> "Its members may usefully bear in mind the language of Lord Loreburn L. C. in —'Board of Education v. Rice', (1911) A. C. 179, where, dealing with the decision of an administrative body the Lord Chancellor said that 'they must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial ..... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view'."

(22) Lord Wright, who concurred in the opinion of the Lord Chancellor, quoted with approval the statement of the law by Lord Loreburn in — 'Board of Education v. Rice', (1911) A. C. 179 and also the observations of the Earl of Selborne in — Spackman v. Plumstead District Board of Works' (1885) 10 A. C. 229. The observations appear at page 240 of the Report and are in these words:

"No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no dicision within the meaning of the Statute if there were anything of that sort done contrary to the essence of justice ..... This is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him."

(23) Lord Wright referred to these authorities as throwing light on what "natural justice" connotes. Later, in the judgment, after referring to the criticism of Hamilton L. J. in — 'Rex v. Local Government Board, Ex parte Arlidge', (1914) 1 K. B. 160 that the phrase "contrary to natural justice" was sadly lacking in precision, Lord Wright observed:

"So it may be and, perhaps, it is not desirable to attempt to force it into any procrustean bed, but the statements which I have quoted be, at least, taken to emphasize the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard ..... If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

(24) If these statements of law are applicable to administrative tribunals and to domestic forum of the nature of the General Medical Council, I can see no reason why they should not apply to the State Medical Faculty or its Governing Body when it decides whether the examination of candidates should be cancelled on the charge that they had used unfair means.

(25) It is unnecessary to multiply authorities but mention may be made of the decision in some Club cases.

(26) In the case of — 'Fisher v. Keane', (1879) 11 Ch. D. 353 which was an action for a declaration that a resolution purporting to expel the plaintiff from membership of the Club was null and void, Jessel M. R. observed as follows:

"They" (the Committee) "ought not, according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever — perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct."

He held that the Committee had not acted properly and fairly and gave judgment in favour of the plaintiff.

(27) In — 'Russell v. Ressell', (1880) 14 Ch. D. 471 the learned Master of the Rolls, in considering whether the Court should refuse to allow certain matters to be referred to arbitration, quoted with approval a statement of law in the case of — 'Wood v. Wood', (1874) 9 Ex. 190 at P. 196 in these words:

"....With regard to 'Wood v. Wood', I am sorry to say that my acquaintance with it has begun today. I must say it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who have judicial functions to perform, which I should have been very glad to have had before me in both of those club cases that I recently heard, namely, the case of — 'Fisher v. Keane', (1879) 11 Ch. D. 353 & the case of — 'Labouchre v. Earl of Wharncliffe', (1880) 13 Ch D. 346. The passage I mean is this, referring to a committee, "They are bound, in the exercise of their functions, by the rule expressed in the maxim, audi alteram partem, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals" I am very glad to find that that eminent judge has arrived at the same conclusion which I arrived at independently, but I should have been still more glad had I been able to fortify my conclusion by citing this, which I may call a most admirably worded judgment."

(28) The case of — 'Dawkins v. Atrobus', (1881) 17 Ch. D. 615 was an action by one Colonel Dawkins who had been expelled from the Travellers' Club claiming a declaration that the expulsion was invalid and for an injunction against the Committee. It was held that the Court would not interfere against the decision of the members of a Club professing to act under the Rules unless it could be shown either that the rules were contrary to natural justice or that what had been done was contrary to the rules or that there had been mala fides or malice. It is worth mentioning that it was found that the plaintiff was given ample notice and given every opportunity of saying anything he chose to say to the Committee or to the meeting.

(29) The law as laid down in these cases was followed in our own Court in — 'M. S. Ezra v. Mahendra Banerjee', 51 Cal W. N. 612 and in the Bombay High Court in — 'Ambalal Sarabhai v. Phiroz H. Antia', AIR 1939 Bom 35.

(30) On a consideration of the authorities, I have come to the conclusion that the law requires that the State Medical Faculty or the Governing Body, in performing its duty of deciding whether the candidates have been guilty of unfair means and what punishment should be inflicted, must not only act in good faith, but also fairly and reasonably and without violation of the principles of natural justice.

(31) In the present cases, the Governing Body gave no notice at all to the candidates of the charges against them and no opportunity whatsoever of showing that the allegation was not true or that even if the allegation was true, the punishment should not be what the Governing Body proposed.

(32) I am also of opinion that even apart from this there was not a fair consideration of the cases, as it is clear that the cases of the different candidates were not individually considered.

(33) There remains for consideration the contention that no order or direction in the nature of a writ of Mandamus should issue in the cases, as

there was no proper demand. We shall assume for the purposes of these cases that such a formal demand was necessary but I have no hesitation in agreeing with Bose J. on a consideration of the affidavits and the counter-affidavits that such demand was made. The assertion that the petitioners went on a deputation to the Faculty and the Governing Body with a prayer for cancellation and withdrawal of the order of the Faculty and the Governing Body but they refused to do so, has been made by each of the petitioners on affidavits. The correctness of this assertion is challenged by one Haridas Ganguly who claims to be the Head Assistant of the office of the State Medical Faculty of West Bengal for over 20 years. What he has said is that the assertion that the petitioners went to the Governing Body of the Faculty is not true and categorically denied, that there was a meeting of the Governing Body on 20th August 1950, but no such deputation had waited on that Body nor was any written request for a deputation made either before or after that date, nor was any written representation for cancellation of the order of the Governing Body received in the office of the Faculty.

(34) In my judgment, this denial by the Head Assistant of the Medical Faculty is wholly insufficient to show that the assertion made by the petitioners was not true. The proper person to deny the truth of the assertion made by the petitioners was the Secretary to the State Medical Faculty or the President of the Governing Body or some member of the Governing Body. Both the President of the Governing Body and the Secretary to the State Medical Faculty were made parties to the applications. They are the appellants. It is worthy of note that none of them has cared to pledge their oath that the assertion made by the petitioners is untrue. It may well be that the Head Assistant was not aware of the visit of the deputation. The denial of a person who is not competent to make the denial is of no use whatsoever.

(35)My conclusion is that the order passed by Bose J. is perfectly justified. The appeals are accordingly dismissed with costs, one set of hearing-fee for all the appeals being assessed at ten gold-mohurs.

(36) The Cross objections are not pressed and are accordingly dismissed, but there will be no order for costs in them.

(37) In concluding I would only express my hope that in dealing with the matter afresh the Governing Body would not be in any way prejudiced by the fact that the students have sought the protection of the Court and they will try to dispose of the matters as early as possible.

(38) LAHIRI J.: I agree.

A/R.G.D. Appeals dismissed.

A.I.R. 1953 CALCUTTA 216 (Vol. 40, C. N. 73)

P. N. MOOKERJEE J.

Nur Mohammad, Appellant v. Seraj and others, Respondents.

A. F. A. D. No. 1045 of 1948, D/- 21-3-1952.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 26 F — Deposit of pre-emption money by pre-emptor cannot be returned on finding defect in pre-emptee's title.

Section 26 F, Bengal Tenancy Act in sub-ss. (2) and (3) provides for certain deposits to be made by the intending pre-emptor, which can compendiously be called the "pre-emption money", and in lieu thereof he gets only the right, title and interest accruing to the transferee or the pre-emptee from the transfer pre-empted. Section 26 F recognises the principle of 'caveat emptor' and is thus inconsistent with the idea of refund of the pre-emption money or any part thereof in case of defect in the pre-emptee's title.

Even apart from statute a claim of refund based on defect of the pre-emptee's title is entirely foreign to the subject of pre-emption. Pre-emption implies involuntary transfer and in case of involuntary transfer the universally accepted rule is that the transferee takes the transfer at his own risk. There is no question of any contract and there is thus no scope also for any application of the doctrine of refund for failure of consideration or of estoppel.

(Paras 6 and 7)

Manindra Nath Ghose and Anil Kumar Sen, for Appellant; Purnendu Narayan Nath, for Deputy Registrar.

JUDGMENT: Three brothers Kalu, Chand and Tufani were the admitted original owners in equal shares of an occupancy raiyati holding comprising .10 decimals roughly six cottahs of land of c. s. plot No. 1109 of mouza Jagadishpur.

(2) According to the plaintiffs, Kalu orally sold his share to Tufani some twenty years back so that Tufani became owner of two-thirds share of the above .10 decimals — that is, of about four cottahs out of the above area of roughly six cottahs of land. On 16th Chaitra 1352 B. S. Tufani sold his above land roughly four cottahs to defendant 1 Nur Mohammad Shaik for a consideration of Rs. 700/-. Thereupon the plaintiffs who were the heirs of Chand and thus co-sharers of the above holding applied for pre-emption under S. 26 F, Bengal Tenancy Act in respect of defendant 1's said purchase. They duly made the necessary deposit (which I shall hereafter call the pre-emption money) and succeeded in getting an order in their favour. The plaintiffs, however, were unable to obtain possession of a moiety of the above pre-empted land, that is, of about two cottahs, on account of resistance of defendant 2 Sher Mohammed who claimed to have purchased the same from the heirs of Kalu on 1st January 1947. The present suit was accordingly instituted by the plaintiffs on 21st July 1947 for a declaration of their title to the said disputed two cottahs and for recovery of possession of the same. In the alternative the plaintiffs prayed for refund of a moiety of the pre-emption money that is the amount paid by him to defendant 1 in the pre-emption proceedings.

(3) The suit was contested by defendants 1 & 2 & their material defence was that Kalu never sold his land to Tufani so that the latter had only an one-third share in the holding in question and nothing more than this one-third share measuring roughly two cottahs in area had passed to the plaintiffs by virtue of the above pre-emption proceedings and as, admittedly, the plaintiffs had already got possession of this area they were not entitled to any relief in the present suit. In short, the defence on the question of title was that as Tufani had never any title to the suit land no title thereto accrued to defendant 1 from Tufani's transfer in his favour so that the plaintiffs acquired no title to the suit land by virtue of the pre-emption proceedings. On

the question of refund the defence contended that as for the "pre-emption money" that is, the money paid in the pre-emption proceedings, the plaintiffs were entitled only to the right, title and interest accruing to the transferee from the transfer pre-empted and as, under the circumstances hereinbefore recited, transferee-defendant 1 got only Tufani's one-third share in the holding in question by the relevant transfer, which one-third share had admittedly been taken possession of by the plaintiffs in the pre-emption proceedings, the latter were not entitled to refund of any portion of the said "pre-emption money". The defendants accordingly prayed for a total dismissal of the plaintiffs' suit.

(4) The learned Munsif held inter alia that the plaintiffs' story that Tufani had orally purchased Kalu's share was true and that, accordingly, the plaintiffs got by the pre-emption proceedings two-thirds share of the .10 decimal land, that is, roughly four cottahs, including the suit land. In that view of the matter he decreed the plaintiff's suit for declaration of title and recovery of possession and did not think it necessary to consider their alternative claim for proportionate refund of the "pre-emption money".

On appeal this decision was substantially reversed and the plaintiffs' claim for declaration of title and recovery of possession in respect of the suit land was dismissed and they succeeded only on their alternative prayer for proportionate refund of the "pre-emption money". The learned Additional District Judge held against the plaintiffs on the question of Tufani's oral purchase from Kalu and, in that view of the matter, he came to the conclusion that Tufani never had more than one-third of the .10 decimals of land so that the plaintiffs by virtue of the pre-emption proceedings got only this one-third, roughly measuring two cottahs, of which possession had admittedly been obtained by them and which admittedly was no part of the suit land. The learned Additional District Judge accordingly dismissed the plaintiff's suit for declaration of title and recovery of possession but having been of the opinion that the price or "pre-emption money" paid by the plaintiffs was for twice the area to which the plaintiffs, as now found, acquired a valid title and that, accordingly, they were entitled to a refund of the "pre-emption money" in respect of the moiety of the pre-empted lands to which the pre-emptee (defendant 1) is now found to have no title, he decreed the plaintiffs' alternative claim for refund.

Against this decision of the learned Additional District Judge defendant 1 has preferred the present second appeal and the short submission that has been made on his behalf is that as, under S. 26 F, Bengal Tenancy Act, for the pre-emption money the pre-emptor gets only the right, title and interest accruing to the transferee from the transfer in question there is no scope for any refund of the pre-emption money either in whole or in part and that, accordingly, the learned Additional District Judge was in error in allowing the plaintiffs' alternative prayer for refund.

(5) There has been no cross-appeal or cross-objection by the plaintiffs against the dismissal of their claim of title and possession by the lower appellate Court. It is also clear that the learned Additional District Judge considered all the relevant materials as also the different reasons given by the learned Munsif on the question of the alleged oral purchase of Tufani from Kalu. It further appears that on the materials on record the finding of the learned Additional District Judge that such oral purchase has not been satisfactorily proved is a good finding. In such circumstances, the decision of the learned Additional District Judge on this part of the case cannot be successfully challenged in this Court and necessarily, therefore, it follows that the plaintiffs did not by the pre-emption proceedings acquire anything beyond Tufani's original one-third share in the above .10 decimals of land of the occupancy raiyati holding of c.s. plot No. 1109 as nothing more than that one-third share had passed to pre-emptee-defendant 1 under his purchase from Tufani. Clearly, therefore, the plaintiffs' prayers for declaration of title and recovery of possession were unsustainable and rightly rejected by the learned Additional District Judge.

(6) One other matter may be noticed at this stage before passing to the consideration of the appellant's submission on the question of refund. There is a finding by the learned Additional District Judge that although defendant 1 did not acquire the suit land or any portion thereof by his purchase from Tufani he did purchase the same subsequently on 1-1-47 that is, after the disposal of the pre-emption proceedings, from Kalu's heirs. Can the plaintiffs under such circumstances invoke the aid of the doctrine of "feeding the estoppel" in support of their claim of title and possession in respect of the suit land? In my opinion the answer must be against the plaintiffs, as the case being clearly one of involuntary transfer by reason of the law of pre-emption, there can be no possible scope for the application of any doctrine of estoppel. The finding of the learned Additional District Judge, noted above, is, therefore, of no assistance to the plaintiffs and their claim of title and possession must, in spite thereof, be held to have been rightly dismissed by the lower appellate Court.

(7) The only question, now remaining for consideration, is the appellant's submission against the learned Additional District Judge's decree for refund in favour of the plaintiffs-respondents. That question — it seems to me — must be answered in the appellant's favour. Section 26 F, Bengal Tenancy Act in sub-ss. (2) and (3) provides for certain deposits to be made by the intending pre-emptor which I have compendiously called above the "pre-emption money" and in lieu thereof he gets only the right, title and interest accruing to the transferee or the pre-emptee from the transfer pre-empted (vide S. 26 F (7), Bengal Tenancy Act). Clearly, therefore, S. 26 F, Bengal Tenancy Act — under which the plaintiffs claimed to pre-empt and succeeded in pre-empting defendant 1's purchase from Tufani — recognises the principle of 'caveat emptor' and is thus inconsistent with the idea of refund of the pre-emption money or any part thereof in case of defect in the pre-emptee's title. The plaintiffs' claim for refund cannot, therefore, be allowed in view of the terms of S. 26 F (7), Bengal Tenancy Act. Even apart from statute a claim of refund based on defect of the pre-emptee's title is entirely foreign to the subject of pre-emption. Pre-emption implies involuntary transfer and it is well known that in cases of involuntary transfer the uni-

versally accepted rule is that the transferee takes the transfer at his own risk. There is no question of any contract and there is thus no scope also for any application of the doctrine of refund for failure of consideration. On statute and principle alike, the plaintiffs' alternative claim for refund must, therefore, fail. The learned Additional District Judge was, therefore, in error in decreeing this alternative claim and to that extent his decision must be set aside.

(8) In the result, therefore, this appeal succeeds. The judgment and decree of the learned Additional District Judge so far as it decrees the plaintiffs' suit are set aside and the suit is dismissed in its entirety. In the circumstances of this case the parties will bear their own costs throughout.

B/R.G.D. Appeal allowed.

A.I.R. 1953 CALCUTTA 218 (Vol. 40, C. N. 74)

K. C. DAS GUPTA AND LAHIRI JJ.

Sew Sankar Lal, Petitioner v. Bejoy Krishna and another, Opposite Party.

Civil Rule No. 1627 of 1951, D/- 4-7-1952.

Civil P. C. (1908), O. 21 Rr. 97, 98, 99 — Application by landlord for possession of premises with police help — Objection by sub-tenant — Discretion of Court — Sub-tenant minor — Illegality of lease — Order directing police help will not be interfered with — (Houses and Rents — W. B. Premises Rent Control Act (17 of 1950), Ss. 13(2) and 11(3).)

The right created in favour of a sub-tenant by S. 11 (3), W. B. Premises Rent Control Act of 1948 or S. 13 (2), W. B. Premises Rent Control Act of 1950 cannot be enforced by way of an application in a proceeding for possession, and the only remedy of the sub-tenant is to enforce his right by a regular civil suit. 87 Cal LJ 181, Relied on. (Para 2)

Whether the Court should order police help or not is a matter of discretion and the fact that a claim is made by the person offering resistance that he is entitled as of right to be in possession, is a matter which the Court must take into consideration in exercise of that discretion: If the Court thinks that a bona fide claim of a sub-tenancy has been made and there is nothing on the face of it to reject the case of a sub-tenancy, the Court ought not to grant police help. (Para 3)

A contract of lease, which is not for the benefit of the minor's existing estate, entered into by a guardian on behalf of a minor is however, invalid in law:

Held that the petitioner sub-tenant being a minor there was no legal sub-tenancy and the order directing police help to the landlord could not be interfered with. 30 Cal 539 (PC); 19 Cal 507 (PC); 11 Bom 551 (PC); AIR 1949 FC 218; 30 Cal 539 (PC), Relied on; 6 Moo Ind App 393 (PC), Expl. (Paras 1 and 8)

Anno: Civil P. C., O. 21, Rule 97 N. 5; R. 99 N. 5.

Sitaram Banerji and Provas Chandra Chatterji, for Petitioner; Samarendra K. Dutt and Satya Priya Ghose, for Opposite Party.

REFERENCES; Courtwise/Chronological/ Paras

('54-57) 6 Moo Ind App 393: (18 WR 81 (PC)) 5

('87) 14 Ind App 89: (11 Bom 551 PC) 6

('92) 19 Ind App 90: (19 Cal 507 (PC)) 5

('03) 30 Cal 539: 30 Ind App 114 (PC) 4, 7

('49) AIR 1949 FC 218: (1949 FCR 65) 7

('51) 87 Cal LJ 181 2

K. C. DAS GUPTA J.: The subject matter of the present litigation is one godown on the ground floor in premises No. 18/1 Nimtola Ghat Street, Calcutta. The godown was admittedly held by Kanai Lal Marwari under the owners Brojen Dutt and Bejoy Krishna Dutt. On 29th March 1948, they filed an application for possession of the godown. The application was allowed and possession was directed to be delivered on 25th May 1949. The date of delivery of possession was extended from time to time till at last on 20th June 1951, the present petitioner Sew Sankar Lal filed an application purporting to be one under O. 21 Rr. 98 and 99, Civil P. C. read with S. 13(2), West Bengal Premises Rent Control Act, 1950, alleging that he had been a sub-tenant in respect of the godown since the latter part of 1947 that he had a right to remain (in?) possession under the provisions of S. 13(2), West Bengal Premises Rent Control Act, 1950, that the landlord's application for police help should be treated as one under the provisions of O. 21 R. 97, Civil P. C. and so the Court should act under the provisions of O. 21 Rr. 98 and 99 of the Code and the order for police help which had been passed earlier should be vacated. This application has been refused.

(2) It has been held in the case of — 'Thakurdas Pushpraj v. Dwarka Prasad', 87 Cal. LJ 181, (that?) the right created in favour of a sub-tenant by S. 11(3) of the Act of 1948 cannot be enforced by way of an application in a proceeding for possession, and the only remedy of the sub-tenant is to enforce his right by regular civil suit instituted for the purpose. It was contended, however, that when a person in whose favour an order for possession has been made is resisted and he instead of filing an application under the provisions of O. 21, R. 97, Civil P. C. asks for police help, the Court should not grant police help if it appeared to the Court that a bona fide claim has been made under the provisions of S. 11(3), W. B. Premises Rent Control Act, 1948, or S. 13(2), W. B. Premises Rent Control Act, 1950.

(3) Whether the Court should order police help or not is a matter of discretion and I am of the opinion that the fact that a claim is made by the person offering resistance that he is entitled as of right to be in possession, is a matter which the Court must take into consideration in exercise of that discretion. I am further of the opinion that if the Court thinks that a bona fide claim of a sub-tenancy has been made and there is nothing on the face of it to reject the case of a sub-tenancy, the Court ought not to grant police help.

(4) It has been urged, however, on behalf of the opposite parties that on the face of it in this case there was no legal sub-letting as the person claiming to be the lessee is a minor. Quite clearly, the lease on which the petitioner claims relief is said to have come into existence when the petitioner was a minor. No case is made that the minor's father was a sub-tenant. It is the minor himself who claims to be the first sub-tenant in the case. On the authority of the decision of the Judi-

cial Committee in the case of — 'Mohori Bibee v. Dharmodas Ghose', 30 Cal 539 (PC), a contract of lease if it was entered into by the minor himself was void.

(5) It was argued, however, that if the lease was taken by his guardian during his minority for his benefit, then on the authority of the decision of the Privy Council in the case of — 'Hunooman Persaud Panday v. Mt. Babooee Munraj Koonweree', 6 Moo Ind App 393 (PC), the lease would be valid and binding. It is important to notice, however, a point which has been brought out in several later decisions that in 'Hanooman Persaud's case' their Lordships of the Privy Council were considering the question of benefit to the existing estate of the minor. In the case of — 'Indur Chunder Singh v. Radhakishore Ghose', 19 Ind App 90 (PC), their Lordships of the Privy Council drew attention to this distinction between the transaction purporting to be for the benefit of a estate and a transaction which created a new liability. That was a suit to recover arrears of rent. The defendant was an heir to a deceased lessee of the plaintiff and during his minority his guardians, the mother and widow of the original lessee, renewed the lease. In considering an argument that as the lease was really taken for the minor and the lessees were in possession for his benefit, the minor's estate was liable for the rent, their Lordships observed after referring to 'Hanooman Persaud's case' thus:

"In that case, however, the managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate, and it was held that the manager might do so in a case of need or for the benefit of the estate, and that the fact that the mortgage contained the inaccurate statement that the mortgagor had a beneficial proprietary right, was immaterial. But in the present case the mother and widow of Gopi Mohan Ghose were not dealing with, and did not purport to deal with or affect his estate, but were incurring new obligations which it is now sought to transfer from them to the estate."

It was held that the renewal of the lease by the mother and widow of Gopi Mohan Ghose did not establish any relation between the plaintiffs and the estate. In 'Indur Chunder Singh's case', the lease was taken by the two women in their own names and not on behalf of the minor, but that does not affect the binding force of the decision that where the guardian and manager of the minor's estate is incurring new obligations and not dealing with the minor's estate as such, 'Hanooman Persaud's case' can have no application.

(6) In the case of — 'Waghela Rajsanji v. Masludin', 14 Ind App 89 (PC), where a guardian covenanted for herself and her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue, their Lordships of the Privy Council held that it was beyond the power of the guardian to impose a personal liability on the ward.

(7) These cases were considered by the Federal Court in the case of — 'Sriramulu v. Pundarikakshayya', AIR 1949 FC 218. The question the Federal Court had to consider in that case was whether a 'de facto' guardian of a Hindu minor can, in law, execute a promissory note in the name of the minor in respect of money borrowed for a necessary purpose and thereby bind the minor's estate. The Court decided that a guardian, whether 'de facto' or 'de jure', could not bind the minor's estate by such a contract. Mukherjea J. in his judgment observed that

"a minor is under the Indian Contract Act absolutely incapable of being a party to a contract; vide — 'Mohori v. Dharmodas', 30 Ind App 114: 30 Cal 539 (PC) and none but a party to a contract can be sued upon it. Even if he is nominally a party to a contract through his guardian, no suit on the basis of such contract would lie against the minor and no decree could be obtained in execution of which his general assets could be touched."

(8) On these authorities it must be held that a contract of lease, which is not for the benefit of the minor's existing estate, entered into by a guardian on behalf of a minor is equally invalid in law as much as a contract entered into by a minor himself. It must, therefore, be held that, on the face of it, there was no legal sub-tenancy in favour of the petitioner. There is, therefore, no ground for interference with the order passed by the learned Court below directing police help to be given for effecting delivery of possession.

(9) The Rule is discharged with costs.

(10) Let the records be sent down as early as possible.

(11) LAHIRI J.: I agree.

B/H.G.P. Rule discharged.

A.I.R. 1953 CALCUTTA 219 (Vol. 40, C. N. 75)

GUHA AND LAHIRI JJ.

S. Fernandez Appellant v. The State.

Criminal Appeal No. 158 of 1952, D/- 28-8-52.

Evidence Act (1872), S. 25 — "Police Officer" — Meaning of — Test of applicability of S. 25 — Confession made to preventive officer of customs — Admissibility in evidence — (Dangerous Drugs Act (1930), S. 23 — Sea Customs Act (1878), S. 169).

The term "police officer" in S. 25, Evidence Act, should be read not in any strict technical sense, but according to the more comprehensive and popular meaning. The investigation or the power of investigation is not the real or governing test for the application of S. 25, Evidence Act. It is enough that the officers under the powers conferred on them by an Act (such as for example the Sea Customs Act or the Bengal Excise Act) have got the essential powers, analogous to police powers, of prevention or detection of crimes even though they have not been vested with the powers of investigation. Hence a Preventive Officer of the Customs Department is a police officer in this extended sense within the meaning of S. 25, Evidence Act and as such no confession made to him shall be proved against a person accused of any offence: 1 Cal 207 and AIR 1934 Cal 580 (FB), Rel. on; AIR 1947 Mad 308, Disting. (Para 7)

Anno: Evidence Act, S. 25, N. 2, 3.

Bibhor Kumar Lahiri, for Appellant; J. M. Banerjee and N. K. Sen, Deputy Legal Remembrancer, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('18) 42 Bom 1: (AIR 1917 Bom 130: 18 Cri LJ 981) 7

('75-76) 1 Cal 207: (25 WR Cr 36) 4, 7

('34) 61 Cal 607: (AIR 1934 Cal 580: 35 Cri LJ 1071 FB) 4, 5, 6
('36) 37 Cri LJ 740: (AIR 1936 Lah 380) 7
('37) 38 Cri LJ 323: (AIR 1937 Mad 209) 7
('47) 48 Cri LJ 326: (AIR 1947 Mad 308) 8

GUHA J.: This appeal has been preferred by S. Fernandez 'alias' Salvador Fernandez who has been convicted under S. 13 read with S. 20, Dangerous Drugs Act in connection with the seizure of a certain quantity of illicit opium. It is alleged that on 24th October 1952, at K. G. Dock, Calcutta Port, he attempted to export and tranship by S. S. Tairea a certain quantity of opium in contravention of S. 7, Dangerous Drugs Act and thereby committed an offence punishable under S. 13 read with S. 20, Dangerous Drugs Act. According to the prosecution version P. W. 1 W. P. Webber, a Preventive Officer of the Customs Department, received information that the appellant was in possession of some opium on board the ship mentioned above which was lying moored at 10 Kidderpore Dock; that he along with G. K. Das, Preventive Officer, Customs, caught hold of the appellant and took him to Customs for interrogation. It is further alleged that the appellant made a confessional statement before P. W. 2 J. P. Smith, Inspector of Customs, Intelligence Branch, Mr. Das and himself. This statement was recorded by Mr. Das. The prosecution case is further that after this statement had been recorded Mr. Smith, Mr. Das and Mr. Webber went on board the Tairea and searched the place which had been indicated by the appellant, namely, berths 90 to 95 in Second Class Cabin and from behind the water pipe in the cabin they recovered 27 packets of opium. It is in connection with this opium that the appellant has been convicted as mentioned above.

(2) The main question in this appeal is whether this confessional statement is admissible in evidence. The learned Magistrate has held that it is not hit by S. 25, Evidence Act and in his view a Customs Officer is not a police officer within the meaning of S. 25, Evidence Act and as such the confessional statement in question is admissible in evidence with the result that the appellant is liable to be convicted on the basis of the admissions made by him in that statement.

(3) On behalf of the appellant it has been contended before us by Mr. Lahiri that the view taken by the learned Magistrate regarding the admissibility of the statement in question is erroneous. He has argued that a Customs Officer is a police officer and as such he comes within the mischief of S. 25, Evidence Act with the result that the statement recorded by G. K. Das is inadmissible in evidence. The question seems to be one of first impressions so far as this Court is concerned.

(4) Under S. 25, Evidence Act which was enacted in 1872 no confession made to a police officer shall be proved against the person accused of any offence. As far back as 1876 it was held by Garth C. J., in the case of — 'Queen v. Hurribole Chunder', 1 Cal 207, that

> "in construing the 25th section of the Evidence Act of 1872, I consider that the term "police officer" should be read not in any strict technical sense, but according to the more comprehensive and popular meaning."

As pointed out by S. K. Ghose J., in the case of — 'Ameen Shariff v. Emperor', 61 Cal 607 (FB), at p. 655 that Courts all over India have agreed in upholding the dictum of Garth C. J.

(5) In deciding the question whether a Customs Officer comes within the meaning of 'police officer' as mentioned in S. 25, Evidence Act we may refer to some observations made by Mukerji J., in the case of — 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), referred to above which was a Full Bench decision of this Court on the point whether an Excise Officer under the Bengal Excise Act (Bengal Act V of 1909) was a police officer. As observed by Mukerji J. in that case, the expression 'police officer' means officer other than a Magistrate whose duty is to prevent and detect crimes, the latter duty involving the duty of holding investigations and that it is in this sense that the term "police officer" should be read in construing S. 25, Evidence Act. The majority of the Judges of the Full Bench agreed with the view of Mukerji J., on the above point. It was, therefore, held in that case that an Excise Officer was a police officer within the meaning of S. 25, Evidence Act and as such hit by that section.

(6) It is necessary now to examine the powers and duties of customs officers under the Sea Customs Act (Act 8 of 1878) in order to ascertain whether a customs officer can be considered to be a police officer within the meaning of S. 25, Evidence Act. It may be mentioned incidentally that this Act was passed after the enactment of the Evidence Act and that the decision of Garth C. J. was given before the Sea Customs Act was placed on the Statute book. Chapter 17 of the Sea Customs Act deals with the procedure relating to offences, appeals, etc. Sections 169 and 171 confer certain powers of search upon Customs officers. Section 173 confers powers upon them of arresting other persons on reasonable suspicion. Section 178 confers the powers to seizure of things liable to confiscation. The powers conferred upon Customs officers and the duties imposed upon them under these sections are clearly analogous to the powers of a police officer, or for the matter of that to that of an Excise officer under the Bengal Excise Act. There is this difference, however, that the Sea Customs Act does not confer any power of investigation on a Customs officer whereas a police officer enjoys such powers and under Ss. 73 and 74 of the Bengal Excise Act (Bengal Act 5 of 1909) Excise officers have been given certain powers of investigation. Now the question that falls for decision is whether by reason of the fact Customs officers have not been given powers of investigation though they enjoy other powers analogous to those exercised by a police officer or Excise officer it can be held from that circumstance alone that S. 25, Evidence Act does not apply to such Customs officers. In other words, the question is whether it can be held that the power of investigation is a governing test on the point whether S. 25, Evidence Act is applicable. We are of opinion that the question should be answered in the negative. In the case of — 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), it was observed by S. K. Ghose J. (who concurred with the majority view) that "it may be that the power conferred to investigate is not a complete test" though Jack J., in that case seemed to base his opinion on the question of investigation as his answer to the point referred to the Full Bench shows. Even Costello J., who took a dis-

sentient view in the case of — 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), seems to have been of the opinion that it was wrong to hold that the power of investigation ought to be taken as being a criterion for the purpose of S. 25, Evidence Act.

(7) The matter may be examined from another standpoint. As regards the applicability of S. 25, Evidence Act it has been held that it is not necessary that the police officer should be the investigating officer, — 'Emperor v. Mallangowda', 42 Bom 1, nor need the crime confessed be under investigation at the time — 'Shashipani Chetti v. Emperor', 38 Cri L J 323 (Mad). It has been further held that in fact it is not necessary that the confession should have been made in the course of investigation, — 'Hussaina v. Emperor', 37 Cri L J. 740 (Lah). It would follow, therefore, that the investigation or the power of investigation is not the real or governing test for the application of S. 25, Evidence Act. It seems to us that Customs officers under the powers conferred on them by the Sea Customs Act have got the essential powers, analogous to police powers, of prevention or detection of crimes even though they have not been vested with the powers of investigation. Reference may in this connection be made again to the observation of Mukerji J., in the case of — 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), referred to before. That being so, we are inclined to hold the view that a Customs officer or, to be more precise, so far as the present case is concerned, a Preventive Officer of the Customs Department is a police officer in its extended sense within the meaning of S. 25, Evidence Act and as such no confession made to him shall be proved as against a person accused of any offence. We are fortified in coming to this conclusion by reason of the rule for placing S. 25, Evidence Act on the Statute. The reason is partly that the evidence of a police officer is untrustworthy to prove a confession and partly that the police should not be encouraged to extract confessions in the hope of gaining credit by securing convictions. These reasons, we are inclined to think, apply with almost equal force to the case of Preventive officers of the Customs Department notwithstanding the fact that they have not been invested with the powers of investigation. We may refer, in this connection to another observation of Garth C. J. in the case of — 'Queen v. Hurribole Chunder', 1 Cal 207 referred to above. It runs thus:

> "I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification."

This observation has not lost its force by the passage of time. In our opinion, therefore, though S. 25, Evidence Act was placed on the Statute Book before the Sea Customs Act was enacted, in the interests of the purity of administration of justice Customs officers who exercise powers substantially analogous to those of police officers should also be subjected to the same limitations in the matter of confessions. We hold, therefore, that the confessional statement recorded by G. K. Das in the present case is hit by S. 25, Evidence Act.

(8) It remains, however, to notice one Madras case, namely, the case of — 'Mayilvahanam v. Emperor', 48 Cri L J 326 (Mad) and decided by a Single Judge, following certain decisions of the Madras High Court based upon the Madras Excise Act the language of which can be contradistinguished from the language used in the Bengal Excise Act. It was held in that case that S. 25, Evidence Act refers only to a police officer and that a statement by an accused to the Assistant Inspector of the Customs is not hit by the section and is admissible in evidence against the accused. As has been indicated already this Madras decision is based upon certain decisions of that Court relating to Excise officers exercising powers under the Madras Excise Act. In that Madras case it was observed that

> "in the Madras Excise Act, however, there are no provisions which confer the same amount of power on the excise officers in this Presidency as in the Bombay and Calcutta Excise Acts", and "it is for this reason that this Court has, in a number of decisions, held the view that upon the construction of the Madras Excise Act excise officers in this Province cannot be deemed to be police officers within the meaning of S. 25, Evidence Act."

In the present case, however, we have to proceed on a proper construction of the relevant provisions of the Sea Customs Act, and contrast them with the corresponding provisions of the Bengal Excise Act and accordingly in spite of the decision in the case of — 'Mayilvahanam v. Emperor', 48 Cri L J 326 (Mad), we are inclined to take the view for reasons given before that a Preventive officer of the Customs Department comes within the mischief of S. 25, Evidence Act.

(9) The main point, therefore, which falls for decision in this appeal is decided in favour of the appellant. In other words the confessional statement of the appellant is hit by S. 25, Evidence Act.

(10) There remains, however, for consideration a certain portion of that statement which may be said to attract the operation of S. 27, Eivdence Act. The only portion of the statement which is admissible in evidence under S. 27 of the Evidence Act is the last sentence in the recorded statement, namely, if a search of this cabin is made the 19 seers of opium will be made (found). Mr. Banerjee appearing for the State fairly conceded that if we come to the conclusion that the entire statement made by the appellant comes within the mischief of S. 25, Evidence Act only the sentence referred to above can be admitted in evidence under S. 27, Evidence Act. Even considering that it was as a result of that statement that the opium was discovered that fact by itself cannot form the basis of the conviction of the appellant under S. 13 read with S. 20, Dangerous Drugs Act.

(11) In these circumstances we are of opinion that the conviction of the appellant cannot be sustained and the appeal must, therefore, be allowed and the conviction and the sentence set aside and the appellant acquitted. Under S. 34, Dangerous Drugs Act, however, the seized opium is confiscated.

(12) LAHIRI J.: I agree.

B/V.S.B. Appeal allowed.

A.I.R. 1953 CALCUTTA 222 (Vol. 40, C. N. 76)

R. P. MOOKERJEE AND RENUPADA MUKHERJEE JJ.

Sreedam Chandra Bhur, Plaintiff-Appellant v. Tencori Mukherjee and others, Defendants-Respondents.

A. F. O. D. No. 1 of 1952, D/- 25-6-1952.

Civil P. C. (1908), O. 7, R. 11(d) and S. 80 — Rejection of plaint in limine on ground that S. 80 was not complied with — Plaint not disclosing whether S. 80 was attracted — Order is bad.

Order 7, Rule 11(d), Civil P. C., is attracted only when on the admitted facts as appearing from the plaint itself the suit is 'prima facie' barred. AIR 1915 Cal 62 Rel. on, 34 Bom. 250 Ref. (Para 7)

The plaintiff filed a suit against certain individuals impleading also the council of Administration of the Free City of Chandernagore as defendant. In the body of the plaint, there was no admission that the Council or the Assembly was the Government within the meaning of S. 80, Civil P. C. The Court rejected the plaint suo motu under O. 7, R. 11(d) without even issuing notice to the defendants on the ground that the provisions of S. 80 were not complied with.

Held that the question whether S. 80 would be attracted or not could not be decided merely on the plaint as it stood. The Court should have registered the plaint, issued notices on the defendants and allowed them to file their written statements. After issues were raised, it would have been open to the Court to take up one or more of the issues as preliminary ones and decide the same. The Order of rejection of the plaint in limine was, therefore, bad and must be set aside. (Para 12)

Anno: C.P.C., S. 80 N. 10; O. 7, R. 11 N. 7, 10.

Nirendra Nath De, Upendra Chandra Mallick and Chittaranjan Chatterjee, for Appellant; Apurba Charan Mukherjee and Ganga Narayan Chandra, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('10) 34 Bom 250: (3 Ind Cas 159) 7
('14) 18 Cal WN 1340: (AIR 1915 Cal 62) 7
('17) 21 Cal WN 209: (AIR 1919 Cal 755) 7

R. P. MOOKERJEE J.: This appeal is directed against an order passed by the Subordinate Judge, Chandernagore, rejecting a plaint on the ground that the provisions of S. 80, Civil P. C., had not been complied with. The order was passed immediately after the plaint was filed and before any notice had been issued on the defendants.

(2) I need refer only to such of the relevant facts as would be necessary to appreciate the objection raised 'suo motu' by the learned Subordinate Judge and the contentions raised by the parties before this Court.

(3) The plaintiff filed the suit against certain individuals in their personal capacity and also as members of the Council of Administration, or the Municipal Assembly, as the case may be, of the Free City of Chandernagore. The said Council and Assembly were also impleaded as party defendants. The suit was one for a declaration that a certain resolution passed by the Council of Administration was illegal and invalid. There were further prayers for certain mandatory orders on the defendants including the Council and the Assembly and the other defendants in their capacity as members of those bodies.

(4) The plaint was originally filed on the 4th December 1951, and was immediately rejected by the learned Subordinate Judge under Order VII, Rule 11(d) of the Code of Civil Procedure for non-compliance of the provisions contained in S. 80 of the Code. A fresh plaint was filed the next day, and the learned Subordinate Judge heard the Counsel for the plaintiff and reserved his orders. The next day the learned Subordinate Judge again came to the conclusion that the plaint must be rejected as the Chandernagore Administration was a Government under S. 80 of the Code. No notice having been served under that section the plaint must be rejected.

(5) On behalf of the plaintiff appellant, it is contended that the Subordinate Judge should not have rejected the plaint at the stage when he had so done. It is not possible to finally decide the question whether either the Council or the Assembly can be regarded as "the Government" under S. 80, Civil P. C., or any one of the other defendants as "public officers". Mr. De has further contended that the Chandernagore Administration is a Local Self-Government body and not the Government.

(6) Under R. 11, O. 7, Civil P. C.,

"The plaint shall be rejected in the following cases:

* * * *

(d) when the suit appears from the statement in the plaint to be barred by any law."

(7) This clause is attracted only when on the admitted facts as appearing from the plaint itself the suit is 'prima facie' barred. As for instance when from the statements made in the plaint it appears that the cause of action arose beyond the period of limitation fixed under the Statute and no indication is given that limitation has been saved, the plaint may be rejected. Even in such a case, an opportunity is to be given to the plaintiff to amend the plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation if it is so prayed, and that without passing an order for rejection of the plaint. — 'Gunnaji Bhavaji v. Makanji Khoosal Chand', 34 Bom 250. As was observed in — 'Ratan Chand v. Secy. of State', 18 Cal WN 1340, action is to be taken under O. VII, R. 11 of the Code of Civil Procedure only if there is a clear and specific admission in the plaint from which it follows that the suit is barred. Reference may also be made to the observations of this Court in — 'Pran Krishna v. Kripanath', 21 Cal WN 209.

(8) Let us now consider whether on the plaint as filed the Court will be justified in rejecting in limine the plaint under cl. (d), R. 11, O. 7, Civil P. C. In the body of the plaint there is no admission that the Council or the Assembly is the Government under S. 80, Civil P. C. On the other hand, it is seriously contested on behalf of the plaintiff that neither of the two bodies can even be deemed to be the government. The learned Subordinate Judge refers in his order vaguely to the

"trend of French Statutes conferring greater and greater powers on the French Settlement in India and creating a 'Council du Government' there and later on cutting out Chandernagore from the Federation and conferring on Chandernagore all those

powers with a separate delegate of the 'Commissaire de la repblique', it is evident that the Chandernagore administration is a government in the grammatical and ordinary sense of the word, though its functions may fall short of the those of the Governments existing in India."

(9) Before us reliance was placed by both the parties on a printed copy of a Decree, dated 7-11-1947, issued by the President and the Council of Ministers in France (abrogating an earlier Decree, dated the 30-6-1947,) creating the Free Town of Chandernagore. Reference is made therein to a large number of earlier Decrees which are stated to have been perused before the present Decree, dated 7-11-1947, was passed. We have not before us copies of the other Decrees. We have not also materials from which it may be possible at this stage to reach a final decision as to the status of either Chandernagore or the legal position occupied by the Council or the Assembly or the President occupying the position previously held by the Mayor of Chandernagore.

(10) It is necessary to refer to another change which had taken place so far as the international position of Chandernagore is concerned. Under an arrangement between the Indian and the French Governments, administration of Chandernagore in certain matters had been left to the Central Government of India. The 'de jure' possession of Chandernagore is stated by both the parties to be as a part of the French possessions in India. According to another contention there are two sovereign authorities, the French and the Indian, if that is possible under the International law.

(11) The Government of India under a notification, dated 1-5-1950, purported to act under the Foreign Jurisdiction Act (XLVII of 1947), extending the operation of certain Indian Statutes, including the Code of Civil Procedure, as applicable in Chandernagore. At one stage of the argument on behalf of the defendants, it was attempted to be urged that the extension of the Code of Civil Procedure to Chandernagore was not legal; and that further if the Code of Civil Procedure was applicable, it could be shown that the present suit was barred under S. 80, Civil P. C. It had further been urged that even if the French law were applicable, the suit was also otherwise barred.

(12) We do not think it necessary to refer to other points urged before us by the contending parties. Suffice it to say that the question whether even if the Code of Civil Procedure applies, whether S. 80 would be attracted or not cannot be decided merely on the plaint as it stands. The Court should have registered the plaint, issued notices on the defendants and allowed them to file their written statements. After issues were raised it would have been open to the Court to take up one or more of the issues as preliminary ones and decide the same. Objection that had been raised by the Court 'suo motu' and such other objections as may be raised by the defendants would have to be tried on the merits, and only after all the necessary facts and materials are brought before the Court.

(13) Whether Article 228 of the Constitution can or would be attracted after the written statements are filed would also have to be considered at the proper stage.

(14) The order rejecting the plaint cannot be accepted. This appeal is accordingly allowed, the order passed by the Lower Court rejecting the plaint is set aside. The case is remitted to that Court so that the plaint may be registered and notices issued on the defendants and the procedure followed according to law. In view of the fact that the order passed by the Lower Court was not on an objection raised by the defendants parties will bear their respective costs in this Court.

(15) In view of the order passed in this appeal, a certificate will be issued in terms of S. 13, Court-fees Act, authorising the appellant to receive back from the Collector the full amount of Court-fees paid on the memorandum of appeal in this Court.

(16) During the pendency of the appeal in this Court, certain orders were passed on 8-1-1952, in Civil Rule No. 3016F of 1951. We direct that the directions issued by this Court on the 8-1-1952, will continue to be operative up to the 6-8-1952. It will be open to either of the parties to move the Lower Court within that date or thereafter for such order or orders to be operative after the expiry of that date. We do not indicate in any way as to what such order or orders should be so far as the 'interim' orders are concerned. Liberty is also reserved to the parties to mention to this Court about the disposal of the amount now lying in deposit in terms of the orders passed in Civil Rule No. 3016F of 1951 on the 8-1-1952.

(17) RENUPADA MUKHERJEE J.: I agree.

B/K.S. Appeal allowed.

A.I.R. 1953 CALCUTTA 223 (Vol. 40, C. N. 77)

BOSE J.

Abdul Hamid, Petitioner v. The State of West Bengal and others, Respondents.

Matter No. 162 of 1951, D/- 27-2-1952.

(a) Constitution of India, Art. 31 (2) — Article covers cases of both requisition and acquisition. (Para 6)

(b) Constitution of India, Art. 31 (2) — Public purpose — Whether requisition is for public purpose, is justiciable in Court of law — (West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947), S. 3 (1).) (Para 6)

(c) Constitution of India, Art. 31 (2) — Public purpose — Requisition for employee of State Government, whether refugee or otherwise, is for public purpose — (West Bengal Premises Requisition and Control (Temporary Provisions) Act 5 of 1947), S. 3 (1).) (Para 7)

(d) Constitution of India, Art. 226 — Unreasonable delay — No explanation — Petition not entertained. (Para 9)

Subimal C. Roy, for Petitioner; A. K. Mukherjee, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('50) 1950 SCR 621: (AIR 1950 SC 222) 3, 6, 7
('50) 54 Cal WN 642: (AIR 1951 Cal 294) 6
('50) 54 Cal WN 855 6
('51) 55 Cal WN 778: (AIR 1951 Cal 111) 3, 6
('52) 87 Cal LJ 140: (AIR 1952 Cal 65) 7
(1943) 2 All ER 546 6
(1943) 2 All ER 560 6

ORDER: This is an application under Art. 226 of the Constitution for appropriate writs for cancellation of an order of requisition dated 8th May 1950, purported to be passed under the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 (Act 5 of 1947) and for direction upon the opposite par-

ties to forbear from giving effect to that order or taking any steps or proceedings thereunder.

(2) The petitioner is the owner of premises No. 2 Chhaku Khansama Lane, Calcutta. The case of the petitioner is that prior to March 1950 the petitioner let out the premises to one Yusuf Miah at a rent of Rs. 300 per month. In or about the month of March 1950 communal disturbances broke out in Calcutta and the area where the petitioner's premises was situated was badly affected by such disturbances, with the result that refugees from East Pakistan and other persons forcibly ousted all the sub-tenants under the said Yusuf Miah (who were all Muslims) from the said premises. Yusuf Miah immediately thereafter left for East Pakistan. In April 1950 the Nehru-Liaquat Ali Pact being entered into, the said Muslim tenants who were driven out of the said premises by the refugees made an application on or about 20th April 1950 to the Deputy Commissioner of Police, North, requesting him to restore possession of the said premises which was in the wrongful occupation of the refugees and others, to the said tenants from whom possession had been wrongfully taken. This petition of the tenants is signed by one Khaliluddin and one Md. Ishaq and is counter-signed by Abdul Hamid the petitioner in the present proceedings. This petition further shows that one Yusuf was the representative of the tenants who were driven out of the premises and he made complaints to the Thana about the forcible eviction; but no police assistance was available.

Yusuf Miah thereafter having left for Pakistan on or about 23rd April 1950, the petitioner at the request of one of the tenants who were actually residing at the said premises granted a tenancy to Abdul Majid for a period of one year and accepted a sum of Rs. 325 as advance payment. This Abdul Majid is respondent 4 in the present proceedings. On 1st May 1950 the Police authorities removed the refugees and other persons who were in wrongful occupation of the premises and made over possession to the Muslim tenants who were in the premises at the time of commencement of the communal disturbances. On 2nd May 1950 the refugees again started creating trouble and threatened the tenants with dire consequences in case they continued to occupy the said premises. Apprehending a breach of the peace three of the tenants — Mushtaq Ahmed, Khaliluddin and Md. Ishaq and the petitioner applied to the Deputy Commissioner of Police for protection.

On 8th May 1950 respondent 3 who is the Assistant Secretary to the Government of West Bengal issued an order in writing purporting to requisition the said premises under S. 3 (I) of the said W. B. Act 5 of 1947 and notice of such acquisition was sent to the petitioner on or about 10th May 1950 requiring the petitioner to place the property at the disposal of the First Land Acquisition Collector on that date. On the same date the Land Acquisition Collector through his representative took possession of the major portion of the said premises. No notice of the requisition was, however, served on either Yusuf Miah or Abdul Majid who were the direct tenants of the petitioner. On 22nd May 1950, Abdul Majid commenced criminal proceedings against the petitioner on a charge of cheating under S. 420, Penal Code. On or about 24th May 1950 the petitioner made an application to respondent 3 setting out the events that had taken place in the meantime and requesting respondent 3 to recall the order of requisition but the respondent 3 did not accede to the petitioner's application. On 31st May 1950 respondent 2 served notice on the petitioner directing him to remove all articles lying in two rooms of the said premises, by 16th June 1950. On 22nd June 1950, the petitioner appealed to the Hon'ble Minister of the Revenue Department. It was pointed out in this petition that the Muslim tenants who had been occupying the entire building had been forcibly displaced by the refugees and the local Goondas and they were roaming about and had no place where they could take shelter. It is also stated in this petition that ultimately with Police help the premises was vacated and made over to the petitioner. In the petition the facts that a new agreement of tenancy was entered into with Abdul Majid and that the latter had filed a criminal case against the petitioner are also recited.

This appeal was also rejected and the petitioner was informed by a letter from respondent 3 bearing date 28th August 1950 that the prayer of the petitioner for de-requisitioning the premises with a view to reinstate the old displaced tenants could not be granted as the house had been occupied by several families of Government employees, who had to be brought down to Calcutta for disturbances in East Bengal. Thereafter on 1st November 1950, a notice was served on the petitioner under S. 4 of W. B. Act 5 of 1947 calling upon the petitioner to execute certain repairs to the premises particulars whereof were specified in a schedule annexed to that letter. As the Government did not succeed in obtaining possession of all the rooms in the said premises a notice was served upon the petitioner on 6th November 1950 intimating that if possession was not delivered by 10th November 1950 forcible possession would be taken by breaking open the locks with the help of Police. On 10th November 1950, the petitioner wrote to respondent 2 pointing out that the locked up rooms which the Government intended to break open were in the occupation of two tenants named Mushtaq Ali Ahmed and Md. Ahsan who refused to vacate the rooms in spite of the fact that the Government order of requisition was shown to them.

Thereafter the Government, however, managed to take possession of the remaining rooms from the petitioner and served him with further notices to execute repairs on the said premises and to pay municipal taxes in respect of the said premises as demanded by the Corporation of Calcutta. In the meantime the criminal proceeding which had been pending for about nine months was disposed of on 27th February 1951. The Magistrate after hearing the prosecution witnesses and the evidence given on behalf of the accused acquitted the petitioner of the charge of cheating. The notices calling upon the petitioner to execute the repairs and to pay out the Corporation taxes were served on the petitioner between 15th March 1951 and 15th May 1951. On 18th July 1951, the petitioner moved this Court and obtained a Rule Nisi.

(3) It has been contended by Mr. Subimal Roy, the learned counsel for the petitioner that the requisition in the present case has not been made for a public purpose. The question whether this matter is justiciable has been the subject of much controversy in this case. Mr. Roy

has relied on some observations of B. K. Mukherjea and Mahajan JJ. in the case of -- 'Province of Bombay v. Khusaldas S. Advani', (1950) S C R 621 and on the observations of Harries C. J. in — 'West Bengal Settlement Kanungo Co-operative Credit Society Ltd. v. Mrs. Bella Banerjee', 55 Cal W N 778, in support of his argument that the question whether a requisition in a particular case is for a public purpose or not can be enquired into by the Court.

(4) Section 3(1) of the Act (W. B. Act 5 of 1947) is as follows:

> Sec. 3(1): Whenever it appears to the Provincial Government that any premises in any locality are needed or are likely to be needed for any public purpose, it may by order in writing, requisition such premises:
>
> Provided that no premises exclusively used for purpose of religious worship shall be requisitioned under this section.

(5) Section 3(2) of the Act which is also relevant for the purpose of this case is set out hereunder:

> Section 3(2) — An order under sub-s. (1) shall be served on the landlord, and where it relates to premises in occupation, of a tenant also on such tenant in such manner as may be prescribed.

(6) It has been held in — 'Point of Ayr Collieries Ltd. v. Lloyd George', (1943) 2 All E R 546 and — 'Carltona Ltd. v. Commissioners of Works', (1943) 2 All E R 560, that where an Act or Regulation commits to an Executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith". Mr. A. K. Mukherjee, the learned counsel for the respondents, placed reliance on these cases. These cases have been followed in this Court in the case of — 'A. C. Mohamed v. Sailendra', 54 Cal W N 642, which was also a case of requisition under W. B. Act 5 of 1947 and in the case of — 'Patri Shaw v. R. N. Roy', 54 Cal W N 855, which was a case of a requisition under the West Bengal Security Act, 1948. These Calcutta cases have been approved of in — 'Province of Bombay v. Khusaldas S. Advani', (1950) S C R 621.

Now if the matter had rested there it might be said that the question of whether a requisition was for a public purpose or not could not be gone into in a Court of law. But Harries C. J. in the case of — 'W. B. S. K. Co-operative Society Ltd. v. Bella Bannerjee', 55 Cal W N 778, has expressed the view that the provisions of the Constitution of India have brought about a change in the situation and the question whether a particular acquisition is for a public purpose is justiciable in a court of law. The learned Chief Justice has attempted to draw a distinction between the case of requisition and acquisition (p. 800) but it appears to me that Art. 31(2) covers cases of both requisition and acquisition. In view of this decision in 'Bella Bannerjee's case' I am bound to hold that the matter whether the requisition in the present case was for a public purpose or not is justiciable.

(7) Mr. Subimal Roy has submitted that the respondents have not placed before the Court sufficient particulars about the alleged public purpose to enable the Court to judge whether the purpose of requisition was really a public purpose or not. Further it is submitted that the respondents have made different statements as to the nature of the alleged public purpose in the affidavits and in the correspondence and from this the Court must conclude that the requisition is not bona fide and is not for public purpose. It is pointed out that the affidavit of respondent 2 states that the requisition was made for accommodation of employees of the Government (Para 6) but in the letter annexed to this affidavit dated 28th August 1950 it is stated that the premises are in the occupation of several families of Government employees who had to be brought down to Calcutta for disturbances in East Bengal. The affidavit of respondent 2 is that the house was required for some of the employees of the Government of West Bengal. It is true that beyond making these statements of the vaguest kind no particulars have been given as to the names and addresses of the employees nor as to the nature of offices held by such employees. When the fact has been challenged one would expect that the Government would come forward with more details. The fact, however, remains that no detailed particulars are available.

The question, however, is whether this fact by itself justifies this Court in finding that the order of requisition was not for public purpose or was passed mala fide. It appears to me that it will not be proper for this Court to come to any such conclusion. Although there is some difference in the wordings of the affidavits and the correspondence, as to the purpose for which the order of requisition was made, I think there is no difference in substance and the acquisition for employees of Government whether they are refugees or not is acquisition for a public purpose. In — 'Sudhindra Nath v. Sailendra Nath', 87 Cal L J 140, Harries C. J. held that requisition for a minister was for a public purpose. It may be that in the present case the employees concerned are not entitled to as commodious or comfortable an accommodation as the Minister but the premises in the present case do not appear to be of such a nature that it cannot be honestly requisitioned for some subordinate officers of the Government. In 'Khusalda's case' Mukherjea J. has held that the housing of refugees is a public purpose. 'Province of Bombay v. Khusaldas S. Advani', 1950 S C R 621 at p. 687. I am, therefore, unable to hold that the requisition in this case was mala fide or it was not made for a public purpose.

(8) It has been next contended by Mr. Subimal Roy that inasmuch as no notice of the Order of requisition was served on the tenants as required by S. 3(2) of the Act the proceedings for requisition are void. There is no doubt that the premises had been let out to some Muslim tenants but the case of the petitioner is that he first let it out to one Yousuf Miah and under Yousuf Miah there were some sub-tenants. The petition of the tenants dated 20th April 1950 states that Yousuf Miah was their representative. So it is clear that Yousuf Miah was a tenant under the petitioner, but according to the case of the petitioner this Yousuf Miah abandoned his tenancy and left for Pakistan in April 1950 and his whereabouts could not be traced. So he was not admittedly in possession of the premises at the time of requisition. It is true that the petitioner had entered into an agreement of tenancy with another person of the name of Abdul Majid in April

1950 but he did not make over possession of the premises to the new tenant before or at the time of requisition, and because possession was not made over to the new tenant the latter filed criminal proceedings against the petitioner. Some of the sub-tenants of Yousuf Miah had perhaps kept some of the rooms under lock and key but they were not tenants of the petitioner according to the petitioner himself. Further it appears to be a fact from the petition dated 22nd June 1950 which was addressed to the Revenue Minister that with the help of the police the petitioner succeeded in driving out the refugees and in having vacant possession made over to him, and the petitioner started making repairs to the premises. The presence of a wooden ladder and the presence of sand and lime in some of the rooms indicate that the repairs were going on when the Government issued the order of requisition. It appears that the premises was not in the occupation of Yousuf Miah or Abdul Majid who are alleged to be the tenants of the petitioner and in the circumstances it cannot be said that the requirements of S. 3(2) had not been complied with or the proceedings for requisition were void

(9) Moreover, the petitioner has been guilty of unreasonable delay in moving this Court and no satisfactory explanation is forthcoming as to why the petitioner did not take steps earlier in the matter. The order of requisition was made in May 1950 and by August 1950 all his representations to the various authorities were rejected and he was totally deprived of possession of the premises in November 1950 but yet he took no steps till July 1951. It is perhaps the Government is pressing for repairs of the premises and the petitioner finds that the repairs will cost him a substantial amount that he is trying to get rid of the order of requisition. However it is not for this Court to speculate as to the reasons which prompted the petitioner to make this application. It is sufficient to point out that the materials on record do not justify this Court in interfering under Art. 226 of the Constitution. In the result this petition fails and the Rule is discharged. I make no order as to costs.

A/R.G.D. Rule discharged.

A.I.R. 1953 CALCUTTA 226 (Vol. 40, C.N. 78)

K. C. DAS GUPTA

AND DEBABRATA MOOKERJEE JJ.

Sudhir Kumar, Accused-Petitioner v. The State.

Criminal Revn. No. 471 of 1952, D/- 27-11-52.

Prevention of Corruption Act (1947), S. 3 — Proviso — Charge-sheet based on investigation made in contravention of proviso — Proceedings quashed as illegal — (Criminal P. C. (1898), S. 156).

The effect of the proviso to S. 3, Prevention of Corruption Act is that S. 156, Criminal P. C. is made inapplicable to investigation of an offence under S. 161, Penal Code. (Para 2)

The failure to comply with the mandatory provisions of the proviso to S. 3, Prevention of Corruption Act is not a mere irregularity but an illegality, the effect of which is that the entire proceedings based on the charge-sheet reported by the officer who was not competent to investigate must fail and must be quashed. AIR 1951 All 546, Diss. from. (Para 4)

Ajit Kumar Dutt, for Petitioner; Jitendra Nath Banerjee, for the State.

REFERENCE..... Para.
('51) 52 Cri LJ 197: (AIR 1951 All 546) 3

K. C. DAS GUPTA J: This Rule was issued on the State of West Bengal to show cause why the proceedings now pending against the petitioner under S. 161, Penal Code should not be quashed. It is contended before us by Mr. Dutt on behalf of the petitioner that as in this case the investigation was by a Sub-Inspector of the Railway Police in violation of the provisions of S. 3 of Act 2 of 1947, the proceedings have no legal basis. Section 3 of Act 2 of 1947 is in these words:

"An offence punishable under S. 161 or S. 165, Penal Code shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein:

Provided that a Police Officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class or make any arrest therefor without warrant".

(2) The effect of the proviso is that S. 156, Criminal P. C. is made inapplicable to investigation of an offence under S. 161, Penal Code. What S. 156, Criminal P. C. provides is that any officer in charge of a police station may without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chap. 15 relating to the place of inquiry or trial. Subsection (2) of this Section provides that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate.

(3) It was contended by Mr. Banerjee on behalf of the State on the authority of a decision of the Allahabad High Court in — 'Promod Chandra v. Rex', 52 Crl. L. J. 197 (All) that this investigation by a Sub-Inspector in violation of the provisions in the proviso that a police officer below the rank of the Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class is merely an irregularity falling within S. 156 (2), Criminal P. C. Reason for the view taken by their Lordships of the Allahabad High Court is given in these words:

"The proviso to S. 3 in so far as it places a restriction on the powers of investigation of police officers below a certain rank, is in effect, therefore, a proviso to subs. (1) of S. 156 of the Code and is analogous to the provision in sub-s. (2) of S. 561 of the same Code that no police officer below the rank of police inspector shall be employed or take part in the investigation of the offence specified in sub-s. (1) of the Section".

It is difficult to see however how the fact that the proviso in S. 3 of Act 2 of 1947 operates as the limitation to the powers of investigation given to police officers in charge of police stations can attract the provision of subs. (2) of S. 156, Criminal P. C. Certainly that would have been the position if the proviso to

S. 3 of Act 2 of 1947 had in fact been incorporated by the Legislature in S. 156, Criminal P. C. That was not done and instead very clear words were used by the Legislature to ensure that such offence shall not be investigated by any police officer below the rank of the Deputy Superintendent of Police, without the order of a Magistrate 1st class. In my opinion, we are not treating the Legislature seriously if we are to ignore such words and take the view that even though command of this nature is disobeyed, it is a mere irregularity.

(4) In my judgment, the failure to comply with the provisions of the proviso to S. 3, Prevention of Corruption Act is an illegality, the effect of which has been that the entire proceedings based on the charge-sheet reported by the officer who was not competent to investigate must fail and accordingly I direct the proceedings to be quashed.

(5) DEBABRATA MOOKERJEE J.: I agree.

A/K.S. Proceedings quashed.

A.I.R. 1953 CALCUTTA 227 (Vol. 40, C.N. 79)

P. B. MUKHARJI J.

Ashutosh Banerjee, Petitioner v. Debjyoti Burman and others, Respondents.

Civil Suit No. 33 of 1952, D/- 6-6-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 46 and 47 (1) (c) — Improper acceptance of nomination paper.

An election petition is maintainable on the ground of improper acceptance of nomination paper by the Returning Officer. AIR 1928 Cal 209; (1883) 8 AC 767 and (1897) 1 QB 175, Rel. on; ILR (1947) 1 Cal 339, Disting. (Para 6)

(b) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 27 and 30 — Rules under, Rr. 12, 13, 14, 15 — Rejection of nomination paper for absence of candidate.

The Returning Officer endorsed his Certificate of Scrutiny assigning the symbol 'Building' to the candidate B and then discovered that no one was present on behalf of B to receive the symbol. Thereupon he made a note to that effect on the margin of the nomination paper and on that ground purported to reject the nomination paper at 11-50 a.m. When the candidate and his agent turned up later on at 1-15 p.m. he reopened the case and accepted the nomination paper:

Held that the Returning Officer is limited to grounds in R. 13 (1) for his refusing any nomination. He cannot refuse any nomination on any other ground. He cannot refuse a nomination only on the ground that the candidate was not present to receive symbol or only on the ground of his absence. In purporting to reject the nomination paper in the first instance the Returning Officer was attempting to exercise a jurisdiction with which he was not vested at all. Such purported action, therefore, was entirely without jurisdiction and so null and void. (Para 18)

Held further that by signing the Certificate and by assigning the symbol in favour of respondent B, the Returning Officer accepted his nomination paper. In case the endorsement of the Returning Officer makes it ambiguous as to whether he rejects or accepts the nomination paper, the Court will incline in favour of construing such ambiguous order to be one of acceptance rather than one of rejection. Hence the Returning Officer's acceptance of the nomination paper was valid and lawful. (Paras 18, 22, 23, 24)

(c) Municipalities — Calcutta Municipal Act (3 of 1923), S. 30 — Rules under — Rr. 3 (1) (b), 12 and 14 — Returning Officer — Functus Officio.

On an interpretation of Rule 3 (1) (b), Rule 12 and Rule 14 (2) the Returning Officer has the whole of "the appointed date" for completing the scrutiny and he cannot be regarded at any part of that date as being divested of that power and becoming 'functus officio' as long as the date so appointed lasts, simply because he has finished scrutiny of a particular nomination paper. (Para 30)

K. K. Basu and A. C. Ganguli, for Petitioner; P. C. Mallik, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('28) 32 Cal WN 264: (AIR 1928 Cal 209) 6
('47) ILR (1947) 1 Cal 339 6
(1883) 8 AC 767: (52 LJPC 84) 6
(1897) 1 QB 175: (66 LJQB 137) 6

ORDER: This is an election petition under the Calcutta Municipal Act, 1923 (Bengal Act 3 of 1923 as amended by the Calcutta Municipal Act, 1950).

(2) The petitioner is Ashutosh Banerjee, a defeated candidate at the last Municipal Election of Councillors of the Corporation of Calcutta whose result was published in the Calcutta Gazette on 1-4-1952. He was a Voter at the First General Election of the Corporation, his name being recorded as No. 703 in Part "A" of the Electoral Roll of Constituency No. 64. There were four other candidates of which the first respondent Deb Jyoti Burman has been elected as the Councillor of the Corporation from the Constituency. The third and the fourth respondents after nomination withdrew from the contest. The nomination paper of the second respondent was rejected. The contest at the Polls was, therefore, between the petitioner and the first respondent.

(3) The sole ground on which the petitioner wants to set aside the election of respondent Deb Jyoti Burman is that the Returning Officer's acceptance of the nomination paper of Burman was improper and illegal.

(4) A preliminary point of objection has been raised by the counsel for the respondent that this election petition is not maintainable on that ground. I propose to deal with the preliminary point first before discussing the merits of the controversy.

(5) The preliminary point of objection is based on s. 46, Calcutta Municipal Act, 1923. It is argued that as the improper rejection of a nomination paper is expressly made a gound for election petition the Statute has impliedly excluded improper acceptance of nomination paper as a ground for challenging and disputing the validity of the election.

(6) The answer to this preliminary point depends on the construction of Ss. 46 and 47, Calcutta Municipal Act. It is true that s. 46 of the Act expressly mentions improper rejection of a nomination as a ground for disputing the validity of election. But that section also contains the words "any other cause". It is not unreasonable to construe the words "any other cause" to cover the case of an improper acceptance of a nomination. A possible argument is that the words "any

other cause" should be construed 'ejusdem generis' in the sense that these words should include only such grounds as are of the same nature as indicated by the preceding categories. In other words if improper rejection of the nomination paper is expressly mentioned then by the doctrine of 'ejusdem generis' the words "any other cause" should not be applied to include the contrary case of an improper acceptance of a nomination.

In my view improper rejection of a nomination paper and an improper acceptance of a nomination paper belong to the same category of act which can come under the doctrine of ejusdem generis & although they represent 2 contrary cases they belong to the same genus of notions. 'Ejusdem generis' rule in any event should be applied with caution so as not to unnecessarily restrict its meaning. A somewhat similar point arose for determination in the case — 'A. B. Mitchell v. J. C. Dutt', 32 Cal WN 264, where the dispute was with regard to a nomination which had become void for failure to make the requisite nomination deposit under S. 27(3) of the Act and that void nomination was put forward as a ground for disputing the validity of election. Gregory J. after noticing the Privy Council decision in —'Attorney General of Ontario v. Mercer', (1883) 8 AC 767 and English Court of Appeal decision in — 'Smelting Co. of Australia v. Commr. of Inland Revenue', (1897) 1 QB 175 at p. 181 came to the same conclusion as I have done on the interpretation of the words "any other cause". In fact at p. 267 the learned Judge observed: "In my opinion it will be pushing the principle of the rule of 'ejusdem generis 'too far not to do so' i.e. not to include the case of improper acceptance of a nomination."

In the case of — 'Noor Md. v. Md. Suleihman', reported in ILR (1947) 1 Cal 339 the Court of Appeal has made certain observations on the same point. Mitter J. at pp. 355 and 356 of that Report notices the words "any other cause" in S. 46 of the Act and also notices the words "irregularity of a nomination paper" in s. 47(1)(c) and expresses the view

> "it would be, in my opinion, legitimate to say that those general words (relating to non-compliance with the provisions of the Act or the Rules or mistake of form used in s. 47(1)(c)) have reference to "any other cause" mentioned in S. 46, with the result that S. 47 does not deal either with what I have enumerated as (a) (candidate allowed to stand for election not having necessary qualification) or (c) (improper rejection of a nomination), the intention of the legislature being that in these two cases, as in the case of corrupt practices falling within Part I Sch. 2, no proof to the effect that the result of the election has been materially affected would be required to set aside the election".

Sharpe J. at p. 364 expresses the view

> "it seems therefore hardly permissible to suppose that the omission of the words "improper rejection of a nomination" from S. 47 (1) (c) was accidental or that the legislature maintained that this specific ground should be included in the general provision of non-compliance with the provisions of the Act or the Rules or any mistake in the use of form. I agree, therefore, with the conclusion reached by my learned brother that the legislature did not intend to include the improper rejection of a nomination in S. 47(1) (c) and consequently that the improper rejection of a nomination paper on account of non-compliance with some mandatory rule will alone justify the setting aside of the election".

This decision of the Court of Appeal, however, was with regard to an improper rejection of a nomination paper and not as I have on the election petition the case of an improper acceptance of a nomination. It is unnecessary for me to pursue the line of the reasoning laid down by the Court of Appeal.

I consider that the substantial reason to hold in this case that the improper acceptance of a nomination paper is a ground for disputing the validity of an election can be supported by the language of S. 47 (1)(c) when it uses the expression "the result of an election has been materially affected by any irregularity in respect of the nomination paper". In this case there can be no doubt that if the allegation made in the election petition is true and sound the result of election has been materially affected for the simple reason that the petitioner and the first respondent Deb Jyoti Burman were the only two candidates and if respondent Burman's nomination should have been rejected then the petitioner would have been elected uncontested.

I am, therefore, of the opinion that apart from the doctrine of 'ejusdem generis' being extended to cover the case of an improper acceptance of a nomination paper within the meaning of those words "any other cause" in s. 46 of the Act, the election of the returned candidate could be declared to be void if there is any "irregularity in respect of a nomination paper" materially affecting the result of the election. In my judgment improper acceptance of a nomination paper is an irregularity in respect of nomination paper" within the meaning of s. 47(1)(c) of the Act and when such improper acceptance of nomination paper materially affects the result of the election it is also a ground for avoiding the election of the returned candidate. I, therefore, overrule the preliminary point of objection raised against this petition.

(7) I proceed now to discuss the merits of the controversy.

(8) The facts on which the main controversy in this petition is raised should be briefly stated before I formulate the point.

(9) The scrutiny of the nomination papers of the respective candidates for election for this Constituency took place on 27-2-1952. Respondent Burman had filed two nomination papers. On 27-2-1952 the Returning Officer rejected one of Burman's nomination papers which was proposed by Nanigopal Chatterjee. But on the same day he accepted his other nomination paper proposed by Anil B. Pal. The circumstances in which the Returning officer accepted this nomination paper require to be carefully stated because those circumstances are said to invalidate such acceptance.

(10) In the margin of this nomination paper appears the following note of the Returning officer.

> "None present to receive the symbol. Candidate or election agent or proposer or seconder not present today (11-50 A.M.).
> Rejected. S. M. Bhowmik.
> 27-2-52.
> Candidate
> Candidate and election agent turned up at 1-15 P.M. I, therefore, reopen the case. It is accepted.
> S. M. Bhowmik.
> 27-2-52."

What happened was that the Returning Officer endorsed his Certificate of Scrutiny assigning the symbol Building to the respondent Burman and then discovered that no one was present on be-

half of Burman to receive the symbol. Thereupon he made the note on the margin of the nomination paper saying that no one was present to receive the symbol. And on that ground purported to reject the nomination paper at 11-50 a.m. When the candidate and his agent turned up later on at 1-15 p.m., he reopened the case and accepted the nomination paper.

(11) Now the argument on behalf of the petitioner is that the Returning Officer having once rejected, rightly or wrongly this nomination paper, became 'functus officio' and he had, therefore, no jurisdiction to recall or reopen the first order of rejection. The subsequent acceptance of the nomination paper by the Returning Officer is, therefore, contended to be improper, void and illegal.

(12) Nomination of a candidate is a stage and a necessary and integral part of the process of election. It is governed by s. 27, Calcutta Municipal Act, 1923 (as amended by the Act of 1950). That section itself does not, however, provide for the scrutiny of nominations by the Returning Officer. Such scrutiny is provided for under the Rules framed under s. 30 of the Act "For conduct of elections."

(13) An analysis of these relevant Rules is necessary to appreciate the nature of scrutiny and determine the points raised on the petition.

(14) Under Rule 3(1)(a) and (b) the State Government shall appoint by Notification in the official gazette for each constituency a date not less than one month before the date fixed for the General Election by which the nominations of candidates shall be made and a further date not later than the seventh day after the first date mentioned for scrutiny of nominations. Under R. 9 the Returning Officer shall on receiving a nomination paper inform the person delivering the same, of the date, hour and place for scrutiny of nominations. Next comes the stage the actual scrutiny of the nominations and here the relevant Rules require to be set out in full.

(15) Rule 12 provides:—

"On the date appointed by the State Government under cl. (b) of sub-r. (1) of r. 3 for the scrutiny of nominations, the candidates, their election agents, every proposer and every seconder of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the Adiministrative Officer may appoint, and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time."

(15A) On a proper construction of R. 12 it is clear that "on the date appointed" for scrutiny of nominations, the candidates, their election agents, every proposer and every seconder of each candidate "may" attend at such time and place. The use of the word "may" indicates that it is not obligatory on those persons to attend. If they do not attend their nomination papers cannot be rejected merely on the ground of their non-attendance. In fact this rule provides that they can attend if they so choose, but they cannot be compelled to attend. The principle behind this enabling provision is obvious. It is this. The validity of the nomination paper of any candidate is a matter in which all the candidates are interested and, therefore, the Rule provides that they may attend and in fact raise objections to the nomination of any particular candidate. The rule, however, directs that the Returning Officer shall afford those persons mentioned in this Rule all reasonable facilities for examination of the nomination papers of all candidates.

(16) It is not contended, nor even alleged by the petitioner in this case that he was given no facilities for examining the nomination papers of respondent Burman. That is not his case. What is stated is that this second nomination paper when subsequently accepted by the Returning Officer was done in the absence of the petitioner and in derogation of the Returning Officer's previous order of rejection. The oral evidence of the petitioner is that at the time of the acceptance of this nomination paper at 1-15 p.m. he was not present although it is not even alleged in the petition. There is, however, no rule which requires that the Returning Officer must accept the nomination paper of a candidate in the presence of other candidates.

(17) Next comes R. 13(1) which proceeds to provide:—

"13(1). The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or of his own motion, after such summary inquiry, if any, as he thinks necessary, refuse any nomination on any one or more of the following grounds, namely:—

(i) that the candidate is ineligible for election in accordance with the provisions of the Act, or

(ii) that the name of the proposer or the seconder is not registered on the electoral roll of the constituency, for which the candidate is nominated, or

(iii) that the proposer or the seconder has subscribed another nomination paper which has already been received by the returning officer, or

(iv) that there has been a failure to comply with any of the provisions of the Act or of the rules relating to the nomination of candidates, or the provisions of the Act relating to the deposit to be made by a candidate under subsection (3) of S. 27 of the Act, or

(v) that the candidate or the proposer or the seconder is not identical with the person whose electoral number is given in the nomination paper as the number of such candidate, proposer or seconder, as the case may be, or

(vi) that the signature of the candidate or the proposer or the seconder is not genuine."

(18) The irresistible conclusion from this Rule may be stated in a few brief propositions. The Returning Officer shall examine the nomination papers. That is a duty cast upon him. His second duty is to "decide" the objections which may be made to any nomination". In this case it is admitted that the petitioner made no objection whatever to the nomination paper of the first Respondent Burman at any stage. This Rule does not say that objection should be made in the presence of the candidate objected to although ordinarily and usually it might so happen. His third function is an enabling power to "refuse" any nomination on the specified grounds. None of the grounds specified in cls. (i), (ii), (iii), (iv), (v) and (vi) in R. 13(1) exists in this case. The Returning Officer is limited to these grounds, for his refusing any nomination. He cannot refuse any nomination on any other ground. He cannot refuse a nomination only on the ground that the candidate was not present to receive symbol or only on the ground of his absence. In purporting to reject the nomination of respondent Burman in the first instance because no one was present to receive his symbol and because of the absence of him and of his proposer or seconder or election agent, the Returning Officer was attempting to exercise a jurisdiction with which he was not vest-

ed at all. Such purported action, therefore, was entirely without jurisdiction and so null and void.

(19) It is necessary at this stage to refer to Rule 14 (1). That Rule provides:

"14(1). The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same, and if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection".

It is clear that this rule imposes a duty on the Returning Officer to endorse on each nomination paper his decision accepting or rejecting same. In case where he rejects a nomination paper he shall record in writing a brief statement of his reasons for such rejection. The decision of rejection must always be supported by his written record of reasons for the rejections. The decision and the reasons together form part of the rejection order. The reasons of the Returning Officer in this case as I have set out, are no reasons at all in law within the grounds specified in Rule 13 (1). Therefore he cannot be deemed to have rejected this nomination paper at all. It has the same effect in law if the Returning Officer had scribbled out some unintelligible hieroglyphics on the nomination paper.

(20) The analysis of the alleged first order of rejection reveals other infirmities which go to the root of the very jurisdiction of the Returning Officer. He says "No one present to receive symbols". That means then he must have signed the Certificate of Scrutiny assigning the symbol, in this case a Building, to the respondent Burman. Now assignment of symbol to a candidate can only take place "on completion of the scrutiny of nominations". This will be clear from the following provision in Rule 15 which is in these terms:

"15. On completion of the scrutiny of nominations, the returning officer shall forthwith examine symbols selected by the candidates and if such symbols are found to conflict with each other, shall allocate the symbols in conformity as far as possible with the wishes of the candidates and if necessary by lot, and his decision in this respect shall be final. Each candidate or his election agent shall at the same time be informed of the symbol assigned to such candidate and shall be given a specimen thereof. He shall then prepare a list of valid nominations indicating therein the symbol assigned to each candidate and shall cause the said list to be affixed in some conspicuous place in his office".

(21) The allocation of symbols can, therefore, take place only after the "completion of the scrutiny". If he has already rejected the nomination paper, then how can he allocate symbol and complain that there is none to receive the symbol? The conclusion is that the Returning Officer far from rejecting the nomination paper had in fact accepted it in the very first instance. "The Certificate of the Scrutiny" which the Returning Officer has signed on this nomination paper is in these terms:

"Certificate of Scrutiny"

"I have scrutinised the eligibility of the candidate, the proposer and the seconder and find that they are respectively qualified to stand for election, to propose and to second the nomination.

The symbol assigned to the candidate is Building.

Sd/- Surendra Mohan Bhowmik.
Returning Officer.
27.2.52."

(22) Its effect is clear. It says not only that he has scrutinised the eligibility of the candidate, his proposer and seconder but also that he finds they are respectively qualified to stand for election, to propose and to second the nomination. By signing this Certificate and by assigning the symbol in favour of respondent Burman, the Returning Officer accepted his nomination paper. The marginal note thereafter that as no one was present to receive the symbol it was rejected is as at best an ambiguous performance of duty. Reading the Certificate of Scrutiny and the first marginal note together I can only come to the conclusion that it amounts to acceptance of nomination paper of respondent Burman in the first instance. In my opinion when the Returning Officer signed the Certificate of Scrutiny which itself is endorsed in print on the nomination paper he endorses his decision accepting the nomination paper within Rule 14 (1).

(23) I hold that in this case, there was in fact no rejection at all of the nomination paper in the first instance. That being so his subsequent marginal note could not or did not alter the fact of prime acceptance evidenced by the printed endorsement of the Certificate of Scrutiny signed by him on the nomination paper. I hold also that in case when the endorsement of the Returning Officer makes it ambiguous as to whether he rejects or accepts the nomination paper, the Court will incline in favour of construing such ambiguous order to be one of acceptance rather than one of rejection. In this view of the fact, the argument on behalf of the petitioner that the Returning Officer having once, rightly or wrongly, made an order becomes 'functus officio' and cannot reopen or recall his previous order goes against him. Because the first order of the Returning Officer in this case on the Certificate of Scrutiny must be read as one of acceptance.

(24) In these circumstances and for these reasons I hold that the Returning Officer's acceptance of this nomination paper of respondent Burman was valid and lawful.

(25) The point whether the Returning Officer becomes 'functus officio, the moment he passes an order for acceptance or rejection in respect of a nomination paper can only arise incidentally if it be said that the first marginal note was an unequivocal order of rejection even when read with the Certificate of Scrutiny. I propose to answer the point even if it be incidental.

(26) I am unable to accept the contention that the Returning Officer becomes 'functus officio' the moment he endorses an order, whether of rejection or of acceptance. Many duties are cast upon the Returning Officer in respect of nomination papers. Under R. 14 (2) he has the whole day appointed under cl. (b) of Sub-Rule (1) of Rule 3 for completing the scrutiny. I am, therefore, of the opinion that he can exercise his right of scrutiny throughout the whole day and he is never divested of this power during that day. Having that right during the day, he can, in my view, exercise the power of scrutiny and make or recall an order as long as that is done during the day appointed for scrutiny. It is then said that it may be when he makes an order of rejection first his rival candidate would leave the place of scrutiny with the knowledge that the contesting candidate has been rejected. Then if the Returning Officer recalls the order and accepts such nomination paper which he had previously rejected, then the rival candidate may be absent at the time of such subsequent acceptance and will not be in a position to object to such nomination. It is further contended that such a right in the Returning Officer throughout the day would mean continued presence of persons interested in a nomination throughout the whole day appointed for scrutiny

even though it has once been rejected in the earlier part of the day.

(27) This argument sounds more plausible than sound. It proceeds on the two broad planks, one of convenience and the other of probable prejudice to a rival candidate.

(28) Question of convenience cannot alter the construction of Statutes or statutory rules if they are clear in their import. Rules 3 (1) (b), 12 and 14 (2) refer to the "date appointed" and I do not see how the date can be cut down to a particular hour in the date when these Rules are so clear. The only argument that can be possible to throw any doubt on such construction is Form I prescribed under R. 3(2) and the provision in R. 9 which enjoins that the Returning Officer shall inform the hour for scrutiny. But even that argument is unavailing. Form I in para (iii) only says "Nomination papers" will be taken up for scrutiny at a particular hour. The Form and R. 9 only indicate that from a particular hour and not before the scrutiny will start. That is only indicative of the 'terminus a quo' and not 'terminus ad quem.' It cannot obviously mean that the scrutiny of a particular nomination paper on pain of invalidity must be started and finished at the instant hour specified in the notice. That will make nonsense of the Rule in practice. It may be that scrutiny of a particular nomination paper will start much later after finishing the scrutiny of other nomination papers on the same date. This does not mean that in spite of the hour indicated the Returning Officer has not the whole date to complete the scrutiny under R. 14(2) and Rr. 12 and 13.

(29) The next question is to consider if such a construction of the Rules means any prejudice to the rival candidate. I see none. A rival candidate can object to any nomination under R. 13(1). Here is a case where there was no objection by the petitioner to the nomination paper of respondent Burman. Here the Returning Officer did not purport to reject even in the first instance (assuming his first marginal note to be an order of rejection) by "deciding" any "objection". Returning Officer acted "on his own motion" under R. 13(2). Even if there were objections by rival candidates and the returning officer decided such objections by refusing the nomination paper, then in that case also there cannot be any prejudice because the Returning Officer while revising the order of rejection as long as this further scrutiny is done during the "date appointed" for scrutiny, will have before him a brief record of written reasons for such rejection.

It must be emphasised in this context that all what is required under R. 13(1) is that before he rejects he must make only a "summary enquiry" and that as "he thinks necessary". As long as that requirement is satisfied I do not see why he cannot revise a former order in the same date while his power of scrutiny lasts and as long as he makes the subsequent revised order if it be of rejection, after such summary enquiry as he thinks necessary. The same reasoning applies in case of a previously accepted nominated paper, the Returning Officer can revise it in the same date, but before he rejects it in revision he must make the "summary enquiry" as "he thinks necessary" which at least on the principle of natural justice would require notice to the candidate concerned before his previously accepted nomination is rejected.

(30) The answer to this election petition, therefore, is:—

(1) Reading the Certificate of Scrutiny and the first marginal note of the Returning Officer at 11-50 A. M. and construing them together, there was in fact no rejection of the nomination paper of respondent Burman at all at any stage.

(2) At best the first marginal note of the Returning Officer at 11-50 A. M. read with his certificate of scrutiny makes it an ambiguous order of the Returning officer. In case where Returning Officer's order is ambiguous the Court will lean on the side of an interpretation that tends to favour the acceptance of the nomination and construe such ambiguous order as one of acceptance. On this principle also I hold there is no rejection of respondent Burman's nomination paper at any stage.

(3) Even if the first marginal note of the Returning Officer at 11-50 A. M. is regarded as an order of rejection of the nomination, then such a rejection not being on any of the specified grounds in R. 13, was an action without any jurisdiction at all and, therefore, completely null and void. This is not a case in that event of an erroneous order but an order without jurisdiction. The Returning Officer, therefore, must be considered to have passed no order at all as per the first marginal note and was, therefore, free to pass the order of acceptance at 1-15 P.M. on the same nomination paper which I hold on this ground also to be valid and lawful.

(4) In any event, on an interpretation of R. 3(1)(b) R. 12 and finally R. 14(2) the Returning Officer has the whole of "the appointed date" for completing the scrutiny and he cannot be regarded at any part of that date as being divested of that power and becoming 'functus officio' as long as the date so appointed lasts, simply because he has finished scrutiny of a particular nomination paper. I will, therefore, hold that his subsequent order of acceptance, even apart from the first three grounds I have just mentioned was on that ground also valid and justified.

(31) I, therefore, dismiss this election petition with costs.

(32) The papers sent by the Corporation of Calcutta to this Court in connection with this election petition under the Rule issued herein will be returned to the Corporation.

B/D.H. Petition dismissed.

A.I.R. 1953 CALCUTTA 231 (Vol. 40, C.N. 80)

HARRIES C. J.

Krishna Lal Mazumdar, Petitioner v. Manindra Nath Banerjee, Opposite Party.

Civil Rule No. 89 of 1951, D/- 2-5-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), Sections 5 and 6 — Applicability — Order for possession made before West Bengal Premises Rent Control (Temporary Provisions) Act 17 of 1950 — Tenant's application under S. 18(1), West Bengal Premises Rent Control Act rejected — Order for possession not appealed from — No application under S. 18(1) or any suit pending when Amendment Act 1950 came into force — S. 5 of the Amendment Act 1950 has no application — S. 6 also does not apply — S. 6 applies only where order for possession is made at any time between commencement of the main Act and the Amending Act — Tenant cannot be given any relief under S. 5 or S. 6. (Paras 3, 4, 5)

Haridas Gupta, for Petitioner; Hirendra Chandra Ghose, for Opposite Party.

ORDER: This is a petition from an order of a learned Judge of the Small Cause Court dis-

missing an application by the tenant defendant for relief under S. 18 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950.

(2) A suit for possession was decreed on 25th November 1949. On 24th May 1950 an application was made under S. 18 of the Rent Control Act, 1950, for relief and by consent the amount of the outstanding arrears of rent etc. was fixed at Rs. 1952/11/3. The amount was deposited, but the landlord refused to accept the same and moved the High Court in revision against the order of the Court vacating the decree for possession upon deposit of the amount due. The revision application was allowed by this Court and the rule was made absolute. The result was that the tenant's application for relief under the 1950 Act stood rejected and the order for possession remained. This was the state of affairs, when on 4th December 1950, the application giving rise to these proceedings was made asking for relief under the 1950 Act as amended by the West Bengal Premises Rent Control Amendment Act, 1950.

(3) Relief could be granted under that Act if the case fell either within the provisions of S. 5 or S. 6 of the Amending Act. Section 5 of the Amending Act deals with cases where applications under S. 18 (1) of the 1950 Act were pending when the Amending Act was passed and with suits which were pending when that Act was passed.

(4) The learned Judge had pointed out that when the amending Act was passed no application under S. 18 (1) of the 1950 Act was pending and no suit was pending as an order had been made for possession which was not appealed from. That being so, S. 5 is of no assistance to the petitioner.

(5) It is suggested that relief can be given by reason of S. 6 of the Amending Act. But it is quite clear that the petitioner cannot bring his case within that section. That section only applies if at any time between the commencement of the 1950 Act and the Amending Act an order or decree for recovery of possession of any premises has been made. This order for recovery was not made between these dates, but had been made long before.

(6) In my view the learned Judge was right in holding that no relief could be given under the provisions of the Amending Act and that being so, this revision fails and is dismissed with costs.

(7) The Rule is discharged.

(8) Let the affidavit in opposite filed in Court to day be kept on the record.

B/R.G.D. Rule discharged.

A.I.R. 1953 CALCUTTA 232 (Vol. 40, C. N. 81)

CHAKRAVARTTI J.

Ram Ratan Karmakar and another, Petitioners v. Amulya Charan Karmakar and others, Opposite Party.

Civil Rule No. 1309 of 1951, D/- 28-4-1952.

Debt Laws — Bengal Agricultural Debtors' Act (7 of 1936), S. 2 (d) — Transaction of loan.

A patta and ekrarnama exchanged between two parties, the former clearly purporting to be a document of lease and the latter stipulating for the return of the property if the amount paid as premium is repaid by a certain date, could not possibly constitute a debt or even a transaction of loan in substance in the absence of any obligation on the part of alleged debtor to repay the amount and the creditor to demand the same. The substance of a loan is a right in the creditor to demand payment and the substance of a debt is a liability upon the debtor to repay the money. (Para 4)

Radha Kanta Bhattacharya, for Petitioners; Hem Chandra Dhar and Satya Charan Pain, for Opposite Party.

REFERENCE ..... /Para

('47) Civil Revn. No. 1565 of 1946, D/- 26-5-1947 (Cal) 4

ORDER: This Rule is directed against an order dated 27th March 1951, passed by the Additional District Judge of 24 Parganas under S. 40A of the Bengal Agricultural Debtors' Act. The applicants before me are the debtors.

(2) The only question for consideration is whether the transaction between the predecessor-in-interest of the petitioners and the predecessor-in-interest of the opposite parties was a mortgage or a lease. It appears that on the 11th March 1921, one Ram Krishna, the predecessor-in-interest of the petitioners took a sum of Rs. 120/- from Amulya Charan, the predecessor-in-interest of the opposite parties. The only question involved in this Rule is the character of this money.

(3) It appears that in connection with that payment a patta was executed in favour of Amulya Charan in respect of a share of a tank, whereas an ekrarnama was executed in favour of Ram Krishna. The patta purports in the clearest possible manner to be a document of lease whereas the ekrarnama stipulates that if the amount paid as premium be repaid by Chaitra, 1343 B. S. Amulya Krishna or his successor-in-interest would be bound to return the property. In an application made on 8th April 1945 by the present petitioner for the settlement of the so-called debt constituted by the aforesaid sum of Rs. 120/- the Special Officer held that there was, in fact, a debt and that it had been satisfied by the usufruct of the property enjoyed by the creditors for upwards of 15 years. On appeal, however, the appellate officer held that there was no loan at all and no debt and that decision has been affirmed by the learned Additional District Judge.

(4) Even if the point concerned had been an open point, I would have no difficulty in coming to the conclusion that the two documents read together could not possibly constitute a transaction of mortgage or for the matter of that a transaction of loan. A formal mortgage is excluded by the terms of the patta themselves and the case for the debtor is not in any way advanced by the terms of the ekrarnama. The only question which remains to be determined is whether the transaction, not being in form a transaction of loan, was yet in substance such a transaction. It appears that the precise question came to be considered by a Bench constituted of Ellis J. and myself in 'Civil Revn. No. 1565 of 1946, D/- 26-5-1947' and it was held by us that documents, precisely of the same character as the document in the present case, could not possibly constitute a debt between the parties. It was pointed out that the lessee under the terms of the lease that was being considered there, was to pay a certain amount per annum as rent and that the alleged debtors were not bound under the ekrarnama to re-

turn the amount of the selami but only had an option to do so. It was further pointed out that the transaction could not possibly be even in substance a loan inasmuch as the substance of a loan is a right in the creditor to demand payment and the substance of a debt is a liability upon the debtor to repay the money. Such right and such liability being absent in the transaction that we had to consider in the previous case, we reached the conclusion that there was no relationship of debtor and creditor between the parties. Sitting singly, I am bound by that decision given in a case which is on all fours with the case I have now before me. As I have stated, even without the assistance of that case, I would have reached the same conclusion.

(5) It was contended that the case cited was distinguishable inasmuch as in that case there was only an option to return the selami whereas in the present case there was an obligation. There is no trace of any such distinction in the Ekrarnama in the present case. Here also there is only an option, nothing more and nothing less.

(6) It was further pointed out that no rent had been paid and at least no payment of rent had been proved in respect of the lease. I cannot see how that circumstance is relevant in construing the effect of a document. What the relationship created between the parties was will have to be spelt out from instruments themselves. If the lessee did not pay rent, the only effect of that failure is that he was in arrears to his landlord. The nature of the relationship between the parties could not thereby be altered in the slightest degree.

(7) In my opinion the correct view was taken by the appellate Officer and the learned Additional District Judge.

(8) The Rule is accordingly discharged with costs—hearing fee one gold mohur.

B/M.K.S. Rule discharged.

A.I.R. 1953 CALCUTTA 233 (Vol. 40, C. N. 82)

ROXBURGH J.

Debendra Nath Sarkar, Petitioner v. Sm. Parul Bala Ghosh and another, Opposite Party.

Civil Rule No. 1138 of 1950, D/- 21-2-1951.

Civil P. C. (1908), O. 21, Rr. 97 and 100 — Decree for possession against tenant — Claim of sub-tenant under Rent Control Acts — Procedure.

Where a landlord has obtained orders for recovery of possession of premises from his tenant and on seeking to carry out the orders is opposed by sub-tenant alleging that he had some right under the new West Bengal Premises Rent Control (Temporary Provisions) Act the Court should not drag in the police and go on providing the landlord with further and more powerful weapons to force the sub-tenant out under the street, and leave him then to go to Court under O. 21, R. 100. In such a case the sub-tenant is perfectly entitled to draw the attention of the Court to the fact that he has a claim under the new Rent Control Acts to ask the Court not to give further assistance to the landlord in carrying out the Court's order in respect of the premises occupied by the sub-tenant, but to insist that the landlord makes an application under O. 21, R. 97 so that the question of the right of the sub-tenant may be properly determined by the Court. (Para 4)

Anno: C.P.C., O. 21 R. 97 N. 5; R. 100 N. 1.

Paresh Nath Bhattacharjya, for Petitioner; Prokash Chandra Bhose, for Opposite Party.

ORDER: This Rule raises the question of the procedure to be adopted in the Calcutta Court of Small Causes in cases where landlords have obtained orders for recovery of possession of premises from their tenants and on seeking to carry out the orders are opposed by sub-tenants alleging that he had some right under the new West Bengal Premises Rent Control (Temporary Provisions) Act.

(2) In previous cases disposed of by me the facts were that the tenants had applied to the Court even before the landlord had sought through Court to obtain possession of the premises, and I have pointed out that such applications are premature. I have also pointed out that in my opinion the sub-tenant has a remedy under the provisions of O. 21, Rr. 97 to 100, Civil P. C. which are made applicable to these proceedings of the Calcutta Court of Small Causes under S. 49 (sic), Calcutta Small Causes Court Act.

(3) In the present case, the landlord had obtained possession of some of the premises in pursuance of his order against his tenant but in respect of one room and kitchen held by opposite party 2 he was resisted by opposite party 2 and did not obtain possession. Opposite party 2 then went to Court and stated that he had a sub-lease and prayed that the plaintiff be forbidden from taking possession of the room occupied by the applicant by execution of the decree and that the bailiff in charge of the execution of the writ of possession in connection therewith be directed accordingly. This prayer was eventually rejected on August 5 on the ground that the application by the sub-tenant was not maintainable. On August 18, the landlord applied to the Court for police help to obtain possession and the Court granted the prayer. The sub-tenant has now moved this Court.

(4) It cannot be said that in form there is anything wrong with the actual order passed by the learned Judge on August 5. because the sub-tenant was not entitled to make the application in the form in which he has made it. On the other hand, the sub-tenant I think is perfectly entitled to draw the attention of the Court to the fact that he has a claim under the new Rent Control Acts to ask the Court not to give further assistance to the landlord in carrying out the Court's order in respect of the premises occupied by the sub-tenant, but to insist that the landlord makes no application under O. 21, R. 97 so that the question of the right of the sub-tenant may be properly determined by the Court. It does not seem to me right that when once a Court is given to understand that there is a sub-tenant claiming a right under the Acts that the Court should drag in the police and go on providing the landlord with further and more powerful weapons to force the sub-tenant out under the street, and leave him then to go to Court under O. 21, R. 100. The order of August 18 directing that such help be given is quashed.

(5) With these comments, the Rule is discharged but the Court may bear this in mind if any further application is made by the landlord for forceful assistance to execute his order

and if the landlord does not first make an application under O. 21, R. 97. I make no order as to costs.

B/D.H. Rule discharged.

A.I.R. 1953 CALCUTTA 234 (Vol. 40, C.N. 83)

G. N. DAS AND LAHIRI JJ.

Bata Shoe & Co., Ltd., Tenant-Petitioner v. Narayan Das Mullick and others, Landlords-Opposite Party.

Civil Rule No. 1920 of 1950, D/- 19-4-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 2 (8) and 9 (e) — "Premises" means what forms subject-matter of one demise — Fixation of basic rent — One room let to two tenants in two portions — Subsequently room let to one tenant after removing partition — Basic rent cannot be fixed on basis of two premises.

The disputed room was let out on 1-12-1941, in two portions to two separate tenants. Since September 1942, the entire room was let out to the petitioner's predecessor-in-interest the intervening partition wall having been removed from the said room. In fixing the basic rent the Rent Controller proceeded on the footing that the basic rent could be ascertained by totalling up the rent payable in respect of the two portions of the disputed room and by giving to the landlord an increase in the taxes payable by the tenant:

Held that the word 'premises' in S. 2 (8) meant whatever formed the subject-matter of one demise. A conspectus of the various provisions of the Act is consistent only with the view that what the Act was contemplating was a determination of the relationship between the landlord and the tenant of a tenancy and to regulate the same in terms of the Act. It would be incorrect to use the word 'premises' as referable to the land itself apart from the question of a tenancy in respect of the same. It must therefore be held that the basic rent of the premises cannot be determined on the footing of the rent which was payable for the two different portions of the said premises which were in the occupation of different tenants on that date. The Court has got to determine what rent was properly payable for the premises the rent whereof was sought to be standardised, on the material date namely 1-12-1941. (Para 3)

Nani Coomar Chakrabarty, for Petitioner; Apurbadhan Mukherji and Gopinath Nandi, for Opposite Party.

G.N. DAS J.: This Rule was obtained by the petitioner who is a tenant of a room in premises No. 24A Canning Street in the city of Calcutta. The petitioner applied on 29-4-1949 for fixation of standard rent in respect of the said room. The Rent Controller fixed the standard rent at Rs. 171-7-3 with effect from 1-4-1949. On appeal the Judge of the Court of Small Causes by his order dated 25-9-1950, has modified the order of the Rent Controller & has fixed the standard rent at Rs. 140-9-6 with effect from 1-5-1950. The petitioner assails the order of the Small Cause Court Judge on the ground that there was no basic rent in respect of the disputed premises and as such the fixation of standard rent was erroneous in law.

(2) The question depends on certain facts to which reference should be made. It appears that the disputed room was let out on 1-12-1941 in two portions to two separate tenants. The rent paid by the tenant in respect of the western portion of the room was Rs. 65/- per mensem. The rent paid by the tenant occupying the eastern portion of the room was Rs. 58/- per mensem. It appears that since September 1942 the entire room was let out to the petitioner's predecessor-in-interest at a rent of Rs. 90/- the intervening partition wall having been removed from the said room. The rent payable by the predecessor-in-interest of the present petitioner was later raised to Rs. 100/-. It does not appear when the rent was so increased. The Rent Controller proceeded on the footing that the basic rent could be ascertained by totalling up the rent payable in respect of the two portions of the disputed room and by giving to the landlord an increase in the taxes payable by the tenant. The appellate Court has modified this decree but the effect of the decisions of both the Courts below is the same. The decision proceeds on the footing that the room, the standardisation of rent whereof is in question, was let out on 1-12-1941, as the rent paid by the tenants occupying the two portions of the said room. The question is whether it could be said that the premises the rent whereof is sought to be standardised were let out at a certain rent on 1-12-1941.

(3) In order to deal with this contention it is necessary to refer to certain provisions of the West Bengal Premises Rent Control Act (Act 17 of 1950). This Act came into force on 30-3-1950. The application for standardisation of rent was made when the earlier Act, West Bengal Premises Rent Control (Temporary Provisions) Act (Act 38 of 1940) was in force. It is not disputed that the rights of the landlord and tenant, so far as it concerns the application for standardisation of the rent, would be governed by the provisions of the 1950 Act. Section 9 of the 1950 Act confers on the Rent Controller jurisdiction to fix the standard rent payable for any premises. Section 9(1) provides as follows:

"In any of the following cases, the Controller shall on application by any landlord or tenant fix the standard rent as set forth hereunder (a) where the provisions of Sch. A apply and there is no cause for the alteration of the rate of standard rent as determined according to the schedule for any of the reasons mentioned in the following clauses, in accordance with the provisions of Sch. A."

We are not concerned with cls. (b) to (d) for the purpose of the present case. Clause (e) runs as follows:

"Excepting the case covered by cl. (f) following where the provisions of Sch. A for determining the standard rent do not apply, either because the premises or the whole of the premises were not let on 1-12-1941 or for some other reasons, or where any premises have been let rent free or at a nominal rent, or for some consideration other than money rent, or in addition to money rent, by fixing the standard rent at a rate in accordance with Sch. A, taking the rent which would have been reasonably payable for the premises if let on 1-12-1941, as basic rent under the said schedule."

We are not concerned with cls. (f) and (g). We have now to refer to Sch. A to find out what the standard rent should be. Schedule A is

headed as "provision for determining the standard rent of premises." The disputed room is used as a shop and not for residential purposes. The material clause would therefore be para 3, which says that where the premises are used or mainly used otherwise than for residential purposes the standard rent

"shall be (a) the basic rent, if a period of three years had not elapsed after the time when rent was fixed as mentioned in para 1(a) or the increased rent as mentioned in para 1(b) was first paid."

Para 3, cl. (b) states further that when the said period of three years relevant to the case has elapsed or elapses or where such period is not relevant the basic rent increased by 10 per cent. if the basic rent per mensem is not more than Rs. 100/-, and the basic rent increased by 15 per centum if the basic rent is more than Rs. 100/-. The question what is the basic rent is dealt with in para 1 of Sch. A. We are not concerned with cl. (a) of para 1 in the present case. Clause (b) of para 1 states that

"where the rent of the premises has not been so fixed the rent which was payable for the premises on 1-12-1941, or if any increased rent was paid for the premises between that date and the coming into operation of this Act, the increased rent, which was last paid but not as to exceed the rent payable on 1-12-1941, by more than 10 per centum in case of premises within Calcutta and 20 per centum in case of other premises."

The contention raised on behalf of the petitioner is that the premises the rent whereof is sought to be standardised was not let on 1-12-1941. The ground suggested is that the word 'premises' should mean the entire subject-matter of the present demise, that is, the room taken as a whole. Mr. Mukherji appearing for the opposite party on the other hand contends that the question which is relevant for this purpose is not whether the subject-matter of the present demise was in the occupation of a single tenant or formed the subject-matter of a separate tenancy but whether the subject-matter of the present demise was in the occupation of tenants, & the fact that the subject-matter of the demise was separately let out to separate tenants and formed the subject-matter of separate letting is entirely irrelevant. In order to determine this question we have to consider the meaning of the word "premises" as used in S. 2, cl. 8. The word 'premises' is defined to mean "any building or part of a building or any hut or part of a hut let separately and....." In its grammatical sense the word 'premises' obviously means a building or part of a building or a hut or part of a hut which is the subject-matter of a separate demise. In other words, the word 'premises' means whatever formed the subject-matter of one demise. Neither the context nor the subject, requires us to place a forced construction on the word 'premises' as suggested on behalf of the opposite party.

The meaning of the word 'premises' as contended for by the petitioner is the correct one, receives support from the definitions of the words 'landlord' and 'tenant' as occurring in the Act. The word 'landlord' is defined in S. 2, cl. 4 of the Act to mean any person who for the time being is recovering the rent of any premises from the tenant thereof and includes any person who is entitled to bring a suit for such rent. The word 'tenant' is defined in S. 2(11) to mean any person to whom rent is, or but for a special contract would be, payable for any premises and includes any person who is liable to be sued by the landlord for rent. When the Act therefore speaks of an application either by the landlord or the tenant to apply for fixation of standard rent it obviously implies that the Controller is required to fix the rent of the tenancy in question. That this is the true interpretation of the word 'premises' would also appear if we consider the other provisions of the Act, namely provisions of ejectment of tenant etc. The words "the premises or the whole of the premises" in S. 9, cl. (c) do not point to a different conclusion. In my opinion, a conspectus of the various provisions of the Act is consistent only with the view that what the Act was contemplating was a determination of the relationship between the landlord and the tenant of a tenancy and to regulate tne same in terms of the Act. It would be incorrect to use the word 'premises' as referable to the land itself apart from the question of a tenancy in respect of the same. On all these grounds we are of the opinion that the contention raised on behalf of the petitioner is correct. It must therefore be held that the basic rent of the premises cannot be determined on the footing of the rent which was payable for the two different portions of the said premises which were in the occupation of different tenants on that date. The Court has got to determine what rent was properly payable for the premises the rent whereof is now sought to be standardised, on the material date namely 1-12-1941.

As the case was not properly approached by the Courts below from the correct angle it is necessary that the orders of the Rent Controller and of the Small Cause Court Judge should be vacated and this application remitted to the Rent Controller for fixing the standard rent in the light of the observations contained in this judgment. The petitioner is entitled to the costs of this Rule, hearing fee being assessed at two gold mohurs.

(4) LAHIRI J.: I agree.

B/R.G.D. Orders accordingly.

A.I.R. 1953 CALCUTTA 235 (Vol. 40, C.N. 84)

BACHAWAT J.

Raj Kumar Shaw, Plaintiff v. Dominion of India, Defendant.

Suit No. 4236 of 1948, D/- 28-11-1952.

(a) Civil P. C. (1908), Ss. 20 and 80 — Notice under S. 80 is part of cause of action — (Letters Patent (Cal.), Cl. 12) — (Railways Act (1890), S. 77).

When the notice under S. 80 for the action against the Dominion of India representing the East Indian Railway was both issued at and served in Calcutta.

Held that the notice was part of the cause of action for the purpose of jurisdiction and the High Court of Calcutta could try the suit. Suit No. 1679 of 1946 (Cal); AIR 1949 Cal 622, Relied on; 86 Cal LJ 98 and AIR 1952 Cal 35 (FB), Dist. (Para 3)

Anno: Civil P. C. S. 80 N. 9; S. 20 N. 15; App. II L. P. Art. 12 N. 8; Railways Act S. 77 N. 1.

(b) Letters Patent (Calcutta), Art. 12 — Rescission of leave.

Obiter: If the institution of the suit in the High Court is oppressive or if the balance of convenience is overwhelmingly in favour of trial of the suit elsewhere, the High Court has undoubted power to revoke the leave granted under Cl. 12, Letters Patent, in a fit and proper case. (Para 6)

Anno: Civil P. C. App. II L. P. (Cal), Art. 12 N. 11; S. 20 N. 12 Pt. 11.

R. C. Deb with Mr. Ramen Dutt, for Plaintiff; R. K. Ghose, for Defendant.

REFERENCES: Courtwise/Chronological/ Paras
('46) Suit No. 1679 of 1946 (Cal) 3
('49) 84 Cal LJ 175: (AIR 1949 Cal 622) 3
('50) 86 Cal LJ 98 4
('52) 56 Cal WN 83: (AIR 1952 Cal 35 FB) 5

ORDER: This is a suit against the Dominion of India representing the East Indian Railway. The matter has been set down for hearing of the preliminary issue whether or not this Court has jurisdiction to try this suit.

(2) On behalf of the plaintiff, it is admitted that the only part of the cause of action upon which they can rely is the issue and service of notice under S. 80, Civil P. C. at Calcutta within the jurisdiction of this Court. It is admitted by counsel for the defendant that notice under S. 80, Civil Procedure Code was both issued at and served in Calcutta within the jurisdiction of this Court. It is contended by the defendant that the issue and service of such notice is not part of the cause of action and therefore this Court has no jurisdiction.

(3) I am satisfied on the authorities that notice under S. 80, Civil P. C., is part of the cause of action for the purpose of jurisdiction. That such notice is part of the cause of action was decided by Sinha J. in — 'Dunlop Rubber Co. (India), Ltd. v. Governor-General', in Suit No. 1679 of 1946 (Cal), and was held in — 'Dominion of India v. Jagadishprosad Pannalal', 84 Cal LJ 175. These cases are binding upon me and I am bound to follow them.

(4) The cases relied upon by counsel for the defendant are distinguishable. In — 'Nilima Sarkar v. Governor-General in Council', 86 Cal LJ 98, it was held that the phrase 'cause of action' as used in Article 10 of the Indian Independence (Rights, Properties and Liabilities) Order, 1947, does not include a notice under S. 80, Civil P. C. But the Court expressly stated that it was unnecessary in that case to decide whether for the purpose of jurisdiction notice under S. 80, Civil P. C. might be regarded as a part of the cause of action.

(5) The case of — 'Banshi v. Governor-General of India in Council', 56 Cal WN 83 (FB), relied upon by the defendant is also distinguishable. In that case it was held that notice under S. 77, Railways Act, is no part of the cause of action for the purpose of jurisdiction. The ground for that decision was that notice under S. 77, Railways Act, is not a condition precedent to the institution of the suit because that notice could be given even during the pendency of the suit. It is clear however that notice under S. 80, Civil P. C. is a condition precedent to the institution of the suit.

(6) I must not be supposed to say that the Union of India is helpless if a suit is instituted in this Court relying solely upon the fact that notice under S. 80, Civil P. C., has been given at Calcutta. If the institution of the suit in this Court is oppressive or if the balance of convenience is overwhelmingly in favour of trial of the suit elsewhere this Court has undoubted power to revoke the leave granted under Cl. 12 of the Letters Patent in a fit and proper case. That is not the issue before me. The only issue before me is whether this Court has jurisdiction.

(7) The preliminary issue is therefore decided in favour of the plaintiff and I hold that this Court has jurisdiction to try and entertain the suit.

(8) The plaintiff is entitled to the costs of the hearing on the preliminary issue.

B/H.G.P. Order accordingly.

A.I.R. 1953 CALCUTTA 236 (Vol. 40, C.N. 85)

DAS AND SEN JJ.

Udaychand Mahatab, Appellant v. Gopinath Reja and others, Respondents.

Letters Patent Appeal No. 14 of 1951 D/- 26-11-1952, from judgment of Roxburgh J., in A. F. A. O. No. 96 of 1949.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 168 A — Decree for arrears of rent of putni tenure — Execution — Stay of — Tenure sold in subsequent execution of rent decree in respect of subsequent period — Prayer for amendment and continuation of previous execution by sale of other properties — Maintainability.

A landlord obtained a decree for arrears of rent in respect of a putni tenure and applied for execution of the decree on 7-3-1941 by sale of the tenure. Thereafter, the execution was stayed as a result of debt settlement proceedings but the stay was ultimately vacated on 4-6-1946. In the meanwhile, the putni tenure was sold on 21-1-1946 in execution of a subsequent decree for rent obtained by the landlord in respect of a subsequent period. On 4-6-1946, the landlord applied for amendment of his previous execution application by praying for sale of other properties of the judgment-debtor on ground that the tenure in question had already been sold and purchased by him in subsequent rent execution. The Court allowed the amendment & directed the execution to proceed as prayed for after issuing notice under O. 21, R. 22, Civil P. C. to the judgment-debtor. The judgment-debtor objected that the execution as prayed was not maintainable in view of S. 168-A Bengal Tenancy Act.

Held that (1) the amendment petition and the order made thereon did not initiate a new proceeding in execution on the date of making of the order but it merely carried on the old execution which was started in 1941. The prayer for sale which was contained in the original application for execution remained, the difference being that as the tenure had been sold and was no longer available for further execution, the landlord decree-holder wanted to sell other properties of the judgment-debtors. AIR 1929 P. C. 209 and AIR 1935 Cal 143 dist; AIR 1942 Cal 306 Ref. (Paras 5 and 9)

(ii) Since the tenure had not ceased to exist when the original execution was applied for in 1941 and which was sought to be continued in 1946, the application was not saved by the proviso to S. 168 A from the bar imposed by S. 168 A. AIR 1946 Cal 6 Rel. on. (Paras 5, 9)

Purushottam Chatterji, for Appellant; Sanat Kumar Mukherji and Hemanta Krishna Mitter for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('29) 33 Cal W. N. 977: (AIR 1929 P. C. 209) 8
('34) 60 Cal LJ 123: (AIR 1935 Cal 143) 6
('41) 45 Cal W. N. 903: (AIR 1942 Cal 306) 6
('45) 49 Cal W. N. 629: (AIR 1946 Cal 6) 5

DAS J.: This is an appeal by the decree-holder under cl. 15, Letters Patent, against the judgment of Roxburgn J. affirming the orders made by the court below dismissing the appellant's application for execution as prayed for.

(2) The facts are not in controversy and may be stated as follows: The respondents held a putni tenure under the appellant. The rent of the putni having fallen into arrears, the appellant landlord obtained a decree for arrears of rent on 17-7-1939. This decree was executed on 7-3-1941, the prayer in the execution petition being a sale of the tenure in arrears. Thereafter the proceedings in execution were stayed on receipt of a notice from the Debt Settlement Board, at the instance of the judgment-debtors. The order for stay made by the Board was ultimately vacated.

On 4-6-1946, the appellant made an application for amendment of the execution petition. In the amendment petition, the decree-holder stated that the tenure in arrear had been sold in an intermediate rent execution and that it was necessary to proceed with the execution by a sale of other properties of the judgment-debtors. The decree-holder accordingly prayed for proceeding with the execution proceedings initiated on 7-3-1941. On this application, the trial court by Order No. 8 dated 2-7-1946 directed that the execution petition be amended and the execution do proceed as prayed for. It was further directed that the notice under O. 21, R. 22, Civil P. C. do issue on the judgment-debtors. On receipt of this notice some of the judgment-debtors filed an objection under S. 47, Civil P. C. on the ground that the execution proceedings as laid were not available to the landlord decree-holder in view of the provisions of S. 168 A, Bengal Tenancy Act.

(3) Before I deal with the validity or otherwise of this objection I may refer to an intermediate execution which was initiated by the landlord decree-holder. It appears that for a period subsequent to that covered by the decree which is now under execution, rent of the putni again fell into arrears and the landlord obtained another decree for rent on the 11-6-1942. This decree was executed and the putni tenure in arrear was brought to sale on the 21-1-1946, and the sale was confirmed on the 25-2-1946.

(4) The objection of the judgment-debtors under S. 168A, Bengal Tenancy Act, was sought to be got round by the decree-holder on the ground that as the tenure in arrears had already been sold and purchased by the landlord and as such had ceased to exist, there was no bar to the decree-holder proceeding with the execution in view of the proviso to S. 168A(1). This contention depends on the view one takes of the effect of the amendment petition which was made on 4-6-1946, and which was allowed by the Court on the 2-7-1946.

(5) Section 168A, Bengal Tenancy Act, forbids execution of a decree for arrears of rent inter alia by a sale of the immoveable properties of the judgment-debtors other than the tenure in arrear. This rule is subject to an exception which is contained in the proviso to S. 168A(1). The proviso takes away the disability imposed by S. 168A(1) in cases where the term of the tenancy expires before an application is made for the execution of the decree. It is now well settled that this expiry may take place after the filing of an initial application for execution of the decree for rent. It is sufficient that the expiry takes place before the initiation of the execution proceedings in which the decree-holder wants to sell other properties of the judgment-debtor, (See the case of —'Sree Iswar Radha Ballav Jew Thakur v. Mahima Ranjan', 49 Cal WN 629.)

The question therefore is whether the sale of the tenure in arrear in the present case took place before an application for execution of the decree in which the landlord prayed for realisation of his decree for rent by a sale of other property. This depends on the view one takes of the effect of the amendment petition filed on 4-6-1946 and the order made thereon. I have already set out the terms of the amendment petition and the order made thereon.

Mr. Chatterji appearing for the appellant has strongly contended that the effect of the order was in substance to initiate new proceedings for execution of the decree on the date of the order amending the execution petition. Reliance is placed on the fact that in the original execution which was started in 1941 the decree-holder prayed for a sale of the tenure in arrear with the consequences which may attach thereto under Ch. XIV of the Bengal Tenancy Act. The amendment petition sought to change the mode of execution by praying for a relief not against the tenure in arrear but against other properties of the judgment-debtors. Reliance is also placed upon the fact that the Court directed the issue of a notice under O. 21, Civil P. C. In my opinion, the effect of the amendment petition and the order made thereon did not initiate a new proceeding in execution on the date of the making of the order but it merely carried on the old execution which was started in 1941. The prayer for sale which was contained on the original application for execution remained, the difference being that as the tenure had been sold and was no longer available for further execution, the landlord decree-holder wanted to sell other properties of the judgment-debtors.

(6) Reference was made by Mr. Chatterji to the case of —'Badri Narayan v. Baidya Nath Pal', 60 Cal LJ 123. In that case the decree-holder had prayed for sale of certain properties. Those properties were sold and thereafter the decree-holder wanted to put in a further list of properties. This list was filed after the decree had become 12 years old. A question then arose whether s. 48 barred the further proceedings in execution by a sale of the added properties. The decree-holder suggested that the filing of the list thereby continued the old execution but Mukerji J. who delivered the judgment of the Bench pointed out that all the reliefs which the decree-holder had prayed for in the earlier execution had been granted by the Court and the execution as prayed for had been fully satisfied, the prayer made by the filing of a fresh list of properties was a new prayer which could not have been given on the original petition and in that view it was held that this must be regarded as a new execution.

This case was considered by a Bench decision of this Court in the case of —'Shekenderali v. Abdul Rashid', 45 Cal WN 903 and was distinguished on the ground that the first execution had been fully satisfied and the filing of the last could not operate to review an execution which was fully satisfied. In the later decision this Court held that it was competent for the executing court in its discretion to amend the original application for execution by the addition of new properties.

The mere fact that some new properties were substituted for some other properties mentioned in the application for execution did not mean that a fresh execution starts on the date the decree-holder puts in a list of fresh properties.

(7) In Badrinarayan's case cited above, the execution started by the decree-holder had worked itself out; unlike the present case, when the execution prayed for was not worked out the prayer for sale of the tenure had become unavailable as a result of some other proceeding in execution of another decree.

(8) Mr. Chatterji also referred us to a decision of the Privy Council in the case of —'Maharaj Bahadur Singh v. A. H. Forbes', 33 Cal WN 977 (P.C.) . In that case the decree-holder had prayed for a sale of the tenancy in arrear. Thereafter, in view of certain judicial decisions the decree-holder made an application for execution stating that the decree might be regarded as a money decree and the same may be executed by a sale of certain properties. It was pointed out that this last execution could not be regarded as a continuation of the earlier one, the reason given being that the decree-holder had abandoned the prayers contained in the earlier execution proceedings and the last execution was a substantial departure from the earlier one and cannot be regarded as a continuation of the earlier execution proceeding. In my opinion, this case does not assist the appellant in his contention.

(9) In the present case, the decree-holder himself prayed for amendment of the execution petition. He expressly stated that the amendment petition be regarded as a part of the execution petition. The relief by way of a sale which was already contained in the original application for execution had not been granted in the execution case and as the properties in respect of which the relief was prayed for became unavailable the same relief by sale could be sought for against certain new properties. In my opinion, the view taken by Roxburgh J. that this cannot be regarded as a new application for execution is correct. In this view, the decree-holder's application was rightly held to be barred under s. 168A, Bengal Tenancy Act.

(10) This appeal accordingly fails and is dismissed with costs.

(11) SEN J.: I agree.

B/K.S. Appeal dismissed.

A.I.R. 1953 CALCUTTA 238 (Vol. 40, C.N. 86)

GUHA AND LAHIRI JJ.

Dulal Chandra Mondal, Accused-Petitioner v. The State.

Criminal Revn. No. 739 of 1952, D/- 20-8-52.

(a) Criminal P. C. (1898), S. 117 (3) — Interim security — Order for, before recording evidence — Competency.

Reading the two sub-sections, namely, sub-s. (1) and sub-s. (3) together it is open to the Magistrate in a suitable case to take action under sub-s. (3) against a particular person even before any evidence has been recorded. The enquiry does not commence only after the Magistrate has started taking down evidence. Consideration of the police papers or hearing learned Advocates of the parties regarding the case may also be treated to be a stage — a preliminary stage — in the enquiry contemplated under sub-s. (3) even before any evidence has been recorded or any witness examined. All that sub-s. (3) says is that pending the completion of the enquiry under sub-s. (1) the Magistrate may direct the person in respect of whom the order under S. 112 has been made, to execute a bond. (Para 2)

Anno: Cr. P. C., S. 117 N. 6.

(b) Criminal P. C. (1898), S. 122 — Sureties — Rejection of — Persons living at considerable distance from accused's residence.

Sureties offered by the accused, living at a considerable distance from his residence, are liable to be rejected on the ground that they would not be able to exercise proper control over him. (Para 3)

Anno: Cr. P. C., S. 122 N. 5.

Nalin Chandra Banerjee, for Petitioner; Amaresh Chandra Roy, for the State.

GUHA J.: This is a petition by one Dulal Chandra Mandal for revision of certain orders passed against him by the Sub-Divisional Magistrate of Barasat. It appears that on receipt of a police report the learned Sub-Divisional Magistrate drew up proceedings against the present petitioner under S. 110, Criminal P. C., on 26-6-1952, asking him to show cause why he should not be ordered to execute a bond of Rs. 500/- with two local sureties for good behaviour for a period of three years. The petitioner was present in Court and on the same day the proceedings drawn up against him under S. 112, Criminal P. C., were explained to him under S. 113, Criminal P. C. On the very same day, the learned Magistrate passed against the petitioner an order under S. 117 (3), Criminal P.C. directing that he be detained in custody until the conclusion of the enquiry or until a bond of Rs. 500/- with two local sureties was executed, as in the opinion of the learned Magistrate immediate measures were necessary for the prevention of breach of the peace and commission of offences and for public safety. This order under S. 117 (3), Cr. P. C., was it appears, passed on the basis of a police report submitted against the petitioner requesting that he might be dealt with under that section.

(2) The main point that has been canvassed before us by Mr. Banerjee on behalf of the petitioner is that in view of the provisions of S. 117 (1), Criminal P. C., the learned Magistrate was not competent to pass an order against the present petitioner under sub-s. (3) of the same section before he had commenced the inquiry against the petitioner under sub-s. (1) by recording at least some evidence. Mr. Banerjee contends that on the plain reading of sub-s. (1), S. 117, Criminal P. C. the enquiry contemplated under that sub-section commences only after some evidence has been recorded. Admittedly, in the present case no such evidence has been recorded yet and the learned Magistrate passed the order under sub-s. (3) on the basis of the police report requesting action against the petitioner under sub-s. (3). Sub-section (1) says that when an order under S. 112 has been read or explained under S. 113 to a person present in Court — these provisions of the law were admittedly complied with in the present case — the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary. Then sub-s. (3) says that pending the completion of the enquiry under sub-s. (1) the Magistrate may,

in certain circumstances, direct the person in respect of whom the order under S. 112 has been made to execute a bond.

Reading the two sub-sections namely, sub-s. (1) and sub-s. (3) together it seems to us that it is open to the Magistrate in a suitable case to take action under sub-s. (3) against a particular person even before any evidence has been recorded. The enquiry does not commence only after the Magistrate has started taking down evidence. Consideration of the police papers or hearing learned Advocates of the parties regarding the case may also be treated to be a stage — a preliminary stage, — in the enquiry contemplated under sub-s. (3) even before any evidence has been recorded or any witness examined. All that sub-s. (3) says is that pending the completion of the enquiry under sub-s. (1) the Magistrate may direct the person in respect of whom the order under S. 112 has been made, to execute a bond.

Looking at the plain words of the Statute, it seems to us that the requirements of this provision of law have been satisfied in the present case inasmuch as the proceedings drawn up under S. 112 were explained to the present petitioner under S. 113, Criminal P. C., and the learned Magistrate had also addressed himself to the facts mentioned in the police report requesting the Magistrate to take action against the present petitioner under sub-s. (3). This being the position, we are of opinion that so far as the legality of the order passed by the learned Sub-Divisional Magistrate against the present petitioner under sub-s. (3), S. 117, Criminal P. C. is concerned it cannot be validly challenged.

(3) Next it was contended that the learned Magistrate was not justified in insisting upon local sureties. So far as this point is concerned, as has been pointed out by the learned Magistrate in his order dated the 21-7-1952 sureties offered by the petitioner living at a considerable distance from the latter's residence would not be able to exercise proper control over the accused were liable to be rejected.

(4) It has been brought to our notice, however, that the police report against the present petitioner was wrong in so far as it was stated therein that he had been convicted previously under S. 392, Penal Code. It appears that the conviction was not under S. 392, Penal Code, but under S. 323, Penal Code. In view of this circumstance as also other circumstances of the case, it seems to us that it will meet the ends of justice if the present petitioner is required under S. 117(3), Criminal P. C., to be detained in custody until the conclusion of the enquiry or until a bond of Rs. 200/- with two local sureties of like amount each is executed and the order of the learned Magistrate is modified accordingly. Suitable opportunities should be given to the petitioner to furnish such bond.

(5) With this modification in the order of the learned Magistrate the Rule is discharged.

(6) LAHIRI J.: I agree.

B/M.K.S. Rule discharged.

A.I.R. 1953 CALCUTTA 239 (Vol. 40, C.N. 87)

P. N. MUKERJEE J.

Brindaban Ghose and another, Plaintiffs-Appellants v. Jiban Chandra and others, Defendants-Respondents.

A. F. A. D. No. 1300 of 1948 D/- 19-8-1952.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 26-F(1), (4) (a) and (7) — A, B and C co-sharers in holding — Sale by B of his share — A pre-empting sale without impleading C — C subsequently pre-empting without impleading A within three years of sale — Rights of A and C inter se.

A, B and C were the co-sharer-tenants in certain holding. B sold his share to a third person. A applied for pre-emption without impleading his co-sharer, C, to whom no notice of the sale had been given and got possession of B's share by pre-emption after depositing the price. Subsequently, within three years of the sale C applied for pre-emption of the same share and obtained possession of it after depositing the price but without making A party to the proceeding. A thereupon brought a suit for declaration of his title to the entire share pre-empted by him on the allegation that the subsequent order for pre-emption in C's favour was of no effect.

'Held' that the order for pre-emption passed in C's favour in proceedings started by him was not void or invalid in law. He was entitled to apply for pre-emption within three years of the sale by virtue of S. 26 F(i) and having exercised that right in time it was not lost under the latter part of S. 26-F (4) (a). Sub-S. (7) of S. 26-F did not really affect this position because what vested in the transferee was merely the right, title and interest of the transferor subject to the statutory right of pre-emption of the co-sharer tenant which arose immediately on the transfer. The order for pre-emption in C's favour stood side by side with earlier order for pre-emption in A's favour and having made equal deposits both A and C were entitled to possession in equal shares:AIR 1948 Cal 48 (F.B.) and 52 Cal W. N. 95 Ref. (Para 5)

Syama Charan Mitter and Manan Kumar Ghose, for Appellants; Rabindra Nath Bhattacharjee, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('46) 50 Cal W. N. 502: (AIR 1946 Cal 339 F.B.) 4

('48) 52 Cal W. N. 64: (AIR 1948 Cal 48 F.B.) 4, 5

('48) 52 Cal W. N. 95 4

('49) 53 Cal W. N. 107: (AIR 1948 Cal 353) 4

JUDGMENT: A quesion of some nicety is involved in this second appeal. The appellants who are the plaintiffs in the trial Court claimed 16 annas title to the entire suit lands on the strength of an order for pre-emption made in their favour under S. 26F, Bengal Tenancy Act. This claim was allowed in part by the learned Munsif, namely, to the extent of an 8 annas share and the said decision was affirmed on appeal by the learned Subordinate Judge. Hence the present second appeal by the plaintiffs.

(2) The relevant facts lie within a short compass and they are as follows: The disputed lands formed part of an occupancy raiyati holding. In this holding plaintiff appellant No. 1, Brindabon and his brother Rashbehari and

defendants Nos. 1 and 2, Jiban Chandra Haldar and Sudhir Chandra Haldar, were co-sharer tenants. Rashbehari died and thereafter his heirs sold the disputed lands as appertaining to his share to one Makhan Lal Gharami by a registered kobala dated 22-6-1946. In the said kobala only Brindabon was named as the co-sharer tenant and upon receipt of notice of the same Brindabon applied for pre-emption under S. 26F, Bengal Tenancy Act, on the 6-9-1946 and the usual deposit having been made his said application which had been registered as Misc. Judicial Case No. 313 of 1946 was allowed on the 9-11-1946 and he got possession of the disputed lands on 7-12-1946 and from him plaintiffs Nos. 2 and 3 claim to be subsequent settlement holders.

No notice of the above sale was, however, served upon the other co-sharer tenants, namely, defendants respondents Jiban and Sudhir, nor were they made parties in or served with notice of Brindabon's pre-emption proceeding (Misc. Judicial Case No. 313 of 1946), but they on coming to know of the said sale applied, sometime in October, 1946, for pre-emption under S. 26F, Bengal Tenancy Act, giving rise to Misc. Judicial Case No. 317 of 1946 and this claim for pre-emption on the part of the defendants respondents Jiban and Sudhir was allowed on 11-1-1947 and in pursuance of the order made in that proceeding they in their turn are said to have obtained possession on 19-1-1947. In this latter pre-emption proceeding Brindabon was not impleaded nor were plaintiffs Nos. 2 and 3 and, accordingly, they brought the present suit claiming 16 annas title to the entire disputed lands on the strength of Brindabon's pre-emption proceeding (Misc. Judicial Case No. 313 of 1946) and contending that defendants Nos. 1 and 2, Jiban and Sudhir, acquired nothing by the order for pre-emption in their favour in their subsequent pre-emption proceeding.

(3) What has to be considered, therefore, is the legal consequence of the two pre-emption proceedings. The courts below have agreed in giving effect to both the said proceedings and divided the fruits of pre-emption between the plaintiffs and the defendants Nos. 1 and 2 half and half in view of the fact that each side deposited equal amounts of purchase money and statutory compensation. The courts below have in the above view declared the plaintiffs' title to a moiety of the disputed lands and have granted them necessary consequential reliefs. The propriety of this decision has been assailed before me by the learned Advocate for the appellants on the ground that by reason of sub-ss. 4 (a) and 7 of S. 26F, Bengal Tenancy Act, the defendants' right to pre-empt the suit lands was lost when they failed to join Brindabon's pre-emption proceeding and the order for pre-emption was passed in favour of Brindabon alone with the consequence that the defendants acquired nothing under their own pre-emption proceeding. The argument is no doubt attractive, but it is unsustainable in the ultimate analysis and I am unable to accept the same.

(4) The right to pre-empt under S. 26F, Bengal Tenancy Act, arises on the making of a transfer vide — 'Debendra Nath v. Gunendra Nath', 53 Cal W N 107, vide also — 'Jatindra Nath v. Jetu Mahato', 50 Cal W N 502 (FB) and it arises in favour of all the co-sharer tenants (vide sub-s. 1, S. 26F). This right, however has to be enforced as laid down in the section itself. Under sub-section 1, it can be enforced by an application made within 4 months of the receipt of the Statutory notice of transfer or in the absence of such notice within 3 years from the date of transfer (vide —'Asmatali v. Mujaharali', 52 Cal WN 64 (SB).) Under sub-s. 4 (a), it can also be enforced by an application made in a pending application for pre-emption within a month of the filing of this latter application or within the period mentioned in sub-section (1), whichever is later. This is an additional or alternative method of such enforcement vide — 'Jahi Ruddin v. Mohammad Shoukat Ali', 52 Cal WN 95. Sub-section 4 (a) then provides that if a co-sharer tenant fails to avail himself of either of the above methods his right to pre-empt will be lost or extinguished (vide the last part of sub-section 4(a)).

In the absence, therefore, of any such default on his part a co-sharer tenant's right to pre-empt is not lost or extinguished, but it subsists & enures to his benefit & has to be respected. Sub-section 7, S. 26F, Bengal Tenancy Act does not really affect this position. What vests under it is the right, title and interest accruing to the transferee from the transfer in question. Such right etc. is undoubtedly subject to the statutory right of pre-emption of the co-sharer tenant which arises immediately on the making of the transfer. What accrued, therefore, to the transferee under the transfer is the right etc., of his transferor subject to the cosharer tenant's right of pre-emption and nothing more vests under sub-s. 7. So long, therefore, as a co-sharer tenant's right to pre-empt is not lost or extinguished he is not affected by the said sub-s. 7. Indeed, even in the sub-section itself, there is a plain recognition of this position as will appear from the wordings of the last part thereof.

(5) Tested in the above light the appellants' contention must fail. Admittedly, the defendants got no notice of the sale in question. They were, therefore, entitled to apply for pre-emption under S. 26F(1), Bengal Tenancy Act, within 3 years from the date of sale, that is, within 3 years from the date of completion of sale vide — 'Asmatali v. Mujaharali', 52 Cal W N 64 (SB), and they did so apply in October 1946 and succeeded in getting an order for pre-emption in their favour. They did not, therefore, allow their right of pre-emption under S. 26F, Bengal Tenancy Act, to lapse or become lost or extinguished under the latter part of sub-s. 4 (a) of the said section and the order for pre-emption made in their favour in their subsequent, that is, subsequently initiated, pre-emption proceeding was not void or invalid and cannot be said to be of no effect in law. It stands side by side with the earlier order of pre-emption in favour of plaintiff No. 1 and has, therefore, in the facts and circumstances of this case, the same or a similar effect on the title to the disputed lands inasmuch as equal deposits were admittedly made in the two pre-emption cases. The Courts below were, therefore, right in their conclusion and their decision must be upheld.

(6) This appeal, accordingly, fails and it is dismissed, but in the circumstances, I make no order as to costs in this Court.

B/K.S. Appeal dismissed.

A. I. R. 1953 CAL. 241 (Vol. 40, C. N. 88)

P. N. MOOKERJEE J.

Bishnupada Mondal and another, Plaintiffs-Appellants v. Dwijabar Mondal and another, Defendants-Respondents.

A. F. A. D. No. 660 of 1948, D/- 26-2-1952.

Tenancy Laws — Bengal Tenancy Act (8 (VIII) of 1885), S. 26 F (7) — Sale of part of homestead by Kobala, and lease of same land by subsequent Kabuliat, in favour of vendor — Held, on construction of these deeds, that what was transferred was not only the superior interest of landlord but the whole interest of the vendor.

The suit land forming a part of the land appertaining to the occupancy rayati holdings and which was mainly homestead was apparently sold by a kobala by the plaintiffs to Defendant No. 2 along with some other patit lands, for a consideration of Rs. 500/- and, on the same day, the plaintiffs executed the kabuliyat in favour of defendant No. 2 in respect of the suit land purporting to take a bemeadi lease of the same from the said defendant No. 2 as their landlord. Defendant No. 1 as a co-sharer of the occupancy raiyati holding of which the suit land formed a part applied for pre-emption in respect of the sale made under the Kobala. It was contended by the pre-emptor that the alleged lease under the Kabuliyat constituted in law a subsequent incumbrance or, an incumbrance "created after the date of the transfer" — within the meaning of S. 26 F (7) of the B. T. Act and could not, therefore, affect or prevail over the pre-emption of the sale under the kobala which conferred full and absolute title to the pre-emptor over the suit land and entitled him to khas possession of the same. For the plaintiffs, it was argued that the Kobala and the kabuliyat formed parts of one transaction so that the effective sale, so far as the suit land was concerned, was not of the plaintiffs' entire interest therein but only of such interest minus the leasehold rights reserved in their favour by the Kabuliyat or, in other words, only the superior or the landlord's interest under the said kabuliyat was actually sold by the Kobala:

Held on the construction of the two deeds that the contention of the pre-emptor was correct and that there was little scope for thinking in the circumstances of this case, that the Kobala and the kabuliyat formed parts of one transaction and should be read together to ascertain the true nature thereof and should be so construed as to lead to the conclusion that what was sold by the plaintiffs to defendant No. 2 was not their full or entire interest in the suit land but only that interest minus the leasehold rights under the kabuliyat or in other words, that only the superior or the landlord's interest vis a vis the said lease-hold rights was sold by the Kobala. AIR 1927 PC 32 and AIR 1927 Cal 884, Distinguished. (Para 5)

Shyama Charan Mitra and Manan Kr. Ghose, for Appellants; S. C. Janah and Shyamadas Bhattacharyya, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('27) 31 Cal WN 670: (AIR 1927 PC 32) 4
('28) 55 Cal 104: (AIR 1927 Cal 884) 4

JUDGMENT: This is the plaintiffs' appeal arising out of a suit for confirmation of possession and permanent injunction on declaration and establishment of their tenancy right in the suit land. The suit has been dismissed by the two Courts below and in this appeal the plaintiffs as appellants contend that the said dismissal is erroneous as, according to them, on a proper construction of the two documents, namely, the Kobala (Ex. 1) and the Kabuliyat (Ex. 2) it ought to be held that the said Kobala and Kabuliyat were parts of one transaction so that what was sold by the Kobala (Ex. 1) was only the superior on (or?) the landlord's interest in the suit land under the Kabuliyat (Ex. 2) and the principal defendant No. 1 Respondent got in his pre-emption case nothing more of the suit land than the said superior or the landlord's interest. This contention of the plaintiffs-appellants which has been rejected by both the learned Munsif and the learned Additional District Judge will have to be carefully examined in this appeal in the light of the submission made by their learned Advocate.

(2) The suit land forming a part of the land comprises an area of .10-1/3 decimals out of .31 decimals appertaining to the occupancy rayati holdings recorded in C. S. Dags Nos. 134, 139 & 141 of Khatian No. 10 of Mouza Chotto Monoharpur, District 24-Parganas, and is mainly homestead. On 4-9-1943 it was apparently sold by the plaintiffs to pro forma defendant No. 2 along with some other lands, admittedly patit—the whole measuring .16 decimals—for a consideration of Rs. 500/- (Vide Kobala Ex. 1) and on the same day the Plaintiffs executed the Kabuliyat (Ex. 2) in favour of pro forma defendant No. 2 in respect of the suit land purporting to take a bemeadi lease of the same from the said pro forma defendant No. 2 as their landlord. The principal defendant No. 1 as a co-sharer of the occupancy raiyati holdings of which the suit land formed a part applied for pre-emption in respect of the sale made under the Kobala (Ex. 1) and succeeded in getting an order in his favour under S. 26F(5), Bengal Tenancy Act, against the vendee pro forma defendant No. 2 and, on the strength of that order, he attempted to disturb the plaintiffs' possession under the Kabuliyat (Ex. 2). Hence the present suit by the plaintiffs for declaration of their tenancy right in the suit land and for confirmation of their possession therein and also for a permanent injunction restraining the principal defendant No. 1 for (from?) disturbing such possession.

(3) The suit was resisted by the principal defendant No. 1 mainly on the ground that the alleged lease under the Kabuliyat (Ex. 2) constituted in law a subsequent incumbrance—or, to use the words of the relevant statute, namely, the Bengal Tenancy Act, an incumbrance "created after the date of the transfer" — within the meaning of S. 26F (7) of the Bengal Tenancy Act and could not, therefore, affect or prevail over the pre-emption of the sale under the Kobala (Ex. 1) which conferred full and absolute title to the pre-emptor principal defendant No. 1 over the suit land and entitled him to khas possession of the same. The Courts below have accepted this defence and dismissed the plaintiffs' suit and against this concurrent decree of dismissal the present second appeal has been preferred by the plaintiffs.

(4) On behalf of the plaintiffs-appellants Mr. Mitter has argued that the Kobala (Ex. 1) and the Kabuliyat (Ex. 2) formed parts of one transaction so that the effective sale, so far as the suit land was concerned, was not of the plaintiffs' entire interest therein but only of such interest minus the leasehold rights reserved in their favour by the Kabuliyat (Ex. 2), or, in other words, only the superior or the landlord's interest under the said Kabuliyat (Ex. 2) was actually sold by the Kobala (Ex. 1). In support of this argument, Mr. Mitter has strongly relied on the decision of the Judicial Committee in the case of — 'Ramarayanimgar v. Maharaja of Venkatagiri', 31 Cal W N 670 (PC) as also on the decision of this Court in the case of — 'Mahmed Yakub v. Hamid Ali', 55 Cal 104. In my opinion, however, none of the said two decisions is of any assistance to Mr. Mitter's clients and neither of them is any authority for holding in favour of his contention.

(5) In each of the two cases cited there was a mortgage under which the mortgagee was entitled to interest and in lieu thereof to possess and enjoy the mortgaged properties. This right to possess and enjoy the mortgaged properties in lieu of interest was transferred — partly in one case and wholly in the other — by the mortgagee in favour of the mortgagor by a lease executed on the same day as the corresponding mortgage and, in these circumstances, their Lordships held in either case that the lease was

"in the nature of machinery for the purpose of — realising the interest due on the mortgage",

or, in other words, that it was a convenient means or arrangement for working out a part of the corresponding mortgage transaction so that the mortgage and the lease in each case were parts of one transaction.

In the present case, no such argument is available as the lease in question (vide Kabuliyat Ex. 2) can hardly be regarded as a machinery or a means or arrangement to work out the sale effected by the Kobala (Ex. 1) which was a sale apparently of all the properties mentioned in the schedule of that Kobala (Ex. 1) including the whole of the plaintiffs' interest in the suit property. When this is considered along with the recital in the Kabuliyat (Ex. 2) that the lessees thereunder, namely, the plaintiffs, were taking settlement of land which had already been sold to and purchased by the lessor the pro forma defendant No. 2 there remains little scope for thinking in the circumstances of this case, that the Kobala (Ex. 1) and the Kabuliyat (Ex. 2) formed parts of one transaction. It is important to note in this connection that there is nothing in the records of this case to indicate—and there is no suggestion even that but for the Kabuliyat (Ex. 2) the price fixed in the Kobala (Ex. 1) would have been higher, or, to put it more plainly, that such price would have been more than Rs. 500/-, the figure named in the Kobala (Ex. 1), if the plaintiffs' whole interest in the suit land had been within the subject-matter of the sale in question. In such context it is impossible to hold. that the Kobala (Ex. 1) and the Kabuliyat (Ex. 2) were parts of one transaction and should be read together to ascertain the true nature thereof and should be so construed as to lead to the conclusion that what was sold by the plaintiffs to pro forma defendant No. 2 was not their full or entire interest in the suit land but only that interest minus the leasehold rights under the Kabuliyat (Ex. 2) or in other words, that only the superior or the landlord's interest vis a vis the said leasehold rights was sold by the Kobala (Ex. 1). It follows, therefore, that Mr. Mitter's argument cannot be accepted and the present appeal must fail.

I, accordingly, dismiss this appeal but, in the circumstances of this case, direct that the parties would bear their own costs throughout.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 CAL. 242 (Vol. 40, C. N. 89)

(SPECIAL BENCH.)

G. N. DAS, GUHA RAY AND S. K. SEN JJ.

Sm. Premlatika Sircar, Petitioner v. Provash Ch. Sircar, Respondent.

Divorce Suit No. 4 of 1949, D/- 14-8-1952.

Divorce Act (1869), Ss. 3(3) and (4) — Jurisdiction — Both parties must reside or must have last resided.

In order that the District Court at a place may have jurisdiction, residence of both the parties within its jurisdiction and not merely of the petitioner is necessary. (Para 2)

Anno: Divorce Act, S. 3 N. 2.

G. N. DAS J.: This matter has come up before this Court for confirmation of a decree nisi made by the District Judge, Howrah, directing that the marriage between the petitioner and the respondent be dissolved. One of the points raised related to the jurisdiction of the Court.

(2) On going through the papers it appears that in the petition the allegation was that the petitioner, the wife, and the respondent, the husband, last lived together at Lake place, Ballygunge, which is within the jurisdiction of the District Court, 24 Parganas. In her evidence the petitioner did not say that she and her husband last lived together or at present reside at any place within the jurisdiction of the District Court of Howrah. The petitioner merely stated that she lived at Amta within the said jurisdiction under S. 4, Divorce Act, the Court which is competent to make an order for dissolution of marriage is the District Court. The term "District Court" is defined in S. 3(3) of the Act as meaning the "Court of the District Judge within whose jurisdiction both the parties, i.e., the husband and the wife, reside or last resided".

Residence of both the parties and not merely of one of them, is necessary. In view of the statement in the petition and in the evidence of the petitioner, it is quite apparent that the parties do not reside or did not last reside together within the jurisdiction of the District Court of Howrah. The District Court, Howrah, had no jurisdiction to make a decree nisi for dissolution of the marriage. The petition must, therefore, be disallowed on this ground.

(2a) The decree nisi passed by the District Court, Howrah, is set aside as having been passed without jurisdiction.

(3) GUHA RAY J.: I agree.

(4) S. K. SEN J.: I agree.

B/R.G.D. Decree nisi set aside.

A. I. R. 1953 CAL. 243 (Vol. 40, C. N. 90)

K. C. CHUNDER J.

Ramrichpal Jhunjhunwalla, Petitioner v. Messrs. Jagadish Prosad Laloo Prosad, Opposite Party.

Civil Rule Nos. 1433 and 1434 of 1952, D/- 25-7-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9(1), cls. (c) and (g)—Both clauses cannot be applied to same proceeding. (Para 2)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (1) (f) — Applicability — Part of building completed after 31-12-1949 and let — Proviso to S. 9 (1) (f) does not apply.

Section 9 (1) (f) has to be applied in the case of fixation of rent of all buildings constructed wholly or substantially after 31-12-1949. The actually completed work of construction may be at the time of either the entire building or of a part of the building. Remembering the definition of the word "premises" in S. 2 (8) there are three different cases of actually completed construction and letting out under that section. The first case is when the entire building has been completely constructed and is let out wholly to one person. In such a case there can be no question that S. 9 (1) (f) will apply and the proviso has no application. The second case will be where the construction of the entire building has been completed but it has been let out separately in parts to separate tenants, that is, there are separate tenancies, or as it is sometimes called, "several lettings". Then also it is clear that the whole of S. 9 (1) (f) will have to be applied, namely, the main sub-clause will apply as also the proviso. (Para 5)

The third class of cases is, where proof has been given that the entire construction, when completed, will be a six-storied building, the plinth is constructed for that purpose and the sanctioned Municipal plan is for the same purpose. The construction as yet completed has been only of a part of it and that part is being let out in separate tenancies or "several lettings". In such cases, it is clear that the proviso to S. 9 (1) (f) cannot apply, because the cost of the entire construction is not known and cannot be ascertained at that stage. There is nothing in the main body of the sub-cl. (f) which may not be applied to that case. (Paras 9, 11)

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (1) (f) — Construction.

The expressions "costs of construction" and "completion of construction" do not refer to the construction of the entire building. The "construction" referred to in the body of the sub-clause, or "the completed construction", appear to refer to the "construction" or "completed construction" of the premises of which the rent is being actually determined. (Para 10)

Binayak Nath Banerjee and Susil Kumar Biswas, for Petitioner; Charu Chandra Ganguly and Prafulla Kumar Chatterjee (Jr.), for Opposite Party.

ORDER: These are two petitions in revision by a landlord against two appellate judgments of the Judge of the Sixth Bench of the Court of Small Causes Calcutta, reversing in appeal an order of the First Additional Rent Controller.

(2) An application was filed before the Rent Controller by the tenant for fixation of standard rent. The premises in question, it is admitted by both parties, form part of a larger building not yet entirely constructed and those premises and the portion of the building up to now constructed were all constructed after 31-12-1949. The Rent Controller directed fixation of rent under Ss. 9 (1) (e) or 9 (1) (g). As I have already pointed out in another decision, two sub-clauses of the same section cannot be applied to the same proceeding. In the proceedings it is not clear whetner he actually applied cl. (e) or cl. (g) of S. 9 (1).

(3) Both the landlord and tenant appealed. There were two appeals. Hence two revisions. In both the appeals the appellate Court directed that the fixation must be under S. 9(1)(f) and remanded the case for the purpose of such fixation.

(4) The point now raised by the landlord in both the revision cases is that S. 9(1)(f) does not apply.

(5) Section 9(1)(f) has to be applied in the case of fixation of rent of all buildings constructed wholly or substantially after 31-12-1949. The actually completed work of construction may be at the time of either the entire building or of a part of the building. Again the word used in S. 9(1)(f) is "premises". Premises has been defined in S. 2(8) as being either the whole building or part of a building or any hut or part of a hut let separately and including certain other things mentioned therein. The main point to be noticed in connection with S. 2(8) is the separate letting. Whatever forms the subject-matter of one tenancy or letting is the premises and this may be the entire building or it may be only a part of it. If it is a separate tenancy or letting of a part of a building, it will still be premises according to the definition.

(6) Remembering this definition of the word 'premises' in S. 2(8), we get three different cases of actually completed and letting out under that section. The first case is when the entire building has been completely constructed and is let out wholly to one person. In such a case there can be no question that S. 9(1)(f) will apply and the proviso has no application. Section 9(1)(f) runs thus.

"Where any premises have been wholly or are substantially constructed after 31-12-1949, by fixing the standard rent payable for one year at a rate equal to six per centum of the actual cost of construction as determined by the Controller added to the market price as on 31-12-1949, of the land included in the premises or to the market price of the said land as on the date of completion of the construction, whichever is less:

Provided that where the premises whose standard rent is to be fixed form a part of the construction the standard shall be fixed at a rate which is fairly proportionate to the total standard rent of the entire construction."

(7) It is clear that the main body of the sub-clause will apply, and the proviso cannot apply in the case of letting out of an entire building newly constructed as one tenancy.

(8) The second case will be where the construction of the entire building has been completed but it has been let out separately in parts, to separate tenants that is there are separate tenancies, or as it is sometimes called "several lettings." Then also it is clear that the whole of S. 9(1)(f)

will have to be applied namely the main sub-clause will apply as also the proviso.

(9) The third class of cases is like the present case, where proof has been given that the entire construction when completed will be a six storied building, the plinth is constructed for that purpose and the sanctioned Municipal plan is for the same purpose. The construction as yet completed has been only of a part of it and that part is being let out in separate tenancies or "several lettings." In such cases, it is clear that the proviso to S. 9(1)(f) cannot apply, because the cost of the entire construction is not known and cannot be ascertained at that stage. There is nothing in the main body of the sub-cl. (f) which may not be applied to that case.

(10) Mr. Binayak Banerjee, appearing on behalf of the petitioner, has raised the following points for our consideration in order to show that application of S. 9(1)(f) may cause insuperable difficulties. The first point he raises is that the section says that in fixing standard rent a percentage of the actual costs of construction, as determined by the Controller, added to the market price as on 31-12-1946, of the land included in the premises, or the market price of the suit land as on the date of the completion whichever is less, is to form the basis of rent fixation. His contention is that "costs of construction" and "completion of construction" are terms which must refer to the construction of the entire building.

It does not appear to be so. The statute subsequently in the proviso of this very sub-cl. (f) has kept clearly in view the distinction between "construction and entire construction." In the proviso, "the entire construction", proportionate to which the rent has to be fixed, will be the construction of the entire building. The "construction" referred to in the body of the sub-clause, or "the completed construction" appears to be the "construction" or "completed construction" of the premises of which the rent is being actually determined. There is nothing to prevent valuation being made of a part of a building actually constructed and such is done very often by valuers without finding any insuperable difficulty. Flats in a building may have to be valued by valuers and the value of the land, the value of the construction including the plinth may have to be apportioned to these different flats as actual cost of such construction and this is done by valuers not only in this country but in other countries as well. The valuation may be sometimes an intricate process, but intricacy of the process cannot be taken to be insuperable difficulty and therefore require a different construction of the section from what appears from the clear words of it. But the mode of valuation is a matter which comes up for consideration at the time of actual valuation. It does not offer any insuperable difficulty for considering the interpretation of the words of the sub-clause.

(11) Another consideration put before the Court by Mr. Banerjee is that there may have to be two valuations of the same "premises" at two different times, namely, one after the entire construction is completed and the other when the entire construction is not completed as in the present case. Theoretically also I do not see why this need be so, because "proportion" referred to in the proviso may be proportion of the costs of construction and if the costs of construction of the "premises" are previously ascertained by proper method of valuation, there need be no difficulty when the costs of construction of the entire building also are known. The costs of construction of the entire building need not alter the cost of construction of the portion which was previously valued. On the other hand, that may form the standard with reference to which the cost of construction of rest of the building when completed may be determined for the purpose of the fixation of rent, on the basis of cost of construction of the entire building.

Even if there arise any question of re-fixation, I do not see there is anything to prevent the same from being done in a proper case under the Rent Control Act, for the very simple reason that the decision of a Rent Controller is not res judicata. It is not a Court. Secondly if the re-fixation has to take place because a statutory provision, giving a right to a person then first comes into operation i.e., the right arises at that time, there is nothing in law to prevent that fresh right being given effect to. It is not a sound argument to say that before the right has actually arisen something else had been done. None of the considerations urged by Mr. Banerjee show that cases of "premises" consisting of part of an unfinished building still under construction are not to be a subject-matter of the main body of S. 9(1)(f) for the purpose of fixation of rent. Therefore, in the third class of cases which we have been considering, namely, where the entire construction is not yet completed but separate portions of such unfinished building are being let out to separate tenants, S. 9(1)(f) will apply, but not the proviso.

(12) The learned Small Cause Court Judge was, therefore, right in his decision and the Rules are discharged with costs.

B/R.G.D. Rules discharged.

A. I. R. 1953 CAL. 244 (Vol. 40, C. N. 91)

SINHA J.

Panmal Lodha and another v. Omraomal Lodha and others.

O. O. in Matter No. 867A of 1934, D/- 5-8-1952.

(a) Accounts — Liability to account — Facts which must exist to impose obligation to account.

The following facts must exist to impose an obligation to account: (1) The person upon whom such an obligation is sought to be imposed (the obligor) must have received some property not his own. (2) The person seeking to impose the obligation (the obligee) must be the owner of the property in respect of which the obligation is sought to be imposed. (3) The obligor must not have received the property as mere bailee. (4) The obligor must have received it into his possession and control. (5) There must be a fiduciary relation between the obligee and the obligor, or, in other words, there must be privity between them. (Para 9)

(b) Accounts — Account — Meaning of.

The word 'account' has no definite legal meaning. The primary idea of "account computatio" is some matter of debit and credit and it implies that one is responsible to another on the score either of contract or some fiduciary relations of a public or private nature, created by law or otherwise. It is not necessarily restricted to several items, nor is it less an account because all are by one person against another and not of mutual demands. (Para 10)

(c) Accounts — Liability to account and method of accounting.

The liability to account must not be confused with the method of accounting. Just as liability differs, the method of accounting also differs. The method or mode of accounting may be regulated by contract, law or even custom and usage. (Para 10)

(d) Accounts — Suit for — Decree against legal representatives of deceased accounting party — Mode of accounting by legal representative — Burden of proof — Non-production of account books — Inference — (Evidence Act (1872), Ss. 101 to 103 and 114).

A decree for accounts can be asked for against the legal representative of an accounting party who is dead and the Court is quite competent to pass a decree ordering the legal representative to render accounts. 16 Ind Cas 742 (Cal), Dissent from. (Para 20)

The mode of accounting by such a legal representative is not the same as the original accounting party. So where a decree for accounts has been made against a legal representative of the original accounting party, the position in law is as follows: (a) The legal representative must produce all the books of accounts, documents and vouchers kept by the deceased accounting party. (b) He cannot however be compelled to explain or vouch for them. But if he is able to explain the account or any part thereof or vouch for the account or any part thereof, he must do so. (c) If the legal representative does not produce the books of accounts, vouchers or documents relating to the transactions, or produces only a part, the Court will be at liberty to investigate and find out whether he is withholding the same, and in the event of a finding to that effect, draw such inferences as it thinks proper. (d) If the books, documents and vouchers are produced, the plaintiff will be at liberty to prove that they are not the proper books, documents or vouchers or that the contents thereof are not correct, or that the items are not true. The onus would be upon him. In such a case, the legal representative can answer the challenge if he so chooses. (e) If the books, documents and vouchers are not produced (either wholly or in part), the plaintiff will be at liberty to prove by secondary evidence or other evidence as to what he claims the dead accounting party to have realised or expended and the balance payable by him, for which the legal representative will be liable to the extent of the assets of the deceased in his hands. The onus of doing so will be upon him and the legal representative will have the right to adduce evidence in answer. (Para 20)

Anno: Evidence Act, Ss. 101 to 103 N. 34 S. 114 N. 9.

(e) Evidence Act (1872), Ss. 101 to 103 — Genuineness — Suit for accounts — Accounts produced by legal representative of deceased accounting party — Genuineness of accounts — Burden of proof — (Accounts).

There is no presumption that in a suit for accounts the accounts produced by the legal representative, as being that of the deceased accounting party, are either genuine or correct. But since the original accounting party is not available, they must be treated as 'prima facie' the accounts of the deceased, and it would be for the plaintiff to prove that they are not genuine or correct. (Para 20)

Anno: Evidence Act, Ss. 101 to 103 N. 34.

R. Goho, for Receiver, Special Referee and Commissioner of Partition; Sankar Banerjea with B. K. Ghosh and S. K. Acharya, for Sobhagmal Lodha; A. C. Bhabra, for Manomohan Lal Lodha; Bibhu Choudhury, for Banwarilal.

REFERENCES: Courtwise/Chronological/ Paras

('82) 2 All WN 6	11
(1900) 22 All 332: (1900 All WN 98)	11
('09) 31 All 429: (2 Ind Cas 118)	17
2 All HCR 103	11
('68) 10 WR 59 (Cal)	10, 14, 18
('69) 11 WR 76: (2 Beng LR AC 139)	13
('81) 7 Cal 627	10, 15
('05) 32 Cal 719: (1 Cal LJ 232)	11, 18
('12) 17 Cal WN 5: (16 Ind Cas 742)	11, 18, 20
('12) 16 Ind Cas 414: 16 Cal WN 1042	18
('47) 51 Cal WN 157: (AIR 1948 Cal 19)	4, 18
('86) 1886 Pun R 96	16
('11) 1911 Pun LR 78: (9 Ind Cas 591)	11
('29) AIR 1929 Lah 362: (117 Ind Cas 233)	18
('23) AIR 1923 Pat 259: (71 Ind Cas 916)	12
('35) 13 Rang 385: (AIR 1936 Rang 17)	10
(1889) 40 Ch D 543: (60 LT 798)	11
(1669) 22 ER 726: (1 Chan Cas 127)	10
(1674) 23 ER 68	10

ORDER: This is an application by the defendant Sobhagmal Lodha for several reliefs the most important being a direction upon the Special Referee to make a special Report. A few facts must be stated in order to appreciate how the question of a special Report arises.

(2) The suit was instituted in May 1934 by Kanmull Lodha father of the present plaintiffs, for partition of what is known as the Lodha Estate. There are numerous parties to this suit, but they may be divided into three groups, namely the Sujanmull group, the Samirmal group and the Umedmull group. The petitioner is the grandson of Umedmull and the son of Abheymull who was the adopted son of Umedmull. The Lodha family carried on about seventeen different businesses in all parts of India and the books of accounts number more than two thousand.

(3) On 16th May 1940, a preliminary decree for partition was made by Ameer Ali J. and various accounts and enquiries were ordered. An account was ordered to be taken of what was due from one party to another and an enquiry was ordered as to who was the accounting party. By an order dated 22nd December 1943, Rai Saheb U. N. Maitra since deceased was appointed the Commissioner of Partition and Special Referee. The late Rai Sahib who was an accountant, prepared balance sheets of the various business and abstract accounts. These are in the English language and run to 20 typed volumes. Unfortunately however the Rai Sahib died before he could complete his labour and by an order dated March 17, 1950, Mr. A. N. Bose, Barrister-at-Law was appointed Commissioner of Partition and Special Referee. The present Special Referee entered into the enquiry as to who was the accounting party. By his finding dated 11th July 1950, the Special Referee held as follows:—

"I therefore find that between 1898 and December 4, 1923 Seth Umedmal Lodha managed the joint businesses and estate of the Lodhas. Between December 5, 1923 and July 30, 1924

Seth Abhaimal Lodha managed the said businesses and estates. And between July 31, 1924 and February 1935 (i.e. till the appointment of the Receiver) Seth Biradhmal Lodha managed the said businesses and estate ..... Accordingly Seth Umedmal Lodha, Seth Abhaimal Lodha and Seth Biradhmal Lodha are the accounting parties for the respective periods of their management as stated above and Seth Sobhagmal Lodha and Seth Umraomal Lodha as their successors in interest are liable to render accounts."

On 10th July 1950, the Special Referee directed the accounting parties to file the accounts for the respective periods mentioned above. On 14th August 1950, Mr. I. P. Mukherjee appeared on behalf of the petitioner and argued that his client Sobhagmal was an accounting party only in the sense of being the legal representative of the deceased accounting parties and was not under the same obligation to render accounts as the original accounting parties who were dead. According to learned Counsel, his client was not called upon to file any accounts except as to that portion of which he had personal knowledge. If any claim was made by any party against his predecessors, an answer would be provided by producing the books of accounts which could then be inspected by the others.

(4) In answer to this contention it was argued that the decree passed in this suit did not contemplate any such mode of accounting and Sobhagmal would have to produce the account books (which are already in possession of the Receiver) and vouch for each item. Both parties relied upon a Bench decision of this Court. — 'Brij Kishore v. Sm. Nazuk Bai', 51 Cal WN 157 at p. 170.

(5) In his reply, learned counsel for Sobhagmal pointed out (56th meeting) that he had no quarrel with the preliminary decree or with the findings of the Special Referee by which Abheymal or Umedmull were found to be accounting parties. According to him, Sobhagmal's duties were to have the books of accounts produced and to vouch for such items as it was possible for him to vouch and if he could not vouch, the other side might call upon the Court to draw such adverse conclusion as the Court thought proper under S. 114 of the Evidence Act. On 11th September 1950, Mr. Deb appearing on behalf of Sobhagmal stated as follows

"Without prejudice to the contentions of my client as already submitted and recorded in the minutes, my client is agreeable to file accounts as directed under the decree."

(6) After this, a statement of fact was filed by Sobhagmal which consists of a number of balance sheets covering the period of accounting. The other parties have filed counter statements. Either side accuses the other of not having complied with the directions of the Special Referee. Sobhagmal's state of fact is attacked as not being a state of fact at all. The counter statements are attacked as being so vague and general that no issues can be raised. In other words, the accounting party complains that he is quite unable to gather as to what is objected to or what is accepted as correct.

(7) The events that have happened subsequently make somewhat painful reading. There was a bereavement in the family of one of the solicitors necessitating an adjournment. It seems that starting with this, a great deal of misunderstanding has ensued, some hard words said and some disagreeable things have crept into the record. It would be a waste of my time to try and apportion the blame. It is sufficient to say that the Special Referee was perhaps a little precipitate in holding that Sobhagmal had refused to render accounts and that he would report accordingly. On the other hand, I cannot say that the parties have always been very helpful to the Special Referee. In my opinion, the offer of Sobhagmal to file accounts without prejudice to his contentions was somewhat meaningless. I can understand the stand taken by his counsel Mr. Mukherjee, but Mr. Deb's offer on behalf of his client to file accounts, without the position being clarified, inevitably led to confusion.

All parties appearing before me have assured me that they are extremely anxious to have the accounting done quickly. If this has always been their attitude, I fail to understand why in twelve years the accounting cannot even be said to have started. I need not further dilate on this aspect of the case. All parties are unanimously agreed that the finding of the Special Referee that Sobhagmal has refused to render accounts, should be set aside. I don't think it is necessary to set aside anything. It will be sufficient for me to say that upon a consideration of all the facts, it does not appear that there has ever been such a refusal and the Special Referee will proceed accordingly. It is upon this point of the accountability of Sobhagmal that a special Report has been asked for. The precise points have been indicated in Para 18 of the petition.

(8) I pointed out to the parties appearing before me that it would be useless waste of time to direct the Special Referee to make a special Report and then deal with the point. All the parties including the Special Referee are before me and I have heard them. It would be much better if I gave my decision on the points raised. All parties have agreed that I should do so now instead of duplicating the proceedings.

(9) Having heard all the parties, including Mr. Goho appearing on behalf of the Special Referee, I think that there is a considerable amount of misapprehension as regards the precise point that arises for determination. There appears also to be a confusion between the liability to account and the mode of accounting. The following facts must exist to impose an obligation to account:

(1) The person upon whom such an obligation is sought to be imposed (the obligor) must have received some property not his own.
(2) The person seeking to impose the obligation (the obligee) must be the owner of the property in respect of which the obligation is sought to be imposed.
(3) The obligor must not have received the property as mere bailee.
(4) The obligor must have received it into his possession and control.
(5) There must be a fiduciary relation between the obligee and the obligor, or in other words there must be privity between them.

The obligation may arise in a variety of ways, giving rise to different manner of accounting. Thus, it may arise between principal and agent, between banker and customer, between mortgagor and mortgagee, between partners, between trustee and 'cestui que trust' and so forth. It cannot however be said that the manner or mode of accounting should be the same in each case.

(10) Since the legal relationships between the parties differ and are not the same, it is not to be expected that the liability should also be the same. The word "Account" has no definite legal meaning. The primary idea of "account computatio" is some matter of debit and credit and it implies that one is responsible to another on the score either of contract or some fiduciary re-

lations of a public or private nature, created by law or otherwise. It is not necessarily restricted to several items, nor is it less an account because all are by one person against another and not of mutual demands.

But the liability to account must not be confused with the method of accounting. Just as liability differs, the method of accounting also differs. The method or mode of accounting may be regulated by contract, law or even custom and usage. There cannot be a uniform rule in all cases upon such points as to what books of accounts should be kept, when they should be adjusted, what vouchers shall be kept and so forth. It is plain that an account from an agent as to what he had purchased for the principal cannot be the same as that of a mortgagee in possession, accounting for rents which he might have realised if he was not negligent. But one of the most vexed questions is as to what happens when the real accounting party dies. In English Common Law, a Bill of Account was sometimes thought to be a personal action falling within the rule "actio personalis moritur cum persona".

But this view is an archaic one, and both in England as well as in India it is no longer accepted as a sound one: — 'Lee v. Sarah Bowler', (1674) 23 E. R. 68; — 'Holstcomb v. Rivers', (1669) 22 E. R. 726; — 'D. K. Cassim & Sons v. Sara Bibi', 13 Rang. 385; — 'Hills v. Shokhee Monee Dossee', 10 W. R. 59 (Cal); — 'Lawless v. Calcutta Landing and Shipping Co., Ltd.', 7 Cal 627. Section 306 of the Indian Succession Act lays down that all demands whatsoever against a person and all rights to prosecute him survive against his executors or administrators except causes of action for defamation, assault etc. On this point however there is a considerable conflict of authority in India and I shall now proceed to consider this.

(11) In — 'Kumeda Charan Bala v. Asutosh Chattopadhyaya', 17 Cal W. N. 5, the plaintiff alleged that the father of the infant defendant was an agent entrusted with collection of rent. He had collected rent, did not account for it and died. The plaintiff asked for an account. Sir Ashutosh Mukherji said as follows:

"On behalf of the appellants, it has been argued that the liability is personal and the legal representatives of the deceased agent cannot be required to render accounts in the same sense in which the agent himself might have been called upon to do. A similar question appears to have been raised in the case of — 'Manmathonath v. Basant Kumar', 22 All 332 where it was ruled that though a guardian of a ward was liable to render accounts of his guardianship, yet after his death his representatives could not be called upon to render an account in the same manner. The same view was adopted in the cases of — 'Rameshur Tewari v. Kishan Kumar', 2 All W. N. 6, and — 'Pritam Singh v. Mubarik Singh', 1911 Pun L. R. 78. This position may plainly be defended on principle.

No doubt as stated in — 'Shib Chandra v. Chandra Narain', 32 Cal 719 the first duty of an agent is to be constantly ready with his accounts, and to be always prepared to explain them and support them by vouchers. But it does not follow that his representatives may be required to discharge this duty to explain matters of which they have no personal knowledge, and to assist the plaintiff in the investigation of the management of his estate of which they are wholly ignorant; any other decision would place the representatives of the deceased agent at an unfair disadvantage; they cannot be called upon to do that which does not lie within their power, and should not be required to attempt the impossible .....

What then is the nature of the remedy of the principal against the representative of his deceased agent? It does not follow that the estate of the agent who has not rendered an account escapes all liability in the hands of the representative. The remedy of the principal in a case of this description is to sue the representative for any loss he may have suffered by reason of the negligence or misconduct, the misfeasance or malfeasance of his agent, in other words the suit is not one for accounts strictly so-called but a suit for money payable to the principal by the representatives of the agent out of the assets in their hands ....The suit may therefore be deemed as one for recovery of the balance, and the onus will be upon the plaintiff to establish, with regard to each specific sum that he is entitled to recover it."

See also — 'Nuyuf Ali v. Patterson', 2 All H. C. R. 103 — 'Concha v. Murietta', (1889) 40 Ch. D. 543.

(12) — 'Rameshwar Singh v. Narendra Nath', AIR 1923 Pat 259 (263) was a case in which the plaintiff, the Maharaja of Darbhanga sued the legal representative of a pleader who was entrusted with the conduct of all his cases at Madhupura. It was held that the defendant as the legal representative of his father had no liability to render accounts to the plaintiff. It will be observed that in this class of cases it has been held that no suit lies for accounts against a legal representative. The proper frame of such a suit is to claim a definite sum of money and the onus is upon the plaintiff to prove each item. But there is another class of cases which hold that a suit for account against the legal representative of a deceased accounting party does lie.

(13) In — 'Kali Krishna v. Mt. Jaggat Tara', 11 W. R. 76 (Cal), the plaintiff a Mahajan sued the heirs of a deceased 'Gomastha' on the allegation that the 'Gomastha' had overdrawn moneys during his lifetime. Sir Barnes Peacock C. J. said

"There would be an obligation on the agent to render an account of his agency and to account for the moneys in question. In using the word "account" I use it in its legal sense as not confined merely to rendering an account of what he has done with the money, but as including the payment of any balance which might be found due from him upon taking the accounts. The agent died before he was requested to account for, or to render an account of the moneys; and then, I apprehend a cause of action accrued against his representatives, so far as they had assets, to repay to the principal any balance, which upon the adjustment of accounts, might appear due from the agent."

(14) In — 'Hills v. Shokhee Monee Dassee', 10 W. R. 59 (Cal), it was held a cause of action accruing against an agent for money received and accounts kept, survived after the death of the agent.

(15) In — 'Lawless v. The Calcutta Landing & Shipping Co. Ltd'; 7 Cal 627 there were two cross suits. The one was brought by the administrator of Captain Lawless for arrears of salary and commission due to Captain Lawless before his death as manager of the Calcutta Landing and Shipping Company. The other suit was for money for which the defendant (the administrator) was said not to have accounted. Wilson J. said

"There is nothing to show that Captain Lawless was ever called on to account for those moneys

or to account generally. He died on 29th August 1877 and his agency terminated. I think by his death the company acquired a fresh right to have an account rendered by his representative, and that right is recognised by Art. 89, Sch II, Limitation Act".

(16) In — 'Chand Mal v. Kalian Mal', (1886) Pun Re. 96, the principal brought a suit against the legal representative of the deceased agent on the allegation that there was a balance in favour of the plaintiff in his account with the agent, and he asked for an account. It was held that "a principal could obtain an account from the son of his agent the agent having died without account". It was pointed out that this was not in reality a case of suing the legal representatives of the deceased agent for rendition of accounts but that the plaintiff was in substance asking that an account between him and his deceased agent may be taken in Court in the presence of the defendants as a step towards the decree against the defendants for payment.

(17) In — 'Rao Girraj Singh v. Rani Raghubir Kunwar', 31 All 429, a manager took moneys from the chest of a Purdanashin lady and put it into his own account. Held that his sons and grandsons were liable to pay the balance which on taking of accounts might be found due to the lady.

(18) In — 'Jhapajhanessa Bibee v. Bama Sundari', 16 Ind Cas 414 (Cal), the suit was against the heirs of one Laban Sarkar who acted as the agent of the plaintiff and his co-sharers: Sharf-ud-din J. said as follows:

"There can be no doubt that there was a contract between the principal and the agent that the latter should render his accounts every year to the plaintiffs and their cosharers. After the agent's death the law presumes that there is always an implied contract by which the heirs of the deceased agent are bound to give an account of whatever they may have received from the agent at the time of his death".

In the same case Cox J., said:

"To hold that when a 'gomostha' dies all his accounts and the money which he may have collected can be kept by his legal representatives is impossible. It is argued that the plaintiffs ought to ascertain themselves what is due to them and sue for that amount. But that amount can only be ascertained with accuracy by an examination of the accounts kept by the 'Gomostha', and there is no reason why the legal representatives should be entitled to withhold those accounts. A suit for money due on an account and a suit for an account are really the same thing"

— 'Shib Chandra v. Chandra Narain', 32 Cal 719.

In — 'Prem Das v. Charan Das', AIR 1929 Lah 362, the suit was brought against a Chela of Mahant Sant Ram as his legal representative and the plaintiff inter alia asked for rendition of account. Aga Haider J., pointed out that — 'Kumeda Bala's case', 17 Cal W. N.. 5 was in conflict with the Division Bench case of — 'Jhapajhanessa Bibee' 16 Cal W. N. 1042 decided a fortnight later. The learned Judge however said as follows:

"After the death of the agent it would be extremely unjust to call upon his legal representatives to render an account in the same manner in which the agent would be liable if he were alive. The reason is obvious. Some of these legal representatives might be 'purdanashin' ladies who knew nothing at all about the dealings of the deceased agent, others might be infants in arms. In the present case when the legal representatives of the deceased agent is being sued, the burden of proof should fall upon the plaintiff who must prove each item of the amount which he claims. On the other hand, it is the duty of the legal representative to place before the Court all the accounts in his possession and power which the deceased agent might have prepared during the period of his agency."

In — 'Brij Kishore v. Sm. Nazuk Bai', 51 Cal W. N. 157, the point for consideration was whether the liability of an executor to render accounts ceased with his death or whether the executor's legal representatives were liable to render accounts. Mitter J. in this case tried to reconcile 'Kumeda Bala's case and said as follows:

"Kumeda Charan Bala's case (ibid) also does not, in our opinion militate against our view. Mookherjee J., nowhere says in his judgment that the cause of action for account against the obligor does not survive. All he says is that the representative of a deceased agent cannot be ordered to render account in 'the same form as' the agent himself..In any view of the matter we prefer to follow the view expressed in our Court in 'Hill's case' (10 W. R. 59 Cal) (ibid) .. 'Kumeda Charan Bala's case lays down the principle that a decree of a Court should not direct what is impossible to perform. That is a sound principle. A trustee should not be ordered by the Court to find out at the suit of the 'cestui que trust' a valuable heirloom, a historic jewel, for instance, which he may have in a fit of anger thrown into the bottom of the sea and to restore it to the trust. On that principle it may at most be said that the legal representative of an agent or other person holding a fiduciary character cannot be directed by the Court to explain the accounts kept by the dead agent or the other person. But there is no inherent impossibility in the performance of the other acts by the legal representative, namely, to deliver the account papers and support them by vouchers, for, the hand of death does not remove papers."

(19) The order so far as accounts were concerned was as follows:

(a) A Commissioner was appointed to take accounts.

(b) The legal representative was directed to file within a month the account papers kept by the dead accounting party (the executor) together with vouchers.

(c) If the account papers were not filed, the plaintiff was granted liberty to adduce secondary evidence and/or adduce other evidence to show what sums of money had been realised by the dead executors and not paid.

(d) In that case, the legal representative was allowed to adduce evidence to show that the sums alleged by the plaintiff to have been realised were not realised or realised and justly expended in due course of administration.

(e) If the account papers or vouchers were not produced for the whole period or a part, the Court was declared to be at liberty to find if they were being withheld and make such inferences as were proper.

In my opinion, the nett result of all these decisions may be summarised as follows:

(20) 1. —'Kumeda Charan Bala's case', (17 Cal WN 5), (ibid) and the decisions following it are not good law in so far as they hold that no decree for accounts can be asked for or passed against the legal representative of an accounting party who is dead. Such a decree can be asked for, and the

Court is quite competent to pass a decree ordering the legal representative to render accounts.

2. All the decisions are however unanimous on the point that the mode of accounting by such a legal representative is not the same as the original accounting party.

3. Where a decree for accounts has been made against a legal representative of the original accounting party, the position in law is as follows:

(a) The legal representative must produce all the books of accounts, documents and vouchers kept by the deceased accounting party.

(b) He cannot however be compelled to explain or vouch for them. But if he is able to explain the account or any part thereof or vouch for the account or any part thereof, he must do so.

(c) If the legal representative does not produce the books of accounts, vouchers or documents relating to the transactions, or produces only a part, the Court will be at liberty to investigate and find out whether he is withholding the same, and in the event of a finding to that effect, draw such inferences as it thinks proper.

(d) If the books, documents and vouchers are produced, the plaintiff will be at liberty to prove that they are not the proper books, documents or vouchers or that the contents thereof are not correct, or that the items are not true. The onus would be upon him. In such a case, the legal representative can answer the challenge if he so chooses.

(e) If the books, documents and vouchers are not produced (either wholly or in part), the plaintiff will be at liberty to prove by secondary evidence or other evidence as to what he claims the dead accounting party to have realised or expended and the balance payable by him, for which the legal representative will be liable to the extent of the assets of the deceased in his hands. The onus of doing so will be upon him and the legal representative will have the right to adduce evidence in answer.

It is a mistake to think that the liability consequent upon accounting, is in any way affected by the death of the original accounting party, as accounting party by his death cannot avoid liability or improve his account or make it more sacrosanct. It is not to be denied however that in such a case, death may in an indirect way improve his chances of ultimate success, by making it immeasurably more difficult for the other side to challenge his accounts. If an accounting party is alive, he has to explain, or if necessary vouch for, every item of debit and credit in his books. If he is dead, it may be inordinately difficult for the other side to prove him in the wrong.

In a long and complicated accounting, the other side might not even know what credits to charge or what debits to allow and be placed in a position of great disadvantage. But this is a position which cannot be helped. No one can guarantee that the accounting party will be alive to render an account personally. If he is dead, the accounts must be taken in the best way that the exigencies of human affairs will allow. There is no presumption that the accounts produced by the legal representatives as being that of the deceased accounting party, are either genuine or correct. But since the original accounting party is not available, they must be treated as 'prima facie' the accounts of the deceased, and it would be for the plaintiff to prove that they are not genuine or correct.

(21) Coming to the facts of this case, we find that there is no difficulty as to the form of the decree inasmuch as there has already been a decree directing accounts & the Special Referee has found that Umedmal and Abheymal are the accounting parties and Sobhagmal should render accounts as their 'successors in interest' by which I take it he means their legal representative. We must not find out as to how he is to render such an account. The mode of accounting by a legal representative has been fully discussed above and Sobhagmal will have to account in the manner indicated. It remains for me to consider whether what has been done or is proposed to be done in this case accords with those principles.

(22) I have already pointed out that a great deal of confusion has been caused by the offer of Sobhagmal to file his statement of facts without the position being clarified. All that he has done is to have a few balance sheets made and file them, calling it a statement of facts. The counter statements have consequently been equally vague. The other parties have proceeded upon the footing that it was for Sobhagmal to state each item of account and to vouch for the same and in so far as he fails to do it, that item was to be disallowed.

(23) In my opinion, the whole accounting is proceeding upon wrong lines and does not accord with the principles of law enunciated above. Now that after 12 years the accounts have at last begun it would be disastrous if it is allowed to proceed upon wrong lines. I have therefore tried to ascertain the views of the parties as to the best method that should be adopted and there seems to be the greatest measure of support for the directions that I propose to give for the future conduct of the reference.

(24) My directions will be as follows:

1. The defendant Sobhagmal Lodha should be directed to file a fresh statement of fact containing the following:

(a) A statement upon oath as to which portion of the account (Between 1898 and July 30, 1924) is within his personal knowledge, or which he can vouch for.

(b) Regarding that part which is within his personal knowledge, or which he can vouch for, a statement in detail showing credits and debits, grouped under classified headings and separately under each year of account.

(c) Regarding that part which is not within his personal knowledge or which he cannot vouch for, a list of all the books of account, documents and vouchers relating to the period of accounting, which he claims to relate to the account for the period of accounting, which are or have been in his possession or are in the possession of the Receiver, and upon which he intends to rely as being the accounts for the relevant period. These should be conveniently classified and grouped under the heading of every separate business or undertaking and separately shown under each year of account.

(d) A statement whether he accepts the balance sheets and/or abstracts of accounts prepared by the late Special Referee Rai Sahib Umanath Maitra, if not, particulars of those items therein which he states are incorrect. Where the balance sheets of the Rai Sahib are stated to be incorrect, a correct balance sheet should be filed. The balance sheets already filed will remain as a part of his statement of facts but marked as "Supplementary" and he may refer to such balance sheets.

(e) All adjustments relied on, should be shown under a separate heading "Adjustments", setting out the adjustments separately under each year of adjustment.

(f) A statement showing the final balance at the end of the accounting period.

2. Upon the statement of fact being filed, the said Sobhagmal Lodha should be directed to make over to the Special Referee all books, documents and vouchers in his possession. They should be distinctively marked.

3. The Special Referee will take steps to separate from the rest of the books, documents and vouchers in the possession of the Receiver either at Ajmere or elsewhere, the books, documents and vouchers stated under heading 1(c) of the statement of facts as being in the possession of the Receiver, and have them distinctively marked.

4. All such books, documents and vouchers between the years 1898 and 1904 should be brought down to Calcutta, unless they are already in Calcutta.

5. All parties should be afforded inspection of these books, vouchers and documents.

6. After inspection, the parties, other than Sobhagmal Lodha, should file counter statements of fact containing the following:

(a) Whether he disputes any of the statements in the statement of fact under headings 1(a) and (c). If it is alleged that Sobhagmal has or ought to have personal knowledge of any period not admitted by him, then particulars of such period. If it is alleged that he has or ought to have in his possession any books, documents or vouchers not disclosed by him, or that he is withholding the same, then particulars of such allegation.

(b) The items of credit or debit not accepted as correct in the statement made under 1(b), setting out the correct figures, as also omissions.

(c) The items of credit or debit not accepted as correct in the books of account as disclosed in the statement under 1(c), setting out the correct figures. If any amount is not credited which should have been credited or debited which should not have been justly debited, the particulars thereof. For purposes of such a statement, the party will be at liberty, if he so wishes, to deal with the balance sheets prepared by Rai Sahib and admitted in the statement of facts under 1(d), or where not admitted the balance sheet prepared by Sobhagmal and forming part of his statement of facts or supplementary statement of facts, instead of the original account books; provided however, that the item challenged shall be clearly specified and the grounds of challenge indicated, so as to raise an issue thereon. Even if the balance sheets are relied on, no party shall be precluded from putting forward any item in the books, in addition thereto or by way of explanation thereof or as showing any defect or omission in the balance sheets or the statement of facts.

(d) A statement showing which items in the statement of facts under heading 1(e) are disputed and if so the correct figures.

(e) A statement as to whether he accepts the balance sheets and/or abstract accounts prepared by Rai Sahib for the years 1898 to 1904. If not, particulars of the items not accepted as correct. Such statement will be taken to relate only to the correctness of the balance sheet and/or abstract accounts 'as such', and not an admission as to the correctness of the items themselves.

The counter statement already filed shall be treated as "supplementary". Any party wishing to withdraw such counter statements and to file an entirely fresh one may do so.

7. Upon the counter statements being filed, the Special Referee will proceed to take the accounts for the period 1898 to 1904. While the account is proceeding, the books, documents and vouchers of the next six years shall be brought down and inspection given to the parties in the same manner, and after inspection further counter statement of facts should be directed to be filed for the said period. After the accounting for the first six years is concluded, the next six years should be taken in hand and so on until the whole accounting period is covered. In the last counter statement, there will be an additional item in answer to item 1(f) of the statement of fact, relating to the final balance which is claimed against the accounting parties and/or their estate.

8. The onus of proof will be as follows:

(i) Statement of fact item 1 (b), upon Sobhagmal Lodha:

(ii) Counter statement of fact item 6 (a) (b) (c) (d) or as to the final balance — upon the party filing the counter statement of fact.

9. The following time schedule shall be followed:

(a) For filing statement of facts	1 month from date of making this order.
(b) For separating the books etc. marking them and bringing them to Calcutta	1 month from date of filing the statement of facts.
(c) For giving inspection to the parties	2 months from the date when inspection is offered.
(d) For filing of counter statement of facts	1 month from the end of the period granted for inspection.

(25) The Special Referee will fix the exact dates in the presence of the parties at a meeting. The accounting will begin a fortnight from the filing of the last counter statement of facts, and will proceed from day to day excepting Saturdays, Sundays and Gazetted holidays.

(26) Liberty is given to the parties as well as the Special Referee to maintain the matter upon notice by letter to all parties, to make these directions effective.

(27) As regards making Ajmere the venue of the reference or any part thereof, I reject the prayer.

(28) I shall now indicate my order as regards the various prayers contained in the notice of motion.

(a) Not necessary. The points upon which a special Report is asked for have been dealt with in my judgment.

(b) Directions are contained herein.

(c) The statement of facts and counter statement of facts already filed shall not be rejected but shall be dealt with in accordance with the directions contained herein.

(d) The time schedule has been laid down in my judgment. The reference shall be held in Calcutta and not elsewhere.

(e) & (f) No direction at present. In case of undue delay, liberty to apply.

(g) & (h) These prayers cannot be adequately dealt with upon the present application. Liberty to the parties to make such further application as they may be advised, upon sufficient materials.

(i) No longer necessary, in view of the directions contained herein.

(29) The costs of all parties of and incidental to the application will be costs in the partition proceedings and will be paid by the Receiver upon being taxed. The Special Referee will get his costs

out of the estate taxed as between the attorney and client, and pay himself out of the funds in his hands.

(30) The Special Referee to act upon a signed copy of the judgment. The attorney for the petitioner undertakes to file a requisition for drawing up of the order forthwith. Let the order be drawn up expeditiously.

A/V.R.B. Order accordingly.

A. I. R. 1953 CAL. 251 (Vol. 40, C. N. 92)

R. P. MOOKERJEE AND K. C. CHUNDER JJ.

Purna Chandra Singha, Plaintiff-Appellant v. Sarojendra Kumar Dutta, Defendant-Respondent.

A. F. O. D. No. 180 of 1950, D/- 16-7-1951.

(a) Evidence Act (1872), S. 115 — Both parties proceeding on certain footing — They cannot subsequently change their case — (Civil P. C. (1908), O. 6, R. 2). (Para 9)

Anno: Evid. Act, S. 115 N. 24; Civil P. C., O. 6 R. 2 N. 9.

(b) T. P. Act (1882), S. 53 — Applicability.

To attract the provisions of S. 53, it must proceed on the footing that title has passed. It is not open to a party to say that the provisions of S. 53 are attracted where the document under which the title is alleged to have passed itself or the transaction was a sham one. (Para 11)

Anno: T. P. Act, S. 53 N. 2.

(c) T. P. Act (1882), S. 53 — Objection of debtor or his assignee in claim case overruled — Declaratory suit by him under O. 21, R. 63, Civil P. C. — Suit not in representative capacity — Creditor can base his defence under S. 53 — Suit by P against executors of father's estate decreed — Executors putting P in possession of some properties — Other property given to mother of P as belonging to her — Suit by S solicitor of P for cost incurred by him on P's behalf in suit — P creating trust of property with knowledge of S.'s cost — S putting his decree for cost in execution — Property attached — Defence by P that property being trust property was not attachable in execution of decree passed personally against P —P's claim rejected — Suit by P under O. 21, R. 63 — Defence by S under S. 53 held could be raised even if suit was not a representative one. (Para 46)

Anno: T. P. Act, S. 53 N. 14.

Atul Chandra Gupta, Benoy Krishna Ghose and Moni Mohan Mukherjee, for Appellant; Dr. Naresh Chandra Sen Gupta & Jatis Chandra Guha, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('05) 32 Ind App 1: (32 Cal 198 PC) 40
('17) 44 Ind App 72: (AIR 1916 PC 238) 11, 32
('21) 19 All LJ 299: (AIR 1921 All 298) 35
('34) 56 All 624: (AIR 1934 All 155 FB) 44
('39) 41 Bom LR 1104: (AIR 1939 Bom 508) 44
('97) 24 Cal 825: (1 Cal WN 665) 35
('07) 34 Cal 1051: (7 Cal LJ 586) 35
('07) 34 Cal 999: (6 Cal LJ 410) 42
('12) 15 Cal LJ 649: (14 Ind Cas 715) 35
('40) 72 Cal LJ 420: (AIR 1941 Cal 233) 43
('18) 41 Mad 612: (AIR 1918 Mad 421 FB) 34, 35
('20) 43 Mad 760: (AIR 1920 Mad 748 FB) 34
(1869) 7 Eq 347: (20 LT 163) 42

R. P. MOOKERJEE J.: This is an appeal on behalf of the plaintiff, and it arises out of a suit brought by him under R. 63, Order 21, Civil P. C., and is directed against an order of dismissal of a claim preferred by him in certain execution proceedings.

(2) To appreciate the points in issue, it will be necessary to refer to some of the circumstances under which the suit came to be filed.

(3) One Gopal Chandra Sinha, father of the plaintiff who was in possession of extensive properties leaving a testamentary disposition. There executors were named by him. In 1931, the plff. Purna Chandra Singha filed a suit in the Original Side of this Court against his father's executors for various reliefs, including the administration of the estate left by Purna's mother, for recovery of certain properties belonging to the latter and some other reliefs. This suit was decreed in June 1933, allowing certain specific claims in favour of the plaintiff. Under the decree, further enquiries were to be made and certain accounts taken. The reference was continued before the Assistant Referee in the Original Side of this Court, and a report was in due course filed some time later. Exceptions were taken to the report as submitted, and after the hearing had proceeded, cerain terms of compromise were filed and a consent decree was passed. The exceptions which were pending before the Court were not pressed. The report by the Assistant Referee was confirmed. The executors defendants became entitled to get the costs of that suit, including the reference, from out of the estate of Gopal Chandra Singha. The plaintiff Purna was allowed to pay the costs out of the estate of his mother Madhabmohini.

(4) In these litigations, the solicitor who acted for the plff. was the defendant in the present suit. The defendant is Sarojendra Kumar Dutta and he filed a bill of costs in respect of the costs incurred by him and also for remuneration due to him for the proceedings before the Assistant Referee. Objections had been taken, but ultimately the costs, as settled by the Court, were made payable. It is not necessary at this stage to refer to the various proceedings which were initiated by the solicitor for getting payment of the amount due. Ultimately, a suit was filed by the solicitor in respect of the amount due to him, and that suit was numbered 166 of 1945. That suit was decreed. The decree was transferred to the court of the Subordinate Judge at Alipore, and premises No. 99/1, Karaya Road, were attached as the personal property of Purna. It may be stated that the decree which was obtained by the solicitor against Purna was in his personal capacity as also as administrator to the estate of his mother. On such attachment being made, claim was put forward by Purna in his capacity as trustee. It was claimed that he had created a trust in respect of the property and it could not be attached as the personal property of his. This claim was dismissed by the executing Court on the finding that the property was in possession of Purna in his personal capacity and not qua trustee. The questions of title which had been raised during the hearing of the claim case by the decree holder were not gone into because of the scope of an enquiry under Order 21 R. 58, Civil P. C.

(5) It is after this decision that the plaintiff filed the present suit for declaration that the property in question belonged to the plaintiff in his capacity as trustee and was not his personal property. He also prayed for a permanent injunction for restraining the defendant from attaching or selling the property in execution of the decree passed by the High Court in the Original Side of this Court in Suit No. 166 of 1945 or in Money Execution Case No. 38 of 1947. It was stated in

the plaint that this property originally belonged to the estate of the plaintiff's father Gopal Chandra Singha, and under the will, the plaintiff was entitled to a monthly allowance of Rs. 250/-; the executors had not paid the amount and a large arrear had accumulated. In lieu of his right to claim maintenance from his father's estate, the surviving executor, Dhirendra Nath Ghose had made over possession of 99/1 Karaya Road to Purna. It was maintained that he had been from that date in possession of the property as a trustee and the proceeds were being utilised for the purpose of the trust. After the creation of such trust, the premises had been requisitioned by the Government, and under an agreement entered into between Purna as trustee and the Government, compensation was being paid to him. The attachment which had been effected in execution case No. 38 of 1947 by the Subordinate Judge at Alipore, was therefore, illegal. Reliefs, as already stated, were therefore claimed in the present suit.

(6) The defence, as raised, referred to some of the earlier history of the dispute between the plaintiff and the defendant, the solicitor. It was urged that the plaintiff had attempted to create a deed of trust, which was illusory and vague and was in effect a void transaction. Reference was made also in connection with such allegation that it was a colourable and fraudulent transaction intended to defraud the just claims of the creditors of Purna, including the defendant. It will be necessary hereafter to refer in greater detail to the character of this defence as an objection has been raised on behalf of the plaintiff-appellant about the scope of the present suit, and whether the defendant is entitled to raise a defence founded on s. 53, Transfer of Property Act. It was claimed that the defendant was entitled to treat the property as still being the property of Purna held personally and the attachment effected the executing Court had been legally and properly made.

(7) Various issues were raised and the learned Subordinate Judge has dismissed the suit holding against the plaintiff in respect of the material Issues.

(8) The first point which arises for decision is on objection raised by the defendant about the maintainability of the suit. It is pointed out that the property originally belonged to the estate of Gopal Chandra Sinha. A decree was obtained by Purna against the executors, and it was admitted that certain amount was due to Purna from the estate of Gopal. It was also admitted that maintenance at the rate of Rs. 250/- per mensem was payable from out of the father's estate to Purna. In lieu of the total amount which became due to Purna, the surviving executor Dhirendra Nath Ghose put Purna in possession of 99/1 Karaya Road. The letter which was written by Dhirendra as executor to Purna is Ex. 3 in the case. The material portion of the letter was in the following terms:

> "I also make over to you the premises No. 99/1 Karaya Road, on receipt of the sum Rs. 593/- in terms of my solicitor's letter of date to you in full settlement of your maintenance claim for Rs. 30,000/-. We also put it on record that the Estate's claim against you for the sum of Rs. 3648/- is also adjusted by the aforesaid arrangement and the Estate shall have no further claim in respect of the said claim..... As regards premises No. 99/1, Karaya Road, I shall execute a conveyance of the same in your name or in the name of ycur nominee at your expenses".

(9) It is an admitted fact that no conveyance was actually executed as it was covenanted by the executor in the last sentence quoted above. On behalf of the defendant, it is contended that the plaintiff is not entitled to maintain the present suit for a declaration of his title in respect of the property as the title had not passed from the executor to Purna. It will not be necessary for us to deal specifically and in detail with the legal implication of a defence of this nature and whether such a defence is at all well founded for the simple reason that the defendant himself has attached this particular property on the basis that it is the personal property of the judgment-debtor. The plaintiff also purported to execute a deed of trust, referred to already, on the 28-9-1943, on the footing that title had passed from the executors in his favour when he was put in possession of the said property in pursuance of the letter from the executor, dated 24-3-1943 (Ext. 3). It is not permissible for the parties to blow hot and cold at the same time. When both the parties have proceeded on the footing that the property is the property of Purna, it is not necessary at this stage and in these proceedings to enter into a discussion on the legal effect and implication of the delivery of possession of the property in pursuance of the letter, dated 24-3-1943. This objection raised on behalf of the defendant must, therefore, be disallowed.

(10) The next question which arises for consideration is whether the deed of trust purported to have been executed on 28-9-1943, was a real transaction or a sham transaction.

(11) It is now well settled that if objection is raised founded on S. 53, Transfer of Property Act, such objection is distinct and separate from the defence referred to above. As it has been observed by Sir Lawrence Jenkins in — 'Mina Kumari v. Bijoy Singh', 44 Ind. App. 72, (P. C.) to attract the provisions of S. 53, Transfer of Property Act. It must proceed on the footing that title has passed, but the document under which the title has passed is a voidable one. It is not open to a party to say that the provisions of section 53 are attracted as the document itself or the transaction was a sham one. The question whether S. 53, Transfer of Property Act, would be attracted in the present case or not, whether such a defence had actually been raised by the defendant, and even if raised, such defence was available to him or not, would be an alternative claim which would be considered at the proper place later on. At this stage all that we are required to consider is whether the transaction itself was a real one or not.

(12) The suit out of which the present appeal arises is one under Rule 63, Order 21, Civil P. C. On the question whether the transaction was a real transaction or not the onus is upon the plaintiff to show that it was so.

(13) We have therefore, to consider the evidence on the record to find out whether the plaintiff has discharged the onus which lies upon him.

(14) Mr. Gupta appearing on behalf of the plaintiff appellant referred to certain circumstances under which he claimed that the real nature and character of the transaction became apparent. To show that the deed of trust was a real transfer from the individual to a trustee, it was pointed out (1) that this was an irrevocable trust without any possibility of the property reversing back to family of the trustor; (2) that although Purna had his wife and sons, the trustees to succeed him were not any one of them, but was the Official Trustee of Bengal (3) the purposes for which the trust had been created were such as others could

enforce the provisions of the trust, if payments were not made to outsiders, as laid down in the deed of trust; and (4) that the property in question was taken in lieu of the right of maintenance which Purna had against his father's estate, if he did not want to make a real trust of the estate he would not have taken the property in lieu of the unattachable right of maintenance which he had.

(15) As regards the irrevocable nature of the trust, as shown from the deed itself, there is not much force in it. That by itself will not be able to give any indication as to whether the trustor really intended the document to be a real one.

(16) As regards the mentioning of the Official Trustee of Bengal as the next trustee, it is to be noticed that the requisites under the Official Trustees Act were not duly followed. Under sections 7 and 8 of the Official Trustees Act, the Official Trustee is not entitled, in the first place, to accept any religious trust, and secondly, without the consent of the Official Trustee he cannot be appointed as a trustee, such consent being recited in the deed itself. There is no evidence on the record and no attempt was even made to suggest that the Official Trustee had even been consulted, far less his consent taken before he was mentioned as the succeeding trustee of the settlor. The mention of the Official Trustee, as it appears in the circumstances of the present case was merely an eye-wash for the purpose of drawing a picture which did not correctly answer or reproduce what the real intention of the settlor was.

(17) About the purpose of the trust, it cannot be appreciated if and how, at least, so long as the settlor continues to be the sole trustee, that the terms of the trust can be enforced if the said settlor refuses or neglects to carry out the terms of the trust during the period of his management. So the particular objects which are mentioned in the deed of trust are such as they become well neigh impossible for an outsider, a member of the public, to call for accounts or to examine how the trust is being managed or whether the trust is being properly conducted or not. It is quite apparent from the manner in which the terms in the deed of trust are put that it is left to the absolute discretion of the sole trustee who happens to be the settlor himself to decide how the money is to be distributed and to whom and when and under what circumstances.

(18) The other point urged in support of the trust being a real one need not engage our attention at this stage for long. That is an argument which has to be considered when the defence under section 53, Transfer of Property Act, is considered. There is no suggestion that at the time when the property was taken along with other properties mentioned in the letter from the executor, already referred to, there was any intention of the settlor to create a trust at that stage. He was getting the property from the executors in lieu of moneys due to him from out of his father's estate, or for the matter of that, the property which belonged to his mother's estate, but had been in the possession of his father's executors. Possession was delivered to Purna in terms of the letter written by the executor on 24-3-1943. The deed of trust was executed on 28-9-1943. It will be a matter for consideration whether at the time when the property was taken, or when the deed of trust was executed, Purna was already cognisant of the heavy liability which had been incurred and which was claimed by the solicitor. The conduct of Purna in disposing of certain other properties which belonged to him will also be a matter for consideration along with the present one when we deal with the provisions of section 53, Transfer of Property Act. It may be stated at this stage that the bill of costs had already been filed before the deed of trust was executed, and the ignorance which was feigned about the proceedings in the High Court for the realization of costs which were claimed against Purna has been found out not to be substantiated, and on the other hand, he has been found to have been cognisant of these proceedings and might have been preparing himself for the ultimate eventuality.

(19) It is not necessary for us to consider the other points which have been referred to by the learned Subordinate Judge in connection with the enquiry as to the real nature of the transaction evidenced by the alleged deed of trust. Whether Purna was of a religious disposition or not, or whether he was giving charities to others from before the trust or not is not strictly relevant for the enquiry which is now before us.

(20) Reference must, however, be made to the evidence which was led by the plaintiff with the help of account papers which had been maintained by him personally to show the disposal of the income from the alleged trust property. We may say at once that the accounts as produced are all in his handwriting and before the Court can reasonably rely upon such accounts, they should be supported by strong evidence adduced from other sources. An attempt was made in this direction by calling some of the persons who had received assistance from the trust estate as alleged by the plaintiff. Only two persons were examined amongst the many who had been called. One is plaintiff's witness No. 4 Sasibala Dey and the other is plaintiff's witness No. 7 Elekeshi Addy. It is not explained why some or other of the other alleged recipients were not called. The two persons who have been examined have also on some material points contradicted the plaintiff. Certain items of help alleged to have been given, according to one or other of the witnesses abovementioned, do not find a place in the accounts as produced. On the other hand, supporting vouchers, whether of Calcutta or of Banaras, although admitted to be in the possession of the plaintiff are not produced. It is not necessary to go into a minute analysis of the evidence of these two witnesses to point out the inconsistencies and contradictions as disclosed in their deposition, the evidence of the plaintiff and the account papers. It may well be that the plaintiff used to help some or other person of the locality or outside, but the real question here is whether the income which was accruing from the alleged trust was not being appropriated by the plaintiff, but was being wholly utilised for the purpose of charitable and religious trust. The evidence led does not support that story.

(21) As regards the performance of the Annapurna Puja, the evidence which has been led is not one of the priests who have actually officiated, but is of Bata Krishna Bhuttacharjya, plaintiff's witness No. 6, who had arranged for others to come as priest. It is neither possible for such a witness, nor such witness purported to state the actual amount spent for the Puja. He merely stated that from Rs. 200/- to Rs. 250/- was spent annually. It is not possible for such a witness to say about the sources from which the money was found.

(22) About the real character of the transaction, reference has to be made to the conduct of the plaintiff in certain proceedings in the High Court. It appears that at different times, the purpose

for which the property was held was being stated differently. No doubt when the agreement was executed with the Government for the purpose of getting compensation when the property was under requisition was signed by the plaintiff in his capacity as a trustee and not in his personal capacity. No separate banking account was shown to have been maintained or when heavy sums were being received from the land and hirings department for the requisitioned property, how and when they were kept does not appear from the evidence as led. But it appears that when in the course of the proceedings which the solicitor had initiated in the Original Side of the High Court this particular property was attached, an undertaking was given by the plaintiff that he would not deal with the property till the disposal of such proceedings. No claim was preferred at this stage as one would naturally think would have been the normal duty of a trustee when such an attachment was going to be effected. The conduct of the plaintiff on the present occasion in making a claim as soon as the property was attached by the Subordinate Judge at Alipore would be the natural conduct which one would expect of him when the seifsame property was attached for the same debt in another Court. On the other hand, an undertaking was given that the property would not be dealt with. Either he was misleading the Court in not bringing it to the notice of the Court and the other side that the property had passed out of his hand and was the subject of a trust, or the purpose for which the trust was alleged to have been created was not the real purpose, and the time was not thought opportune to bring to the notice of the Court the existence of such an alleged trust, it was so near the date of the alleged trust that it might have been possible to say, as it has been possible for the plaintiff to make an attempt in the present case which would not have been possible had it been made at the earlier stage. It is not possible for us and we are not going to speculate, but it remains an admitted fact that an undertaking was given which has not been explained in the present case. It is apparent that the creation itself of the trust was concealed from the Court.

(23) Reference may in this connection be made to certain letters sent by the lawyers on behalf of the plaintiff or the solicitor on certain occasions where the question about the right of the plaintiff in respect of this property was being dealt with. In exhibit D, a letter written by B. Mallick, pleader for the plaintiff to the Land Acquisition Collector on 20-2-1947, about 99 and 99/1 Karaya Road, both the properties were described to be the properties of Deity of Siva Thakur. Premises No. 99 Karaya Road was a property in which the title of the plaintiff as shebait was distinct and separate from the alleged title of the plaintiff as trustee under the alleged trust created by him. No attempt was made to differentiate the title of one from the other.

(24) A few months later, on 1-10-1947, Messrs. Mukherjee and Biswas, Solicitors of the plaintiff were writing to the Land Acquisition Collector (Ext. D 2) that both the premises Nos. 99 and 99/1 Karaya Road were under requisition, but compensation was not being paid regularly, and the letter was being written by the Solicitors on behalf of Purna Chandra Singh, "Shebait of Sri Sri Iswar Shiva Thakur, Hindu Deities situate respectively at No. 26A Puddapukur Road and at Benaras."

(25) On 27-9-1948, Messrs. Mukherjee and Biswas are sending another letter to the Land Acquisition Collector as solicitors of the plaintiff (Ext. D 1) giving notice that a suit would be filed for compensation. It is significant that with 99/1 Karaya Road is not mentioned 99 Karaya Road. The description of the title is stated to be that Purna is suing as trustee to the estate of Sri Sri Lakshmi Janardan Jew situate at 25A, Puddapukur Road and of Benaras. A copy of the plaint is sent along with the letter purporting to be a notice under section 80, Civil P. C. The plaint was drawn up by an Advocate of this Court.

(26) Purna when he was deposing during the claim proceedings in the Court of the Subordinate Judge at Alipore on 27-9-1948, the deposition being marked as Exhibit K in the present case, was confronted with these contradictory positions taken up by him or on his behalf at different stages. All that he could say was that it was not true that he had given instructions to his solicitors to write to the Land Acquisition Collector that he was the shebait in respect of 99/1 Karaya Road. He also had not given instructions to B. Mallick, to state as had been mentioned in his letter referred to above. It is significant that it was, however, stated by Purna before the Court,

> "I did not also give instructions to Mr. B. C. Mallick, pleader to say that I was Shebait of premises No. 99/1 Karaya Road. When I got a copy of the notice under S. 80, Civil P. C., I at once asked the solicitors to rectify the mistake."

No attempt was made in the present suit to call the records from the solicitors, Messrs. Mukherjee & Biswas to show what instructions had been given by the plaintiff or on his behalf, and how such a contradictory instruction could be given and why no assertion of the plaintiff's title as trustee was made at any stage during all these proceedings.

(27) Mr. Gupta appearing on behalf of the plaintiff-appellant attempted to explain that this might have been a case of mistake but it is inconceivable how there can be successive mistake not of the same nature, but of different types and mistakes committed by lawyers and solicitors who can only be reasonably be expected to act on instructions received from the client. Unless there be any specific explanation as to how these things happened, the conclusion is irresistible that such contradictory positions had been taken up by Purna himself for reasons which it is not possible to define specifically at this stage. There is only one conclusion to which one is drawn, and that is that Purna was not serious when he executed the alleged deed of trust. It was a sham transaction, and it cannot be regarded as having any legal effect. We therefore agree with the learned Subordinate Judge with the conclusion reached on this point.

(28) The conclusion reached by us is sufficient to dispose of the plaintiff's claim in the present suit, but in view of the grounds taken in the Lower Court and the arguments before us in this Court, we should also advert to the alternative prayer which had been made and the defence which had been raised by the defendant. This alternative defence is based upon S. 53, Transfer of Property Act.

(29) Mr. Gupta on behalf of the plaintiff-appellant contends that this defence under S. 53, Transfer of Property Act, is not available to the defendant as such a defence had not been raised and in the form in which it ought to have been raised in the pleadings. Such a defence was not raised specifically in the Issues as well.

(30) The defence is made in the following passage in paragraph 4 of the written statement: "With reference to paragraphs 2 and 3 of the

plaint this defendant denies that Purna Chandra Singha was or is of 'religious and charitable bent of mind'. His father did not bequeath any property to him as will appear from his Will inter alia because he had become an insolvent and had 'already wasted a great deal of money'. This defendant is not aware if any and what other personal income the said P. C. Singha has or had at the time of execution of the alleged Trust Deed and he puts the plaintiff to strict proof thereof. In fact shortly prior thereto the said Purna Chandra Singha in order to defraud and defeat the claims of the defendant sold at an undervalue the premises No. 25, Puddopukur Road and No. 14, Madhub Chatterjee Lane (which he got through the exertions and as a fruit of the labour and partly of the money of the defendant). This defendant states that the said Purna Chandra Singha had no right to create a trust of the said property and that the terms and objects of the alleged trust are illusory, vague and uncertain and impossible of performance at any rate after the death of the said Purna Chandra Singha and that the same was in respect of certain class of persons of Bhowanipur and not specifically of Bhowanipur as alleged. Further there has been no transfer or assignment of the property in favour of the alleged trustee or his successor or any other person whatsoever and accordingly the trust is void and otherwise bad in law and cannot be carried out. This defendant further states that the alleged deed of trust is also inoperative in law inter alia because it is a colourable and fraudulent document intended to defraud the just claim of the creditors of the said Purna Chandra Singha including this defendant and was made after the said Purna Chandra Singha realised that in spite of his strenuous opposition a very large sum amounting to about Rs. 32000/- would be due by him as allowed on taxation in respect of the defendant's bill of costs of the reference in the said Suit No. 891 of 1931 which was lodged on the 22-12-1942, and notice was served on him."

(31) It is pointed out that what the defence was; that was not an alternative plea as distinct from the one dependant upon the nature of the transaction itself. It is not contested that the case as may be made by a party on the ground that the transaction is a void one is separate and distinct from the case that the transaction is hit by the provisions of S. 53, Transfer of Property Act. No doubt, the language used in para. 4 of the written statement and in Issues Nos. 2 to 4 as raised in the suit do clearly and specifically refer to the alternative defence as was argued in the Lower Court and was also contended in this Court. It is quite apparent, however, that the parties were not misled by this jumbling of the two distinct and alternative issues and defence. Evidence was led by the plaintiff keeping in view the alternative defence based upon the provisions of S. 53, Transfer of Property Act.

(32) In view of the nature of the evidence which was led by the plaintiff, this is not a case of the type which was criticised by Sir Lawrence Jenkins in 'Mina Kumari's case reported' in 44 Ind App. 72, (P. C.) already referred to. The Lower Court had no difficulty and we have no difficulty in coming to a definite conclusion as to what would be the decision on the application of S. 53, Transfer of Property Act. In our view, though the written statement was rather inartistic, full opportunity had been availed of and relevant evidence had been produced by the plaintiff on the two distinct and separate defences. There will be no injustice done if such definite and alternative defences are considered and a decision reached.

(33) The next question, therefore, which arises for our consideration is on the footing that even if the deed of trust was a real and valid transfer at the time when the document was executed, can it be avoided and if so, has it been avoided by the defendant as being one intended to defraud the just claims of the creditor of Purna?

(34) In this connection it was argued on behalf of the plaintiff appellant that it was not competent for the defendant to raise this defence in this suit as framed. It is urged that whatever might have been the legal position under S. 53, Transfer of Property Act, before the amendment of 1929, such a defence can be raised only in a suit which is binding on all creditors as being a representative suit. The contention of Mr. Gupta was further that even under S. 53 as it stood before the amendment of 1929, the earlier view expressed in — 'Subramania Aiyar v. Muthia Chettiar,' 41 Mad 612 (FB) which was subsequently overruled by a subsequent Full Bench of the same Court in — 'Ramaswami Chettiar v. Mallappa Reddiar', 43 Mad 760 (FB), was the correct view.

(35) Under S. 53, Transfer of Property Act, as it stood before the amendment, there was some difference of opinion in some of the Courts as to whether a suit brought by a creditor to avoid the transfer on the ground that the intention was to defeat or delay the creditors or the transferees. Such a suit was to be one so framed as to be a representative one so as to bind all the creditors. With the exception of the case —'Subramania Aiyar v. Muthia Chettiar', 41 Mad 612 (FB) all the Courts were unanimous that if in a proceeding started by the debtor a defence was raised by a creditor that the claim made by the debtor or transferee from the same based upon a particular transaction which was being questioned as being hit by S. 53, Transfer of Property Act, such a defence was not barred by the suit was not a representative one. This view had been expressed by this Court also in — 'Abdul Kader v. Ali Meah', 15 Cal LJ 649. Reference may also be made to an earlier decision in — 'Ram Chand v. Mathura Chand', 19 All LJ 299. In two of the earlier decisions of this Court, a plea under S. 53, Transfer of Property Act, was allowed to be raised without objection by way of defence. Vide — 'Ishan Chunder v. Bishu Sardar', 24 Cal 825, and — 'Rajani Kumar v. Gaur Kishore', 34 Cal 1051.

(36) It is not necessary for us to proceed further with the discussion as to what the law was or should have been under S. 53, Transfer of Property Act, as it stood before the amendment of 1929.

(37) Mr. Gupta on behalf of the plaintiff appellant contends that the amendment as introduced in 1929 has by implication made a change in the then existing law. Reliance is placed upon the 4th para. of sub-S. (1) of S. 53 of the Transfer of Property Act as it now stands. It is in the following terms:

"A suit instituted by a creditor (which term includes a decree holder) whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors".

It is apparent that the only kind of suit referred to in this paragraph is a suit which is instituted by

a creditor. No reference is made to a suit by a debtor or a transferee from the debtor. It may be for obvious reasons that in the principle which was made clear in the remodelled section in 1929 no reference was made to a suit by a debtor or a transferee from him. If one of the many creditors brings a suit for declaration that he is entitled to proceed against particular property belonging to the debtor so that he may realise his dues from that particular property. Similar suits and successive ones may be brought by other different creditors of the same debtor in different Courts. Such suits would not only be harassing ones, but would be unnecessary ones as the question whether creditors of a particular person are entitled to proceed against specific property as being the property of that debtor should be decided one for all and not by successive decisions which may be contradictory ones *by* different Courts. The harassment of the debtor should also be minimised.

(38) The position is not such in the case of a suit by a debtor or a transferee from a debtor in respect of the particular property for a declaration of his title which may be in possession or the title of which is being questioned by another person.

(39) Let us take the specific facts of the present case. The creditor has proceeded against a particular property on the footing that that property is his debtor's property. A claim is put forward by the debtor or his assignee, and the claim is dismissed. On behalf of the debtor a suit is filed not for a declaration that this particular property cannot be attached for a particular debt. The other creditors may or may not find it necessary to proceed against this property. There may or may not be other creditors, and if a debtor's suit is to be made maintainable only if such a suit is constituted as a representative one that would be dragging to the Court all the different creditors who may or may not be interested in that particular property which is under attachment. As it has been held and has been the accepted rule of law in the different Courts, a decision in such a suit is not res judicata in subsequent suits so far as the decision about the attachability of that particular property is concerned.

(40) In this connection reliance was placed on behalf of the plaintiff appellant on — 'Chutterput Singh v. Maharaj Bahadoor Singh', 32 Ind App 1 (PC) & on a certain expression of opinion appearing at page 15. It was contended that an Issue whether transfers were or were not liable to be set aside at the instance of a transferee from the debtor could be raised. Their Lordships observed:

> "Such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose, and this suit was not so constituted either as to parties or otherwise."

Emphasis was laid on the word "only" used by Lord Davey in the sentence quoted above. One material fact on which that observation was made by the Judicial Committee was however overlooked. Few of the relevant facts need only be stated to point out that the sentence could not be interpreted to mean that no suit could be brought by a debtor or a transferee from a debtor and that no defence under S. 53 Transfer of Property Act, could be raised in such a suit as such a suit was not a representative one.

(41) Some of the properties in that case had been mortgaged to certain persons. A second mortgage was created on his own behalf by one of the mortgagors and on behalf of the other mortgagor to one Luchmiput. A third mortgage by the same to Lachmiput was made, out of the consideration of which the second mortgage was paid off. Lachmiput was also a transferee of the mortgages from the first mortgagee. The appellant claimed his title from Lachmiput. The respondents before the Judicial Committee claimed under a subsequent mortgage to one Dhunput, executed by the same mortgagor who had been a party to each one of the three mortgages and as executor of the other mortgagor. A suit was brought by Dhunput and his son against Chutterput and the heirs of Lachmiput. The plaint narrated many other matters — a purchase by Dhunput at sales in execution of certain decrees which alleged that Lachmiput was a prior mortgagee to some of the properties included in the mortgage in favour of Dhunput. In the plaint declaration was prayed for of title to all the properties in suit and as to the property included in Lachmiput's prior mortgage, if the Court considered that the defendant could reap the benefit of the prior mortgage, then for accounts and for foreclosure. Further, in the suit, which went up to the Judicial Committee all the necessary parties were not impleaded, and it was not possible for the Court to pass an effective decree making a declaration as prayed for and that in the absence of such necessary parties. The Judicial Committee on that account came to the conclusion that the suit as constituted was not one where such a plea could be taken, and therefore, made the observation on which reliance was placed by Mr. Gupta that such an Issue could have been raised and a decree giving that relief could have been possible only if the suit had been properly constituted for that purpose. That observation cannot be taken to be a general one, and applicable to facts different from the facts of that case. That is not an authority for the very broad proposition for which reliance was placed by Mr. Gupta.

(42) Reference may in this connection be made as to the interpretation of this decision of the Judicial Committee to — 'Hakim Lal v. Mooshahar Sahu', 34 Cal 999 and to the observation of this Court appearing at pages 1006 and 1007. It was thus observed by this Court giving reference to the sentence on which reliance has been placed by the appellant before us.

> "Their Lordships held that an issue upon such a question could be raised, and a decree could be made only in a suit properly constituted for the purpose, & that the suit as framed, which was between the purchaser on the one hand and one only of the creditors on the other was not so constituted either as to parties or otherwise. This view, it may be observed, is in harmony with what has been regarded as the settled rule in England, where it has been held that if the settlor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13 Elizabeth Chap. 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the settlor; see — 'Reese River Silver Mining Co. v. Atwell', (1869) 7 Eq. 347; see also — 'White and Tudor's Leading Cases on Equity', 7th Edition, Vol. II, P. 822. The rule appears to us to be based upon a perfectly sound and intelligible principle. To allow one creditor to impeach the validity of a conveyance would expose the transferee to separate attacks by different creditors, each of whom might litigate

the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusion in different suits brought at the instance of different creditors."

(43) The question whether the amendments made in 1929 have in any way affected the law was considered by this Court in — 'Jagat Kishore v. Kula Kamini Dassya', 72 Cal L. J. 420 where a Division Bench of this Court, though without going into detail into the question of the principle involved, accepted the present law to be the same as before the amendment.

(44) Reference may in this connection be also made to the decisions of some of the other High Courts where a consistent view as stated above has been repeatedly taken. Vide — 'Hakimbu Bai v. Dayabhai', 41 Bom L. R. 1104; — 'Lallu Singh v. Chander Sen', 56 All 624(F.B.).

(45) What is necessary is that there must be unequivocal declaration of intention to avoid the attachment by a creditor. Such declaration is an exercise of option to avoid the transfer.

(46) We, therefore, hold that it is open to the defendant to raise by way of defence a plea under S. 53, Transfer of Property Act. Such a plea had been taken; an attempt had been made by the plaintiff, and according to the learned Subordinate Judge, unsuccessfully.

(47) As we have indicated already that in view of our decision on the earlier question about the real character of the transaction, a decision on this point is not called for, but if we were to answer, we would have no difficulty in agreeing with the learned Subordinate Judge that had the transaction been a real and valid transaction at the time when it was entered into, that transaction can be avoided by the creditor on the ground that this was for the purpose of delaying and defeating creditors. We do not think it necessary to refer to the facts to which reliance has already been made in connection with the first point. There are other materials also to which reference has been made by the learned Subordinate Judge, and we agree with the conclusion reached by him.

(48) All the points raised on behalf of the appellant fail and this appeal is dismissed with costs.

(49) K. C. CHUNDER J.: I agree.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 CALCUTTA 257 (Vol. 40, C. N. 93)

BOSE J.

Nirmal Chakravarti and others, Petitioners v. The Land Acquisition Collector, Alipur and others, Opposite Party.

Civil Rule No. 1750 of 1951, D/- 27-11-1951.

(a) Constitution of India (1950), Art. 226 — Another remedy open.

Questions of title have to be decided in appropriate proceedings taken for the purpose and not in the proceedings under Art. 226. (Para 4)

Anno: C.P.C., App. III; Const. of India, Art. 226 N. 8.

(b) Constitution of India (1950), Art. 226 — Scope — Persons entitled to apply.

Trust property acquired by government — Beneficiaries not parties to proceedings and represented by receiver of estate — Compensation under award paid to receiver on his giving undertaking to refund if required — Land Acquisition Collector ordering refund, on application for amendment of award by person claiming interest in portion of property — Court on application of receiver directing refund after hearing objections from beneficiaries — No steps taken, to have Court's order modified or set aside:

Held (i) that application under Art. 226 by beneficiaries to correct Court's order, only on allegations against receiver's conduct in acquiescing in and carrying out Collector's order, was inappropriate; (Para 5)

(ii) that they were strangers to Land Acquisition proceedings, and so even if the order of Collector enforcing the undertaking amounted to amendment of award, it was not open to the beneficiaries to challenge the amendment in the proceedings under the Article; (Paras 8, 9)

(iii) that their application was not bona fide since its object was to get round Court's order by having the Collector's order set aside; (Para 9)

(iv) and that therefore there was no justification for interference. (Para 10)

Anno C.P.C., App. III; Const. of India, Art. 226 N. 1, 6.

(c) Civil P. C. (1908), S. 152 — Applicability — (Land Acquisition Act (1894), S. 12).

Land acquired under Defence of India Rules, subsequently derequisitioned — Proceedings under Land Acquisition Act started after actual re-delivery and award made by Land Acquisition Collector — Latter acquisition is not continuation of one under Defence of India Rules and question whether Collector has power to amend award is to be governed by Land Acquisition Act, S. 152, Civil P. C. has no application — (Land Acquisition Act (1894), S. 12). (Para 9)

Anno: Land Acq. Act, S. 12 N. 1.

(d) Civil P. C. (1908), S. 152 — Clerical or arithmetical mistakes or accidental slips or omissions.

Award in land acquisition proceedings — Subsequent application for amendment by person interested in portion of land in respect of which compensation is paid — Amendment sought is not one falling within mistakes or slips referred to in S. 152. (Para 9)

Dr. N. C. Sen Gupta and Hemendra Nath Lahiri, for Petitioners; Apurbadhan Mukherjee, J. Mazumdar and Amarnath Banerjee, for Opposite Party.

ORDER: This is an application under Art. 226, Constitution of India, for an appropriate writ for cancellation of an award made by the Land Acquisition Collector of 24 Parganas and of orders for refund of compensation money passed by him and the Subordinate Judge, Alipore, directing the Receiver to whom the compensation money had been paid to refund the same. The facts may shortly be stated as follows:—

One Rai Bahadur Dwarka Nath Chakravartty had created a trust in respect of his immovable properties for payment of debts and for distribution amongst the beneficiaries mentioned in the trust. By the said deed the settlor appointed himself and petitioner 1 and opposite parties 4 and 5 as trustees for carrying on the said trust. The settlor died on 6th July 1945, and petitioners 1 and 2 and opposite parties 4 and 5 are the present trustees in respect of the trust estate. Disputes and differences arose amongst the trustees and there was an application made to Court under S. 20, Arbitration Act which was registered as Title Suit

No. 70 of 1947 and by an order, dated 12th July 1949, one Kalikananda Mukherjee, opposite party 2, was appointed receiver of the trust estate in that suit. It appears that thereafter some of the plots of lands belonging to the trust estate were acquired by the Government and the Land Acquisition Collector of 24 Parganas made an award on 15th March 1950, by which a sum of Rs. 9,112-8-0 was awarded as compensation in favour of Mr. Mukherjee, Receiver to the Dwarkanath Trust Estate, in respect of plot No. 135. By the same award, other sums were awarded to opposite party 3 Sitaram Kapur in respect of other plots of land.

On 20th March 1950, compensation money was paid to the Receiver upon his giving an undertaking to refund the amount subsequently if called upon to do so. Thereafter opposite party 2 applied to the Land Acquisition Collector for amendment of the award by representing himself to be a purchaser of the plot, being Dag No. 135, and the land Acquisition Collector has acceded to such application and amend the award and has called upon the Receiver to refund the sum to the Collector. On 17 August 1950, the Receiver was informed by a letter about the correction and refund of the money was actually asked for from him within a week from that date. On 20th March 1951, the Land Acquisition Collector, by another letter, again called upon the Receiver to refund the sum of Rs. 9,112-8-0 forthwith. On 9th April 1951, the Receiver applied in suit No. 70 of 1947 to the Subordinate Judge, Alipore for direction in respect of the order of the Land Acquisition Collector to refund the money and it appears that the Subordinate Judge has given directions upon the Receiver for complying with the order of the Land Acquisition Collector with liberty to the receiver to come up for further directions if necessary. This order was made on 19th May 1951, after hearing the petitioners and other beneficiaries who opposed any such direction being given to the Receiver for refund of the money.

(2) The special Land Acquisition Collector, 24 Parganas, has filed a counter-affidavit in this case. In para 5 of the said affidavit, it is stated that the Land Acquisition Collector considered the application for amendment of the award in the presence of the parties and the Advocates appearing on behalf of the parties. It is alleged that one Lalit Mohan Chakravartty, who was the Advocate appearing on behalf of the receiver, was present during the hearing on the different dates. It is pointed out by Dr. Sen Gupta that this Lalit Mohan Chakravartty is not an Advocate at all but he was a mere clerk. It is further stated in the said para 5 of the said affidavit that the order amending the award was made upon hearing the parties and upon withdrawal of objections by the parties concerned. The deponent further states that from a perusal of the Land Acquisition proceedings it is clear that the Receiver was represented by an Advocate and that the receiver had full knowledge of the proceedings.

(3) Opposite party 3, Sitaram Kapur, has also filed a counter-affidavit. In para 4 of the said affidavit he sets out the various facts showing his chain of title and the extent of his interest in the land in question. It is further stated that prior to the acquisition under the Land Acquisition Act, the lands had been requisitioned by the Government for military purposes under the Defence of India Rules and possession had been taken, but subsequently notice of derequisition was served upon opposite party 3, but before possession was re-delivered, proceedings under the Land Acquisition Act for acquisition of the property were started.

(4) It may be pointed out that questions of title cannot be determined in proceedings under Art. 226, Constitution of India. Such questions have to be decided in appropriate proceedings taken for the purpose.

(5) The petitioners are the beneficiaries in respect of the trust estate. They were not parties to the land acquisition proceedings at all. The receiver represented the interest of the beneficiaries at all material times and he was a party to these land acquisition proceedings. At the time the compensation money was paid to the receiver, the receiver had given an undertaking to refund the money if subsequently called upon to do so. The fact remains that the Land Acquisition Collector has called upon the receiver to carry out his undertaking and the receiver has agreed to do so. Not merely he has agreed but he has been directed by the Subordinate Judge to comply with the requisition of the Land Acquisition Collector. No steps have been taken to have the order of the learned Subordinate Judge which was passed after hearing the petitioners and in spite of the opposition, set aside or modified. But the petitioners have come forward to this Court in an application under Art. 226, Constitution of India for having that order corrected. This relief the petitioners are not clearly entitled to in this application. The grievance of the petitioners is that they are affected by the conduct of the receiver who has acquiesced in carrying out the direction given by the Land Acquisition Collector for refund of the money. If they have any complaint against the conduct of the Receiver and have any grievance on that score, the proceeding under Art. 226, Constitution of India is not the proper proceeding for ventilating such grievance.

(6) It may be noted that no affidavit in reply has been filed on behalf of the petitioners to controvert the facts stated in the counter-affidavits filed by opposite parties 1 and 3. Dr. Sen Gupta submitted that as he is not asking this Court to enter into an investigation about the merits of the rival claims of the parties to the compensation money in question, his clients did not file any affidavit in reply. It is clear, however, from the materials before this Court that the receiver who represents the trust estate is not actively taking up any obstructive attitude so far as the carrying out of the directions of the Land Acquisition collector and the Subordinate Judge is concerned and in fact as officer of the Court he cannot do so. He applied for directions from the Court which was the proper thing for him to do and he has been directed to comply with the order of the Land Acquisition Collector. No objection to the order of the Land Acquisition Collector, or the order of the Subordinate Judge has been raised on behalf of the receiver. It is only the beneficiaries interested in the estate who are not parties to the Land Acquisition proceedings who have come up before this Court and are challenging the order of the Land Acquisition Collector directing refund of the money, although the receiver had given an undertaking to refund it.

(7) I am given to understand that the Land Acquisition Collector has not yet come to a decision as to the merits of the claims of the rival claimants.

(8) It has been contended by Dr. Sen Gupta that the Land Acquisition Collector having made an award in favour of the receiver, the award became final and conclusive under S. 12, Land Acquisition Act and after that there is no power in the Land Acquisition Collector to amend his award. He further contends that if any person is aggrieved by the award and does not accept the award,

he may have the matter referred to the Court for determination of his objections as to the amount of compensation, as to the person to whom the compensation is payable and as regards the apportionment of the compensation money amongst the persons interested (S. 18). In the circumstances, Dr. Sen Gupta contends that the order amending the award was wholly without jurisdiction and so should be set aside. As I have pointed out before, the order of the Subordinate Judge directing the receiver to comply with the requisition of the Collector cannot be interfered with by this Court in this proceeding. What the Land Acquisition Collector has done is merely to call upon the receiver, who had already given an undertaking at the time he received the compensation money, to carry out his undertaking. The interest of the estate was being represented by the receiver and certain directions have been made upon him for refund of the money by the Subordinate Judge and the Collector. The petitioners are strangers to the land acquisition proceedings. It is not open to them to challenge the amendment of the award in this proceeding under Art. 226, Constitution of India. I am of the view that this application is not maintainable at the instance of the present petitioners.

(9) It was contended by Mr. Mazumdar, appearing for opposite party 1, that the land in question was acquired by the Government in the first instance under the Defence of India Rules for military purposes and it is in continuation of the proceedings taken for acquisition under the Defence of India Rules that steps under the Land Acquisition Act were taken and so the award is really an award in respect of the acquisition under the Defence of India Rules proceedings and so the provisions of the Code of Civil Procedure will apply and the Land Acquisition Collector has power to amend or correct the award as he has purported to do in this Case. This contention of Mr. Mazumdar is based on a misapprehension and cannot be accepted. It appears from the affidavit of opposite party 3 and the fact is also admitted by the learned Advocate for opposite party 3 that in fact a notice of derequisition was served upon opposite party 3 and the property was derequisitioned. But before possession was actually re-delivered to opposite party 3, proceedings under the Land Acquisition Act were started. In this state of facts, the matter must be governed by the provisions of the Land Acquisition Act and there is no question of S. 152 Civil P. C. applying to the facts of this case. Moreover, S. 152, Civil P. C. deals only with correction of clerical or arithmetical mistakes, or accidental slips or omissions. The nature of the amendment concerned cannot by any stretch of imagination be said to fall within the mistakes or slips as referred to in S. 152 of the Code.

(10) I do think I shall be justified, in the facts and circumstances stated above and in the exercise of my discretion under Art. 226, Constitution of India, in interfering with the order complained of.

(11) The whole object of this application is to get round the effect of the order of the learned Subordinate Judge which was passed after contest by the petitioners (Para 14 of petition) by the indirect process of getting the order of amendment of the award, if it was amendment at all, set aside by this application under Art. 226. It is a debatable matter whether the Land Acquisition Collector has at all amended the award or not. An undertaking was taken from the receiver to refund the money and the Land Acquisition Collector has purported to enforce the undertaking. That is all that has really taken place so far. I do not think that it is a bona fide application.

(12) In the circumstances, this petition fails and the Rule must be discharged. The petitioners will pay two sets of costs, one to opposite party 1 and the other to opposite party 3, the hearing fee for each set being assessed at one gold mohur.

A. M.K.S. Rule discharged.

A.I.R. 1953 CALCUTTA 259 (Vol. 40, C. N. 94)

CHAKRAVARTTI C. J. AND G. N. DAS J.

Dulal Chandra Chatterjee, Plaintiff-Appellant v. Gosthabehari Mitra, Defendant-Respondent.

A. F. O. O. No. 21 of 1951, D/- 21-5-1952.

Partition Act (1893), S. 4 (1) — "Dwelling house", meaning of — (T. P. Act (1882), S. 44) — (Words and Phrases — Dwelling house).

Assuming that the house concerned must be a residential house of the members of the family owning it in order to make it a 'dwelling house' within the meaning of S. 4 (1), it cannot be that any suspension of occupation or, for the matter of that, the absence of the owners of the house therefrom or an occupation or terminable occupation by tenants, can have the effect of making the house to be a dwelling-house. The creation of a tenancy does not terminate the possibility of the owners of the house returning to its occupation. What seems to be important under S. 4 (1) is that the house concerned should either be actually in use, though not necessarily in constant occupation, by the owners as a residential house or that conditions should be such that it is still possible for them to return to the occupation of the house at some future time. Judged by that test, the mere grant of a tenancy cannot possibly have the effect of making a house, which is otherwise a residential house of the members of the undivided family owning it, cease to be a dwelling-house. It may be that if a permanent and irrevocable lease is granted to a third party a question may arise as to whether the character of the house as a dwelling house, in so far as the owners are concerned, still survives. No such question can possibly arise where what has been created is nothing more than a tenancy of the ordinary kind. AIR 1940 Rang 53, Disting. (Para 6)

Anno: Partition Act, S. 4 N. 3; T. P. Act, S. 44 N. 9.

Nalin Chandra Pal and Amarendra Narain Bagchi, for Appellant; Haridas Gupta, for Respondent.

REFERENCE..... /Para.

('40) AIR 1940 Rang 53: 12 Rang 343 6

CHAKRAVARTTI, C. J: This appeal raises a short point under S. 4, Partition Act.

(2) The facts which have led up to this appeal are as follows. There is a house situated within the limits of Konnagar Municipality which was owned at one time by one Nilmoni Mitra and on his death devolved on his four sons, Tinkari, Bishnu Charan, Gangacharan and Gostha Behari. By three separate conveyances executed on three different dates in 1948 the appellant, Dulal Chandra Chatterjee, purchased the respective shares of Tinkari, Bishnu Charan and Gangacharan, and thereafter he filed a suit for partition. In that suit the remaining brother Gostha Behari, who is the respondent in this appeal, made an application

under S. 4, Partition Act, praying that he might be allowed to buy the shares purchased by the plaintiff at a valuation fixed by the Court. That application was met by the appellant with the objection that the application did not lie, inasmuch as the house concerned had been let out to tenants long ago and had therefore ceased to be a 'dwelling house' within the meaning of S. 4, Partition Act. The learned Second Subordinate Judge of Hooghly declined to give effect to that objection and allowed the application made by the respondent. Thereupon the present appeal was preferred.

(3) Neither of the parties led any evidence before the learned Judge and the matter seems to have been dealt with as on a demurrer. We also, therefore, have to proceed on the basis that the statements made by the respondent in his application or in his reply to the objection filed by the appellant are correct. In the absence of evidence the facts, therefore, must be collected from those applications and petitions of objection.

(4) The allegation of fact made by the appellant in his petition of objection was "that the suit property is not a dwelling house but a tenanted one and all the co-sharers have been in possession thereof for a long time by letting out the same to tenants". The real facts, as explained by the respondent in his written statement in the suit and later on in his reply to the appellant's objection, are that till 1945, all the four brothers were living in the house concerned, which was their ancestral residential house. In 1945 they left Konnagar for Calcutta where they settled down for the purpose of carrying on business, and as their old family-priest needed a house and they themselves needed someone to look after the ancestral house left behind, they had let out the house to the said family priest, one Dhirendra Nath Bhattacharjee, at a nominal rent of Rs. 12/- per month. It is to be noted that in the petition of objection filed by the appellant, he also relied solely on the occupation of Dhirendra Nath Bhattacharjee as a tenant, but did not allege that the house was being habitually let out to tenants or that there had been any other tenants before Dhirendra Nath Bhattacharjee.

(5) Even on those facts it was contended by Mr. Nalin Chandra Pal, who appeared on behalf of the appellant, that the house had ceased to be a 'dwelling-house' within the meaning of S. 4, Partition Act. In his submission, a dwelling-house, as contemplated by the section, was a house in which the members of the undivided family, owning the house, actually dwelt or a house in which it was possible for them to dwell, if they were minded to do so. But if, as the fact was in the present case, the house had been let out to tenants, there could be no question of the owners of the house dwelling in it any longer, particularly in view of the restrictions introduced by the Rent Acts. In those circumstances, the argument concluded, the house had ceased to be a dwelling-house so far as the members of the undivided family to whom it belonged were concerned, and therefore it was outside the purview of S. 4, Partition Act in a suit as between the co-sharer owners of the house and a stranger-purchaser of the share of one or more of them.

(6) I am entirely unable to accept the argument of Mr. Pal. Purely as a matter of language, S. 4 (1), Partition Act would seem to be satisfied if the house concerned was a dwelling-house in the sense of being a residential house, used or usable for purposes of human dwelling and if it belonged to an undivided family. The generally accepted view, however, is that it is not sufficient that the house concerned should be a house for the dwelling of human beings but it should also be a residential house in relation to the members of the undivided family owning it. It is not necessary for the purpose of this case to insist on the extreme view which can perhaps be taken on the strict language of the section, and I may proceed on the view which has been commonly accepted as to the true meaning of the word "dwelling-house" as used in S. 4 (1). But assuming that the house concerned must be a residential house of the members of the family owning it, I am altogether unable to agree that any suspension of occupation or, for the matter of that, the absence of the owners of the house therefrom or an occupation or terminable occupation by tenants, can have the effect of making the house cease to be a dwelling-house. As is well known, the object of both S. 4 (1), Partition Act and S. 44, T. P. Act is to keep off strangers who may purchase the undivided share of some co-owner of an immovable property and so far as dwelling-houses are concerned, to make it possible for the co-sharer, who has not sold his share, to buy up the stranger purchaser. The whole object therefore is to provide for peaceable enjoyment of the property and to secure privacy. The need for making such provision cannot possibly come to an end, if by reason of special circumstances the owners of the house find it necessary to let it out to tenants for a time or to allow it to be occupied by a licensee. It has already been held in cases, too numerous to mention, that in order that an application under S. 4 (1), Partition Act may lie it is not necessary that the co-sharer owners should be in constant residence at the house. From that position to the position where the house has been let out to tenants is but a short step forward. The creation of a tenancy does not terminate the possibility of the owners of the house returning to its occupation. The tenant may voluntarily give up possession or he may be ejected. What seems to me to be important under S. 4 (1), Partition Act is that the house concerned should either be actually in use, though not necessarily in constant occupation, by the owners as a residential house or that conditions should be such that it is still possible for them to return to the occupation of the house at some future time. Judged by that test, it appears to me that the mere grant of a tenancy cannot possibly have the effect of making a house, which is otherwise a residential house of the members of the undivided family owning it, cease to be a dwelling-house. It may be that if a permanent and irrevocable lease is granted to a third party, a question may arise as to whether the character of the house as a dwelling-house, in so far as the owners are concerned, still survives. No such question, in my view, can possibly arise where what has been created is nothing more than a tenancy of the ordinary kind.

Reliance was placed by Mr. Pal on a single-Judge decision of the Rangoon High Court in the case of — 'J. C. Chatterjee v. Maung Mye', A. I. R. 1940 Rang. 53 : 12 Rang 343. It was contended on the supposed authority of that decision that if a house was mostly let out to tenants, it could no longer be said to be a dwelling-house and in respect of such a house, no application under S. 4 (1), Partition Act would lie. I would, in any event, hesitate to accept a decision given by a single Judge of the Rangoon High Court, if the reason on which it was based did not commend itself to me. But it appears that the case relied on by Mr. Pal is clearly distinguishable on the facts. The house with which the learned Judge had to deal in that case was only an ancestral house, but there is no finding that it had ever been the ancestral dwelling-house or even the present dwelling-house of

the descendants of the ancestors. All that appears from the report is that the house was built in the father's time and had since been mostly let out to tenants, but there is no finding that so far as the members of the family themselves were concerned, they had ever used the house as a residential house. In those circumstances, there could be no question of the house ceasing to be a dwelling-house inasmuch as it had never been a dwelling house at all.

(7) It is not disputed in the present case that the house belongs to an undivided family and that as between the members of that family, it has not been divided. Nor is it disputed that it was the family residential house of, first, the father and then the four sons till the year 1945. The only fact relied upon is that since 1945 the sons have moved out to Calcutta for purposes of business and have let out the house to the family-priest who seems to be both a tenant and a caretaker. But even assuming that he is purely a tenant residing in the house in his own right, I am clearly of opinion that his tenancy does not operate to destroy the character of the house as a dwelling-house.

(8) In my opinion the view taken by the learned Judge below is clearly right. The appeal accordingly is dismissed with costs.

(9) G. N. DAS J.: I agree.

B/V.B.B. Appeal dismissed.

A.I.R. 1953 CALCUTTA 261 (Vol. 40, C. N. 95)

K. C. DAS GUPTA AND BACHAWAT JJ.

Bishno Charan, Petitioner v. Birendra Krishna Mazumdar and others, Opposite Party.

Civil Revn. No. 540 of 1951, D/- 6-3-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions Act (17 of 1950), Section 18 (1) — "Decree for recovery of possession" includes order for recovery of possession under Chap. VII, Presidency Small Cause Courts Act. AIR 1951 Cal 32 and 55 Cal WN 347, Rel. on. (Para 2)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Section 18 (1) — Application for vacating order for possession beyond 60 days of coming into force of Act is not maintainable. — The Amendment Act of 1950 does not extend this period — Section 6 of the Amendment Act of 1950 has no application where the order for possession was not passed between March 31, 1951, and November 30, 1951. (Paras 6, 8, 16)

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions Act (17 of 1950), S. 18 (1) and (5) — Applicability.

Sub-section (5) of S. 18 has no application if no order for possession had been made before the relevant date. In terms it applies to proceedings in which the order for possession would be passed. It does not empower the Court to vacate the order for possession. Read with S. 14 it gives the Court the power to order amendment of pleadings, production of evidence and eventually to order dismissal of the proceedings if certain conditions are fulfilled. The Court cannot exercise such power in proceedings in which an order for possession has already been passed. Sub-section (1) of S. 18 provides for the case where an order for possession has been passed before the relevant date. In such a case the tenant is entitled to apply for vacating the order under that sub-section. Such application of course must be made within 60 days from the relevant date. Reading sub-ss. (1) and (5) of S. 18 together it must be held that if an order for recovery of possession has been passed, the proceedings are no longer pending and the tenant can get no relief under sub-s. (5). It will be anomalous to hold that the tenant is entitled to the same relief under both sub-sections on the same state of facts and while relief under sub-s. (1) is barred by lapse of time relief under sub-s. (5) is not so barred. Reading sub-ss. (1) and (5) of S. 18 together for the purposes of that section the proceedings must be regarded as pending only as long as the order for recovery of possession has not been passed. (Paras 6, 7, 8, 13)

Pravas Ch. Chatterji, for Petitioner; Lala Hemanta Kumar, for Opposite Party; Sambhunath Banerjee, for Deputy Registrar.

REFERENCES: Courtwise/Chronological/ Paras

('21) 45 Bom 1048: (AIR 1921 Bom 201) 11
('50) ILR (1950) Bom 453: (AIR 1950 Bom 321) 9
('42) 46 Cal WN 11 11
('43) 47 Cal WN 656 11
('50) 54 Cal WN 931: (AIR 1951 Cal 395) 9
('51) 55 Cal WN 343: (AIR 1951 Cal 32) 2, 7
('51) 55 Cal WN 347 3
('51) 55 Cal WN 719: (AIR 1952 Cal 273 FB) 7
('52) 56 Cal WN 82: (AIR 1952 Cal 533 SB) 7
('52) 56 Cal WN 167: (AIR 1952 Cal 550 SB) 7

BACHAWAT J.: On December 6, 1949 the landlord petitioner obtained from the Small Cause Court an order for recovery of possession of the premises from the tenant opposite party on the ground of ipso facto termination of tenancy under the Rent Control Act of 1948 in summary proceedings instituted under Chap. VII, Presidency Small Cause Courts Act. The order directed possession to be given on January 3, 1951. On 31-3-1950 the Rent Control Act of 1950 came into force. The latter Act was amended by the Amendment Act of 1950 which came into force on November 30, 1950. On January 2, 1951 the tenant applied for vacating the order for possession. On January 8, 1951, the Court directed payment of a certain sum of money and on such payment on January 19, 1951 vacated the order for possession. The landlord has moved this Court in revision against the order dated January 19, 1951.

(2) It is now settled law that the expression "decree for recovery of possession" in S. 18(1), Rent Control Act of 1950 includes an order for recovery of possession under Chap. VII, Presidency Small Cause Courts Act. This was first decided in — 'Atulyadhan v. Sudhangsu', 55 Cal W. N. 343. In that case Das J. observed that ordinarily decree means the formal expression of an adjudication made in a suit which conclusively determines the rights of the parties so far as regards the Court expressing it is concerned but that in certain parts of the 1950 Act the term suit may include proceedings under Chap. VII, Presidency Small Cause Courts Act.

(3) It follows from the reasons given in that decision and Lahiri J. so decided in — 'Dhanesh Prokash v. Lalit Mohan', 55 Cal W. N. 347 that the word "suit" in S. 18(5), Rent Control Act of 1950 includes a proceeding for recovery of possession under S. 41, Presidency Small Cause Courts Act. Lahiri J. held that for purposes of sub-S. (5) of S. 18 proceedings in which no order for recovery of possession is passed is pending and the tenant is entitled to relief under that sub-section.

(4) In this case the application for vacating the order for possession not being made within 60 days of the coming into force of the Rent Control Act of 1950 was not maintainable under sub-S. (1) of S. 18.

(5) It is however contended on behalf of the tenant that on the date of the coming into force of the Rent Control Act of 1950 the proceedings for recovery of possession was pending in the trial Court and the tenant could ask for relief under sub-s. (5) of S. 18.

(6) Quite clearly sub-s. (5) of S. 18 can have no application if an order for possession had been made before the relevant date. In terms it applies to proceedings in which the order for possession would be passed. It does not empower the Court to vacate the order for possession. Read with S. 14 it gives the Court the power to order amendment of pleadings, production of evidence and eventually to order dismissal of the proceedings if certain conditions are fulfilled. The Court cannot exercise such power in proceedings in which an order for possession has already been passed.

(7) Sub-section (1) of S. 18 provides for the case where an order for possession has been passed before the relevant date. It has been held in a series of decisions that in such case the tenant is entitled to apply for vacating the order under that sub-section. See —'Atulya Dhan v. Sudhangsu', 55 Cal WN 343; —'Iswari Prosad v. N. R. Sen', 55 Cal WN 719(S.B.); —'Shibram v. Subodh Kumar', 56 Cal WN 82(S.B.); —'Satyanarain v. Sewmurat', 56 Cal WN 167(S.B.). Such application of course must be made within 60 days from the relevant date.

(8) Reading sub-ss. (1) and (5) of S. 18 together it must be held that if an order for recovery of possession has been passed, the proceedings are no longer pending and the tenant can get no relief under sub-s. (5). It will be anomalous to hold that the tenant is entitled to the same relief under both sub-sections on the same state of facts and while relief under sub-s. (1) is barred by lapse of time, relief under sub-s. (5) is not so barred.

(9) I am aware of decisions in which it has been held that for purposes of s. 47, Presidency Small Cause Courts Act the proceedings must be regarded as pending until actual delivery of possession and that the tenant under that section is entitled to a stay of proceedings though an order for possession has already been passed: —'Mathuradas Vassanji v. Tulshidas Damodar', ILR (1950) Bom 453. See also —'Monomohan v. Umarani', 54 Cal WN 931. Incidentally in the report of the latter case "S. 47, Civil P. C." seems to be a misprint for "S. 47, Presidency Small Cause Courts Act". I agree that for the purpose of Chap. VII, Presidency Small Cause Courts Act the proceeding is pending until delivery of actual possession and does not terminate on the making of the order for possession. Such proceeding is not commenced by a plaint and therefore strictly is not a suit.

(10) We are, however, dealing with S. 18, Rent Control Act for the purposes of which the summary proceedings must be treated as a suit and the order for recovery of possession must be regarded as a decree.

(11) It has been well observed that the summary proceedings under Chap. VII, Presidency Small Cause Courts Act is a proceeding 'sui generis' and partake of a mixture of suit and execution proceedings. The summary proceeding is commenced by an application under S. 41, Presidency Small Cause Courts Act. Under S. 43 of that Act the Court can make an order addressed to the bailiff directing him to give possession on a date to be named in the order. Under this section on being satisfied that the landlord is entitled to make the application the Court at first makes an order for recovery of possession and fixes the date on which possession is to be delivered. This order has important consequences. It is final so far as the Court of Small Causes is concerned and cannot be varied by that Court: —'Official Trustee of Bengal v. Taj Mahammad', 46 Cal WN 11; —'Jamshedji Hormasji v. Gordhandas Gokuldas, 45 Bom 1048. The actual writ of possession addressed to the bailiff is issued subsequently. The form of the writ is given at p. 238 of Vol. 2 of the Manual of the Court of Small Causes, 1949 and the procedure for taking it out is prescribed by Rr. 109 and 110 of the same Volume. The writ specifies the date on which possession is to be given. The bailiff can execute this writ under S. 44 of the Act. It has been held in —'Ashgar Hossain v. Official Trustee of Bengal', 47 Cal WN 656, that the order does not lose its force if it cannot be executed on the date named and that the Court can make the writ effective by extending the time for its execution. Assuming that the Court has this power the order for extension must be regarded entirely as an order made in execution.

(12) A suit for the recovery of possession on the other hand is commenced by a plaint and terminates when a decree for possession is passed. The decree-holder has to apply formally for execution of the decree. On such application the Court orders execution of the decree and issues its process for execution. The decree is then executed under O. 21, R. 35 C. P. C.

(13) Technically a summary proceeding under Chap. VII, Presidency Small Cause Courts Act is one entire proceeding and does not terminate until actual delivery of possession. But if the summary proceeding is treated as a suit and if the order for recovery of possession is treated as a decree for the purposes of S. 18, Rent Control Act 1950 it must also be held for the purposes of that section that the proceedings terminate in the order for recovery of possession and that further proceedings are in the nature of execution of that order. On the same analogy the taking out of a writ of possession must be treated as an order for delivery of possession for the purposes of sub-s. (1) of S. 18.

(14) Reading sub-ss. (1) and (5) of S. 18 together for purposes of that section the proceedings must be regarded as pending only as long as the order for recovery of possession has not been passed.

(15) In this case the record does not show if a writ of possession had been taken out and delivered to the bailiff. Assuming that such writ has not been taken out the proceedings cannot still be regarded as pending for the purposes of S. 18. All proceedings subsequent to the order for recovery of possession must be regarded for that purpose as proceedings in the nature of execution of that order.

(16) The proceeding therefore was not pending on March 31, 1950 for the purposes of sub-s. (5) of S. 18 and the tenant could not ask for relief under that sub-section. The application not being made within the specified period of time was not maintainable under sub-s. (1) of S. 18. The Amendment Act of 1950 does not extend this period. Section 6 of the Amendment Act of 1950 has no application because the order for possession was not passed between March 31, 1951 and November 30, 1951. The order dated January 19,

1951 is therefore set aside and the rule made absolute with costs assessed at 2 gold mohurs.

(17) K. C. DAS GUPTA J.: I agree.

B/R.G.D. Rule made absolute.

A.I.R. 1953 CALCUTTA 263 (Vol. 40, C. N. 96)

CHAKRAVARTTI AND SINHA JJ.

Edward Ezra and others, Appellants v. The State, Respondent.

Criminal Appeals Nos. 92 to 96 of 1950, D/-29-4-1952.

(a) Criminal Law Amendment Ordinance (29 of 1943 as amended by W. B. Ordinance, 1 of 1950), Ss. 3 and 4 — Special Tribunal — Necessity of notification for its constitution.

Tribunal composed of 3 members — Resignation by one member — Subsequent legislative amendment reducing numerical strength of tribunal from 3 to 2 — Fresh notification reconstituting Tribunal not issued — Remaining 2 members concluding hearing and delivering judgment — In the absence of notification in Gazette constituting Tribunal composed of remaining 2 members, under S. 4(1) as amended, mere legislative reduction of numerical strength of Tribunal to 2 members, would not bring into existence validly constituted Tribunal composed of the remaining 2 members. AIR 1951 SC 230, Applied. (Paras 39, 44)

In any event, gap between resignation by one member and the legislative amendment reducing numerical strength was also fatal. (Para 45)

Hence, proceedings before them and judgment delivered by them were void and of no effect. (Para 45)

*(b) Criminal Law Amendment Ordinance (29 of 1943) as amended by Ordinance, 6 of 1946 (Central), S. 5 — Validity — (Constitution of India, Arts. 13 and 14).

Provision for special courts, special procedure etc. — Unfettered discretion in Government to allot any case to be tried by special Tribunal — Special procedure not only prejudicial to accused but also offending against basic principles of fair judicial proceeding — Section 5 is repugnant to Art. 14 of the Constitution and has become void under Art. 13(1), on the Constitution coming into force: AIR 1952 SC 75, Rel. on. (Paras 49, 51)

(c) Criminal Law Amendment Ordinance (29 of 1943) as amended by Ordinance 6 of 1946 (Central), S. 5 — Continuance of proceedings pending at the date of Constitution — (Constitution of India, Art. 13(1) — (General Clauses Act (1897), S. 6(e)).

Where the trial under the Ordinance, which had become void under Art. 13(1), Constitution of India, was pending at its date, the trial held after the Constitution was void, because it was in the trial being held on a special forum and in the procedure of the trial that the infringement of the fundamental right of equality before the law lay and consequently during every moment of the trial after the Constitution such infringement was suffered. AIR 1951 SC 128 Explained. (Para 50)

Section 6(e), General Clauses Act, has no application. (Para 51)

Anno: Gen. Cl. Act, S. 6 N. 5.

(d) Constitution of India, Art. 13 — 'Void' is not synonymous with 'repealed': AIR 1951 Bom 188, Dissented from — (General Clauses Act (1897), S. 6). (Para 51)

Anno: Gen. Cl. Act, S. 6 N. 1.

(e) Criminal P. C. (1898), S. 423 (1)(b) — "Order him to be re-tried."

Appeal from conviction on the facts — Evidence not such that, even if believed, it would be insufficient for prosecution — Evidence complex and vast — No valid trial by competent tribunal of first instance — Order for retrial is the only proper order — Fact that such situation was created due to errors of State authorities, cannot weigh with Court. (Para 54)

Anno: Cr. P. C., S. 423 N. 23 Pt. (5).

(f) Criminal P. C. (1898), S. 423(1)(b) — Partial re-trial.

Appeal from conviction — Appellate Court cannot direct a re-trial on evidence already recorded. (Para 56)

Anno: Cri. P. C., S. 423 N. 23 Pt. (22).

Ajit Kumar Dutta, Amal Kumar Basu and Biren Maitra (in No. 92); D. N. Chakravarti (in No. 93); S. K. Das, Benode Behari Haldar and Bireswar Chatterjee (in No. 94); J. P. Mitter, with Bireswar Chatterjee (in No. 95) and N. K. Basu, Sisir Kumar Basu and S. P. Sarkar (in No. 96), for Appellants; J. K. Mukherjee, with Sukumar Mitra, for the State in (all the Appeals).

REFERENCES: Courtwise/Chronological/ Paras

('47) 1947 FCR 141: 52 Cal WN (FR) 25: (AIR 1947 FC 38: 48 Cri LJ 886) 34, 77
('50) 1950 SCR 869: (AIR 1951 SC 41) 86, 88
('51) 1951 SCR 228: (AIR 1951 SC 128: 52 Cri LJ 860) 50, 91
('51) 1951 SCR 380: AIR 1951 SC 230 40, 44, 80
('52) 1952 SCR 284: (AIR 1952 SC 75: 1952 Cri LJ 510) 48, 49, 85, 89, 90
('51) In re Keshava Madhava Menon, (AIR 1951 Bom 188) 51
('52) AIR 1952 Cal 150: (1952 Cri LJ 450 FB) 48, 85
(1885) 113 US 27: (28 Law Ed 923) 90
(1885) 118 US 356: (30 Law Ed 220) 88
(1896) 163 US 150: (41 Law Ed 666) 88
(1909) 216 US 400: (54 Law Ed 536) 88

CHAKRAVARTTI, J.: These appeals are succeeding on two legal grounds concerning the validity of the trial at which the Appellants were convicted and it is therefore hardly necessary to state any facts other than those which bear on those grounds. The trial was held under the provisions of the Criminal Law Amendment Ordinance (29 of 1943). It appears that after the Ordinance had been promulgated, it was amended eleven times and adapted twice, with the undetected result that the thread of continuity, at least as regards the constitution of the Tribunal by which the Appellants were being tried, had snapped at a vital point. It was also overlooked that while the trial was proceeding under a special law, the new Constitution of India had come into force with its declarations of fundamental rights.

(2) These are five appeals before us. The appellant in Appeal No. 95 is Major J. Phillips who was Accused No. 1 in the case and had been, at all material times, the Controller of Telegraphs Stores, Alipore. The appellant in Appeal No. 94 is Captain A. J. Rodrigues who was accused No. 2 & had been the Deputy Assistant Engineer, Purchase Section. The appellant in Appeal No. 93 is Jagat Bhusan Biswas

who was Accused No. 4 and had been the Stock-Holder, Wire Godown. The appellant in Appeal No. 92 is Edward Ezra who was accused No. 6 and had supplied large quantities of copper strips and McIntyre sleeves to the Telegraph Stores. Appeal No. 96 is by Nanda Lal Dey, accused No. 7, who also had been a supplier of stores and had supplied, besides copper strips and McIntyre sleeves, large quantities of bolts and nuts.

(3) Along with the appellants, two other persons were placed on their trial as accused Nos. 3 and 5. Accused No. 3 was one Dasarathi Mukherjee who had been the Sub-store-keeper of the Construction Branch, but as he died during the course of the trial, the prosecution as against him abated. Accused No. 5 was one Dhruba Chandra Banerjee who had been the Purchase Clerk in the Telegraph Storeyard at all relevant times. He turned approver and gave evidence as a prosecution witness.

(4) As our decision is not going to turn on the merits, I shall state the prosecution case and the defence only in the barest outline. The case for the prosecution is that as Controller of Telegraph Stores, Phillips had the duty of procuring stocks of all varieties of Telegraph Stores and supply them on demand to the Branch Stores, Depots and Divisions throughout India. His functions and the manner in which he was to discharge them were both defined by rules. The various Depots, Divisions and Branch Stores would send him demands for their requirements or rather estimates thereof in writing and on receipt of those requisitions he would have first to prepare an amalgamated list of the year's requirements and then proceed to procure them either from the Telegraph Workshops or through the Indian Stores Department. He would procure such articles from the workshops as the workshops could manufacture and supply, but for other articles, he would have to place indents on the Indian Stores Department which would either buy them from the market by means of regular contracts with suppliers or procure them from other sources. Phillips himself had no authority to make direct purchases except when an actual demand for some item of stores could not be met out of the existing stock in the godown, but even in such cases he could make purchases only upto a limit of Rs. 500/- for a single item and, on emergent occasions, upto a limit of Rs. 1000/-. In making such purchases, he would have to invite openly tenders from firms and stockists of repute out of a list of approved concerns maintained in his office, consider the tenders received along with the recommendation of the officer-in-charge of the Purchase Section and then make a choice of the lowest tender consistent with the required quality. His procurements had thus to be limited to the Departmental demands received by him and his power of making direct purchases was not only circumscribed by a financial limit, but also controlled by certain rules as regards the method of its exercise. Bulk purchases were entirely the concern of the Indian Stores Department from which Phillips was to ask for stores that he could not obtain from the workshops.

(5) During the last War, however, telegraph stores were required not only by the Posts and Telegraphs Department, but also by the War and the Defence Departments which required them for operational needs. Accordingly, sometime in the middle of 1941, the post of a Director of the Telegraph Storeyard and Workshops, shortly called D. S. W., was created and it became the duty of the officer appointed to that post to co-ordinate the demands of the Controller of Telegraph Stores for telegraph goods and such demands made by other Departments of the Government. It was to him that indents from all Departments went and it was for him to organise the production or procurement of the stores required so that it would be for him to see what stores could be obtained from the workshops and what stores had to be purchased or procured from elsewhere and also to determine primarily in what order the stores required by the various Departments would be supplied. Any disputed question of priority as between the different Departments would be determined by higher authorities. It is the case of the prosecution that Phillips, as the Controller of Telegraph Stores, had no concern with the demands received from the War and the Defence Departments which were mostly not demands for stores to be procured by purchase, but demands for production by the workshops with materials supplied by Departments themselves. Such demands could be no excuse or justification for Phillips making any direct purchases. According to the prosecution, his functions as well as responsibilities were limited to the needs of his own Department which were to be met by supplies from the workshop, whenever possible or by purchases through the Indian Stores Department, supplemented, in cases of emergency by petty purchases made by himself within the limits of his financial competence. Even when stores were manufactured for him by the workshops, he had to go to the Indian Stores Department for the necessary raw materials and ask for them by indents.

(6) It will now be possible to explain what the charges against the appellants are. It is alleged that in 1942, when the War was at its height, a careful and well-laid plan was evolved for using the power to make petty purchases which Phillips had as a cover for his making enormous purchases of certain varieties of stores, though the same were not really required and purchasing them from a favoured group of contractors at exorbitant rates in return for bribes paid by them to Phillips and to certain of his subordinate officers in league with him. The central figure in that scheme was necessarily Phillips and he chose his associates with great circumspection. He took in Jagat Bhusan Biswas, accused No. 4, who was the Stock-Holder at the Wire or Works and Cables godown and utilised him for supplying fictitiously low figures as to the stock position to Dasarathi Mukherjee, accused No. 3, who was the Sub-Store-Keeper in the Construction Branch.

The next ally was Dasarathi, who helped by submitting to the Purchase Section grossly exaggerated figures as to the requirements of the Department on the basis of the low stock position, as communicated by Jagat. The recruits from the Purchase Section were Rodrigues, accused No. 2, who was the Deputy Assistant Engineer and Dhruba, originally accused No. 5 and subsequently a prosecution witness, who was the Purchase Clerk. The duty of Rodgrigues was to check the demands so that no supplies in excess of actual requirements might be procured, to ascertain the possibilities of production by the workshops so that no un-

necessary purchases might be made and to ensure, by means of calling for open tenders, that whatever stores were purchased from the market, were purchased at a fair rate. It was for him to recommend to Phillips that a certain quantity of a certain item of stores might be purchased, to tabulate the tenders received and to submit them to Phillips with his suggestions as to the party or parties with whom orders might be placed. He co-operated in carrying out the scheme of fraud by acting on the false figures supplied by Dasharathi and Jagat which he knew to be false, by not calling for open tenders but making, instead, a pretence of ascertaining 'the tone of the market' by telephonic enquiries limited to certain firms which were in the conspiracy and sometimes even by making a false record of such enquiries, though in fact none had been made.

The approver Dhruba, who was the Purchase Clerk, had officially the duty of attending to the correspondence in the Purchase Section and drawing up contracts to be entered into with the tendering firms, but in practice he came to be the person who handled the business with the contractors in the first instance, selecting firms to be included in the approved list and recommending firms to which contracts for supply might be given. As all business relating to purchases was transacted through him and all relevant papers passed through his hands, he had to be taken into confidence and he helped by becoming a willing party to the irregularities and lending himself to the carrying out of the scheme. Phillips made it easy for Dasarathi and Jagat to make false reports as to the requirements and for Roderigues to act on them with impunity by discontinuing the old system of recoupment indents under which the various Branch Stores and Depots and Divisions had to submit written indents for their needs, so that by reference to them, the existence or otherwise of an actual demand for a certain variety of stores at a given point of time and the necessity for its procurement could always be checked. As the documentary evidence of actual demands was thus eliminated, Jagat, Dasarathi and Roderigues found themselves free to say, when a purchase was intended to be made, that a necessity for such purchase existed. Thus, Jagat and Dasarathi combined to create a false appearance of necessity; Roderigues utilised the misrepresentation for recommending a purchase and also contrived to make the exorbitant rates sanctioned appear normal by confining his enquiries to a number of friendly dealers or not making any enquiries at all, while Dhruba assisted by doing all the incidental clerical work and putting the deal through. It is alleged by the prosecution that for all these services, the officers were systematically bribed by the contractors who obtained the orders.

(7) The next part of the prosecution case relates to the role played by a group of contractors who are said to have been accomplices of the officers. It is alleged that there was a ring of them, some trading in several names, and they worked on the basis of an understanding as between themselves and with the officers in such a way that each got a contract in his turn in one or other of his trade names, the rates charged and paid appeared to be in order though in fact they were grossly excessive and the purchases appeared to be within the financial competence of Phillips, though in reality they were enormously in excess. The 'modus operandi' was as follows: One of the contractors would make an offer to supply a large quantity of a certain item of stores and Roderigues, on being referred to, would duly report, with the co-operation of Dasarathi and Jagat, that such stores were required. He would then make a show of obtaining quotations from the market by sending out a circular letter to other contractors of the ring or make telephonic enquiries of them and the latter, knowing that the contract was intended to be given to the confederate who had made the offer and what rate he had quoted, would themselves quote slightly higher rates so that the rate quoted along with the offer might appear to be the lowest. When the offer was made by a person trading in several names, he himself would quote higher rates in the names of his other so-called firms. Sometimes, even such enquiries were made after the offer had already been accepted, just to put the record in order, or not made at all and false entries were made on slips of paper of quotations alleged to have been obtained or, again, the order was placed before the replies to the enquiries had been received, because it was known what the replies would be.

It was possible to carry out this plan, because in regard to items of stores purchased in this manner, the practice of making entries in the Tender Register of tenders called for and quotations received was discontinued. After an offer was accepted, the next step taken would be to place a "reservation order" for the entire quantity of stores offered, but as the value of that quantity would be much in excess of the financial competence of Phillips, a suitable device for evading the difficulty was evolved and the supply was split up into a succession of instalments, each within the limits of Phillips' authority. Thus, though in the bulk, the purchase made under each reservation order greatly exceeded the financial powers of Phillips and he could never have purchased the quantity without reference to higher authorities if he took it in one lot, the device of instalments made the direct purchases by himself possible and conferred on them an external appearance of regularity. These reservation orders or copies of them were never sent to the higher authorities, although contracts of their value could only be made by the Indian Stores Department or, in rare cases, by Phillips under authority delegated by them.

The method followed was that after a reservation order had been placed, the stores covered by it would be gradually appropriated by means of a succession of requisitions and then paid for, but although there was an obvious element of uncertainty in this procedure so far as appropriations were concerned and it increased towards the latter part of the period of conspiracy when the reservation orders came to contain a "break contract" clause which expressly authorised Phillips to cancel an order at his pleasure, the contractors willingly submitted to it, because they knew that the system had been devised in the common interest of the officers and themselves and felt sure that the quantity for which an order had been placed would, in the end, be taken. Indeed, so sure did they feel that they dumped their stores in the telegraph godowns in advance, in anticipation of requisition orders, and so far as the Wire Godown was concerned, Jagat helped the

contractors by receiving such advance supplies and allowing them to be dumped in the godown without the knowledge of the Ledger Section.

(8) It is to be stated here that in spite of the general character of the prosecution case, the actual prosecution is limited to three varieties of stores, viz., copper strips, Mclntyre sleeves and bolts and nuts of certain sizes; and although according to the prosecution, the ring of contractors involved in the supply of those stores included not only Edward Ezra, accused No. 6 and Nanda Lal Dey, accused No. 7, but also one Niranjan Paul and eight other persons who, between themselves owned sixteen other firms, the actual prosecution is limited to Ezra who supplied copper strips and Mclntyre sleeves and Nandalal who supplied those stores and bolts and nuts as well. Niranjan Paul, who had supplied only bolts and nuts, was examined as a prosecution witness. Only copper strips and Mclntyre sleeves were stocked in the Wire Godown of which the Stock-Holder was Jagat and he, as already stated, is among the accused: but the stock-holder of the Posts and Masts Godown where the bolts and nuts were stocked was not included in the prosecution.

(9) It has further to be pointed out that the prosecution does not allege that any part of the stores, said to have been purchased, was not actually purchased or that any stores were removed and misappropriated after they had been received. All quantities purchased were fully accounted for and although at one time there was a huge accumulation, because purchases had been made without corresponding necessity, the stock was cleared off in 1944 when, on account of a sudden turn in the War situation, exceptionally heavy supplies for military needs were called for. The main charge laid by the prosecution is thus limited to causing wrongful loss to the Government in money to the extent of the difference between the price at the proper rates and that at the inflated rates allowed and to doing so on receipt of or by paying bribes.

(10) The volume of the transactions questioned by the prosecution will appear from the relevant figures. According to certain tables compiled by the Tribunal, reservation orders in respect of Mclntyre sleeves were for 10,40000 pieces, of which 7,67,574 were supplied and the price paid for the supplies was Rs. 3,45,305. Reservation orders in respect of copper strips were for a total of 187 lakhs of which 11004600 were supplied and the price paid for the same was Rs. 17,57,949/-. Reservation orders in respect of bolts and nuts were for 19275 cwts. of which 18042.5 cwts. were supplied and the price paid was Rs. 18,08,848/-. Certain quantities of bolts and nuts were purchased otherwise than under reservation orders and the total quantity purchased by the two methods was 19769 cwts., the price of which was Rs. 19,71,577/-. It must, however be stated that in the case of bolts and nuts, certain small quantities were purchased from some firms which the prosecution does not allege to have been in the conspiracy. Out of the total purchase of 19,769 cwts. of bolts and nuts of the total value of Rs. 19,71,577/-, 5961 cwts. of the value of Rs. 5,98,213/- were supplied by four firms which, according to the prosecution, were all owned by Nanda Lal Dey. Three of those firms supplied 22.15.975 copper strips of the value of Rs. 3.52,939/- out of the total purchase of 1,10,04,600 pieces of the value of Rs. 17,57,949/-. One of those firms supplied 21,900 Mclntyre sleeves of the value of Rs. 10,879/- against reservation orders for 59,000 pieces. The supplies by Ezra were 13,15,675 copper strips of the value of Rs. 2,11,073/- and 2,62,634 Mclntyre sleeves of the value of Rs. 1,13,582/- out of the total purchase of 7,67,574 pieces of the value of Rs. 3,45,305/-. It is alleged by the prosecution that for the supplies of the copper strips, an excess payment of Rs. 1,30,425-4 as. was made to Nanda Lal Dey on the basis of inflated rates and similarly an excess payment of Rs. 58,901-3 as. was made to Ezra. Although the general case made for the prosecution covers over-payment not only for copper strips but also for Mclntyre sleeves and bolts and nuts, the specific charges are limited to copper strips only.

(11) On the above allegations, which include only the broad outlines of the prosecution case, seven charges were framed against the six accused persons, viz., Phillips, Roderigues, Dasarathi, Jagat, Ezra and Dey. As already stated, the prosecution as against Dhruba was withdrawn and he was examined as a prosecution witness. Of the seven charges, the seventh may be left out of account, because it was a charge against Dasarathi alone who is dead. Charge I was a general charge of conspiracy against all the accused persons under S. 120B, Penal Code, read with Ss. 409 and 161 and it alleged that between April, 1942 and December 1944, the four public servants, along with Ezra, Dey, Dhruba, Niranjan Paul and the proprietors of sixteen other firms, tabulated under eight heads, had been "parties to a criminal conspiracy to commit the offences of criminal breach of trust and of giving and accepting bribes in the manner following, to wit, by dishonestly allowing inflated rates to accused Nanda Lal Dey and Edward Ezra and to the said Niranjan Paul and the proprietors of the other firms mentioned above in respect of supplies of stores, namely, copper strips, Mclntyre sleeves and bolts and nuts made by them and by obtaining gratification other than legal remuneration as a motive or reward for giving of such orders."

Charge II was a charge under S. 409, Penal Code, directed against Phillips, and it included two counts, one in respect of a sum of Rs. 1,30,425/4/-, alleged to have been wrongfully paid by him to Dey for supplies of copper strips and the other in respect of a sum of Rs. 58,901/3/-, alleged to have been similarly paid to Ezra in breach of trust, also for supplies of copper strips. The third charge against Phillips was charge V, under section 161, I.P.C., and that also included two counts, each charging Phillips with having received a bribe of Rs. 500/- from Niranjan Paul on a particular date "as a motive or reward for doing an official act, to wit, giving orders for supply of stores." It is to be noticed that while the accusation in the conspiracy charge was not the giving of orders by itself, but only allowing inflated rates on the orders, as admitted before us by the learned Counsel for the State, the specific overt act alleged in charge V was nothing more than placing orders with Niranjan Paul which suggests, if anything, only undue preference.

As regards the remaining charges, charge III was against Roderigues, Dasarathi, Jagat & Nandalal Dey and charge IV was against the first three persons and Ezra. Each was a charge under S. 109, read with S. 409 of the Indian Penal Code, the first charging the accused with

having aided and abetted Phillips in committing criminal breach of trust as a public servant in respect of a sum of Rs. 130425/4/-, alleged to have been wrongfully paid to Nandalal Dey on the basis of inflated rates and the second charging the accused concerned therein with having similarly abetted Phillips in respect of the alleged over-payment of a sum of Rs. 58,901-3-0 to Ezra. Charge VI, a charge under S. 161, I. P. C., was against Roderigues alone and included two counts, each charging him with having received a bribe of Rs. 50/- from Niranjan Paul on a particular date "as a motive or reward for showing him favour in your official capacity in the matter of getting orders for the supply of stores." One of the dates was the same as that on which Phillips was charged, by the first count in charge V, with having received a bribe of Rs. 500/- from the same Niranjan.

(12) The defence of the appellants again need be set out only in broad outline. All pleaded not guilty. Phillips denied that the purchases in question had been made by him without necessity, without authority and at inflated rates, as alleged. According to him, they had been made in order to meet urgent demands coming from not only by the Posts and Telegraphs Department but also from the Defence Department, the Army, the Air Force, the Defence Services Lines of Communication Board and the South East Asia Command and some purchases had also been made by way of building up stores in anticipation of demands which was a perfectly legitimate thing to do. All had been absolutely bona fide purchases made at current market rates and in accordance with a method known and applied in his office since the time of his predecessors. The method which included calling for quotations from certain individual firms and placing reservation orders had particularly been resorted to, because the leisurely procedure of inviting open tenders by means of advertisements and concluding formal contracts through the Indian Stores Department was wholly out of place during the emergency of the War when quick supplies of enormous quantities of stores were needed for urgent military purposes. It was also the defence of Phillips that as regards the existence of demands, selection of firms, ascertainment of rates and the placing of orders he had depended entirely, as he had to, on his subordinates, Roderigues, Dasarathi and Jagat. In any event, he pleaded further, no charge under S. 409, I. P. C. or of conspiracy to commit an offence under that section could be maintained against him, inasmuch as he had no dominion over the funds of the Telegraphs Stores.

(13) The defence of Roderigues was that he had only carried out the orders of Phillips and in the matter of selection of firms, had relied on the recommendations of Dhruba. He had not called for tenders by advertisement but had obtained quotations from certain individual firms, because that method was authorised by Phillips and because in view of the emergent War situation, it was the more expeditious and appropriate method. He repudiated the charges of bribery.

(14) The defence of Jagat was that it was not part of his duty to acquaint the Controller with the stock position and he had never done so. Nor had he supplied any information, false or otherwise, to the Purchase Section. It was true that contractors had been allowed to dump stores in his godown, but that practice was an old one and the dumping in the present case had been authorised by Phillips himself which he, as a subordinate officer, could not question. He had no concern whatever with the purchases made by Phillips and had received no illegal gratification in connection with them.

(15) Tne defence of Ezra and Dey was that they were bona fide contractors and had supplied stores to Phillips in the course of bona fide business. They denied that the rates paid to them were unconscionably high and pleaded further that, in any event, they were entitled to charge any rates they liked and the mere fact that Phillips accepted those rates when he might possibly have bought cheaper elsewhere could not show that they had abetted Phillips in committing an offence under section 409, I. P. C. They also complained that they should have been charged with having conspired with the proprietors of certain other firms who were not going to be before the Court either as accused or witnesses. A special defence was taken on behalf of Dey to the effect that there was a misjoinder of parties inasmuch as there was nothing in the prosecution evidence before charge as to any connection or understanding or arrangement between Ezra and himself.

(16) In support of its case, the prosecution examined 45 witnesses, 44 before charge and one after the charges had been framed. The documents exhibited on behalf of the prosecution were 1452 in number. The defence called no witness, but proved 373 documents through the prosecution witnesses themselves during their cross-examination and relied strongly on the documentary evidence. Six documents were admitted in evidence as Court exhibits. After the defence had proved certain documents which purported to be statements of costings or analyses of rates called for and received by Phillips from five of the firms named in the conspiracy charge, but with which Ezra and Dey were not connected, a suggestion was made that representatives of those firms might be examined as Court witnesses in order that the genuineness or bona fides of the documents, which the prosecution questioned, might be tested and explanations obtained as to the circumstances in which they had been submitted. The defence strongly objected to the summoning of such witnesses at that stage, mainly on the ground that after the defence had proved certain documents which disproved a part of the prosecution case, the prosecution could not be allowed to fill up gaps in its evidence by cross-examining Court witnesses, particularly since if such witnesses would support the prosecution case in spite of being members of accomplice firms, the prosecution should have examined them earlier on its own behalf. In the end, the Tribunal decided not to examine the persons concerned as Court witnesses.

(17) In addition to the evidence referred to above, the Tribunal also took into account as against Phillips and Jagat certain accretions to their property under the provisions of Ss. 9 and 10 of the Ordinance. The accretions, in the case of Phillips, were deposits in two banking accounts and in the case of Jagat, a plot of land and some gold ornaments. The explanation of Phillips was that the deposits represented his winnings on the race course and Jagat's explanation was that the land and the

ornaments had been purchased out of the sale proceeds of his share in his ancestral house and of some old ornaments of his wife, as also his savings out of his salary and subsidiary earnings as a private tutor.

(18) The proceedings before the Tribunal commenced on 20-9-1946, when the petition of complaint was filed and the arguments were concluded on the 25-3-1950. Judgment was reserved and it was delivered on the 26th May next. The proceedings thus lasted for about 3 years and 9 months.

(19) The Tribunal acquitted Phillips and Roderigues of the charges under section (161?), I. P. C. (charges V and VI respectively) on the ground that the evidence of the accomplice Niranjan Paul on which they were based had not been corroborated in material particulars by independent evidence. They found all other charges proved against all the accused. Thus, all the five Appellants were found guilty under Charge I (S. 120B, read with Ss. 409 and 161).

In addition, Philips was found guilty under S. 409, I.P.C. (Charge II) in respect of both the counts of the charge. Roderigues and Jagat were found guilty under both the charges under S. 109, read with S. 409 I. P. C. (charges III & IV). Ezra was found guilty under charge IV and Nanda Lal De was found guilty under Charge III.

(20) The sentences passed on the appellants are as follows:

Phillips:— Charge I: Rigorous imprisonment for 4 years and a fine of Rs. 10,000/-, in default rigorous imprisonment for 1 year.

Charge II: 1st Count: rigorous imprisonment for 3 years and a fine of Rs. 130425-4-0 in default, rigorous imprisonment for 1 year; 2nd Count: rigorous imprisonment for 3 years and a fine of Rs. 58901-3-0 in default, rigorous imprisonment for 1 year, the substantive sentences of imprisonment under both the charges to run concurrently.

Roderigues:— Charge I: Rigorous imprisonment for 3 years and a fine of Rs. 10,000/-, in default rigorous imprisonment for 1 year.

Charge III: Rigorous imprisonment for 1 year and a fine of Rs. 2000/-, in default, rigorous imprisonment for six months.

Charge IV: Do.

The substantive sentences of imprisonment under all the three charges to run concurrently.

Jagat:— Charge I: Rigorous imprisonment for 1 year and a fine of Rs. 2000/-, in default, rigorous imprisonment for 6 months:

Charge III: Rigorous imprisonment for 6 months and a fine of Rs. 500/-, in default rigorous imprisonment for 3 months;

Charge IV: Do.

The substantive sentences of imprisonment under all the charges to run concurrently.

Ezra:— Charge I: Simple imprisonment for 9 months and a fine of Rs. 20,000/- in default, simple imprisonment for 3 months;

Charge IV: Simple imprisonment for 9 months and a fine of Rs. 10,000/-, in default, simple imprisonment for 3 months.

The substantive sentences of imprisonment to run concurrently.

Dey: Charge I: Rigorous imprisonment for 3 years and a fine of Rs. 20,000/-, in default, rigorous imprisonment for 1 year;

Charge III: Rigorous imprisonment for 1 year and a fine of Rs. 10,000/-, in default, rigorous imprisonment for 6 months,

The substantive sentences of imprisonment to run concurrently.

In the case of Ezra, the imprisonment awarded was simple, presumably because of his age which was given as 71 years. In the case of Phillips, the sentences of fine under the two counts of Charge II were passed under S. 10 of the Ordinance which, as amended by Ordinance VII of 1946, requires the Special Tribunal to impose a sentence of fine equivalent to the amount or value of other property found to have been procured by the offender by means of the offence, in addition to any other sentence that may be imposed.

(21) As already stated, the accused have preferred five separate appeals to this Court. The learned Counsel on their behalf addressed us extensively on the facts of the case, but they also took two legal objections to the validity of the trial which appear to us to be well-founded and which make it unnecessary for us to consider the arguments directed to the value or the effect of the evidence. Indeed, Mr. Mukherjee who appeared for the State himself conceded that so far at least one of the objections was concerned, he could see no answer to it. If I have yet set out the prosecution and the defence cases at some length, it is only to give some indication of the complexity and magnitude of the case which will be relevant to the consideration of a suggestion made to us at the end of the hearing to which I shall in due course refer.

(22) The legal objections taken were the following:

I. That the Special Tribunal which commenced the trial as a tribunal composed of three members and concluded it as a tribunal composed of only two of them after the third member had resigned, was no longer, after such resignation, a legally constituted tribunal, in spite of the amendment of S. 4 of Ordinance 29 of 1943 by S. 3 of Ordinance I of 1950, subsequently enacted into Act IX of 1950, and, accordingly, all proceedings before the tribunal as composed of two members, were utterly void;

II. That, further, the provisions of Ordinance 29 of 1943, as amended from time to time, being arbitrarily discriminatory and as such repugnant to Article 14 of Constitution, they became void when the Constitution came into force by virtue of the provisions of Art. 13 (1) and accordingly all proceedings had under the provisions of the Ordinance after 26-1-1950, were devoid of legal validity and of no effect.

(23) It may be pertinent to point out that the two legal objections seek to hit the proceedings practically at the same stage and the same point of time. After the resignation of one of the members, the Tribunal resumed the hearing as a two-member Tribunal on 16-1-1950, when the argument on behalf of the prosecution commenced. On 28-1-1950, which was the first date of hearing after the Constitution had come into force, the argument for the prosecution was still proceeding. Thus, if either of the two objections succeeds, practically the same part of the proceedings will be invalidated.

(24) In order to appreciate the first point, it is necessary to refer to the history of Ordinance 29 of 1943 and the connected Acts. We are indebted to Mr. Mukherjee, the learned Counsel for the State, for compiling that history upto January 1946, which was by no means an easy

task to perform, because, unfortunately and very curiously, copies of the amending Ordinances are not readily available even from official sources and they are not easily traceable elsewhere. However that may be, it appears that the principal Ordinance was promulgated by the Governor-General on 11-9-43 and before the present case was allotted to the Tribunal, which was on 27-8-1946, the Ordinance had been amended eleven times. We were unable to obtain the date on which this particular Tribunal, which came to be known as the First Special Tribunal at Calcutta, was first constituted, but that date is not of any importance since the material portion of the provision regarding the Constitution of Special Tribunals on which the Appellants rely remained unaltered. The material portion of the provision regarding the composition of Special Tribunals also remained unaltered till long after the present case had been allotted to the First Appellate Tribunal at Calcutta.

(25) The provision regarding the constitution of Special Tribunals is contained in S. 3 of the Ordinance which, as it stood originally, provided as follows:

"3. The Central Government may, by notification in the Official Gazette, constitute for the purposes of this Ordinance two Special Tribunals, one to sit at Calcutta and the other to sit at Lahore."

(26) The latter part of the section which deals with the number of Special Tribunals and their location was subsequently amended from time to time, by Ordinance 16 of 1944, Ordinance LII of 1944 and finally by Ordinance 12 of 1945 which conferred on the Central Government a general power to constitute such further Special Tribunals as it might consider necessary. But the primary requirement that a Special Tribunal must be constituted by notification in the Official Gazette was never modified and was in fact expressly repeated in the omnibus clause added by Ordinance 12 of 1945. That clause provided for the constitution of further Special Tribunals "by like notification."

(27) The provision regarding the composition of Special Tribunals is contained in S. 4 (1) of the principal Ordinance which, so far as is material, reads as follows: 4(1). A Special Tribunal constituted under this Ordinance shall consist of three members.

(28) Then follow provisions regarding the qualifications of the members which have been amended since the Ordinance was first promulgated, but since nothing turns in the present case on the qualifications, it is not necessary to refer to the amendment.

(29) Two other provisions of the principal Ordinance require to be referred to. By Ordinance XL of 1944, promulgated on the 26th August of that year, a new sub-section, numbered (1A), was inserted in S. 6, although it was really a proviso to section 4 (1). It reads as follows:

"6(1A) Notwithstanding anything contained in section 4, any two members of a Special Tribunal may proceed with the trial of a case during the temporary and unavoidable absence of the third member:

Provided that all three members shall be present when after the evidence has been concluded, the prosecutor or the accused or his pleader is addressing the Special Tribunal and when the judgment is delivered."

The other provision to which it is necessary to refer is S. 6(3) which occurred in the Ordinance, even as originally promulgated. It reads as follows:

"6 (3): A Special Tribunal shall not, merely by reason of a change in its members, be bound to recall and rehear any witness who has given evidence and it may act on the evidence already recorded by or produced before it."

(30) It will be noticed that S. 6(1A) does not provide for a case of vacancy among the members of a Tribunal but only for a case where a member, while still a member, is unable to attend a sitting or sittings. Section 6 (3), however, obviously contemplates that members may be changed, but even that section does not authorise a Tribunal to proceed with a case after a member has ceased to be a member and before his successor is appointed. It may further be pointed out that the Ordinance contains no provision for filling up an individual vacancy in the Tribunal merely by appointing a new member in the place of a member who may resign or may be removed. The only provision regarding the constitution of Special Tribunals is S. 3 and consequently whenever a vacancy occurs, the situation can only be met by constituting a fresh tribunal by a notification under S. 3, composed of the two old members and the new member appointed to succeed the outgoing member. In practice, that appears to have been the procedure always followed by the Government.

(31) Before I proceed to the next relevant provision of law, it is necessary to interpose the history of the First Appellate Tribunal at Calcutta since the date when the present case was allotted to it. On the 20-9-1946, when the petition of complaint was filed, the members were Mr. M.A. Ispahani, Mr. P.R. Barucha & Mr. N. C. Basu, the first-named being the President. Mr. Ispahani was succeeded by Mr. Lethbridge who continued to be the President till the sitting of 8-5-1947. He was then succeeded as President by Mr. Barucha & a new member, Mr. E. M. Joshi, was appointed to take Mr. Barucha's place. The Tribunal remained a tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu till the 16-12-1949 when Mr. Basu resigned.

(32) I may observe in passing that frequent occasion appears to have arisen to take advantage of the provisions of S. 6(3) and to proceed with the hearing in the absence of a member. Mr. Basu was absent on as many as 53 days till at last he resigned. Mr. Barucha and Mr. Joshi were also absent on occasions, sometimes on three or four hearing days at a stretch. Besides, Mr. Joshi joined the Tribunal after the trial had proceeded for about nine months.

(33) The resignation of Mr. Basu was accepted by a notification dated the 20-12-1949 with effect from the 16th. After his resignation, the remaining members of the Tribunal went on adjourning the case from date to date, in anticipation, as they said in the order-sheet, of orders of the Government, reconstituting the Tribunal. This they were bound to do, because as the examination of witnesses had been concluded and the case had reached the stage of argument, they could not have proceeded with the hearing in the absence of the third member, even if such absence had been a temporary one. But the situation was one of a vacancy to which even section 6 (1A) did not apply at all, and the two remaining members rightly

took the view that before they could function further, the Tribunal required to be "reconstituted." Obviously, they expected that the Government would proceed in the same manner as on previous occasions and would reconstitute the Tribunal in the form of constituting a fresh Tribunal, composed of a new member and themselves, by means of a fresh notification under S. 3. Actually, however, the Tribunal was not reconstituted in that form. Instead, the Governor of Bengal promulgated an Ordinance, called the Calcutta Special Tribunal (Change of Composition) Ordinance (West Bengal Ordinance, I of 1950), by which the Central Ordinance of 1943, "as modified by the Bengal Special Tribunal (Continuance) Act, 1946" was amended. The Ordinance was promulgated on the 11-1-1950 and it was subsequently enacted into an Act of the Legislature, with slight modifications as West Bengal Act, 9 of 1950 which came into force on 15-3-1950.

(34) It is necessary to pause here for a moment to explain what the Bengal Special Tribunal (Continuance) Act, 1946 was. Ordinance 29 of 1943 was promulgated on 11-9-1943 in exercise of the powers conferred on the Governor-General by S. 72 of the Ninth Schedule to the Government of India Act, 1935. Under the provisions of that section, an Ordinance made thereunder could remain valid and effective only "for the space of not more than six months from its promulgation." Previously, however, by S. 1(3), India and Burma (Emergency Provisions) Act, 1940, an Act of the British Parliament, it had been enacted that as respects Ordinances promulgated during the period specified in S. 3 of the Act, S. 72 of the Ninth Schedule to the Government of India Act, 1935 shall have effect as if the words "for the space of not more than six months from its promulgation" were omitted. The period specified in S. 3 was the period between the date of the passing of the Act and the date declared by His Majesty to be the end of the emergency which had caused the passing of the Act, both inclusive. The Act was passed on 27-6-1940 and the 1-4-1946 was declared to be the date on which the emergency had come to an end. Ordinance 29 of 1943 was passed between those dates.

But at one time it was thought that the effect of the Parliamentary Act, 1940 might only be that the limitation of six months would remain suspended during the period mentioned in S. 3 of the Act so that it would come into operation again on the expiry of that period and all Ordinances made within the period would cease to have effect after six months from the date of such expiry, i.e., after 30-9-1946. It was because of that doubt, as stated in the preamble, that the Bengal Special Tribunals (Continuance) Act (12 of 1946) was passed and brought into force on 30-9-1946, providing that barring S. 5(1) which empowered the Government to allot cases to Special Tribunals, all other provisions of the Ordinance of 1943 would continue in force and all acts done under the Ordinance would remain valid and effective. The precaution was unnecessary, because, as the Federal Court has since pointed out in — 'J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor', (1947) F C R 141: 52 Cal W N (FR), 25, the Ordinances made within the period mentioned in the Act of 1940 are subject to no time-limit at all as regards their duration, unless imposed by the Ordinances themselves, and the period only sets the limits of time, ordinances made during which would have that effect. The passing of the Bengal Act thus created the somewhat peculiar situation that Ordinance 29 of 1943 continued to remain effective of its own force and at the same time was continued by an Act of the Provincial Legislature.

(35) To return now to Ordinance 1 of 1950, it amended Ordinance 29 of 1943 not in general but only in its application to the First Special Tribunal at Calcutta and the amendment with which we are concerned was to provide by S. 3(1) that thenceforward the principal Ordinance would apply to that particular Tribunal and to cases pending before it at the time,

"subject to the following modifications, namely:

(a) in sub-section (1) of Section 4, for the words "three members", the words "two members" shall be substituted;

(b) sub-section (1A) of Section 6 shall be omitted."

(36) The effect of the amendment was thus to reduce the numerical strength of the Tribunal from three to two members and, consequentially, to delete the provision that in the case of a temporary absence of one of the members, the remaining two might proceed with the trial of a case. Reference may also be made to the substitution of a new provision for S. 6(4) to the effect that in the event of a difference of opinion between the two members, the Provincial Government shall appoint a third member, notwithstanding the provisions of S. 4(1), and that the Tribunal, as so constituted, shall re-hear arguments and deliver judgment in the case.

(37) After receiving a copy of the amending Ordinance from the Government of West Bengal, Mr. Barucha and Mr. Joshi resumed the hearing of the case on 16-1-1950, obviously on the basis that by virtue of the Ordinance there was a properly constituted Tribunal, composed of themselves. No notification re-constituting the First Special Tribunal under the provisions of the amended Ordinance as a tribunal composed of Mr. Barucha and Mr. Joshi was issued. On the other hand, no objection to the constitution of the Tribunal was taken on behalf of the accused. Mr. Barucha and Mr. Joshi concluded the hearing of arguments and in due course delivered judgment.

(38) It may be convenient to dispose of here a minor point, faintly argued on behalf of the Appellants. It was contended that Ordinance 29 of 1943 being a Central Ordinance, the Governor of Bengal had no power to amend it by an Ordinance of his own. There is no substance in the contention, though the legislative steps taken by the local authorities appear to have been of a confused character. By the Bengal Special Tribunals (Continuance) Act (12 of 1946), the provisions of Ordinance 29 of 1943 were, in effect, adopted by the Bengal Legislature and re-enacted with certain amendments, as an Act passed by itself. Thereafter, there could be no question of amending the Central Ordinance, as such, since the provisions of the Ordinance had become in Bengal the provisions of a Bengal Act by which they had been adopted and given further life. But presumably, in 1950, the Governor was advised that the Central Ordinance had not expired with the expiry of six months from the termination of the period

specified in the Parliamentary Act of 1940, but was still surviving and accordingiy he proceeded to amend, not the Bengal Act but the Central Ordinance itself. It appears that he did so in a perfectly legal and constitutional manner. The preamble of the Ordinance recites that instructions of the Governor-General had been obtained and that being so, the provisions of Proviso (b) (i) to S. 88(1) of the Government of India Act, 1935, read with section 108(2) (b), were duly complied with.

(39) The main contention of the appellants regarding the constitution of the Tribunal was that the mere reduction of the numerical strength of the First Special Tribunal at Calcutta to two members would not bring into existence a validly constituted Tribunal composed of Mr. Barucha and Mr. Joshi in the absence of a notification constituting a Tribunal composed of them. In my opinion, that contention is well-founded. In fact, Mr. Mukherjee who appeared for the State very fairly conceded that he could not possibly resist the objection.

(40) A very similar case had recently to be dealt with by the Supreme Court in — 'United Commercial Bank Ltd. v. Their Workmen', (1951) S C R 380. The Act there concerned, the Industrial Disputes Act, provides by S. 7(2) that a Tribunal "shall consist of such number of members as the appropriate Government thinks fit" and Rule 5, framed under S. 38 of the Act, provides that the appointment of a Tribunal, "together with the names of the persons constituting the.....Tribunal", shall be notified in the official Gazette. Bodies dealt with by the Act are Boards, Courts of Inquiry, and Tribunals, but so far as a Tribunal is concerned, there is no provision, as there is in the cases of a Board and a Court of Inquiry, that it "may act, notwithstanding the absence of the Chairman or any of its members or any vacancy in its number", provided there is the prescribed quorum. Section 8(1) deals with all the three classes of bodies and it provides as follows:

> S. 8(1). If the services of the Chairman of a Board or the Chairman or other member of a Court or Tribunal cease to be available at any time, the appropriate Government shall, in the case of a Chairman & may, in the case of any other member, appoint another independent person to fill the vacancy, and the proceedings shall be continued before the Board, Court or Tribunal so re-constituted.

(41) The facts of the case were that the services of one of the members of a Tribunal, composed of the Chairman and two members, ceased to be available for a certain period as he was appointed to another Tribunal and the Government informed the Chairman and the remaining member that they did not intend to appoint a new member in his place at the time. Thereupon, the Chairman and the remaining member proceeded with the cases pending before the Tribunal and made certain intermediate awards in the absence of the third member. Thereafter, the third member rejoined the Tribunal and after further proceedings before the Tribunal, as composed of three members, the main award was made and signed by all of them. The intermediate awards and the main award were all challenged before the Supreme Court and all were held to be invalid by the majority of their Lordships. We are concerned in the present case only with the reasons given for the invalidity of the intermediate awards.

(42) The reasons given, broadly stated, are that section 3(1) deals only with the case where on the services of a member ceasing to be available, the Government elects to appoint a new member in his place, in which case the Tribunal is "re-constituted", but the section has no concern with a case where the Government chooses not to make an appointment. It is not implicit in the section that in the latter case, the Chairman and the remaining member automatically become a properly constituted Tribunal. Nor does the Act provide, in the case of a Tribunal, that it may act notwithstanding the absence of a member or in spite of there being a vacancy among the members. The situation that had arisen in the case was one of a vacancy. A Tribunal composed of the Chairman and one of the original members would be a different Tribunal from the original Tribunal, composed of the Chairman and two members. Such a Tribunal, being a new and different Tribunal, could be validly constituted only by a notification under Rule 5 which applies as much to the case of a vacancy as to the case of the first constitution of a Tribunal, for, in both cases, a new Tribunal is brought into existence. No such notification having been issued, the two persons who had purported to function during the intermediate period did not constitute a valid Tribunal and, accordingly, the awards made by them were void.

(43) In my opinion, the facts of the present case are even stronger. Like the Industrial Disputes Act in its application to Tribunals, Ordinance 29 of 1943 also does not provide for a case of vacancy. Both S. 6(1A) which provides for the temporary absence of a member and S. 11(b) which provides for the making of rules to meet the case of a permanent absence, contemplate that the member concerned remains a member.

It is true that Ordinance 1 of 1950 dealt specifically with the First Special Tribunal at Calcutta which was notified and known to be a Tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu and that S. 3(1) (a) of the Ordinance reduced the number of the members of that Tribunal from three to two. But it is no more implicit in the provisions of that section that Mr. Barucha and Mr. Joshi automatically became a validly constituted First Tribunal than it is implicit in S. 8(1) of the Industrial Disputes Act that on the services of a member of a Tribunal ceasing to be available and the Government choosing not to appoint a successor, the Chairman and the remaining members automatically continue to constitute a validly constituted tribunal.

It appears to me that the effect of the amendment of S. 4(1) of the principal Ordinance in the present case, by which the number of the members of the Tribunal was reduced from three to two, is exactly the same as the effect of section 8(1) of Industrial Disputes Act in its application to a case where the Government does not choose to appoint a new member. It is true that who the remaining members of the First Special Tribunal were, was known, but so it was known in the case before the Supreme Court who the Chairman of the Tribunal concerned was and who was the remaining member. All that Ordinance 1 of 1950 provides is that the First Special Tribunal at Calcutta shall,

instead of being composed of three members as in the case of other Tribunals constituted under the Ordinance, be composed of two members. But as Mr. N. K. Bose pointedly and pertinently asked, which two? The provision has reference only to the numerical strength of the Tribunal, but none to its actual personnel.

Indeed, so far as the amendment itself is concerned, the two members of the Tribunal need not have been Mr. Barucha and Mr. Joshi at all, but might well be two outsiders, newly appointed, and even if the choice was to be limited to the original members, there is no reason in the amendment itself why the two members should not have been Mr. Basu and Mr. Barucha or Mr. Basu and Mr. Joshi. As pointed out by the Supreme Court in the case already cited, a Tribunal composed of two of the three original members is a different Tribunal from the original Tribunal of three members. If so, such a Tribunal could be validly brought into existence only by a notification under S. 3 which prescribed the only method of constituting a Tribunal and which had not been amended. Even if, therefore, the amendment of S. 4(1) is to be read with the notification dated 20-12-1949 by which the resignation of Mr. Basu was announced, it required a notification to constitute a valid Tribunal composed of Mr. Barucha and Mr. Joshi. No such notification having been issued, no properly constituted Tribunal, composed of Mr. Barucha and Mr. Joshi, ever came into existence.

(44) It may be added that, as pointed out by Mukherjea J., in the 'United Commercial Bank case', (1951 S C R 380), a Tribunal cannot be conceived of as an entity different from the members of which it is composed and it cannot be said that whatever changes might occur in the composition of a Tribunal, the identity of the tribunal, once it is constituted, remains intact. It cannot therefore be argued that the Tribunal concerned having been specified in the Ordinance and the size of that Tribunal having been reduced by the Ordinance itself, no further notification specifying the names of the members of the Tribunal, as reduced, was necessary.

In the case before the Supreme Court also, the relevant Act contained provisions by virtue of which the size of a Tribunal would become reduced in certain circumstances and those circumstances had come to arise. Nevertheless, the Supreme Court held that a notification was necessary and the reason is clear. A tribunal has no concrete existence apart from the members composing it and therefore a mere definition of the numerical strength of the membership of a tribunal does not bring a tribunal into existence. In order that a tribunal may be constituted in fact, it is essential that its members should be named and their names notified. A statutory declaration or a notification, containing only the number of the members of a tribunal, would be perfectly meaningless. I am therefore of opinion that notwithstanding the legislative reduction of the size of the First Special Tribunal, a notification constituting a new tribunal of two named members under S. 4(1), as amended, was further necessary and the fact that S. 3 does not expressly require the names of the members to be included in the notification, like R. 5, Industrial Disputes Act rules, does not make the reasoning of the Supreme Court decision any the less applicable.

(45) In any event, it appears to me that the gap which occurred between the resignation of Mr. Basu and the promulgation of Ordinance 1 of 1950 was fatal. Ordinance 29 of 1943, apart from the amendment made by the Bengal Ordinance, knew only of a tribunal composed of three members. Under S. 4, as it stood in the Central Ordinance, there could only be a tribunal composed of three members or no tribunal at all. It was under that section that the First Special Tribunal had originally been constituted and that section, in its unamended form, was in force on 16-12-1949 when Mr. Basu resigned. It continued to be in force in that form up to 11-1-1950, not till which date was the Bengal Ordinance promulgated. The legal result of that sequence of events clearly was that the moment Mr. Basu's resignation came into effect, the First Special Tribunal at Calcutta, which had existed so long, ceased to exist—for, at that date, it could have no valid existence as a tribunal of two members. Between 16-12-1949 when Mr. Basu's resignation took effect and 11-1-1950 when the Ordinance was promulgated, there was no First Special Tribunal at Calcutta and Mr. Barucha and Mr. Joshi were not members of any such Tribunal. On 11-1-1950, therefore, there could be no question of changing the composition of any existing First Special Tribunal at Calcutta, for, the old Tribunal was not only dead but also, to adopt an apt expression used by Mr. Mukherjee, "decomposed".

Had the Ordinance been promulgated on 16-12-1949, so as to bring it into force before or simultaneously with the resignation of Mr. Basu, it might perhaps be argued with some plausibility that no break of continuity had occurred and all that had been done was that the composition of an existing Tribunal had been altered by making a law which the Governor or the Legislature could validly do. Whether even in such a case the necessity of a fresh notification would be obviated, unless the Ordinance itself named the members of the Tribunal, as reduced, is very doubtful. But, in any event, a break having been allowed to occur and the old Tribunal having gone out of existence, all that could possibly be done after the promulgation of the Ordinance, if a Tribunal was to be had, was to constitute a fresh Tribunal by a fresh notification, although by reason of the amendment of S. 4(1), it might properly be a Tribunal of two members and although the members chosen might be Mr. Barucha and Mr. Joshi. There having been no such notification, there was no validly constituted Tribunal composed of Mr. Barucha and Mr. Joshi and therefore the proceedings had before them and the judgment delivered by them were void and of no effect.

(46) There is also another circumstance bearing on this point to which I refer with some diffidence, because the facts are not clear. Mr. Mukherjee was asked to place before us the notifications by which the Tribunal of three members, as last composed had been constituted and the resignation of Mr. Basu had been accepted. In compliance with that direction, he produced copies of two notifications, one, Notification No. 6269-J. dated 18-11-1947 and the other, Notification No. 6822-J, dated 20-12-1949. The former is a notification under West Bengal Ordinance No 9 of 1947 by which a Special

Tribunal, composed of Mr. Barucha, Mr. Joshi and Mr. Basu, was constituted for the purposes of that Ordinance to sit at Calcutta. The provisions of Ordinance 9 of 1947 were subsequently re-enacted as an Act of the West Bengal Legislature, the West Bengal Criminal Law Amendment Act (7 of 1947). It appears that the West Bengal Ordinance and the West Bengal Act of 1947 are virtually reproductions of the Central Ordinance No. 29 of 1943, providing in particular that a Special Tribunal constituted under them shall consist of three members. The notification produced by Mr. Mukherjee could not be the first notification constituting a Tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu for the purposes of the present case, because it is dated 18-11-1947, whereas it appears from the order-sheet that the first date on which Mr. Joshi attended the sittings of the Tribunal was 13-6-1947.

There must have been, however, reasons why a second notification became necessary. Why Ordinance No. 9 of 1947 was promulgated is not clear, but Mr. Mukherjea suggested, perhaps correctly, that after the partition of Bengal, doubt was perhaps felt about the continued applicability of the old Central and Bengal Laws in West Bengal and therefore West Bengal promulgated an Ordinance of her own and re-constituted the Tribunal under that Ordinance. But if the Tribunal composed of Mr. Barucha, Mr. Joshi and Mr. Basu which dealt with the present case was constituted by the notification produced by Mr. Mukherjee, the number of its members could not possibly be reduced by Ordinance 1 of 1950, because it did not purport to amend either Ordinance 9 of 1947 under which the notification was issued and the Tribunal constituted or Act 7 of 1947, based on that Ordinance. In that case, the law under which the Tribunal had been constituted and which required a Tribunal to consist of three members remained unamended and a Tribunal composed of two members was clearly not a validly constituted Tribunal. It appears that in 1950 the advisers of the Ordinance-making authority forgot not only Bengal Act 12 of 1946 by which the provisions of the Central Ordinance 29 of 1943 had been adopted and made an enactment of the Bengal Legislature but also West Bengal Ordinance No. 9 of 1947 and West Bengal Act 7 of 1947 which had been passed in terms of Ordinance 29 of 1943 and under which the First Special Tribunal at Calcutta had been re-constituted.

(47) The first point taken by the Appellants is sufficient for the disposal of the appeals but I am of opinion that the second point taken by them is also a sound one, although I have felt some difficulty in coming to that conclusion. The point, it will be remembered, is that the trial of the Appellants under the provisions of Ordinance 29 of 1943 after the Constitution had come into force was bad, since those provisions were repugnant to Art. 14 of the Constitution.

(48) We have to consider the Ordinance as it stood at the time when the present case was allotted to a Special Tribunal, i. e., as it stood after the eleventh amendment made by Ordinance VI of 1946, promulgated on 17-1-1946. The Ordinance mentions a number of offences in a Schedule which, save for offences under the Hoarding and Profiteering Prevention Ordinance 1943 and under rules made under the Defence of India Act, are all offences under the Penal Code and it provides by S. 5 (2) that Special Tribunals constituted under it shall have jurisdiction to try the cases for the time being respectively allotted to them in respect of such of the offences specified in the Schedule as may be preferred against the several accused. There can be no doubt that as compared with persons tried for the same offences under the ordinary law, the Ordinance subjects the persons dealt with under it to differential treatment, though the difference is not as serious as in the case of the West Bengal Special Courts Act, recently pronounced on by this Court in — 'Anwar Ali Sarkar v. State of West Bengal', A. I. R. 1952 Cal. 150 (F. B) and by the Supreme Court in the — 'State of West Bengal v. Anwar Ali Sarkar', (1952) S. C. R. 284. Still, the difference is substantial and is such as to affect the persons concerned prejudicially.

Thus, offences under the Indian Penal Code specified in the Schedule are all, except those under Ss. 417 and 165, triable both by a Court of Session and a Presidency Magistrate or a Magistrate of the 1st class and in the case of a trial for such offences under the ordinary law, the Magistrate would, if he thought he could not award the sentence called for, commit the accused to the Court of Session. In most cases, that course would be adopted, because the offences are bribery, cheating, criminal breach of trust as a clerk or public servant and reception, disposal or concealment of stolen property and in cases chosen for allotment to Special Tribunals, they would generally involve huge amounts of money. The Ordinance, however, provides by S. 6 (1) that a Tribunal may take cognizance of offences without the accused being committed to it for trial and that it shall, in trying the accused persons, follow the procedure of warrant cases. The expectation or possibility of the benefit of a trial by jury or at least with the aid of assessors and of the advantage of commitment proceedings in which the prosecution would have to disclose its evidence in advance are thus both affected.

Again, section 6 (2) provides that the provisions of section 196A of the Criminal Procedure Code shall not apply and thus the safeguard of a sanction for the prosecution for certain classes of criminal conspiracy is taken away. Section 8 takes away the authority of any Court to transfer any case from a Special Tribunal, whereas S. 5 (1) gives an uncontrolled power of transfer to the Government and S. 8 also bars the jurisdiction of the High Court to make any order under S. 491 of the Criminal Procedure Code. Section 6 (1A), again, provides for the Tribunal proceeding in the absence of a member and exposes the accused to the risk of being tried by persons who have not heard a part or it may be the greater part, of the evidence and not seen some of the witnesses at all. A similar risk is involved in the provision of S. 6 (3) that a Special Tribunal shall not, merely by reason of a change in its members, be bound to recall or re-hear any witness. Some very drastic provisions are contained in sections 9 and 10, but Mr. Mukherjee rightly pointed out they involved no discrimination, since exactly similar provisions had been incorporated in the General Law by Ordinance VI of 1946, promulgated on the same date as Ordinance 7 of 1946 and since, for reasons already explained, that Ordinance, being subject

to no time-limit, remains valid and effective to this day. But even apart from Ss. 9 and 10, the provisions of Ordinance 29 of 1943 are substantially different from those of the general law.

(49) Such difference, however, would not amount to unjustifiable discrimination if it could be shown that the cases liable to be dealt with under the Ordinance formed a class, marked off by some difference which bore a just and reasonable relation to the objects of the Ordinance. The objects of the Ordinance, as stated in the pre-amble, are "more speedy trial and more effective punishment", but neither of them can form the basis of any valid classification. The first was considered both by this Court and the Supreme Court in the case of — 'Anwar Ali Sarkar', (AIR 1952 Cal 150 (FB) and 1952 S C R 284 (SC)) and held to be too vague and indefinite to be capable of furnishing any reasonable basis of classification. The second is obviously open to the same objection. But a more serious difficulty in the way of relying on those objects as the basis of any classification at all is that they cannot be imported into S. 5(1) of the Ordinance which is the provision laying down what cases may be brought under it and which gives the Government uncontrolled power to allot any case it likes to a Special Tribunal, save that, by reason of the provisions of S. 5(2), the case must involve one or more of the offences specified in the Schedule. Section 5(1), as last amended, provides, so far as is material, that "the Central Government may from time to time by notification in the official Gazette allot cases for trial to Special Tribunal" and S. 5(2), as already stated, provides that "the Special Tribunals shall have jurisdiction to try the cases for the time being respectively allotted to them under sub-section (1) in respect of such of the charges for offences specified in the Schedule as may be preferred against the several accused". The effect of these provisions is that although the Schedule specifies a number of offences, it is not all cases of those offences which are to be tried by special Tribunals but only such cases as the Central Government may, in its absolute discretion, allot to them. It is thus clear that S. 5(1) of the Ordinance, read with S. 5(2), corresponds to that part of S. 5(1) of the West Bengal Special Courts Act which authorises a special court to try such "cases" as the State Government may direct and accordingly the section must be held to be repugnant to Article 14 of the Constitution on the authority of the decision in the — State of West Bengal v. Anwar Ali Sarkar', (1952) S C R 284 and to have become void under Article 13(1) on the Constitution coming into force.

(50) There is however, a special difficulty in the present case, constituted by the fact that the trial under the Ordinance had commenced before the Constitution came into force and was, at its date, pending. In the case of — 'Keshavan Madhava Menon v. State of Bombay', (1951) S C R 228, it was held by the Supreme Court that the continuance, after the Constitution, of a trial for an act done before the Constitution which was an offence under a law valid at the time, was not barred under Article 13(1), although the law concerned might now be inconsistent with a fundamental right. The reason given was that Article 13(1) rendered pre-existing laws void only to the extent that they were inconsistent with the fundamental rights, but as those rights were creations of the Constitution and had only come into existence along with it, there could be no question of a pre-existing law encroaching on a fundamental right in so far as it was applied to an act done before the Constitution when the fundamental rights did not exist. Accordingly, such an act could be punished under the pre-existing law even after Constitution, although the law might be repugnant to the Constitution, and now void, in so far as it made such an act an offence. In so punishing the act, no violation of any fundamental right would be involved. The decision, however, is to my mind distinguishable, inasmuch as the trial in that case was under the ordinary law and therefore the form or the procedure of the trial itself, when it was continued after the Constitution did not constitute any infringement of any fundamental right. As I understand the decision, it means that in so far as a preconstitution law may operate to forbid or impede a post-Constitution exercise or enjoyment of a fundamental right, it is ineffectual and if such a law is applied to restrict the present exercise of a fundamental right, such application of it would be void. If so, the trial of the Appellants under the provisions of the Ordinance, so far as it was held after the Constitution, was void, because it was in the trial being held in a special forum and in the procedure of the trial that the infringement of the fundamental right of equality before the law lay and, consequently, during every moment of the trial after the Constitution such infringement was suffered.

(51) A subsidiary point requires consideration. In 're Keshava Madhava Menon', (AIR 1951 Bom 188), the Bombay High Court reached the conclusion, subsequently affirmed by the Supreme Court, along another line. It held that that the word 'void' had been used in Art. 13(1) in the sense of 'repealed' and since Art. 367(1) made the General Clauses Act applicable to the interpretation of the Constitution, proceedings under the impugned Act pending at the date of the Constitution would not be affected, even if the Act was inconsistent with the fundamental right conferred by Article 19(1) (a), as alleged. The Supreme Court found it unnecessary to consider that reasoning, because it was able to hold the continuance of the proceedings to be valid without the aid of the General Clauses Act. As already explained, it held that although a pre-existing law might be inconsistent with some fundamental right, still, in so far as it authorised punishment for an act done before the Constitution, it had not been declared void by Article 13(1) and accordingly to that extent it remained valid even after the Constitution under the limitation contained in Article 13(1) itself. That being so, proceedings under such an Act in respect of a pre-constitution act, could be lawfully continued after the Constitution.

The Supreme Court was able to dispose of the case on that basis, because the trial there was under the general law and in the continuance of the trial after the commencement of the Constitution, no violation of any fundamental right was involved. I have already shown that in the present case the continuance of the trial under the Ordinance did involve an invasion of a fundamental right and accordingly it becomes necessary to consider whether S. 6(e), General Clauses Act, has any application. In my opinion, it has none.

Although the Supreme Court did not decide that the word 'void' in Art. 13(1) was not synonymous with 'repealed', Das, J., who delivered the majority judgment, had occasion to observe that "the effect of Art. 13(1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute". That, if I may say so with respect, appears to be plain, for not only is the general meaning of the word 'void' different but, as occurring in Art. 13(1), it cannot also be read in the sense of 'repealed'. The Article covers "all laws in force — immediately before the commencement of the Constitution" which obviously include customary laws and to speak of repealing such laws would obviously be inappropriate. Again, the same expression "shall be void" is used in Art. 13(2) which deals with laws made after the Constitution and it is equally inappropriate to read the Article as saying, by that expression, that if, after the Constitution, the State makes any law in contravention of any fundamental right, such law shall be 'repealed' or shall 'stand repealed.' With respect, the view taken by the Bombay High Court does not appear to me to be correct.

If the word 'void' in Article 13(1) has not the meaning of 'repealed', the General Clauses Act offers no obstacle to giving effect to its provisions even in respect of proceedings pending at the date of the Constitution. The Article declares that on and after the date of commencement of the Constitution, all existing laws, so far as they may contain provisions inconsistent with any of the fundamental rights, shall be ineffectual and void. Ordinance 29 of 1943 is inconsistent with Art. 14 of the Constitution, as already explained. Consequently, on the Constitution coming into force, the Ordinance ceased to be valid and since there was no longer any valid Ordinance 29 all proceedings purported to have been had under it after the date of the Constitution were utterly void.

(52) It was not argued on behalf of the State and I do not think it can be said that whatever the inconsistency of the Ordinance with the general law and therefore with Art. 14, the proceedings held after the Constitution had come into force involved no inequality of treatment. After the commencement of the Constitution all that was done was that a part of the argument for the prosecution which had already commenced and the arguments for the defence were heard. Still, however, the accused were being tried by two persons, acting as a Sessions Court, but without the aid of a jury or assessors. They were being so tried for offences which, under the ordinary law, might have to be tried by a jury. One of the offences for which they were being tried required sanction under S. 196A, Criminal P. C., but they were being tried without such sanction. They were also being tried by two persons, each of whom had not heard a part of the evidence. They were prevented from approaching the High Court for a transfer of the case or for a 'de novo' trial. These and other departures from the general law which were gravely prejudicial to the accused, were involved even in the stage of argument and in the pronouncement of judgment against the accused by the Tribunal.

(53) For the reasons given above, it must be held that the trial of the Appellants in so far as it was held after 16-12-1949, was bad, because the Tribunal before which it was held was not validly constituted and in so far it was held after 26-1-1950, it was also bad, because it was held under a law which had become void.

(54) The next question is what order we ought to make. It was submitted on behalf of the Appellants that in view of the evidence in the case which, according to them, did not establish the offences charged, we should direct an acquittal. It was in anticipation of that submission that we heard the appellants on the merits, because the appeal was an appeal on the facts and if it appeared from the evidence which had been concluded before a validly constituted tribunal that the prosecution had clearly failed to prove its case, it would not be proper to direct a retrial, even if there had been no valid trial by a competent tribunal of first instance. Having been taken through the evidence and having heard the appellants, I am unable to say that there is not sufficient in it which, if believed, would establish the offences charged.

The case made by the prosecution is one of a gigantic fraud, carried out with a great elaboration of steps in aid and it is to give some indication of its magnitude and complexity that I have set out the prosecution and the defence cases at some length, although what I have given are only outlines. The evidence is voluminous and the number of the exhibits, which is large enough, does not yet give a correct idea of their size, many of them being registers or collections of ledger and bin cards nor of the complicated nature of the information to be extracted from them, e.g., quantities of issues as against quantities of supplies as on different dates during the space of several years. Much again depends on the credibility of the two accomplices and on the extent to which their evidence is corroborated by contemporary correspondence between a wide circle of officers and the innumerable office-notes on the tenders or letters. The evidence, so far as we were taken through it, is not such that, even if believed, it would be clearly insufficient for the purposes of the prosecution and in those circumstances and also in view of the vastness and complexity of the evidence and the fact that there has been no valid trial, I think an order for a retrial is the only proper order that can be made.

(55) But in making such an order and in having to throw upon the accused the appalling burden of going through again what they had once to endure for three years and nine months, it is impossible to avoid a feeling of deep distress. Nor can it be agreeable to the prosecution that all its labours should be thrown away. That such a situation should have been created by the law-making authorities of the State making error after error and the Government committing further errors in applying such laws as were made, adds to the feeling of distress. Even if the accused are guilty of the offences with which they are charged, they have only deserved to be punished adequately for their transgressions, but not also the agony and strain of two protracted trials. Such considerations, however, cannot weigh with a Court so as to restrain it from making the order which the law requires. They are matters to be considered by the Government in deciding whether actually a retrial will or will not be proceeded with.

(56) As all the evidence in the case was concluded at a stage when the Tribunal was still

properly constituted, I have considered whether it would be possible to direct that the retrial should be on the evidence already recorded. In my opinion, no such direction can be given. To do so would be virtually to direct something like a further enquiry which cannot be done in an appeal or to direct a partial retrial which the Code does not contemplate. It would also be to direct a Court to try the accused on evidence which it had not heard and evidence taken before a Tribunal which would constitutionally be, in respect of cases arbitrarily allotted to it as the present case was, a bad tribunal today. I ought to add that the difficulties were pointed out by us at the end of the hearing and no such order of partial retrial was asked for by Mr. Mukherjee.

(57) In the result, the appeals are all allowed, the convictions of all the Appellants and the sentences passed upon them are set aside and they are directed to be retried in accordance with law by a Court of competent jurisdiction.

(58) The appellants will continue to remain on the same bail till 6th May next on which date they must appear before the Registrar, Original Side, and furnish bail, of like amounts as under the present bonds with like sureties as at present, for their appearance before the Court or Tribunal, if any, before which they may be called upon to appear for the purposes of a retrial.

(59) On their furnishing such securities, they will continue to remain on bail.

(60) It is expected that if it is decided to hold a retrial, the necessary steps in that behalf will be taken with reasonable expedition.

(61) Let the attention of the Registrar, Original Side, be drawn to this order and let the original bail bonds which have been obtained from the Court below be placed before him for his guidance.

(62) SINHA, J.: These are five consolidated appeals against the judgment of the First Special Tribunal sitting at Calcutta, dated 26-5-1950. By that judgment, all the five accused persons have been convicted and sentenced to varying terms of imprisonment and fine.

(63) As it transpires, however, the tribunal which passed judgment was not a validly constituted tribunal at all, and had no power either to hear arguments or to pronounce judgment. In 1943, during the continuance of the last World War, it was felt that a large number of persons had managed successfully to exploit the war situation to their own profit, and that corruption and bribery had taken place on a large scale. It was further felt that the ordinary laws of the land were not sufficiently drastic to cope with this emergent situation and the Governor-General of India, under powers conferred upon him by S. 72, Government of India Act, promulgated an ordinance known as "The Criminal Law Amendment Ordinance 1943 (Ordinance XXIX of 1943)." This Ordinance came into operation on 11-9-1943. The preamble of the ordinance recites

> "Whereas an emergency has arisen which makes it necessary to provide for the more speedy trial and more effective punishment of certain offences punishable under the Penal Code....."

The events as they have happened in this case stand as a grim reminder of the fact that special legislation hastily promulgated and leisurely administered, more often than not defeats its own purpose. The first information in this case was laid on 24-2-1945 and the petition of complaint was filed on 20-9-1946. Thereafter, there was an elaborate, costly and prolonged trial and after approximately five years the judgment was pronounced consisting of over three hundred and fifty closely typed pages. And now it is found that this enormous expenditure of energy, time and public money has been wholly wasted and the entire performance must now be repeated once more.

(64) The facts of this case in so far as it is necessary to state them have been exhaustively dealt with in my lord's judgment and I do not intend to repeat them. I shall concern myself only with expressing my views on the two preliminary points of law taken on behalf of the accused which are sufficient by themselves to dispose of the cases. In order however to appreciate the preliminary points it is necessary to bear in mind certain dates which I set out hereunder in chronological order.

April 1942 to December 1944	...	Period of the alleged conspiracy between all the accused. (Charge I).
1st April to 31st March 1944	...	Period covering Charge II against Major Phillips.
Do	...	Period covering Charge III against Captain Rodrigues, Dasarathi Mukherji, Jagat Bhusan Biswas and Nandalal De.
Do	...	Period covering Charge IV against Captain Rodrigues, Dasarathi Mukherji, Jagat Bhusan Biswas and Edward Ezra.
4th November 1942 to 20th May 1943	...	Dates on which bribes are alleged to have been received by Major Phillips.
4th November 1942 to 28th April 1943	...	Dates on which bribes are alleged to have been received by Captain Rodrigues.
28th April 1943 to 11th June 1943	...	Dates on which bribes are alleged to have been received by Dasarathi Mukherji.
11th September 1943	...	Ordinance No. 29 of 1943 (Central).
26th August 1944	...	Ordinance No. 40 of 1944 (Central).
24th February 1945	...	The First Information Report.
12th May 1945	...	Ordinance No. 12 of 1945 (Central).
4th July 1945	...	Ordinance 22 of 1945 (Central).
17th January 1946	...	Ordinance 6 of 1946 (Central).
20th September 1946	...	Petition of complaint.
30th September 1946	...	The Bengal Special Tribunal (Continuance) Act 1946. (Bengal Act 12 of 1946) adapting Ordinance 29 of 1943.
28th October 1946	...	Trial commenced. All accused appear and are released on bail.
24th February 1947	...	Case opened by the prosecution.
6th May 1947	...	Examination of witnesses commenced.
9th October 1947	...	West Bengal Criminal Law Amendment (No. II) Ordinance 9 1947.

18th November 1947	...	Notification No. 6269-J under Ordinance 9 of 1947 constituting a special tribunal consisting of Mr. Bharucha (President), Mr. Joshi and Mr. N. C. Basu.
1st January 1948	...	West Bengal Act 7 of 1947 confirming Ordinance 9 of 1947.
13th May 1948	...	Examination of prosecution witnesses concluded.
26th May 1948	...	Charges framed.
28th June 1948	...	Cross-examination of witnesses commenced.
23rd June 1949	...	Cross-examination concluded.
28th August 1949	...	Examination under S. 342 commenced.
24th October 1949	...	Examination of accused concluded.
16th December 1949	...	Mr. N. C. Basu resigned.
20th December 1949	...	Notification No. 6822-J of the Government of West Bengal accepting the resignation of Mr. N. C. Basu from the tribunal constituted by Notification dated 23rd September 1948.
3rd, 5th and 7th January 1950	...	Proceedings adjourned on the ground "Tribunal not yet constituted."
11th January 1950	...	The Calcutta Special Tribunal (Change of Composition) Ordinance 1950. (Ordinance 1 of 1950).
12th January 1950	...	A copy of Ordinance 1 of 1950 received by Mr. Bharucha and Joshi.
16th January 1950	...	Arguments commenced.
15th March 1950	...	The Calcutta Special Tribunal (Change of Composition) Act 1950.
25th March 1950	...	Arguments concluded.
26th May 1950	...	Judgment pronounced.

It will now be convenient to set out the preliminary points of law as raised by Mr. Basu and adopted by the other accused:

1. The Tribunal (describing itself as "the First Special Tribunal (Calcutta)") which heard arguments and passed judgments in these cases, was not a legally constituted tribunal inasmuch as: (a) The Governor or the State Legislature were not competent to promulgate ordinances or to pass Acts affecting a central ordinance. (b) Assuming that the State of West Bengal was capable of constituting a special tribunal consisting of two members to try the cases, no such tribunal was ever constituted, in the absence of the requisite Notification to that effect. Consequently, after the acceptance of the resignation of Mr. N. C. Basu, the remaining two members of the tribunal were 'functus officio' and had no right to hear arguments or to pass judgment.

2. The relative Ordinances and Acts under which the trial was held offend against Art. 14 of the Constitution and are void under Art. 13 (1) thereof. The whole trial, or alternatively that portion of it which was held after the Constitution came into being, is invalid.

(65) Before I deal with the points raised, it will be necessary to recapitulate the history of the special legislation, under or in virtue of which, the cases were tried. The original Ordinance 29 of 1943 has been amended eleven times and adapted twice. It is not necessary to notice all the Acts and Ordinances but only the chief ones. I will proceed to deal with them chronologically. "The Criminal Law Amendment Ordinance 1943, Ordinance No. 29 of 1943." This Ordinance came into operation on 11th September 1943. All the subsequent Acts and Ordinances are based on this and are either variations or adaptations. The important provisions are set out below:

Section 3 — 'Constitution of Special Tribunals'. — The Central Government may by notification in the Official Gazette constitute for the purposes of this Ordinance two Special Tribunals, one to sit at Calcutta and the other at Lahore. Provided that either such special tribunal may, if it is satisfied that it will tend to the general convenience of the parties or witnesses in any particular case, sit for the trial of that case in a place other than Calcutta or Lahore.

Section 4 — 'Composition of Special Tribunals'. — 'A special tribunal constituted under this ordinance shall consist of three members.....'

Section 5 — 'Cases triable by Special Tribunals'.—

(1) The Special Tribunals shall have jurisdiction to try the cases respectively allotted to them in the First Schedule in respect of such of the charges for offences specified in the second Schedule as may be preferred against the several accused and any such case which is at the commencement of the ordinance pending before any Court shall be deemed to be transferred from that Court to the Special Tribunal to which it is allotted.

(2) When trying any such case as aforesaid, a special tribunal may also try any offence not specified in the second schedule which is an offence with which the accused may under the Code of Criminal Procedure 1898 be charged at the same trial.

(66) Under sub-s. (1) of S. 6, a special tribunal may take cognizance of offences without the accused being committed to it for trial and follow the procedure appropriate to the trial of warrant cases. Under sub-s. (2) the special tribunal is to be deemed to be a Court of Session trying cases without a Jury. Under sub-s. (3), a special tribunal is not bound to recall or rehear any witness merely by reason of the fact of a change in its members. Under S. 7, appeal against any order or sentence of the Special Tribunal is barred and the High Court is given only a limited power of revision under S. 8. Under S. 9, special rules of evidence are introduced. Where an accused failed to account satisfactorily for any of his pecuniary resources or property disproportionate to his known sources of income, that was to be a "relevant fact" which could be taken into consideration. Further, if he accepted or agreed to accept etc, any illegal gratification from anyone seeking facilities for transport or a contract etc., then it was to be presumed that he did so with the motive etc., as required by S. 161. Finally, there are special provisions as to punishment. In the first schedule is given a long list of names and the offences with which they were charged.

(67) 'Ordinance 40 of 1944' — Came into operation on 26th August 1944. This added a new sub-section viz. 1A to S. 6 and runs as follows:

6(1A) Notwithstanding anything contained in S. 4, any two members of a special tribunal

may proceed with the trial of a case during the temporary and unavoidable absence of the third member;

Provided that all three members shall be present when after the evidence has been concluded the prosecutor or the accused or his pleader is addressing the special tribunal and when the judgment is delivered.

(68) 'Ordinance 12 of 1945' — Came into operation on 12th May 1945. Section 5 was amended by renumbering the sub-sections and introducing the following as sub-s. (1):

"The Central Government may from time to time by notification in the official Gazette allot cases for trial to each special tribunal and may also from time to time by like notification transfer any case from one special tribunal to another or withdraw any case from the jurisdiction of a special tribunal or make such modifications in the description of a case (whether in the names of the accused or in the charges preferred or in any other manner) as may be considered necessary."

(69) 'Ordinance 22 of 1945'— Came into operation on 4th July 1945. It altered the provisions as to qualifications necessary for becoming a member of the tribunal and restored to the High Court its powers under Chap. 32, Criminal P. C. (Appeals, references and revisions).

(70) 'Ordinance 6 of 1946'—Came into operation on 17th January 1946. This is a little-known ordinance which made special provisions as regards the law of evidence similar to that contained in S. 9 of Ordinance 29 of 1943 applicable to all trials. (Also see the Prevention of Corruption Act, 1947—Act 2 of 1947 which made legislative provision to the same effect).

(71) 'The Bengal Special Tribunal (Continuance) Act 12 of 1946'— This Bengal Act came into operation on 30th September 1946. It adapted all the provisions of the Ordinance 29 of 1943 except S. 5 (1) which was omitted. The Act was passed as it was apprehended that the period of War emergency having expired on 1st April 1946, it was doubtful whether the Ordinance 29 of 1943 was effective any longer. The omission of S. 5 (1) is significant and will be dealt with later. Powers conferred upon Central Government by the original ordinance were conferred upon the Provincial Government.

(72) 'West Bengal Criminal Law Amendment (No. 2) Ordinance 1947 (West Bengal Ordinance 9 of 1947)'—This came into operation on 9th October 1947. This Ordinance also adapted the provisions of the Central Ordinance 29 of 1943. It must have been thought that due to the partition of Bengal it was doubtful whether the original ordinance or the Act 12 of 1946 applied any longer.

(73) 'The West Bengal Criminal Law Amendment Act, 1947—(West Bengal Act 7 of 1947)'— Came into operation on 1st January 1948. This Act continued the provisions of Ordinance 9 of 1947 and contained provisions similar to the original ordinance.

(74) Section 4 of the Act runs as follows:

"Cases triable by Special Tribunals—(1) The Provincial Government may from time to time by notification in the official Gazette allot cases for trial to each special tribunal, and may also from time to time by like notification transfer any case from one special tribunal to another or withdraw any case from the jurisdiction of a special tribunal or make such notifications in the description of a case (whether in the names of the accused or in the charges preferred or in any other manner) as may be considered necessary.

(2) The special tribunals shall have jurisdiction to try the cases for the time being respectively allotted to them under sub-s. (1) in respect of such of the charges for offences specified in the schedule may be preferred against the several accused and any such case which is at the commencement of this Act or at the time of such allotment pending before any Court or another special tribunal shall be deemed to be transferred to the special tribunal to which it is so allotted:

(3) When trying any such case as aforesaid, a special tribunal may also try any offence whether or not specified in the Schedule which is an offence with which the accused may, under the Code of Criminal Procedure, 1898 be charged at the same trial."

(75) The provisions of the Prevention of Corruption Act 1947 (11 of 1947) were made applicable to trials under the Act.

(76) The High Court could entertain appeals, references or revisions as from a Court of Session trying cases without a jury but the power of transfer was taken away.

(77) Reverting now to the preliminary points, it is quite clear that there is no substance in point 1(a). The provisions of the Central Ordinance 29 of 1943 have now been (with modifications) incorporated in a local Act, and adapted in another. It is not argued before us that the State Legislature was not competent to pass such Acts or that either Act 12 of 1946 or Act 9 of 1950 are 'ultra vires' the local Legislature. It is therefore profitless to consider whether a local ordinance could modify a central ordinance or a local Act affect a Central Ordinance. This however is the appropriate place to point out the confusion that has arisen by reason of the successive amendments and adaptations of the original Ordinance 29 of 1943, and the passing of the local Acts. The original ordinance was promulgated in 1943, by the Governor General in exercise of the powers conferred upon him by S. 72, Government of India Act, 1935. As such, it could remain effective for a period for six months only. But by an Act of the British Parliament, namely the 'India and Burma (Emergency Provisions) Act, 1940', S. 1(3), it was enacted that in the case of any ordinance promulgated between the date of the passing of the Act and the date declared to be the end of the emergency (which happened on 1st April 1946) this limitation as to the period of an ordinance would be deemed to have been omitted. Hence the Ordinance 29 of 1943 did not come to an end on the date of the ending of the emergency or six months after it. (See the Federal Court decision — 'J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. King-Emperor', 52 Cal WN (FR) 25).

(78) It follows therefore that the Central Ordinance as well as the local Acts are effective. Now the notification under which Mr. Bharucha (as President), and Messrs. Joshi and N. C. Basu (as members) were appointed, is Notification No. 6269-J dated 18-11-47 and reads as follows:

"In exercise of the powers conferred by S. 2 read with sub-s. (1) of S. 3 and by sub-s. (3)

of S. 3 of the West Bengal Criminal Law Amendment (No. 2) Ordinance, 1947 (West Bengal Ordinance No. 9 of 1947), the Governor is pleased to constitute for the purposes of the said Ordinance a special tribunal to sit at Calcutta consisting of the following:

(1) Mr. P. R. Bharucha, Bar-at-Law, President,

(2) Mr. E. M. Joshi, Bar-at-Law, (3) Mr. N. C. Basu, District & Sessions Judge (Retd.)—Members.

By order of the Governor,
Sd/- B. K. Guha,
Secretary."

Coming now to Ordinance I of 1950, and Act 9 of 1950 which continues its operation, we find that they define "The principal ordinance" as the Criminal Law Amendment Ordinance, 1943 as modified by the Special Tribunal (Continuance) Act, 1946 (i.e. Act 12 of 1946), and amend sub-s. (1) of S. 4 of the 'principal ordinance' by reducing the number of members from three to two. This, however, leaves Act 7 of 1947, outstanding and unaffected. The notification which constituted the three members (Messrs. Bharucha, Joshi and Basu) as a tribunal was made under ordinance 9 of 1947 and neither that ordinance nor Act 7 of 1947 which replaced it have been affected by ordinance I of 1950 or Act 9 of 1950. Coming now to the notification No. 6822-J, dated 20-12-49 accepting the resignation of Mr. N. C. Basu, it states as follows:

"The Governor has been pleased to accept with effect from 16-12-1949, the resignation tendered by Sri Narayan Chandra Basu from membership of the Special Tribunal constituted by the Government of India, War Department Notification No. 1322 dated 23-9 1943, as subsequently amended."

(79) Therefore the following perplexing questions arise: (1) As long as Act 7 of 1947 is in operation, is it enough to amend the ordinance 29 of 1943 as modified by Act 12 of 1946? Since Act 7 of 1947 remains unaffected, we arrive at the curious result that a special tribunal must consist of three members under Act 7 of 1947 and two members under Ordinance I of 1950 or Act 9 of 1950. (2) The Special tribunal consisting of Messrs. Bharucha, Joshi and Basu was constituted by notification No. 6269-J dated 18-9-1947, under West Bengal Ordinance No. 9 of 1947 which would be deemed to be a notification also under Act 7 of 1947. Under Bengal Act 12 of 1946 S. 3(3), all notifications under Ordinance 29 of 1943 would continue in force until superseded or amended by the Provincial Government under that Act. The notification No. 6822-J, dated 20-12-1949 accepts resignation of Mr. N. C. Basu from the Special Tribunal constituted by the Government of India notification No. 1322 dated 23-9-1943 as subsequently amended. Mr. Basu became a member in 1946 (we have not got the specific notification appointing him in 1946, before us). But can it be said that the notification No. 6269-J under West Bengal Ordinance. 9 of 1947, (continued by West Bengal Act 7 of 1947) is an "amendment" of the original notification No. 1322, dated 23-9-1943 under the central ordinance; as that ordinance is still in force? If not, his resignation is not an effective one, or it may be an effective one so far as the original notification No. 1322 is concerned but not so far as notification No. 6269 J is concerned. (3) What is the effect of the principal ordinance being still alive? That Ordinance can only be amended by another Central Ordinance or a Central Act & it still contains the provision that there shall be three members in a Special Tribunal.

(80) Having pointed out these difficulties, I shall now deal with point 1(b), upon the footing that Mr. N. C. Basu validly retired with effect from 20-12-1949 and that the only provision applicable as to the number of persons constituting a special tribunal is S. 4 (1) of the 'principal ordinance' as defined by ordinance 1 of 1950 (and continued by Act 9 of 1950). It is of course admitted that no appointment of a Special Tribunal is valid without a sufficient notification under S. 3. The tribunal of three members was constituted by notification dated 18-11-1947. On the date of the retirement of Mr. N. C. Basu (20-12-1949), the special tribunal as then constituted was reduced to two members and ceased to be a special tribunal at all. because under Cl. 4(1) of the 'principal ordinance' it is laid down that a special tribunal constituted under the ordinance "Shall consist of three members." On 11-1-1950, the ordinance I of 1950 came into operation which states that as from the commencement of the ordinance a special tribunal shall consist of two members. But S. 3 is still there and such a special tribunal would have to be constituted by a notification. No such special tribunal existed at the date of the commencement of the ordinance and none has ever been constituted and there can, in my opinion, be no question that Messrs. Bharucha and Joshi had no right whatsoever to proceed to hear arguments and pronounce judgment, since they had become 'functus officio' several weeks before the Ordinance came into operation.

In fact the point is so unarguable that Mr. Mukherjee appearing on behalf of the prosecution, fairly conceded that he had no answer for it. The confusion is entirely due to the fact that it was taken for granted that the dead and defunct tribunal could be revived and resuscitated by the simple expedience of reducing the required number from three to two. But before an enactment can revive the dead it will at least have to say, "Lazarus arise," and those words are wanting here. There is no notification appointing Messrs. Bharucha and Joshi as a Special tribunal entitled to try the cases. It is not for us to say whether under the circumstances a further notification will be enough. The difficulties are writ large, and have been indicated above. If authority is at all required, reference may be made to the case of — 'United Commercial Bank Ltd. v. Their Workmen', AIR 1951 S C 230.

That case was under the Industrial Disputes Act, under which was constituted an Industrial tribunal (Bank disputes). By a notification dated 13-6-1949 the Central Government constituted an Industrial tribunal in bank disputes consisting of Mr. Sen Chairman, Mr. Varma & Mr. Mazumdar. On 24-8-1949, a second notification was issued appointing Mr. Chandrasekhar Aiyer in the place of Mr. Verma whose services had ceased to be available on and after 23-11-1949. The services of Mr. Aiyer were subsequently lent to the ministry of external affairs as a member of the Indo-Pakistan boundary disputes Tribunal. Although the Government had taken the view that there was a vacancy, it did not notify the same. Mr.

Aiyer rejoined the tribunal on 20-2-1950, but in the meantime the tribunal with its two remaining members had gone on hearing disputes and several awards had also been made.

(81) It was held by the Supreme Court that when the services of a member ceased to be available, the rest by themselves had no right to act. As Kania C. J. put it

".....A tribunal of three consisting of Mr. Sen, Mr. Mazumdar and Mr. Chandrasekhara Aiyar is a different tribunal from one consisting of two viz. of Mr. Sen and Mr. Mazumdar only."

(82) The learned Judges were divided on the point as to whether a fresh notification was necessary when Mr. Aiyar rejoined, but that difficulty does not arise here as Mr. N. C. Basu had resigned and his resignation was accepted by a notification. In the Industrial Disputes Act, there was a provision as to vacancy but there is none in this case, which makes it all the more worse for the prosecution. Here we have a three-member tribunal constituted by a notification. If there is to be a two-member tribunal then the same must be constituted by an express notification. As soon as one of the three members ceased to be a member the original tribunal ceased to exist. The necessity of such a notification has been emphasized by the learned Chief Justice in these words:

"It is, therefore, obligatory on the appropriate Government to notify the composition of the tribunal and also the names of the persons constituting the same. In respect of a tribunal which is entrusted with the work of adjudicating upon disputes between employers and employees which have not been settled otherwise, this provision is absolutely essential. It cannot be left in doubt to the employers or the employees as to who are the persons authorised to adjudicate upon their disputes. This is also in accordance with notifications of appointments of public servants discharging judicial or quasi-judicial functions. The important thing, therefore, to note is that the number forming the tribunal and the names of the members have both to be notified in the official Gazette for the proper and valid constitution of the tribunal."

(83) It follows, therefore, that the three-member tribunal which ceased to exist is quite different from the two-member tribunal which has yet to be constituted. In my opinion, therefore, the preliminary point 1(b) succeeds.

(84) The second preliminary point is also, in my opinion, a sound one. Article 14 of the Constitution runs as follows:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 13(1) is in the following terms:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part shall to the extent of such inconsistency be void."

The way this point is formulated is this. It is said that the 'principal ordinance' as well as Act 7 of 1947 (which stands independent of the principal ordinance) both discriminate as to the person of the accused and the law and procedure adopted to try him. Thus the accused are not getting equality or equal protection before the law. The following points, therefore, arise for determination: (1) What is the meaning of "equality before the law or the equal protection of laws" as used in Art. 14 of the Constitution? (2) How have the accused being discriminated against? (3) The trial having been completed, and only the arguments and delivery of judgment having taken place after the Constitution came into operation, what law has been affected and how it reacts on the verdict of the tribunal?

(85) As regards the first point, reference may be made to the Full Bench decision of — 'Anwar Ali v. State of West Bengal', A. I. R. 1952 Cal 150 (FB), a decision, which has since been upheld by the Supreme Court in — 'State of Bengal v. Anwar Ali', (1952) SCR 284. That was a case under the West Bengal Special Courts Act, 1950, and it was held that S. 5 (1) of the Act was 'ultra vires' the Constitution as it offended against Art. 14. Das Gupta J. held that the entire Act was 'ultra vires', a view subsequently upheld by the Supreme Court. Section 5 (1) of the impugned Act is in the following terms:

"1. A special court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing direct."

It was held that in so far as this section empowered the Government to try any case, it offended against Art. 14, but not in so far as it refers to "offences" or "classes of offences" or "classes of cases".

(86) "Equality before the law" is an expression taken from the English Common Law whereas the words "equal protection of the laws" has been taken from the American Constitution. According to the Supreme Court, — 'Charanjit Lal v. Union of India', (1950) SCR 869, they mean very much the same thing under our Constitution. According to Dicey, (Law of Constitution, 1939, p. 47) equality before the law does not mean an absolute equality of all men which is a physical impossibility but the denial of any special privilege by reason of birth, creed or like in favour of any individual and also the equal subjection of all individual and classes to the ordinary law of the land administered by the ordinary law courts. In the words of Jennings (Law of Constitution, 3rd Edn., p. 49) it means:

"That among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and to be prosecuted for the same kind of action should be the same kind for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence."

(87) Professor Willis dealing with the equal protection clause in the American Constitution States as follows:

"The Guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privilege conferred and in the liabilities imposed. The inhibition of the amendment... was designed to prevent any person or class

of persons from being singled out as a special subject for discriminating and hostile legislation....."

(88) "It must be admitted" said Mukherji J. in — 'Charanjit Lal v. Union of India', (1950) SCR 869:

"that the guarantee against the denial of equal protection of laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. As has been said by the Supreme Court of America, "Equal protection of laws is a pledge of the protection of equal law" See — 'Yick Wo v. Hopkins', (1885) 118 U S 356 at p. 369 and this means "Subjection to equal laws applying alike to all in the same situation" vide — 'Southern Railway Co. v. Greene', (1909) 216 U S 400. In other words there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same.....There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character (See Willis Constitutional Law, 580). It would be bad law "if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them which is not imposed upon others guilty of like delinquency" See — 'Gulf C & S.F.R. & Co. v. Ellis', (1896) 163 U S 150 at p. 159. The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws and if the law deals alike with all of a certain class it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made and classification made without any substantial basis should be regarded as invalid (See — 'Southern Railway Co. v. Greene', (1896) 216 U S 400 at p. 412)."

(89) Applying this test of classification it was held in — 'Anwar Ali's case', 1952 S C R 284 (ibid) that the power of the Government to allot 'any' case to the tribunal could not pass the test and was bad. The impugned Act in that case was also held to be bad because it curtailed the rights of the accused persons in several important respects, e.g., it abridged the right of appeal and revision and in the case of a right of trial by jury, deprived them of such trial.

(90) Applying these principles to the present case what do we find. In the original S. 5, the accused persons mentioned in the first schedule were picked out arbitrarily and directed to be tried by the special tribunal under Ordinance 29 of 1943 which contained provisions similar to the West Bengal Special Courts Act, 1950. By Ordinance 12 of 1945, S. 5 (1) was introduced which made the matter much worse. The Central Government could by notification allot 'any' case it liked (which obviously is not a reasonable classification) to any special tribunal. Thus the position was exactly that which prevailed in — 'Anwar Ali's case', 1952 S C R 284.

Section 5(1) was, however, omitted by Bengal Act 12 of 1946 but in West Bengal Act 7 of 1947 we find S. 4 which is in similar terms and this Act is still in operation. Besides this, both under the 'principal ordinance' (now adapted by Act 9 of 1950) and Act 7 of 1947. various other disabilities have been imposed. e.g., the right of trial by Jury has been negatived. The tribunal can take cognizance of offences without the accused being committed for trial although it acts like a Court of Session but follows the procedure of warrant cases. The authority of any Court to transfer has been taken away. What, however, strikes me as most prejudicial is the provision that all the members need not be present during the examination of witnesses. The result is that a member who never saw the witnesses could be called upon to appraise the evidence or a member might listen to the examination of a witness without hearing the cross-examination, with the result that he might form a view which cannot be dispelled. This is not only prejudicial to the accused but offends against the basic principles of a fair judicial proceeding. Then we have the special rules of evidence, but since these are now applicable to all trials, they need not be considered. There also remain the special provisions for punishment. Can there be any doubt that under this special legislation a person may be arbitrarily singled out for a kind of punishment which is not meted by the ordinary Courts to persons committing similar offences? Equal protection means

"that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences," 'Barbier v. Cannolly', (1885) 113 U S 27.

(91) There can be no doubt that the provisions of the 'principal ordinance' (now adapted by Act 9 of 1950) as well as of Act 7 of 1947 offend against Art. 14 and are void under Art. 13(1). There is, however, a further difficulty. The principal ordinance and the Act abovementioned came into operation before the Constitution came into being and the entire trial took place before 26-1-1950 save that a part of the argument was heard after that date and of course the judgment was delivered afterwards.

The case cited before us on this point is — 'Keshava Madhava Menon v. State of Bombay' (1951) S C R 228. There, an offence was committed which ceased to be an offence after the Constitution because the law concerned was inconsistent with a fundamental right. The trial was being held by the ordinary Courts and the question was could the trial proceed. It was held that under Art. 13 (1), only that much of a law is void which infringes a provision of the Constitution. It was pointed out that the offence had already been committed and there was no fundamental right which prohibited a proceeding to punish an offence already committed. But this case is clearly distinguishable. In the present case, the offence is still an offence but the tribunal which continues to try the case and the law and procedure it applies after the Constitution came into being are repugnant to Art. 14, inasmuch as they are the result of discrimination.

The question may be looked at from another angle. After the Constitution came into being. a citizen is entitled to say that he must have the equal protection of the laws and should not be exposed to the peril of trial or punishment which citizens similarly placed would not

have to be subjected. The very trial itself and the persons trying the cases are the outcome of something which discriminates, and, therefore, cause infringement of the fundamental right. Can there be any doubt that even after the Constitution came into being these accused continue to be singled out for a trial and punishment which would not normally be meted out to like accused, under like circumstances. Take the case of another citizen who has committed a similar offence shortly prior to 26-1-1950 and a complaint has been preferred against him after that date. Would he, as a matter of course, be tried by a special tribunal? Could he be absolutely denied the right to be tried by a Jury (If he was otherwise entitled to it)? Could he be punished more than what is laid down in the Indian Penal Code? Since the answers are clearly in the negative, it must follow that every moment that the trial of the accused in this case proceeded after the Constitution came into being, there was clear discrimination and a clear breach of a fundamental right. And apart from other things, the special tribunal, in awarding sentence proceeded in terms of the 'principal ordinance' and Act 7 of 1947, both of which offended against Art. 14 and are void. It follows also that the special tribunal which owes its existence to those laws can no longer act and their judgment cannot be supported. The second preliminary point also succeeds. I, therefore, agree with the order made by my Lord.

A/V.B.B. Retrial ordered.

A.I.R. 1953 CALCUTTA 282 (Vol. 40, C.N. 97)

CHAKRAVARTTI C. J. AND
S. R. DAS GUPTA J.

Birendra Nath Banerjee and others, Plaintiffs-Appellants v. Shibaram Aditya and others, Defendants-Respondents.

Supreme Court Appeal No. 15 of 1952, D/-19-8-1952.

(a) Constitution of India, Art. 133(b) — Civil P. C., S. 110 — Substantial question of law.

S died leaving him surviving widow R, daughter A and plaintiffs who were sons of A — A propounded a will by S of his entire estate in her favour and obtained probate. But in appeal the will was held as forged. While second appeal in Privy Council was pending R and A executed two settlement deeds. By one R relinquished her claim in lieu of monthly maintenance. By another A got absolute title. Question whether properties could be dealt with in that manner by A and R with effect of arrangement being binding upon plaintiffs as reversioners is a substantial question of law.

(Para 2)

Anno: Civil P. C., S. 110 N. 17; Const. of India, Art. 133 N. 6.

(b) Constitution of India, Art. 133(b) — Civil P.C., S. 110 — Substantial question of law.

A mortgage was executed to pay off earlier mortgage. Earlier mortgage was not for legal necessity. Question whether later mortgage could be regarded as justified by legal necessity is a substantial question of law.

(Para 3)

Anno: Civil P.C., S. 110 N. 17; Const. of India, Art. 133 N. 6.

(c) High Court Rules and Orders (Cal.) (App. Side) — Chap. 6 R. 33 as amended in 1948 — "Ordinarily" meaning of.

The word "ordinarily" does not leave it to the discretion of the Court to fix the amount of security at Rs. 4000/- or to vary it at a higher or lower sum. The word 'ordinarily' was used in the main rule in order to mark off cases where there was a single appeal and the first proviso was added to deal with "extraordinary cases" e.g. cases where there were more than one appeal grouped together as analogous appeals. In the first case i.e. in the main rule Rs. 4000/- still remains the amount of the security. In the record case, i.e. in the proviso the court is given power either to reduce the amount of the security in the case of all appeals other than the first one, or to fix a consolidated security of Rs. 4000/-. (Paras 4, 5)

(d) High Court Rules and Orders (Cal.) (App. Side) Chap. 6 R. 33 — Necessity for further amendment.

The effect of those provisions of the C.P. Code which enable a party to combine several claims in one suit is to relieve him to a very substantial extent of the financial burden which he would have to bear if he brought separate suits on each cause of action. If he is getting the benefit of the joinder of the claims at the stage of the Supreme Court Appeal, such benefit is not inconsistent with what he got even at the stage of bringing the suit. Therefore further amendment in the Rule is not essential. (Para 6)

Bireswar Chatterjee with Gouri Prasad Mukherji, for Appellants; Atul Chandra Gupta, Surendra Nath Basu (Sr.), Nalini Ranjan Bhattacharyya, Hemanta Krishna Mittra and Jitendra Nath Ghosh, for Respondents.

CHAKRAVARTTI C. J.: This is an application for leave to appeal to the Supreme Court by the plaintiffs in a suit which they have lost both in the trial Court and in first appeal. The judgment is thus one of affirmance. There is no question that the value of the subject-matter in dispute before the Court of first instance and in dispute in the proposed appeal exceeds Rs. 20,000/-. The only question therefore is whether the proposed appeal involves any substantial question of law.

(2) On that point, fortunately, even the respondents agree that the points involved in the appeal are all points of law and at least two of them are certainly substantial. It appears that the properties in question belonged originally to one Surendra Nath Mookerjee who died, leaving him surviving a widow named Rakhal Dasi Debi and a daughter named Sm. Avistakarini Debi & five grandsons, who are sons of Avistakarini & who are the plaintiffs in the suit out of which the present appeal arises. Avistakarini propounded a will, said to have been left by her father, Surendra Nath Mokerjee, by which the entire estate was left to her. Probate in respect of the will was granted by the Court of first instance, but on appeal the High Court held the will to be a piece of forgery. Thereafter, an appeal was preferred to the Privy Council by Avistakarini and while that appeal was pending, the parties settled the dispute between themselves by means of two documents. By one of those documents Rakhal Dasi relinquished her claim to the properties on receipt of a monthly maintenance and

by another Avistakarini seems to have got an absolute title to the properties concerned. The principal question involved in the appeal is whether the properties could be dealt with in that manner by Avistakarini and Rakhal Desi with the effect of the arrangement being binding upon the plaintiffs, as reversioners. This undoubtedly is a substantial question of law and the respondents agree that it is.

(3) There is a further question, also of great importance, which affects only respondents Nos. 1, 1(a), and 1(b). They are mortgagees and it appears that the mortgage loan was taken from them to pay off an earlier mortgage. That earlier mortgage had not been contracted for any legal necessity and the question was whether the later mortgage could be regarded as one justified by legal necessity, even though the earlier mortgage could not be said to be so justified. The trial Court held that since the first mortgage could not be defended on the ground of legal necessity, the second mortgage failed with it. But the High Court held that what was required was pressure on the estate and it was immaterial what caused the pressure, so long as the mortgagees of the second mortgage were not in any way responsible for or parties to the first mortgage. It is admitted that this question also is a substantial question of law. In our opinion the case satisfies the requirements of Art. 133, cls. (a) and (b) of the Constitution as also the same clauses of S. 110, Civil P. C., and accordingly the petitioners are entitled to the certificate they ask for.

(4) On behalf of some of the respondents it was contended by Mr. Gupta that in view of the peculiar facts of the case, the appellants should be directed to furnish security of an amount higher than Rs. 4,000/- which is ordinarily to be the amount of the security as provided for by R. 33 of Ch. VI of the Appellate Side Rules. Mr. Gupta pointed out that the suit, out of which the appeal to the Supreme Court has arisen, was really a combination of five suits in respect of five transactions and although the provisions of the Code enabled the plaintiffs to combine all their claims in a single suit, in fact there were several respondents with separate interests, and to limit the security to a sum of Rs. 4,000/- would be practically providing no security for the respondents at all. Mr. Gupta referred to the language of R. 33 of Ch. VI of the Appellate Side Rules, as it stands now after the amendment of 1948 and contended that the amended rule authorised the Court to direct the appellant to furnish security for amounts higher than Rs. 4,000/-. Reference was made to the adverb "ordinarily", which was introduced in the rule by the amendment of 1948 and it was contended that the effect of that adverb was to make the amount of the security elastic and to leave it to the discretion of the Court to fix the security at that figure or at a higher or a lower sum as it might deem fit to determine. Mr. Gupta endeavoured to support his contention by reference to the two provisos to R. 33.

(5) As the true intention of the rule is not too clear, we took the liberty of making some investigation as to the origin of the amendment, but it will not be proper to refer to the history of the rule for the purpose of interpreting the true meaning of the words used. The contention of Mr. Gupta is that the words "shall ordinarily consist of cash or Government securities to the value of Rs. 4,000/- in each appeal" can only mean that Rs. 4,000/- is no longer to be the one fixed amount prescribed by the rule, but the amount may be varied according to the circumstances of each case. The difficulty in the way of accepting that construction, in my view, is caused by the very first proviso which follows. That proviso, in its first part, states that in analogous cases the Court may reduce such security for each successive appeal after the first one to any smaller amount, or may direct that a consolidated security of Rs. 4,000/- be furnished for the entire group of analogous appeals. Even if Mr. Gupta's construction of the main rule be the right one, there may be some room for the second part of the first proviso; but I do not see why it was necessary to provide specifically that the Court might reduce the amount of the security for each successive appeal after the first, if the word "ordinarily", occurring in the main rule itself, authorised the Court to direct a smaller sum than Rs. 4,000/- to be offered. I do not say that the construction suggested by Mr. Gupta of the main rule is not a plausible one, but if a provision is going to impose a new and a higher burden on the appellant, I should certainly insist on clearer words being used. The language in which the amended rule has been expressed is certainly not the clearest that it could be, but it appears to me that the word "ordinarily" was used in the main rule in order to mark off cases where there was a single appeal & the first proviso was added to deal with what I might call "extraordinary cases", namely, cases where there were more than one appeal, grouped together as analogous appeals. In the first case, Rs. 4,000/- still remains the amount of the security. In the second case, the Court is given power either to reduce the amount of the security in the case of all appeals other than the first one, or to fix a consolidated security of Rs. 4,000/-. While I am not accepting Mr. Gupta's construction I cannot say that the construction which I am suggesting is very satisfactory, because ordinarily I should not expect a proviso to be used for the purpose which my construction assigns to the proviso. But if a provision which is imposing a financial burden on the suitor is expressed in obscure language, the suitor must have the benefit of the obscurity. For those reasons, I am of opinion that R. 33 of Ch. VI of the Appellate Side Rules, as it now stands, does not authorise the Court to fix a higher amount of security because of the special circumstances of a case.

(6) Mr. Gupta contended that if such were the effect of the rule even after the amendment, some further amendment was clearly called for and necessity of such amendment was powerfully illustrated by the facts of the present case. I am disposed to agree with Mr. Gupta that some further amendment of the rule might usefully be made. But at the same time we need not forget that the effect of those provisions of the Code which enable a party to combine several claims in one suit is to relieve him to a very substantial extent of the financial burden which he would have to bear if he brought separate suits on each cause of action. If he is getting the benefit of the joinder of the claims at the stage of the Supreme Court Appeal, such benefit is not inconsistent with what he got even at the stage of bringing the suit. I do not therefore feel prepared to accede to the argument of Mr. Gupta.

(7) In the result, the certificate asked for is granted. Let a certificate issue that as regards valuation and the existence of a substantial question of law, the case satisfies the requirements of Art. 133(1), cls. (a) and (b) of the Constitu-

tion of India and that accordingly the petitioners are entitled to prefer an appeal to the Supreme Court. The costs will be costs in the appeal to the Supreme Court - the hearing-fee being assessed at three gold mohurs.

(8) S. R. DAS GUPTA J.: I agree.

A/H.G.P. Application allowed.

A.I.R. 1953 CALCUTTA 284 (Vol. 40, C.N. 98)

ROXBURGH J.

Mrs. R. Cohen, Petitioner v. S. J. Ejekiel and another, Opposite Party.

Civil Rules Nos. 1266, 1121 and 1122 of 1951, D/- 28-6-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 and Sch. A — Tenant spending large sums for making alterations in premises — Subsequent sub-letting by him — Fixation of standard rent — Basis of.

Where a tenant who has taken premises on a long lease spends large sums of money for making additions and alterations to the building so that the altered premises can be treated as entirely new premises, then if the tenant in turn sublets them to others he becomes their landlord for what are to be taken to be entirely new premises. This principle is of course subject to the proviso that the additions and alterations are not made for the purpose of avoidance of the provisions of the Rent Act. In such a case the standard rent has to be fixed on the basis that the sub-tenants are tenants following the provisions of S. 9 and the schedule to the Act. (Paras 10, 11)

Hirendra Chandra Ghose, for Petitioner; Kamal Krishna Palit, for Opposite Party (in No. 1266).

REFERENCES: Courtwise/Chronological/ Paras

('27) AIR 1927 Bom 648: (105 Ind Cas 764) 10
('29) AIR 1929 Bom 220: (53 Bom 432) 10
(1922) 1 KB 222: (91 LJKB 198) 10
(1922) 1 KB 393: (91 LJKB 220) 10

ORDER: These three Rules are against as many orders passed in appeal by the Court of Small Causes, Calcutta, against orders of the Rent Controller fixing the standard rent of the facts in No. 3, Sudder Street, Calcutta.

(2) The rents in each case have been fixed on the basis that the opposite parties are sub-tenants and that the petitioner Mrs. R. Cohen is a tenant. Accordingly, applying para. 4 of Sch. A of the West Bengal Premises Rent Control Act 17 of 1950, the rents have been fixed pro rata at an increase of 6¼ per cent above the rents of Rs. 225/- payable by Mr. Cohen for the whole house. The rents payable in respect of the three flats on December 1,1941, were respectively Rs. 65/- Rs. 65/-, and Rs. 30/- and these have now been fixed at Rs. 25-15-9, Rs. 54-13-0 and Rs. 9-3-0.

(3) The petitioner Mrs. Cohen contends that she is an assignee of the leasehold interest of the whole premises No. 3, Sudder Street, having paid Rs. 15,00/: for that leasehold interest in August, 1940. She also says that she has spent some Rs. 8,000/- for improvement and additions and alterations.

(4) The original lease, it is said, was taken by one Mr. Solomon and his wife in 1928, the premises being an old delapidated one and partly two storied. The lease was for 30 years, the rent benig fixed at Rs. 200/- for the first 10 years, Rs. 210/- for the next 10 years and Rs. 225/- for the last 10 years. Under the terms of the lease, Mr. Soloman spent large sums of money in reconstruction, building and re-building of the premises, making new rooms and a new second storey, it being stipulated that on the expiry of the lease the lessee would leave the new building and structures to the owner of the premises. In accordance with this arrangement, the rent fixed was at a very low rate.

(5) In 1935 the lease was conveyed by the widow of Mr. Solomon to one Mr. Chotirmull for Rs. 18,000/- and in August 1940 Mrs. Cohen purchased the interest for Rs. 15,000/-.

(6) Mrs. Cohen has to pay for the upkeep and maintenance of the essential services of the premises including the electric charge for the pump & the lights in the stairs, salaries of sweepers and darwan, amounting to Rs. 70/- a month and under the terms of the lease she has to keep the house in good repair which costs some Rs. 600/- per annum.

(7) The lease, of which Mrs. Cohen is the assignee, having been entered into in 1928, is such that under S. 3 of the Act of 1950 nothing in the Act is to be deemed to affect the terms as to rent of the lease. It follows under the provisions of para. 4 of Sch. A that, if Mrs. Cohen is to be taken to be the tenant and the opposite parties to be sub-tenants, this is a case "where because of the provisions of S. 3 the tenant has no standard rent under this Act." Accordingly, the excess of 6¼ per cent provided therein, is to be with reference to the rent of Rs 225/- payable by Mrs. Cohen as tenant. Hence the extraordinary result is that although the premises in these cases were all let at rates stated above on 1-12-1941, nevertheless under the provisions of the Act the standard rent in two cases has been reduced almost to a third. In all cases of tenants the rent on December 1941 is a minimum: in no case is provision made for reducing rents below the rate then payable.

(8) In my opinion, it is not necessary under the terms of the Act to hold that such a grossly anomalous position must result. I assume for the sake of argument at this stage that the statements of the petitioner are correct, but I propose that the cases be sent back to the Rent Controller for investigating those statements and the facts generally as necessary in accordance with my judgment. It seems to me that the resolution of the apparent anomaly is to be found in the fact that in a case of this sort it may well be that the premises, which are the subject matter of the lease from the landlord, are not the same premises as are the subject matter of the lease by the original tenant to the supposed sub-tenant; in other words, that there have been such changes made in the original premises leased, that the tenant (in these cases Mr. Solomon, or his successors) has or have become in turn the landlords in respect of the premises, the rent of which is now being investigated. It will be seen from the definition of premises that this, at any rate, includes any fittings fixed by the landlord for the use of the tenant. If Mr. Solomon, or his successors put in fittings in the premises which were not in the premises leased to him, that would be one ground for saying that the premises leased by him are different premises.

(9) In this connection I would also refer to the provisions of Ss. 34 and 38, which impose penalties on landlords for discontinuing essential supplies or services comprised in the tenancy, or also for making repairs which the landlord is bound to

make to the premises. In the present cases, I assume here that, under the lease Mrs. Cohen's landlord, in respect of any supplies or services in her own tenancy, is not bound to make any repairs. Therefore, if the present persons who have been found to be sub-tenants by the appellate court and the Controller wished to take action under those sections, they could not take action in any way against the original landlord, and they could not take action against Mrs. Cohen unless she is the landlord; but if they are sub-tenants, she is not "landlord", but a tenant. The sub-tenants would thus have no remedy.

(10) That alterations to premises may be such that the altered premises are to be treated as entirely new premises has been held in some cases, though admittedly all the cases cited relate to alterations by landlords, the question usually being whether the premises let on some material date were the same as the premises let at an earlier date at a lower rent. I may refer to the decision in the case of — 'Phillips v. Barnett', (1922) 1 K.B. 222, and also to the decision in the case of — 'Sinclair v. Powell', (1922) 1 K.B. 393. and to the decision in two cases of the Bombay High Court in — 'Gopalji Umersey v. Devji Naranji', AIR 1929 Bom 220, and — 'Ibrahim Fazalbhai v. v. Jan Mahomed', AIR 1927 Bom 648. If premises can be altered so that it can be said that the altered premises are new premises, where the alterations are by the landlord, I cannot say why premises taken by a tenant on a long lease, on which the tenant may have spent large sums of money, may not be held also to have been so altered that when that "tenant" in turn lets them to others, he becomes their landlord for what are to be taken to be entirely new premises. Of course, the principle is liable to abuse. It is liable to be sought to be used for avoiding the provisions of the Rent Act. But each case is to be decided on the facts in each case. It is to be decided whether the alterations or additions are merely for purposes of such avoidance, or whether they are such that they clearly justify the view that the altered premises are entirely new premises, such that the tenant of the unaltered premises becomes the landlord in respect of the altered premises within the meaning of the provisions of the Act of 1950.

(11) These cases must go back for investigation of the facts by the Rent Controller in the light of the principle indicated above. If he finds that, on the facts, Mrs. Cohen is to be held as to be the landlord in respect of the premises as let to the opposite parties, he will then proceed to fix the standard rent in each case on the basis that the opposite parties are tenants following the provisions of S. 9 and the Schedule to the Act of 1950.

(12) These Rules are accordingly made absolute. The orders of the lower appellate court are set aside and the cases are remanded to the Rent Controller for disposal as directed.

(13) I make no order as to costs in the Rules.

B/K.S. Rules made absolute.

A.I.R. 1953 CALCUTTA 285 (Vol. 40, C.N. 99)

R. P. MOOKERJEE AND K. C. CHUNDER JJ.

Brojobala Dassi, Defendant-Appellant v. Shebaits of Sri Sri Saradiya Durgamata Thakurani, Plaintiffs-Respondents.

A. F. O. D. No. 220 of 1945, D/- 6-9-1951.

(a) Hindu Law — Religious Endowment — Dedication — Creation of debuttar in favour of deity by valid and bona fide deed of Arpannama — Subsequent deed of cancellation can have no legal effect — Subsequent lapses on the part of the dedicator would not convert debuttar into a revocable one — Title created in favour of deity cannot be affected by acts of shebait. (Paras 6, 16)

(b) Hindu Law — Religious Endowment — Dedication — There must be divesting of property.

The mere execution of a deed although it may purport on the face of it to dedicate property to an idol is not enough to constitute a valid endowment. The validity of the deed would depend on proof that the executant had divested himself of the property dedicated. Whether he had done so or not is to be determined by the acts and conduct of the parties. Application of the entire income where an absolute debuttar is being created is one of the tests and not the sole criterion. (Para 14)

(c) Hindu law — Religious Endowment — Dedication in favour of deities which are consecrated temporarily once a year for worship and then immersed in water — Endowment is legal.

Endowments created for the performance of annual pujas of deities which are consecrated temporarily once a year for the worship and then consigned to the water or for casual performance of Doljatra, Rasajatra etc. are countenanced by the Hindu law givers. Such endowments are valid and property dedicated for such worship is debuttar property. Case law reviewed. (Para 28)

Atul Chandra Gupta and Panchanon Pal, for Appellant; Bireswar Chatterjee and Gouri Prosad Mukherjee, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('79) 6 Ind App 182: 5 Cal 438 PC 26
('25) 52 Ind App 245: (AIR 1925 PC 139) 21
('85) 9 Bom 491 26
('87) 12 Bom 247 26
(1829) 1 Knapp 245 26
('82) 8 Cal 788: (11 Cal LR 370) 26
('86) 14 Cal 222 26
('97) 25 Cal 112 26
('05) 1 Cal LJ 605: (9 Cal WN 528) 26
('06) 3 Cal LJ 606 26
('10) 37 Cal 128: (3 Ind Cas 642 FB) 21, 24, 27
('16) 20 Cal WN 901: (AIR 1917 Cal 292) 24
('22) 36 Cal LJ 478: (AIR 1923 Cal 60) 21
('42) 46 Cal WN 477: (AIR 1942 Cal 386) 23, 25

R. P. MOOKERJEE J.: Debendra Nath Mukherjee, the predecessor of the plaintiffs respondents who have sued as representing Sri Sri Saradiya Durgamata Thakurani, was the owner of a number of immovable properties including Pargana Kismet Maharul within Pargana Kulbaria Touzi No. 371 of the Murshidabad Collectorate and a two anna share of Dihi Hilara, Touzi No. 486 of the same Collectorate. Debendra had been performing the Saradiya Durga Puja from 1921. In September 1929 he executed an Arpannama (Ex. 2) in favour of Sri Sri Durgamata Thakurani Jew for the due performance of the annual puja of the said

Goddess. An image of the Goddess Durga would have to be made ready according to the shastras, every year during the autumn season from out of the income of the properties endowed, the deity is to be worshipped either at the dwelling house of the settlor at Gorabazar in Murshidabad or at Benares. Directions were also given as to how the income accruing from the said two properties was to be disbursed on the occasion of the annual puja. On 5-1-1932 Debendra executed two deeds. In the first deed (Ex. E) described as a deed of cancellation of the Arpannama (Ex. 2) referred to above he stated inter alia that the latter deed was a benami document and that the income from the property included within the Arpannama had never been spent specifically for the puja. It was further stated therein that he had been financially embarrassed and had executed the Arpannama to avoid any embarrassment that his creditors create in respect of the said properties. As he intended to sell the property to pay up his debts he was declaring by this later deed (Ex. E) that the earlier deed of settlement was a benami one and had not been acted upon. He further declared that he had every right to transfer the properties which were the subject-matter of the settlement and that by the deed of cancellation he was revoking the so-called deed of settlement.

(2) Simultaneously on the same date Debendra executed a conveyance (Ex. D) in favour of Brajobala Dassi, who is the defendant in this suit and the appellant in this Court, conveying to her Kismet Maharul being one of the two items of property included in the Arpannama (Ex. 2). Debendra died six years after in December, 1938. The suit, out of which the present appeal arises, was filed by the widow and the son of Debendra, describing themselves as Shebaits of Sri Sri Saradiya Durgamata Thakurani for a declaration that the properties which had been included in the Arpannama (Ex. 2) still belonged to the deity and that in respect of Kismet Maharul, purported to have been sold to the defendant Brajobala Dassi, the latter had got no title to the same. The defendant was further to be ejected from Kismet Maharul. Some other reliefs also were prayed for.

(3) The defence was that Debendra had not, at the time when the Arpannama was purported to have been executed, any intention to create a debuttar. The transaction was really one to defraud the creditors of Debendra, and so an attempt was made to put certain properties of his beyond the reach of his creditors. The alleged puja of the Goddess Durga had not been regularly performed and even after the execution of the Arpannama the property had not been treated by the settlor as belonging to the Deity. The Arpannama was a mere paper transaction and the right, title and interest of Debendra had not been affected by that document. The deed of cancellation was really the clearest proof of the intention of Debendra.

(4) The learned Subordinate Judge decreed the plaintiff's suit holding inter alia that Debendra had, from the year 1921, when the annual Durga Puja celebration was started by him, the intention to make necessary provision for the proper performance of the Puja not only during the life time but for the continuance of the same by his successors after his death. Debendra was in possession of a large estate and for the total amount of debt which he owed at the time when the Arpannama was executed there was no evidence of any pressure at that stage. His only creditor was the Maharaja of Cossimbazar. There was no motive for creating any benami document and the Arpannama was a valid and binding one. Neither the alleged deed of cancellation nor the subsequent financial embarrassment, if any, of Debendra could have the legal effect of modifying or affecting the Arpannama previously executed. The defendant purchaser was at the time of her purchase fully aware that the properties were debuttar ones. The suit was accordingly decreed, the claim for mesne profits to be adjudged in separate proceedings.

(5) The first question for consideration is whether Debendra had dedicated the property in suit in favour of Sri Sri Saradiya Durgamata Thakurani by the Arpannama executed on 12-9-1929. Did he divest himself of the ownership of the property, or in other words, was the Arpannama a real valid and bona fide document?

(6) It is unquestionable that if the Arpannama was a valid and bona fide document creating a Debuttar in favour of the Deity, the subsequent and so-called deed of cancellation (Ex. E) dated 5-1-1932 can have no legal effect. Mr. Gupta appearing on behalf of the defendant-appellant did not contest this proposition but contended that this Deed of Cancellation was only a piece of evidence to show what the real intention of Debendra was at the time when the Arpannama had been executed. To appreciate the circumstance under which the Arpannama had been executed by Debendra, reference may be made to the substance of the evidence as adduced by the parties.

(7-12) (His Lordship reviewed the evidence and continued:)

(13) Reference, however, has been made to certain circumstances immediately following the execution of the Arpannama and between the period of the creation of the endowment and the execution of the Deed of Cancellation. Before we refer to such evidence, reference may be made to a statement made by Debendra in the Arpannama which was not quite accurate. It was stated that though nc endowment had actually been created till 1929, Debendra had been treating the two properties as having been endowed already. But the Puja accounts which had been produced for some of the years before the execution of the Arpannama viz. for 1921 to 1923 and 1925 show that the amount actually spent for the Puja varied between about Rs. 500 and Rs. 650. The annual income from the two properties subsequently endowed was about Rs. 1000/-. It was, therefore, not correct to state in the Arpannama that the income from the two properties had from 1921 been utilised for the Puja. There is further no evidence to show how the balance of the income from the two properties was being utilised, whether before the Arpannama was executed or thereafter. Certain account papers which have been produced in Court purporting to be for 1929-1931 are on the face of those papers altered in material places. We are satisfied that the papers produced are not for the years 1929-31. These papers were found in the office almirah and how, when, and by whom these alterations had been made has not transpired in evidence.

The learned Subordinate Judge also had come to the conclusion that the account papers purporting to be for the period immediately following the execution of the Arpannama could not be relied upon. No doubt this raises a suspicion and we have to bear this in mind when other pieces of evidence adduced in this case are considered. The learned Subordinate Judge was correct in not relying upon these account papers for deciding the issue. There is no doubt that the account papers for 1929 to 1931 would have been a very material evidence to show how the property was being treated by Debendra after the endowment was created and before the execution of the Deed of Cancellation. The defendant could not for obvious reasons adduce any evidence on this point. The suit has been brought by the widow and the son of Debendra as representing the Deity and they alleged that all such papers as were available, had been produced.

(14) We shall now proceed to consider each of the following circumstances, which were relied upon on behalf of the appellant in support of the case that the Arpannama executed in 1929 did not create any real endowment but was a simulate one.

1. As Debendra was in debts he made an attempt to save these properties from the creditors. The evidence indicates that he had one creditor only and that creditor again was Maharaja Manindra Chandra who did not put any pressure on the debtor. Though he had been indebted to the extent of about Rs. 20,000/- the value and extent of the properties of which Debendra was then the owner show the futility of a suggestion that the execution of the Arpannama was in the nature of a benami transaction. If any attempt were to be made by him to save the properties from the hands of the creditor it would be only reasonable to think that the debtor would try to save the more valuable house properties which included his valuable residential house.

2. The income from the two endowed properties had not been proved by the plaintiffs to have been spent for the Pujas even after dedication and that no proper accounts had been either kept or produced. As has already been indicated there are no papers before us from which it can be shown that the entire income was being utilised for the purpose of the Trust. It is no doubt the correct proposition that the mere execution of a Deed although it may purport on the face of it to dedicate property to an idol is not enough to constitute a valid endowment. The validity of the deed would depend on proof that the executant had divested himself of the property dedicated. Whether he had done so or not is to be determined by the acts and conduct of the parties. Application of the entire income where an absolute debuttar is being created is one of the tests and not the sole criterion.

(15) As regards the performance of the Puja in successive years from 1921 and the continuance thereof after the execution of the arpannama has been satisfactorily proved on behalf of the plaintiffs. Evidence led on behalf of the plaintiffs and believed by the learned Subordinate Judge justifies the conclusion that the Puja was continued from 1921 onwards. We agree with the trial Court in the conclusion reached. The conduct of Debendra in getting the name of the deity mutated in the Collectorate records and in making collections in the name of the deity from and after 1929 supports the case of a true endowment. The registration of the deity's name in the Collectorate and payment of land revenue & cesses by Debendra as shebait proved the intention of Debendra at the crucial moment. This state of things continued from 1929 till 1939.

(16) As stated already there is no evidence before us from which it can be ascertained what amount was being spent for the Pujas. If the other circumstances led us to the conclusion that Debendra had intended to create an endowment in 1929 even if it be supposed that the entire income from the endowed properties was not being utilised by Debendra for the purpose of the endowment, that by itself would not justify the conclusion that no real endowment was intended to be created. Non-utilisation of the entire income for the purpose of the Trust would clearly be a dereliction of duty on the part of the shebait. Once we reach the conclusion on other facts and circumstances that Debendra intended to create and actually created an absolute debuttar in 1929 the subsequent lapses of his would not convert the debuttar into a revocable one. The title which had been created in favour of the deity cannot be affected by such acts on the part of the shebait.

(17) It is more significant that Ex. E — the Deed of Cancellation dated 5-1-1932, mentions in the schedule only one of the two properties included within the Arpannama. Kismat Maharul is only mentioned, presumably because that was the property which was being sold on the same day by Debendra in favour of the plaintiff. If the alleged Deed of Cancellation be read with reference to the schedule it revokes the endowment in respect of one only of the properties and this makes the defendant's position still weaker. No doubt there are expressions of a general nature in the Deed of Cancellation which touch the Arpannama as a whole but the mention of one of the properties indicate unmistakably the purpose for which this cancellation was being made. Necessity had arisen in 1932 to sell one of the properties and the cancellation was accordingly being made.

(18) One of the reasons why this cancellation was being made in 1932 may be that the total income of the two properties was not being required for the annual Puja and Debendra thought of withdrawing one of the properties originally endowed. Thus, the income which was not being required for the Puja could be sold for clearing off at least a portion of the debts due to the Maharaja. This mental attitude or change of front will not entitle Debendra to put out of action the Deed of Endowment originally made.

(19) On the evidence and on a proper consideration of the circumstances in this case there is no doubt that the endowment created by Debendra in 1929 was a real and absolute Debuttar in favour of the Deity Saradiya Durgamata Thakurani. Debendra had no right to take out any property out of the said endowment or to transfer the same in favour of the defendant. Both the properties would continue to be the properties of the Deity and the plaintiffs as representing the Deity are entitled to have a declaration to that effect. He agrees with the learned Subordinate Judge as to the

estimate of evidence and the conclusion reached by him.

(20) On behalf of the defendant it has been urged that Ex. 2 the Arpannama could not in law create a debuttar. The Arpannama purports to make a gift in favour of Sree Sree Saradiya Durgamata Thakurani — for the annual performance of the puja during the autumn each year. In the case of Saradiya Durga Puja the deity is made ready for the annual puja and the idol is worshipped after consecration. On the conclusion of the worship the idol is immersed in water. A new idol is made every year and after the puja it is dropped into water. It is contended that an endowment to be a legal one must be in favour of a deity which has a continued existence. This objection had not been taken in the Court below in the form as stated above. As this is a pure question of law we allowed this ground to be urged and we proceed to consider the same.

(21) The principle in Hindu Law which invalidates gifts other than to a sentiment being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death nor does it make such a bequest void. 'Bhupati Nath v. Ramlal Maitra', 37 Cal 128 (FB). It is contended that though there may be a bequest for the worship of an image to be established in future, the deity to be the recipient of a gift must be particularised. A dedication is to be in favour of a personal God and not to the 'Parama Brahman'. Reliance is placed in this connection on an observation of the Judicial Committee in — 'Pramatha Nath v. Pradhyumna Kumar', 52 Ind App 245 (PC) at p. 250 where Lord Shaw relies upon the description given by Mookerjee J. in — 'Rambrahma v. Kedar Nath', 36 Cal L J 478 at p. 483. How the normal type of continued worship of a consecrated image is performed is thus described:

> "the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food and the retirement to rest."

(22) This description of the services to be rendered to a consecrated deity applies with equal force and relevancy to the various items of puja and ministration irrespective of the fact whether the deity is or continues to be physically manifested whether during particular periods or occasions, or throughout the year and from year to year. The deity consecrated and worshipped during a particular period or periods does not cease to be a personal God of the person so worshipping.

(23) There is no doubt that the deity to be the recipient of a gift must be particularised — 'Purna Chandra v. Kalipada Roy', 46 Cal W N 477. Mentioning the deity to be worshipped periodically is nonetheless the deity particularised.

(24) In — 'Ashit Mohan v. Nirode Mohan', 20 Cal W N 901 an opinion was given casually that the absence of a permanent image does not in any way affect dedication to a deity. In — 'Bhupati Nath v. Ramlal Maitra', 37 Cal 128 Mookerjee J. (at page 161) made it clear that —

> "It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in course of the year."

Chatterjee J. at pages 169-170 in — 'Bhupati Nath's case referred to the fact that bequests for the performance of the periodical puja of different deities and for celebrations of festivals like 'Dole', Rashjatra had been accepted by the Courts for a long time

> "If a gift in favour of a deity whose image is to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all except for any reason any reconstruction coming to pass, should be invalid."

(25) The same view was expressed by B. K. Mukherjee J. in — 'Purna Chandra v. Kalipada Roy', 46 Cal W N 477:

> "The dedication of the deity of Saratkali who has no permanent image but who is worshipped only four days in the year on constructing an image which is afterwards immersed in river is perfectly valid in law."

(26) For the performance of the periodical worship of deities like Sri Sri Durga, Sri Sri Kalimata etc. or for the celebration of periodical festivals like the Doljatra, Rasajatra by the Vaishnavas have from very old times been given effect to by our Courts. Reference may in this connection be made to — 'Ramtonoo Mallick v. Ramgopaul Mullick', 1 Knapp 245; — 'Ashutosh Dutt v. Doorga Churn Chatterjee', 6 Ind App 182 : 5 Cal 438 at p. 442 (PC).— 'Hemangini v. Nobin-Chand', 8 Cal 788; — 'Jairam Narronji v. Kuverbai', 9 Bom 491; — 'Gokool Nath v. Issur Lochun Roy', 14 Cal 222; — 'Monohar Ganesh v. Lakshmiram Govindram', 12 Bom 247; — 'Bhuggobutty Prosonna v. Gooroo Prosanno', 25 Cal 112 at p. 124; — 'Prafulla Chundra v. Jogendra Nath', 1 Cal L J 605; — 'Bisseswar Prasana v. Bhagbati Prasanna', 3 Cal L J 606 at p. 631.

(27) Endowments for the performance of occasional worship or for the observance of religious ceremonies held once or twice a year may be treated (?) from very ancient times as it appears from some of the old copper plate grants and from references in commentaries as well. It is not necessary to refer to the various original texts which have all been collected by Mookerjee, J. and Chatterjee, J. in — 'Bhupati Nath v. Ramlal Mitra', 37 Cal 128 (FB).

(28) It is now too late in the day to contend that endowments created for the performance of annual 'pujas' of deities which are consecrated temporarily for the worship and then consigned to the water or for casual performance of Doljatra, Rasajatra etc. are not countenanced by the Hindu law givers. This contention must accordingly be overruled.

(29) This appeal is accordingly dismissed with costs.

(30) K. C. CHUNDER, J.: I agree.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 CALCUTTA 289 (Vol. 40, C. N. 100)

BOSE J.

Bijoy Ranjan, Petitioner v. B. C. Das Gupta, President, Governing Body, State Medical Faculty of West Bengal and others, Opposite Party.

Civil Rule No. 2295 of 1951, D/- 4-2-1952.

(a) Constitution of India, Art. 226 — Proper parties — (Constitution of India, Art. 367(1)) — (General Clauses Act, 1897, S. 3 (39)) — (Civil P. C., O. 1 R. 8).

In view of the provisions of Art. 267 (1), the word 'person' in Art. 226 should be interpreted in the sense in which it has been used in S. 3 (39) of the General Clauses Act of 1897. Therefore, although the State Medical Faculty is an unincorporated body of individuals, a writ can be properly issued against such a body in its official title and designation. Further, since the petitioner can have recourse to O. 1 R. 8, Civil P. C. and proceed against only some of the members representing themselves and all other members of the State Medical Faculty, it is not necessary to implead all the members of the faculty. AIR 1918 Mad 763, Rel. on; 40 Cal 588, Ref.

(Paras 6, 7, 8, 10 and 11)

Anno: Civil P. C., App., Const. of India, Art. 226 N. 1.

(b) Constitution of India, Art. 226 — Mandamus.

Governing body of State Medical Faculty cancelling examination without giving opportunity to examinees to allay suspicion entertained by examiners as to the adoption of unfair means in examination — Principles of natural justice not observed — Good faith not enough to justify action — Amounts to failure to exercise their powers reasonably and with due care and caution — Cancelling of entire examination was not justified — Mandamus to revoke the order issued: Case law relied on.

(Para 16)

Anno: Civil P. C. App.; Const. of India, Art. 226, N. 11.

Priti Bhusan Barman and Jnanendra Mohan De, for Petitioner; Binayak Nath Banerjee, & D. N. Basu, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('51) 1951 1 AC 66: (54 Cal WN 883 PC)	15
('39) AIR 1939 Bom 35: (180 Ind Cas 685)	17
('13) 40 Cal 588: (18 Ind Cas 527)	11
('47) 51 Cal WN 612	17
('17) 40 Mad 125: (AIR 1918 Mad 763)	9
('52) AIR 1952 Orissa 1: (ILR (1951) Cut 407)	16
(1863) 14 CB (NS) 180: 143 ER 414	16
(1881) 17 Ch D 615: (44 LT 557)	17
(1874) 9 Ex 190: (43 LJ Ex 153)	17
(1890) 24 QBD 712: (59 LJQB 250)	17

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ directing the opposite parties to withdraw or revoke the order of cancellation of the Intermediate Licentiateship Medical examination held at the Burdwan centre in June 1951 and to publish the results of the said examination. The petitioner is a Matriculate of the University of Calcutta. In 1947 he got himself admitted into the Chittagong Medical School in Eastern Pakistan for the purpose of obtaining a L. M. F. Diploma. In 1948 the petitioner passed the Primary examination. In February 1950 owing to communal disturbances in Eastern Pakistan the petitioner and his family came over to India as refugees. After coming to India, the petitioner continued his medical studies and got himself admitted in the Burdwan Ronaldsnay Medical School, which is an institution run by the State Medical Faculty of West Bengal. In November 1950 the petitioner appeared in the Intermediate examination conducted by the said Faculty and out of the 3 subjects prescribed for such examination the petitioner passed in two subjects namely Physiology and Pharmacology but was unsuccessful in the 3rd subject namely Anatomy. Under R. 4 of the Rules and Regulations of the said Medical Faculty relating to Intermediate Licentiateship examination a candidate who fails in one subject only is on payment of a certain fee permitted to appear in that subject at the next 6 monthly examination and if he passes he shall be held to have passed the entire examination, but a candidate failing to pass or appear under this provision shall be required to appear in all subjects of the examination. By virtue of this rule the petitioner got a chance to appear in the Anatomy paper at the June term examination in 1951. In April 1951 the medical school where the petitioner was prosecuting his studies held a test examination and the petitioner stood first in Anatomy. Thereafter the petitioner appeared at the June term of the Intermediate examination of the Medical Faculty which was held on or about 7-6-1951. Under the rules the petitioner had to sit for a theoretical examination in Anatomy and also for oral and practical examination. The theoretical examination was held on the aforesaid date namely 7-6-1951 and on 18-6-1951 the oral and practical examinations were held. It is alleged that the petitioner fared well in all these examinations.

It appears that about 71 students from different schools in West Bengal appeared in the said examination of the June term held in the Burdwan centre. Under the rules and regulations framed for the conduct of these medical examinations the examinations at the different centres are conducted under the supervision of a presiding officer, inspectors, convenor and invigilators. It appears that so far as this June term examination in Burdwan centre was concerned there was no unhappy incident during the examination. There was no case of detection of any unfair means being adopted by any of the candidates and there was no case of any expulsion from the examination hall for taking any unfair means and there was no adverse report by either the presiding officer or the inspectors or the invigilators conducting the examination. It further appears from the rules and regulations for the conduct of the medical examination that the examiners who conduct oral and practical examinations are to examine and look over the written theoretical papers of the examinees before they take up oral and practical examinations of these examinees and they are further to enter the marks of the theoretical papers on the slip rolls. It is alleged that at the time the petitioner's practical and oral examination was held the theoretical written papers and the roll slips containing the marks of that paper were before the examiners.

After the oral and practical examination of the petitioner was over the petitioner got the impression that he had fared well in such examination but sometime later the petitioner

found to his utter surprise from a notice signed by the Secretary of the State Medical Faculty and hung up in the Notice Board of the school that the examination of 51 candidates including the petitioner out of the total of 71 candidates had been cancelled for taking unfair means. The petitioner thereupon made enquiries and came to know that at an emergent meeting of the Governing Body of the State Medical Faculty held on 25-7-1951 the Governing Body had resolved and decided that the entire examination of the term in all the subjects of the said 51 candidates would stand cancelled, as the Governing Body had come to the conclusion that these candidates had adopted unfair means. The Governing Body came to this conclusion inasmuch as the answers written by a large number of candidates were exactly similar and most of the answers in the Anatomy and Physiology subjects were verbatim reproduction of certain pages of Gray's Anatomy and Chakravarti's "Aids to Human Physiology". It is alleged in the petition that the Governing Body was wrong in coming to the conclusion that the petitioner had adopted any unfair means. It is alleged that Gray's Anatomy is the only text book prescribed for the examination and it being a highly technical subject the petitioner who wanted to get through the examination had to commit to memory important portions of the book and as the questions set were stock questions the petitioner answered the same to the best of his ability and knowledge and without adopting any unfair means.

It appears that after the decision of the Governing Body as to cancellation of the entire examination of the June term was taken, a notice was issued by the Governing Body that in view of the cancellation candidates who had already passed in 2 subjects would have to appear again in all the 3 subjects. In other words the notice purported to cancel the result of the previous examination held in November 1950. It is alleged that the order of cancellation of the examination was passed without any enquiry and without giving the petitioner any opportunity to offer an explanation. It is further alleged that there is no rule by which the Governing Body can cancel the entire examination when there is no detection of any unfair means being adopted by the candidates during the examination. The petitioner challenges the order of cancellation of the examination as illegal and arbitrary and as being against all principles of natural justice.

(2) The counter affidavit filed in the present proceeding is affirmed by one Haridas Ganguly, who is the Head Assistant in the office of the State Medical Faculty of West Bengal. In this affidavit it is admitted that no candidate was actually hauled up in the examination hall for resorting to unfair means but the examiners made an adverse report to the State Medical Faculty stating that the written answers of a large number of candidates were exactly the same in language and contents and many of the candidates could not answer the same questions at the oral examination and the examiners thereupon strongly suspected that unfair means of copying had been resorted to by the candidates at the written examination. It is further stated in this affidavit that the written examinations in the three subjects viz. Anatomy, Physiology and Pharmacology were held on the 7th, 8th and 9th June 1951 respectively and there were 6 questions in each subject — each question being answered in a separate book — for eventual examination by 3 examiners, namely two questions by each examiner. The examiners commenced their examination of the written answer books as well as the oral and practical examinations from 15-6-1951 and such examinations continued till 19-6-1951 and it was during this time that a suspicion arose in the minds of the examiners that there was something unusual in the written answers and after further comparisons and consultations the examiners in Anatomy and Physiology submitted their report dated 28-6-1951.

On receipt of these reports the Board of Studies had a meeting held on that very date and directed a scrutiny of the written answer books by two of its members and at a subsequent emergent meeting held on 10-7-1951 the Board directed the examiners to meet again and go into the matter fully. The examiners thereafter met on 13-7-1951 for comparison of the answer papers and for sorting out answer books in which the answers were similar in language. The Board thereafter met on 16-7-1951 and after considering all the reports and comparing the answer books with certain pages of Grey's Anatomy and Chakravarti's 'Aids to Human Physiology' the Board came to the conclusion that 51 candidates including the petitioner had adopted unfair means. The matter was then taken up at an emergent meeting of the entire Governing Body on 25-7-1951 and the resolution as to cancellation of the entire examination was passed at such meeting by the Governing Body. Subsequently on 9-8-1951 the Board of Studies took the view that these candidates must appear in all the 3 subjects at the ensuing examination and this was approved by the Governing Body at a meeting held on 20-8-1951. The proceedings of the emergent meeting of the Governing Body held on 25-7-1951 as also copies of reports of the examiners in Physiology and Anatomy dated 28-6-1951 have been annexed in this Counter Affidavit and it appears therefrom that the examiners who submitted the reports and the members of the Governing Body who participated in the meeting of 25-7-1951 were of opinion that the answers of a large number of candidates were exactly similar and most of the answers in the 2 subjects of Anatomy and Physiology were verbatim copies of the language and other details of certain pages of Grey's Anatomy and Chakravarti's 'Aids to Human Physiology'. It does not appear that they formed this opinion with regard to all the candidates appearing in the said examination. It also appears from the report of the examiner in Anatomy which is Annexure "B 1" that it is only some of the candidates but not all who could not answer the questions set in the theoretical examination in their oral examination.

(3) In course of the hearing, the mark sheet of the candidates who appeared in the June term examination in Anatomy was produced before the Court and it appears therefrom that the petitioner whose roll number was 42 obtained the total mark of 134 in the theoretical paper out of 200 and he secured 75 per cent. marks in the oral examination and 105 out of 200 in practical examination. It is, therefore, clear that the petitioner was certainly not one of those candidates who, according to the

report of the examiner in Anatomy, could not answer the questions set in the theoretical paper in his oral examination, for, had it been so, it is unlikely that he would secure 75 per cent. marks in the oral examination. It is true as is evident from the mark sheet that a large number of students did not fare well in the oral examination but there are a few including the petitioner (it may be their number does not exceed 7) who did fare well in the oral examination.

(4) It has been contended by Mr. Binayak Banerjee the learned Advocate for the opposite parties that proper parties against whom the writ asked for may be issued have not been impleaded in this application and therefore this application must fail. It is submitted by Mr. Banerjee that the State Medical Faculty of West Bengal is not a corporate body and as such all the members composing that body should have been made parties in their individual names. It is not enough to make the President of the Governing Body of the State Medical Faculty or the Secretary as parties nor is it enough to make the State Medical Faculty party in its official designation. It is further pointed out by Mr. Banerjee that the State Medical Faculty is not a creature of Statute in the sense that it has not been brought into existence by any legislative act but by an executive order. According to Mr. Banerjee all the individual members composing the Faculty should be brought on record. It appears to me that this application cannot be thrown out on this technical ground.

(5) Article 226 (1) of the Constitution is as follows:

"Notwithstanding anything in Art. 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to 'any person or authority' including in appropriate cases any Government within those territories, directions, orders or writs, including writs in the nature of Habeas Corpus, mandamus, prohibition, quo warranto and certiorari or any of them for the enforcement of any of the fundamental rights conferred by Part 3 and for any other purpose."

(6) Article 367 (1) of the Constitution provides:

"Unless the context otherwise requires the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Art. 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India."

(7) It is, therefore, clear that the word 'person' in Art. 226 should be interpreted in the sense in which it has been used in S. 3 (39), General Clauses Act, 1897, which is as follows:

" 'Person' shall include any company or association or body of individuals whether incorporated or not."

(8) Thus, although the State Medical Faculty is an unincorporated body of individuals, a writ can be properly issued against such a body. Now it appears that the State Medical Faculty was established by an order of the Governor in Council which is numbered as Bengal Government Resolution No. 2545 Medl. dated 11-8-1914 which was published in the Calcutta Gazette of 12-8-1914 at page 1653. It is not, however, clear from the Gazette nor from the book which has been published and which contains the rules and regulations of the State Medical Faculty whether this Order in Council is a legislative order or an executive order. It is well known that at the time this Order in Council was passed the Councils of the Governors of Bengal, Madras and Bombay had the power vested in them by Statute to hold ordinary meetings that is to say meetings for executive purposes and legislative meetings that is to say meetings for the purpose of making laws. Mr. Priti Bhusan Burman referred to the earlier Statutes relating to the Government of India for the purpose of establishing that this Order in Council dated 11-8-1914 was a legislative order. But I do not think that he had been able to place sufficient materials before the Court to establish that fact. It appears from the counter affidavit that the State Medical Faculty was constituted by an executive order and this has not been denied in the affidavit in reply. It appears, however, from para. 4 of the said resolution No. 2545 Medl. that by the said Order in Council certain statutes and bye-laws were framed defining the constitution, functions and powers and duties of the State Medical Faculty as constituted by the said Order in Council. A perusal of these statutes and the rules and regulations show that the State Medical Faculty is a public body which was set up by the Government and it was entrusted with the performance of certain public duties. A public body need not necessarily be constituted by a statute. It may be set up by Government in exercise of its executive functions and otherwise than through the medium of a statute and rules and regulations may be laid down defining the scope of its powers and duties; and thereafter it functions as a body having the authority of the Government. It appears that the State Medical Faculty has received statutory recognition and the power of conferring medical degrees or diplomas has been entrusted to this body by the Indian Medical Degrees Act (Act 7 of 1916).

(9) In the case of — 'In Re G. A. Natesan', 40 Mad 125, Kumaraswamy Sastriyar J. at p. 159 observed as follows:

"The practice in English Courts seems to be that where the application is to compel some public officer or body to perform a public duty the persons are not named but are proceeded against under their official title. For example, writs of mandamus have been issued to justice of a county, inhabitants of a parish, churchwardens, overseers, inhabitants, and bailiffs of a town, keepers of the common seal of a University, the assessment committee of a borough, the Registrar of the British Pharmaceutical Society, etc. There has been so far as I can see, no objection taken in any of the reported cases on the ground that except in the case of Corporations, all other public bodies or officers should be proceeded against in the individual names of the members composing them."

(10) It is true that in this Madras case the learned Judges were dealing with the case of Syndicate of the University which was constituted by a Statute, but it is clear from this decision that unincorporated public bodies can be proceeded against in their official title or designation.

(11) In the case of — 'In the matter of Provas Chandra Roy', 40 Cal 588, an objection was taken that an application for a writ of mandamus against the Board of Examiners was not in order as the members of the Board were not impleaded in their individual names, but it appears that the learned counsel did not press this objection but ultimately waived it. It appears from the Statute relating to this State Medical Faculty being Cl. 2 that the State Medical Faculty consists of — (a) Governing Body, (b) Fellows, (c) members and (d) Licentiates, and it is stated by the learned Advocate for the opposite parties that the total number of the members of the State Medical Faculty is very large. Even assuming that it would be more appropriate to implead all the members of the Faculty as parties to this application, it is open to the petitioner to have recourse to O. 1 R. 8, Civil P. C. and proceed against only some of the members representing themselves and all other members of the State Medical Faculty. It appears to me that the objection taken by Mr. Banerji is a purely technical one and can be easily cured by a formal amendment. Therefore, the objection cannot be considered as fatal to this application.

(12) It was further contended by Mr. Banerjee that the Governing Body which is a smaller body than the State Medical Faculty should have been impleaded and not the larger body of State Medical Faculty inasmuch as it is the act of the Governing Body which is complained of, in the present proceeding. If the Governing Body had purported to exercise any functions or powers which were peculiar to the Governing Body and in furtherance of the purposes of the Governing Body the argument of Mr. Banerjee might have some force. But the Governing Body has purported to exercise its powers for and on behalf of the State Medical Faculty. The act or decision of the Governing Body is the act or decision of the State Medical Faculty. The State Medical Faculty as a whole is liable or responsible for the acts of its Governing Body. In my view the State Medical Faculty has been rightly impleaded and the contention of Mr. Banerjee cannot be accepted.

(13) The next point for consideration is whether the Governing Body of the State Medical Faculty was justified in cancelling the entire examination in Anatomy held in the June term of 1951. It appears from the Minutes of the proceedings of the emergent meeting of the Governing Body held on 25-7-1951 that the Governing Body in coming to the decision relied entirely on the individual Reports of the Examiners in Physiology and Anatomy and upon certain Reports of the Inspectors about the conducting of the examinations. There was no joint report of examiners as required by the Rules. The Governing Body did not hold any independent enquiry. The Report of the examiner in Anatomy shows that the Examiner found three sets of answers with exactly the same language and as many of the students could not answer the same questions in oral examination he entertained strong suspicions that the written papers were copied from three sets of slips brought from outside. The minutes of the meeting of the Governing Body show that there was a further scrutiny of the answer papers and it was found upon such scrutiny that most of the answers were verbatim the same in language and other details as in certain pages of Grey's Anatomy. Mr. Binayak Banerjee went to the length of suggesting in course of his argument that the petitioner's answers were also verbatim reproduction of certain passages of Grey's Anatomy and even the punctuation marks are the same. Upon such suggestion being made I expressed my desire to have a look into the answer paper of the petitioner (which was in Court) for satisfying myself as to the suggested similarity in language and the punctuation marks. My attention was drawn to a page in the Answer paper and to page 862 of Grey's Anatomy for satisfying me as to the exact similarity. I glanced through the particular page of the answer paper and the page in Grey's Anatomy but it did not appear to me that the answer was an exactly verbatim reproduction of Grey's passage or that the punctuations were in all respects absolutely identical. As has been pointed out in the affidavits the subject of Anatomy is a highly technical subject and the only book prescribed is Grey's book and it is, therefore, not at all unnatural that the candidates in order to get through the examination would try to commit to memory as many passages as possible of the Grey's Book.

(14) It is quite possible that the candidates appearing in the Anatomy examination had anticipated some of the questions set in the examination and so they had committed to memory the particular passages in Grey's book or had committed to memory the language of the lectures given in school on such questions and this has resulted in the similarity of answers of the different candidates. It is clear from the Rules and Regulations framed for the conduct of the examinations that the examinations are conducted under the supervision of Presiding Officer, Inspectors, Convenor and Invigilators. It is an admitted fact that there was no detection of the adopting of any unfair means by any of the candidates during the examination and there was no case of expulsion. Rule 16 of the Rules for conduct of Examinations (page 115 of the Book of Rules and Regulations) provides for penalties in cases of detection of unfair means during an examination. There is no specific rule for cancellation of the entire examination on the ground of suspicion as to adoption of unfair means, though I do not doubt that where a case of unfair means is established the Governing Body is entitled to take such action as it may reasonably decide to take even though there is no detection during the actual holding of the written examination of adoption of any unfair means. The minutes of the Governing Body show that the Inspectors reported that there was no proper invigilation. The Reports of the Inspectors have, however, not been placed before the Court nor is there any affidavit by the Inspectors or the Examiners. The report of the examiner in Anatomy states that "many of the students could not answer the questions set in the written paper in their oral examination" thereby suggesting that some of the candidates did not fare in the same manner in the oral examination. The petitioner and six other candidates who got marks between 60 per cent. to 80 per cent. in the oral examination (See Roll Nos. 11, 19, 36, 40, 42 (petitioner), 47, 54) were perhaps among the very few who according to the examiner did not fare as miserably as the other

candidates, but there is no definite material before the Court to show whom the examiner had in mind as falling within the exception.

(15) The decision of the Governing Body seems to have been taken on the Report of the Examiner based on pure suspicion. But it appears that no inquiry was held nor any opportunity was given to the candidates who were being condemned, to offer any explanation or make any representations against the charge of adoption of unfair means which was levelled against them. The learned Advocate for the opposite parties placed reliance on the decision of the Judicial Committee in — 'V. Nakkuda Ali v. M. F. De S. Jayaratne', (1951) 1 A C 66 (PC) and submitted that as there was a cloud of suspicion in the matter, the action of the Governing Body was justified. It may be noted, however, that in that case the person charged had been given ample opportunities to dispel the suspicion but he failed to do so. At page 82 Lord Radcliffe made the following observation:

"The appellant was informed in precise terms what it was that he was suspected of and he was given a proper opportunity of dissipating the suspicion and having such representations as might aid him put forward by counsel on his behalf. In fact the explanation he did offer was hardly calculated to allay the respondent's suspicions; probably it confirmed them.....But failing explanations from him on points such as these, a heavy cloud of suspicion remained; and if the respondent felt bound to act on this suspicion, it was not because he had some to entertain it through any denial of natural justice or without reasonable cause, but because the appellant himself either could not or would not, produce the explanation that would have dissolved it."

(16) It appears to me that in the facts and circumstances of the case before me the Governing Body did not act reasonably in not giving an opportunity to the candidates to allay the suspicion entertained by the examiners and the Governing Body as to the adoption of unfair means by the candidates appearing in the June Term examinations. The principles of natural justice were not observed in this case. It may be that the Governing Body or the Board of Studies acted in good faith but that is not enough to justify their action. They were under a duty to exercise their powers reasonably and with due care and caution. This they have failed to do. See — 'S. K. Ghose v. Vice Chancellor of Utkal University', AIR 1952 Orissa 1 at p. 7. The facts and circumstances of this case before me cast a duty upon the Authorities to investigate into the individual cases of the different candidates so far as the examination in Anatomy was concerned and to find out which of the candidates had actually adopted unfair means in such examination. A sweeping decision to cancel the entire examination does not appear to have been justified in the facts of this case. The candidates were entitled to have an opportunity to explain before their examination could be cancelled. In the case of — 'Cooper v. Wandsworth Board of Works', (1863) 14 C B (N S) 180: 143 E R 414, Byles J. at page 420 of the English Report observed as follows:

"It seems to me that the Board are wrong whether they acted judicially or ministerially. I conceive they acted judicially because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions beginning with Dr. Bentley's case and ending with some very recent cases establish that, although there are no positive words in a Statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. The judgment of Fortescue J. in 'Dr. Bentley's case', is somewhat quaint, but it is very applicable and has been the law from that time to the present. He says, "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God) "Where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve also". There has been neither notice of the one sort nor of the other; and it seems to me, therefore, that, whether the Board acted judicially or ministerially, they have acted against the whole current of authorities, and have omitted to do that which justice requires and contravened the words of the Statute" (See also the judgment of Earle C. J. pages 417-418).

(17) In — 'Dawkins v. Antrobus', (1881) 17 Ch D 615 at p. 630, Brett L. J. made the following observation:

"In my opinion there is some danger that the Courts will undertake to act as Courts of appeal against the decisions of members of clubs whereas the Court has no right to sit in appeal upon them at all. The only question which a Court can properly consider is whether the members of the club, under such circumstances have acted ultra vires or not and it seems to me the only questions which a Court can properly entertain for that purpose are whether anything has been done which is contrary to natural justice, although it is within the rules of a club, in other words, whether the rules of the club are contrary to natural justice; etc.....at page 53.

"The first thing then is whether there was anything contrary to natural justice. If a decision was come to depriving a gentleman of his position on such a charge as must be made out here, namely that he has been guilty of conduct injurious to the character and interests of the club, in my opinion, there would be a denial of natural justice if a decision was come to without his having an opportunity of being heard." (See also — 'Hopkins v. Smethwick Local Board', (1890) 24 Q B D 712 at p. 716 per Lord Esher; — 'Wood v. Wood', (1874) 9 Ex 190 at 196; — 'Ambalal Sarabhai v. Phiroz H. Antia', AIR 1939 Bom 35 and — 'M. S. Ezra v. Mahendra Banerjee', 51 Cal W N 612).

(18) In my view this petition should succeed and the Rule is made absolute to the extent that the opposite parties are directed to revoke the order of cancellation of the entire examination in Anatomy held in June, 1951, and the order that the petitioner is to appear in all the three subjects at the ensuing examination. The opposite parties will be at liberty to enquire

into the individual case of the candidate concerned and after such enquiry they will take such steps as they are entitled to take in accordance with law. The petitioner is entitled to costs of the present proceeding. Hearing fee is assessed at two gold mohurs.

A/H.G.P. Order accordingly.

A.I.R. 1953 CALCUTTA 294 (Vol. 40, C. N. 101)

BANERJEE J.

Ganeshmull Surana Petitioner v. Nagraj Surana Respondent.

Suit No. 1131 of 1947, D/- 20-11-1951.

Civil P. C. (1908), O. 22 R. 3 — Death of karta — Application by next karta — Limitation Act (1908), Art. 181.

The death of the karta does not make any difference to the suit at all. The family is there and the next karta springs up and the family is described as suing by so and so (the next karta). An application for setting aside abatement (if any) of the suit and substitution of the petitioner, the next karta, in place of the deceased karta who filed the suit for self and as the karta of a Mitakshara joint family is an application to continue the suit and the suit does not abate. It was assumed that Art. 181 applies to such an application and if the application has been made within three years from the death of deceased karta it is within time.) Case law discussed. (Paras 24, 28, 31)

Anno. C. P. C. O. 22 R. 3 N. 13; Lim Act, Art. 181 N. 13,13A.

H. N. Sanyal for Petitioner; Asoke Sen for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('15) AIR 1915 P.C. 124: (38 Mad 406 P.C.) 18
('27) 54 Ind App 122: (AIR 1927 P. C. 56) 13
('48) 52 Cal WN 109: (AIR 1948 P. C. 1.) 21
('18) 42 Bom 504: (AIR 1918 Bom 165) 22
('31) 55 Bom 709: (AIR 1931 Bom 484) 21
('07) 34 Cal 642: (5 Cal LJ 491 F.B.) 20
('19) AIR 1919 Mad 479: (49 Ind Cas 268) 17, 28
('45) AIR 1945 Oudh 60: (1944 A.W.R.C.C. 291) 26

ORDER: This is an application for setting aside abatement (if any) of the suit and substitution of the petitioner in place of the deceased Ganeshmull Surana who filed the suit for self and as the Karta of a Mitakshara joint family carrying on a joint family business in the name and style of Messrs. Ganeshmull Nimchand, against defendant Nagraj Surana on (inter alia) the following allegations: Ganeshmull Surana at all material times was the Karta of the joint family and for the benefit of the family carried on a joint family business which acted as a commission agent of the defendant; that there were various transactions between the parties, & a sum of Rs. 10,887/7/- including interest became due which the defendant in spite of demand did not pay.

(2) The suit was filed in 1947. Ganeshmull died on 23-12-1949, & the Notice of Motion of this application was taken out on 1-5-1950.

(3) From the dates it is clear that the application is out of time. Mr. H. N. Sanyal who appears on behalf of the petitioner has conceded that the petition does not disclose sufficient grounds for enlargement of the time. But he has raised an interesting question. He contends that the suit has not abated and a suit of this nature cannot abate by the death of a Karta. I think Mr. Sanyal's contention is right. As the point is an important one, and as I am differing from certain decisions of other Courts, I must give my reasons. No authority of this Court has been brought to my notice which directly covers the point.

(4) The Question is — Has there been an abatement of the suit. The answer depends on the nature of property in Hindu Law. In the plaint the allegation being that the joint family firm acted as the Commission agent, the right to recover the money is in the joint family.

(5) The Hindu system of property has a peculiar characteristic. It has no reference to any notion that can be drawn from the English Law. In England ownership, as a rule, is single, independent and unrestricted. That is not so, as a general rule, in India. Individual property is the rule in the West; corporate property is the rule in the East.

(6) Three forms of the corporate system of property exist in India. The patriarchal family, the joint family and the village community. The two former in one shape or other exist throughout the length and breadth of India. The village community exists only in certain parts of India, particularly in the Punjab.

(7) The patriarchal family may be defined as 'a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grandfather, great grandfather.' The patriarch has absolute authority over the family. Whatever property is acquired by any member of that family belongs to the patriarch.

(8) The joint family arises, where it does arise, at the death of the common ancestor. After the death of the common ancestor, if the family chooses to continue united, there is a joint family. The eldest son, as a rule, is the natural head. But his position is not like that of the deceased patriarch; the one was head of the family by a natural authority; the other can only be so by a delegated authority. He is head by choice, or by natural selection, and not by right. The eldest of course is usually the head. But it is not necessary that he should be the head. A junior member who is more capable and better suited for the post may be the head. The head of a joint family is known as the 'Karta' or its managing member.

(9) The joint family may not have any property. But if it has, it belongs to the family which is a corporate body of which the members are individuals. The ownership of the coparcenary property is in the whole body of the coparceners. According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. Each member with his wife and children is entitled to be maintained and educated out of the family property. But no member can say that because some other member has got a bigger family, he is entitled to a better mode of living commensurate with his share in the income as on partition. If he is dissatisfied, his remedy is to ask for partition. But until then, perfect equality exists among the members of the family, namely, in their right to be maintained, to be educated, etc., out of the joint family property but no member has any share in the property or in the income thereof.

(10) Death does not dissolve the family nor make any difference in its corporate character.

At any particular point of time, if the question is asked: 'who is the owner of the property'— the answer would be, 'the joint family'. Who are its members?— "A, B, C". If ten years later, the same questions are asked, the first question will evoke the same answer if, in the meantime, there has been no partition: the answer to the second question may be C, D, E, —A and B having died in the meantime, and D and E born into the family. Those who are born in the family are entitled to be maintained and educated in the same way as the other members. But they get no specific share in the property. On the death of a particular member, nothing devolves on his sons as his heirs, because the member had no share or estate in the joint family property. His sons are interested in the joint family property not because they are sons of the deceased coparcener, but because they are members of the coparcenary. This is the fundamental characteristic of a Hindu joint family. Recent legislation, I do not think, has made any change in this respect.

(11) It is obvious that the business of the family cannot be carried on by all the members; some of them may be babies. Yet the business has to be carried on. It is carried on by the Karta for the time being. He is not an agent of the other members of the family though to a certain extent he is liable to render accounts. At times of compelling necessity he can dispose of the entire joint family property. This is not because he has got any proprietary right in the joint family property, but because he represents the family and can sell the property for the necessity of the family.

(12) It follows, as a result of the necessity for either joint action or action by the accredited representative of the family, that a single coparcener who is not the managing member cannot sue or be sued on behalf of the family. A single member cannot sue, or proceed by way of execution, to recover a particular portion of the family property for himself, whether his claim is preferred against a stranger who is asserted to be wrongfully in possession, or against his coparceners. If the suit is against a stranger, the suit must be by all the members and must be brought to recover the whole property for the benefit of the family.

(13) A necessary consequence of the corporate character of the family holding is that, wherever any transaction affects that property, all the members must be expressly or impliedly represented by the managing member or must be parties to it; and whatever is done must be done for the benefit of all, and not of any single individual. It is well settled that the managing member of a family business, or the managing members where there are more than one have the power of making contracts, giving receipts, and compromising or discharging claims incidental to the business. They can sue and be sued in all matters affecting that business without joining the other members of the family and in particular in respect of contracts and transactions made in their own names.

In other words, the managing member has the right to represent the entire family in all transactions relating to the family, whether they are in connection with immoveable properties or otherwise. The managing member represents the family in a suit, whether the suit is on a mortgage or is for the recovery of money. (Mayne, 10th Edn. Chapters 7 and 8). This is the principle, I apprehend, which underlies the decision of their Lordships of the Privy Council in — 'Lingangowda v. Bastangowda', 54 Ind App 122 (PC) where it was held that a decree obtained by or against the managing member of a joint Hindu family is binding upon minor members of the family under S. 11, Expl. 6, Civil P. C. (1908), if it appears to the Court that the Manager was acting in the former litigation on behalf of the minors in their interests.

(14) Lord Phillimore delivering the judgment of the Board made the following observation (p. 125):

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; & in each of these cases, therefore, the Court looks to Expl. 6 of S. 11, Civil P. C. (1908) to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors."

(15) The relevant portion of S. 11, Expl. 6 is this:

"Where persons litigate bona fide in respect of.....a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

(16) The decision, in my view, depends upon a very broad principle and that principle I apprehend is this: that if a person has by law the right to represent a group of persons and files a suit for the benefit of all to enforce a right belonging to them collectively, then whatever is decided in the suit is binding on all the persons concerned: all those persons are regarded as being parties to the suit.

(17) In — 'Krishnaswami Iyer v. Seethalakshmi Ammal', AIR 1919 Mad 479, in a suit by the nearest reversioner to set aside a widow's alienation, the plaintiff died and the Court declared an abatement of the suit 'suo motu' without hearing the next reversioner. It was held that the latter could apply to the Court to continue the suit for himself and the other surviving reversioners and the Court could under O. 1, R. 8(2) bring him on the record in place of the deceased plaintiff. It was further held that the right to apply to continue the suit was incidental to a reversionary suit, wherein the plaintiff represented the entire body of reversioners and such a suit should be decided, if possible, in one litigation. An application to set aside the order of abatement would be misconceiving the action but it may be treated as an application to continue the suit.

(18) Sadasiva Aiyar J., said at p. 480:

"in the beginning of 1915 the Privy Council decided the case reported as—'Benkatanarayana Pillai v. Subbammal', AIR 1915 P C 124 in which their Lordships held that a suit brought by the next reversioner is a suit really brought on behalf of the entire body of the reversioners and that if the reversioner who was conducting the suit dies, the next man is entitled to come in for the purpose of continuing the conduct of the suit. Their Lordships express a doubt on the question whether the next reversioner, who has the

right to continue the suit comes within the definition of a "legal representative" in S. 2, sub-s. 11, Civil P. C. But they base their decision on a broader ground, namely, that he was already a party to the suit though the conduct of it was in the hands of the first reversioner and that, therefore, he was entitled to continue the suit after the plaintiff's death."

(19) Just as reversioner represents the other reversioners, so a Karta represents the joint family in the suit. The Hindu Law permits the conduct of the family's suit to be placed in the hands of the Karta, but the family is the party to the suit.

(20) In — 'Amar Chandra Kundu v. Sebak Chand Chowdhry', 34 Cal 642 (FB), a decree for money passed against a member of a joint Hindu family governed by the Mitakshara was sought to be executed after his death against his son and heir Mitra J., one of the members of the Full Bench, made the following observation at p. 654:

"Both, therefore, on the principle that the son is an heir as regards self-acquired property and that he is the person to whom the 'univers itas juris' of the deceased passes according to Hindu Law, he being the representative of the family and the custodian of the family property in succession to the deceased according to the Mitakshara system which retains the relics of the patriarchal system. I am of opinion that the son may, on the death of the father, be placed on the record of a suit as his legal representative after decree, irrespective of the nature of the property sought to be attached by the decree-holder."

(21) In — 'Ganesh v. Narayan', 55 Bom 709, it was held that a decree for injunction obtained against the father as the Manager and representative of a joint family estate can, on his death, be executed against his son as his legal representative under S. 50 read with S. 53, Civil P. C. This decision was approved by the Privy Council in — 'Bhimsingh v. Shersingh', 52 Cal WN 109 (PC). Patkar J. in the Bombay case said at p. 716.

"In one sense a coparcener leaves no estate in the coparcenary property on his death, and so a surviving coparcener, even though a son, is not strictly his legal representative, and it cannot be said that the estate of the judgment-debtor has devolved on the death of the judgment-debtor on his joint son who is sought to be proceeded against in execution. If the father represented the estate of the joint family during his life time, it is difficult to hold that the son though joint with him cannot represent the estate of the joint family which was represented by his deceased father, and is not a person who in law represents the estate of a deceased person. Under S. 53 property in the hands of the sons, which is liable under Hindu Law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son as his legal representative".

(22) In this case his Lordship further observed that it was difficult to accept the view taken in — 'Chunilal v. Bai Mani', 42 Bom 504, that under S. 50 Civil P. C., a son who is joint is not a legal representative of his father.

(23) The words "shall be deemed to be property of the deceased" in S. 53 are very significant. It suggests that the deceased has left no property; but in respect of debts of the father which are not tainted with immorality the entire property of the joint family consisting of the father and the sons is liable. When a father incurs a debt it is the pious obligation of a son governed by the Hindu Law to pay the debt. On that ground when the father is dead though he does not leave any estate because he had none in his lifetime, property in the hands of the son becomes liable to be attached and sold to satisfy the father's debt and such property is deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

(24) The Karta has neither any share in the income nor in the property. It is the family, the corporate body, which is the owner of the property and if one member dies, it is still the family that remains the owner. If that is so, in a suit to recover joint family property, the Karta suing as such conducts the suit on behalf of the family. His name is used for the family. To borrow an expression from the Law of Partnership, it is a compendious way of describing the family. The death of the Karta does not make any difference to the suit at all. The family is there and the next Karta springs up and the family is described as suing by so and so (the next Karta).

(25) This is the logical conclusion of the legal concept that underlies a joint Hindu family.

(26) Mr. Asoke Sen on behalf of the respondent opposing the application referred me to— 'Rajendra Prasad v. Ganga Bux Singh', A I R 1945 Oudh 60. In that case Misra J. referred to the definition of the term 'legal representative' in S. 2, Cl. 11, C. P. C., which is as follows:

" 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

His Lordship said:

"In case of a joint Hindu family if the right to sue survives at all, it survives in consequence of the fact that the estate of the deceased is represented by the survivors. If it does not, the action must terminate upon the death of the deceased party. If it is claimed that the right to sue survives, it must come to the coparceners as representatives of the deceased".

(27) With great respect to the learned Judge, I am unable to see how any estate of the deceased can devolve. There is no estate at all as I have already tried to explain. Therefore, there cannot be any question of its devolution.

(28) On these considerations I hold that the suit has not abated. The application is an application to continue the suit, and I treat it as such as was done in — 'Krishnaswami Iyer's case', AIR 1919 Mad 479.

(29) Ganeshmull who was the Karta of the joint family is dead. The petitioner as the next Karta represents the family and can go on with the suit on behalf of the family which was represented by Ganeshmull before his death.

(30) The petitioner, as it appears from the petition, was anxious to be brought on the

record. He says for certain reasons he could not apply earlier. The family has got to get a large sum of money from the defendant. It cannot be and has not been suggested that the suit by Ganeshmull was not for the benefit of the family.

(31) Whether to an application of this kind any article of the Limitation Act applies, I need not consider now. In the present case I assume that Art. 181 applies and as this application has been made within three years from the death of Ganeshmull, it is within time.

(32) I allow the application. The petitioner will continue the suit as the Karta of the joint family. Necessary and consequential amendments may be made in the plaint and the suit will be heard in the usual way.

(33) Without prejudice to the right of any party to appeal from this judgment I give the following directions:

"Within fourteen days from the date the amendments are made in the plaint, the defendant will be at liberty to file an additional written statement. There would be cross-order for discovery within fifteen days thereafter; inspection forthwith; thereafter the suit to be placed on the prospective list on 2-2-1952. Costs of this application and of the additional written statement (if any) will be costs in the cause; Certified for counsel."

B/D.H. Application allowed.

A.I.R. 1953 CALCUTTA 297 (Vol. 40, C. N. 102)

BOSE J.

Sm. Gita Mitra, Appellant-Petitioner v. S. P. Ghose and others, Opposite Party.

Civil Rule No. 2258 of 1951, D/-5-9-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), S. 28 — Rent Controller exercising function under Act does not act as Court. (Para 6)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 32 — Retrospective operation — (Limitation Act (1908), Ss. 18 and 29(2)) — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), S. 32).

Section 32, Rent Control Act of 1950 has no retrospective effect. Consequently, S. 18, Limitation Act did not apply by virtue of S. 29(2) of that Act to review proceedings under the Rent Control Act of 1948. (Paras 5 and 7)

Anno. Limitation Act, S. 29 N. 3.

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), S. 30 — Application for fixation of fair rent — Notice to landlady sent to residential address of her father and not to her ordinary place of residence — Landlady's father managing and administering property on her behalf and in her name — Notice sent to address given in application — Rent Controller held did not contravene terms of S. 30. (Para 8)

(d) Constitution of India, Art. 226 — Certiorari.

If the former application for the issue of a writ of 'certiorari' is not refused after hearing it on merits, but it is allowed to be withdrawn for want of sufficient materials to support the application, a second application is not barred. (Para 10)

Anno. C. P. C., Appendix III; Constitution of India, Art. 226 N. 13.

I. P. Mukherjee, Kalyan Kumar Bose and Subodh Kumar Bhattacharjee, for Petitioner; Hemendra Kumar Das, Smriti Kumar Rai Chaudhury, (for No. 1) and Nirmal Chandra Sen (for No. 5), for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('52) 1952 S. C. A. 501: (AIR 1952 S. C. 399)	9
('43) 47 Cal WN 460: (AIR 1943 Cal 247)	6
('47) 51 Cal WN 818: (AIR 1947 Cal 455)	6
('51) 87 Cal LJ 130	6
('38) AIR 1938 Mad 688: (179 Ind Cas 16)	5
(1931) A. C. 275: (100 LJ P. C. 55)	6
4 N and M. 312	10
(1892) 2 Q. B. 21: (61 LJ M. C. 151)	10

ORDER: This is an application under Art. 226 of the Constitution for writs in the nature of 'certiorari' and 'mandamus' for quashing of certain orders dated 2-6-1949, 23-12-1949 and 25-7-1950 purported to be made under the provisions of the West Bengal Premises Rent Control Act, 1948 (Act 38 of 1948), and for direction upon the opposite parties 1 to 4 to forbear from giving effect to the said orders.

(2) The petitioner is the owner of premises No. 1/2 Lovelock Street in the suburbs of Calcutta. After purchasing the said premises the petitioner repaired and improved the said premises at a cost of about Rs. 4,000/- and converted the same into a good dwelling house consisting of 6 living rooms, 2 covered verandahs, one open verandah, 2 lavatories and one servants room and it was surrounded by boundary walls. The premises stands on land measuring about 3 cottahs and its estimated value is said to be Rs. 40,000/-.

In December 1947 the petitioner let out the premises to one Sashi Prova Debi at a rent of Rs. 200/- per month, from 16-12-1947 as a monthly tenant. Sashi Prova vacated the premises at the end of May 1948. Subsequently the petitioner let out the premises to respondents 5 and 6 at a rent of Rs. 150/- per month plus occupier's share of taxes. The said tenancy commenced from 15-6-1948. The said respondents duly paid rent at the said rate upto the end of June 1949 but put off payment of rent for the months of July, August and September 1949 on various pretexts. It appears, however, that in the meantime on 24-2-1949 the respondent 5 filed an application for fixation of standard rent before the Rent Controller, Calcutta, under the provisions of Act 38 of 1948 which came into force on 1-12-1948.

On 5-3-1949 a notice of the application was sent by registered post from the Rent Controller's office to the petitioner c/o S. K. Ghosh at the address 28/1 Allenby Road which is the address of the petitioner's father's residence. It may be pointed out at this stage that the petitioner is a married lady and she resides with her husband at No. 23 Bechu Chatterjee Street, Calcutta and was actually residing at her husband's place at the time the said notice was sent to the address of her father. It appears that the said registered letter was returned through the Post Office with the endorsement of the postal peon "Refused".

The Rent Controller fixed the hearing of the application which was numbered as Case No. 748A of 1949, on 25-4-1949. On 27-5-1949 an Inspection is alleged to have been carried out

by the Inspector of the Rent Controller. The petitioner's case is that such inspection was not made in her presence or in the presence of any of her representatives. On 2-6-1949 the Rent Controller heard the case 'ex parte' and fixed the standard rent at Rs. 35/- per month with effect from 1-2-1949. In October 1949 the petitioner's father wrote from Hazaribagh Road two letters to Mr. S. N. Chowdhury, Solicitor, (who had introduced the tenants respondents 5 and 6 to the petitioner's father) requesting Mr. Chowdhury to realise the rents from July to September from the tenants.

On 24-11-1949 Mr Chowdhury informed the petitioner's father that respondents 5 and 6 had applied for fixation of standard rent and such rent had been fixed at Rs. 35/- per month long ago. It is alleged that the petitioner and her father came to know of the order of 2-6-1949 for the first time on 24-11-1949. On 5 12-1949 the petitioner made an application for review of the order of 2-6-49 and on 9-12-1949 the petitioner's Solicitors wrote a letter to the Presidency Post-Master making inquiries about the registered letter sent by the Rent Controller.

On 23-12-1949 the Rent Controller dismissed the application for review on the ground that as it was not made within 30 days from the date of the order as required by R. 11, West Bengal Rent Control Rules 1949 the application could not be entertained. He further held that as the Rent Controller was not a Court the petitioner could not take advantage of S. 18, Limitation Act upon which she relied for the purpose of getting an extension of the period of limitation as prescribed in the said R. 11 and by S. 32, Rent Control Act, 1948.

On 5-5-1950 the Superintendent of Post Office intimated to the petitioner's Solicitor that the postman who carried the letter for delivery did not care to verify the correctness of the alleged refusal and that consequently disciplinary action was being taken against the said Postman. The petitioner preferred an appeal from the order of the Rent Controller to the District Judge at Alipore. The said appeal was heard by respondent 3 who was the Subordinate Judge at Alipore on 25-7-1950. Respondent 3, however, confirmed the order of respondent 1 and dismissed the said appeal. The petitioner challenges the orders made by respondents 1 and 3 as illegal and as being orders which are erroneous on the face of the record.

(3) It has been contended by Mr. I. P. Mukherjee that the order of the Rent Controller refusing to entertain the application for review and the order of respondent 3 confirming the order of the Rent Controller are grounded on error of law which is apparent on the face of the record and therefore, the orders should be quashed by 'certiorari'.

Mr. Mukherjee has submitted with reference to Ss. 28, 29, 30, 31(2) and the various subsections of S. 32, West Bengal Rent Control Act, 1948 and Rr. 9, 10, 11, West Bengal Rent Control Rules, 1949 that the Rent Controller or the appellate authority when exercising their functions under the Rent Control Act, 1948, act as a Court and consequently the provisions contained in S. 4 and Ss. 9 to 18 and S. 22, Limitation Act, 1908 apply to proceedings before the Rent Controller or the appellate authority by virtue of S. 29(2), Limitation Act, and as the petitioner was kept from the knowledge of the application for fixation of standard rent made by respondents 5 and 6, by means of fraud, the petitioner was entitled to have the benefit of S. 18, Limitation Act for the purpose of getting an extension of the period of limitation prescribed by the provisions of the Rent Control Act for making an application for review of the order passed by the Rent Controller.

(4) It was further contended by Mr. Mukherjee that at any rate the provisions of the West Bengal Rent Control Act 17 of 1950 have put the matter beyond all doubt by enacting in S. 32 that the Rent Controller and the Appellate Authority act as judicial officers and may exercise powers given to Courts by Ss. 151 and 152, Civil P. C. and by further providing in sub-s. (5) of S. 32 that the Limitation Act applies to proceedings before the Rent Controller and the Appellate Authority.

(5) It is true that S. 32 of Act 17 of 1950 has made the Limitation Act applicable to proceedings under the Rent Control Act of 1950 but I do not think that by virtue of this S. 32 of the Act of 1950 the Limitation Act can be made to apply to proceedings initiated under the Act of 1948. The argument of Mr. Mukherjee is that the law of limitation being a law of procedure it can have retrospective operation, as nobody has a vested right in procedure. This is however not an accurate statement of the law (see — 'Girdharilal Son & Co. v. B. Kappini Gowder', AIR 1938 Mad 688 where most of the cases bearing on the point are considered.) The question moreover is not so much a question of the retrospective operation of the Limitation Act but the real question is whether S. 32 of the Act of 1950 is retrospective in effect. I am of the view that it cannot be so construed.

(6) It has been held by this Court in construing the provisions of the Rent Control Order of 1943 and the Rent Control Ordinance 1946 that the Rent Controller and the Appellate Authority exercised their functions under the provisions of the said Order and Ordinance as 'persona designata' and not as Courts. See — 'Kiron v. Kalidas', 47 Cal W N 460 and — 'Sm. Suhashini v. Mahendra', 51 Cal W N 818. B. P. Mukharji J. has also held in construing the provisions of the West Bengal Rent Control Act 1948 that the Rent Controller while exercising functions under this Act does not act as a Court: See — 'Indra Kumar v. C. C. Ganguli', 87 Cal L J 130 at pp. 135, 137. No argument has been advanced in this case which includes me to take a different view from that expressed in the cases referred to above and so I agree with those decisions. To quote the words of the Judicial Committee, the Rent Controller and the Appellate Authority are

> "Tribunals with many of the trappings of a Court which nevertheless are not Courts in the strict sense": See — 'Shell Co. of Australia v. Federal Commr. of Taxation', (1931) A. C. 275.

(7) It is clear that as a result of these decisions the Legislature thought fit to amend the Rent Control legislation and has enacted S. 32 of the Act of 1950 in its present form. Under the law as it stood before this amendment the Limitation Act had no application to proceedings initiated under the previous Statutes and by reason thereof respondents 5 and 6 acquired vested rights which cannot be affected by S. 32 of Act of 1950 which has not been made expressly or by necessary intendment retrospec-

tive in operation. In my view the orders dated 23-12-1949 and 25-7-1950 cannot be said to contain any error of law, as suggested by Mr. Mukherjee.

(8) It was also contended by Mr. Mukherjee that the Rent Controller not having acted in conformity with the provisions of S. 30 of the Rent Control Act 1948 the order made by him on 2-6-1949 should be quashed. It is argued that by addressing the registered letter to the residential address of the petitioner's father and by not sending it to the petitioner's ordinary place of residence at 23 Bechu Chatterjee Street the Rent Controller has violated the terms of S. 30 of the Act. It appears to me that this contention of Mr. Mukherjee has no force.

It is clear from the affidavit filed in the present proceedings that the petitioner's father had been managing and administering the property on behalf of and in the name of the petitioner, and he realised rent in respect of the premises from his own residence at 28/1 Allenby Road. There is nothing on record to show that respondents 5 and 6 or the Rent Controller knew or had any information about the petitioner's residential address at 23 Bechu Chatterjee Street. The application for fixation of standard rent gave the address of the petitioner as 28/1 Allenby Road and accordingly the Rent Controller sent the Notice to that address. It cannot, therefore, be said that the Rent Controller has contravened the terms of S. 30 of the Act.

(9) Even assuming that the orders of the Rent Controller and the Appellate Authority are erroneous in law it is a matter of some doubt having regard to the latest pronouncement of the Supreme Court in the case of — 'Ebrahim Aboo Baker v. Custodian General, Evacuee Property, New Delhi', 1952 S C A 501 whether this Court has power to correct an error of law by writ of 'certiorari' issued in exercise of its jurisdiction under Art. 226 of the Constitution.

(10) Mr. Nirmal Chandra Sen, the learned Advocate appearing for respondents 5 and 6, contended that the previous application made by the petitioner under Art. 226 on 4-6-1951 praying for the same reliefs as are asked for in this application precludes the petitioner from maintaining this second application. Mr. Sen relies on Halsbury Vol. 9 p. 786 para 1329. I do not think that this contention of Mr. Sen can be accepted. What happened with regard to the first application was that this Court allowed the petitioner to withdraw that application without going into the merits thereof. The observations made by Charles J. in the case of — 'Queen v. Mayor of Bodmin', (1892) 2 Q B 21 at p. 24 suggest that if the former application is not refused after hearing it on merits, but it is allowed to be withdrawn for want of sufficient materials to support the application, a second application is not barred. The case of — 'Ex parte Inhabitants of Carlton High Dale', 4 N & M 312 is referred to by Charles J. in support of this observation.

(11) Having regard however to my findings on the points urged by Mr. Mukherjee this petition must fail. The Rule is accordingly discharged. The petitioner must pay the costs of respondent 5. Hearing fee is assessed at five gold mohurs.

A/V.R.B. Petition dismissed.

A.I.R. 1953 CALCUTTA 299 (Vol. 40, C. N. 103)

CHAKRAVARTTI AND S. R. DAS GUPTA JJ.

Commissioner of Income-tax, West Bengal v. General Family Pension Fund.

Ref. No. 40 of 1950, D/- 28-11-1951.

Income-tax Act (1922), Sch., Rr. 2(a) and 5 — "Annuities", meaning of — Annuities depending on human life — Business of effecting such annuity contract, is doing insurance business within meaning of S. 2(11), Insurance Act — Assessee held carried on such business and not life insurance business of ordinary kind — Computation of profits of such business, method of — (Insurance Act (1938), S. 2(11)). (Para 6)

Anno: Income-tax Act, S. 10 N. 18; Insurance Act, S. 2 N. 1.

Sukumar Mitra, for Company; E. Meyer, for Income-tax Deptt.

REFERENCES: Courtwise/Chronological/ Paras

('39) 43 Cal WN 926: (AIR 1939 PC 190)	26
(1892) AC 309: (62 LJ QB 41)	21, 22, 28
(1913) AC 610: (82 LJ KB 1221)	26
(1918) 2 Ch 54: (87 LJ Ch 454)	20
(1858) 3 H & N 769: (28 LJ Ex 100)	20
(1854) 1 K & J 216: (1 Jur (NS) 203)	20
(1917) 88 LJ Ch 105: (119 LT 303)	20
(1889) 2 Tax Cas 551	26

CHAKRAVARTTI J.: The principal question submitted to us by this Reference relates to an apparent difficulty in computing, under the Income-tax Act, the taxable profits of a life insurance business, where such business includes sale or granting of annuities. In the particular case where the question has arisen, the business consists solely in granting of annuities and in such cases the difficulty appears to be greater.

(2) In order to explain what the question is and how it has arisen, it is necessary to refer to the relevant provisions of the Act before stating the facts. At the present stage the reference need be only in broad outline. Before the amending Act of 1939, the profits and gains of life insurance business, in the case of companies incorporated in British India, were to be computed mainly under R. 25 of the Rules framed under S. 59 of the Act. That rule prescribed a single straight-cut method and directed that the profits for any particular year were to be determined by simply taking the annual average of the total profits disclosed by the last actuarial valuation of the business and making certain additions thereto. The amendment of 1939 introduced a more complicated rule and prescribed what one may call a two-pronged method. It added a schedule to the Act and provided by S. 10(7) that the profits and gains of any business of insurance must be computed in accordance with the rules contained in the schedule. The schedule deals with all varieties of insurance, but the general method of computing the profits of a life insurance business is laid down in R. 2. That rule prescribes two alternative methods of computation and directs that of the two sums arrived at by the application of the two methods, the greater shall be taken to be the profits and gains of the business. The rule, as it stood at the relevant time and as it stands now, is in the following terms:

(3) The profits and gains of life insurance business shall be taken to be either—

(a) the gross external incomings of the preceding year from that business less the management expenses of that year

or

(b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation for the last inter-valuation period ending before the year for which the assessment is to be made, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure which may under S. 10 of this Act be allowed for in computing the profits and gains of a business, whichever is the greater.

(4) Broadly speaking, the profits under the first method are the 'incomings' received during the relevant year, less expenses while under the second method they are only the average of the actuarial surplus, as disclosed by the last valuation, subject to certain adjustments. Under the first method, an attempt is to be made to ascertain the actual profits of the year by reference to the receipts and disoursements. Under the second, no such attempt is to be made and the surplus disclosed by the last actuarial valuation, after making certain adjustments, is to be divided by the number of years for which the valuation was made and the amount thus arrived at is to be taken as the profits of the year.

(5) So far there is no difficulty. The two methods would appear to be mutually exclusive, as logically they ought to be, if the amounts respectively arrived at by their application are to be compared and the greater of the two is to be taken to be the profits. But a difficulty is created by the definition of 'gross external incomings', referred to in R. 2(a). That term is defined in R. 5(ii) as follows:

"'Gross external incomings' means the full amount of incomings from interest, dividends, fines and fees and all other incomings from whatever source derived (except premiums received from policy-holders and interest and dividend on any annuity fund) and includes also any profits from reversions and on the sale or the granting of annuities, but excludes profits on the realisation of securities."

There is a proviso to the definition to which it is not material to refer.

(6) It will be noticed that 'gross external incomings' includes "profits on the sale" or the granting of annuities. What profits are to be included under that head and how are such profits to be computed? The answer depends on what is meant by 'annuities'. Annuities may be annuities certain or they may be annuities dependent on human life. Where they are of the latter kind, a business of selling or granting them would be life insurance business within the meaning of the schedule, because R. 5(iv) adopts the definition of life insurance business as given in S. 2(11), Insurance Act, 1938 and the definition there given is 'inter alia' to the effect that 'life insurance business' includes "annuity business, that is to say, the business of effecting contracts of insurance for the granting of annuities on human life". But if 'sale or the granting of annuities' in the definition of 'gross external incomings' means carrying on life insurance business of the annuity type, a difficulty arises in applying the two parts of R. 2 to the computation of the profits of companies which carry on such business.

It is well known that to ascertain the profits of a life insurance business for any particular year by application of the ordinary methods of profit-calculation is practically impossible and such profits can only be ascertained, in a somewhat artificial way, by reference to the last actuarial valuation. The term 'gross external incomings' occurs in R. 2(a). If the word 'annuities', occurring in the definition of that term, means insurance annuities and if the profits from the sale of such annuities are to be ascertained by reference to the actuarial valuation, which is the only way in which it can be done, the effect will be to import the actuarial method into R. 2(a) and the mutual exclusiveness between that Rule and R. 2(b) will be destroyed. Where a company carries on life insurance business of the ordinary kind and also annuity business, it will be destroyed partially, but where annuity business is the only business done, the destruction will be complete. Basically, the same method of computation will then have to be applied under both the sub-rules, in part in one case and wholly in the other and the direction that the two sums ascertained by the two methods are to be compared with a view to taking the greater of them as the income of the year, will, to a certain extent at least, become unreal. The controversy under the principal question in this Reference relates to this difficulty and the question is whether in the case of the assessee company which does only annuity business, the Income-tax Officer was right in taking the annual average of the actuarial surplus disclosed by the last valuation as the 'gross external incomings', less management expenses, for the purposes of R. 2(a), subject to certain adjustments. The other question referred concerns the nature of the annuity business carried on by the assessee company.

(7) The facts of the case may now be stated. The assessee company was established in the year 1870 and carries on the business of granting terminable pensions or annuities, dependent on human life, in favour of subscribers to the pension fund or their nominees. It issues four kinds of policies, known as Class A, Class B, Class C and Class D. In the case of the first three classes of policies, the beneficiary is a nominee of the subscriber and the contingency upon which a pension becomes payable is the subscriber's death. Under class A policies, the pension is payable to the wife of the subscriber for the remainder of her life, under Class B to a son until the age of 24 years and under class C to a daughter until her marriage. In the case of Class D policies, the beneficiary is the same person as the subscriber. The contingency upon which the pension becomes payable is the attainment of a selected age and it continues to be payable for the remainder of the subscriber's life.

This class of policies is divided into two subclasses, DM and DF, the first being for male lives and the second for female lives. The pension payable is Rs. 100/- per month in the case of A and D policies and Rs. 80/- per month in the case of B and C policies, or multiples thereof, according to the premium paid. In each type of policy there is provision for a refund of the premium paid if the benefit stipulated for is not entered upon, as for example, in the case of the first three classes, if the beneficiary dies before the death of the subscriber and in the case of the fourth class, if the subscriber dies before attaining the selected age. There is also a provision for certain minimum benefits payable in certain circumstances to the legal representatives of the beneficiary or the beneficiary himself or herself. Besides issuing these four types of policies, the company does no other business. Its business is thus solely confined to the 'sale or the granting of annuities'.

(8) The reference covers assessments of the company for four assessment years, viz., 1943-44, 1944-45, 1945-46 & 1946-47, & the same points have been raised in respect of all the assessments. What

the points are will be better understood if we explain first how the assessments have been made. It appears that the assessments for the first three years are assessments on a remand made by the Appellate Assistant Commissioner, while the assessment for the year 1946-47 is an original assessment. The method adopted in making the assessments can be ascertained only from the original assessment orders in respect of the first three years which have not been included in the Paper Book & without reference to which neither the contentions of the parties, nor the findings of the Appellate Tribunal are intelligible.

It appears that in making the original assessments for the first three years, the Income-tax Officer first computed the profits under R. 2(b) by reference to the last actuarial valuation which was a triennial valuation for the period ending on 31-12-1942. There is no question that this computation was correctly made. The Income-tax Officer next proceeded to make a computation under R. 2(a) and for that purpose he had to ascertain the 'gross external incomings' of the preceding year, as defined in R. 5(ii) and deduct therefrom the 'management expenses' as defined in R. 5(iii). As has been seen from the definition quoted earlier, under 'gross external incomings' fall to be included

(a) interest;

(b) dividends (but not interest and dividends from an annuity fund);

(c) fines;

(d) fees;

(e) incomings from all other sources (but not premiums received from policy-holders);

(f) profits from reversions;

(g) profits on the sale or the granting of annuities (but not profits on the realisation of securities).

(9) In determining the 'gross external incomings' of the preceding year, the Income-tax Officer had thus to include therein the profits of the annuity business for that year, which meant the profits of the entire business of the company, since it did no business other than annuity business. But the company had submitted no annual Profit and Loss Accounts. In those circumstances, the Income-Tax Officer apparently thought that since he had to take the profits of the whole business of the company under the head 'g', he had nothing to take under the remaining heads; and since in the absence of an annual actuarial valuation and a profit and Loss Account based thereon the profits of the preceding year could be ascertained only by reference to the last triennial valuation, he had no alternative but to take the average of the actuarial surplus as such profits. "In the case of a purely annuity business" he observed, "such as that of the assessee, 'gross external incomings' mean the actuarial surplus". This observation was not wholly accurate, because the actuarial surplus would be the equivalent of not the gross external incomings, but such incomings, less management expenses. In fact, that was the basis on which the Income-tax Officer actually proceeded, for while adopting the adjusted actuarial surplus determined under R. 2(b) as the profits to be included in 'gross external incomings' for the purposes of R. 2(a), he made no deduction on account of management expenses. He allowed a small deduction on account of depreciation in the value of furniture and as he found that the profits determined under R. 2(a) in accordance with the above method were greater than those determined under R. 2(b), he took the former as the taxable profits. Assessments for all the three years, i.e., 1943-44, 1944-45 and 1945-46, were made in the same manner.

(10) From these assessments, the company appealed to Appellate Assistant Commissioner. The Assistant Commissioner did not hold that if the provision contained in the definition of 'gross external incomings' for including therein the 'profits on the sale or the granting of annuities' was applicable to the case, the method of computation adopted by the Income-tax Officer was still wrong. What he held was that the said provision applied only to 'purely annuity business', but not to cases where the contract was 'an admixture between an annuity and life insurance'. In his opinion, the policies issued by the company required closer examination and, in that view, he remanded the cases to the Income-tax Officer for making fresh assessments after studying the various schemes evidenced by the policies. There can be no doubt that by 'purely annuity business' the Assistant Commissioner meant annuities certain or at least annuities not dependent on human life.

(11) It appears that thereafter the attempt on each side was to adjust its case to the observations made by the Assistant Commissioner. The Income-tax Officer, before he took up the fresh assessments for the first three years, completed the assessment for the year 1946-47. The company contended that the contracts embodied in its policies were admixtures of annuity and life insurance, but expressed its inability to dissect its accounts and show the results of its annuity and life insurance business separately, as it was required by the Income-tax Officer to do, if he was to apply R. 5(ii) on that basis. The Income-tax Officer held that there was "no element of life insurance" in any of the contracts which were "purely annuity policies" and that therefore he was entitled to take in the profits of the annuity business and compute them for the purposes of R. 2(a), read with R. 5(ii), in the way he had done. Accordingly, he adopted the figure of the annual adjusted surplus which he had already worked out for the earlier assessments and taking that to represent the profits computed under R. 2(a), as before, he determined the net business income for 1946-47 after allowing a certain deduction on account of depreciation in the value of furniture. He did so, because the company had submitted its return even for the year 1946-47 on the basis of the 1942 valuation and a further valuation for the period ending on 31-12-1945, which had since been made, was not brought to his notice.

(12) As regards fresh assessments for the three earlier years, the Income-tax Officer repeated the original assessments. In the orders recorded by him, he merely mentioned the amount of the income he had already computed under R. 2(a) in the original assessment and referred for his reasons to the assessment order for 1946-47.

(13) The assessment orders printed in the Paper Book are these reassessment orders for the first three years and the assessment order for 1946-47, none of which shows the actual process of computation to which the principal question referred to this Court relates. The Tribunal itself had to refer to the original assessment orders but did not yet direct their inclusion in the Paper Book.

(14) It may be pointed out at once that the whole business of the company is annuity business and if there was no element of life insurance in that business, as the Income-tax Officer held, it is impossible to see how he could have applied R. 2 of the Schedule at all. In the application for a reference, it was sought to be made out

that what the Income-tax Officer had held was that the company did no other life insurance business than granting of annuities, but that is certainly not what his order says. The Appellate Assistant Commissioner who had to deal with these four assessments, upheld them, but he did not proceed on the basis adopted by the Income-tax Officer. Before him, the company repeated its contention that it carried on a mixed type of business and also advanced a fresh contention that its business was ordinary life insurance business and not annuity business at all, the only difference being that the insured amount was paid in instalments instead of in a lump sum. Both these contentions were rejected by the Appellate Assistant Commissioner. He held that the business carried on by the company was life insurance business of the annuity type, as defined in the Insurance Act of 1938, and being thus life-insurance business within the meaning of the schedule, the sale and granting of annuities in which it consisted came within the purview of R. 5(ii) and accordingly the profits of the company from the granting of annuities were to be included in the 'gross external incomings'. The view attributed to the Appellate Assistant Commissioner in the Statement of the Case does no appear to be correct. He proceeded to hold that in the absence of a Profit and Loss Accounts for the previous year, the Income-tax Officer had to make an estimate of the profits of the previous year and the way in which he had done so was the only way possible in the circumstances and correct in all its details.

(15) On further appeal by the company, the Tribunal held that the business carried on by the company was "in a way life insurance business". It held further that the method followed by the Income-tax Officer in making the computation under R. 2(a) was incorrect and accordingly it set aside all the four assessments and directed fresh assessments to be made "by following to the letter of the law the provisions contained in R. 2(a)" and by working out the profits independently under the provisions of that Rule "without resorting to the actuarial valuation report".

(16) Thereupon, the Commissioner of Income-tax asked for a reference of the following question of law:

> "Whether on the facts of the case and on a proper construction of the provisions of the Schedule to the Income-tax Act, the Tribunal was right in holding that the method followed by the Income-tax Officer in determining the profits of the assessee under R. 2(a) of the said Schedule was an incorrect method?"

The Tribunal, however, had referred the following two questions:

1. Whether in the facts and circumstances of the case, the business of the Assessee-Company consisted wholly of annuity business or whether it contained some elements of ordinary life insurance business as distinct from annuity business?
2. Whether the Income-tax Officer was justified in making an estimate under R. 2(a) of the Schedule attached to S. 10(7), Income-tax Act?

(17) It is not easy to understand why the first question was referred at all or what the point of referring it, in the facts of the present case, is. Nobody wanted it or indeed any question about the nature of the company's business to be referred. The Tribunal had found that the company's business was life insurance business 'in a way'. Not only did the Commissioner of Income-tax, who was the applicant for a reference, not challenge that finding or propose any question about it for reference, but in his observations on the draft Statement of the Case, he expressly admitted that "the Contracts A to D came under the expression 'life insurance business' ". As for the company, it did not ask for a reference of any question at all and also did not raise any question about the nature of its business in its reply to the Commissioner's application. It is true that in his application for a reference the Commissioner said that what the Income-tax Officer had held was that the company did "no other life insurance business than the granting of annuities" and thereby he tried to explain away the inconsistency in the Officer's action in holding that the company's business had "no element of life insurance" in it and yet applying R. 2 of the Schedule to the computation of its profits. That explanation, as I have already pointed out, is not acceptable, but the Tribunal held nothing contrary to the view wrongly attributed to the Income-tax Officer and its finding that the company's business was life insurance business "in a way" was not questioned by anybody. The explanation attempted by the Commissioner of what the Income-tax Officer had held could therefore be no occasion for referring the first question.

(18) Apart from the fact that the reference of the question is an unwanted reference, it is not very clear what the question, as framed, really means. Surely it does not ask whether the company's business consisted in granting annuities dependent on human life or in granting annuities not so dependent, for the contrast it draws is not between annuity and life insurance, but between annuity and "ordinary life insurance". Had the former been the question, one might have thought the Tribunal was thinking of the Income-tax Officer's "purely annuity policies" with "no element of life insurance" in them and the company's contention that its policies were "admixtures of annuity and life insurance" contracts. It is true that the question speaks of the company's business containing "some elements of ordinary life insurance business as distinct from annuity business", which would suggest that the same business might have those two elements in it, but it is meaningless to speak of any such co-existence of two separate elements of annuity and life insurance in a business of issuing annuity policies. An annuity contract is either a life insurance contract or it is not so. If it provides for the payment of annuities and if the right to payment is governed by the happening of a contingency which depends in any way upon the duration of human life, the business of effecting such contracts is life insurance business under the definition of that term. It is nothing else and cannot be anything else at the same time, at least for the purposes of the Insurance and Income-tax Acts. If, therefore, any intelligible meaning is to be given to the question, as framed, it can only mean whether the company's business consisted wholly in life insurance business in the form of granting annuities or whether a part of the business was such business and a part was life insurance business of the ordinary kind. If so, the question contemplates what was nobody's case before the authorities below and really it does not arise out of the Tribunal's order.

(19) But the question having been referred, it was contended by Mr. Mitra on behalf of the company that the business carried on by it was wholly life insurance business of the ordinary kind and not annuity business at all. In any event, it was further contended, the business relating to

the A, B and C classes of policies was not annuity business. The first and the extreme part of this contention, it will be remembered, was the new contention advanced for the first time before the Appellate Assistant Commissioner, but there is no trace or hint of it in the appellate order of the Tribunal. As far as can be seen from that order, the contest before the Tribunal was as to whether the policies had or had not in them an element of life insurance. That contest might well arise on and out of the Income-tax Officer's order, but why the parties engaged in it before the Tribunal and why the order of the Assistant Commissioner, holding that the company's policies were life insurance policies, were totally ignored both by the Tribunal and the parties, is by no means clear. Be that as it may, the extreme contention of Mr. Mitra is clearly not within the question referred, for the alternatives contemplated by it do not cover a case of the company not doing any annuity business at all. In any event, I am of opinion that neither of the contentions of Mr. Mitra is tenable and the view taken by the Tribunal, though somewhat curiously expressed, is correct.

(20) The object of Mr. Mitra's contentions was clear. If he could establish that the business of the company was not annuity but ordinary life insurance business, either wholly or in part, then to the extent he succeeded in his contention, no profits would be liable to be included in the computation of 'gross external incomings' under the head 'profits on the sale or the granting of annuities'. The contention, it must be noticed, was not that the contracts evidenced by the policies were not life insurance contracts: the only contention was that, although life insurance contracts of annuities. I am entirely unable to see how they were not, at least in the case of the first three classes of policies, contracts for the payment of annuities. I am entirely unable to see how that contention could be sustained. An ordinary contract of life insurance is one

> "under which the insurers undertake to pay a specified sum of money upon the death of a particular person in consideration of a premium which is to be paid during the continuance of the life insured".

I am ignoring the variations that can be found in the stipulation for the payment of a premium and also the various other ways in which the right to payment may depend on the duration of a life. But the common feature is that the sum insured is a specified sum. In the case of the A, B and C policies, the contingency upon the happening of which the right to payment arises is indeed the death of the subscriber, but the payment stipulated for is not payment of a fixed gross sum, but recurrent payments of monthly sums which are not instalments of any specified amount and which are terminable on the happening of another contingency. An annuity is a fixed sum paid every year as income, at one or more regular intervals, during the life-time of the recipient or a shorter period and it has been judicially defined; though from another point of view, as an annual income purchased with capital, where the capital has disappeared and has been converted into an annuity: — 'Foley (Lady) v. Fletcher', (1858) 3 H. & N. 769 at p. 784. No point was made by Mitra of the fact that the payments are monthly payments and none could be made, because in considering whether there is an annuity "regard must be paid not to the length of the intervals between the payments, but the length of the total period during which they are payable" and monthly or weekly payments may well be payments of an annuity. — 'Bebb v. Bunny', (1854) 1 K. B. & J. 216; 'In re Cooper: Cooper v. Cooper', (1917) 88 L. J. Ch. 105; — 'In Re Janes Settlement; Wasmouth v. Jones', (1918) 2 Ch. 54.

It is thus clear that the payments stipulated for under the A, B and C policies are payments of annuities and if life insurance business includes "annuity business, that is to say, the business of effecting contracts of insurance for the granting of annuities on human life", as under the definition it does, annuity business contemplated by the definition can only be business of the kind represented by those policies. The business done by the assessee company under the A, B and C policies is therefore the specific variety of life insurance business defined by the Act as annuity business and not life insurance business of the ordinary kind. The case of the D policies was hardly argued. Under them, the subscriber secures for himself a monthly pension commencing from a selected age and lasting upto the end of his life and there can be no doubt that what he secures is a life annuity commencing from the selected age. It need hardly be pointed out that the subsidiary provisions contained in all the policies as to the refund of the premium in certain circumstances or the payment of certain minimum or additional benefits do not affect the fundamental character of the contracts which are contracts for the payment of annuities. Since the company does no business other than the business of issuing the four kinds of policies mentioned above, it follows that its business is wholly a business of granting annuities on human life and no part of its business is ordinary life insurance business. The answer to the first question must accordingly be to the above effect, though, as I have pointed out, the question does not strictly arise out of the Tribunal's order.

(21) I may now pass on the second and the principal question. That question which, again, is not very accurately expressed, is whether in determining the profits of the company's business for the preceding year under Rule 2 (a), the Income-tax Officer was justified in adopting and adjusting the estimated profits under the actuarial valuation instead of himself making calculations from receipts and disbursements. I hope I shall be doing no injustice to Mr. Mitra if I point out that his argument on the second question was not always on the same basis and was not consistent. On the one hand, he contended that the profits of a business of granting annuities on human life could be ascertained without reference to the actuarial valuation as, according to him, was done in the case of — 'Gresham Life Assurance Society v. Styles', (1892) A. C. 309. On the other hand, he admitted that the profits of such a business, like the profits of all other kinds of life insurance business, could only be ascertained by actuarial calculations, but his contention was that such profits were not at all liable to be included in 'gross external incomings'.

(22) I may point out at once that the second contention raised a point which is entirely foreign to the question referred. The question does not contemplate that in computing the 'gross external incomings' of the preceding year for the purposes of Rule 2 (a), nothing might have to be included under the head "profits on the sale or the granting of annuities", but only asks whether, given that the profits of the annuity business were to be computed and included, the method of computation followed by the Income-tax Officer was correct. But since Mr. Mitra raised the point, I shall deal with it shortly. His argument was that the words 'annuities in the definition of gross

external incomings' meant not life insurance annuities, but annuities certain. According to him, the definition contemplated a case where a life insurance company, while carrying on life insurance business, also carried on a business of granting or selling annuities certain & it was only in such cases that the profits of the subsidiary business of granting annuities certain were to be included in the 'gross external incomings' under the head 'profits on the sale or the granting of annuities'. The computation of the profits of such an annuity business would require no actuarial valuation and it was contended that since such construction of the definition would avoid the overlapping between Rr. 2 (a) and 2 (b), it ought to be adopted as the practically feasible construction. In my opinion, this contention is plainly untenable. Rules 1 to 5 of the Schedule contain provisions for the computation of the profits of not life insurance companies, but life insurance business. No business which is not life insurance business is germane to those Rules of the Schedule, although such business may be carried on by a life insurance company. 'Life insurance business', according to its definition given in the Insurance Act which the Schedule adopts, includes the business of 'granting annuities on human life'.

Mr. Mitra himself pointed out, by reference to the language used in — 'Gresham's case', (1892) A. C. 309, that in the case of a business in insurance annuities, 'sale' and 'granting' was synonymous and so the use of the word 'sale' does not point to the annuities contemplated by Rule 5 (ii) being annuities certain. There can thus be no doubt that, since Rr. 1 to 5 of the Schedule are concerned only with life insurance business, the annuities contemplated by Rule 5 (ii) can only be annuities on human life such as are included in the definition of 'life insurance business' and such as the assessee company grants or sells. The Forms relating to life insurance business contained in the First, Third and Fourth Schedules to the Insurance Act all treat such business in two parts, viz., ordinary life insurance and annuities, and the same structure of a life insurance business is clearly contemplated by Rule 5 (ii) of the Schedule.

(23) If then, in determining the profits under Rule 2 (a) and computing for that purpose the 'gross external incomings' of the preceding year, the profits of the annuity business had to be included, the next question is how, in the facts of the present case, those profits could be ascertained or rather, since the profits from the annuity business were the whole profits of the company, how Rule 2 (a) could be applied to those profits. As the Appellate Assistant Commissioner has pointed out, the company submitted no Profit and Loss Accounts for the relevant preceding years. Nor had there been any yearly actuarial valuation which might give the actual surplus for each year. In the absence of such materials, the Income-tax Officer adopted the average annual surplus, determined according to the last triennial valuation, as representing the gross external incomings, less management expenses and did not take any figures either of incomings or of expenses, item by item. The Tribunal has condemned that method, with some severity of language, as not in accordance with Rule 2 (a) and has directed the Income-tax Officer to make a fresh computation "by following to the letter of the law" the provisions contained in the Rule and without reference to the actuarial valuation report. It has not said how that could be done.

(24) Since the objection is that Rule 2 (a) was not correctly applied and the direction of the Tribunal is that its provisions are to be followed "to the letter of the law" I may now examine in greater detail what the Rule directs & what the Income-tax Officer has done. Under the Rule, he had first to compute for each year 'the gross external incomings' of the preceding year, as defined in R. 5 (ii), and then deduct therefrom the 'management expenses' of that year, as defined in Rule 5 (iii). In carrying out the first part of his task, he had to take in (i) interest and dividends (but not those on the annuity fund), (ii) fees, (iii) fines, (iv) incomings from all other sources (but not premiums received from policy-holders), (v) profits on the sale or the granting of annuities and (vi) profits from reversions. The complaint against the Income-tax Officer is that he did not take the incomings under the several heads, item by item, but confined himself to the total profits of the annuity business and that for those profits, he adopted the annual average of the actuarial surplus. I shall take the two parts of the criticism separately. As regards the first part, in a case where apart from annuity business, the company also does life insurance business of the ordinary kind, it may be possible to apply Rule 2 (a) "to the letter of the law" and proceed by way of taking some incoming under each head, for while the incomings of the annuity business will go into the profits of that business, to be taken in as a whole under item (v) above, there will still be the incomings of the general business and therefore something to take in under items (i) to (iv) and (vi) provided there are receipts under those heads.

But where, as in the present case, the only business done is annuity business and the profits of that business are to be taken as a whole under item (v) above, such profits will necessarily cover all the incomings of the business and there can be nothing to be included again under the remaining heads. The management expenses will also be covered, for the profits could be arrived at only after deducting the expenses, and therefore there can be no expenses to be deducted again. To put it shortly, under Rule 2 (a) the profits of the whole life insurance business of a company are equal to gross external incomings, (including profits of the annuity business, if any) 'minus' management expenses. It is obvious that where annuity business is the only business done, the profits of that business are all the profits and once they are taken in, there can be nothing else to add or subtract under the formula contained in the Rule. I am accordingly of opinion that in confining himself to the profits of the annuity business and performing no other operation under Rule 5 (ii) or Rule 5 (iii), the Income-tax Officer did not contravene Rule 2 (a), but followed the only course possible in the peculiar facts of the case. Of the several component items of 'gross external incomings', he had to take in the present case only what I have put under 'v' above. Mr. Meyer pointed out that, in any event, if the Income-tax Officer did not take in anything under the remaining heads, his action went in favour of the assessee. While that may be a fact, it is not relevant to the question as to whether the method followed by the Income-tax Officer was correct.

(25) I may pause here to observe that R. 2(a) appears to me to be adapted primarily to a case where a company does life insurance business of the ordinary kind, but may also be doing annuity business in addition. Under the Rule, read with R. 5 (ii), profits from annuity business are only a part of the total profits of a business of life insurance. That, coupled with the specific provision that in taking interest and dividends

those "on any annuity fund" are to be excluded — which must mean 'interest and dividends on an annuity fund, if any clearly suggested that the business contemplated in the main is a business of ordinary life insurance, but there may be an annuity business as well. It is to be noticed further that the profits of an annuity business are not only treated separately as a distinct item, but also differently. While R. 2(a), read with Rr. 5(ii) & 5(iii), purports to prescribe an investment income minus expenses method of computing the profits of a life insurance business, it at the same time lays down that one of the items to be included on the receipt side is profits from the sale or the granting of the annuities, taken as a whole.

The method of taking the individual items of certain kinds of receipt and deducting the expenses, as defined in R. 5(iii), from the sum-total which is generally directed by the Rule, is not applied to annuity business but, on the other hand, the direction with regard to such business is to take the resultant profits in a lump. Such profits, it will be noticed, will include the premiums received on the annuity policies, although under the general rule, premiums received from policy-holders are to be excluded. But the main point is that where, as in the present case, the only business done is annuity business and the whole profits of the business are to be taken in under the clear directions of R. 5(ii), such profits will necessarily represent the balance of all incomings left after deduction of all expenses and it is impossible to see what else will remain to be done under R. 2(a), read with Rr. 5(ii), and 5(iii), except perhaps making some further adjustments on facts peculiar to the year of assessment.

At first sight, it might seem that 'profits on the sale or the granting of annuities' means only the profits arising solely from the sale of annuities, i.e. the excess of the present value of the premia receivable over the present value of the liabilities under the policies, but apart from the fact that there can never be any such excess in a life insurance business, there being always a net actuarial liability, such cannot be the meaning of the phrase. If it had been so, there could be no reason why under the first and the second heads of 'gross external incomings interest and dividends on the annuity fund should have been excluded. They are excluded obviously for the reason that they would be included in the profits of the annuity business; otherwise, they would be excluded altogether. 'Profits on the granting of annuities' must therefore mean, as it means under the corresponding provision of the English law, profits from the whole administration of the annuity fund and therefore a case where annuity business is the only business done, there is no scope for the remaining items in R. 2(a), read with Rr. 5(ii) and 5(iii) or indeed for the process prescribed by those Rules. I greatly doubt whether in enacting R. 2(a), the Legislature had at all present to its mind a case where a life insurance company might do only annuity business, but since it has made no exception, the Rule must be applied as best it can be done.

(26) The next criticism of the Income-tax Officer's action is that in applying R. 2(a), he adopted for the profits of each year the annual average of the surplus as ascertained from the last actuarial valuation or, as the Tribunal has put it, "allowed himself to be entirely guided by the actuarial valuation which helps to determine profits under R. 2(b)". The criticism involves two points, viz., (i) whether the Income-tax Officer was justified in referring to the actuarial valuation report at all and (ii) whether he was justified in making use of it in the way he did. As regards the first point, the Tribunal has held that in applying R. 2(a), reference to the actuarial valuation report is permissible and it has directed the Income-tax Officer to make a fresh computation "without resorting to" the report. There can be no doubt that the view taken by the Tribunal is wrong. A business of granting annuities on human life is life insurance business and it is now a matter of elementary knowledge that the profits of such a business cannot be ascertained in the ordinary way: — 'Commr. of Income-tax, Bengal v. Himalaya Assurance Co., Ltd.', 43 Cal WN 926 at p. 932 (PC), per Lord Romer; and that they can be ascertained only by an actuarial valuation: — 'Scottish Union and National Insurance Co. v. Smiles', (1889) 2 Tax Cas 551; — 'Liverpool London and Globe Insurance Co. v. Bennet', (1913) A. C. 610 at p. 617. The obvious reason is that the amount of the premia receivable and the sums payable under the policies issued must necessarily vary with the incidence of mortality among the insured and therefore anything like profits can be ascertained only by intricate actuarial calculations of the present value of the permia receivable under the policies and that of the liabilities thereunder on the basis of mortality expectations. The difference between the two is the 'net actuarial liability' which is an indispensable item in the computation of the profits of a life insurance business. An ordinary Revenue Account of a life insurance business would not disclose the profit or loss of the business at all, because it does not incorporate the net actuarial liability. A reference to the valuation report is therefore indispensable and as this was ultimately admitted by Mr. Mitra, I need not pursue the point further.

(27) As regards the second point, it was contended by Mr. Mitra that if the actuarial surplus was adopted for the purpose of R. 2(a), "the primary requirement" of that Rule that the method to be followed under it was to be different from that prescribed by R. 2(b) and that under the Rule only 'external' incomings were to be taken, would at once be violated. He contended further that if such was the consequence to which application of the Rule led, there was a lacuna in the Act, but such consequence ought not to be held to have been intended. We are, however, to take the Act as it stands and I have already pointed out that R. 2(a) is extremely ill-adapted to a case where the only business done is annuity business. I shall presently deal with the objection to taking the actuarial surplus, but may first deal with the objection as to overlapping. Now, it is noteworthy that R. 2(a) does not direct that with regard to the profits of an annuity business also, the method of computation prescribed by the Rule is to be followed. On the other hand, it merely directs such profits to be taken. It follows that the profits are to be computed by the process of which they are ordinarily susceptible & if that process is the process of actuarial valuation prescribed by R. 2(b), the adoption of the process has the sanction of R. 2(a) itself and it is a mistake to suppose that the latter Rule requires the whole computation under it to be by a different method.

It is instructive to notice that the position is precisely the same under the English law. Under that law, the Crown has an option of assessing a life insurance company either under Case I of Schedule D, i.e. on the balance of its profits and gains or under case II, IV or V of that Schedule, i.e. on the profits determined by the investment income less expenses method. Broadly

speaking, the first method corresponds to R. 2(b) and the second method to R. 2(a). When a company is assessed according to the second method, it is entitled to claim refund of tax on an amount equal to the expenses of management, but from such expenses must be deducted fines, fees, income from untaxed sources, profits from reversions (Income-tax Act, 1918, S. 33(1)(b)) and profits arising from the granting of annuities of human life (Finance Act, 1923, S. 16 (1)). The process under the English law is thus the converse of that under the Indian Act, for, whereas under the Indian Law deductions are made when computing the assessable income, under the English law, tax is first suffered on the gross income and a refund of tax on the amount of the allowable deductions is then granted. But what is important to notice is that for the purposes of the deduction, the profits of the annuity business are to be computed in accordance with the Rules of Case I of Sch. D (Finance Act, 1923 S. 16(2)). It will thus appear that while the computation in one case is on the balance of profit basis, corresponding to R. 2(b) and in the other case on the investment income 'minus' expenses basis, corresponding to R. 2 (a), still, the computation of the profits of the annuity business even for the purposes of the second case is to be on the balance of profit basis. I am referring to the English law only for an analogy and for pointing out that the precise overlapping complained of occurs under that system as well and that there is nothing inherently shocking in such overlapping.

(28) Mr. Mitra referred repeatedly to the case of — 'Gresham Life Assurance Society v. Styles', (1892) AC 309, and contended that that case was illustrative of the correct method of computation applicable in the present case for the purposes of R. 2(a). I am entirely unable to see what relevancy the case cited has to the question before us. All that it decided was that in computing its assessable income under Case I Sch. D, i.e. on the balance of profits & gains basis, an insurance company was entitled to deduct as expenses the amounts of the annuity payments made. The whole question in the case was whether the annuities were payable 'out of the profits and gains', deduction of which was forbidden under R. 4 applicable to Cases I and II, now R. 3(b), or whether they were expenses incurred in earning the profits and therefore deductible in arriving at the profits and gains. Their Lordships held that in the case of an insurance company dealing in annuity policies, the annuities paid were the cost of procuring the policy contracts in which the comany traded and therefore the payments were expenses laid out for the purpose of earning the profits & not application of profits after the same had been earned. The annuities were accordingly held to be not 'payable out of the profits & gains' and the payments were held to be deductible. I cannot see how the case affords any guidance in deciding in what manner the profits of an insurance company, doing only annuity business, are to be computed under R. 2(a) which prescribes an investment income 'minus' expenses method or how it discountenances adoption of the actuarial surplus. In the first place, the company in the case cited was doing both ordinary insurance and annuity business and the profits computed were the profits of the whole undertaking; in the second place, the income was computed on the balance of profit basis; and in the third, the method adopted in computing the profits was in fact to take the annual average of the actuarial surplus (see p. 310 of the report). As regards the actual decision nothing contrary thereto has been done in the present case, for it is nobody's contention that in determining the actuarial surplus, the annuity claims paid were not deducted.

(29) I have already pointed out that the profits of an annuity business under R. 2(a) are to be ascertained by the particular method of commercial accounting of which such profits are susceptible but that reference to the actuarial valuation can in no case be avoided. Yet, although such reference is required and the net actuarial liability on the relevant dates must always be taken into account, adoption of the annual average of the actuarial surplus will not always be necessary. Three kinds of cases are possible, viz., (i) where a company does both annuity business and insurance business of the ordinary kind, but maintains a common fund and a combined Revenue Account; (ii) where a company does business of both kinds, but maintains a separate Annuity Fund and a separate Revenue Account for the annuity business; and (iii) where the company does annuity business only. We are concerned here only with the third case. In none of the cases, however, can the profits of the annuity business for any particular period be ascertained without taking into account the net actuarial liability at the beginning of the period and at the end. That liability can be found only from the actuarial valuation report. Under R. 2(a), the period for which the profits are to be ascertained is the preceding year. If there be a yearly actuarial valuation, the figures of the net actuarial liability at the beginning and at the end of the year will be available and, in such a case, the Revenue Account and the Actuarial Valuation Balance Sheet can be combined into a Profit and Loss Account for the year, showing, on the one side —broadly speaking— the annuity claims paid, the expenses of management and the net actuarial liability under the policies as at the end of the year and, on the other side, the profits brought forward, the premia received, the investment income and the net actuarial liability at the beginning. Such an account will show the surplus, if any, as at the end of the year and if, where there is a surplus, the profits brought forward from the previous year are deducted from it, the profits for the year concerned will emerge.

In the first of the three cases mentioned above, a pro forma Revenue Account for the annuity business will first have to be constructed by appropriate apportionments, but there will be no question in any of the cases of taking the annual average of the actuarial surplus. Indeed, there being an annual valuation, there will be no question of any average at all. But where there is no annual but only a triennial or quinquennial valuation, figures for the net actuarial liability at the beginning and at the end of the year will not be available and consequently it will not be possible to draw up a Profit and Loss Account of the kind mentioned above, nor to apply the process of computation indicated. The ordinary annual Revenue Account or even the Profit and Loss Account, prescribed by S. 11, Insurance Act, will be of no help, since they do not take note of the net actuarial liability on policies still current. The latter can be ascertained only from the documents prescribed by S. 13, read with Sch. 4, Part II, particularly the Summary and valuation and the valuation Balance Sheet, but they will give the figures for the beginning and the end of the particular year only when there is a yearly actuarial valuation. Where there is no such valuation and no Profit and Loss Account of the kind mentioned or of any kind has been submitted by the company, it is not possible for the Income-tax Officer to make any computations himself of the

profits of the particular years with which he is concerned and he must necessarily fall back on the computation made by the Actuary for the last valuation period and take the annual average of the surplus found by him, as representing the profits of each of the years. In the present case, there was no annual actuarial valuation and as the Appellate Assistant Commissioner has pointed out, no Profit and Loss Account of any kind for the relevant preceding years was submitted by the company at all. In those circumstances, the Income-tax Officer, in my opinion, had no alternative to adopting the annual average of the actuarial surplus as representing the basic profits for each of the years. The direction of the Tribunal to make a computation in some different manner by, as it says, following the provisions of R. 2(a) "to the letter of the law" and without reference to the actuarial valuation report is not a practicable one and the Tribunal has not said, nor was it pointed to us, how it could be carried out.

(30) In my opinion, when the only business done by an insurance company is to issue annuity policies dependent on human life, the Income-tax Officer, in computing the profits of the business under R. 2(a) of the Schedule to the Income-tax Act, has to take for 'gross external incomings' only the 'profits on the sale or granting of annuities' out of the items included in the definition of the former term and in computing such profits, he must needs proceed on the basis of the last actuarial valuation. Further, where there is no yearly valuation and no Profit and Loss Account based thereon or any Profit and Loss Account relating to the relevant year, the Income-tax Officer must needs proceed on the basis of the annual average of the surplus disclosed by the last valuation and make such further adjustments as may be required by the special facts of the case before him. That was what the Income-tax Officer did in the present case and, in my opinion, the method followed by him was, in the circumstances of the case, correct.

(31) No question as to the adjustments made was raised before us and none is covered by the question referred. The question only asks whether the Income-tax Officer was justified in following the method of an estimate instead of a method of calculations.

(32) In the result, the answers to the questions referred should, in my opinion, be as follows:

Question 1: The question does not strictly arise out of the Tribunal's order, but the answer is that the business of the company consisted wholly in life insurance business in the form of granting annuities on human life.
Question 2: Yes.

(33) We cannot part with this case without remarking on the extreme carelessness on the part of the Tribunal in preparing the Paper Book. As regards its contents, the most important documents viz., the original assessment orders for the first three years without reference to which the impugned method of computation cannot be understood at all and to which the Tribunal itself felt bound to refer in its appellate order, have not been included. In the second place, the inefficiency of the proof-reading betrayed by almost every page of the Paper Book is shocking. Not only have whole sentences been left out or long phrases and clauses transposed, but gross misprints such as "some pension" for "same person", "age" for 'paid', 'local representative' for 'legal representative' appear throughout. We must record a warning that if Paper Books of this kind are submitted in future, we shall feel compelled to decline to hear the Reference till a proper Paper Book is prepared and filed.

(34) The Commissioner of Income-tax will have the costs of the Reference.

(35) S. R. DAS GUPTA J.: I agree.

B/R.G.D. Answer accordingly.

AIR 1953 CALCUTTA 307 (Vol. 40, C. N. 104)

K. C. CHUNDER J.

Taru Bala Roy, Appellant v. The State.

Criminal Appeal No. 96 of 1952, D/- 16-7-1952.

Evidence Act (1872), Ss. 73, 18 — Proof by comparison — Identity of accused's signature — Admitted signature.

No one in a criminal trial can admit anything on behalf of an accused person except the accused himself or herself. If signatures are to be taken as admitted signatures they must be admitted by the accused himself or such signatures must be proved. (Para 2)

Anno: Evi. Act, S. 73, N. 2; S. 18 N. 5a.

Chintaharan Roy, for Appellant; Amaresh Chandra Roy, for the State.

JUDGMENT: This is an appeal against the conviction of the appellant under S. 7 of the Essential Supplies Act, 1946, for contravention of Cl. 9 of the Calcutta Industrial Area Rationing Regulation, 1943, by a Presidency Magistrate of Calcutta and sentence of Rs 500/- as fine. It is said that the accused possessed two sets of ration cards—one in Beadon Street and another taken from North Barrackpore. Really the two sets of cards did not belong to the accused as the head of the family. The accused has a husband and the set of cards of North Barrackpore are said to have been issued in the name of the accused's husband as the head of the family, whilst the cards taken at Beadon Street, Calcutta, were issued in the name of the accused as the head of the family. The learned Magistrate's judgment does not show that the accused did not take the cards lawfully in Beadon Street, while some one else may have taken wrong or illegal cards at Barrackpore. This is the first defect.

(2) The second defect is that there is absolutely nothing to connect the accused with anything done purporting to be in her name. The learned Magistrate himself found this defect. So he proceeded to solve it in a way which again did not legally solve it. He became a handwriting expert himself and he says that he compared some admitted signatures of the accused with those in the document, namely, the ration cards alleged to have been signed by her. The learned Magistrate as a stipendiary Presidency Magistrate of Calcutta should know at least this much of elementary law that no one in a criminal trial can admit anything on behalf of an accued person except the accused himself or herself. If signatures are going to be taken as admitted signatures they must be admitted by the accused himself or such signatures must be proved. Mr. Roy appearing on behalf of the State could not find out anything from the record to show that the accused admitted these signatures with which the comparison is said to have been made by the handwriting expert, namely, in this case the learned Magistrate himself. Under the circumstances the learned

Magistrate's finding is based absolutely on no legal evidence.

(3) The appeal is, therefore, allowed and the conviction and sentence are set aside. The fine, if paid, is to be refunded.

B/M.K.S. Appeal allowed.

AIR 1953 CALCUTTA 308 (Vol. 40, C. N. 105)

CHUNDER J.

Yusuf Cossim, Complainant-Petitioner v. Maya Rani Sen Gupta and another, Accused Opposite Party.

Criminal Revn. No. 1275 of 1952, D/- 22-12-1952.

(a) Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act (16 of 1951), Ss. 3 and 4 — Scope — (Criminal P. C. (1898), S. 522).

Neither section affects jurisdiction of Magistrate to order restoration of possession under S. 522, Criminal P. C. by displaced persons, who took possession of land committing offences under Ss. 143, 448 and 453, Penal Code and has been convicted. (Paras 1, 2)

Anno: Cr. P. C., S. 522 N. 1.

(b) Criminal P. C. (1898), S. 522 — Powers of Court of appeal or revision — Time limit fixed in Cl. (1) does not apply and Court can order restoration even after one month from conviction: AIR 1947 Cal 390, Dissent. (Para 3)

Anno: Cr. P. C., S. 522 N. 10.

(c) Criminal P. C. (1898), S. 522 — Scope.

Order under section is discretionary — Likelihood of conflict of authority and decision arising — Discretion should be used avoiding conflict — Appeal under S. 6, Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act (16 of 1951) pending — Restoration of possession should be directed so as to give effect to order in that appeal. If appellate order directs alternate accommodation to be given restoration of possession will be after such accommodation has been given by State Government and otherwise after that order is passed. (Paras 4, 5)

Anno: Cri P. C., S. 522 N. 1.

Ajit Kumar Dutt, for Petitioner; N. R. Biswas and Amal Kumar Basu, for Opposite Party.

REFERENCE..... /Para

('47) AIR 1947 Cal 390: (48 Cri LJ 908) 3

ORDER: This Rule was issued at the instance of the complainant in connection with an order under S. 522, Criminal P. C. The facts briefly are that the complainant was the owner of a house which was broken into by refugees who took possession of the same committing offences under Ss. 143, 448 and 453, Penal Code attended, as has been found by the learned Magistrate, with criminal force, show of force and criminal intimidation. The opposite parties in the present application are two ladies Maya Rani Sen Gupta and Bimala Sanyal. The complainant is one Yusuf Cossim Ariff. The opposite parties along with others were convicted by the learned Magistrate and sentenced to pay fines. The matter came up to this Court in revision after an appeal had been filed. This Court upheld the conviction. The landlord after the conviction of the opposite parties had prayed to the learned Magistrate for restoration of possession by ousting the two opposite parties. There is no question and there can be no question that the learned Magistrate had complete jurisdiction under S. 522 Criminal P. C. to restore the complainant petitioner into possession.

(2) It has been urged by Mr. Biswas on behalf of Maya Rani Sen Gupta that the complainant petitioner having gone to the competent authority under S. 3 of West Bengal Act 16 of 1951 and the competent authority having passed an order for eviction of Maya Rani Sen Gupta when the State Government had provided her with alternative accommodation as mentioned in S. 4 and the matter now having been taken up to the Appellate Tribunal by the complainant petitioner the learned Magistrate had no jurisdiction to pass an order under S. 522 Criminal P. C. As far as the question of jurisdiction is concerned, neither S. 3 nor S. 4 of West Bengal Act 16 of 1951 has purported to interfere with the provisions of any other legislation. The sections are not that these provisions will apply notwithstanding anything contained in any other Act for the time being in force. These only give a limited jurisdiction to a particular authority to pass a particular kind of order and also an appeal against such an order provided assistance is sought by the owner of any land who had been dispossessed by unauthorised occupation. Therefore as far as the question of jurisdiction is concerned the learned Magistrate was fully competent to pass the order. But competence is not the same thing as the question whether the power given should be exercised in a particular case. I will come to this question later on.

(3) It appears that the learned Magistrate was asked to stay his hands when he was going to take action under S. 522 Criminal P. C. on the ground that an appeal had been filed. It appears that the learned Magistrate instead of passing an order of restoration subject to any other order or direction by the Appellate Court stayed his hands altogether with the result that the limit of one month's time from the date of conviction laid down in cl. 1 of S. 522, Criminal P. C. expired. The Appellate Court also did not deal with the question of restoration of possession after expiry of one month. Under cl. 3 "an order under this section may be made by any Court of appeal, confirmation, reference or revision". The Appellate Court found that a revisional application had been filed in this Court. The question now arises whether this Court has got to pass an order within one month. It may be pointed out that in order to obviate the legal difficulties the case is being heard within one month of the order finally upholding the conviction in revision but the point requires elucidation. A previous decision of this Court was that the time of one month did not apply to appeal or revision or reference or confirmation. It seems that Lodge J. in a decision —'Abdul Mannan v. Taiyab Ali', AIR 1947 Cal 390 was of the opinion that all the other Courts were bound by the time limit fixed in the case of a Magistrate.

As a matter of history it may be pointed out that this time limit of one month was first imposed by the amending Act of 1923, and inserted in Cl. (1) of the section. The power of the appellate, revisional and other higher Courts to pass the order had been there from the very first in the Code of Criminal Procedure. It appears to me that Lodge J. did not consider the distinction between conferring of a power and the time limit within which the power is to be exercised. Clause 3 merely confers the power on the appellate and other higher Courts to pass an order of restoration, but the time limit which had been fixed by the amending Act subsequently and inserted in Cl. (1) was not extended to the case of the

appellate and other higher courts as the power itself is conferred under cl. 3 without any restriction as to the time within which such power is to be exercised by these higher Courts. Indeed the power would be meaningless in many cases because the limit of one month fixed is one month from the time of conviction. Now hearing of an appeal in the majority of cases begins after more than one month from the time of conviction. Therefore the natural result of reading in cl. 3 the limitation which is only to be found in cl. 1 will be to make cl. 3 almost an unusable clause. For these reasons I am not in agreement with the decision of Lodge J. above referred to and I would rather follow the previous decision of this Court which applied the time limit only to the case of a Magistrate and not in the case of appellate and other higher courts. Clause 3, in my opinion, is not subject to the restriction of time mentioned in cl. 1. The two clauses must be read separately.

(4) It has been pointed out by Mr. Biswas that the complainant himself had gone under S. 3 of West Bengal Act 16 of 1951 for redress and action had been taken by that Court as far as Maya Rani Sen Gupta is concerned and the matter is now pending in an appeal filed by the complainant as owner. The question, therefore, arises whether the discretion given under S. 522 should be exercised in the present case and if exercised in what manner should it be exercised. Section 522 clearly lays down that the order of restoration "may be made" if the Court so thinks fit. It is not an order which it is automatically bound in every case to pass. In the present case there would be likelihood of conflict of authority and decision if the discretion is not exercised in such a way that the conflict is avoided. Under S. 4 the competent authority orders eviction when the State Government has provided alternative accommodation to the person. The Magistrate's order under S. 522, Criminal P. C. is without any such limitation.

(5) Therefore in my opinion, the best course in the present case will be to order that the complainant is to be restored to possession as far as Bimala Sanyal is concerned who has not contested the Rule and he is to be restored to possession as far as Maya Rani Sen Gupta is concerned after the appeal under S. 6 has been disposed of and the appellate order given effect to. If under the appellate order Maya Rani Sen Gupta is directed to be provided with an alternative accommodation then the restoration of possession in her case will be after the State Government has provided her with alternative accommodation. If, on the other hand, the appellate order sets aside the order of the competent authority, then the learned Magistrate under S. 522 will restore the complainant to possession after the appellate Court order.

(6) This Rule is thus disposed of.

B/M.K.S. Order accordingly.

AIR 1953 CALCUTTA 309 (Vol. 40, C. N. 106)

BACHAWAT J.

In re P. P. De & Co., Applicant.

Civil Matter No. 576 of 1950, D/- 14-12-1950.

Companies Act (1913), Ss. 211 and 216 — Company in voluntary liquidation — Stay of execution proceedings against, can be granted as a matter of course except in case of preferential creditor but Union of India or State Government is not preferential creditor. (1924) 2 KB 410 and (1942) 1 Ch D 121, Rel. on. (Paras 7, 15)

Anno: Companies Act, S. 211 N. 1; S. 216 N. 2.

R. Chowdhuri, for Applicant; A. K. Sen, for Union of India; and S. C. Sen, for State of West Bengal, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('46) 50 Cal WN (FR) 10: (AIR 1946 FC 16) 11
('15) 27 Ind Cas 685: (AIR 1915 Lah 344) 8
('31) AIR 1931 Lah 589: (131 Ind Cas 379) 8
(1942) 1 Ch D 121: (111 LJ Ch 87) 7
(1906) 1 KB 134: (75 LJ KB 199) 8
(1924) 2 KB 410: (93 LJ KB 1135) 6

ORDER: This is an application on the part of Messrs. M. L. Mallick and D. N. Das who are the liquidators of Messrs. P. P. De & Co. Ltd. for an order that all attachment and certificate proceedings initiated for realisation of income-tax and sales tax be stayed and for an order setting aside the attachment and execution put in force against the estate and effects of the company for realisation of income-tax and sales tax and for other reliefs. The company went into voluntary liquidation by a special resolution of the members on 7-3-1949.

(2) It appears that the Union of India and the State of West Bengal are claiming large sums on account of income-tax and sales tax respectively and they seek to realise their claim by execution and attachment of the properties of the company. The notice of motion was served upon the Union of India, the Income-tax Officer, Companies District I and the Commercial Tax Officer, Central Section, West Bengal. The notice of this application was not served upon the State of West Bengal, but Mr. Samaren Sen who is instructed by the solicitor to the State of West Bengal appeared on behalf of the State and waived service of the notice of motion and I have proceeded upon the footing that the State of West Bengal is adequately represented in these proceedings.

(3) The question whether and under what circumstances the petitioners are entitled to restrain the respondents from realizing their claims by execution and attachment has been very much debated before me.

(4) The relevant sections of the Indian Companies Act are as follows:—

Section 211— Subject to the provisions of this Act as to preferential payment the property of the company shall, on its winding up be applied in satisfaction of its liabilities 'pari passu' and subject to such application shall, unless the Articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Section 216(1)— The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects by the company after the commencement of the winding up.

(3) The Court, if satisfied, that the determination of the question or the regular exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks fit.

(5) Mr. Chowdhury appearing on behalf of the applicant contended that in case of a voluntary liquidation if an execution is put in force against

the estate of the company after the commencement of the winding up, such execution should be set aside as a matter of course in the absence of special circumstances. On the other hand, Mr. A. K. Sen and Mr. Samaren Sen appearing on behalf of the respondents contended that in the case of a voluntary liquidation unless a special case is made out such stay ought not to be granted.

(6) The practice as to stay of execution proceedings prevailing in England is stated in the following words by Scrutton L. J. in —'Anglo Baltic and Mediterranean Bank v. Barber & Co.', (1924) 2 KB 410 at pp. 417 and 418:—

"While that action was proceeding, on 8-3-1921, Barber & Co went into voluntary liquidation. The effect of that was that by S. 186 of the Companies Act, the assets of the company became divisible equally among the creditors 'Pari passu' and the result of that statutory provision has been that the powers of the Court to stay the actions against a company in compulsory liquidation have been extended in practice to companies in voluntary liquidation, and 'it is now the almost invariable practice' when a company is in voluntary liquidation to stay proceedings in an action against it, because the result of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors 'pari passu', the judgment creditor, by enforcing his judgment, would obtain an advantage over the other creditors. * * * .But it is only in very special circumstances such as these that the Court will depart from its general practice of staying execution when the company is in voluntary liquidation for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets 'pari passu'."

In that case the Appeal Court stayed execution proceedings against the company in voluntary liquidation and discharged garnishee order 'nisi'.

(7) The latest case on this point is —'In re Margot Bywaters Ltd.', (1942) 1 Ch D 121, at p. 123, where Simonds J. observed as follows:—

"Where the liquidation is voluntary it is necessary for the liquidator to come to the Court to have the distress proceeding stayed, and the Court will stay them unless there be extraordinary reasons or exceptional circumstances which justify their continuance. * * * It is contended on behalf of the Crown that this is an assessed tax with regard to which preference is given by S. 264, Companies Act, 1929, and, therefore, this case does not differ from any other case in which the creditor who is not entitled to any preference is seeking in a liquidation to enforce otherwise than by proof his claim against a debtor."

The result of these authorities seem to be that except in the case of preferential creditors, the Court will as a matter of course and in the absence of special circumstances stay execution proceedings against a company in voluntary liquidation because the result of allowing a judgment creditor to levy execution would inevitably interfere with the scheme of distribution of the assets 'pari passu' amongst the creditors in accordance with S. 211, Indian Companies Act.

(8) Mr. A. K. Sen relied upon the case of — 'Liquidators Marwar Bank Ltd. v. Pannalal', 27 Ind Cas 685 (Lah) where the question arose as to whether an action against a company in voluntary liquidation should be stayed. In that case the claim of the plaintiff was disputed by the company and the question arose as to whether the proceedings to establish the claim by ordinary action should be restrained. Shadilal J. refused to restrain the plaintiff from proceeding with the suit. He relied upon the judgment of —'Currie v. Consolidated Kent Collieries Corporation Ltd.', (1906) 1 K.B. 134. In the latter judgment it is pointed out that where the existence of a debt or liability is substantially admitted but the exact amount of liability was disputed the ordinary practice is to restrain the plaintiff from proceeding with his suit but where there was a real dispute as to the existence of liability the suit ought not to be restrained. It is to be noticed that 'Curry's case' and the case reported in 27 Ind Cas 685 (Lah), deal with the question of the stay of a suit. None of those cases relate to stay of execution proceedings. It is to be observed that there is an essential distinction between these two types of cases. In the case of execution proceedings the distribution of assets is necessarily interfered with if the execution is allowed to proceed whereas in the case of an action to establish a claim there is no question of interference with the distribution of assets and it is preferable, when the company is in voluntary liquidation, to have a disputed claim established in Court rather than to have it established before the liquidators. This distinction is pointed out in the judgment of Tekchand J. in —'Buta Singh & Sons Ltd. v. People's Bank of Northern India Ltd.', AIR 1931 Lah 589, where the learned Judge distinguished the earlier case reported in 27 Ind Cas 685 (Lah), and restrained the execution proceedings.

(9) The company was assessed for the sum of Rs 11658/9/- in respect of income-tax for the year 1943. It is alleged by the petitioner that in fact no income-tax is payable for the year. An appeal has been filed in respect of that assessment and the Appeal is still pending but it is admitted by the petitioner that if any moneys are due to the Union of India in respect of the 1943 income-tax the Union would be entitled to rank as a preferential creditor inasmuch as the demand notice in respect of such tax was served on the company before it went into voluntary liquidation. There have also been assessments of income-tax in respect of periods subsequent to 1943 and large sums of money are claimed by the Union of India to be due to it in respect of such assessments. The demand notices in respect of such assessments were served on the company after it went into voluntary liquidation and the petitioners claim that the Union of India is not entitled to the preferential payment of income-tax subsequent to 1943. There is no doubt about the bona fides of this contention of the petitioners having regard to S. 230, Indian Companies Act.

(10) It is alleged on behalf of the petitioners that a sum of over Rs. 7000/- has been realised by and/or paid to the Union of India. It is also alleged that besides this sum other sums have also been realised by the Union of India but the petitioners are unable to give particulars of such realisation. This statement is not categorically denied in the affidavit-in-opposition and I am unable to ascertain at present what sum precisely have been recovered by the Union of India. It is to be observed that the contention of the applicant is that on a proper assessment no tax would be payable to the Union of India in respect of the year 1943. I have no doubt that there is a serious dispute pending between the Union of India and the petitioners as to the amount of income-tax payable to the Union of India in respect of the year 1943 & the subsequent periods. It is impossible to say at the present moment what sum of money is due to the Union of India

on account of income-tax, and to what extent, if at all, the Union of India is entitled to any preferential payment. The result is that so far as the Union of India is concerned, I must deal with this case on the footing that the Union of India has not established its claim to rank as preferential creditor in respect of any definite sum of money. On that footing it does not appear to me that there are any exceptional circumstances in this case which ought to entitle the Union of India to proceed with the execution proceedings.

(11) I have no doubt that the Union of India and the State of West Bengal are bound by the provisions of the Indian Companies Act and by the scheme of administration of companies in liquidation laid down by that Act and are not entitled to any preferential rights or treatment or to any prerogative save and to the extent expressly provided for in that Act. This proposition is not and cannot be disputed having regard to the judgment of the —'Federal Court in Governor General in Council v. Shiromani Sugar Mills Ltd.', 50 Cal WN (F.R.) 10.

(12) It is contended by counsel for the respondents that the declaration of solvency is not an honest statement and that the company is really insolvent. On the other hand, it is contended by the petitioner that there has been arbitrary assessment in respect of income-tax and that the real amount of income-tax payable to the Union of India is much less than what is demanded by the Union of India. It is too early to say what would be the result of the pending appeals in the income-tax proceedings and, I am not satisfied at present that there has been any false statement in the declaration of solvency.

(13) It is also urged by counsel for the respondents that there has been a long delay in the liquidation proceedings and for the last one year and a half practically nothing has been done, but on the other hand, it is pointed out by Mr. Chowdhury that there are large number of outstandings to be realised and a number of jobs have to be completed and such completions have been undertaken and the jobs are being completed. I do not think that there has been any extraordinary delay in the liquidation proceedings or that there are any exceptional facts in so far as the Union of India is concerned which ought to entitle them to continue the execution proceedings.

(14) With regard to the state of West Bengal large sums of money are due to it on account of sales tax. In respect of sales tax for the period subsequent to December 1945 the demand notices in respect of such tax was served upon the company after it went into voluntary liquidation and consequently it is disputed that the State is entitled to rank as preferential creditor in respect of such tax. I will not decide this dispute but there is no doubt that this dispute is fairly raised by the petitioners. With regard to sales tax for the period April 1944 up to December 1945 the company was assessed at a sum of Rs. 7779/11/6. The State of West Bengal has received certain sums of money in respect of such tax and on behalf of the petitioners it is contended that no more than Rs. 4141/9/6 is due to the State in respect of the tax for the period April 1944 to December 1945.

For the purpose of this application I cannot safely assume that a sum of more than Rs. 4141/9/6 is due to the State in respect of sales tax for such period. Demand notice in respect of this tax was served on the company before it went into voluntary liquidation and consequently it is admitted by the petitioners that the State of West Bengal is a preferential creditor for the sum of Rs. 4141/9/6. With regard to the rest of the claim of the State of West Bengal I cannot safely assume that it is a preferential creditor at all. I have, therefore, no doubt that the State of West Bengal should in the absence of any special circumstances be restrained as a matter of course from realising by execution any portion of its claim over and above Rs. 4141/9/6. Mr. Chowdhury contends on the authority of an unreported judgment of Sinha J. 'in the matter of Suburban Bank Ltd.' that the State of West Bengal ought to be restrained from realising even its preferential claim pending liquidation proceedings. In the case before Sinha J. there was a serious dispute between the parties as to whether Union of India was entitled to be a preferential creditor in respect of this income-tax dues. Sinha J. after noting the respective contentions of the parties observed as follows:

> "I do not think that I should decide the question now. That question has to be decided at the time when the time for distribution arrives. Even if the Income-tax authorities are entitled to preferential payment, they would have to take rateably with preferential creditors in case of insufficiency of assets. The question of priority should be considered in the presence of the creditors who are entitled to a share in the distribution of assets. Till that time arrives, no payment should be made on account of income-tax assessed."

(15) It is to be observed that in the case before me the claim of the State of West Bengal to a preferential treatment in respect of Rs. 4141/9/6 is admitted by petitioners. It is not alleged that there are any preferential creditors other than the Union of India. The Union of India, however, does not desire that the State of West Bengal should be restrained from realising its claim. In fact Mr. A. K. Sen on behalf of the Union of India expressly requested me to allow the State of West Bengal to realise its claim by execution. I am not prepared to hold that in the case of admitted preferential claims as a matter of course the preferential creditor ought to be restrained from executing this decree. It seems to me that ordinarily he ought not to be restrained unless there are special circumstances justifying that course. It does not appear that there are any special circumstances in this case justifying the State of West Bengal from realising by execution its admitted preferential claim for Rs. 4141/9/6.

(16) I will not determine finally the rights of the parties nor will I determine to what extent, if any, either the State of West Bengal or the Union of India is entitled to preferential payment. That question may be determined at a later stage but to the extent the claim of the State of West Bengal to a preferential payment is admitted, I will not restrain execution proceedings unless the amount of such claim is paid into the hands of Mr. N. C. Mitra, attorney to the State of West Bengal.

(17) Mr. Chowdhury's client through him has, however, given an undertaking to pay Rs. 4141/9/6 to Mr. N. C. Mitra, attorney for the State of West Bengal by Monday next. In the circumstances, I am satisfied that it is just and beneficial that the respondent should be restrained from realising by execution the amounts payable by the petitioners on account of income-tax and sales tax. Under S. 216, Indian Companies Act I am entitled to impose on the petitioners suitable terms and conditions to safeguard the interest of the respondents and Mr. Chowdhury does not object to such terms being imposed upon the petitioners.

(18) There will be, therefore, an order in terms of prayers A and C of the petition. The order against the State of West Bengal is made on the footing of the above undertaking. The respondents are entitled to the costs of and incidental to the attachment and execution proceedings. The respondents are also entitled to the costs of this application. Certified for counsel. The costs of this application and of the attachment and execution proceedings will be paid out of the assets in the hands of the Liquidator. The point whether such costs ought to be paid out of the assets has not been fully argued and this order should not be treated as a precedent.

The Liquidators have also given an undertaking that they will make an inventory of the assets of the Company as best as they can by the 7th January and will supply the respondents with copies of such inventory. They have also given an undertaking that they will forthwith allow the respondents or their duly authorised agents to initial all the books of account of the company and they also will allow the respondents to inspect and take copies of such books of account, during reasonable hours. Such inspections and taking of copies must be completed by 3-1-1951. The Liquidators have also given an undertaking not to distribute any of the assets amongst the creditors without a fortnight's notice to the respondents. Liberty is also given to the respondents to inspect and take copies of the books of account of the company periodically every month upon three days notice to the attorney of the petitioner. Such inspection may be made and copies may be taken by the attorneys or the duly authorised agents of the respondents but the inspection and the copies must be completed in course of one day. The sum of Rs. 4141/9/6 to be paid to Mr. N. C. Mitra attorney for the West Bengal will be held by him free from all lien subject to further orders of the Court.

B/G.M.J. Order Accordingly.

AIR 1953 CALCUTTA 312 (Vol 40 C. N. 107)

K. C. DAS GUPTA AND LAHIRI JJ.

Kalipada Jotedar, Appellant v. Bimal Kumar and others, Respondents.

A. F. A. D. No. 438 of 1948, D/- 21-7-1950.

(a) Tenancy Laws — Bengal Tenancy Act (8 of 1885), Ss. 178 and 191 (as amended in 1928) — Effect of S. 191 — Stipulation about payment of Chouth.

In consequence of the amendment of S. 191 the status of the tenant has been altered from that of a raiyat at a fixed rate to that of a settled raiyat with a right of occupancy. The status of the tenant being that of an occupancy raiyat the stipulation as regards payment of Chouth in the Kabuliyat ceases to be enforceable. AIR 1942 Cal 133; AIR 1914 Cal 617 and 30 Cal 811 (PC), Disting. (Paras 6, 10)

(b) Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 4 — Raiyat holding at fixed rate for limited period.

A raiyat holding at fixed rate as understood by S. 4 is a raiyat who holds at a rent which is fixed in perpetuity. As soon as it is recognised that the rent will be fixed not in perpetuity but for a limited period, the conclusion is inescapable that the raiyat is not a raiyat holding at fixed rates as defined in S. 4.

(Para 7)

Abinash Chandra Ghose, for Appellant; Bhabesh Chandra Mitter, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('03) 30 Cal 811: (30 Ind App 159 PC) 9

('14) 19 Cal LJ 308: (AIR 1914 Cal 617) 9

('41) 74 Cal LJ 139: (AIR 1942 Cal 133) 8

K. C. DAS GUPTA, J.: The principal question in this appeal is whether the tenancy for which a kabuliat was executed in 13-7-1920, remained after the amendment of S. 191, Bengal Tenancy Act in 1928 a raiyati at a fixed rent or fixed rate of rent. The kabuliat was executed by Nara Mandal, predecessor-in-interest of the present appellant, in favour of the predecessor-in-interest of the plaintiffs. There was a clause therein that if there was a sale of the land comprised in the kabuliat or any part thereof, the lessor would be entitled to a quarter of the consideration money and if that money was not paid by the purchaser, the lessor would be entitled to refuse to recognise the purchaser as a tenant and also to take khas possession of the land without notice. Nara Mandal sold the disputed land to defendant 8 on 13-9-1941 for a sum of Rs. 1500/-. It appears that thereafter the plaintiffs' father instituted a suit for his share of the chouth and the suit was decreed on contest. On 14-12-1943 defendant 8 sold the disputed plots to defendants 1 to 6 for Rs. 6000/-. Shortly thereafter on 24-6-1944, these defendants 1 to 6 in their turn sold these lands to defendant 7 for Rs. 6500. The plaintiffs claim Rs. 1300 as one-fourth of the consideration money for these two transactions with interest at 10 per cent. per annum.

(2) The defence was that the status of the tenant was that of an occupancy raiyat and not a raiyat at fixed rent and the necessary consequence of that was that the term as regards payment of chouth was not enforceable in view of the provisions of S. 178(1)(g), Bengal Tenancy Act. It was further contended that in any case defendants 1 to 6 would be liable for the chouth with respect to the sale in December 1943, and defendant 7 would be liable for the chouth only as regards the sale of June 1944.

(3) The trial Court rejected the defence contention and held that the term as regards chouth was enforceable. He decreed the suit on contest against defendant 7 and ex parte against the other defendants for a sum of Rs. 1171/14 but ordered that the plaintiffs would recover this sum as chouth from defendant 7 and get corresponding costs from him. There was no order as regards recovery of any sum from defendants 1 to 6.

(4) On appeal the learned District Judge agreed with the trial Court that the term as regards chouth was enforceable, his conclusion being that the status of the tenant was that of a raiyat at fixed rate of rent and not an occupancy raiyat. In modification of the decree passed by the trial Court, however, he directed defendants 1 to 6 to deposit in Court Rs. 562/8 and defendant 7, Rs. 609/6 within the period fixed in the judgment and further ordered that if defendants 1 to 6 failed to deposit this amount within the period fixed defendant 7 will have to deposit this amount within 30 days thereafter. In default of these payments it was ordered that the landlord will be entitled to khas possession.

(5) The main contention raised by Mr. Ghose on behalf of the appellant is that in view of the provisions of section 191, Bengal Tenancy Act after the amendment in 1928, the status of the tenant is now that of an occupancy raiyat and no longer that of a raiyat at a fixed rate of rent. Looking at the Kabuliat itself I have no hesitation in holding that the tenancy as then created was that of a raiyat at a fixed rate of rent. The

position, however, is that this was in a temporarily settled estate. Section 191 after the amendment in 1928 is in these words:

"Where the area comprised in a tenure or holding is situate in an estate and subject to a subsisting permanent settlement and when,

(a) land-revenue is for the first time made payable in respect of the land, or

(b) land-revenue having been previously payable in respect of it, a fresh settlement of land-revenue is made.

Nothing in this Act or in any lease or contract made after the passing of the Bengal Tenancy Act, 1885, shall entitle any tenant to hold his tenancy free of rent or at a particular rent, unless in the case of a fresh settlement made under cl. (b) the right so to hold beyond the term of the previous settlement by a Revenue authority empowered by the Provincial Government to make definitely or confirm settlements and the Revenue officer may notwithstanding anything in the contract between the parties, by order, on the application of the landlord or of the tenant, or of his own motion, fix a fair and equitable rent for all grades of tenants in accordance with the principles laid down in Ss. 6, 7, 8, 9, 27 to 36, 38, 39, 43, 50 to 52 and 180".

Provided that, notwithstanding anything contained in sub-section (3) of S. 7 he may divide the minimum profit of ten per centum provided for in that sub-section among two or more grades of tenure-holders if such exists."

It is argued by Mr. Ghose that the necessary consequence of these provisions is that though the rate of rent was by the kabuliat fixed for perpetuity that fixity ceased to be operative in law.

(6) Mr. Mitter appearing for the respondents has argued that section 191 will have no application to this case. According to Mr. Mitter section 191 can have application only to cases where the terms of the tenancy have transgressed some rights. I am unable to find any justification in principle or authority for limiting the plain words of S. 191 in this manner. It seems clear to me that so long as a fresh land revenue is not being made, the old term of fixed rate of rent will continue to be operative. The result of section 191, Bengal Tenancy Act is that as soon as a fresh settlement of land revenue is made nothing in the kabuliat which is executed after the passing of the Bengal Tenancy Act should entitle the tenant to hold the tenancy at the particular rate of rent unless the right so to hold beyond the term of previous settlement was recognised at the previous settlement by the Revenue authority.

(7) Mr. Mitter has then argued that in any case so long as a fresh settlement is not made, the tenant should be held in law to be a raiyat at a fixed rate of rent. Section 4, Bengal Tenancy Act which mentions the different classes of tenants recognised by the Act, mentions three classes of raiyats:

"(a) raiyats holding at fixed rates, which expression means raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity,

(b) occupancy raiyats, that is to say, raiyats having a right of occupancy in the land held by them, and

(c) non-occupancy raiyats, that is to say, raiyats not having such a right of occupancy".

The law does not recognise any class of raiyat holding at a fixed rate for a limited period. A raiyat holding at fixed rate as understood by S. 4, is a raiyat who holds at a rent which is fixed in perpetuity'. As soon as it is recognised that the rent will be fixed not in perpetuity but for a limited period, the conclusion is inescapable that the raiyat is not a raiyat holding at fixed rates as defined in section 4 of the Bengal Tenancy Act.

(8) Mr. Mitter drew our attention to a decision of this Court by Mukherjea J. in the case of — 'Srikanta Mridna v. Pratulya Chandra', 74 Cal. L. J. 139. The lease in that case was created by a kabuliat executed in 1294 and it was decided by the Court that the provisions of section 191, Bengal Tenancy Act were applicable. A stipulation as regards interest was held to be enforceable in spite of section 178 (1) (i), Bengal Tenancy Act because it was held that proviso (i) to section 178 was applicable to the circumstances of the case and so the provisions of section 178 (1) (i) had no application. An argument that the proviso should be attached only to sub-section (3) of the section was rejected. I am unable to see how this is of any assistance to Mr. Mitter for his contention that section 191, Bengal Tenancy Act will have no application to the present case.

(9) Nor can I get any assistance from the other decision cited by Mr. Mitter, — 'Mohendra Nath v. Syam Lal', 19 Cal. L. J. 308, in which following the authority of the Privy Council decision in the case of — 'Pria Nath Das v. Ramtaran', 30 Cal. 811 (P. C.) it was held that the effect of the resettlement by the Government with the original settlement holders was to keep alive the contractual obligation of the subordinate holders as amongst themselves. It is important to notice that that was a case in which the lease was of a period prior to the Bengal Tenancy Act.

(10) In my judgment the contention of Mr. Ghose that in consequence of the amendment of section 191, Bengal Tenancy Act, the status of the tenant has been altered from that of a raiyat at a fixed rate of rent must prevail. It is not disputed that if he is not a raiyat at fixed rate of rent, he is certainly a settled raiyat with a right of occupancy. The next question is whether the status of the tenant being that of an occupancy raiyat, the stipulation as regards payment of chouth has ceased to be enforceable. Mr. Ghose relied on section 178 (1) (g), Bengal Tenancy Act under which

"Nothing in any contract between a landlord and a tenant made before the passing or after the passing of the Act * * * shall take away or limit the right of an accupancy raiyat to transfer his holding or any share or portion thereof in accordance with the provisions of sections 26B to 26G".

The question is whether the stipulation as regards the chouth limits the right to transfer. Mr. Mitter says that it does not limit the right; that the right remains but only a condition is created for the exercise of the right. In my judgment the existence of such a condition to the transfer cannot but be held to limit the right to transfer. But for the condition the occupancy raiyat would have an unlimited right to transfer his holding. The stipulation of payment of chouth, therefore, certainly puts a limit to that right. My conclusion, therefore, is that this stipulation being against the provisions of section 178, Bengal Tenancy Act is not enforceable in law.

(11) My conclusion, therefore, is that the plaintiffs' suit should fail.

(12) I would, therefore, allow the appeal, set aside the orders passed by the Courts below and order that the suit be dismissed.

(13) The appellant is entitled to his costs in all the courts.

(14) LAHIRI, J: I agree.

B./D.H. Appeal allowed.

A.I.R. 1953 CALCUTTA 314 (Vol. 40, C. N. 108)

HARRIES C. J. AND SINHA J.

Messrs. M. K. Ispahani Ltd., Appellant v. Commissioner of Excess Profits Tax, Respondent.

Income-tax Ref. No. 1 of 1950, D/- 10-5-1950.

Income-tax Act (1922), Ss. 5(2), 5(5) and 5(7a) — Notification under S. 3(3), Excess Profit Tax Act — Income-tax assessment and provisional Excess Profits tax assessment completed — Subsequent transfer of case by Commissioner under S. 5(5), Income-tax Act to another Income-tax Officer — Transfer held one under S. 5(5) and not under S. 5(7-A) — Assessment by transferee Officer held valid — (Excess Profits Tax Act (1940), Ss. 3(3), 13(1), 14).

Section 5(7-A) deals only with the transfer of a particular case from one Income-tax Officer to another. Under S. 5(5) the Commissioner of Income-tax is given the power to transfer a class of cases from one Income-tax Officer to another. (Paras 21, 22)

Anno: Income-tax Act, S. 5 N. 2; Excess Profits Tax Act, S. 13 N. 1.

Radha Binode Pal, for Appellant; Dr. S. K. Gupta with J. C. Pal, for the Govt.

SINHA, J.: This is a Reference under S. 21, Excess Profits Tax Act read with S. 66(1), Income-tax Act.

(2) The question referred to is in these terms: "Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in holding that the Excess Profits Tax Officer, Central Circle IV, Calcutta, was competent to make the Excess Profits Tax assessment under S. 14(1), Excess Profits Tax Act, 1940, for the chargeable accounting period ending 31-12-1941, corresponding to the previous year relevant to the Income-tax Assessment for 1942-43?"

(3) The Reference arises out of an assessment for Excess Profits Tax for the chargeable accounting period commencing on 1-1-1941, and ending on 31-12-1941, the corresponding assessment year under the Income-tax Act being 1942-43.

(4) On 24-2-1943, the Income-tax Officer, Companies District No. II, made the income-tax assessment of the assessee for the assessment year 1942-43. He was the Officer who was exercising the functions of an Income-tax Officer under S. 5(5), Income-tax Act in regard to the case of the assessee during the period 1-1-1941 to 1-9-1944.

(5) By a notification dated 14-9-1940, the Central Board of Revenue, in exercise of powers given to them by S. 3(3), Excess Profits Tax Act, appointed every Income-tax Officer to be an Excess Profits Tax Officer and assigned to every such Excess Profits Tax Officer all cases in respect of which he was, for the time being, exercising the functions of an Income-tax Officer.

(6) The Income-tax Officer, Companies District No. II, became by reason of the notification the Excess Profits Tax Officer to assess the excess profits tax of the assessee. He issued notice under S. 13(1), Excess Profits Tax Act requiring the assessee to submit a return of income with respect to the chargeable accounting period 1-1-1941 to 31-12-1941. On 2-9-1943, he made a provisional Excess Profits Tax assessment under S. 14A, Excess Profits Tax Ordinance (16 of 1943).

(7) By a notification dated 1-9-1944, the Central Board of Revenue, in exercise of their power under S. 5(2), Income-tax Act assigned the case of the assessee to the Commissioner of Income-tax (Central) Calcutta. That section authorises the Central Government to appoint a Commissioner of Income-tax for any area specified in the order of appointment to discharge the functions of a Commissioner in respect of any cases or classes of cases assigned to him, to the exclusion of any Commissioner appointed for any area.

(8) On 8-9-1944, the Commissioner of Income-tax (Central) Calcutta in exercise of his power under S. 5(5), Income-tax Act assigned the Income-tax case of the assessee to the Income-tax Officer, Central Circle IV, Calcutta.

(9) On such assignment the Excess Profits Tax Officer, Companies District No. II, who was also the Income-tax Officer, Companies District No. II, transferred the Excess Profits Tax case of the assessee to the Excess Profits Tax Officer, Central Circle IV, Calcutta.

(10) On 11-12-1945, the Excess Profits Tax Officer, Central Circle IV, Calcutta, made the final assessment of Excess Profits Tax under S. 14, Excess Profits Tax Act.

(11) No objection was taken to the jurisdiction of the Excess Profits Tax Officer who made the assessment during the assessment proceedings.

(12) On appeal to the Appellate Assistant Commissioner objection was raised for the first time that the assessment had been made without jurisdiction. It was urged that as the Income-tax Officer, Companies District No. II, had already made the assessment, the assignment of the Income-tax case to the Income-tax Officer, Central Circle IV, by the notification dated 8-9-1944 did not give him jurisdiction to make the assessment of Excess Profirst tax. It was also argued that the assessment of Excess Profits tax was illegal because it was made by an Excess Profits Tax Officer who had not issued the notice under S. 13, Excess Profits Tax Act.

(13) The Appellate Assistant Commissioner held that the Excess Profits Tax Officer, Companies District No. II, could not be deprived of the jurisdiction which he had assumed, by the assignment of the Income-tax Assessment case by the Commissioner of Income-tax, Central, Calcutta, to the Income-tax Officer, Central Circle IV, Calcutta; and the latter had no jurisdiction to make the Excess Profits Tax assessment. The assessment was accordingly cancelled.

(14) Against that order an appeal was taken to the Income-tax Appellate Tribunal, who allowed the appeal and held that by the notification dated 8-9-1944, when the income-tax case of the assessee was assigned to the Income-tax Officer, Central Circle IV, Calcutta, that Officer acquired jurisdiction to make the Excess Profits Tax assessment.

(15) At the instance of the assessee, the Tribunal has referred to us the question to which I have already made reference.

(16) Dr. Pal appearing for the assessee first argued that as the Income-tax Officer, Companies District No. II, had already made the assessment the case of the assessee could not be assigned to any other Income-tax Officer.

(17) That argument, however, assumes that once an assessment is made, there remains nothing further to be done in the case by the Income-tax Officer having seisin of the case and he becomes 'functus officio'. That is, however, not the position.

It is admitted that the Income-tax Act gives to the Income-tax Officer powers which he can exercise even after the assessment has been made. He can, as the Tribunal has pointed out, exercise the powers under Ss. 34 and 35, Income-tax Act if he considers that any portion of the income of the assessee has escaped assessment. The making of an assessment by itelf is no bar to an order for transfer of the case to any other Income-tax Officer to enable him to exercise the powers necessary to be exercised in the circumstances of the particular case.

(18) Dr. Pal next argued that the assignment of the case to the Income-tax Officer, Central Circle IV, Calcutta, did not confer jurisdiction on that Officer to make the Excess Profits Tax assessment.

(19) The decision of the question turns on the construction of the notification of the Central Board of Revenue dated 14-9-1940. It will be remembered that by that notification, every Income-tax Officer was appointed an Excess Profits Tax Officer and to every such Excess Profits Tax Officer were assigned all cases in respect whereof he was, for the time being, exercising the functions of an Income-tax Officer. There cannot be any doubt as to the meaning of this notification. It seeks to combine in one officer the functions of an Income-tax Officer and of an Excess Profits Tax Officer in respect of a case or a class of cases. If at a particular point of time an Income-tax Officer is in charge of the case of a particular assessee for income-tax purposes, he is given the power to deal also with the Excess Profits Tax assessment of that assessee. The moment the Income-tax Officer loses seisin of the case by a valid order of assignment or otherwise, he also loses jurisdiction to make Excess Profits Tax assessment in that case. The Income-tax Officer who then acquires jurisdiction to deal with the case whether by an order of assignment or otherwise, automatically derives power to deal with the Excess Profits Tax assessment in that case.

In my opinion, it was clearly intended by the notification to vest in one officer the power to make the assessment in a particular case under both the Acts. Dr. Pal's argument is that only the Income-tax Officer who for the first time assumes jurisdiction in a particular case of income-tax assessment can discharge the functions of an Excess Profits Tax Officer in that case. In any other case, a special order would be necessary. The notification does not say anything about assumption of jurisdiction. It gives the power of Excess Profits Tax assessment in a case to an officer when he is discharging the functions of an Income-tax Officer in regard to that case.

(20) This construction seems to me to be in accord with sound good sense and any other construction would lead to inconvenient results and would introduce needless complications. The language of the notification does not seem to me to admit of any other construction.

(21) Dr. Pal next argued that it was not competent for the Commissioner of Income-tax, Central, Calcutta, to transfer the case under S. 5(5), Income-tax Act. He refers us to S. 5(7A) of the Act and contends that an order for transfer can only be made under sub-s. (7A). It however, appears that S. 5(7A) deals only with the transfer of a particular case from one Income-tax Officer to another. Under S. 5(5), the Commissioner of Income-tax is given the power to transfer a class of cases from one Income-tax Officer to another. The notification dated 8-9-1944, did not direct the transfer of one specified case but of a class of cases. I, therefore, do not think that there is any substance in this objection.

(22) It, therefore, appears that the assignment of the Income-tax case of the assessee to the Income-tax Officer, Central Circle IV, Calcutta, was valid. After the assignment that officer was discharging the functions of an Income-tax Officer in regard to the case of the assessee. By reason of the notification dated 14-9-1940, therefore he automatically derived power to make the Excess Profits Tax assessment in that case.

(23) The question in my opinion referred to us should be answered in the affirmative.

(24) The assessee will pay the costs of this Reference. Certified for two Counsel.

(25) HARRIES C. J.: I agree.

B/R.G.D. Answered in the affirmative.

AIR 1953 CALCUTTA 315 (Vol 40 C. N. 109)

ROXBURGH J.

Marzia Khatun Saheba, Petitioner v. Srimanta Kumar, Opposite Party.

Civil Rule No. 1669 of 1950, D/- 12-4-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 9, 17 — Determination of standard rent — Application under Act of 1948 — Appeal decided in 1950 — Provisions applicable.

Where an application for determination of standard rent is dealt with by the Rent Controller under the Act of 1948 but the appeal is disposed of after the W. B. Act, 17 of 1950 has come into force, the standard rent has to be fixed in accordance with the provisions of the latter Act.

The provision applicable for fixing of standard rent in respect of buildings erected between December 1, 1941 and December 31, 1949 is section 9(1)(e) of the Act of 1950. Buildings erected after December 31, 1949, are dealt with by cl. (f) of section 9(1). Civil Revn. Case No. 954 of 1950 (Cal) Referred.

(Para 3)

Apurba Dhan Mukherji, for C. F. Ali, for Petitioner; Nilkantha Chatterji, for Opposite Party.

REFERENCE ..... /Para
('50) Civil Revn. Case No. 954 of 1950 (Cal) 3

ORDER: This is a Rule against an order passed in appeal by the District Judge of Burdwan in a matter for fixation of standard rent under the Rent Control Acts. The original application was dealt with by the Rent Controller under the Act of 1948. The appeal was disposed of on 6-6-1950, after Act 17 of 1950 came into force. Under the provisions of S. 17 (3) of the later Act, the standard rent was to be fixed in accordance with the provisions of that Act. It is quite clear from the judgment of the learned District Judge that he never considered the effect of the provisions of the new Act, and dealt with the matter as though it was entirely to be disposed of under S. 9 (a) or 9 (g) of the Act of 1948.

(2) It is therefore necessary to set aside the order of the learned Judge and direct him to re-hear the matter.

(3) I have already decided in the case of — 'Charu Bala Dassi v. Satyaranjan Mukherjee', Civil Revn. Case No. 954 of 1950 (Cal), and

in subsequent cases, that, the provision applicable in respect of buildings erected between 1-12-1941 and 31-12-1949 is S. 9 (1) (e) of the Act of 1950. Buildings erected after 31-12-1949, are dealt with in Cl. (f) of S. 9 (1). Clause (e) begins:

"excepting in the case covered by Cl. (f) following....."

This shows clearly that, but for the exception the cases now dealt with in Cl. (f) would be dealt with in Cl. (e). In other words, Cl. (e) deals with buildings erected after 1-12-1941 and those erected after 31-12-1949, are excluded. In ascertaining the rent at which the premises would have been let on 1-12-1941, the provisions of sub-s. (2) may require to be applied. Whether the total effect of applying Ss. 9 (1) (e) and 9 (2) to the case will be that the rent arrived at is the same as has been referred to as the "prevailing rate" in S. 9 (a) of the Act of 1948, I am of course unable to say, but it is clear that in accordance with the law, standard rent is to be determined under the provisions I have indicated and that has not yet been done in this case.

(4) The Rule is accordingly made absolute. The order of the District Judge is set aside and the case is sent back to him to be dealt with in accordance with the directions given above.

(5) I make no order as to costs.

B/D.R.R. Rule made absolute.

AIR 1953 CALCUTTA 316 (Vol. 40, C. N. 110)

BOSE J.

Suresh Chandra, Petitioner v. Himangshu Kumar Roy and others, Respondents.

Matter No. 4 of 1951, D/- 22-5-1951.

(a) Bengal Subordinate Services (Discipline and Appeal) Rules, 1936 — Departmental proceedings under, are judicial or quasi-judicial — Writ of certiorari lies to quash proceedings — Alternative remedy is no bar — (Constitution of India, Art. 226). (Para 24)

(b) Police Regulations, Bengal (1915), R. 15 — Validity — Constitution of India, Arts. 311 (1) and 313.

Rule 15 of the Police Regulations, 1915, must now be held to be ultra vires as infringing Art. 311(1) of the Constitution. The rule must be held to be inoperative under Art. 313 of the Constitution. (Para 30)

(c) Constitution of India, Art. 20(2) — "Prosecution" — Meaning of.

The word "prosecution" in Art. 20(2) means judicial proceedings before a Court or a legal tribunal. It cannot have reference to departmental or disciplinary proceedings taken for inflicting departmental penalty or punishment on an officer belonging to the department for any misconduct. (Para 34)

Ranadeb Chowdhuri and Anil Kumar Das Gupta, for Petitioner; S. M. Bose, Sankar Bannerjee and Asoke Sen, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('48) 1948-10 FCR 44: (AIR 1948 PC 121) 17
('48) 75 Ind App 343: (AIR 1949 PC 112: 50 Cri LJ 383 PC) 30
('50) 1950 SCR 621: (AIR 1950 SC 222) 25

ORDER: This is an application under Art. 226 of the Constitution for a Writ of Certiorari for quashing the order dated 6-5-1950, passed by respondent 2 in certain departmental proceedings taken against the petitioner.

(2) It appears that the petitioner was a member of the clerical establishment in the Bengal Police for the last 23 years and was governed by the Bengal Subordinate Service (Discipline and Appeal) Rules, 1936. It is stated by the learned counsel appearing for the petitioner that the petitioner was appointed a clerk in the Bengal Police some time in April 1927 by the Deputy Inspector General, Backergunj range, and the petitioner was given a letter of appointment according to the service rules of the Police Service. This fact of the petitioner being appointed by the Deputy Inspector General of Police, Backergunj, is, however, not stated in the petition but it appears that for the purpose of establishing this fact before the Court the petitioner's solicitor by a letter dated 9-4-1951 called upon the respondents' solicitor to produce the Police Gazette dated 13-1-1928, and the service book of the petitioner at the hearing but none of these documents have been produced on behalf of the respondents. The same request was repeated at the hearing but with no effect.

(3) It is alleged in the petition that until 17-12-1947, the petitioner used to work in the Force Department of the Inspector General of Police office along with one Upananda Mukherjee and one Bolai Chand Mukherji.

(4) The Inspector General of Police office is divided into three departments, (1) The Intelligence Branch department which operates from 13, Lord Sinha Road, (2) Force Department and (3) the Budget Department which operates at the Writers Buildings.

(5) Until 17-12-1947 the petitioner was an Assistant in the Force Deparment, while the said Upananda was in charge as the Assistant Inspector General of Police and the said Bolai was his Head Assistant. The said Bolai Chand who had as long a service to his credit as the petitioner is alleged to have entertained feelings of jealousy towards the petitioner as likely rival to the post of Superintendent in the Inspector General's office. The said Upananda is alleged to have been openly hostile to the petitioner, as the petitioner objected to the transfer and promotion of one Tarananda a brother of the said Upananda some time in 1947 and also for other reasons.

(6) On 17-12-1947, the petitioner was transferred to the Intelligence Branch office at Lord Sinha Road as an Assistant. Respondent 2 was the Special Superintendent and respondent 1 was the Special Assistant in that office.

(7) On 25-8-1947, one Amulya Choudhury made an application to the Inspector General of Police for re-appointment in the Police Force. On 1-12-1947 the said Amulya made a further application to the same effect. On 16-12-1947 both Bolai and Upananda endorsed the second application of Amulya holding out hopes of re-appointment. On 20-12-1947, the said Amulya at the instigation of Upananda and Bolai and in conspiracy with them falsely made a complaint to the Deputy Superintendent of Police, anti-corruption department, Government of West Bengal, against the petitioner falsely alleging that the petitioner had promised to secure the

re-appointment of the said Amulya provided Amulya paid a bribe to the petitioner of a sum of Rs. 50/-.

(8) On 5-1-1948, the said Bolai endorsed the first petition of Amulya dated 25-8-1947, keeping the question of his re-appointment pending.

(9) On 13-1-1948, the petitioner was suspended with effect from 22-12-1947, under R. 7, Bengal Subordinate Service Rules.

(10) On 26-5-1948, the said Upananda granted sanction for the prosecution of the petitioner under S. 161, Penal Code, although he was not the proper authority to grant such sanction.

(11) On 3-12-1948, the petitioner was convicted by the learned Magistrate of Howrah for an offence under S. 420, I. P. C. The Magistrate held that the charge for bribery was not proved. The petitioner appealed to the Sessions Judge, Howrah, who disbelieved the prosecution story completely and acquitted the petitioner of all the charges on 27-1-1949.

(12) Thereafter between 19-4-1949 and 6-5-1950, respondents 1 and 2 held a departmental enquiry against the petitioner in respect of the identical charges on which the petitioner was acquitted and on 6-5-1950, respondent 2 found the petitioner guilty of the alleged offence of dishonesty and ordered his dismissal from service. Prior to that date respondent 1 also came to conclusion that the petitioner had been so guilty and recommended his dismissal on 18-4-1950.

(13) The petitioner challenges the findings and orders of the respondents as dishonest perverse and against the weight of evidence. It is stated in the petition that the departmental enquiry is not warranted by law and the respondents acted without jurisdiction in conducting it. (Para 19 of the petition). The portion of the evidence given by the said Amulya at the enquiry has been set out in the petition and it appears therefrom that Amulya admitted before the enquiring officer that the alleged bribe of Rs. 10/- said to have been paid to the petitioner was not paid by way of bribe but it was an amount which Amulya had taken by way of loan from the petitioner and which he repaid to the petitioner later on.

(14) In the circumstances the petitioner moved this Court for the reliefs stated above and also for certain other directions and reliefs but this Court on 30-1-1951, issued a rule nisi only for the quashing of the departmental proceedings and the orders made in relation thereto.

(15) Respondent 2 has affirmed an affidavit in opposition in these proceedings dated 27-2-1951. It is stated in this affidavit that being directed by the Inspector General of Police of West Bengal on 2-5-1949 respondent 1 drew up charges against the petitioner for holding the departmental enquiry into such charges. The charges drawn up were placed before respondent 2 and were approved by him. It is pointed out by setting out the different dates and the events that took place on such dates that the petitioner was repeatedly given opportunities to defend himself against the charges drawn up against him and every facility was afforded to the petitioner for the purpose. The petitioner, however, did not avail himself of such opportunities and ultimately the enquiry had to be held in his absence and respondent 1 after having considered the materials, papers and events which were produced before him at the departmental enquiry made his report on 18-4-1950 recommending dismissal of the petitioner from service. The petitioner was thereafter supplied with a copy of the findings of respondent 1 and was asked to show cause by respondent 2 why he should not be dismissed. The petitioner did make a representation on 3-5-1950 and it was after considering and scrutinising the papers and the report of the departmental enquiry and the explanation of the petitioner that respondent 2 came to the conclusion that the petitioner should be dismissed from service and ordered his dismissal on 6-5-1950.

(16) In the affidavit in reply filed by the petitioner on 12-3-1951, it is stated that the petitioner was advised not to make any statement or commitments or adduce any evidence with regard to the same in the departmental enquiry started by the respondents and he was advised only to confine himself to item 4 of the charges drawn up against him and to adduce evidence on such charge. As stated above, however, the petitioner did not adduce any evidence in the enquiry conducted by the respondents.

(17) It appears to me that the petitioner was given reasonable opportunity of showing cause against the action proposed to be taken in regard to him in the departmental enquiry and he cannot make any grievance on that score. See — 'High Commissioner for India v. I. M. Lall', (1948) 10 F C R 44 (PC) at p. 64 per Lord Thankerton. The petitioner also wanted to rely on a supplementary affidavit in reply affirmed by him on 6-4-1951, but this was objected to by the learned counsel for the respondents and I have rejected the said affidavit.

(18) The main contention of Mr. R. Chaudhuri, the learned counsel for the petitioner, is that the order of dismissal having been passed by an officer not competent to pass it the order must be held to have been made without jurisdiction and should, therefore, be quashed in these proceedings.

(18A) Rule 4(a) of the Police Regulations, Bengal, 1915, is as follows:

"Appointments of lower grade clerks will also be made by the Deputy Inspector General of the Range on the recommendation of the Superintendent of Police."

Rule 7:

"Every person appointed as a ministerial officer shall receive a letter of appointment under the signature of the officer appointing him and the appointment shall be notified in the Police Gazette."

(19) As I have pointed out before, the Police Gazette & the Service Records Book have been kept back by the respondents and as it is evident from para 1 of the petition that the petitioner was appointed as a lower grade clerk 23 years ago i.e., some time in 1927 or 1928, it must be presumed that he was appointed in terms of R. 4 by the Deputy Inspector General of the Range as stated by the learned counsel for the petitioner.

(20) Mr. Chaudhuri has also referred me to the relevant Rules of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, by which the petitioner's service is admittedly governed. Rules 8 and 9 of the said rules lay down ranks of the officers who are competent to impose penalties upon the members of the services as specified in the schedule annexed

to the rules but it is clear from those rules that no officer may be removed or dismissed by an authority subordinate to that by which he was appointed.

(21) It may be noted in this connection that Art. 311, Constitution of India, is also to the same effect. The Article is as follows:

"No person who is a member of a Civil Service of the Union or an All-India Service or a Civil Service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed."

(22) Mr. Chaudhuri has also referred me to Rule 10(1) which provides that no officer can be dismissed or removed from service unless he has been given an adequate opportunity of making any representation that he may desire to make and such representation if any has been taken into consideration before the order is passed. Rule 10(11) enjoins that the authority imposing the penalty under these rules shall maintain or cause to be maintained a record showing the allegations upon which he proceeded against the officer penalised, the officer's representation, if any, and the evidence taken, if any, the recital of the Officer's previous character as recorded in his service book or office records, the findings and the grounds thereof.

(23) Rules 11 to 15 show that an officer against whom an action is taken is entitled to prefer an appeal to the higher authority. Rule 24 provides that except in very special circumstances no pleader or agent should be allowed to appear either on behalf of Government or the accused either before the officer who conducts the enquiry or any officer to whom appeal may be made.

(24) Mr. Chaudhuri submits that the aforesaid rules clearly show that these departmental proceedings are in the nature of judicial or quasi-judicial proceedings and certiorari does lie to quash such proceedings or orders if there is want or excess of jurisdiction in relation to such proceedings, and further the existence of any alternative remedy is no bar to this Court exercising jurisdiction under Art. 226 of the Constitution. In my view the contention of Mr. Choudhuri must be accepted.

(25) It has been held that for the purpose of a Writ of Certiorari the term "Judicial Act" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law but it is an act done by competent authority upon consideration of facts and circumstances and imposing liability of affecting the rights of others. The word "quasi-judicial" implies "the existence of the judicial element in the process leading to the decision" to quote the words of the learned Chief Justice of the Supreme Court in the case of — 'Province of Bombay v. Khushaldas S. Advani', (1950) S C R 621 at p. 632. If a judicial approach is required before a decision can be arrived at the decision will be quasi-judicial.

(25A) Fazl Ali, J. in the same case observed as follows:

"Without going into the numerous cases cited before us, it may be safely laid down that an order will be a judicial or quasi-judicial order if it is made by a Court or a Judge or by some person or authority who is legally bound or authorised to act as if he was a Court or a Judge. To act as a Court or a Judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation, making some kind of inquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of a controversy before any decision affecting the rights of one or more parties is arrived at. The procedure to be followed may not be as elaborate as in a Court of law and it may be very summary but it must contain the essential elements of judicial procedure as indicated by me."

(26) In the rules of the Services (Discipline and Appeal) Rules, 1936, there is provision for representation to be made by the person charged, for an inquiry being held and of evidence being taken if necessary. The person charged is termed as "accused" (Rule 24) and under special circumstances a pleader can be engaged to represent the accused or the Government (Rule 24), a penalty can be imposed as a result of the inquiry, a Record has to be maintained of the proceedings (Rule 10(ii)) and there is provision for appeals, and also for revision by the Government.

(27) In the circumstances, it is difficult to resist the conclusion that the proceedings by way of departmental enquiry as contemplated by the rules do partake of the character of quasi-judicial proceedings and an order made in such proceedings can be interfered with by a Writ of Certiorari.

(28) The contention of Mr. Chowdhury further is that the petitioner was appointed by the Deputy Inspector General of Police but he has been dismissed by respondent 2 who held the rank of Superintendent of Police.

(29) It appears that R. 15, Police Regulations, Bengal, 1915, is as follows:

(a) Ministerial officers of the Police department shall be liable to punishments of dismissal, removal, degradation, stoppage of promotion or of increment of pay and black marks.

(b) Superintendents are empowered to inflict any of these punishments on ministerial officers serving under them.

(30) But the petitioner has been dismissed by the Order of 6-5-1950 after the Constitution of India came into force. The petitioner's service is governed by the Constitution and by Art. 311 of the Constitution Rule 15 of the Police Regulations, 1915, which must now be held to be 'ultra vires' as infringing Art. 311(1) cannot stand in the way of the petitioner. The rule must be held to be inoperative under Art. 313 of the Constitution. That the petitioner's service is governed by the present Constitution of India admits of no doubt. See — 'North West Frontier Province v. Suraj Narain Anand', 75 Ind App 343 (PC).

(31) Mr. A. K. Sen, the learned counsel for the respondents, submitted that the petitioner cannot rely on his original appointment as after the partition of Bengal the old officers ceased to exist and the petitioner became an officer under the State of West Bengal. This argument is obviously based on a misapprehension as under Art. 375 of the Constitution the old officers must be deemed to have continued even after partition of Bengal.

(32) In my view the order of dismissal must be held to have been made by a person not competent to make it and was wholly without jurisdiction. The Order was in breach of the

Constitution of India, Art. 311(1) and in contravention of the Rules of 1936 (Cls. 8 and 9). In the circumstances, even if the Order of dismissal is regarded as an executive or administrative order it is liable to be interfered with by this Court under Art. 226 of the Constitution.

(33) It was contended by Mr. Chowdhury that the petitioner having been acquitted of the charges in the criminal proceedings by the Sessions Judge, Howrah, on 27-1-1949, the departmental proceedings conducted by respondents 1 and 2 in respect of the identical charges were without jurisdiction and were not warranted by law as there is an infringement of Art. 20(2), Constitution of India. It appears to me that this contention of Mr. Chowdhury cannot be accepted as sound. Article 20(2) is merely a reproduction of the principles underlying or laid down in S. 403, Criminal P. C. and S. 26, General Clauses Act (Act 10 of 1897).

(34) The word "Prosecution" in Art. 20(2) means judicial proceedings before a Court or a legal tribunal. It cannot have reference to departmental or disciplinary proceedings taken for inflicting departmental penalty or punishment on an officer belonging to the department for any misconduct.

(35) Rule 863 of the Police Regulations clearly provides that

"An order of discharge or acquittal of a police officer by a Court shall not be a bar to the award of departmental punishment to that officer in respect of the same cause or matter."

(36) This contention of Mr. Chaudhuri must fail.

(37) In view of my finding, however, that the order of dismissal of 6-5-1950 was made without jurisdiction, being made by a person not competent to make it this petition must succeed. The Rule is made absolute and the Order of dismissal dated 6-5-1950 is quashed and cancelled. The petitioner is entitled to the costs of the present proceedings.

B/G.M.J. Application allowed.

A.I.R. 1953 CALCUTTA 319 (Vol. 40, C. N. 111)

BOSE J.

Subodh Ranjan, Applicant v. Major N. A. O'Callaghan and another, Respondents.

Matter No. 88 of 1952, D/- 6-1-1953.

(a) Constitution of India, Arts. 311 (2), 299 — Applicability of Art. 311 (2) — (Government of India Act, 1935, S. 175 (3)).

The person whose service agreement is not in conformity with the requirements of S. 175 (3), Government of India Act, 1935, or Art. 299 of the Constitution, is not a servant of the Union of India and as such he cannot take advantage of Art. 311 (2) of the Constitution. **(Para 6)**

(b) Government of India Act (1935), S. 175 (3) — Scope.

The provisions of S. 175 (3) are not only directory but mandatory in character. AIR 1947 FC 38; AIR 1952 SC 181, Explained and distinguished; AIR 1952 Cal 306, Ref.; 89 Cal LJ 342, Followed. **(Para 7)**

B. C. Dutt, for Applicant; G. P. Kar, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('31) 58 Ind App 91: (AIR 1931 PC 79) 8
('47) 1947-9 FCR 141: (AIR 1947 FC 38: 48 Cri LJ 886) 7
('52) 1952 SCA 526: (AIR 1952 SC 181: 1952 Cri LJ 955) 7
('37) 39 Bom LR 807: (AIR 1937 Bom 449) 6
('49) 84 Cal LJ 275: (AIR 1952 Cal 306) 7
52) 89 Cal LJ 342 7
(1883) 8 AC 517: (52 LJQB 713) 8

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ for cancellation of certain orders passed against the petitioner in March 1951 and on 25-4-1952 imposing certain punishments for misconduct in the discharge of his duties as an Overseer in the Military Engineering Service and also for quashing of an order D/- 10-4-1952 by which the petitioner was discharged from service with effect from 10-7-1952.

(2) The petitioner's case is that he was appointed as Overseer in the Military Engineering Service in 1940 under the Government of India. In 1942 he was promoted to the post of Sub-Divisional Officer which was re-designated as Superintendent, Grade I, with effect from January 1947. On 16-6-1949 a departmental enquiry was started against the petitioner on a charge of throwing away certain stores which were the property of Fort William. As a result of the enquiry a warning order was made against the petitioner in or about March 1951. As the authorities were not satisfied with merely passing a warning order against the petitioner, a charge-sheet was given to the petitioner on or about 28-2-1952, and it appears that the petitioner was held guilty of the said charge and it was directed that Rs. 50/- would be deducted from the pay and allowance due to the petitioner. The petitioner challenges the orders as mala fide. It further appears that prior to the said orders the petitioner had also been charged with absence from duty without leave and for disobeying an order of transfer made by the authorities in the department in which he was serving and the petitioner was found guilty of the charge of disobedience of the transfer order and it is alleged that he was reverted to the post of Superintendent, Grade II. The petitioner preferred an appeal against the order of reversion but the same was rejected. The petitioner then gave notice under S. 80, Civil P. C. and has filed a suit in this Court being suit No. 975 of 1952 which is still pending. It is alleged that after the service of notice under S. 80, the petitioner was falsely and maliciously charged with neglect of duty regarding the recording of sizes and lengths of certain wooden beams handed over to a contractor for sawing and for failing to obtain the cut pieces from the contractor and to record measurements of sawing made by the contractor. The petitioner submitted his defence to the said charges on or about 24-10-1951. On or about 10-4-1952 notice was served upon the petitioner intimating that his service would stand terminated after three months with effect from 10-7-1952. The petitioner challenges the validity of this order on the ground that it is mala fide and also as being made in contravention of Art. 311 (2) of the Constitution of India.

(3) In the affidavit in opposition affirmed by respondent 1 it is denied that the orders in question were passed mala fide and some facts are set out explaining the circumstances under which the impugned orders were made.

(4) In the course of the hearing it was indicated by me that as there was considerable dispute with regard to the issue of mala fide,

the question cannot be decided in a proceeding under Art. 226 of the Constitution and the petitioner should take appropriate proceedings for determination of that question, if he was really inclined to press the charge of mala fide against the respondent in respect of the orders in question. Mr. B. C. Dutt realized the force of the observation and asked the Court to keep the matter open for the purpose of being agitated in other appropriate proceeding if his client will be so advised. I have acceded to the request of Mr. Dutt and it may be noted that this issue as to the orders being made mala fide is left open.

(5) Mr. Dutt has in this application, therefore, confined his attack to the validity of the notice or order dated 10-4-1952 on the ground that it is made in violation of the provision of Art. 311 (2) of the Constitution. It is argued that after the authorities concerned arrived at the provisional conclusion that the petitioner was guilty of the charges made against him in the charge sheet dated 17-10-1951, he should have been given a further opportunity to show cause against the action of his dismissal proposed to be taken against him by the authorities concerned. As this opportunity was not given the order of 10-4-1952 terminating the service of the petitioner is bad.

(6) On behalf of the respondents it is contended by Mr. Kar that inasmuch as the service agreement of the petitioner is not in conformity with the requirements of S. 175(3), Government of India Act, 1935, or Art. 299 of the Constitution, it is void and, therefore, the petitioner is not a servant of the Union of India and as such he cannot take advantage of Art. 311 (2) of the Constitution. Although this is an unreasonable and unfair attitude on the part of the Government to take up and does not merit any encouragement, I have most reluctantly given effect to this contention in Original Side Matter No. 23 of 1952 (Dinendra Nath Mullick v. Director of Supplies & Disposals, Judgment dated 3-7-1952) and accordingly I have no other alternative but to uphold the contention of Mr. Kar. As the petitioner is not a validly appointed servant of the Government, he has no right which he can enforce in this proceeding. Mr Dutt argued that as S. 175 (3), Government of India Act, 1935, has been repealed the respondents cannot take advantage of this section for the purpose of invalidating the appointment of the petitioner. I do not think there is any substance in this contention. Mr. Dutt further argued that in any event there has also been infringement of R. 55, Civil Services (Classification, Control & Appeal) Rules. But this point has not been taken in the petition. Moreover, R. 55 presupposes that the person claiming to be governed by the Rule is a member of service under the Government. But as I have pointed out already, the petitioner cannot be deemed to be in the employment of the Government. See — 'Krishnaji v. Secretary of State', 39 Bom L R 807 in which S. 30 of the old Government of India Act was applied to contract of employment.

(7) Mr. Dutt also contended that S. 175 (3), Government of India Act, 1935, or Art. 299 of the Constitution was not mandatory in character but only directory and hence non-compliance with their provisions did not render the contract invalid. Reliance was placed on the decision of the Federal Court in the case of — 'J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor', (1947) 9 F C R 141 at pages 154-158, and on the decision of the Supreme Court in the case of — 'Dattatraya Moreshwar v. State of Bombay', 1952 S C A 526. In the earlier case the Federal Court construed S. 40, Government of India Act, 1919, and upon consideration of the scope and object and the wordings of the Section, came to the conclusion that the Section was directory and not imperative in character, following the principle of interpretation laid down in Maxwell's Interpretation of Statutes. The later decision of the Supreme Court merely follows the decision of the Federal Court and applies the reasonings of the Federal Court to the interpretation of Art. 166 of the Constitution. But none of the two decisions has expressed any opinion on the interpretation of S. 175 (3), Government of India Act, 1935, or Art. 299 of the Constitution of India. Mr. Justice Sinha in the case of — 'Ram Nagina Singh v. Governor General in Council', 84 Cal L J 275 at pp. 290-291, dealt with the Federal Court decision and pointed out that the decision was no authority for the proposition that S. 175 (3) was not mandatory. The learned Judge further observed that having regard to the authorities it was too late in the day to contend that the Section was only directory. This case went up in appeal before Chakravartti J. (as his Lordship then was) and S. R. Das Gupta J. and the view of Sinha J. was affirmed in such appeal. 'Union of India v. Ram Nagina Singh', 89 Cal LJ 342 at pp. 357-358. This is a decision directly in point and relates to the interpretation of S. 175 (3), Government of India Act, 1935, and I respectfully follow this decision.

(8) It was also argued by Mr. Dutt that admission made by the respondents to the effect that the petitioner was an employee of the Government and the acts and conduct of the Authorities concerned in granting the petitioner promotion and increments of pay operate as estoppel and preclude the respondents from denying the status of the petitioner as a servant under the Government. It is, however, clear from para. 16 of the affidavit in opposition that there is no unqualified admission about the contract of employment. An alternative case has also been pleaded that there is at any rate no valid employment of the petitioner. Moreover, it is clear law that the equitable doctrine of estoppel cannot override the provisions of a Statute (See for instance — 'G. S. C. Ariff v. Jadunath', 58 Ind App 91 at p. 104 (P C) last but one paragraph). It is true that it is an extremely hard view to take of the law, that S. 175 (3) or Art. 299 defeats this application. But as observed by Lord Blackburn in the case of — 'Young & Co. v. Mayor of Leamington Spa', (1883) 8 AC 517 at p. 522:

> "It may be said that this is a hard and narrow view of the law; but my answer is that Parliament has thought expedient to require this view to be taken and it is not for this or any other Court to decline to give effect to a clearly expressed Statute because it may lead to apparent hardship."

(9) In my view this petition fails. The Rule is accordingly discharged. I make no order as to costs.

A/H.G.P. Rule discharged.

A.I.R. 1953 CALCUTTA 321 (Vol. 40, C. N. 112)

P. N. MOOKERJEE J.

Murulidhar Agarwalla and others, Defendants-Appellants v. Rupendra Mitter and another, Plaintiff-Respondents.

A. F. A. D. No. 288 of 1948, D/- 11-7-1951.

(a) T. P. Act (1882), S. 6(e) — Transfer of right to recover damages in respect of property along with property itself — Validity.

When a property is transferred and along with it, a right to recover damages or compensation in respect of that property, the assignment of this right is a valid assignment and is not hit by cl. (e) of S. 6. AIR 1929 Cal 719 and AIR 1921 Cal 795 Rel. on.; AIR 1932 PC 32 Ref. (Para 4)

Anno: T. P. Act, S. 6 N. 18.

(b) Civil P.C. (1908), O. 20 R. 12 — Suit for mesne profits without possession against trespasser on 'prima facie' proof of title — Maintainability. 2 Beng LR AC 67, Rel. on; 21 Cal 244 and 18 Ind Cas 751 (Cal) Discussed. (Para 10)

Where in the suit there is a claim for damages for use and occupation and claim for mesne profits is only in the alternative, the plaintiff may be said to have waived the trespass and sued for damages. In this view of the matter, apart from anything else, the suit would be maintainable: AIR 1927 Cal 13 and 9 Cal 908, Rel. on. (Para 11)

Anno: C.P.C., O. 20 R. 12 N. 5.

Hiralal Chakravarty and Jagadish Chandra Ghose, for Appellants; Satindra Nath Ray Choudhury and Sovendra Madhab Bose, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('32) 59 Ind App 41: (AIR 1932 PC 32)	4, 5
('69) 11 WR 83: (2 Beng LR AC 67)	9, 10
('83) 9 Cal 908: (13 Cal LR 69)	11
('94) 21 Cal 244	7, 8, 9
('13) 17 Cal WN 324: (18 Ind Cas 751)	7, 8
('22) 26 Cal WN 285: (AIR 1921 Cal 795)	4, 5
('26) 97 Ind Cas 564: (AIR 1927 Cal 13)	11
('29) 33 Cal WN 614: (AIR 1929 Cal 719)	4

JUDGMENT: This appeal by the defendants arises out of a suit for recovery of damages for use and occupation, or alternatively mesne profits. Upon the findings of the Courts below on the questions of fact which have not been and cannot be either in law or on the materials on record challenged in this appeal the position stands thus:

(2) The property in suit belonged, originally, to Dr. Kartick Chandra Bose and Sons, of Calcutta, under a lease from the Chatterjees. On 23-5-1945, this property was transferred by a conveyance by Dr. Kartick Chandra Bose and sons to the plaintiffs of the present suit and by the said conveyance not only the property but also all right to realise arrears of rent, compensation, etc., in respect of the said property was transferred to the plaintiffs. It is the plaintiffs' case that the defendants had trespassed into the lands sometime in June 1942, and were continuing their wrongful possession as trespassers. The plaintiffs have brought the present suit for damages for use and occupation, or alternatively, for mesne profits, for the period February 1943 to January 1946, the prior period from June 1942 to January 1943, having been apparently left out of account because of the law of limitation. Both the Courts below have decreed the plaintiffs' suit.

(3) In this appeal Mr. Chakravarty, appearing on behalf of the defendants appellants, has raised two contentions (1) that the assignment of a claim for damages would be invalid under the law and, therefore, on the basis of the assignment of the right to recover compensation as made by the conveyance from Dr. Kartick Chandra Bose & sons, the plaintiffs would not be entitled to get any relief, and (2) that even assuming that such assignment was valid & gave the plaintiffs the right to recover compensation, the plaintiffs are not entitled to succeed in the present suit, as they, having been out of possession at the date of the suit, cannot maintain a suit for damages or mesne profits without a suit for recovery of possession, the more so, as their vendors also were out of possession at the date of this conveyance. In my opinion, none of the two contentions raised by Mr. Chakravarty can be accepted.

(4) In support of his first contention Mr. Chakravarty relied upon S. 6(e), T. P. Act, and pointed out the difference in language between the said cl. (e) and cl. (c) of that Section. According to Mr. Chakravarty this difference in language shows that, even though the property itself might be transferred, and the right claimed may be incidental to the ownership of that property, still the transfer of this right would be hit by cl. (e) of S. 6, T. P. Act, and that clause would make the assignment of such right invalid. I am unable to hold that this view of the matter is correct. The use of the word "mere" in cl. (e) is significant and that, in my opinion, is sufficient to show that when the property itself is transferred, and along with it the right to claim compensation or damages in respect of the same, the transfer or the right to claim compensation or damages is a valid transfer. In other words, the same result is obtained by the use of the word "mere" in cl. (e) as is obtained by the use of the expression "apart from dominant heritage" in cl. (c). I am of opinion, therefore, that when a property is transferred and, along with it, a right to recover damages or compensation in respect of that property, the assignment of this right is a valid assignment and is not hit by cl. (e) of S. 6, T. P. Act. In this view, I am supported by the authority of a Bench decision of this Court in the case of — 'Manmatha Nath v. Matilal Mitra', 33 Cal W N 614. I may also mention here that neither the case of — 'Manmatha Nath v. Hedait Ali', 59 Ind App 41 (PC), nor the case of — 'Jewan Ram v. Ratan Chand', 26 Cal W N 285, is against this view. There is nothing in any of the said two decisions which militates with the view which I have expressed above or the view which has been expressed in '33 Cal W N 614'. Rather, it seems to me that the case in '26 Cal W N 285' supports the said view.

(5) In the Privy Council case in — 'Manmatha Nath v. Hedait Ali', 59 Ind App 41 (PC), it was not necessary for their Lordships to consider this aspect of the matter as, upon the admitted facts, their Lordships found that the claim which had been transferred in that case was an actionable claim, that is a claim to a definite sum of money a claim by way of reimbursement of money paid. In 26 Cal W N 285, it was found that there was no transfer of the property but only the right to recover damages had been transferred, and, in that view of the matter, their Lordships held that the assignment would not be valid. It is clear,

however, from the discussion in — 'Jewan Ram v. Ratan Chand', 26 Cal W N 285, that their Lordships recognised the distinction between transfer of a mere claim for damages in respect of a property and the transfer of the property along with the right to recover damages in respect of the same and expressed themselves unequivocally in favour of the validity of the assignment of the right to recover damages in this latter case.

(6) I hold, therefore, that there is no substance in the first contention, raised by Mr. Chakravarty. It is, accordingly overruled.

(7) As to the second contention, raised by Mr. Chakravarty, it is to be observed, in the first place, that upon the findings of the Courts below there has been sufficient proof in the present case of title—at any rate, of a prima facie title—in the plaintiffs. Mr. Chakravarty contends that, on the authority of the decisions in the cases of — 'Lep Singh v. Nimar Khasia', 21 Cal 244, and — 'Giri Narain v. Modhu Sudan', 17 Cal W N 324, this suit must be held to be not maintainable and the proper suit for the plaintiffs would be a suit for recovery of possession of the disputed property, in which they might also include the claim for damages or mesne profits.

(8) It is true that the case in — 'Giri Narain v. Modhu Sudan', 17 Cal W N 324, states the proposition somewhat broadly in favour of Mr. Chakravarty, but it is equally true that in that case this question did not strictly arise and was not a relevant, at any rate, not a necessary, issue. It is absolutely clear from '17 Cal W N 324', that there their Lordships distinguished the case in — 'Lep Singh v. Nimar Khasia', 21 Cal 244, on facts & proceeded to demonstrate that, even upon the widest interpretation in favour of the defendant, the case in '21 Cal 244', could not afford any assistance to him. I am convinced that the statement of the proposition in the broad form in which it appears in '17 Cal W N 324', is not an accurate statement of the decision in '21 Cal 244', and their Lordships in '17 Cal W N 324', never meant to lay down the proposition in those broad terms. '17 Cal W N 324', is, therefore, no authority in support of Mr. Chakravarty's second contention and cannot reasonably be construed — having regard, particularly, to its actual decision — adversely to the plaintiffs in the present suit.

(9) As to the case in — 'Lep Singh v. Nimar Khasia', 21 Cal 244, it is enough to say that, apart from the fact that that case is also clearly distinguishable and is, strictly speaking, no authority on the present question, there is, even in that case, one observation which is highly significant and which really supports the plaintiffs respondents. It is clear from the decision in '21 Cal 244', that there their Lordships recognised that proof of title would entitle the plaintiff to a decree for mesne profits, irrespective of the question of possession. That case related to a claim for the value of fruits grown in the suit land during the period of the plaintiff's alleged possession thereof and the plaintiff's claim was sought to be resisted by the defendants by setting up title in themselves with regard to the suit land. In these circumstances their Lordships held that (1) if the defendants succeeded in proving title in themselves the plaintiffs' suit would fail, (2) if the plaintiffs succeeded in proving their title their suit would be decreed and (3) if neither party succeeded in proving title the plaintiffs would still succeed if the plaintiffs proved their possession of the suit land at the date of the suit and prior thereto. In my opinion, there is nothing in '21 Cal 244' which supports Mr. Chakravarty's second contention. On the other hand, it seems to me that that decision, when closely read, is opposed to that contention as it clearly lays down that the plaintiff would be entitled to succeed if he has proved title to the suit property which, in the context and the circumstances of that case, can only mean a prima facie title or, to put it in other words, the plaintiff would be entitled to succeed if he has given prima facie proof of title to the suit property.

This conclusion seems irresistible when we remember that the case in '21 Cal 244', purports to be based—and is also really based—upon the decision in the case of — 'Radha Churn v. Zumuroonissa Khatoon', 11 W R 83 (Cal). That decision, if closely analysed, leads to this position that the plaintiff in a suit of the present type can succeed on prima facie proof of title and prior possession may, under certain circumstances, be sufficient prima facie evidence of title. To my mind, the cases in '21 Cal 244 and 11 WR 83 (Cal)' rather appear to be authorities against the appellant — at any rate no argument against the maintainability of the plaintiffs' suit can be founded upon any of them. 'Radha Churn's case' has some resemblance to the present case and the decision therein substantially favours the respondents.

(10) In the above state of the law, the plaintiffs' suit cannot be held to be not maintainable as upon the findings of the Courts below — and these findings are amply justified on the materials on record — the plaintiffs' title to the suit property has been sufficiently proved and there is no case or claim of the title having been extinguished by limitation or adverse possession and the test of 'prima facie evidence of title' laid down by Sir Barnes Peacock in — 'Radha Churn's case', (11 W R 83) has been satisfied by the plaintiffs beyond all doubts.

(11) There is also another aspect of the matter. On the authority of the cases of — 'Samiulla v. Nil Mamud', 97 Ind Cas 564 (Cal) and — 'Surnomoyee v. Deonath Gir Sunnyasee', 9 Cal 908, the plaintiffs may be said to have waived the trespass and sued for damages. This position is clearly tenable as, admittedly in the present suit, there is a claim for damages for use and occupation and the claim for mesne profits is only in the alternative. In this view of the matter, apart from anything else, the present suit would be maintainable.

(12) In the light of what I have said above, I am bound to overrule also the second contention raised by Mr. Chakravarty and I reject the same.

(13) My conclusion, therefore, is that the plaintiffs' suit has been rightly decreed by the Courts below. This appeal, accordingly, fails and is dismissed with costs.

(14) Leave to appeal under Cl. 15 of the Letters Patent is asked for and is refused.

B/V.B.B. Appeal dismissed.

A.I.R. 1953 CALCUTTA 322 (Vol. 40, C. N. 113)

P. N. MOOKERJEE J.

Banarashi Lal, Accused-Petitioner v. The State.

Criminal Revn. No. 957 of 1951, D/- 14-1-1952.

West Bengal Cotton Cloth and Yarn Control Order (1948), Cl. 18(1) — Failure to keep price list hanging in absence of cloth is no offence. (Para 2)

Chandra Narain Laik, for Petitioner; Samarendra Nath Mukherjee, for the State.

ORDER: The petitioner before me was prosecuted on a charge of "violating the provisions of cl. 18(1), West Bengal Cotton Cloth and Yarn Control Order, 1948 by not keeping the price list of the textile goods in his shop hanging." The petitioner's defence was that he was not guilty. On the evidence before him the learned Magistrate came to the finding that the petitioner had no price list hanging in his shop at the time when the offence was said to have been committed. The learned Magistrate, upon that finding, convicted the petitioner and sentenced him to pay a fine of Rs. 50/- in default to suffer rigorous imprisonment for one month. The learned District Magistrate refused to interfere with this order of conviction and sentence in revision. The petitioner then moved this Court and obtained the present Rule.

(2) The short submission that has been made before me on behalf of the petitioner is that, even accepting the finding of the learned Magistrate that the petitioner had no price list hanging at the relevant time in his shop to be correct, that alone would not be sufficient for the conviction of the petitioner inasmuch as the prosecution had not proved that the petitioner had at the relevant time in his shop cloth having prices stamped thereon and in the absence of such proof cl. 18, West Bengal Cotton Cloth and Yarn Control Order, 1948 could not be attracted to the case and no question of any violation of that provision would arise. It seems to me that on the materials on record the petitioner's submission has considerable force and cannot but be accepted. There is nothing on the record to show that at the relevant time the petitioner had in his shop cloth of the description mentioned in cl. 18 of the Control Order, referred to above, and, accordingly, the failure to hang a price list in his shop cannot be construed to be an offence of violation of the provisions of the said clause. The conviction of the petitioner must, accordingly, be quashed and the sentence, passed upon him, must be set aside.

(3) This Rule is, therefore, made absolute. The conviction of the petitioner and the sentence passed upon him are set aside and the fine, if paid, is directed to be refunded.

C/D.R.R. Rule made absolute.

A.I.R. 1953 CALCUTTA 323 (Vol. 40, C. N. 114)

ROXBURGH J.

Lankeswar Haldar and another, Judgment-debtors-Petitioners v. Ram Gopal Das Naskar and others, Opposite Party.

Civil Rule No. 1702 of 1950, D/- 8-6-1951.

Debt Laws — Bengal Agricultural Debtors' Act (7 of 1936), S. 37A — Application by a cosharer must be independent and on his own behalf. (Para 3)

S. C. Janah, for Petitioners; A. C. Gupta, Amritalal Mukherjee and Nirmal Chandra Mukherjee, for Opposite Party.

ORDER: This rule raises an interesting point under S. 37A, Bengal Agricultural Debtors' Act. The proceedings originally started by a petition dated 4-9-1942 under S. 37A filed by Biju Haldar, opposite party 4. The Section itself had just come into force on 18-6-1942. The application was not made in Form XIXA as required by R. 77A framed under the Act. Although, possibly, in substance, it contains all the necessary material, if read with the previous application under S. 8 of the Act which had been made by Biju Haldar, and which is referred to in his later application under S. 37A. Nothing much appears to have been done on this application but on 10-1-1944, Biju Haldar filed another application in proper form. The present petitioners, Lankeswar Haldar, and Sm. Promila Sundari Dasi are cosharers of Biju Haldar in the properties, the sale of which was sought to be set aside by these proceedings. Eventually, on 24-5-1943, they themselves filed an application under S. 37A mentioning that Biju Haldar was considering withdrawing his application. Eventually, on 10th August, Biju Haldar withdrew his application.

(2) It is not necessary to trace the subsequent history of the case which has once before been before this Court. The present stage is that the only question for consideration is whether the application of the present petitioners under S. 37A is barred by limitation. Ever since the point was taken, it has been decided against them. The decision of the learned First Extra Additional District Judge of 24-Parganas which is the subject-matter of the present rule is based on the view that the original application of Biju Haldar on 4-9-1942, was no application under the Act, and therefore, no application of any sort had been made by any party under S. 37A before 10-1-1944, which was therefore out of time, the period of limitation being uptill one year from 18-6-1942, the date of commencement of the Bengal Agricultural Debtors' Act, 1942.

(3) Mr. Janah appearing on behalf of the petitioners has contested this view. Mr. Atul Chandra Gupta appearing on behalf of the opposite party does not attempt to challenge the argument put forward by Mr. Janah but contends simply that the only question for consideration is as to when was the application made by the present petitioners. His contention is that even assuming that the application of Biju Haldar was good that application could only be for the benefit of Biju Haldar, and that if any cosharer wishes to make an application to obtain the benefit of the provisions of S. 37A, he was required himself to make an independent application under the Section within the period of limitation. Even assuming that the petitioners were in some way parties to the proceedings on the application of Biju Haldar that gave them no right to the benefit of the application of Biju Haldar, and if they wished to obtain in their own favour the benefit of the provisions of this Section, it was necessary for them to make an application before 18-6-1943. In my opinion, there appears to be no answer to this contention. It has been held that a cosharer can make the application on his own behalf and recover the whole property sold if he undertakes the obligation of paying the amount of the debt. It seems to me to follow as a corollary that the contention of the learned Advocate for the respondents is sound. I do not think there is any analogy here between the case of a 'pro forma' defendant being transferred to the category of a plaintiff in an ordinary civil suit. There is a closer

analogy perhaps to the provisions of S. 26F, Bengal Tenancy Act where a special right of pre-emption is given to cosharers under S. 26F (4) (a), but they have to apply to join in the said application and a special period of limitation is laid down for such applications. Thus, I consider that the order of the learned Judge in the matter is correct although I am, to say the least, doubtful that the reason on which he has based his order is sound.

(4) This rule is accordingly discharged with costs.

C/D.R.R. Rule discharged.

A.I.R. 1953 CALCUTTA 324 (Vol. 40, C. N. 115)

BOSE J.

Shri Ganesh Jute Mills Ltd., Petitioner v. Commercial Tax Officer and others, Respondents.

Suit No. 110 of 1950, D/- 6-12-1951.

Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), S. 5 (2) (iii) — Effect of change in designation of "Stores and Supply Departments".

Where the petitioner had contracted to supply certain goods to Government of India at the price exclusive of Bengal Sales tax, the change brought by the Notifications D/- 31-12-1945 and 2-9-1947 in the designations of "Supply Department and the Stores Department of the Government of India" which appear in S. 5 (2) (iii) of the Act 6 of 1941, to "the Department of Industries and Supplies" and to "Ministry of Industry and Supply", respectively, without an amendment to this effect in the section itself, could not deprive him of the benefit of the exemption under the section, in respect of the supplies made by him before the passing of the West Bengal Finance Sales Tax Amendment Act (10 of 1949), which withdrew the said exemption. (Paras 6, 7)

A. N. Roy, for Petitioner; S. Bannerjee, for State of West Bengal; E. Meyer, for the Union of India.

ORDER: This is an application under Art. 226 of the Constitution, for an appropriate Writ for cancellation of the demands made by the respondent Nos. 1 and 2 under Notification dated 8-11-1950, asking for a sum of Rs. 9, 401/10/6 to be paid by the petitioner and for direction on the said respondents to forbear from giving effect to that Notification.

(2) The facts are that by a contract entered into with the Government of India; Ministry of Industry and Supply, dated 1st September 1948, the petitioner agreed to supply some hessian cloth to the Government of India. The contract provided inter alia that the prices shown in that contract were exclusive of the Bengal Sales Tax and the Government of India would arrange direct payment of sales tax to the Government of West Bengal if it is found ultimately that sales tax is payable in respect of the said contract.

(3) Pursuant to the said contract, the petitioner supplied goods to the Government of India and charged the Government of India the prices payable in respect of such supplies which were exclusive of the sales tax. The petitioner also entered into two other similar contracts with the Government of India for sale of hessian goods and supplied goods under the said contracts.

(4) The Commercial Tax Officer came to the conclusion that the petitioner was liable to pay sales tax in respect of the said contracts and he purported to demand sales tax from the petitioner, and it appears that by a Notification No. 6767 dated 8-11-1950, the Commercial Tax Officer made a demand from the petitioner of a sum of Rs. 9,401/10/6 as sales tax in respect of the goods supplied. The petitioner challenges this demand of the Commercial Tax Officer as illegal. In the circumstances he has moved this Court for the reliefs stated above.

(5) The Sales Tax Act, Section 5(2)(iii) provides as follows:

"In this Act, expression "taxable turn-over" means that part of a dealer's gross turn-over during any period which remains after deducting therefrom

(iii) sales to the Indian Stores Department, the Supply Department of the Government of India and any Railway or Water Transport Administration."

(6) It is contended by the learned Counsel for the petitioner that in respect of the supplies under the contracts mentioned in the petition, he is entitled to the benefit of this exemption inasmuch as the supplies were to the Department of Supply as mentioned in the said sub-cl. (iii) of S. 5(2). One Mr. M. P. Pai who is Joint Secretary in the Ministry of Works, Production and Supply of the Government of India, has affirmed an affidavit in connection with these proceedings. It is stated in the said affidavit that the Department of Supply came into existence in September 1939. Before 7-1-1946, the said Department of Supply was charged with the procurement of stores from all places in India including Bengal, but by a Notification dated 31-12-1945, the Governor General in Council was pleased to announce the creation with effect from 7-1-1946 of the Department of Industries and Supplies in place of the existing departments of Supply and of Industries and Civil Supply. A copy of this Notification is annexed to the said affidavit, and it appears from such Notification that this newly created department was charged with the work of procurement of stores for Government and with certain additional works. It further appears from Annexure 'B' to that affidavit that subsequently by another Notification dated 2-9-1947, the designation of "Industries and Supplies Department" was changed to "Ministry of Industry and Supply". It thus appears that the powers and functions of the Department of Industries and Civil Supply in the matter of procurement of stores were continued and they remained the same after 7-1-1946. Although there was change in the designation of the Indian Stores Department or the Supply Department of the Government of India in the manner which I have stated before, S. 5(2)(iii) was not amended in any way and the names of Indian Stores Department and the Supply Department were continued.

(7) Mr. Banerjee appearing for the respondents Nos. 1 and 2 has contended that since this Indian Stores Department and the Supply Department of the Government of India had become merged into the Departments of Industries and Supplies by the Notification of the 31st December, the exemption granted by S. 5(2)(iii) is not available to the petitioner. It may be further pointed out that in 1949 an Act was passed by the West Bengal Legislature, being West Bengal Act 10 of 1949, which withdrew this exemption granted under S. 5(2)(iii), but the supplies in respect of the contracts mentioned in the petition were effected before that date, and therefore the amendment does not affect the question before me. I am unable to accede to the contention of Mr. Banerjee that by change of the desi-

gnation which appears in the exemption section and by means of a simple merger of the functions of these departments with the newly designated department, the petitioner can be deprived of the benefit of the exemption claimed. As I have pointed out before, although the Notification in question created this new department and conferred on this new department these functions which were being performed by the Indian Stores Department and the Department of Supply, there was no amendment effected in sub-cl. (iii) of Cl. 5(2).

(8) I am of the view, therefore, that the petitioner is not liable to pay sales tax in respect of the supplies in question.

(9) In the circumstances this Rule must be made absolute, the Notification dated 8-11-1950 is cancelled and respondents Nos. 1 and 2 are directed to forbear from giving effect to the said Notification.

(10) The West Bengal Government will pay one set of costs to be divided between the petitioner and the Union of India.

B/H.G.P. Rule made absolute.

A.I.R. 1953 CALCUTTA 325 (Vol. 40, C. N. 116)

BACHAWAT J.

Bank of Calcutta Ltd., Plaintiff v. Dhirendra Nath Roy and others, Defendants.

Suit No. 347 of 1938, D/- 5-3-1951.

Registration Act (1908), S. 17 (1) (b) and (e) — Assignment of decree.

An assignment of a preliminary mortgage decree for sale of immovable property is not compulsorily registrable under S. 17 (1) (b) but requires registration under S. 17(1)(e).

(Paras 26 and 34)

Anno: Reg. Act, S. 17 N. 46 Pt. 4.

H. N. Sanyal and Niren De, for Plaintiff; A. K. Sen and Amiya Kumar Basu, for Defendants.

REFERENCES: Courtwise/Chronological/ Paras

('24) 51 Ind App 321: (AIR 1924 PC 198) 32
('36) 63 Ind App 114: (AIR 1936 PC 63) 31
('45) 72 Ind App 277: (AIR 1945 PC 152) 31
('80-81) 5 Bom 232 28
('96) 23 Cal 450 26
('08) 12 Cal WN 625 26
('46) 50 Cal 486 31
('48) AIR 1948 Cal 363 32
('38) AIR 1938 Lah 430: (178 Ind Cas 278) 29
('28) 51 Mad 701: (AIR 1928 Mad 914 FB) 32
('40) ILR (1940) Mad 306: (AIR 1940 Mad 140) 27

ORDER: On 17-7-1933 there was a mortgage of various valuable immovable properties, by the defendant in favour of Jessore Loan Company Ltd. In 1938 Jessore Loan Company Ltd. instituted this suit to enforce the mortgage. On 4-2-1946 the Jessore Loan Company Ltd. was amalgamated with the Bank of Calcutta Ltd. The Bank of Calcutta Ltd. became entitled to all the assets of Jessore Loan Company Ltd. and was substituted in its place as the plaintiff in this suit. On 15-11-1946 by consent of all parties preliminary mortgage decree for sale was passed in the suit.

(2) The Bank of Calcutta fell into difficulties and on 26-11-1946 there was an interim order granting moratorium upon the undertaking of the Directors of the Bank not to pay more than 25 per cent. to the creditors. This undertaking was modified from time to time. On 8-12-1946 the Directors were given liberty to pay in full the deposits made after 26-11-1946. On 17-3-1947 the Directors were given liberty to pay up to 60 per cent. of the claim of the creditors and the period of moratorium was also extended for another three months. On 26-8-1947 the application for moratorium was dismissed, and on the same day a winding up petition was admitted and the Official Liquidator was appointed the provisional Liquidator. On 1-9-1947 an application for scheme of arrangement was presented. On 19-11-1947 the scheme was sanctioned and the application for winding up was also dismissed.

(3) The scheme did not function well, and the Bank again fell into difficulties. On 14-2-1949 a second application for winding up was presented, and on 1-4-1949 an order for compulsory winding up of the Bank was made and the Official Receiver was appointed the Official Liquidator.

(4) The present application is made by Ram Chandra Paida, Kalash Chandra Paida, Radha Nath Paida and Sreehari Charan Paida for an order that they be substituted as the plaintiffs in place of the Bank of Calcutta Ltd. and for an order recording an adjustment of the preliminary decree whereby petitioners agreed to accept from the defendant a sum of Rs. 60,000/- in full settlement of the claim and costs.

(5) The petitioners claim that they are entitled to the preliminary decree on the strength of certain deeds of assignment executed by the Bank of Calcutta.

(6) One Biswanath Paida was a rich zemindar of Balasore. He is now dead. He opened several fixed deposit accounts in the names of several persons. During his lifetime he was the Karta of a joint family consisting of these persons and after his death petitioner Ram Chandra Paida became the Karta of the said joint family.

(7) The petitioners allege that on 26-11-1946, a sum of Rs. 3,14,400/- was due from the Bank on these several accounts. They also allege that Biswanath Paida paid a further sum of Rs. 9,360/- to the Bank on 10-2-1947, in order to enable the bank to pay its constituents in Balasore and that on 15-6-1947 the petitioners paid to the Bank a sum of Rs. 18,500/-.

(8) The petitioners produce an agreement in writing signed by Murari Mohan Chatterjee, Managing Director of the Bank, and dated 15-6-1947 whereby the Bank agreed to assign the preliminary decree in the suit to the petitioners for the sum of Rs. 2,16,500/- made up as follows:

(a) Rs. 1,88,640/- being 60 per cent. of Rs. 3,14,400/-.

(b) Rs. 9,360/- paid on 10-2-1947 and

(c) Rs. 18,500/- paid by the petitioners on the date of the agreement.

(9) There is also a letter from Murari Mohan Chatterjee to the petitioners dated 15-6-1947, stating that the sum of Rs. 2,16,500/- was being adjusted against the preliminary decree in the suit and the balance of Rs. 1,25,760/- was being transferred to the Head Office. At or about that time, a sum of Rs. 2,20,000/- was payable from the defendants under the preliminary decree.

(10) The petitioners have also produced a Bengali deed of assignment dated 25-8-1947. This deed is signed by Murari Mohan Chatterjee, the Managing Director of the Bank, and also by Sisir Kumar Dutt, a Director of the Bank. The scribe is one Golak Behari Das and it is witnessed by one Srikanta Bhattacharjee.

(11) According to the petitioners the Bengali deed of assignment was not registered because a list of the properties was not annexed to the deed and also because the Income-tax Clearance Certificate was not forthcoming. The petitioners

thereupon requested the Board of Directors of the Bank functioning under the scheme of arrangement to execute a fresh deed. The minutes of the meetings of the Board of Directors held on 24-3-1948 and on 27-7-1948 have been produced. In the first meeting, the Directors resolved to take legal advice on the point and in the second meeting the Directors resolved to execute a fresh deed of assignment in favour of the petitioners.

(12) The petitioners produced another deed of assignment in English dated 30-1-1949. This deed is also signed by Murari Mohan Chatterjee and Sisir Kumar Dutt and witnessed by Srikanta Bhattacharjee and Bansidhar Das, an employee of the petitioners. The deed appears to have been presented to the Collector of Stamps for adjudication and the Collector seems to have adjudicated on it on 20-9-1948. The deed was presented for registration but registration was refused on 6-5-1949.

(13) This application is opposed by the Official Liquidator of the Bank of Calcutta who challenges the genuineness and validity of the agreement and of the two deeds of assignment.

(14) One Jiban Ratan Sanyal, an assistant of the Official Liquidator, affirmed an affidavit on August 1950. It was stated in that affidavit (a) that the Official Liquidator was unable to obtain possession of the books of account and other records of the Balasore Branch, (b) a charge of fraudulent preference was made, and (c) a reference was made to a letter dated 11-11-1948 written by the Bank to Messrs. Orr, Dignam & Co. in which the Bank requested Messrs. Orr, Dignam & Co. to co-operate in the sale of one of the mortgaged properties. The suggestion then was that the deeds of assignments were not in existence on 11-11-1948. If there was an assignment the Bank had no interest and could not sell. This suggestion is, however, now dropped. There is satisfactory evidence that the deed was in existence in November 1948. Indeed the case of the Official Liquidator now is that the deed was executed in November 1947.

(15) On behalf of the petitioners, an affidavit in reply was filed by one Banshidhar Das. This affidavit was affirmed on 16-8-1950, Banshidhar stated that the affidavit of Jiban Ratan was filed at the instigation of one Sudhanshu Sekhar Banerjee who was really instrumental for the preparation of the deeds of assignment. It was alleged that Sudhansu had taken inspection of the deeds and it was significant that he had filed no affidavit. It was also stated that the petitioners came to know about 3 months back that the Liquidator had taken possession of the books and records of the Balasore branch.

(16) Sudhanshu thereupon affirmed an affidavit on 26-8-1950. In this affidavit it was alleged that the agreement dated 15-6-1947, and the deed dated 25-8-1947, were executed on 18-11-1947. I am unable to place any reliance on this affidavit for the following reasons:

(17) Sudhanshu was an employee of the Official Liquidator since March 1950. It is not denied that he took inspection of the several deeds of assignment. No explanation was given in his affidavit as to why he did not affirm an affidavit earlier and as to why no suggestion was made in the affidavit of Jiban that the deed dated 15-6-1947 was executed in November 1947. No explanation is given as to why the earlier suggestion that the deed was not in existence in November 1948 was made.

(18) The Official Liquidator himself produced an entry in the Balasore books which shows that a sum of Rs. 2,16,500/- was being adjusted against this preliminary decree.

(19) The minutes of the meetings of the Board of Directors of the plaintiff company in June 1947, are said not to be available and are not produced.

(20) The Official Liquidator knew of the execution of the deeds at least in January 1950. Letters had been written to Murari Mohan Chatterjee demanding explanation but no application for his examination has been made so far.

(21) The Bengali deed of assignment is referred to without any protest and apparently with approval of the Board of Directors of the plaintiff company in their meetings which were held in April and July 1948. This Board consisted 'inter alia' of Directors who represent the depositors and who were independent of the previous management.

(22) Sudhanshu in his affidavit relied upon a chit dated 17-11-1947 written by Murari Mohan Chatterjee requesting him to do the work of the Balasore people, who had come down to Calcutta. Sudhanshu alleges that he came to know the Padias for the first time on that day and that the chit was really a request to him to see the matter of assignment through. On the face of it the chit does not refer to the execution of a deed. The chit may well have been written in connection with the income-tax clearance certificate.

(23) One Nirmalendu Bikash Banerjee, another assistant of the Official Liquidator, filed an affidavit which was affirmed on 11-11-1950. He purports to give the result of his investigation into some of the books of the bank. I believe Bansidhar's statement that all these books were in the possession of the Official Liquidator when Jiban affirmed his affidavit. According to Nirmalendu, the books show (a) that Rs. 3,14,400/- was due on the several accounts from the bank, (b) That on 14-6-1947 against this sum a sum of Rs. 1,09,000/- was adjusted on account of payment and set off several other accounts, (c) that there are no entries in the books of account of the Bank showing any payment of the sums of Rs. 9,360/- and Rs. 18,500/-.

(24) The evidence of Nirmalendu is hearsay of the worst type and I can place no reliance on his affidavit. He has no personal knowledge of the transactions. He did not keep the books of account and he cannot even say as to whether they were kept in the usual course of business. In spite of a challenge from the petitioners no writing has been produced by the bank showing that the petitioners gave any authority to set off any amount as alleged by Nirmalendu. Some of the books of the Balasore branch are said not to be available and are not produced. A set-off of Rs. 1,09,000/- on 14-6-1947 is inconsistent with the entry in the Balasore books adjusting a sum of Rs. 2,16,500/-. If there was set-off the balance left would be less than Rs. 2,16,500/-.

(25) My finding is that the agreement dated 15-6-1947, the Bengali deed of assignment dated 25-8-1947 and the English deed of assignment dated 30-1-1949, were executed on the dates which they bear and for the consideration mentioned therein. It is conceded by Mr. A. K. Sen that on this finding he can urge two other contentions only in defence to this application, viz., that (a) The deeds of assignment are compulsorily registrable and not being registered are not admissible in evidence: (b) In the alternative the applicants are not assignees of an interest in the subject-matter of the suit and cannot apply for leave to continue the suit under O. 22, R. 10, Civil P. C.

Mr. A. K. Sen contended that the deeds are compulsorily registrable under sub-ss. 17 (1)(b) and 17(1)(e), Registration Act which require registration of the following documents:

"(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

* * *

(c) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

(26) I hold that sub-s. 17(1)(b) has no application. This Court has held that a mortgage decree for sale of immovable property is not immovable property and that an assignment of such decree is not compulsorily registrable under sub-s. 17(1)(b). —'Gous Mahomed v. Khawas Ali Khan', 23 Cal 450; —'Ram Ratan v. Jogesh', 12 Cal WN 625. I am bound by these decisions and I must follow them.

(27) By the Transfer of Property (Amendment) Supplementary Act, 1929 the Legislature amended S. 17, Registration Act by introducing cl. (c) to S. 17(1). Reliance is placed on —'Shiva Rao v. Official Liquidator', ILR (1940) Mad 306 and it is contended that the amendment shows that a mortgage decree for sale is now immovable property. I do not agree with this contention. If the Legislature intended to say that such decree is immovable property, the definition of 'immovable property' in S. 2, Registration Act would have been amended so as to include such decree.

(28) The next question is whether the deeds of assignment are compulsorily registrable under sub-s. 17(1)(e), Registration Act. The group of words "purport or operate to declare X X X immovable property" also appear in sub-s. 17(1)(b). West J.'s interpretation of those words in —'Sakharam v. Madan', 5 Bom 232 which has become classic is as follows:

"There 'declare' is placed along with 'create', 'assign', 'limit' or 'extinguish' a 'right, title or interest', and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will, not a mere statement of fact."

(29) Mr. A. K. Sen relied on —'Peoples Bank of Northern India Ltd. v. Malik Ram Kishan', AIR 1938 Lah 430 which decided that a final mortgage decree for sale of immovable property requires registration under sub-s. 17(1)(e). Mr. Sanyal disputed the correctness of the Lahore decision and contended that in any event a preliminary decree stands on a different footing and its assignment need not be registered.

(30) In this case the preliminary decree is by consent. It declares the amount due. The amount is made payable in instalments. If the payment is made in accordance with the decree, the documents relating to the mortgaged property have to be delivered and the property has to be re-transferred to such persons as the Court may direct. In default of payment, the plaintiff is entitled to apply to the Court for final decree for sale, subject to the provisions of the Bengal Money-Lenders Act.

(31) The preliminary decree is not capable of execution. —'Jivandas Khimji v. Dindoyal Shah', 50 Cal WN 486. The suit is pending in spite of the passing of the preliminary decree. The application for final decree is a step in the pending suit and is not an application for execution: —'Madan Theatres Ltd. v. Dinshaw & Co. Bankers Ltd.', 72 Ind. App. 277 (P.C.). For some purposes the loan is not merged in the preliminary decree and interest 'pendente lite' until the final decree is given at the contractual rate: —'Kusum Kumari v. Debi Prosad', 63 Ind. App. 114 (P.C.).

(32) But on the passing of the preliminary decree there is no longer merely a right to sue. There is something more, viz., a decree which crystallizes the rights and obligation of the parties. The suit cannot be dismissed for default of appearance nor can it abate on the death of the plaintiffs or the defendant: —'Lachminarain v. Balmakund', 51 Ind. App. 321 (P.C.); —'Perumal Pillai v. Perumal Chetty', 51 Mad 701(F.B.); —'Bhusanchandra v. Chhabimoni Dasi', AIR 1948 Cal 363.

(33) The preliminary consent decree is not merely a recital of a pre-existing fact. It finally declares and determines the amount due under the mortgage. It establishes and declares the plaintiff's right to have the property sold if the debt is not paid. It embodies the declaration of the will of both the parties and of the Court and causes a definite change in the legal relation of the parties to the property. The rights & obligations are finally settled & the parties cannot go behind the preliminary decree. The final decree is but the consummation of the preliminary decree which has now become a starting point and a source of the rights and obligations.

(34) In my judgment a preliminary mortgage for sale of immovable property declares a right, title and interest in immovable property and the assignment of such decree requires registration under S. 17(1)(e), Registration Act.

(35) I, therefore, hold that the deeds of assignment are not admissible in evidence and this application must, therefore, fail. It is therefore not necessary to deal with the alternative contention of Mr. A. K. Sen.

(36) I will, therefore, dismiss the application but in the special circumstances, I will direct each party to pay and bear its own cost of this application. The Official Liquidator will retain his own cost out of the assets.

B/R.G.D. Application dismissed.

A.I.R. 1953 CALCUTTA 327 (Vol. 40, C. N. 117)

G. N. DAS AND K. C. DAS GUPTA JJ.

Samarendra Nath Bose, Appellant v. Corporation of Calcutta, Respondent.

A. F. O. O. No. 120 of 1949, D/- 28-8-1950.

Municipalities — Calcutta Municipal Act (3 of 1923), S. 138 — Increase of valuation how proved.

Where the rent payable by the tenant per month is apparently unchanged, the only way by which the Corporation can succeed in showing that there has been an increase of the rent proper for the premises is by showing that either the furniture or other things for which deduction was made at the time of the previous assessment is less than before or at least that the rent

payable for such furniture or other things is less than before. (Para 2)

S. C. Mitter, Jyotish Chandra Pal, Krishna Prosad Basu and Prosanto Kumar Ghose, for Appellant; Krishna Lal Banerji, for Respondent.

DAS GUPTA J.: At the general revaluation which was to take effect from the fourth quarter of 1939-1940 premises No. 2, Heysham Road were assessed at a value of Rs. 11,080/-. It appears that the monthly income was taken at Rs. 1140/- in spite of the fact that admittedly the rent was Rs. 1300/- per month. In 1945 the Corporation authorities increased the valuation from Rs. 11,080/- to Rs. 12,636/- and in the notice under S. 138, Calcutta Municipal Act under which when a valuation is increased the notice shall contain a statement of the grounds of such increase it was stated that the increase was estimated on account of rise of rent since the last valuation. There was an objection by the assessee and the Deputy Executive Officer thereupon reduced the valuation to Rs. 11,907/-. He appears to have calculated the monthly income at Rs. 1225/-. There is an appeal by the assessee under S. 41, Calcutta Municipal Act on the ground in fact that there has been no rise in the rent of the premises since the increase in valuation was unjust and arbitrary. The learned Small Cause Court Judge dismissed the appeal.

(2) It has been contended before us in this appeal against the decision of the learned Small Cause Court Judge by Mr. Mitter on behalf of the appellant that as the rent admittedly remained unchanged at Rs. 1300/- per month no case had been made out for increase of the valuation. Mr. Banerji on behalf of the Corporation of Calcutta has contended that the registered lease of 1944 shows that the rent was fixed at Rs. 1300/- per month and a deduction of Rs. 75/- on account of some part of the furniture and fittings out of the list given in Sch. 2 of the lease cannot be considered to be unreasonable. It is to be noticed however that while the evidence that Rs. 1300/- has all along been the rent is not in any way challenged the evidence also shows that there has been no change in the furniture and the fittings. If there had been a change in the furniture and fittings or in the rent payable therefor it might have reasonably been argued that the rent proper for the premises, though apparently unchanged, has undergone a change. It seems to me clear that when the Corporation wants to increase the valuation on the ground that the rent had been increased the burden is clearly on the Corporation to show that there has been such an increase and also the extent of the increase. The position is that the rent payable by the tenant is Rs. 1300/- per month and was so before. The only way by which the Corporation can succeed in showing that there has been an increase of the rent proper for the premises is by showing that either the furniture or other things for which deduction was made at the time of the previous assessment is less than before or at least that the rent payable for such furniture or other things is less than before. That has not been shown. Indeed no attempt has been made to show that there has been a decrease in the furniture or any decrease in the rent payable thereof. It was contended by Mr. Banerji that there is nothing to show that the deduction of Rs. 160/- that was made at the time of the previous valuation was on account of furniture. In any case the deduction having been made by the Corporation it was clearly within the special knowledge of an officer of the Corporation to show as to what the deduction was for and the burden of proving that was therefore on the Corporation. I cannot understand how the Corporation can be allowed to withhold that evidence and still argue that as it is not known what that deduction was for that deduction may very well be disallowed now.

(3) Even supposing that the reasons for that deduction are not before the Court the position is that nothing has been shown to justify a conclusion that the reasons for that deduction from the gross rent are not equally operative at the time the new assessment is made.

(4) In my judgment the contention of the learned Counsel for the appellant that the Corporation has failed to show that there has been an increase of rent should prevail. My conclusion is that the learned Small Cause Court Judge ought to have allowed the appeal of the assessee and reduced the valuation to the figure at which it stood at the previous valuation viz. Rs. 11,080/-.

(5) I would therefore allow the appeal and order that the appeal by the assessee to the Small Cause Court Judge be allowed and direct that the valuation of the premises No. 2, Heysham Road be reduced to Rs. 11,080/-.

(6) The appellant will get his costs here and below. Hearing fee in this Court is assessed at three gold mohurs.

(7) G. N. DAS J.: I agree.

C/V.B.B. Appeal allowed.

A.I.R. 1953 CALCUTTA 328 (Vol. 40, C. N. 118)

R. P. MOOKERJEE J.

Susamarani Debi and others, Defendants-Appellants v. Udai Chand Mahatab, Plaintiff and another, Respondents.

A. F. A. D. No. 52 of 1946, D/- 22-8-1949.

(a) Tenancy Laws — Bengal Tenancy Act (VIII (8) of 1885), S. 105 — Constructive 'res judicata' — (Civil P. C., S. 11).

What is decided in a proceeding under S. 105, is to be looked at simpliciter and it is not open to the court to introduce or apply principles of constructive 'res judicata'. Where, however, a particular objection is actually raised before the revenue authorities in those proceedings the fact that there is no reference to such objections in the order as passed would not stand in the way of the Court in a subsequent proceeding holding that such points as were raised were given up and such points would not be allowed to be raised in any future suit. AIR 1920 Cal 253 Ref. (Para 2)

(b) Village Chowkidari Act (VI (6) of 1870), S. 50 — Transfer under — Inclusive of income of chowkidari chakran lands — Zamindar cannot claim additional rent. (Para 5)

Syama Charan Mitter, for Appellants; S. C. Mitter and Promode Kumar Ghose, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('17) 25 Cal LJ 556: (AIR 1917 Cal 850 (2)) 2

('20) 24 Cal WN 223: (AIR 1920 Cal 253) 2

ORDER: On behalf of the defendants, it is urged that the court of appeal below erred in holding that the defence was barred under S. 109, Bengal Tenancy Act. The plaintiff had brought the suit to realise arrears of rent, cess and interest in respect of a holding of which the rent had been settled under S. 105, Bengal Tenancy Act. The order passed under S. 105 was in 1937 and the present claim is for the years 1347 to 1350 B. S. The defence was that no rent was payable for the land as the plot in question was a resumed chowkidari chakran land and had been included in the putni created in 1846. The putni rent included the rent of these lands and the tenants are not liable to pay separately any rent for the same. Both the courts below have held that as rent was assessed under S. 105, Bengal Tenancy Act, and the order passed by the revenue authorities (a copy of which is marked as Ex. 6 in the case) was a contested one, that decision had the force and effect of a decree of civil court under S. 107, Bengal Tenancy Act. The defendant is not entitled to urge in the present suit any ground which he could have and ought to have raised in the proceedings under S. 105, Bengal Tenancy Act.

(2) The only paper produced to show what was raised or decided before the revenue authorities during the proceeding under S. 105 is the copy of the order already referred to. It appears from that order that two points were raised, one was an objection grounded on an allegation that the lands were situate in two mouzas and the other as to the basis for the calculation to fix the reasonable rent. No question appertaining to the particular point now raised in the present suit appears from the order Ex. 6. During the preparation of the final record of rights these lands were recorded as lands liable to be assessed with rent. A question might have been raised as to whether the land was niskar or not or that rent was at all payable or not under other considerations. If so, then proceedings could have been started under S. 105A, Bengal Tenancy Act, and a decision arrived at. What is decided in a proceeding under S. 105 is to be looked at simpliciter and it is not open to the court to introduce or apply principles of constructive 'res judicata'. The courts however have gone so far as to lay down that if a particular objection is actually raised before the revenue authorities in proceedings under S. 105, the fact that there is no reference to such objections in the order as passed would not stand in the way of the Court in a subsequent proceeding holding that such points as were raised were given up and such points would not be allowed to be raised in any future suit. — 'Apurba Krishna v. Shyama Charan', 24 Cal WN 223. As stated already, the only paper produced by the landlord in support of the bar raised against the defendant is a copy of the order passed under S. 105. As there is no indication from that order that the matter which is now in issue was even raised, not to speak of being decided by the revenue authorities, it cannot be held that the matter now in dispute was the subject-matter of a decision under S. 105, Bengal Tenancy Act. — 'Nawab Bahadur of Murshidabad v. Ahmad Hossein', 25 Cal LJ 556. The courts below were therefore not correct in holding that the defendants are not entitled to urge the defence raised here.

(3) With regard to the defence as to whether the zamindar is entitled to claim any rent for land now in suit, reference is to be made to the engagement between the parties. In 1846 the potta and the kabulyat which were exchanged clearly mentioned that all the lands included within particular mouzas were being settled and the putni rent which was being fixed was in respect of all such lands. It is not a general statement that all the lands within the mouza are being settled but particular kinds of properties held by the zamindar are mentioned, chowkidari chakran lands being one of the different types of land so specifically mentioned.

(4) From exhibit 1, the order of transfer made by the Collector in favour of the plaintiff landlord on the 13th of February, 1901, it appears that the transfer of these plots must have been effected under section 50 of Bengal Act VI of 1870. Section 51 of the Act is in the following terms:

> "Such order shall operate to transfer to such zamindar the land therein mentioned subject to the amount of assessment therein mentioned, and subject to all contracts theretofore made in respect of, under, or by virtue of which any person other than the zamindar may have any right to any land, portion of his estate or tenure, in the place in which such land may be situate."

(5) The transfer in favour of the zamindar therefore is subject to all contracts theretofore made in respect of or in favour of the persons. If on an interpretation of the potta and the kabulyat evidencing the creation of the putni it be held that the rent which was then assessed was inclusive of the income arising out of the chowkidari chakran lands, the zamindar will not be entitled to claim any additional rent because of the transfer effected in his favour under S. 50 of the said Act. It must therefore be held that the plaintiff is not entitled in law to claim any rent for the land in suit as there is a clear indication in the putni patta and the kabulyat that the chowkidari chakran lands were settled and that the putni lands were inclusive of all lands which were being then settled.

(6) The appeal is accordingly allowed and the plaintiff's suit is dismissed with costs in all the courts.

(7) This decision is on the basis of an interpretation of the putni potta and the kabulyat in question. The plaintiff did not claim the right to assess rent on any custom alleged to be in existence in the locality. It is not necessary to decide whether this point would have been at all available or if raised what would have been the result.

(8) In view of the order passed, no separate order is necessary so far as the application under S. 115, Civil P.C., is concerned.

C/D.R.R. Appeal allowed.

A.I.R. 1953 CALCUTTA 329 (Vol. 40, C. N. 119)

HARRIES C. J. AND BANERJEE J.

Commr. of Income-tax, West Bengal, Applicant v. Administrator-General of Bengal, Calcutta, Respondent.

Income-tax Ref. No. 39 of 1950, D/- 12-12-50.

Income-tax Act (1922), S. 4 (3) (i) — Property held under trust — Religious trust — Gift to family God through intervention of

trustee. AIR 1932 Cal 791 (FB) and AIR 1933 Cal 519, Rel. on; AIR 1922 PC 123 and 14 Mad 1, Ref.

The provisions relating to the feeding of the poor and for putting a tablet on the Thakoorbati, by themselves did not show that the intention of the testator was to make the Thakurbati a public temple. In the circumstance trust was held to be private religious trust and hence not exempted. (Para 14)

Anno: I. T. Act, S. 4 N. 15, 18 and 19.

Dr. Radhabinode Pal, for Assessee; Dr. S. K. Gupta and J. C. Pal, for Commr. of Income-tax, Bengal.

REFERENCES: Courtwise/Chronological/ Paras

('21) 48 Ind App 302: (AIR 1922 PC 123) 7
('33) 60 Cal 452: (AIR 1932 Cal 791 FB) 9
('33) 37 Cal WN 181: (AIR 1933 Cal 519) 10
('91) 14 Mad 1 10

BANERJEE J.: This is a reference under S. 66, Income-tax Act. The question referred to us is as follows:

"Whether on a proper construction of the will dated 12-8-1927, made by Manicklal Dutt, the Tribunal was right in holding that the Trust created by the will was a public religious trust and therefore wholly exempt from taxation under S. 4(3) (i)?"

(2) Manicklal Dutt in his lifetime was a Hindu governed by the Dayabhag and lived at premises No. 31 Hidaram Banerjee Lane. He had an undivided half share of and in a dwelling house in Raja Kisory Mohan Goswami Street in Serampore which was the family dwelling house. He had other immovable properties and was possessed of various movable properties, such as Government securities. bonds, shares, etc. He made his last will and testament on 12-8-1927. The testator was a widower. He had no son or daughter and it appears from the will that he intended to make gift of the whole of his estate for charitable and religious purposes for the spiritual benefit of himself, his ancestors, his father-in-law and mother-in-law. The material clauses of the will are as follows:

"1. I do hereby revoke all wills and testamentary dispositions heretofore made by me. I have cancelled my registered will dated the ninth day of September one thousand nine hundred and twenty four and I declare this to be my last Will.
2. I do hereby appoint the Administrator General of Bengal and his successor or successors in office for the time being to be the sole Executor and Trustee of this my Will (hereinafter referred to as my Executor and Trustee).
3. I give, devise and bequeath whole of my estate both moveable and immoveable which I am possessed of or may be entitled to at the time of my death unto my executor and Trustee upon the trusts and for the purposes hereinafter mentioned.
4. I direct that my said Executor and Trustee shall take possession of the whole of my estate and shall sell and convert into cash all my moveable and immoveable properties save and except the house and premises No. 31, Hidaram Banerjee Lane, in the town of Calcutta until a suitable and more commodious Thackoorbati is built as hereinafter provided and also save and except my half share of and in my said family dwelling house and land in Benapara in Serampore and the tenanted shop rooms in the Bazar in Serampore and invest the same after payment thereout of my just debts, funeral testamentary and Sradh expenses into three and a half per cent. Government Securities.
5. I declare that I have established and installed deities of Thackoors Radhakanto Jiu and Gopal Jiu in the said house and premises, No. 31, Hidaram Banerjee Lane. The said house and premises No. 31, Hidaram Banerjee Lane, shall until another Thackoorbati is built as hereinafter provided be used as the Thackoorbati for the location of the said Thackoors and I direct that a tablet bearing the inscription 'Srimati Sowdamini Dassee Thackoorbati established by Manicklal Dutt' to be put up on the said premises.
6. I direct my Executor and Trustee to set apart and spend out of my estate a sum not exceeding Rupees forty five thousand for buying a suitable plot of land in the town of Calcutta measuring not less than four to five cottahs and build a suitable Thackoorbati thereon for the location and habitation of the said deities Radhakanto Jiu and Gopal Jiu or to buy a ready made house with land measuring not less than four cottahs in a good locality suitable for a Thackoorbati for the location and habitation of the said deities at a price which together with the expenses that may be incurred for making additions & alterations thereto shall not exceed the sum of Rupees forty five thousand. After a new Thackoorbati is built or purchased a tablet bearing the inscription 'Srimati Sowdamini Dassee Thackoorbati established by Manicklal Dutt' shall be put up on the said premises and the said Thackoorbati together with the land appertaining thereto shall be the absolute property of the said Thackoors Radhakanto Jiu and Gopal Jiu.
7. I direct that after such Thackoorbati is built and the said Thackoors Radhakanto Jiu and Gopal Jiu are removed and located there my Executor and Trustee shall sell at the best value that may be obtained the said premises, No. 31, Hidaram Banerjee Lane and the sale proceeds thereof shall form part of my estate.
8. I direct my Executor and Trustee to pay to the person who shall be entitled to perform my Sradh a sum of Rupees two thousand for meeting the expenses of my funeral, Sradh and Sapindakaran (i.e. first anniversary) ceremonies.
9. I will and direct that my Executor and Trustee shall set apart and hold Rupees one lac and seventy-five thousand to be invested in three and a half per cent. Government Securities which shall be called and known as Radhakanto Jiu and Gopal Jiu Debuttor Fund & the said fund shall be the absolute property of the said Thackoors. My Executor & Trustee shall out of the income of the said Radhakanto Jiu and Gopal Jiu Debuttor Fund pay for the periodical repairs and upkeep of the Thackoorbati and shall pay monthly and every month out of the balance of such income a sum of Rupees two hundred and

fifty to the Shebaits for the time being to meet the expenses to be incurred for the daily sheba, worship and Bhoga of the said Thackoors including the salary of the Pujari, cook, servant and other incidental charges. I further direct that the balance of the income of the said Debutter Fund that may be left after payment of the said monthly sum of Rupees two hundred and fifty and the commission of the Administrator General for collection of the income of the said Debutter Fund and the expenses of the periodical and other repairs and upkeep of the Thackoorbati shall be spent for the performance of periodical festivities and ceremonies of the said Thackoors in the manner following: Rupees one thousand two hundred and fifty for Jhoolan Jatra ceremony. Rupees seven hundred and fifty for Dole Jatra ceremony. Rupees seven hundred and fifty for annual Mahatsab and for all other festivities and ceremonies during each year and the feeding of the poor and Atithis in connection therewith. My Executor and Trustee shall in consultation with the Shebaits for the time being of the said Thackoors frame a scheme for the administration of the said fund in accordance with my direction & for the daily Sheba worship and Bhoga of the said Thackoors and my Executor and Trustee shall be at liberty to provide for a reserve fund up to the limit of Rupees ten thousand out of the surplus income, if any, of the said Debutter Fund for the purpose of meeting expenses for the improvement of the Thackoorbati and other contingent expenses.

10. I will and direct that my niece Srimati Kiranbala Dassee who is a widow shall during the term of her natural life be entitled to live and reside in the Thackoorbati and shall look after and attend to the Sheba of the said Thackoors, she shall be fed and maintained out of the income of the said Debuttor Fund. I further will and direct that none of my Shebaits or other relatives shall have any right to reside permanently or temporarily in the Thackoorbati."

(3) By cls. 11 and 12 the testator made provisions for the appointment of shebaits. Clause 12 contains an important provision relating to the management and carrying on of the sheba of the Deities. He directed that in case of difference of opinion amongst the shebaits with reference to the management and carrying on the seba of the Thakurs and the festivities, the opinion of the majority of the shebaits shall prevail. In case there was no majority amongst the sebaits or the sebaits could not agree as to the management and carrying on of the seba, the shebaits should submit their points of difference to Babu Surendra Lal Pyne, Attorney-at-Law, whom the testator appointed as the supervisor over the sebaits. The will provides that the decision of Babu Surendra Lal Pyne shall be final and binding. Surendra Lal Pyne was the testator's attorney & draftsman of the will.

(4) Paragraphs 13 to 21 relate to gifts in favour of charity; for example, maintenance and upkeep of a free children's ward, distribution of scholarship to students belonging to the Subarnabanik community, opening and erecting a permanent charitable eye infirmary at Serampore and construction and erection of tubewells for drinking water for the public etc. etc.

(5) By para. 22 he gave and bequeathed his undivided half share in the family dwelling house and his half share of and in the shops in the market or bazar at Serampore unto his brother Upendra Nath Dutt to be held and enjoyed by him during the term of his natural life and after his death he gave his said halt share absolutely to the family Deity located at Serampore, Thackoor Sree Sree Laksmmi Janardan Jiu.

(5a) Clause 23 runs as follows:

"My Executor and Trustee shall after obtaining probate of this my will cause necessary advertisements to be made in two English newspapers, one Bengali newspaper and the Calcutta Exchange Gazette once in every week during the period of two months for notifying to the public the various charitable bequests hereby made in order to enable the deserving public to apply for the benefits under this my will."

(6) Dr. Pal appearing on behalf of the assessee, the Administrator General of Bengal, has conceded that the trust created in para. 9 of the will is a religious trust. The question is whether it is a public religious trust. That depends on the intention of the testator as expressed in the will and the construction of para 9 read with other relevant clauses of the will.

(7) The endowment in this case has been made in the form of an English trust as recognised in the case of — 'Vidya Varuthi Thirtha v. Baluswami Ayyar', 48 Ind App 302 (P. C.). It was not a gift direct to the Deity. It was a gift to the deity through the intervention of a trustee. But that does not affect the point we have got to consider.

(8) Religious endowments or debuttor are of two kinds, public and private. In a public endowment the dedication is for the use or benefit of the public. But when property is set apart for the worship of a family God, in which the public are not interested, the endowment is a private one. In this case it has not been said expressly in the will that the Thackurbati would be for the benefit of the public; in other words, it has not been said that the public as a matter of right would have access to the Thakurbati and the right to worship the Deities therein.

(9) Undoubtedly, there is the direction in the will that the poor and the Atithis should be fed in connection with the ceremonies to be observed for the Deities who (it appears from the will) were established by the testator in his house at No. 31, Hidaram Banerjee Lane. But that by itself does not make the trust a public trust. In the referring judgment — 'Manohar Mukherji v. Bhopendranath', 60 Cal 452 (FB), Rankin C. J. observed: "A direction that the shebait shall spend any surplus income on certain charitable objects or pious acts is not uncommon in Hindu debattars."

It appears to us that in this case the direction of the testator to spend money for the feeding of the poor and the Atithis was subordinate to the main religious purpose, namely, the performance of the ceremonies of the Deities. The testator directed that a certain sum should be spent by the sebaits for the daily

seba, worship and bhog of the Thakurs. Then there is the direction for the performance of two ceremonies which are observed in connection with the worship of Lord Krishna whose other names are Radhakanta and Gopal. They are essentially ceremonies performed in connection with the worship of that Deity. The testator said: "Rupees seven hundred and fifty for annual Mahatsab and for all other festivities and ceremonies during each year and the feeding of the poor and Atithis in 'connection therewith;'" that is to say, the poor and the Atithis should be fed as a part of the main religious ceremonies. The management was entirely vested in the shebaits and the public had no say in the matter. If there was a dispute among the shebaits, Mr. Surendra Lal Pyne was to settle it. Neither the general public nor any section of the people, it appears, had any interest either in the maintenance or management of the Thakurbati or the performance of the prescribed religious duties.

(10) This aspect of the matter was considered by a Bench of this Court in the case of — 'Prasad Das Pal v. Jagannath Pal', 37 Cal W N 181. In the deed of endowment in that case there was a provision for spending the income of the debattar property for the purposes of 'deba seba' and feeding of the poor. It was held that the provision relating to the feeding of the poor did not make the endowment a public charitable one. The learned Judges in the case observed as follows:

> "It is argued that this provision about feeding of the poor is part and parcel of the debsheba and cannot be regarded as independent charity in which any class of the public was to have a direct and independent interest. The argument is that the feeding of the poor is really incidental to the Puja. Mr. Pugh who appears for the respondent argues that the trust is principally public, seeing that the feeding of the poor and the feeding of students of educational institutions have been provided for in the deed of endowment. We are unable to accept this contention of the respondent, for it seems to us that the feeding of the poor and the feeding of students if the income of the debutter property increases are really incidental to the main purpose of the endowment, namely, the puja of the Deity."

Their Lordships referred to — 'Sathappayyar v. Periasami', 14 Mad 1.

(11) In this case the will was made on 12-8-1927 and the testator died about six months later. Though the endowment has been in existence all these years, no evidence was produced before the Income-tax authorities to show that the public had as a matter of right any access to the Thakurbati or had anything to do with the management of the Thakurbati or the worship of the deities.

(12) The will has been carefully drawn. The draftsman uses the word "public" in at least two paragraphs, paras. 18 and 23. The draftsman knew the distinction he was making between "public trusts" and "trusts not for the public". We, therefore, are of opinion that the testator himself whose will it was knowing fully well that the trusts created under paras 13 onwards were public trusts did not say in the will with regard to the trust created in para 9 that it was to be a public trust.

(13) The point was canvassed before us as to on whom the onus lay to establish that the trust under consideration is a public trust. But we think the question of onus is of very little importance because we have got to come to a conclusion from the intention of the testator as expressed in the will and we do not find any indication in the will in reference to the trust created by para 9 of the will which enables us to say that the intention of the testator was to dedicate the Thakurbati to the public or, in other words, that it was to be a public religious trust.

(14) We notice, however, the testator's direction for putting a tablet on the Thakurbati bearing this inscription: "Srimati Sowdamini Dassee Thakoorbati established by Manicklal Dutt." Dr. Pal said that in a private temple that was not ordinarily done. I am not very sure of that. In any event that by itself does not show that the intention of the testator was to make the Thakurbati a public temple.

(15) The will was made in the following circumstances. The testator had no issue. He had ancestral Deities at Serampore. He established two Deities at his own house in Calcutta. Having no issue he makes provision for his ancestral Deities by making the bequest in para 23 of the will. He makes also a gift in favour of the Deities which he himself established at 31 Hidaram Banerjee Lane. He appoints sebaits and the major part of his property he gives to public charity saying that if there was any surplus the same should be added to augment the property of the Deities established by him. There is no doubt in our mind that the testator was very anxious for the proper upkeep and maintenance of the two Deities which he himself established and which undoubtedly in his life time he devoutly worshipped. We are unable to find in this will any indication which enables us to say that the trust created in para 9 is a public trust. The grant under consideration does not disclose any intention to confer a benefit either upon the people in general or upon any class of sectarians. We, therefore, hold that the trust in favour of the Deities as created in para 9 is a private religious trust.

(16) Therefore, our answer to the question put to us is in the negative and the debattar property is not wholly exempt from taxation under S. 4(3) (i), Income-tax Act.

(17) The Commissioner of Income-tax is entitled to his costs of this reference.

(18) The Administrator-General will pay his own costs and the costs of the Commissioner out of the estate. Certified for two counsel.

(19) HARRIES, C. J.: I agree.

C/V.B.B. Answer in the negative.

A.I.R. 1953 CALCUTTA 332 (Vol. 40, C. N. 120)

K. C. CHUNDER J.

Santa Bala Dasi, Petitioner v. Sashi Bhusan Das and others, Opposite Party.

Criminal Revn. No. 1002 of 1951, D/- 5-12-1951.

Penal Code (1860), Ss. 354 and 448 — Case under Ss. 354/448 — Testimony of prosecutrix — What she said at or about time of occurrence being part of 'res gestae' can be corroborative evidence of her evidence — Conviction can be

based on such testimony — (Evidence Act (1872), Ss. 6 and 133). **(Para 1)**

Anno: Penal Code, S. 354 N. 1; Evidence Act, S. 6 N. 4; S. 133 N. 7.

S. S. Mukherjee and Kishore Mukherjee, for Petitioner; Basanta Kumar Panda, for Opposite Party.

ORDER: This Rule was obtained by a complainant in a criminal case who alleged an offence under Ss. 354/448, I. P. C. against three persons who are the opposite parties before me. The Magistrate believed her story, the Sessions Judge has acquitted these three persons. The learned Sessions Judge was under the erroneous impression that anything said by the complainant at or about the time of the occurrence, that is, what formed the part of 'res gestae', was not corroborative evidence. This is a very serious mistaken view of the law which has coloured his decision of this case and for which the decision cannot stand. He obviously did not notice that Lort-Williams J. in requiring corroboration in cases of sexual offence was not dealing with cases under S. 354, I. P. C. Moreover, Lort-Williams J. never required that some other eye-witnesses must actually see the whole occurrence going on. Corroborative evidence may be of any kind which will make the evidence given by the prosecutrix to have the ring of probable truth. Moreover, it may be pointed out that the correctness of Lort-Williams J. as regards corroborative evidence being required has been doubted and a contrary opinion has been held by learned Judges of this Court. In any case, a substantial body of evidence was given in corroboration whatever might have been the value of it. The learned Judge did not understand that this was corroborative evidence and he therefore proceeded to say that the conviction could not be based upon the uncorroborative testimony of the prosecutrix.

(2) The second mistake that the learned Judge made was in considering that it was immaterial in this case to decide whether the prosecutrix had actually conceived or not. Briefly, the case for the prosecution was that on 7-12-1950, the accused persons actuated by a moral mission viz. to prevent vice in family or social life, trespassed into the house where the petitioner Santa Bala Dassi lived to examine whether she had conceived. She was a young widow aged about 20 who had lost her husband about three years back and was living with her husband's brother who was a bachelor aged about 22. The prosecution story was that as on 7-12-1950 these accused persons did commit an offence, they promptly ran to the Court and on 8th December filed a petition alleging that the lady had conceived and was intending having miscarriage. The defence version on the other hand was that as they had filed a petition on 8th December, so on 11th December a petition was filed through the complainant alleging the occurrence on the 7th. On behalf of the complainant an explanation was given of the cause of delay. The best test would have been whether the lady had actually conceived or not. She produced a medical witness and it appears that she voluntarily submitted herself to an examination by the Assistant Surgeon. It does not appear that the medical evidence has been properly handled by the learned District Judge who himself has written that in the present case in his opinion it is not very material whether the complainant had conceived or not. If it was found that the complainant had not at all conceived, then there would not in reasonable probability be any ground for bringing a false case as a counter blast. In view of the order that I am going to pass, it is not desirable for me to enter into an elaborate examination of the discussion of the evidence in the learned Judge's judgment. The judgment has not commended itself to me and indeed it appears that he did not properly understand the learned Magistrate's point of view. As I have pointed out that substantial errors in law in handling the case have taken place, the learned Judge's judgment cannot stand. Though I am very reluctant to interfere with acquittals by way of Revision in the present case in the interest of justice the acquittal must be set aside and the appeal remanded to the Sessions Judge for re-hearing. The accused persons may be directed by him to appear again.

The Rule is accordingly made absolute, the order of acquittal is set aside and the appeal remanded for re-hearing.

C/R.G.D. Rule made absolute.

A.I.R. 1953 CALCUTTA 333 (Vol. 40, C. N. 121)

BOSE J.

Mangru Meya and others, Petitioners v. Commissioners of the Budge Budge Municipality and others, Opposite Party.

Civil Rule No. 159 of 1951, D/- 16-3-1951.

(a) Municipalities — Bengal Municipal Act (15 of 1932), S. 370 (2) — Refusal of licence on grounds not specified in section — Order of refusal is invalid in spite of Art. 48 — (Constitution of India, Art. 48).

Further that the municipality could not travel beyond the statute and take shelter under Art. 48 of the Constitution for the purpose of justifying the resolution or the notice. (Paras 5, 6, 8)

(b) Constitution of India, Art. 226 — Existence of alternative remedy is not an absolute bar to exercise of jurisdiction under Art. 226 — But it is a matter to be considered on the facts and circumstances of each case whether such remedy will be an adequate remedy. **(Para 11)**

(c) Municipalities — Bengal Municipal Act (15 of 1932), S. 531 — Order to be appealed against if not an order under the Act, question of preferring appeal does not arise. AIR 1951 All 257 (FB) and AIR 1951 Him P 36. Rel. on. **(Para 12)**

G. P. Kar and Nirmal Chandra Choudhury, for Petitioners; Purnendu Sekhar Basu, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('50) AIR 1950 SC 163: (1950 SCJ 124) 11

('51) AIR 1951 All 257: (ILR (1951) 1 All 269 FB) 12

('51) AIR 1951 Him Pra 36 12

ORDER: This is an application under Art. 226 of the Constitution for a writ in the nature of mandamus directing the respondents to cancel or withdraw the notice dated 27-2-1950 served on the petitioners and also for an order for cancellation of the resolution dated 24-2-1950 passed by the respondents and for direction calling upon the respondents to forbear from giving effect to the said resolution and/or the said notice.

(2) The petitioners are the owners of two beef shops in Ward No. 4 Charial, Budge Budge, in

the District of 24-Parganas. The petitioner 3 is the nephew of the petitioners 1 and 2 and one of the said beef shops is stated to have come into existence 100 years ago. The area in which the shops are situated is an industrial area and it is stated that it is inhabited predominantly by Mahomedans. It is alleged that beef is one of the staple food of Mahomedans particularly the poorer section of that community and due to the persistent demands of the local people two other shops besides the two shops belonging to the petitioners came into existence about thirty years ago and have been in the locality ever since. The petitioners have been at all material times holders of licences from the respondent Municipality granted under S. 370(1) of the Act for carrying on the said business of sale of beef and meat in the locality and at no point of time they contravened any of the terms or conditions of the licence in any way as to be a cause of annoyance or offence or danger to persons residing in or frequenting the immediate neighbourhood. In the middle of February 1950 one Pandit Ram Chandra Awasthi, an orthodox Up-country Brahmin was appointed Chairman of the said Municipality. At a meeting of the Commissioners of the Municipality held on 24-2-1950 a resolution was purported to be passed in the following terms:

"In view of the fact that due to indiscriminate slaughter depletion of cattle wealth — the backbone of this country has become the order of the day and inasmuch as acute shortage of draught animals and paucity in milk supply has brought in their wake, woes and miseries in abundance and because providing an adequate diet full of milk is one of the main factors in building up of a strong nation of healthy and happy inhabitants, resolved that with a view to increasing the yield of milk and cattle wealth and their progeny for the general economic uplift of the masses specially the agricultural produces of the country, the Municipal Slaughter House for slaughtering cow, bull, bullock, or buffaloes, be closed down with effect from 1-3-1950 and further resolved that no licence under Ss. 408 and 418 be issued for slaughtering or for sale of beef or flesh of such animals within the municipal area, excepting on bona fide religious festivals and on ceremonial occasions.

"It is also resolved that the services of the watchman of Municipal Slaughter House be dispensed with from 1-3-1950 on payment of one month's salary in lieu of notice".

(3) On 27-2-1950 the petitioners were served with a notice under the signature of Mr. Awasthi, the Chairman of the Municipality to the following effect:

"To
Shaikh Mongru Mia and others,
Beef Stall Holder, Trunk Road, Charial,
Dated, Budge Budge, 27-2-1950.

Dear Sir,

With a view to increase the supply of milk and cattle wealth and their progeny, the Commissioners of the Budge Budge Municipality in their special meeting held on 24-2-1950 have decided to close down the Municipal Slaughter House and no licence for slaughtering or for sale of beef or flesh of buffaloes etc. will be issued henceforth. This will come into effect from 1-3-1950 which please note.

Yours faithfully,
Sd. Illegible
Chairman, Budge Budge Municipality."

(4) It is stated that the said resolution and the notice are ultra vires, illegal and mala fide, and constitute violation of the fundamental rights of the petitioners guaranteed under Art. 19(1)(g), Constitution of India. It appears that after the service of the notice on the petitioners the latter made various representations to the various authorities, viz., the Additional District Magistrate, Alipore, 24 Parganas. The President of the District Minority Board, 24-Parganas, the Chairman of the Members of the Minority Commission, West Bengal and to other persons and also made representations to the respondents but neither the respondents nor the other authorities aforesaid had paid any heed to such representations and they have denied justice to the petitioners. The petitioners made various applications for renewal of the licences and the last of such applications was made on 22-2-1950. The respondents, however, had not entertained the said applications.

(5) Mr. G. P. Kar, the learned counsel for the petitioners has referred me to S. 370(2), Bengal Municipal Act (15 of 1932) and has contended that the only grounds on which the grant or renewal of a licence can be withheld by the Municipality are those mentioned in that Section. The Municipality is a creature of statute and their powers and duties are confined within the four corners of the statute. The Municipality has no power to refuse or withhold a licence except for reasons expressly specified in the Section. Section 370(2) is as follows:

"A licence for any of the purposes mentioned in sub-s. (1) shall not be withheld unless the Commissioners at a meeting have reason to believe that the business which it is intended to establish or maintain would be a cause of annoyance, offence or danger to persons residing in or frequenting in the immediate neighbourhood or that the area should be for general reasons kept clear of the establishment of such business."

(6) It is clear from the wordings of the resolution and the wordings of the notice dated 27-2-50 that the reasons for closing down the Slaughter House and for not renewing or issuing the licence are not those specified in the Section. The Municipality has taken into consideration extraneous matters in passing the resolution and in issuing the notice complained of and has thus exceeded its jurisdiction or powers conferred by the statute. Neither the resolution nor the notice is warranted by the terms of the statute. Under S. 370(2) it is incumbent upon the Commissioners to grant the licence unless the grounds on which the licence may be withheld and which are specified in the Section, exist in any particular case.

(7) The learned advocate appearing for the respondents relies on Art. 48 of the Constitution which is as follows:

"The State shall endeavour to organise Agriculture and Animal Husbandry on modern and scientific lines and shall in particular take steps for preserving and improving the products and prohibiting the slaughter of cows and calves and other milch and draught cattle."

(8) He points out that the word "State" in this Article includes the local Authority such as the respondent Municipality and reference is made for this purpose to Arts. 36 and 12 of the Constitution. It is argued on behalf of the respondents relying on these Articles that the resolution passed by the Municipality was a valid one and was within the competence of the commissioners to pass it. It may be noted that Art. 48 is one of the directive principles of State policy. These are only fundamental principles for the governance of the country and they are not enforceable by any Court but such principles are to be applied in making laws of the State (Art. 37). There has been

no law enacted for general closing down of the slaughter houses or forbidding the carrying on of the business of sale of beef in the State or in the Indian Union. The Bengal Municipal Act is an existing law which has continued in force even after the commencement of the Constitution. The Commissioners of the respondent Municipality must act within the four corners of this statute and they cannot travel beyond the statute and take shelter under Art. 48 for the purpose of justifying the resolution or the notice complained of in this application.

(9) In my view the petitoners have made out a case for interference by this Court in respect of the acts complained of.

(10) It is contended by the learned advocate for the respondent Municipality that the petitioners had an alternative remedy by way of an appeal to the Provincial Government under S. 531 of the Act and in the circumstances the petitioners cannot be allowed to have recourse to this extraordinary remedy under Art. 226. It is argued that if the petitioners had appealed under S. 531 the Provincial Government could have granted the petitioners complete and adequate relief by virtue of the controlling powers vested in the Government under Ss. 548 and 549 of the Act read with the said S. 531.

(11) It is well settled that the existence of an alternative remedy does not operate as an absolute bar to the grant of prerogative writs, under the extraordinary jurisdiction of the Court. It is true that the Court will as a general rule and in the exercise of its discretion refuse a writ of mandamus when there is alternative specific remedy at law which is not less convenient, beneficial and effective. It has no doubt been held that if a right of an appeal is provided by any statute, that may exclude the remedy by writ of mandamus; but it is a matter to be considered on the facts and circumstances of each case whether such remedy by way of appeal will be an adequate remedy for the redress of the petitioners' grievance: —'Rashid Ahmed v. Municipal Board Kairana', AIR 1950 S. C. 163 at p. 165.

(12) In order that the petitioners can avail of S. 531 of the Act there must be a definite order refusing a licence required under the Act. The resolution of 24th February and the notice dated 27th February served on the petitioners cannot be considered as a definite order refusing a licence within the meaning of S. 531 of the Act. These are in the nature of general determinations and not an order or decision in respect of any particular application for grant or renewal of licences. In fact no order has been passed in respect of the applications made for renewal by the petitioners. Moreover the resolution and the notice embody decisions which are outside the ambit of the Act. As pointed out in —'Motilal v. Govt. of State of Uttar Pradesh', AIR 1951 All 257 (F.B.) Paras 33, 160 and 161 and —'Bhagat Transport Service Ltd. v. State of Himachal Pradesh', AIR 1951 Him-Pra 36 at p. 40 Para 10, unless the order to be appealed against is an order made under the Act no question of preferring an appeal does or can arise. In my view the petitioners are not precluded by reason of the remedy of appeal contained in S. 531 of the Act from applying to this Court for directions under Art. 226 of the Constitution.

(13) It was contended by the learned counsel for the petitioners that the resolution and the notice are mala fide. I do not think that the petitioners have on the facts of this case sufficiently made out a case of mala fide. The conflicting affidavits which have been filed in these proceedings do not justify me in coming to the conclusion that the conduct of the respondent Municipality in passing the resolution or issuing the notice complained of is tainted with want of good faith.

(14) In the result the petition succeeds and the rule is made absolute. The resolution dated 24-2-1950 and the notice dated 27-2-1950 are cancelled and the respondents are directed to forbear from giving effect to the resolution and/or the said notice, and they are further directed to determine the applications of the petitioners for renewal of license according to law. There will be no orders as to costs.

B D.R.R. Rule made absolute.

A.I.R. 1953 CALCUTTA 335 (Vol. 40, C. N. 122)

LAHIRI AND P. N. MOOKERJEE JJ.

Tarakdas Dutta, Plaintiff-Petitioner v. Sarat Chandra, Defendant-Opposite Party.

Civil Rule No. 952 of 1950, D/- 15-5-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18(1) — Consent decree.

A consent decree comes within the purview of S. 18(1) provided it can be ascertained from the decree or from the proceedings in the suit that the decree was made on the ground of default in payment of arrears of rent. 53 Cal WN 859 and 53 Cal WN 905, Rel. on; AIR 1949 Cal 151, Expl. (Para 3)

Phanindra Kumar Sanyal, for Petitioner; Sitaram Banerjee and Prasun Chandra Ghose, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('48) 52 Cal WN 230: (AIR 1949 Cal 151) 3
('49) 53 Cal WN 859 3
('49) 53 Cal WN 905 3

ORDER: This Rule was obtained by the plaintiff in a proceeding for recovery of possession under S. 41, Presidency Small Cause Courts Act against the order of the Registrar of the Small Cause Court by which he set aside a consent decree obtained by the plaintiff under S. 18(1), West Bengal Premises Rent Control (Temporary Provisions) Act of 1950.

(2) The facts which are material for the purposes of this Rule are undisputed and may be stated as follows: The plaintiff started the present proceeding against the opposite party for recovery of possession of a portion of premises No. 59, Ahireetola of which the opposite party was a tenant at a monthly rent of Rs. 23/-. On 23-5-1949, the said proceeding terminated in a compromise decree made by the Registrar under which the opposite party undertook to vacate the premises. The date of delivery of possession was extended by consent to 24-4-1950. On 31-3-1950, the West Bengal Premises Rent Control Act of 1950 came into operation and on 18-4-1950, the opposite party filed an application for vacating the consent decree under S. 18(1) of the said Act, and the application was allowed by the Registrar by an order dated 10-6-1950. Against this order the petitioner obtained the present Rule.

(3) Mr. Sanyal appearing in support of the Rule has argued that S. 18(1), West Bengal Premises Rent Control Act of 1950 does not apply to a consent decree which on the face of it does not show that it was obtained on the ground of default in payment of arrears of rent

and in support of this contention he has relied upon the decision of this Court in the case of — 'Manik Chandra Pal v. Haripada Roy', 52 Cal WN 230. This was a decision under para. 9B(3), Calcutta House Rent Control Order of 1943 the language of which is somewhat similar to the language of S. 18(1), West Bengal Premises Rent Control Act of 1950. In that case it was held that if the consent decree for ejectment on the face of it showed that the decree was consented to on the ground that the tenant was not entitled to the protection of the House Rent Control Order on account of default in payment of rent, the consent decree was liable to be set aside under para 9B (3), Calcutta House Rent Control Order, but if there was nothing in the pleadings or in the decree to show that the decree was made on any such ground the consent decree was not liable to be set aside. At p. 235 of the Report Mookerjee J. who delivered the judgment of the Court made the following observations:

"It is not however necessary for purposes of the present case to decide as to whether or not para. 9B(3) excludes consent decrees altogether. We will assume for our present purpose that a consent decree does come within the purview of this paragraph."

Then his Lordship examines the terms of the compromise and also the proceedings in the suit and comes to the conclusion that there was nothing either in the petition of compromise or in the proceedings to show that the decree was made on the ground of default in payment of arrears of rent and on that finding came to the conclusion that the case did not satisfy the requirements of para. 9B(3) of the Calcutta House Rent Control Order. In the plaint which was filed in the case before us there is a distinct allegation that there was an 'ipso facto' determination of the tenancy as the tenant was in arrears from the 1st Baisakh. The consent decree which was passed on such a plaint may, in our opinion, be held to have been made on the ground of default in payment of arrears of rent. In the case of — 'Md. Ekramal Haque v. Rebati Bhusan', 53 Cal WN 859 Biswas and G. N. Das JJ. held that if the consent decree or the proceeding in the suit showed that the real ground on which the landlord sought eviction was non-payment of rent by the tenant, the consent decree was liable to be set aside under para. 9B(3), Calcutta House Rent Control Order. Mr. Sanyal has argued that there is a direct conflict between the decisions in the case of — 'Manik Chandra Pal v. Haripada Roy', 52 Cal WN 230 and the case of — 'Md. Ekramal Haque v. Rebati Bhusan', 53 Cal WN 859.

After considering the two decisions carefully, however, we have come to the conclusion that there is no real conflict between them. In the earlier case of — 'Manik Chandra Pal v. Haripada Roy', 52 Cal WN 230, Mookerjee J. expressly left the point open and proceeded on the view that even assuming that para. 9B(3), Calcutta House Rent Control Order applied to consent decrees the facts of that case did not fulfil the requirements of that paragraph because there was nothing on the face of the consent decree or in the proceedings to show that the decree was made on the ground of default in payment of arrears of rent. The decision in — 'Md. Ekramul Huq's case', is a direct authority in support of the view that a consent decree comes within the purview of para. 9B(3), Calcutta House Rent Control Order provided it can be ascertained from the decree or from the proceedings in the suit that the decree was made on the ground of default in payment of arrears of rent. In the case of — 'Haripada Sen v. Santosh Kumar', 53 Cal WN 905, G. N. Das J. sitting singly, held that a consent decree does come within the purview of S. 18, West Bengal Premises Rent Control Act of 1948. Although the decisions in the cases of — 'Manik Chandra Pal' and 'Haji Md. Ekramul Huq', were given under para. 9B(3), Calcutta House Rent Control Order, the principle of those decisions applies to a case which comes under S. 18(1), West Bengal Premises Rent Control Act of 1950.

(4) For the reasons given above we are of the opinion that the contention raised by Mr. Sanyal must be overruled and this Rule must accordingly be discharged; but in the circumstances we make no order as to costs.

B/V.B.B. Rule discharged.

A.I.R. 1953 CALCUTTA 336 (Vol. 40, C. N. 123)

HARRIES C. J. AND G. N. DAS J.

P. C. Chunder and Co., Ltd., Appellant v. Ram Asis Ram Nonia, Respondent.

A. F. O. O. No. 51 of 1951, D/- 19-12-1951.

(a) Workmen's Compensation Act (1923), S. 30 — Question whether workman was working overtime is one of fact — No appeal lies. (Para 3)

Anno: W. C. Act, S. 30 N. 3.

(b) Evidence Act (1872), S. 114 — Employer denying that certain workmen were working overtime — Book alleged to show overtime work not produced by employer — Commissioner entitled to presume that if produced the book would not have assisted employer's case. (Para 3)

Anno: Evi. Act, S. 114 N. 10.

Sasanka Bhusan Ghose, for Appellant; Nalini Kanta Mukherjee, for Respondent.

HARRIES C. J.: This is an appeal from a decision of the Commissioner for Workmen's Compensation granting the dependents of the deceased a sum of Rs. 1500/- as compensation with certain costs.

(2) The case for the respondent was that the deceased workman was in the employment of the appellants as an electric mistry and that whilst he was following his employment on 1-10-1948, he was electrocuted and died as a result thereof. The respondent was the father of the deceased workman and a dependent.

(3) The only point in the case was whether the accident arose out of and in the course of the employment. There can be no doubt I think that the man was electrocuted and killed whilst in the factory. But it is suggested that he was there for his own purposes and not for the purposes of his employers. The case for the applicant was that the deceased workman with others was working overtime and that he was carrying an electric light the plug of which had been fitted into a socket in the manager's room. Apparently there was some defect in the flex and the man was electrocuted. If that version be true, there can be no question whatsoever that the accident arose out of and in the course of the employment. The defence was that these men were not working overtime and witnesses were called to establish that fact. It was however admitted that a book was

kept showing the overtime and that book was not produced. That book was a vital piece of evidence and the learned Commissioner was entitled to presume that as it had not been produced, if it had been produced it would not have assisted the appellants' case. Whether or not these men were working overtime is a pure question of fact. It is true that there was only one witness for the respondent and a number of witnesses for the appellants, but the learned Commissioner who saw and heard the witnesses was entitled, if he thought right, to accept the evidence for the respondent. The question was a pure question of fact and from such a finding there is no appeal, if the findings are based on evidence and further there was no misdirection in law on the part of the Commissioner in approaching the evidence.

(4) Learned Advocate for the appellants has contended that the witness for the respondent was a workman who had been discharged and therefore that workman should not have been believed. How that is a matter of law is entirely beyond my understanding. It is a circumstance which the commissioner was bound to take into account in arriving at a finding of fact, but nothing more. Having regard to the fact that the one piece of evidence that mattered was not produced I am not surprised that the Commissioner came to the conclusion which he did.

(5) Learned Advocate now suggests that an adjournment should have been given for production of this register. But it must have been obvious to anybody connected with this case that that register was the all important piece of evidence and much might happen to it if an adjournment was given for it to be produced.

(6) There is no question of law whatsoever involved in this case, and upon the findings of fact which are supported by evidence it is clear that this deceased man met his death through accident arising out of and in the course of the employment and that being so he was entitled to compensation. There is no dispute as to the amount and therefore the appeal fails and is dismissed with costs, the hearing fee being assessed at three gold mohurs.

(7) The injunction restraining payment out of the compensation is dissolved.

(8) G. N. DAS J.: I agree.

C/D.R.R. Appeal dismissed.

A.I.R. 1953 CALCUTTA 337 (Vol. 40, C. N. 124)

R. P. MOOKERJEE AND GUHA JJ.

Garibulla Mondal and others, Applicants-Petitioners v. Esmail Mondal and others, Opposite Party.

Civil Rule No. 906 of 1950, D/- 21-2-1950.

(a) Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), S. 44(a) — Limitations of review.

If there be a specific provision in a special statute authorising the tribunal in question to review its decision, that provision has to be interpreted to find out what the limitations of that tribunal are in the exercise of its jurisdiction in entertaining an application for review. (Paras 9, 11)

(b) Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), S. 44(a) — Application when to be made.

It cannot be said that the stage at which an application for review can be entertained is only before the order in question has been given effect to. The jurisdiction which is vested in the Board under cl. (a) of S. 44 is a discretionary one, and that discretion has to be exercised on a consideration of all the relevant materials and circumstances. The fact that the award has been implemented is, however, not sufficient by itself to justify throwing out the application for review without a consideration of the merits. (Paras 12, 13)

(c) Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), S. 13(3) First Proviso — Applicability to final order passed by Board.

The application referred to in the proviso can be made only up to the point of time which is anterior to the disposal of the proceedings by the Debt Settlement Board and there could be no objection to the provisions contained in cl. (a) of S. 44 being attracted to a case where the proceedings have already been disposed of by the Board. There can be no valid objection to a person making an application for review under cl. (a) of S. 44 for reviewing a final order which had been passed by the Board without service of relevant notices. (Para 15)

Panchanan Pal and Murari Mohan Mitra, for Petitioners; Sudhir Kumar Acharjya, for Opposite Party.

R. P. MOOKERJEE, J.: This is an application in revision on behalf of the debtors, and is directed against an order passed by the Additional District Judge of 24-Parganas under S. 40A, Bengal Agricultural Debtors Act.

(2) The relevant facts necessary for determining the matter in dispute may be shortly stated. In 1921 a conveyance was executed by the predecessor-in-interest of the debtors petitioners in favour of the predecessor-in-interest of the opposite parties in respect of a certain share in different plots of land. An agreement for reconveyance was also executed immediately thereafter by the purchaser in favour of the predecessor of the debtor. The dispute between the parties is as to whether these transactions were in essence a loan governed by the provisions of the Bengal Agricultural Debtors Act or not.

(3) On 2-10-1942, the predecessor-in-interest of the debtors petitioners applied before the Special Debt Settlement Board at Basirhat under S. 8, Bengal Agricultural Debtors Act for the settlement of his debts treating the transaction referred to above as a loan. Some of the heirs of Farsed Mondal, the predecessor-in-interest of the opposite parties, were impleaded as creditors. An ex parte order was passed and an award was issued by the Debt Settlement Board. It was held that the transaction in question was a loan, and as the opposite parties had been in possession of the lands in dispute for over fifteen years, the debt had been satisfied. The opposite parties were accordingly directed to restore possession of the properties in question. The award was actually drawn up on 8-2-1946.

(4) The further case of the debtor petitioners is that after the award had been signed, the certificate officer was moved for giving effect to the same and possession was delivered in fa-

vour of the present petitioners by the Certificate Officer in November 1946. Subsequently, the opposite parties moved the Collector under R. 91B of the Rules framed under the Bengal Agricultural Debtors Act for granting permission to move the Debt Settlement Board for reviewing the decision made in 1946. On the requisite sanction being given by the Collector, an application for review was filed by the opposite parties before the Debt Settlement Board. The Special Officer, Debt Settlement Board, dismissed the application. An appeal was preferred before the Appellate Officer who also affirmed the decision of the Board. The Additional District Judge, 24-Parganas, before whom the revision case under S. 40A, Bengal Agricultural Debtors Act was preferred held that the opposite parties were entitled to agitate the points raised in their application for review and accordingly, the order of the Appellate Officer was set aside and the case sent back for rehearing. It is against this order that the present Rule has been obtained by the debtors.

(5) On behalf of the petitioners, it is urged that as after the award had been drawn up possession had already been delivered, an application for review of the order leading to the award is not maintainable in law.

(6) Section 44, Bengal Agricultural Debtors Act provides:

"Subject to any rules made under this Act—

(a) a Board may, on an application made by any person interested or of its own motion, review any decision or order passed by it and pass such order in reference thereto as it thinks fit,.....

The relevant rules framed under this provision are Rr. 91A to 91D. Rule 91A provides that if an appeal has been preferred against the order in question, no application for review of the same order would be entertained. Rule 91B lays down that an application for review of an order under cl. (a) of S. 44 of the Act shall ordinarily be made within sixty days of the date of the decision or order,

"Provided that no action shall be taken by a Board on an application for review made after the said period of sixty days and no Board shall review its decision or order after the said period save with the sanction of the Collector."

The procedure to be followed by the Collector when such an application for sanction is made is to be found in R. 91C:

"In deciding whether sanction should be given under R. 91B, or not, the Collector shall consider—

(a) whether any material illegality or irregularity has occurred;

(b) whether substantial injustice, hardship or difficulty has been occasioned; and

(c) whether the applicant had good and sufficient reasons for not making the application within sixty days of the date of the decision or order of the Board as required under R. 91B."

(7) The question, whether a person is to be given an opportunity to make an application for review after the lapse of sixty days or not, falls to be decided under R. 91C by the Collector. In the present case we have not before us the order by the Collector permitting the applicants to move the application for review. We must proceed on the basis that the Collector had considered all the particulars which he was required to do under R. 91C.

(8) On behalf of the petitioners it is contended that although cl. (a) of S. 44, Bengal Agricultural Debtors Act does not lay down any limitation or impose any restriction on the exercise of the powers by the Board when an application for review is made, such provision is to be read as being governed by what the learned Advocate says, "the ordinary and usual rules for reviewing a decision by a tribunal".

(9) It is well settled that unless review is provided by any statute, a tribunal cannot review its own judgment except in very exceptional circumstances. If, on the other hand, there be a specific provision in a special statute authorising the tribunal in question to review its decision, that provision has to be interpreted to find out what the limitations of that tribunal are in the exercise of its jurisdiction in entertaining an application for review.

(10) A strenuous attempt was made on behalf of the petitioners to attract the provisions contained in Order 47, R. 1, Civil P. C. & to try to import restrictions which are contained in that rule in the Code for the purpose of interpreting the powers of the Board under cl. (a) of S. 44, Bengal Agricultural Debtors Act.

(11) In the first place, it is quite apparent that the powers which have been given in the Civil Procedure Code for reviewing a decision by a Court are very restricted, and as has been repeatedly explained both by this Court as also by the Judicial Committee, the rules as contained in Order 47, R. 1 are to be strictly interpreted; it is not competent for the Court to override those provisions if the application be one under the Civil Procedure Code. It is not, however, permissible to introduce any extraneous rules or limitations which may have been imposed in other statutes for limiting the powers of the Debt Settlement Board as given under cl. (a) of S. 44, Bengal Agricultural Debtors Act. There being no limitations imposed either in the Special Statute or the Rules framed thereunder, it is open to the Board to consider on the merits the application which may be filed for review.

(12) It is further urged that the stage at which an application for review can be entertained is only before the order in question has been given effect to. But we do not find any such limitation imposed in the provisions contained either in cl. (a) of S. 44, Bengal Agricultural Debtors Act, or in the Rules framed under that Act.

(13) We should, however, make it clear that it is not our intention to express any opinion as to what should be decision of the Board so far as the application for review is concerned. It will not only be open to the Board, but it will be necessary to consider when entertaining the application of this nature to consider whether the application should be granted or not; particularly in view of the lapse of time which has taken place or for other relevant circumstances. Reference may in this connection be made to the very wide powers which are given to a Court under Ss. 152 and 153, Civil P. C. for amending judgments or decrees or orders passed by the Court. There had been occasions when in spite of the fact that an error was detected, the Court refused to exercise the power given under the said sections because the interest of third parties had come into the picture, or for such other sufficient reasons.

The jurisdiction which is vested in the Board under cl. (a) of S. 44, Bengal Agricultural Debtors Act is a discretionary one, and that discretion has to be exercised on a consideration of all the relevant materials and circumstances. The fact that the award has been implemented is, however, not sufficient by itself to justify throwing out the application for review without a consideration of the merits.

(14) A further ground was urged on behalf of the petitioners that the only reason given by the creditors in support of their application for review was that the notice had not been served on them before the award had been made. It is contended that under the first proviso to sub-s. (2) of S. 13, Bengal Agricultural Debtors Act, a specific provision is made for giving an opportunity to a party to move the Board if notices had not been served. When there is a specific provision in the proviso to sub-s. (3) of S. 13, cl. (a) of S. 44, Bengal Agricultural Debtors Act would not be attracted. In other words, an application, if it were to be moved, would come under the proviso to sub-s. (3) of S. 13, and no application would lie for review of the order under cl. (a) of S. 44 of the Act.

(15) The first proviso to sub-s. (3) of S. 13, Bengal Agricultural Debtors Act lays down that when an order under sub-s. (2) or sub-s. (3) has been made, the same

"may be varied or reversed by the Board on an application for review or by the Appellate Officer on appeal if it is proved to the satisfaction of the Board or of the Appellate Officer that the creditor or debtor.....had no knowledge of the notice under sub-s. (1) or that he has complied with it or that he had sufficient reason for non-compliance."

In the first place, the word used in this proviso to sub-s. (3) of S. 13 is a "review" of the order complained of. If it be taken that the proviso is referring to proceedings for review as contained in cl. (a) of S. 44, then there is no substance in the argument advanced on behalf of the petitioners. On the other hand, if the proviso be taken, and the language used in this proviso is capable of that interpretation, that the application referred to in this proviso can be made only up to the point of time which is anterior to the disposal of the proceedings by the Debt Settlement Board, then in that case there could be no objection to the provisions contained in cl. (a) of S. 44, Bengal Agricultural Debtors Act being attracted to a case where the proceedings have already been disposed of by the Board. In either view, therefore, there can be no valid objection to a person making an application for review under cl. (a) of S. 44, Bengal Agricultural Debtors Act for reviewing a final order which had been passed by the Board without service of relevant notices.

(16) The grounds urged fail, and this Rule is accordingly discharged. We have indicated already that we do not express any opinion as to the merits of the application and also to what extent the circumstances relied upon by the petitioners in this Court would affect the merits of the case when the application is considered by the relevant authority concerned.

(17) In the circumstances of this case, there will be no orders for costs in this Court.

(18) GUHA, J.: I agree.

C/D.H. Rule discharged.

A.I.R. 1953 CALCUTTA 339 (Vol. 40, C. N. 125)

HARRIES C. J. AND S. R. DAS GUPTA J.

Sudhindra Nath, Accused-Appellant v. The State.

Criminal Appeal No. 184 of 1951, D/- 26-3-1952.

(a) Evidence Act (1872), S. 33 — Previous deposition must be in judicial proceeding — Proceedings without jurisdiction are not judicial proceedings — Deposition taken in such proceeding is not by person authorised. 3 Mad 48; AIR 1926 Lah 582; AIR 1931 Mad 575 and 38 Cal 639, Rel. on. (Paras 10, 14)

Anno: Evid. Act, S. 33 N. 2 and 3.

(b) Evidence Act (1872), S. 167 — Sufficient evidence on record, after eliminating inadmissible evidence, to determine guilt of accused — Still case sent back to trial Court for decision for ends of justice, since the trying Magistrate had advantage of seeing demeanour of witnesses. (Para 18)

Anno: Evid. Act, S. 167 N. 1.

Nalin Chandra Banerjee with Prasun Chandra Ghosh, for Appellant; J. M. Banerjee, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('11) 38 Cal 639: (12 Ind Cas 464) 13
('26) 7 Lah 396: (AIR 1926 Lah 582: 27 Cri LJ 1168) 12
('81) 3 Mad 48: (2 Weir 756) 12
('31) 54 Mad 561: (AIR 1931 Mad 575) 13

S. R. DAS GUPTA, J.: This is an appeal from an order of a learned Presidency Magistrate, Calcutta, convicting the appellant under S. 420, Penal Code and sentencing him to undergo rigorous imprisonment for two years and also to pay a fine of Rs. 1000/-, in default to suffer rigorous imprisonment for six months more.

(2) The prosecution case is that on 30-7-1947 Phanindra Nath Mukherjee, a retired Deputy Magistrate, lodged a written complaint charging the accused with cheating him in respect of a total sum of Rs. 49,000/-. The cheating as alleged took place in the following manner. The accused represented to the said Phanindra Nath Mukherjee and his partner in the firm of Indo Trading Corporation that he had already purchased a certain quantity of joists, angles and tees of the value of Rs. 85,000/- and that he had already obtained a delivery order in respect of the same. The said goods were alleged to have been purchased from M. E. S. and the delivery order issued by the Director General of Disposals in respect of 75 tons of tees, 75 tons of angles and 200 tons of joists. He represented to the said Phanindra Nath Mukherjee that he had already paid the price and in order to do that he had to borrow a sum of Rs. 47,000/- and that sum had to be paid off immediately. He requested the said Phanindra Nath Mukherjee to pay a sum of Rs. 49,000/- including Rs. 2000/- which he required as miscellaneous expenses and take delivery of the goods and from the sale proceeds give him the balance and some profits.

(3) The complainant agreed to that proposal subject to the goods being inspected and found saleable. On the next day, that is on 20-6-1947, the appellant took one Harey Krishna, the other partner of the complainant, and one Satyen Chatterjee, P. W. 3, to the Garrison Engineer's Depot at Barrackpore for inspection of the goods. The appellant managed to show to those persons some goods which were stocked with the said M. E. S. and they found the quality of the goods to be in order. Thereafter, the matter was reported to

the complainant and the complainant thereupon gave two cheques, one for Rs. 20,000/- and another for Rs. 27,000/- and also a bearer cheque for Rs. 2000/-. The alleged delivery order was endorsed over to the complainant by the appellant and it was arranged that the delivery would be taken on 25-6-1947 and the complainant would send one of his men to the place wherefrom delivery was to be taken, where the appellant would be present. Although the complainant's man went there to take delivery but the appellant could not be found. Thereafter the other partner of the complainant, namely, Hare Krishna, contacted the appellant on 2-7-1947. As the date for taking delivery was expiring on 3rd July, the appellant represented to the said Hare Krishna that he would get the delivery order extended by seven days and took the delivery order on that representation; thereafter the said Hare Krishna tried to contact the appellant several times but failed. On 10-7-1947 the appellant came to complainant's house and told that he was arranging delivery very soon. The complainant became suspicious and started enquiring about the matter and on enquiry it was found from the Disposals Office that no delivery order in question was at all issued & that the said delivery order was a faked one. The complainant then lodged the complaint upon which the appellant was charged under S. 420, Penal Code.

(4) After the complainant presented his complaint, the then Additional Chief Presidency Magistrate examined the complainant under S. 200, Criminal P. C. and sent the case to the Deputy Commissioner, Detective Department, for enquiry. Thereafter the charge sheet challan was received on 24-7-1948 against the appellant and another person under S. 420, Penal Code and the case was ultimately transferred to the file of a Presidency Magistrate, Mr. K. C. Ghosal for disposal. After hearing the appellant was convicted.

(5) Against the said conviction the appellant preferred an appeal to this Court. On appeal the conviction and sentences were set aside by the High Court on 8-7-1949 and a retrial was ordered on the ground that the entire proceedings from after the submission of the charge sheet onwards were without jurisdiction, inasmuch as the Additional Chief Presidency Magistrate having acted under S. 200, Criminal P. C., the case could not be proceeded with upon a charge by the police.

(6) When the case came back on remand the Chief Presidency Magistrate transferred the case to the file of another Presidency Magistrate, one Mr. Mukherjee, for disposal. Mr. Mukherjee issued process on the accused and the accused was tried and convicted. The appellant again appealed against the said conviction. The said conviction was again set aside on 4-4-1950 by this Court and a retrial was ordered. The said conviction was set aside on the ground that the Additional Chief Presidency Magistrate having taken cognizance of the case and having directed an enquiry under S. 202, Criminal P. C. it was for him to decide whether process should be issued or not and he could not transfer that task to anybody else. In other words, it was held that the action of the said learned Magistrate, Mr. Mukherjee in issuing process on the accused was without jurisdiction and the subsequent trial was also without jurisdiction.

(7) When the case came back on remand for the second time the Additional Chief Presidency Magistrate issued process on the accused under S. 420, Penal Code. The accused appeared on 14-6-1950 on which date the case was transferred to the file of a Presidency Magistrate, Mr. K. C. Sen, who tried this case. He examined eight witnesses, framed charges against the accused under S. 420, Penal Code and fixed 1-11-1950 and the subsequent two dates for cross-examination of the witnesses. On 1-11-1950 it transpired that the complainant had died that very morning. The case had to be adjourned. Thereafter, an application was made on behalf of the accused appellant for quashing the proceedings, but that application was rejected by this Court. The case then proceeded to trial. The learned Presidency Magistrate found the accused guilty under S. 420 Penal Code and convicted him under the said section and sentenced him as mentioned.

(8) The complainant having died on 1-11-1950 he found that the evidence in chief of the complainant could not be tested by cross-examination by reason of his death and therefore no use could be made of the said evidence before him. But he admitted the evidence of the complainant, which had been given in the two previous proceedings and he purported to do so under S. 33 Evidence Act. He held that the parties were identical, the subject matter of the charge was identical and the accused in those proceedings had the right and opportunity to cross-examine the complainant and had in fact exercised that right and had cross-examined him and therefore the said evidence could be admitted in evidence. It appears to us that the learned Magistrate committed a great error in admitting the said evidence.

(9) Section 33, Evidence Act permits evidence which had been given in a previous judicial proceeding by a witness to be admitted in evidence in a subsequent judicial proceeding or in a later stage of the same judicial proceeding in order to prove the truth of the facts which it states, when the witness is dead or cannot be found. But such evidence in order to be admissible under the said section of the Evidence Act must have been given by the said witness in a judicial proceeding or to any person authorised by law to take it.

(10) The question which arises is whether in the present circumstances the evidence which had been given by the complainant in the two previous proceedings was given in a judicial proceeding or before a person authorised by law to take it. In the first place, it cannot be doubted that the evidence given by the complainant in the previous proceedings was not given in a judicial proceeding because the previous proceedings had been declared by this Court to have been without jurisdiction.

(11) That the evidence given in a judicial proceeding which had taken place without jurisdiction cannot be admitted in evidence under S. 33, Evidence Act, has been made quite clear in a number of decisions, which have been placed before us.

(12) In a Madras case, —'In re Rami Reddi and Seshu Reddi', 3 Mad 48, it has been so held by their Lordships. In another case, — 'Buta Singh v. The Crown', 7 Lah 396, the same view has also been taken. In the Lahore case the appellant was tried twice on a charge of murder. The first trial was set aside as being without jurisdiction. In the second trial the Sessions Judge, acting ostensibly under S. 33, Evidence Act, admitted in evidence the statements of certain witnesses made before the Sessions Judge during the first trial and the statement of one witness was made in the first committal proceedings. Their Lordships held that a proceeding before a Judge or a Magistrate who had no jurisdiction is not a judicial proceeding and that the evidence of witnesses given in such a proceeding could not be used under S. 33, Evidence Act on a retrial before a competent Court. In the course of their judg-

ment their Lordships, inter alia, observed as follows:

"The first trial was not a judicial proceeding as there is a final order by this Court ruling it to have been without jurisdiction. It was held in —, 'Rami Reddi In re', 3 Mad 48 that evidence which was in a proceeding subsequently pronounced to be one coram non judice was not admissible and could not be used under S. 33, Evidence Act on a retrial before a competent Court."

(13) The same view has also been taken in another Madras case, — 'Sankappa Rai v. Koraga Pujary', 54 Mad 561, where it has been held that a proceeding before a Court which has no jurisdiction to entertain it is not a "judicial proceeding" within the meaning of S. 33, Evidence Act, and a deposition given in such a proceeding is inadmissible in evidence under the said section. Their Lordships held: "that if a Court has no jurisdiction over the subject-matter of the litigation its proceedings are mere nullities"; and for that proposition their Lordships referred to the case of 'Rajalakshmi Dassee v. Katyayani Dassee', 38 Cal 639 and held that the "contents of the statement, cannot be used in evidence in this case."

(14) The matter seems to us to be beyond all question. If the proceedings had taken place without jurisdiction, it cannot by any means be said that the evidence given in those proceedings was given in a judicial proceeding. Such proceeding, on the authorities which I have cited, can never be a judicial proceeding. The next question is can such evidence of the complainant, given in the two previous proceedings, be admitted on the ground that it was given before a person authorised by law to take it.

(15) It seems to me that when it is said that a person must be authorised by law to take it, it means that the person must be authorised to take that particular deposition or the particular case in which the deposition has been given. As I have said the entire trial had been declared by this Court to have been without jurisdiction. If that is so, it cannot be said that the Magistrate who took deposition in such a trial was a Magistrate who was authorised by law to take that deposition. Such a person must be, as I have indicated, a person authorised to take that particular deposition. But the effect of the decision of this Court in those two Revision Cases, is that he was not authorised to take those depositions —the trials having been declared to be without jurisdiction.

(16) In the premises I have come to the conclusion that the evidence which has been admitted under S. 33, Evidence Act could not have been admitted under the said section and the said evidence has been wrongly admitted by the learned trying Magistrate.

(17) But the question then arises as to what should be done in the circumstances? Should the appellant be acquitted or should the matter be sent back for retrial by the learned Magistrate or should we under S. 167, Evidence Act go into the evidence which has been given before the trying Magistrate and determine the matter ourselves? It appears that although the complainant is dead and his evidence is not available for the purposes of the present trial, yet there are evidences of other persons given at the trial. For instance, there is the evidence of the other partner of the complainant before whom the representations in question are alleged to have been made and who is alleged to be an eye-witness to other facts and circumstances of the case, on which the guilt of the accused person is sought to be proved. In the circumstances the question of acquitting the appellant does not arise.

(18) In my opinion although we can under S. 167, Evidence Act determine the matter ourselves on the evidence which are on the record eliminating the evidence of the complainant, yet for the ends of justice, I think, we should send the matter back to the learned Magistrate to determine the guilt or otherwise of the appellant after eliminating the evidence of the complainant which he had wrongly admitted. The trying Magistrate had the advantage of seeing the demeanour of the witnesses who had given evidence before him and we are informed that the said learned Magistrate is still available for the purpose of determining the case.

(19) In the circumstances, I do not think we should decide the matter ourselves on the evidence before us on records, but should send the matter back to the trying Magistrate to determine it after eliminating the evidence of the complainant which had been admitted by him. He is to decide the matter on the other evidence which is before him.

(20) The appeal is allowed, the conviction and sentences are set aside and the case is sent back to the learned Magistrate to decide it after eliminating the evidence of the complainant in the two previous proceedings which he had admitted.

(21) Whether the other evidence is or is not sufficient to maintain the conviction, we express no opinion and we leave it entirely to the Magistrate.

(22) The appeal is disposed of in those terms.

(23) The appellant will continue on the same bail.

(24) HARRIES, C. J.: I agree.

C/R.G.D. Appeal allowed and case remanded.

A.I.R. 1953 CALCUTTA 341 (Vol. 40, C. N. 126)

HARRIES C. J. AND S. R. DAS GUPTA J.

Manicklal Mondal and another, Petitioners v. The State.

Criminal Revn. No. 1195 of 1951, D/- 21-3-52.

Criminal P. C. (1898), S. 96 — Issue of search warrant — Recording of reasons for belief not necessary.

Under S. 96, the Magistrate is not bound to record his reasons in writing before he issues a search warrant. All that the section requires is that the Magistrate must himself be satisfied that there is necessity for the search warrant to be issued because the thing would not be produced otherwise. (Para 4)

Anno: Cr. P. C., S. 96 N. 5.

Bireswar Chatterjee with Bimal Chandra Chatterjee, for Petitioners; Ajit Kumar Dutt, for the State.

S. R. DAS GUPTA J.: The petitioners before us are two in number. The petitioner No. 1 has been convicted under S. 353 and S. 332, Penal Code, and sentenced to rigorous imprisonment for six months and to rigorous imprisonment for three months respectively — both the sentences to run consecutively. The petitioner No. 2 has been convicted under S. 353, Penal Code, and sentenced to pay a fine of Rs. 200/- in default to rigorous imprisonment for three months. The case was originally tried by a Magistrate, First Class, Uluberia and he found the petitioners guilty of the aforesaid charges and sentenced them as

aforesaid. Against the said convictions there was an appeal to the Additional Sessions Judge of Howrah, but the appeal was dismissed except that the sentences on petitioner No. 1 were directed to run concurrently. It is against the said order of the Additional Sessions Judge that the present application in revision has been made before us.

(2) The case for the prosecution against the petitioners is as follows.

(3) There was a case instituted under S. 107, Criminal P. C. on 18-3-1950 against the petitioner No. 1 Maniklal Mandal and others. A search warrant was issued by the Sub-Divisional Officer, Uluberia on 20-3-1950 authorising the Officer in charge, Shyampur Police Station, to search for certain gold ornaments and documents lying in an iron safe in the house of one Narendra Nath Mondal of Naul. The said search warrant was endorsed in favour of one Someswar Bhattacharyya, Assistant Sub-Inspector of Police (P. W. 1) for execution on 21-3-1950. The said Someswar Bhattacharyya went to Naul to execute the search warrant in company with some search witnesses, and when they reached the house to Narendra Nath Mondal they called Narendra Nath Mondal and explained to him the contents of the search warrant in presence of the search witnesses. The room in question where the iron safe was to be searched was found locked and the police officer asked him to open the room. Naren Mondal thereupon made certain statements to A. S. I. and in pursuance of that statement the petitioner Manicklal and another person Jaharlal Mondal were called. The police officer explained to them the contents of the search warrant and asked them to open the room, but they refused. The Assistant Sub-Inspector of Police then proceeded to break open the padlock when the petitioner Tulsirani Mondal, wife of the petitioner Manicklal Mondal, came near him and showed him a 'katari' and threatened him. She was however persuaded to leave the place. Someswar Bhattacharyya then broke the padlock by means of a 'sapol' and entered the room after observing all the formalities of the search. He seized the iron safe and with the help of two pieces of bamboo had the same carried from the place where it was found towards the house of one Debendranath Mondal. The labourers who were carrying the iron safe, after they had gone some distance, felt tired and were resting.

It was then that the accused Manicklal Mondal suddenly came up to the spot, took the piece of bamboo and attacked the Officer Someswar Bhattacharyya with the same. The petitioner No. 2 Tulsirani Mondal also came up in the meantime to the place of occurrence with a 'Sapol' and she made it over to her husband Manicklal Mondal. The other accused Jaharlal Mondal came there with a 'ballam' to attack the complainant. There was a scuffle and ultimately Manicklal was overpowered and arrested. On these facts the petitioners had been charged under the sections to which I have referred, and they were found guilty and convicted as aforesaid.

(4) Mr. Chatterjee appearing on behalf of the petitioners urged several points in support of the petition. In the first place he urged that the search warrant was illegal in view of the provisions of S. 96, Criminal P. C. His contention is that the Magistrate did not record in writing before he issued the search warrant under S. 96, that he had reason to believe that a person to whom a summons or order under S. 94 or a requisition under S. 95, sub-s. (1), might be addressed, would not produce the document or thing as required by such summons or requisition. In other words, Mr. Chatterjee's contention is that the learned Magistrate has not recorded the grounds on which he had been satisfied that the person to whom a summons under S. 94 might have been issued would not, if it were so issued, have produced the document or thing required to be produced by issue of such summons.

It does not appear to me that there is any substance in this contention. It may be true that the Magistrate has not recorded his reasons for believing that the person would not produce the document if he was merely served with a summons under S. 94. But, then, it does not appear from the section itself that the Magistrate was bound to record his reasons in writing. All that the section says is that the Magistrate must have reason to believe that such is the state of affairs. In other words, the Magistrate must himself be satisfied that there is necessity for the search warrant to be issued as otherwise the thing would not be produced. Apart from this, it appears that there were ample materials on which the search warrant could have been issued by the learned Magistrate. Proceedings under S. 107, Criminal P. C., had already been started against the accused persons and the Magistrate had a police report before him that the accused persons were men of dangerous and desperate character and were likely to commit breach of the peace. There were therefore ample materials on which the learned Magistrate could come to the conclusion that the issue of a search warrant under S. 96 was necessary.

(5) The next point urged by Mr. Chatterjee in support of the petition is that the room where the search warrant was executed was not the room belonging to Narendra Nath Mondal, but it was the room of his clients. He contended before us that the findings of the Magistrate points to that direction, but, it appears on evidence that Narendra pointed out the room as belonging to him to the Assistant Sub-Inspector of Police and this fact has been believed by the learned Magistrate. In the words of the Sessions Judge "in view of the fact that Narendra actually pointed out the room belonging to him to the A. S. I. all vagueness about the matter and difficulty in executing the search warrant had come to an end." If Narendra had pointed out that room as belonging to him to the Assistant Sub-Inspector of Police and if thereafter the Assistant Sub-Inspector of Police had broken open the room, the petitioners having refused to open it by the keys, there was nothing wrong in the conduct of the Assistant Sub-Inspector and the Assistant Sub-Inspector was fully justified in executing the search warrant in that manner. That being so in my opinion the contention of Mr. Chatterjee on this point must also fail.

(6) Lastly, Mr. Chatterjee said something about the private defence of the petitioners in question. The question of private defence comes to an end, if the room in which the search warrant had been executed was the room pointed out by Narendra Nath Mondal and belonging to him. Apart from this, it appears that the incident in question took place not at the time when the iron safe was re-

moved from the room where it was seized. The incident in question took place after the iron safe had been taken away to some distance and when the labourers having kept the iron safe were resting. It was then that these people came along and committed the offence. We do not think that there is any force in this contention of Mr. Chatterjee.

(7) The result therefore is that the petition must fail and the Rule is discharged.

(8) Mr. Chatterjee contended before us that we should consider the question of sentence. I do not think that the sentences in this case as varied by the Sessions Judge have been unduly harsh and I do not think we should interfere with the sentence which has been passed upon the petitioners.

(9) The petitioner No. 1 must surrender to his bail bond.

(10) HARRIES C. J.: I agree.

C/D.R.R. Petition dismissed.

A.I.R. 1953 CALCUTTA 343 (Vol. 40, C. N. 127)

LAHIRI AND GUHA JJ.

Kamala Sundari Dassi, First Party v. Nilmony Das, Second Party.

Criminal Ref. No. 31 of 1952, D/- 30-7-1952.

† **(a) Criminal P. C. (1898), S. 488 (3) and (5) — Enforcement of order — Husband's failure to obtain cancellation of order — Maintainability of objection.**

The failure of the husband to obtain a cancellation of the order for maintenance under S. 488 (5) does not stand in the way of his filing an objection under S. 488(3). If as a matter of fact, the husband is able to prove the allegations which he has made in his objection, the Magistrate will not only refuse to issue a distress warrant under S. 488 (3), but he should also cancel the order for maintenance under sub-s. (5). (Para 3)

Anno: Cr. P. C., S. 488 Notes 15 and 24.

(b) Criminal P. C. (1898), S. 488 (3) — Enforcement of order — Sufficient cause — Enquiry as to — Necessity of.

The Magistrate must hold an enquiry as to the sufficiency of the cause shown by the husband and he cannot order the issue of a distress warrant without satisfying himself as to the sufficiency of the cause shown. (Para 3)

Manishi Kumar Das, for First Party; Ranjit Kumar Banerjee and Bimal Krishna Banerjee, for Second Party.

LAHIRI J.: This is a Reference under S. 438, Criminal P. C., made by the Sessions Judge of Hooghly recommending that the order of Sri M. M. Kusari, Magistrate, First Class, Serampore, dated 3-3-1952, by which he ordered that a distress warrant should be issued unless the husband paid the maintenance grant to his wife Kamala Sundari Dasi from 2-7-1950, on or before 23-3-1952 should be set aside, and the Magistrate should be directed to hold an enquiry into the objection filed by the husband under sub-s. (3), S. 488, Criminal P. C.

(2) The facts of this case lie within a short compass and may be briefly stated as follows: On 30-9-1947, the wife Kamala Sundari Dasi obtained an order for maintenance against her husband under S. 488, Criminal P. C., directing the husband to pay her maintenance at the rate of Rs. 40/- per month. It is admitted that the husband paid maintenance up till May 1948, but did not pay it thereafter. On 2-7-1951, the wife, Kamala Sundari Dasi, filed an application for enforcement of the order of maintenance under sub-s. (3) of S. 488, Criminal P. C. A notice was served upon the husband who filed an application alleging that no order for enforcement could be made against him, because his wife was living in adultery and secondly because the wife had been living separately from him by an agreement, dated 18-3-1949. The husband made a further prayer that on these grounds the order for maintenance might be cancelled under sub-s. (5), S. 488, Criminal P. C. The learned Magistrate refused to entertain this objection filed by the husband on the ground that as the husband did not submit any petition before for the cancellation of the maintenance grant, he had no right to oppose the order for maintenance upon the allegations made by him in his petition. Accordingly the learned Magistrate held the husband liable to pay maintenance to his wife from 2-7-1950 and directed the issue of a distress warrant for the recovery of the same in default of payment by the husband by a certain date. Against this order (is?) made this Reference under S. 438, Criminal P. C.

(3) Sub-section (3), S. 488, Criminal P. C. provides that if a person ordered to pay maintenance under sub-s. (1), S. 488 "fails without sufficient cause" to comply with the order, the Magistrate may issue a warrant for levying the amount due in the manner provided for realisation of fines. It is therefore clear that before a Magistrate can make an order for the issue of a distress warrant, the Magistrate must be satisfied that the husband has failed without sufficient cause to comply with the order for maintenance. In refusing to hold an enquiry upon the objection filed by the husband, the Magistrate acted in violation of the clear provisions of sub-s. (3), S. 488, Criminal P. C. The failure of the husband to obtain a cancellation of the order for maintenance under sub-s. (5), S. 488 does not stand in the way of his filing an objection under sub-s. (3), S. 488. If as a matter of fact, the husband is able to prove the allegations which he has made in his objection, the Magistrate will not only refuse to issue a distress warrant under sub-s. (3) of S. 488, but he should also cancel the order for maintenance under sub-s. (5). It is quite clear from the words used by the legislature in sub-s. (3) that the Magistrate must hold an enquiry as to the sufficiency of the cause shown by the husband and he cannot order the issue of a distress warrant without satisfying himself as to the sufficiency of the cause shown.

(4) For the reasons given above, we accept the Reference made by the Sessions Judge of Hooghly, set aside the order of the Magistrate dated 3-3-1952 and direct the Magistrate to hold an enquiry into the allegations made by the husband in his petition of objection, dated 27-8-1951.

(5) In the circumstances of the case, it is desirable that the enquiry should be held by a Magistrate other than Sri M. M. Kusari to be nominated by the District Magistrate of Hooghly.

(6) GUHA J.: I agree.

C/V.R.B. Reference accepted.

A.I.R. 1953 CALCUTTA 344 (Vol. 40, C. N. 128)

CHAKRAVARTTI AND S. R. DAS GUPTA JJ.

Maharajadhiraja Bahadur of Darbhanga, Applicant v. Commissioner of Agricultural Income-tax, West Bengal, Respondent.

Income-tax Ref. No. 66 of 1950, D/- 15-5-1951.

Bengal Agricultural Income-tax Act (4 of 1944), S. 2(1) — Income or capital receipts — Sale of certain specified varieties of forest trees every year by auction — Consideration always a lump sum — Sum, however, allowed to be paid in instalments in period of two and a half years within which trees sold were to be cut down and removed — Sums held were income and not capital receipts — Income-tax Act (1922), S. 4(1) and (3) (vii).

There is no absolute rule that a receipt, in order to be income, must always be of a recurrent nature. Income has an infinite variety of forms and a single receipt may be income. Recurrence, again, is a matter of degree. (Paras 16 and 17)

Anno: Income-tax Act, S. 4 N. 10 and 27.

B. N. Bannerjee and Biswanath Dhar, for Applicant; Ashoke Sen and S. M. Bose, Advocate-General, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('49) 53 Cal WN 590: 16 ITR 330: AIR 1949 PC 13 19

('50) 54 Cal WN 33: 17 ITR 473: AIR 1949 PC 311 19

('48) Civil Appeal No. 30 of 1948, D/- 16-5-1948 (FC) 15

('30) 52 All 419: (AIR 1930 All 389) 19

('51) 1951-19 ITR 379: (AIR 1951 Assam 2) 19

('49) 53 Cal WN 596: 17 ITR 426 7, 8

('97) 20 Mad 58: (6 Mad LJ 281 FB) 13

('30) 54 Mad 21: (AIR 1930 Mad 764 FB) 19

('28) 112 Ind Cas 156: (AIR 1929 Oudh 93) 13

('45) 1945-13 ITR 74: (AIR 1945 Oudh 35) 19

('46) 1946-14 ITR 673: (AIR 1947 Pat 115) 19

(1913) 9 AC 771: (83 LJ PC 6) 13

CHAKRAVARTTI J.: The question involved in this Reference under S. 63(1) of the Bengal Agricultural Income-Tax Act relates to three sums of money which, according to the contention of the Respondent Commr. & the finding of the Appellate Tribunal, are agricultural income of the assessee but according to the assessee himself, not income at all. For reasons presently to be stated he has not sought to argue further that even if the sums concerned be income receipts, they are still not agricultural income within the meaning of S. 2(1) of the Act.

(2) Although there is a single reference, it covers three assessments made for three consecutive assessment years, viz. 1944-45, 1945-46 and 1946-47. As the monies received by the assessee in the three relevant accounting years were derived from transactions of an identical character, a common question of law has been referred, although the amounts involved naturally differ.

(3) The facts are as follows. The assessee, the Maharaja of Dharbhanga, is one of the bigger landlords of the country and among his possessions is a tract of forest land extending over 50 square miles and grown mostly with sal trees. In respect of each of the three years mentioned above, the Maharaja filed a return of his agricultural income in this Province, but in none of them did he include any income derived from forest lands. The Income-tax Officer, however, discovered that in each of the three years the Maharaja had collected a fairly su' stantial amount by disposing of sal trees, standing on one part or another of the forest tract and acting on the view that the receipts constituted agricultural income he included them in the appropriate assessments, after allowing certain deductions. The sums so brought under assessment were Rs. 17,719/4/ as for the assessment year 1944-45, Rs. 4,200 for 1945-46 and Rs. 17,032/2 as for 1946-47. Before the Income-tax Officer, the assessee objected to the inclusion of these sums in his assessable income and after the assessments had been made, he appealed successively to the Appellate Assistant Commissioner and the Appellate Tribunal, but without success. He then applied for a reference to this Court of a question of law formulated by him, but the Appellate Tribunal, although it made the present reference, altered the form of the question. While the assessee required the Tribunal only to ask whether the sums concerned were capital receipts, the Tribunal re-framed the question in the widest possible form and has asked this Court to say whether the sums can be treated as agricultural income, assessable under the Bengal Act. The question actually referred is as follows:

"Whether on the facts and circumstances of the case and upon a true construction of the Ekrarnamas (agreements), the money received by the assessee on account of sale of jungle woods in his zemindary can be treated as agricultural income, assessable under the Bengal Agricultural Income-tax Act, 1944?"

(4) In spite of the wide terms in which the question has been framed, I think we are not required, in the circumstances of the case, to deal with anything more than one aspect of it. The only point ever urged by the assessee, either before the Tribunal or the Departmental authorities, was that the sums in question were capital receipts and therefore not assessable as income. That this was so is abundantly clear from the various orders and the grounds of appeal, both before the Appellate Assistant Commissioner and the Tribunal. The question of law formulated by the assessee for reference to this Court was limited to that one point and when he found that the question, as referred by the Tribunal, made no reference to the sums being alleged to be capital receipts, he applied to the Tribunal for an amendment of the question.

On being told by the Tribunal that it was functus officio, he made an application to this Court which was placed before us along with the reference. In that application the assessee stated that his contention had always been that the money was a capital receipt and that it was on that question that he had sought a reference to this Court and he prayed that the question referred by the Tribunal might be suitably amended so as to bring out that character of the controversy. At no stage did the assessee contend that the sums concerned, even if income, were not agricultural income and he made no attempt to do so before us, not, as his learned advocate put it, because he admitted the income to be agricultural, but because to make it out to be non-agricultural would be only to invite assessment under the Indian Income-tax Act at a higher rate of tax. The learned Advocate for the Commissioner also naturally did not ask us to pronounce on the second question as well, because the decision of the Tribunal is in his favour. In the above circumstances, it appears to me that as to the receipts being agricultural or otherwise, there is no question between the Department and the assessee and all that we are required to consider is whether the sums concerned are capital receipts

Nor is it necessary to amend the question, as prayed for by the assessee, for, the point sought to be introduced by him is covered by the question, as framed.

(5) The facts relevant to the question to be considered by us may now be stated. It is unfortunate that the Tribunal should not have included a full statement of the facts found by it in the case stated, but should have left them to be collected partly from the statement of the case and partly from the appellate order. Be that as it may, the facts found are that the assessee owns forest lands covering an area of 50 square miles. The trees in these forests are mostly sal trees, some of which have a girth of more than 3 feet at a height of 3 feet above the ground, but there are other trees as well, fruit-bearing and valuable timber trees. These latter are not sold, but every year, the sal and other jungle trees in those blocks of the forest which have become mature for extraction, are sold to contractors by auction, with the reservation that sal trees with a girth of more than 3 feet at 3 feet above the ground are excepted and must not be cut.

The consideration for a block or blocks is always a lump sum, but it is allowed to be paid by instalments or parts, the scheme, broadly stated, being that a period of about two years and a half is fixed within which the entire consideration must be paid & the trees sold, cut down & removed. In cutting down the trees the purchaser is required not to leave stumps more than 5 inches higher than the ground and not to disturb the roots, so that new shoots may spring from the stumps. Such shoots grow into mature sal trees and become fit for extraction in about 10 years' time and then the particular block is auction-sold again and bring in a further sum to the assessee. The trunks of the trees so sold are used as posts and rafters of kutcha huts or for making fences, while the branches are used as fuel.

(6) The tribunal recorded certain further findings which are not relevant to the question we are required to decide, but which it is necessary to set out in order to explain how it dealt with & disposed of the case. It was pointed out that the trees which had been sold in the years in question were coppice growths from stumps of trees cut down ten or twelve years earlier and so it was held that they were not trees of wild and spontaneous growth. In the opinion of the Tribunal, human labour and skill had been expended on promoting the growth of those trees, because the contractors who had purchased and cut down trees on the earlier occasion had had to take care not to leave stumps higher than five inches from the ground and also because, during the rains, the forest had to be guarded carefully against trespass by men and animals so that the growing shoots might not be damaged.

(7) It was contended before the Tribunal, as before us, that what the assessee had conveyed to the contractors by the transactions in question was not merely a right to cut down and remove trees but an interest in land and accordingly, the sums he had received for parting with such interest were capital receipts. Reference was made to the terms of the deeds by which the transactions were evidenced. The Tribunal held that what the assessee had granted to the contractors was a "mere right to cut & collect the fuel wood" and nothing more and since, in the opinion of the Tribunal, there was nothing in the present case to exclude the application of the decision in the — 'Commissioner of Agricultural Income-tax, West Bengal v. Jagadish Chandra', 53 Cal W N 593: 17 ITR 426, it followed that decision and held the receipts in question to be agricultural income of the assessee.

(8) The question whether when a Zemindar sells trees from his forests, the proceeds are capital or income receipts in his hands was not raised in 'Jagadish Chandra Deo's case' (53 Cal WN 593: 17 ITR 426). It proceeded on the footing that the receipts were income and held on the facts, which were largely similar to those of the present case, that the income was of an agricultural character. For reasons already stated, we are not dealing with the latter question, but since on that question 'Jagadish Chandra's case' was followed by the Tribunal in the order out of which the present reference has arisen, I desire to make it clear that as to whether that case was rightly decided or whether even if rightly decided, it concludes the present case on the second question, I must not be understood to express any opinion.

(9) Reverting now to the question before us, the broad contention of the assessee was that the sums in question were capital receipts, though he does not appear to have advanced it always in the same form. In what shape it was urged before the Income-tax Officer is not clear, but before the Appellate Assistant Commissioner it was said that the sums in question were "the price of the trees" and as such, capital receipts. What was meant must have been that the trees themselves were capital assets which, by the sales, had been converted into cash. Before the Appellate Tribunal, the ground was changed and it was then urged that the transactions concerned were in fact leases whereby the assessee had granted a portion of his zemindary rights to the contractors for a limited period, with the right to cut down and remove certain types of trees. Before us the contention was repeated and, to a certain extent, developed. As a result of some interrogation by us, a second branch was added to it and it was said that the sums in question were capital receipts either in the strict sense that they represented replacement of a capital asset or in the loose sense that they were of a casual and non-recurrent nature or in both. We shall deal with those contentions separately.

(10) In support of the first contention, it was stated that the capital asset parted with was possessory interest in the jungle lands for a specified period with the right to enjoy the lands by cutting down & removing certain specified varieties of trees and that that interest had been transferred on receipt of a single payment. All the elements of S. 105 of the Transfer of Property Act were therefore present and what was granted in each case was a lease. The transactions, as already stated, are evidenced by deeds, one of which has been included in the paper-book as typical of all. The translation which has been made by a pleader of Laheriasarai is not very happy or always accurate, but there was no dispute as to the true meaning of any expression and the parties readily accepted such corrections as we had occasion to suggest. It will be convenient to refer at this stage to the terms of the deed.

(11) The deed begins by describing itself as an agreement for the purchase of jungle wood and also an instalment bond for the payment of Rs. 8261/4, which is stated to be the balance of the purchase money. It is noticeable that the transaction is referred to as a purchase and the subject matter, as specified, is not land, nor even trees, but only jungle-wood (Jangler Koshtha). The document proceeds to recite that there had been a proclamation for sale by auction of jungle wood from the jungles of the Maujas mentioned in the

Schedule and the highest bid of Rs. 11,015, offered by the executant, had been accepted. In the Schedule, a number of jungle plots, situated in the district of Bankura, are mentioned in groups and in the case of each group, particulars of the plots, together with their area, are first given, the total area is mentioned next, then the Zemindary right of the assessee is recited and lastly the subject-matter of transfer is described in the carefully limited words, "only the wood over it" (Uparistha Kashtha matra). In body of the deed, the "wood" is further specified and it is stated that out of the jungle mentioned in the Schedule and excluding all fruit-bearing and valuable timber trees (of which 21 varieties are particularly mentioned), as also sal trees of a girth of more than 3 feet at 3 feet from the ground, the executant is purchasing sal, Parashi and Jhanti trees for a period of two and a half years from a certain date to a certain date. The consideration of Rs. 11,015, is described as the "price of the wood of the jungle purchased by me" (Amar Khorida jangler Kashther mulya) and a scheme of graduated payment and graduated appropriation of the trees is set out.

The jungle and the price are both divided into three parts and it is provided that the initial payment which has already been made, will entitle the executant to cut down trees only from the first part of the jungle described in Schedule "A" that he will be entitled to cut trees from the second part (Sch. B) only on payment of the second instalment of the price and that similarly before he can cut down trees from the third part (Sch. C), he will have to pay the third instalment of the price fixed. There are a number of other undertakings which embody the duties of the purchaser and the restrictions imposed on him. He must not cut trees at a height of more than 5 inches from the ground and must not disturb the roots of the stems. He must not cut any tree a second time and must not cut any tree at all from the end of Jaitha to Sraban. He must remove all trees cut down by him within the month of Jaistha subsequent to the cutting and thereafter will have no right to enter the area, from which the trees have been cut, again. He must complete the cutting and removal of all trees within the period of the deed and if he fails to do so, he will not be entitled, after the expiry of the period, to cut any trees or even to remove trees already cut down. Such trees, cut or uncut, will pass to the khas possession of the assessee. After the expiry of the period of the deed, the whole jungle will revert to the khas possession of the assessee & even during that period the excepted trees will remain in his khas possession.

(12) I am entirely unable to hold that the parties to the deed, the terms of which have been set out above, ever contemplated a lease, or that in spite of themselves, they created one by the form of the words used or that they agreed to terms which created a lease in law. The document is plainly what it purports to be, viz., an agreement embodying the terms & conditions of an auction-sale of certain trees and also an instalment bond regarding payment of the balance of the price. It conveys no interest in the land, save and except the right to enter upon particular areas for the purpose of cutting down and removing trees therefrom, but that also after the portion of the consideration assigned to the particular area sought to be entered upon, has been paid. Neither exclusive possession of the land, nor a right to all the trees is conferred. The various restrictions imposed on the executant of the document and the reservations in favour of the executee are entirely inconsistent with the notion of a lease, apart from the fundamental feature, apparent on the face of the document and every part of it, that the subject-matter is only certain specified varieties of trees and the transaction is a sale.

(13) Mr. Banerjee who appeared on behalf of the assessee, contended that if the transaction provided for an instant cutting down and removal of the trees, it would have been a sale of goods, viz., the trees, but the fact that a period of two and a half years was allowed, made a difference. He referred to the decision of the Privy Council in — 'Kauri Timber Co., Ltd. v. Commissioner of Taxes', (1913) 9 AC 771 and on the authority of that decision contended that when, as in this case, a purchaser of timber was allowed to let it remain on the land for a certain period, during which it derived sustenance from the soil & the trees grew, entitling the purchaser to the additional growths, an interest in land was conveyed. The same argument was also put forward in a slightly different form on the language of the deed and it was contended that the provision that the executant was purchasing the trees "for two and a half years" indicated that he was acquiring an interest in the land for that period. I do not see that the Privy Council decision has any application to the facts of the present case.

The law reports show that that decision has been the unfortunate cause of a mistaken line of argument in many cases and not always has it been borne in mind that the question there related to not the seller, but the purchaser & the question was whether the purchaser, who carried on a business of cutting, milling and selling timber, could, in striking the annual profits of his business for the purpose of taxation under a certain New Zealand Act, deduct from the gross proceeds the proportionate price assignable to the timber cut down during the year out of the total price paid for a large stock of standing timber which had been purchased by him with the right to cut and remove it at any time during specified period, generally ninety-nine years. It was in dealing with that question that the Privy Council said that looked at from the point of view of common law, the transaction under which the standing timber had been acquired was not one under which a mere possession of goods by a contract of sale had been given to the purchaser, but an interest in, and possession of, land had been conveyed to him; and looked at from the point of view of accounting and finance, the proportionate price of the trees cut down during the year was not a business but capital expenditure of the purchaser and it was not a proper debit item as against revenue.

The question in the present case is not whether the price paid for the trees was a capital expenditure in the case of the purchaser, but whether it was a capital receipt in the hands of the seller. Still, even assuming on the basis of the first part of the proposition laid down by the Privy Council, that if the purchaser acquired an interest in land he could have done so only if the seller parted with such an interest I am unable to hold that the facts of the present case attract the principle laid down by the Privy Council. In the first place, where, as in the Privy Council case, a person purchases a bush property in the form that he purchases the timber with the right of cutting it any time within ninety-nine years & therefore with the right of letting it remain on the land till the end of that period, it may fairly be said that what was conveyed was the right to exploit the bush, together with its natural accretions, for

almost a century & therefore an interest in the land which nourished the trees and begot accretions during that period was necessarily conveyed. That principle can hardly apply to a case where the purchaser purchases only some among many varieties of trees standing on the land and is required to cut and remove the trees purchased by him within two years and a half and where, further, in the case of some of the trees, his right to appropriate them actually arises not at the date of the instrument, but on later dates when he pays further instalments of the price, so that he has really much less than two years and a half.

Mr. Banerjee cited the decision in —'Seeni Chettiar v. Santhanathan Chettiar', 20 Mad 58 (F.B.) where the period was four years, but the seller in that case was the lessee of two shares in a village and in the trees and the grass and other vegetation standing in the village tank and what he conveyed was "the said two shares, together with the tank and the bed of the tank" and the right given to the purchaser was not merely the right to cut down and remove the grass and the trees but also to enjoy the produce of all the trees, such as gum and nuts etc. and also the reeds and the grass (see p. 59 of the report where the document is set out). In the present case, no land or interest in the land is mentioned in the deed and the right to enjoy the fruit-bearing & valuable timber trees remains with the seller. But apart from these considerations, it appears to me, in view of the scheme of payment and the manner and time of the cutting and removal of the trees, that the period of two years and a half was fixed only for the sake of convenient payment and convenient appropriation, which the seller took care to hedge in with suitable safeguards and penalties and that it was not the intention to convey any interest in the trees on the basis that such interest was to last for a certain time.

The deed in this case is, in some respects, very similar to that in the case of —'Rajindra Bahadur Singh v. Malhoo Khan', 112 Ind Cas 156 (Oudh), which also related to trees subject to periodical cutting and in my opinion, it ought to be held, as it was held in that case, though for the purposes of the Registration Act, that it conveyed no interest in land. The intention in giving the purchaser some time for cutting and removing the trees was not that the trees should continue to stand for such period so that he might enjoy them as such and benefit by their further growth. In substance, it was a case of sale with immediate effect and the time allowed was only for convenient clearance of the goods and payment of the price in convenient instalments. The sale was a bare sale of the trees.

(14) If no interest in land was conveyed by the transaction, there was no other capital asset which the assessee parted with and the consideration he received cannot obviously be said to have replaced any capital. Under the definition of 'Agricultural income', such income is, except in the case of income derived from buildings occupied by cultivators or rent-receivers, rent or revenue derived from land or income derived from land directly by agricultural operations or by the sale of agricultural produce. The capital in the case of agricultural income is thus land. It could not therefore be said in the present case that the capital was the forest trees. But even if the trees were taken to be capital, the receipts in question could not be said to be not income on the ground that by the transactions which yielded them, the capital was exhausted, for it is well settled now that receipts from capital which is exhausted in the process of realisation may well be income, as in the case of mines and quarries. This argument which was only casually mentioned by Mr. Banerjee was not pressed by him and indeed on the facts of the case there is no room for it. In the first place, the forest is not the capital. In the second, the forest is not in fact exhausted by the periodical sales of trees, but in spite of the sales it remains a standing asset. It does so because what happens is that trees of a particular block or blocks are sold in the course of the normal management and enjoyment of the forest, as & when they become mature for extraction and those blocks become filled with new trees which become saleable again in about ten years' time.

(15) Mr. Banerjee did not overlook the fact that agricultural income included rent or revenue derived from land and that where the income concerned was rent, the landlord had certainly parted with some interest in land in favour of the tenant. He therefore laid emphasis on the fact that what the assessee had received in the present case from each transaction was a single payment and proceeded to equate the receipt with selami of the kind which is a capital payment and has no connection with rent. Proceeding further, he placed before us an uncertified copy of the unreported decision of the Federal Court in the case of — 'Jyotirindra Narayan Sinha v. Commr. for the Board of Agricultural Income-tax, Assam', Civil Appeal No. 30 of 1948, D/. 16-5-1948, in which the question was whether selamis or premia received for the settlement of waste lands or abandoned holdings, were agricultural income within the meaning of the Assam Agricultural Income-tax Act and their Lordships remanded the case for further findings as to certain matters. I do not think that the receipts with which we are concerned in the present case have any similarity or affinity with the selami amounts which the Federal Court had to consider in the case cited and I am unable to see that any assistance can be derived from that decision. Nor do I think that any further enquiry of the kind directed by the Federal Court is necessary here. There is a deed and all the facts bearing on the nature and composition of the receipts, as also the general course of dealing in respect of the forest trees, are before us. On the facts, the consideration received from the contractors is not premium for the right to enjoy the land, but the price of the trees.

(16) Passing on now to the Second branch of Mr. Banerjee's argument, I am of opinion that the receipts cannot be held to be of a casual or non-recurring nature. According to the finding of the Tribunal which is based on a statement by an officer of the assessee, he owns a forest area of 50 square miles, the whole of which is covered mostly by sal trees. Every year the trees in some blocks of the forest become mature for extraction and every year the assessee sells such trees to contractors by auction. Blocks which are sold out once do not cease to be sources of receipts, for, new shoots spring from the stems of trees cut down and those shoots grow into saleable trees in about ten years' time when they are sold again. Blocks into which the forest has been divided are thus sold in rotation in such manner that every year trees in some blocks are sold and receipts come in. On those facts, it appears to me that the assessee enjoys a regular flow of annual receipts from sales of forest trees and the receipts of any particular year cannot be said to be of a casual character. It is true that the same block of forest does not yield a return every

year and the receipts in different years are from different blocks, but it is no more necessary for a receipt, in order to be agricultural income, that it should be one of an annual series, coming from the identical field, than it is necessary for a business receipt to come from the same transaction or transactions of an identical character in order to be business income. It is enough if it comes from a definite source which in this case is the forest. To my mind, the position is as if the assessee owns a number of forest blocks which yield a ten-yearly crop, but each year is the tenth year for some block or blocks so that each year there is, so to say, a harvest and a receipt from a sale of the crop. In those circumstances, the receipts are recurring receipts and since they were not obtained in replacement of capital, but out of working it, they are income.

(17) I may add, though it is not necessary to do so in the present case, that there is no absolute rule that a receipt, in order to be income, must always be of a recurrent nature. Income has an infinite variety of forms and a single receipt may be income. Recurrence, again, is a matter of degree. If, for example, a cultivator has an odd acre of land which grows only sugarcane and he grows a cane crop in that field once in four or five years. I cannot see why his receipt from the sugar-cane, where so grown, should not be income. In the present case, the assessee has other agricultural income; and even if forest trees were not sold every year, the receipt, when the trees were sold, would be income, at least if sales took place periodically.

(18) Towards the close of his argument, Mr. Banerjee submitted that all the 50 square miles of forest were not situated in the province of West Bengal and that we should send the case back to the Tribunal for a further finding as to what area lay within this province, because according to him, in judging the character of the receipts, the course of dealing in respect of only the area lying within this province would be relevant. I am unable to accede to that suggestion. At no stage of the proceedings was it ever suggested that any part of the forest lay outside this province and Mr. Banerjee was frank enough to admit that he himself did not know of it till he was told late in the course of the hearing of the reference. In those circumstances, it would be unusual to allow the assessee to raise a new point which involved a fresh investigation of facts; but, in any event, the point does not seem to me to be material. There is no dispute that the plots from which the receipts of the three years before us came, are all situated within this province and even if some part of the 50 square miles be situated outside, it is not easy to see why, for the purpose of ascertaining the incidents of the receipts, the totality of the assessee's dealing with the entire forest area cannot be taken into account. The officer of the assessee who gave the facts about the forest and the manner of sales spoke of all the 50 square miles and did not make any distinction between one area and another.

(19) It remains now to refer to the authorities cited at the Bar. Cases in which the only question was whether the income from the sale of forest trees was of an agricultural character may be left out of account, for that question is not being considered by us. In the case of — 'Messrs. Mohanlal Hargovind v. Commr. of Income-tax', C. P. 54 Cal W. N. 33: 17 ITR 473 (P.C.), where the question was whether a manufacturer of bidis was entitled to claim as business expense the sum spent by him on acquiring the grant of a right to collect tendu leaves from a forest, the Privy Council had to consider whether the grant conveyed an interest in land, but as the question was considered from the point of view of the purchaser and the grant comprised only leaves, no assistance on the question before us could be derived from that decision. The question whether the receipts of a land-owner from sales of forest trees were capital or income, was raised before the Privy Council in the case of — 'Mustafa Ali Khan v. Commissioner of Income-tax', U. P. Ajmer & Ajmer-Merwara 53 Cal W. N., 590: 16 I. T. R. 330 (P.C.), but was not decided, as their Lordships held that the question was not open to the assessee in the appeal. The question was raised and decided under the Indian Income-tax Act in the cases of — 'Commissioner of Income-tax, Madras v. Manavadan Tirumalpad', 54 Mad 21 (F.B.), — 'Maharaja of Kapurthala v. Commissioner of Income-tax', C. P. & U. P. (1945)-13 ITR, 74 (Oudh), In the matter of Ram Prasad 52 All 419 and — 'Kamakshya Narain Singh v. Commissioner of Income-tax', B. & O. (1946) 14 ITR 673 Pat, and under the Assam Agricultural Income-tax Act in the case of — 'Jyotirindra Narayan v. State of Assam (1951) 19 ITR, 379 (Assam). In each case the answer was that the receipts were not capital. It may be mentioned, however, that in the cases of the 'Maharaja of Kapurthala' and 'Ram Prasad' (in fact the Tehri State), there appears to be a finding that the assessee was carrying on a business or carrying out a scheme of profit-making, though in the former case, it looks like an interpretation of what the assessee did rather than a finding of actual business. In 'Kamakshya Narain Singh's case', no reasons are given.

(20) In the result I hold, both on principle and authority, that the receipts in question are not capital receipts, but income. Accordingly, the answer to the question referred must be in the affirmative, but subject to the proviso that the question whether the receipts, even if income, are income of an agricultural character, was not canvassed before us and we must not be understood as expressing any opinion thereon.

(21) The Commissioner of Agricultural Income-tax is entitled to the costs of this Reference. We assess the hearing fee at 30 Gold Mohurs.

(22) No orders on the application are necessary.

(23) Before concluding, I cannot help making an observation on the form in which the case has been stated by the Tribunal. Unfortunately, this is the form usually adopted. A statement of case is expected to contain a narration of the facts found by the Tribunal which bear upon the question referred and the contentions of the parties on those facts, out of which the question between them arises. On the one hand, it must be self-complete and on the other hand, there is no room in it for irrelevant matters. What the Tribunal has sent up is not a statement of case at all, but only its order on the application for a reference which, besides the question referred, comprises a discussion of other matters and of another question, not referred. If I may make a suggestion, statements of cases drawn up by the General or Special Commissioners in England, examples of which are to be found in the Tax Cases, may usefully be adopted as models.

(24) S. R. DAS GUPTA J.: I agree.

B/G.M.J. Answer in the affirmative.

A.I.R. 1953 CALCUTTA 348 (Vol. 40, C. N. 129)

LAHIRI J.

Champalal Lunia, Petitioner v. Sm. Gulab Devi and another, Opposite Party.

Civil Revn. No. 1137 of 1950, D/- 5-2-195_.

(a) Civil P. C. (1908), O. 1, R. 10 — Addition of necessary party — Obstruction to delivery of possession on ground of claimant being statutory tenant under S. 11 (3), West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948).

In view of the allegations of C in suit by A against B and the fact that B was not appearing in the suit it was necessary for the Court to add C as a party defendant on his application, in the suit in order to effectually and completely adjudicate upon all questions involved in the suit. Civil Rule No. 226 of 1949 (Cal), Foll. (Paras 4, 5)

Anno: C.P.C., O. 1 R. 10 N. 14.

(b) Civil P. C. (1908), S. 115—Refusal to join proper party is material irregularity in exercise of jurisdiction. **(Para 6)**

Anno: C.P.C., S. 115 N. 12.

Paresh Nath Bhattacharyya, for Petitioner; Nikhil Ch. Talukdar, for Opposite Party.

REFERENCE..... /Para.
('49) Civil Rule No. 226 of 1949 (Cal) 3

ORDER: This is a Rule under S. 115, Civil P. C. and it is directed against two orders made by the Presidency Small Cause Court Judge, dated 15-6-1950 and 7-8-1950.

(2) It seems that opposite parties 1 and 2 started a proceeding for recovery of possession against opposite party 3 under S. 41, Presidency Small Cause Courts Act in respect of one room in the first floor of premises No. 3, Baisakh Street, Calcutta, and this proceeding was registered as Suit No. 12910 of 1949. On 15-6-1950, when the suit was taken up for hearing, the petitioner filed an application to the Court alleging that the plaintiffs and the defendant of the aforesaid suit were colluding with each for the purpose of evicting the petitioner who, according to his allegation, was a sub-tenant under opposite party 3. The Court rejected this application on the ground that it was premature, and the Court observed that the point raised by the petitioner would arise and the petitioner might apply for relief when the plaintiffs went to take delivery of possession on the basis of the order for possession that might be passed by the Court. The application filed by the petitioner was therefore rejected and the Court proceeded to make an order for delivery of possession.

(3) Later on when the plaintiffs went to take delivery of possession on the basis of the aforesaid order, the petitioner offered resistance and the plaintiffs thereupon applied to the Court for police help under the provisions of O. 21, R. 97, Civil P. C. and to this application the petitioner filed an objection alleging that he was a statutory sub-tenant under the provisions of S. 11 (3), West Bengal Premises Rent Control Act, 1948. The Court rejected the objection filed by the petitioner by an order dated 7-8-1950 relying upon a Division Bench judgment of this Court in Civil Rule No. 226 of 1949. Against these two orders the petitioner has obtained the present Rule.

(4) The second order is really concluded by the judgment of the Division Bench referred to above and the remedy of the petitioner is not by way of an application to the Presidency Small Cause Court Judge. But with regard to the first order, dated 15-6-1950, it has been urged by the learned Advocate appearing for the petitioner that the Court was absolutely wrong in rejecting the application on the ground that it was premature.

(5) In my opinion, there is considerable force in the argument. In this application which was filed on 15-6-1950, the petitioner alleged that the plaintiffs and the defendant of that suit were colluding with each other for the purpose of ejecting the petitioner. In that view of the matter and in view of the fact that the defendant of that suit was not appearing in Court on the date when the suit was taken up for hearing, it was necessary for the Court to give the petitioner an opportunity of filing a written statement by adding him as a party to the suit. It is to be noticed that the tenant defendant did not also file any written statement to the suit. In my opinion, in the special facts of this case it was necessary for the Court to add the petitioner as a party defendant in the suit in order to effectually and completely adjudicate upon all the questions involved in the suit. Section 11 (3), West Bengal Premises Rent Control Act, 1948, gives the sub-tenant a legal right. Whether or not the petitioner in the present case will be able to prove that he has a right under S. 11 (3), West Bengal Premises Rent Control Act, 1948, will have to be decided upon the evidence which will be adduced by him after he is added as a party defendant in the suit.

(6) In my opinion, the Court exercised the jurisdiction with material irregularity in throwing out the petitioner's application dated 15-6-1950, on the ground that it was premature.

(7) The Rule is accordingly made absolute, the order of the Court dated 15-6-1950, is set aside and the suit is ordered to be re-tried after adding the petitioner as a party to the suit and allowing him an opportunity to file a written statement.

(8) There will be no order as to costs in this Court. Further costs will abide the result.

C/D.H. Rule made absolute.

A.I.R. 1953 CALCUTTA 349 (Vol. 40, C. N. 130)

BACHAWAT J.

Muralidhar Kulthia v. Sm. Tara Dye.

Suit No. 150 of 1945, D/- 6-9-1950.

(a) Registration Act (1908), S. 35 — Bengal Registration Rules, Rule 55 — Lease executed by A in favour of B — A not appearing before Registrar — Lease registered by B only — Held, the registration was effective only as against B but not against the executant A who did not appear or admit registration before Registrar: AIR 1923 Cal 35 Rel. on. **(Para 7)**

Anno: Regn. Act, S. 35 N. 10.

(b) Registration Act (1908), S. 49 — Unregistered lease for five years — Admissibility in evidence for collateral purposes.

A lease of premises for five years must be registered under S. 17, Registration Act. In the absence of registration, the lease cannot affect the premises and cannot be received as evidence of any transaction affecting the property under S. 49. The lease, however, is admissible in evidence of part performance of a contract for the purpose of S. 53A, T. P. Act, and also as evidence of any collateral transaction and not required to be effected by registered instrument, e.g. to show the nature and character of possession of the defendant:

AIR 1942 Bom 268; AIR 1932 Cal 634 and 46 Cal WN 419 Ref. (Para 8)
Anno: Regn. Act, S. 49 N. 6.

(c) Transfer of Property Act (1882), Ss. 105, 106 — Possession under invalid lease — Rent accepted — Nature of tenancy — Notice to quit — Validity.

If there is possession under a void or invalid lease, there is a tenancy at will. This situation generally arose in England when the lease was oral and offended against the Statute of Frauds. The law implied that, in the first instance, there was a tenancy at will and that it was converted by payment of rent into a tenancy from year to year or from month to month as the case might be. The law is the same in India. AIR 1944 Pat 30, Rel. on.

Thus where a lessee is in possession of certain premises under a lease which is invalid for want of registration and the rent is paid by the lessee and accepted by lessor every month, by implication of law, there is a tenancy from month to month. 42 Cal WN 771, Foll.

In such a case, one month's notice given by the lessor to the lessee to vacate the premises by the end of certain specified month is a valid notice to quit.
(Paras 11, 12, 14)

Anno: T. P. Act, S. 105 N. 82; S. 106 N. 12, 40.

(d) Transfer of Property Act (1882), S. 113 — Waiver of notice to quit — What constitutes — Notice to quit followed by notice demanding possession — No waiver.

Under S. 113, T. P. Act, there can be waiver of notice to quit with the express or implied consent of the tenant by any act on the part of the landlord showing an intention to treat the lease as subsisting.

Held that in the circumstances of the case, a letter sent by the lessor, after the notice to quit, demanding possession of the premises, did not constitute waiver of the notice. Also that there was no waiver because the lessee was allowed to collect rent and to pay taxes. (Paras 15, 16)
Anno: T. P. Act, S. 113 N. 3.

(e) Transfer of Property Act (1882), S. 53A — Scope — Enforcement of right expressly provided by contract.

Where the transferor has put the transferee in possession in part performance of the contract S. 53A, T. P. Act, by plain implication, enables the transferor to enforce a right expressly provided by the terms of the contract. The fulfilment of all the conditions mentioned in the section is not a condition precedent to the enforcement of such right and the unregistered document is admissible in evidence in a suit to enforce this right of the transferor. AIR 1950 Cal 23, Rel. on.

Thus where a lessee is already put in possession of certain premises in part performance of an unregistered lease, the lessor can enforce the term of the lease entitling him to re-enter if there is default in payment of six months' rent.
(Paras 17, 20)

Anno: T. P. Act, S. 53A N. 13.

REFERENCES: Courtwise/Chronological/ Paras
('27) 54 Ind App 276: (AIR 1927 PC 151) 22
('37) 41 Cal WN 1253: (AIR 1937 PC 251) 22
('42) ILR (1942) Bom 595: (AIR 1942 Bom 268) 8
('23) 50 Cal 180: (AIR 1923 Cal 35) 7
('25) 42 Cal LJ 71: (AIR 1925 Cal 1171) 11
('32) 36 Cal WN 583: (AIR 1932 Cal 634) 8
('38) 42 Cal WN 771 13
('42) 46 Cal WN 419: (76 Cal LJ 369) 8
('50) 54 Cal WN 58: (AIR 1950 Cal 23) 17
('44) AIR 1944 Pat 30: (22 Pat 554) 11

JUDGMENT: This is a suit for the recovery of possession of No. 11/1, Hari Sarkar Lane, Calcutta, arrears of rent and mesne profits.

(2) In 1942 one Srichand Khettry, the husband of the defendant borrowed moneys from the plaintiff and executed deeds of mortgage and further charge over the premises in favour of the plaintiff. On 15-6-1943 the total dues of the plaintiff from Srichand amounted to Rs. 6240/-.

(3) By a registered conveyance dated 15-6-1943 Srichand sold and conveyed the premises to the plaintiff for the sum of Rs. 7500/-. The consideration was paid by adjustment of the outstanding dues and by payment of Rs. 1260/- in cash. By a lease dated 15-6-1943 the plaintiff leased the premises to the defendant for a period of 5 years commencing from the last day of July, 1943 and ending on June 30, 1948. By this lease defendant agreed to pay to the plaintiff a monthly rent of Rs. 40/- as also the owner's and occupier's shares of taxes and the plaintiff was given a right of re-entry in default of payment of six months' rent and the defendant covenanted to deliver vacant possession on the expiry or the sooner determination of the lease. The defendant deposited the sum of Rs. 80/- as advance rent. There is a dispute as to whether this lease is validly registered. By a registered agreement dated 23-9-1943 the plaintiff agreed to convey the premises to the defendant for the sum of Rs. 7625/-. It was provided that if the purchase would not complete within 30-6-1948 or if the defendant would fail to pay six months' rent under the lease, the agreement would stand cancelled and the earnest money of Rs. 101/- would be forfeited, and the defendant would give vacant possession in terms of the lease. The plaintiff's name has been mutated as owner of the premises in the records of the Corporation of Calcutta in spite of the objections of Srichand.

(4) There were negotiations for sale of the premises by Srichand to a client of Messrs. B. N. Basu & Co. but the negotiations fell through. On 29-9-1944 the plaintiff's pleader gave to the defendant a notice to quit on the expiry of the last day of October 1944, and also demanded payment of the sum of Rs. 400/- being arrears of rent for 10 months from December 1943 up to September 1944. In reply, the defendant's pleader asserted that the relationship between the parties was not that of a landlord and tenant and that there was a conditional sale and the defendant would soon release the property on full payment. By way of rejoinder, the plaintiff's pleader sent a letter on 2-11-1944. As there was default in payment of six months' rent the plaintiff by that letter treated the agreement for sale cancelled and forfeited the earnest money and the deposit of advance rent and called upon the defendant to quit and give possession of the premises in terms of the lease. On 12-11-1944 the defendant's pleader sent a reply reiterating her stand. On 2-1-1945 the defendant's pleader informed the plaintiff that the defendant was ready to buy the premises under the agreement dated 23-9-1943 and also enquired as to what amount was due to the plaintiff under the lease dated 15-6-1943. By another letter dated 10-1-1945 the defendant's pleader purported

to tender the sum of Rs. 520/- in full payment of arrears from December 1943 upto December 1944 under the lease. This sum of money was not accepted by the plaintiff. On 22-1-1945 this suit was instituted.

(5) The following issues were settled at the trial:

"1(a) was there a lease as alleged in paragraph 1 of the plaint? If so, is it admissible in evidence? Is the defendant entitled to raise these objections in view of the pleadings?

(b) Was there a forfeiture of the lease? If so, was the forfeiture waived?

(c) If not, is the defendant entitled to relief?

2(a) Was the defendant a monthly tenant under the plaintiff? If so, from what date?

(b) Was such tenancy terminated by valid notice to quit?

(3) Is the suit maintainable in the absence of leave of the Rent Controller to continue the suit?

(4) To what relief, if any, is the plaintiff entitled?"

(6) I have no doubt that the lease dated 15-6-1943 is executed by the defendant. There is a dispute whether this lease has been duly registered. It appears that this lease was presented for registration by the plaintiff on 23-9-1943. The plaintiff duly admitted execution. Four months from the date of execution expired on 15-10-1943. No steps were taken to procure the appearance of the defendant within that period. The Registrar of Assurances thereupon by an order dated 16-10-1943 refused registration of the document in respect of the defendant under sections 76 (1) (a) & 34 of the Registration Act, read with Rule 52 (4) of the Bengal Registration Rules. There is an endorsement dated 11-11-1943 that the document was registered in Book No. 1. Under section 34, Registration Act, no document can be registered under the Act unless the persons executing the document appear before the Registering Officer within the time allowed for presentation. Under section 35, if any person by whom the document purports to be executed denies its execution, the registering officer must refuse to register the document as to the person so denying. Under Rule 55 of the Bengal Registration Rules, if some of the executants appear and admit execution and others do not appear, the document shall be registered in respect of those who admit and registration shall be refused as regards others.

(7) There is no doubt that there is no effective registration as against the defendant. She never appeared before the Registrar. Under Rule 55, Bengal Registration Rules, the registration was refused as against her but the document was registered as against the plaintiff who admitted execution. Indeed it is settled law that even if the Registrar had purported to register the document against the defendant, such registration would not be effective as against the defendant who neither appeared nor admitted execution. — 'Eziekeil & Co. v. Annada Charan Sen', 50 Cal 180.

(8) The document purports to be a lease for five years. Under S. 107, T. P. Act, such lease could be made only by a registered document. As the document is not duly registered, there is no effective lease. Under section 17, Registration Act, such lease must be registered and in the absence of registration under section 49, the lease cannot affect the premises and cannot be received as evidence of any transaction affecting the property. The lease, however, is admissible in evidence of part performance of a contract for the purpose of section 53A, T. P. Act, and also as evidence of any collateral transaction and not required to be effected by registered instrument, e. g. to show the nature and character of possession of the defendant — 'Vishwanath Haibatrao Deshpande v. Raghunath Dhondo Deshpande', I. L. R. (1942) Bom 595. — 'J. C. Gaistaun v. Pratulla Kumar', 36 Cal W. N. 583. In — 'Suruchibala v. Surujmia', 46 Cal. W. N. 419, there was a dispute as to title and by an unregistered solenama filed in a suit for ejectment, the defendants agreed to continue in possession as tenants under the plaintiff. Pal, J., held that the document was admissible in evidence to show that though before the solenama the defendants might have been in possession in assertion of right of ownership, after the solenama the character of their possession became changed and they began to hold the lands only as tenant under the plaintiff.

(9) The plff. has sworn that the deft. through her husband paid to the plaintiff rent from 15-6 1943 up to November 1943. I read the correspondence as an admission by the defendant that all sums payable under the lease and accrued due prior to December 1943 has been paid. Counterfoils of rent receipts issued to the defendant have been proved. The defendant has not chosen to give any evidence. I have no hesitation in coming to the conclusion that the rent up to and including November 1943 was paid by the defendant to the plaintiff.

(10) I hold that the relationship between the plaintiff and the defendant was that of landlord and tenant, that the defendant was in possession of the premises as tenant and as such paid rent to the plaintiff.

(11) If there is possession under a void or invalid lease, there is a tenancy at will. This situation generally arose in England when the lease was oral and offended against the statute of frauds. The law implied that, in the first instance, there was a tenancy at will and that it was converted by payment of rent into a tenancy from year to year or from month to month as the case might be. The law is the same in India. Mulla's Transfer of Property Act, 3rd Edn. pp. 630, 631, 633, 658. — 'Darbarilal v. Ranigunge Coal Association, Ltd. A. I. R. 1944 Pat 30. — 'Ramchandra v. Syameswari', 42 Cal L. J. 71. In England Courts of Equity went further and said that the lease though void as a lease was valid as a contract and could be enforced by specific performance and also said that if there was part performance of the lease the defence of the statute of frauds was excluded. In India there is no such equitable doctrine yet under section 53A, T. P. Act., the lease may be enforced as a contract to the extent and in the manner provided in that section. The implied monthly tenancy is therefore subject to the modification if any made by that section.

(12) In this case there is an unregistered lease followed by payment and acceptance of rent. By implication of law there is therefore a tenancy from month to month. The terms of the lease may also be enforced under section 53A in the manner and to the extent provided by that section.

(13) The tenancy commenced on 15-6-1943. The rent for 15 days upto the end of June 1943 was paid & thereafter subsequent rent from month to month according to the English calendar was also paid. I have no doubt that the tenancy in the eye of the law is deemed to be a tenancy from month to month according to the English calendar and is terminable by 15 days' notice expiring with the end of a month of such tenancy. In — 'Udoytara v. Habibar', 42 Cal W. N. 771 there was an unregistered lease executed in the middle

of the year followed by payment and acceptance of rent from the beginning upto the end of the year; Mukherjee J. held that there was a tenancy from month to month according to the English calendar.

(14) The notice to quit by the end of October, 1944 was served on the defendant on the 4th October 1944. I have no doubt that this notice is a valid notice to quit.

(15) It is contended by the defendant that the notice to quit has been waived by service of the notice dated 2-11-1944 whereby the plaintiff demanded possession. In my judgment, this contention is unsound. Under section 113, T. P. Act, there can be waiver of notice to quit with the express or implied consent of the tenant by any act on the part of the landlord showing an intention to treat the lease as subsisting. The letter dated 2-11-1944 does not show any intention to treat the lease as subsisting. It is a demand for possession. It is not a notice to quit in term of section 106, T. P. Act. It does not show that the defendant could remain rightfully in possession after the expiry of October, 1944.

(16) It is also contended by the defendant that the plaintiff waived the notice to quit by allowing the defendant to collect rent and pay taxes. In my judgment, this contention also is plainly unsound. The plaintiff is therefore entitled to a decree for ejectment.

(17) The plaintiff must succeed on another ground also. In — 'Ram Pratap v. National Petroleum', Co. Ltd.. 54 Cal. W. N. 58, there was an unregistered lease for a term of five years for manufacturing purposes. The lessee was let into occupation and paid rent which was accepted. On the expiry of the period of the lease, the lessor instituted a suit for ejectment. The defence was that the letting for manufacturing purposes followed by payment and acceptance of rent, must be deemed to be a lease from year to year terminable by six months notice to quit and that as no such notice to quit was served, the plaintiff had no cause of action.

P. N. Mitra and R. C. Mitter, JJ., held that:

(1) Section 53A, Transfer of Property Act, by plain implication enables the transferor to enforce a right expressly provided by the terms of the contract:

(2) The fulfilment of all the conditions mentioned in the section is not a condition precedent to the enforcement of such right:

(3) The unregistered document is admissible in evidence in a suit to enforce this right of the transferor.

(18) The Court also observed that there was no doubt that in that case if the transferor wants to enforce the right provided by the contract he must have put the transferee in possession in part performance of the contract. I have no doubt that the same result would follow if the transferee being already in possession continues in possession in part performance of the contract and does some act in furtherance of the contract.

(19) This decision is a decision of a Division Bench of this Court and I have no doubt that I should follow it. I do not consider myself free to put another construction on the section.

(20) I confess that I did not foresee this aspect of the case when I framed the issues. But I think the plaint in this case can be fairly read as a plaint to enforce the terms of the lease. There is no doubt that the defendant continued in possession as lessee in part performance of the contract of lease and as such paid rent in furtherance of such contract. The plaintiff is therefore entitled to enforce the terms of the lease. Under the lease the plaintiff is entitled to re-enter if there is default in payment of six months rent and on the determination of the lease on such default the defendant is bound to quit and give vacant possession to the plaintiff. There is no doubt that there has been default of six months rent. The lease has been determined. The defendant must therefore in terms of the lease quit the premises.

(21) Mr. Mitra has conceded and in my view rightly that it is not necessary to obtain the leave of the Rent Controller to maintain this suit.

(22) There was some suggestion that the defendant is entitled to show that the plaintiff is not the owner of the premises inasmuch as she was not in possession of the premises at the time of the commencement of the tenancy. There is no substance in this contention. In — 'Krishnaprasad v. Barabani Coal Concern', 41 Cal W. N. 1253 at p. 1259, (P. C.) His Lordship of the Judicial Committee observed as follows:

"There is in English case law some authority for the view that a tenant is only estopped from denying his landlord's title if at the time when he took his lease he was not already in possession of the land. But in section 116 the Indian Legislature has formulated no such condition. The words 'at the beginning of the tenancy' give no ground for it. When a demise of land is made and acted on, when the tenant proceeds to occupy and enjoy under a grant, gets the shelter of the grantor's title and the benefit of his covenants, it is difficult to see why 'during the continuance of the tenancy' he should be free of this form of estoppel. 'Tenant who has occupied but not entered' is a difficult notion to thrust into section 116 and quite impossible to find therein. * * * In — 'Vertannes v. Robinson', 54 Ind. App. 276 (P. C.) the Board applied section 116 to a case in which it was difficult to say that the tenant had obtained possession from the landlord."

(23) The plaintiff is, therefore, entitled to a decree for possession and ejectment of the defendant from premises No. 11/1, Hari Sarkar Lane. and a decree for the sum of Rs. 400/- on account of arrears of rent and a decree for mesne profits at the rate of Rs. 40/- per month from 1-10-1944 until vacant possession is delivered up, and costs.

(24) The entire decree would not be executed for a period of three months from today. The plaintiff is also entitled to reserve costs and the plaintiff will be entitled after the expiry of three months to withdraw the moneys deposited in this Court to the credit of the suit in pro tanto satisfaction of his claim under this decree.

B/D.R.R. Order accordingly

A.I.R. 1953 CALCUTTA 352 (Vol. 40, C. N. 131)

P. N. MOOKERJEE J.

Jatindra Nath, Defendant-Appellant v. Malai Ram Show, Plaintiff-Respondent.

A. F. A. D. No. 380 of 1948, D/- 26-6-1951.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 14 and 18 (5) — Suit under Bengal House Rent Control Order, 1942 — Applicability of S. 18 (5).

Section 14 so far as it conferred benefit upon the tenant is not retrospective except to the extent that it is attracted by S. 18(5). (Para 5)

In order that S. 18 (5) may apply, the case must be one where the decree for ejectment can be passed only on the ground

of default in payment of arrears of rent or 'ipso facto' determination of tenancy under the Act of 1948. The suit in question did not fall within that description. The suit in the present instance was instituted at a time when the Rent Control Order, 1942 was in force. There was nothing in the Act of 1948 which made its provisions applicable to pending actions and, therefore, no part of the Act of 1948 could apply to the present suit. Therefore, S. 18 (5) of the Act of 1950 was not applicable to the present case. Accordingly, S. 14 also could not apply: 55 Cal WN 6 and AIR 1952 Cal 130, Rel. on. (Para 6)

Even assuming that S. 14 was retrospective by itself and applied to pending cases independently of S. 18 (5), the position would not be altered in the present case as apart from anything else, the defendant, having made defaults on more than three occasions within a period of 18 months in the payment of two months' rent, must be held to have disentitled himself to the benefits if otherwise available, of S. 14, under the proviso thereof. AIR 1952 Cal 433, Rel. on. (Para 7)

(b) Precedents — Bench decision in Original Side appeal — It is equally binding upon all Judges sitting singly.

A Bench decision, pronounced on either Side of the High Court is, nevertheless a Bench decision of the High Court and is, as such equally binding upon all its Judges, sitting singly. (Para 8)

Anno: C. P. C., Pre. N. 15.

(c) T. P. Act (1882), S. 106 — Lease from month to month — Notice to quit — Notice demanding possession in the alternative at the end of tenancy which would expire next after 15 days from receipt of notice is valid. (1811) 170 ER 1324, (1847) 175 ER 145, (1810) 170 ER 1251 (2) and (1895) 1 QB 378, Rel. on. Case law Ref. (Para 13)

Demand for possession in the alternative form is perfectly valid and well recognised in law. (1811) 170 ER 1324 and (1947) 2 A.U.E.R. 45, Rel. on. (Para 15)

(General principles applicable to notice to quit discussed).

Anno: T. P. Act, S. 106 N. 19, 40.

Apurbadhan Mukherjee and Sachindra Chandra Das Gupta, for Appellant; Nani Coomer Chakravarti and Chandra Kumar Chatterjee, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('18) 45 Ind App 222: (AIR 1918 PC 102)	12
('34) 1934 All LJ 674: (AIR 1934 All 787)	12
('49) AIR 1949 All 173: (ILR (1949) All 414)	16
('98) 25 Cal 36: (2 Cal WN 106)	12
('38) 68 Cal LJ 481: (AIR 1939 Cal 291)	12
('51) 55 Cal WN 471: (AIR 1952 Cal 130)	6
('51) 87 Cal LJ 4: (AIR 1952 Cal 433)	7, 8
('51) 55 Cal WN 6	6
('31) 60 Mad LJ 293: (AIR 1931 Mad 352)	12
('21) AIR 1921 Pat 307: (61 Ind Cas 976)	16
(1836) 5 Ad & El 350: (111 ER 1198)	12, 15
(1947) 1 AUER 246	12
(1947) 2 AUER 45	15
(1810) 170 ER 1251 (2): (2 Camp 559)	14
(1811) 170 ER 1324: (3 Camp 115)	14, 15
(1847) 175 ER 145: (2 Car & K 351)	14
(1802) 4 Esp 185: (170 ER 685)	12
(1807) 6 Esp 70: (170 ER 833)	12
(1895) 1 QB 378: (64 LJQB 200)	12, 14
(1900) 1 QB 23: (69 LJQB 17)	12

JUDGMENT: In this appeal by the defendant which arises out of a suit for ejectment, arrears of rent and damages, two questions have been raised by Mr. Mukherjee appearing for the defendant-appellant. The first is whether the defendant-appellant is entitled to any benefits under either S. 18(5) or S. 14, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and the second question relates to the legality, validity and sufficiency of the notice to quit which, according to the plaintiff-respondent and the Courts below, determined the tenancy in the present case.

(2) The material facts as found by the Courts below are not now in dispute and they are as follows:

(3) The defendant was a monthly tenant under the plaintiff in respect of the two rooms in suit in holding No. 172, Panchanantala Road, Howrah, at a rental of Rs. 12/- per month. There was default in payment of rent and, therefore, the plaintiff instituted a suit for recovery of over nine months' rent and therein the plaintiff obtained a decree against the defendant. Eevn after the institution of the said suit the default in the payment of rent continued and, accordingly, the plaintiff served a notice to quit on the defendant on 19-7-1945 and brought the present suit for ejectment and the other reliefs, mentioned above, on 29-9-1945, after obtaining the necessary permission from the Rent Controller under the law then in force.

(4) Both the Courts below have decreed the plaintiff's suit holding 'inter alia' that the notice to quit (copies whereof are Exs. 2 and 3 (a)) was legal, valid and sufficient and that it had been properly served upon the defendant and had duly terminated his tenancy. In this appeal against the said decree for ejectment Mr. Mukherjee has, as stated above, raised only two contentions which have been mentioned above.

(5) Admittedly, the suit was instituted on 29-9-1945. At that time the Bengal House Rent Control Order, 1942 was in force at Howrah. So far, therefore, as the recent Rent Laws are concerned, this case would, in my opinion, be governed by the provisions of the said Rent Control Order, 1942, unless there be something in the subsequent Rent Laws applicable to the present case. Mr. Mukherjee has argued that Ss. 14 and 18(5) of the Rent Act of 1950 would be applicable to the present case. His argument is that the said sections are retrospective and apply to the present case. In my opinion, this argument cannot be accepted. Section 14, so far as it confers benefit upon the tenant is not retrospective except to the extent that it is attracted by S. 18(5). Unless, therefore, S. 18(5) applies to the present case S. 14 cannot be of any assistance to the appellant.

(6) Dealing with this part of the case, Mr. Mukherjee urges that S. 18(5) is expressly retrospective and applies to pending cases. The difficulty, however, is that the section is retrospective only to this extent that "it applies to a pending action for ejectment only when that action is of such a type that no decree of ejectment would be passed therein except on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, or after the recent amendment of the said S. 18(5) on the ground that the interest of the tenant in the premises in question has been 'ipso facto' determined under the provisions of sub-s. 3 of S. 12, West Bengal Premises Rent Control (Temporary Provisions) Act, 1948." The portion underlined (here in " ") above indicates that, in order that

S. 18(5) may apply, the case must be one where the decree for ejectment can be passed only on the ground of default in payment of arrears of rent or 'ipso facto' determination of the tenancy under the Act of 1948. The present case does not, in my opinion, fall within that description. The suit in the present instance was, as I have said above, instituted at a time when the Rent Control Order, 1942 was in force. There is nothing in the Act of 1948 which makes its provisions applicable to pending actions and, therefore, no part of the Act of 1948 can apply to the present case. See the case of —'Monomohan Moitra v. Gobinda Das', 55 Cal WN 6. If, therefore, any decree for ejectment can be made in the present case it will be made not on any 'ground' under the 1948 Act but on 'grounds' outside the same. Section 18(5) of the 1950 Act, whether before or after amendment, cannot, therefore, be invoked by the appellant in his aid. This view is amply supported by the Bench decision of this Court in the case of — 'Joy Kumar v. S. K. Choudhury', 55 Cal WN 471. I hold, therefore, that S. 18(5) of the Act of 1950 is not applicable to the present case and that, accordingly, S. 14 also cannot apply.

(7) Even assuming that S. 14 is retrospective by itself and applies to pending cases independently of S. 18(5), the position will not be altered in the present case as apart from anything else, the defendant, having made defaults on more than three occasions within a period of 18 months in the payment of two months' rent must be held to have disentitled himself to the benefits, if otherwise available, of S. 14, under the proviso thereof. This follows from the Bench decision of this Court in the case of — 'Sreenarain Mansingka v. Amarnath Mishra', 87 Cal LJ 4, which has held that, for purposes of the proviso to S. 14, pre-Act defaults are relevant and have to be taken into account, and sitting singly, I consider myself bound by that decision.

(8) In expressing myself as above I have not overlooked the fact that the Bench decision, referred to above, was pronounced in an Original Side Appeal of this Court. To me, however, that appears to be of no consequence as, notwithstanding opinions to the contrary sometimes expressed, I feel no hesitation in holding that a Bench decision, pronounced on either Side of this Court, is, nevertheless, a Bench decision of this Court and is, as such, equally binding upon all its Judges, sitting singly. I hold, therefore, that I am bound by the decision reported in — 'Sreenarain Mansingka v. Amarnath Mishra', 87 Cal LJ 4 and must accordingly, reject the appellant's claim to protection under S. 14 of the Act of 1950.

(9) The first contention of Mr. Mukherjee must, therefore, fail and is overruled.

(10) The contention regarding the notice to quit raises question of some nicety and considerable importance. The relevant portion in the notice to quit is in these terms:

> "Notice is hereby given to you to vacate and deliver up possession of the said two rooms with the end of 31-7-1945 or at the end of a month of your tenancy which would expire next after fifteen days from the receipt of this notice."

Mr. Mukherjee contends that the notice is illegal, invalid and insufficient. In developing this contention Mr. Mukherjee has advanced the following three arguments namely, (1) that the notice having admittedly been served on 19-7-1945, it is illegal, invalid and insufficient so far as it demands possession "with the end of 31-7-1945" as in such circumstances, it cannot be a fifteen days' notice to quit; (ii) that the notice, so far as it demands possession 'at the end of a month of your tenancy which would expire next after 15 days from the receipt of this notice', is also bad, invalid and insufficient as it is vague and indefinite and, therefore, inappropriate and ineffective in law to terminate the tenancy; and (iii) that the notice is also bad and invalid as the demand for possession, contained in it, being in the alternative, renders the notice bad for uncertainty and therefore, void, or, at least, ineffective in law to determine the tenancy.

(11) Argument (i) noted above has no answer and must be accepted, but that would not be sufficient to invalidate the notice to quit. Unless, therefore, either of the other two arguments (ii) and (iii) Mr. Mukherjee noted above can be accepted the contention raised on the notice to quit must fail.

(12) In judging the soundness of the said two arguments (ii) and (iii) it has to be remembered, at the outset, that the relevancy and applicability of English decisions on this branch of the law to Indian conditions has been expressly recognised by the Judicial Committee in the case of — 'Harihar Banerjee v. Ramsoshi Roy', 45 Ind App. 222 (P.C.). It is also necessary to recall in this connection that in this country and in England the rule is firmly established that the construction of notices to quit should be such as to 'rationally interpret' lame and inaccurate notices & make them sensible where the recipient cannot have been misled as to the intention of the giver: See — 'Doe d Williams v. Smith', (1836) 5 Ad & EL 350 and — 'Wride v. Dyer', (1900) 1 QB 23 which were cited with approval in the above Privy Council decision, that a liberal construction ought to be put upon a notice to quit and it should not be defeated by inaccuracies either in the description of the premises: See — 'Doe d Cox v. Roe', (1802) 4 Esp 185, — 'Shama Churn v. Wooma Churn', 25 Cal 36, —'Giridhari v. Purnendu', 68 Cal LJ 481 and 45 Ind App. 222 (P.C.), referred to above, or the name of the tenant: See — 'Doe v. Spiller', (1807) 6 Esp 70 the principle of which decision must be held to be applicable to India in view of the observation made in '45 Ind App 222 (P.C.)' or the date of expiry of the notice: See — 'Sidebotham v. Holland', (1895) 1 Q B 378, —'Doe d Williams v. Smith', (1836) 5 Ad & El 350, — 'W. Davis Ltd. v. Huntly', (1947) 1 A.U.E.R. 246, —Gnanaprakasam v. F. S. Vaz, 60 Mad LJ 293, — 'Tika Ram v. Dooji Maharaj', 1934 All LJ 674, and, further, that the test of its sufficiency would be not what it would mean to a stranger ignorant of all facts and circumstances of the tenancy in question but what it would mean to the tenant, presumably conversant with all those facts and circumstances: see — 'Harihar Banerjee v. Ramsoshi Roy', 45 Ind App 222 (P.C.). In addition to the above, the rule is also well established that notices to quit are to be construed not with a desire to find faults with them which would render them defective but they are to be construed at 'res magis valeat quam pereat': see — 'Harihar Banerjee v. Ramsoshi Roy', 45 Ind App. 222 (P.C.).

(13) The legality, validity and sufficiency of a notice to quit has to be examined in the light of the above rules, the soundness of which cannot now be questioned, and, as a result of such examination in the present case, I have unhesitatingly come to the conclusion that arguments (ii) and (iii) of Mr. Mukherjee are unsound and cannot be accepted. In my opinion, the notice to quit, served in the present case, is neither vague

nor insufficient and not bad in law and the defendant's tenancy has been duly determined thereby.

(14) Mr. Chakravarti, appearing for the plaintiff-respondent, has drawn my attention to the English decisions reported in — 'Doe D Digby v. Steel', (1811) 170 ER 1324 — 'Doe v. Timothy', (1847) 175 ER 145 and —'Doe D Baker v. Woombwell', (1810) 170 ER 1251 (2) which hold, in effect, that a notice to quit demanding possession at the end of the anniversary of the commencement of the tenancy is not vague or insufficient or invalid. The leading case of —'Sidebotham v. Holland', (1895) 1 QB 378, confirms that view. To my mind the principle underlying these decisions is sound and ought to be applied in this country. Argument (ii) of Mr. Mukherjee must, therefore, fail.

(15) Reference may now be made to the following passage occurring in Mulla's Transfer of Property Act, Edn. 3, at p. 653, which runs thus:

"It is usual after mentioning the date of the anniversary of the tenancy to add in the alternative some general words as 'at the end of the year of the tenancy which will expire next after the end of one half year from the date of the service of this notice' ".

That passage (which first appeared in the 1st Edition of the book in 1933 and was reproduced verbatim without any change — in the two later editions of the book) suggests that demand for possession in the alternative form is perfectly valid and well recognised in law. The English case of — 'Doe D Williams v. Smith', (1836-5 Ad. & El 350) cited above, and —'Doe D Digby v. Steel', (1811) 3 Camp 115 at p. 117, and — 'Crate v. Miller', (1947) 2 A. U. E. R. 45, clearly support the validity of such demand. There is also nothing, either in principle or in the authorities, which runs counter to this suggestion of the learned Author and, accordingly, I am inclined to accept the same. Tested in this background argument (iii) of Mr. Mukherjee must also fail.

(16) It further appears that the question, now before me, has also been judicially considered in other parts of this country. There are, at least two judicial decisions — 'Sankar Ram v. Tulsi Bhagat', AIR 1921 Pat 307 and — 'Ganga Prasad v. Prem Kumar', AIR 1949 All 173 which have a direct bearing on that question. These two decisions, in my opinion, clearly support the view that the notice to quit in the present case is good, valid and sufficient and, as I have already indicated above, I have no doubt in my mind that that view is correct and ought to prevail.

(17) I would, accordingly, reject Mr. Mukherjee's second contention and hold that the notice to quit served in the present case is neither bad nor invalid nor insufficient & that it had duly determined the defendant's tenancy.

(18) The result, therefore, is that all the contentions raised by Mr. Mukherjee fail and this appeal is dismissed. Having regard, however, to all the circumstances I make no order as to costs in this appeal.

(19) Leave to appeal under Cl. 15 of the Letters Patent is asked for and is granted.

B/V.B.B.

Appeal dismissed.

AIR 1953 CALCUTTA 355 (Vol. 40, C. N. 132)

HARRIES C. J. AND BANERJEE J.

The Indian Spinning Mills Ltd. and others, Appellants v. His Excellency Lt. General Madan Shamsher Jang Bahadur Rana and others, Respondents.

A. F. O. O. No. 132 of 1950, D/- 30-1-1951.

Companies Act (1913), S. 79(3) — 'Impracticable' means impracticable from a reasonable point of view. 55 Cal WN 653, Rel. on.

(Paras 20 and 21)

S. K. Basu with B. C. Dutt, for Appellants; Ranadev Chaudhuri and Sudhamay Bose, for Respondents.

REFERENCE ..... /Para

('50) Suit No. 202 of 1950: (55 Cal WN 653) 20

HARRIES, C. J.: This is an appeal from an Order of Mookerjee J. dated 22-9-1950, directing that an extraordinary general meeting of the Company should be held.

(2) The application was made to Mookerjee J. under S. 79(3), Companies Act. It was alleged that owing to disputes which had arisen between the share-holders and the directors of the company in question it was impracticable to hold an extraordinary general meeting and therefore application was made to the Court for the convening of such a meeting under the directions of the Court. The learned Judge having considered the whole of the matter came to the conclusion that it was impracticable to call a meeting of the company in any manner in which the meetings of that Company might be called in accordance with the Articles of the Companies Act.

(3) The paid up capital of this Company is Rs. 4,59,420/- of which the contesting respondents hold Rs. 3,66,000/-.

(4) The last annual general meeting of the Company was held on 23-12-1949 and thereafter the Board of Directors consisted of Gopal Chandra Saha Monoj Mohan Ray, S. K. Mukherjee, N. N. Bose and A. C. Roy Chowdhury; the latter was the nominee of the contesting respondents who are referred to by the learned Judge as the Nepal group. This Nepal group holds roughly 3/4ths of the paid up share capital.

(5) Mr. Roy Chowdhury had been elected Chairman of the Board of Directors. But disputes arose and eventually the other Directors challenged his position on the Board. Mr. Roy Chowdhury originally only held one share and the qualification of a director was the holding of 250 shares. The contesting respondents arranged to transfer the necessary number of shares to Mr. Roy Chowdhury to qualify him for the post of a director. But it is said on behalf of the appellants that the transfer was bad. On 12-7-1950 the Board noted in their proceedings that the transfer of 250 shares in the name of Mr. Roy Chowdhury on the strength of which he had been acting as a director was defective. The following resolution was accordingly passed:

"It is therefore resolved that in view of irregular transfer which does not confer on Mr. Roy Chowdhury title to the shares he be requested to vacate from the Board of Directors of the Company till the transfer is regularised when he will be co-opted."

(6) Mr. Roy Chowdhury thereafter was excluded from the Board. Another share-holder was co-opted in his stead and a new chairman appointed.

(7) The contesting respondents contend that the whole of these proceedings of the Board of Directors were illegal and of no effect. According to them Mr. Roy Chowdhury held the necessary qualification and therefore was a director and could not be excluded by his co-directors and no one could be appointed in his stead.

(8) The position of Mr. Roy Chowdhury has now become the subject-matter of two suits. Certain members of the Nepal group and Mr. Roy Chowdhury filed on 30-8-1950 Suit No. 3559 of 1950 on the Original Side of this Court in which they claimed a declaration that Mr. Roy Chowdhury had at all material times been and was still a director of the company and was entitled to act as such. They further claimed that the resolution of the Board dated 12th July was illegal and 'ultra vires' and they asked for an injunction restraining the other directors from excluding Mr. Roy Chowdhury from the meetings of the directors. They further asked for a declaration that all the resolutions passed by the directors during the time when Mr. Roy Chowdhury was excluded were invalid and inoperative.

(9) Another suit was filed by one Jatish Chandra Pal along with another share-holder and in that suit a prayer was made for a declaration that an extraordinary general meeting which had been called for 9-9-1950, was improperly convened, and further that any directors appointed at that meeting should be declared to have been invalidly appointed.

(10) The cause of this latter suit was the requisitioning of an extraordinary general meeting by the respondents.

(11) It is suggested that the respondents had been endeavouring to have an extraordinary general meeting called from June 1950. Requisitions, it is said, had been sent to the directors, but nothing had been done. According to the respondents a requisition for an extraordinary general meeting was sent to the Company on 12-7-1950. The Company admit receiving this requisition, but state that they received it on 2nd August. Be that as it may, no meeting was called within twenty-one days of 2nd August, and it is quite clear that the directors did not wish to have a meeting. Mr. I. P. Mukherjee, who appeared for the directors before the Court below, stated quite frankly that the directors did not propose to call a meeting as the general meeting of the Company would be held in December of 1950.

(12) As the directors did not call a meeting, the respondents who were entitled to requisition such a meeting gave notice to all the shareholders for an extraordinary general meeting to be held at the registered office of the Company on 9th September. It was this meeting that the suit of Jatish Chandra Pal was intended to defeat. It may be added that the respondents claim that a large number of share-holders came to the registered office to attend this meeting, but they found the office locked. The case for the directors is that no one came to the office to attend the meeting, though the place was kept open for half an hour after the scheduled time of the meeting. However, it is clear that no meeting was held & an application was made to the Court to summon an extraordinary general meeting under the provisions of S. 79 (3), Companies Act.

(13) Section 79(3) in so far as it is material is in these terms:

"If for any reason it is impracticable to call a meeting of a Company in any manner in which meeting of that Company may be called or to conduct the meeting of the Company in manner prescribed by the Articles or this Act, the Court may, either of its own motion or on the application of any director of the Company or of any member of the Company who would be entitled to vote at the meeting, order a meeting of the Company to be called, held and conducted in such manner as the Court thinks fit....."

(14) The case for the respondents was that having regard to the disputes that had arisen between the directors and the share-holders it was impracticable to hold a meeting of the Company and accordingly an application was made to the Court.

(15) Mr. Bankim Dutt on behalf of the appellants has urged that it was quite impracticable to hold a meeting. He pointed out that if the directors refused to convene a meeting, then by reason of S. 78 the share-holder could convene an extraordinary general meeting. According to him there was nothing to prevent the respondents, who, as I have said, held practically 3/4ths of the paid up share capital, calling a meeting, and it could not be said that the calling of such a meeting was impracticable.

(16) Mr. Chowdhury, on the other hand, has pointed out that it could well be argued that by reason of S. 78(3), Companies Act, no meeting could be called by the share-holders. That sub-section deals with the right of share-holders to requisition an extraordinary general meeting and the sub-section is in these terms:

"If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so-called shall be held within three months from the date of the deposit of the requisition."

(17) This sub-section gives the share-holders a right to call a meeting if the directors do not proceed within twenty-one days of receiving a requisition to call such a meeting. Mr. Chowdhury has pointed out that one of the serious disputes in this case is whether at the time an application was made to the Court there existed a Board of Directors. If Mr. Roy Chowdhury, as suggested by the respondents, had been illegally excluded from the Board, then there was no valid Board of Directors. Therefore there was no valid Board of Directors who could order an extraordinary general meeting if one was requisitioned. Therefore Mr. Chowdhury contends that if there was no valid Board of Directors, there could be no question of directors not proceeding within twenty-one days to call a meeting and it is only when directors do not proceed to call a meeting that the requisitionists may call such a meeting. In short, Mr. Chowdhury has contended that the right of the requisitionists to call a meeting only arises if the directors refuse or neglect to call such a meeting. Where there are no competent directors there can be no question of the refusal or neglect and therefore he contends that the right to call a meeting under S. 78(3) would not arise.

(18) The learned Judge rightly refused to decide the matters which are in issue in the suit and I do not think it will be right for us to express any opinion upon these matters. However, it is clear that there is a serious dispute between the parties as to whether Mr. Roy Chowdhury was qualified to act as a director and whether or not he was wrongly excluded from the Board. If it transpired in the suit that he was wrongly excluded from the Board difficulties might arise concerning any meeting which

the requisitionists might call under S. 78(3). In fact it seems fairly clear that if such a meeting was called it would be the cause of considerable litigation.

(19) If the meeting was called difficulties would undoubtedly arise as to the conduct of the meeting. In an extraordinary general meeting the parties might elect their own Chairman, but the probabilities are that objection would at once be taken to Mr. Roy Chowdhury either acting as chairman or even voting or being concurred in the proceedings at all. It seems to me that if the requisitionists were allowed to conduct this meeting endless difficulties would arise and therefore, I think the learned Judge was right in holding that it was impracticable to hold such a meeting.

(20) The meaning of the word "impracticable" as used in this section has been considered by my learned brother in the case of — 'In re Malhati Tea Syndicate Ltd.', (Suit No. 202 of 1950). He following some observations in a decision of the Privy Council, held that the term implies that it is impracticable from a reasonable point of view. The Court must take a common sense view of the matter and must act as a prudent person of business.

(21) Where the calling of a meeting by requisitionists would lead to endless litigation and where matters might arise for debate and decision which were already the subject-matter of suits, it appears to me that the holding of a meeting would be impracticable. It would be most unlikely to lead to any result and would inevitably cause more litigation and confusion and further embitter the feelings between the parties. That being so the learned Judge, I think, was right in coming to the conclusion that the Court should order such a meeting.

(22) The directors did summon a general meeting of this Company in December of 1950. But it appears that before that meeting was held, the meeting ordered by the Court was held when an entirely new set of directors were appointed. Mr. Bankim Chandra Dutt contended that the meeting ordered by the Court should not have been held by reason of a stay order issued by this Bench. It is true that this Bench did issue an order staying the order of Mookerjee J., but it was thought that the meeting which had been ordered to be held had not been held. It now transpires that the meeting ordered by Mookerjee J. had been held and therefore the stay order which this Bench issued was wholly infructuous. The stay order issued by this Bench was ultimately vacated, and in any event it never was effective. What effect the meeting ordered by the Court will have upon the subsequent meeting in December is a matter on which we express no opinion.

(23) A point was taken as a preliminary point that no appeal lay in this case. I do not think it is necessary to discuss that matter, but I wish to make it clear that we do not hold that an appeal does lie. However as there are no merits in the appeal it is unnecessary to consider that preliminary point, because even if an appeal lay it would fail.

(24) In the result, therefore, this appeal must be dismissed with costs. Certified for one counsel.

(25) BANERJEE J.: I agree.

B/D.R.R. Appeal dismissed.

AIR 1953 CALCUTTA 357 (Vol. 40, C. N. 133)

P. B. MUKHARJI J.

Subala Devi, Petitioner v. Corporation of Calcutta, Opposite Party.

Criminal Revn. No. 237 of 1952, D/- 11-7-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 3(48) and 527 — Occupier — Meaning of.

A tenant is an occupier within the meaning of the Calcutta Municipal Act. A tenant whose tenancy has been terminated by a notice to quit will in any event be a person liable to pay damages or mesne profits and would therefore come within the meaning of the word "occupier." (Para 5)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 12 — Scope of — Municipalities — Calcutta Municipal Act (3 of 1923), S. 527.

The Small Cause Court acting under S. 527(2), Calcutta Municipal Act, does not make an order or decree for the recovery of possession. It only makes an order requiring the occupier of a building "to afford all reasonable facilities" to the owner to comply with the requisition under the Calcutta Municipal Act. Such an order of the Small Cause Court is not of the nature of an order or decree for the recovery of possession contemplated by S. 12. Section 527, Calcutta Municipal Act and S. 12 of Rent Act of 1950 are not concurrent Statutes invading the same field of operation. They contemplate different orders and different categories. Section 12, West Bengal Premises Rent Control Act of 1950 does not override S. 527, Calcutta Municipal Act. (Para 5)

(c) Municipalities — Calcutta Municipal Act (3 of 1923), S. 488(2) — "Continues to commit such offence" — Criminal P.C. (1898), S. 403.

The words "continues to commit such offence" used in sub-s. (2) of S. 488 mean that the particular offence for which the person has been previously convicted under S. 488(1) is allowed to continue. What was a primary offence under S. 488(1)(c) of the Act becomes the repetitive offence of continuance under this sub-s. (2). Though the requisition formed the cause of the first offence under S. 488(1)(c), it did not spend its force in the sense that it still continues to provide the basis of the fresh offence of continuance contemplated under S. 488(2) of the Act. Such an interpretation does not mean that the accused is being convicted twice for the same offence which certainly cannot be. Here the Statute provides that continuance of the offence will itself be another species of offence under this sub-s. (2) for which a different penalty is imposed so that not only the act of prime failure is an offence but also its continued failure, another offence. (Para 7)

Anno: Cr. P. C., S. 403 N. 1, 3.

(d) Municipalities — Calcutta Municipal Act (3 of 1923), S. 488(2) — Fresh requisition — Necessity.

It is not correct to say that a further conviction under S. 488(2), Calcutta

Municipal Act can only be maintained on a fresh requisition under R. 4(1) of Sch. 18 of the Act. If fresh requisitions are to be given then it would no longer be a case of continuance of offence under S. 488(2), Calcutta Municipal Act in such case of non-compliance with the further requisition. In that event the offence will again be one under S. 488(1)(c) of the Act. Because then the offence will be failure to comply with such fresh requisition lawfully made under the Rules as stated under S. 488(1)(c). (Paras 6 and 7)

(e) Municipalities — Calcutta Municipal Act (3 of 1923), S. 488(2) — Fine for offence not yet committed.

Where the accused has been punished under S. 488 of the Act it is no part of the Magistrate's business either to purport to impose daily fine for offences not yet committed or to make threats about what may happen in future. If the order is not complied with it is for the Corporation to apply for a separate summons in a separate case and the Magistrate may then if satisfied that the offence has been committed for any number of days impose a further fine appropriate to that number of days and so on 'ad infinitum' or until the party does comply with the order. AIR 1952 Cal 737, Rel. on. (Para 10)

(f) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 488 and 527, Sch. 18, R. 4(1) — Notice under R. 4(1) — Procedure to be followed by landlord.

When the petitioner was served with the notice under R. 4(1) of Sch. 18, Calcutta Municipal Act she could have and should have proceeded under S. 527, Calcutta Municipal Act if she felt that her proceedings in the ejectment of the tenant, in the Small Cause Court after service of legal notice of ejectment on the tenant would take a long time. At any rate she should have moved under S. 527, Calcutta Municipal Act after her first conviction under S. 488(1) of the Act. If she had done so then in that event the tenant's refusal to afford reasonable facilities for repair would have discharged her from all liability for conviction by reason of S. 527(3), Calcutta Municipal Act. (Para 4)

Ajit Kumar Dutta, for Petitioner; Sushilkumar Basu, for Opposite Party.

REFERENCE ..... /Para

('51) 55 Cal WN 712: (AIR 1952 Cal 737: 1952 Cri LJ 1466) 10

ORDER: This is a Rule directed against the order of the Municipal Magistrate of Calcutta dated 4-3-1952 convicting the petitioner under S. 488(2), Calcutta Municipal Act, 1923, and sentencing her to a daily fine of Annas four from 14-3-1950 being the date of her first conviction under S. 488(1) of that Act amounting to a total fine of Rs. 180-4-0 upto 4-3-1952 which is the date of the order now complained of.

(2) The facts of the case may be briefly stated. The petitioner Subalabala Devi is the owner of premises No. 27/2, Jugal Kishore Das Lane. She was required by the Corporation

"to secure and repair the entire building except the portion collapsed and requisitioned to be demolished within seven days."

This was a requisition by the Corporation under R. 4(1) of Sch. 18, Calcutta Municipal Act. She was convicted on 14-3-1950 under S. 488(1), Calcutta Municipal Act read with R. 4(1) of Sch. 18 for non-compliance with the requisition. Even after the conviction the petitioner did not secure and repair the building. Thereafter the Corporation of Calcutta started the present proceedings on 2-5-1950 under S. 488(2), Calcutta Municipal Act for continuing the offence of non-compliance with the requisition. After repeated adjournments which she asked to comply with the requisition and after being granted such adjournments by the Municipal Magistrate she was again convicted on 4-3-1952 under S. 488(2), Calcutta Municipal Act by the order now complained of.

(3) The first defence of the petitioner is inability to comply with the requisition for reasons which are beyond her control. Her case is that it was impossible to secure and repair the said premises as the tenant opposite party therein did not vacate the same. She had served the tenant with a notice of ejectment on 8-9-1949 after having herself received notice under R. 4(1) of Sch. 18, Calcutta Municipal Act requiring her to repair the said building in the terms I have mentioned. The tenant refused to comply with the notice of ejectment whereupon the petitioner instituted proceedings under S. 41, Presidency Small Cause Courts Act for recovery of possession of the said premises on the ground that the petitioner required the said premises for the purpose of building and rebuilding. While the proceeding was pending in the Small Cause Court the petitioner was convicted on 14-3-1950 by the Municipal Magistrate under S. 488(1), Calcutta Municipal Act. Then on 10-3-1951 the petitioner obtained from the Small Cause Court a decree or what is more properly called an order for ejectment directing possession to be delivered to the petitioner on 16-3-1951. But the proceedings did not conclude at that stage.

The tenant preferred an appeal before the Special Bench of the Small Cause Court with the result that on 12-7-1951 the tenant's appeal was allowed & the petitioner's suit dismissed. Against that order of the Special Bench of the Small Cause Court the petitioner moved the High Court on 19-11-1951 in revision and obtained a Rule in Revision Case No. 2874 of 1951. Such Rule is still pending final decision. While that Rule was pending the petitioner was convicted on 4-3-1952 under S. 488(2), Calcutta Municipal Act for continuing the offence of non-compliance with the requisition.

(4) On these facts it is contended by the petitioner that throughout the relevant time she has tried her best to get possession of the premises but has not succeeded yet and unless she does obtain such possession from the tenant it is not possible for her to secure and repair the building as required by the requisition of the Corporation. In aid of this contention reliance has been placed on the fact that she herself proved that the house was in a dangerous condition and required rebuilding and that her whole case in the Small Cause Court was that she required the premises for the purpose of building and rebuilding. While I cannot but have every sympathy for the petitioner in a situation such as this yet it will in my view be unjustifiable to permit such sympathy to override clear statutory provision enjoining the civic responsibility to secure buildings in a dangerous

condition likely to harm and injure human life in the city. The Municipal Act makes special provision to meet such a situation. That provision is contained in S. 527, Calcutta Municipal Act. Under that provision the owner of a building may apply to the Small Cause Court when the occupier prevents the owner from complying with any provisions of the Municipal Act or of any Rule or Bye-Law made therein or with any requisition.

The scheme laid down in the three different sub-sections of S. 527, Calcutta Municipal Act is clear. In such a case the owner may apply to the Court of Small Causes and that Court on receipt of such application from the owner may make a written order requiring the occupier of the building to afford all reasonable facilities to the owner for complying with the provisions of the Municipal Act or with the requisition thereunder. The scheme under this section makes it clear that within 8 days from the date of such order the occupier shall afford all such reasonable facilities to the owner for the purpose aforesaid. Sub-section (3) of that Section then proceeds to provide that in the event of the occupier's refusal to afford such reasonable facilities according to the order of Small Cause Court. the owner shall be discharged during the continuance of such refusal from any liability which such owner will otherwise incur by reason of the failure to comply with the provisions of the Municipal Act or any requisition thereunder.

Now in this case when the petitioner was served with the notice under R. 4(1) of Sch. 18, Calcutta Municipal Act she could have and should have proceeded under S. 527, Calcutta Municipal Act if she felt that her proceedings in the ejectment in the Small Cause Court after service of legal notice of ejectment on the tenants would take a long time, as they were bound to take. At any rate she should have moved under S. 527, Calcutta Municipal Act after her first conviction under S. 488(1) of the Act. But she did not adopt the procedure laid down under S. 527, Calcutta Municipal Act. If she had done so then in that event the tenant's refusal to afford reasonable facilities for repair would have discharged her from all liability for conviction by reason of S. 527(3), Calcutta Municipal Act.

(5) In order to meet this argument Mr. Dutt appearing for the petitioner has argued that S. 527, Calcutta Municipal Act does not apply to this case on two grounds. First it is said that the word "occupier" under S. 527, Calcutta Municipal Act does not include a tenant. Secondly the West Bengal Premises Rent Control Act of 1950 is said to override S. 527, Calcutta Municipal Act. Neither of these two grounds should in my opinion be sustained and I am unable to accept the argument that S. 527, Calcutta Municipal Act does not apply to this case. The word "occupier" is defined by S. 3(48), Calcutta Municipal Act to include any person for the time being paying or liable to pay to the owner the rent for the building or damages on account of occupation of such building and also includes a rent free tenant.

I have therefore no hesitation in holding that a tenant is an occupier within the meaning of the Calcutta Municipal Act. Then Mr. Dutt develops a further refinement of his argument by saying that a tenant whose tenancy has been terminated by notice to quit is not a person paying or liable to pay rent within the meaning of the definition of "occupier". But even that refinement cannot succeed because S. 3(48), Calcutta Municipal Act mentions even a person liable to pay damages on account of the occupation of the building. A tenant whose tenancy has been terminated by a notice to quit will in any event be a person liable to pay damages or mesne profits and would therefore come within the meaning of the word "occupier". The other branch of the argument that the Rent Act of 1950 overrides the Calcutta Municipal Act is developed on the basis of the words "notwithstanding anything to the contrary if any other Act or law" used in S. 12 of the Rent Act of 1950. It is contended that because of these words in S. 12 of the Rent Act, 1950 no order can be made by the Small Cause Court under S. 527(2), Calcutta Municipal Act requiring the occupier tenant to vacate the premises. This argument proceeds on a fundamental fallacy. That fallacy is that S. 12 of the Rent Act of 1950 is only intended to prevent and restrict an order or decree for the recovery of the possession of any premises except on ground specified in the Act. It so prevents and restricts notwithstanding any law to the contrary. But the Small Cause Court acting under Section 527(2) Calcutta Municipal Act does not make an order or decree for the recovery of possession. It only makes an order requiring the occupier of a building "to afford all reasonable facilities" to the owner to comply with the requisition under the Calcutta Municipal Act. It is entirely erroneous in that context to suggest that such an order of the Small Cause Court is of the nature of an order or decree for the recovery of possession contemplated by S. 12 of the Rent Act of 1950. Here again it is unwise to forget that this provision is intended to secure safety for human life by protecting and securing dangerous buildings in the city.

It is a responsibility alike of the Corporation as well as its citizens. I am not prepared by a process of any technical interpretation to remove that responsibility either from the Corporation or from the citizens of this great city. As I read these two provisions of S. 527, Calcutta Municipal Act and S. 12 of the Rent Act I see no conflict between them and they are perfectly reconcilable. So I read them in public interest. Where there is express provision in the Calcutta Municipal Act the course is clear. It is laid down in S. 558, Calcutta Municipal Act, 1923 that except as in that Act otherwise expressly provided nothing in that Act shall be deemed to affect the provisions of any other enactment. In my judgment S. 527, Calcutta Municipal Act and S. 12 of the Rent Act of 1950 are not concurrent Statutes invading the same field of operation. They contemplate different orders and different categories.

(6) The last argument very ably advanced by Mr. Dutt on behalf of the petitioner is that no offence has been committed by the petitioner under S. 488(2), Calcutta Municipal Act. This argument is developed on a number of points. The requisition under R. 4(1) of Sch. 18, Calcutta Municipal Act in this case was on the following terms: "To secure and repair the entire building except the portion collapsed and requisitioned to be demolished within 7 days". It is said that on the terms of this requisition the period is specified to be 7 days. Therefore when the petitioner failed to comply with the requisition she was convicted under S. 488(1) Calcutta

Municipal Act. The requisition spent its force after 7 days mentioned there. There was no further requisition. Hence no continuance of any offence for not complying with any other requisition. According to Mr. Dutt a further conviction under S. 488(2), Calcutta Municipal Act can only be maintained on a fresh requisition under R. 4(1) of Sch. 18 of the Act. As that was not done and as there was no further requisition after the first conviction of the petitioner under S. 488(1) of the Act the conviction for continuing the offence under S. 488(2) of the Act is contended to be bad in law.

(7) This argument though ingenious suffers from many basic infirmities. In the first instance as I read the terms of the requisition quoted above it does not mean that securing and repairing the entire building was to be done within 7 days. That would be creating a physical impossibility having regard to the nature of the building and the work involved which cannot reasonably be done in 7 days. The true and proper meaning of the requisition is that the period of 7 days mentioned there was only the period within which the portion of the building was to be demolished and which was not obviously therefore to be secured and repaired. What was to be secured and repaired under the requisition was the entire building except the two portions — one already collapsed and the other requisitioned to be demolished within 7 days. But there was no time limit fixed in the requisition notice under R. 4(1) to secure and repair the building. Therefore failure to comply with that requisition continued even after the first conviction. Hence the petitioner did continue to commit offence specified under S. 488(1) and comes within the further offence of continuance under S. 488(2) of the Act.

But there is a possible answer on behalf of the petitioner on this point. It is that under S. 510(a), Calcutta Municipal Act every requisition under that Act must prescribe a reasonable time within which the requisition is to be carried out. But the validity of this answer depends on the question whether failure to prescribe the time limit in the notice or requisition completely vitiates such requisition and makes it void, or whether law will imply such reasonable time in case the requisition itself fails to specify it. Having regard to the view I take, and which I will presently state I need not decide this incidental question. The second infirmity of this argument is that if fresh requisitions are to be given then it would no longer be a case of continuance of offence under S. 488(2), Calcutta Municipal Act in such case of non-compliance with the further requisition. In that event the offence will again be one under S. 488(1)(c) of the Act. Because then the offence will be failure to comply with such fresh requisition lawfully made under the Rules as stated under S. 488(1)(c) of the Act.

Thirdly even if the requisition is construed in the way Mr. Dutt contends namely that the entire requisition is intended to be complied with within 7 days his argument cannot be sustained. The provision in S. 488(2) of the Act makes it clear that whoever after having been convicted of any offence referred to in Cls. (a), (b) or (c) of sub-s. (1) continues to commit such offence shall be punished for each day after the first during which he continues so to offend, with the fine which may extend to the amount mentioned in the table to that section. The proper interpretation of this section to my mind is that the words "continues to commit such offence" used in this sub-s. (2) of S. 488 is that (sic) the particular offence for which the person has been previously convicted under S. 488(1) is allowed to continue. That previous offence was failure to comply with the requisition within 7 days. That period of 7 days was allowed to pass without complying with that requisition. What was therefore a primary offence under S. 488(1)(c) of the Act becomes the repetitive offence of continuance under this sub-s. (2). It is true that the requisition formed the cause of the first offence under S. 488(1)(c). But it did not spend its force in the sense that it still continues to provide the basis of the fresh offence of continuance contemplated under S. 488(2) of the Act. Such an interpretation does not mean that the accused is being convicted twice for the same offence which certainly cannot be. The theory of prohibition of double jeopardy in criminal jurisprudence is a misleading siren in this context where the gist of municipal offence is by Statute an offence of continuance and whose whole purpose is to make a citizen discharge his civic responsibility in securing his own building from being dangerous to human life and thus ensure safety in the city. Here the Statute does not make it the same offence but provides that continuance of the offence will itself be another species of offence under this sub-s. (2) for which a different penalty is imposed so that not only the act of prime failure is an offence, but also its continued failure another offence.

(8) To take any other view would make subsection (2) of S. 488 completely nugatory in the case of offence of continuance mentioned in Cl. (c) of sub-s. (1) of S. 488 of the Act. It is necessary perhaps to illustrate this point. Normally it is provided by S. 510 of the Municipal Act that a requisition shall prescribe a reasonable period within which such requisition is to be carried into effect. In that event in every case under cl. (c) of S. 488 (1) of the Act a conviction once made will mean that there can never be a further offence of continuance under S. 488 (2) of the Act. In that view the provision in sub-s. (2) of S. 488 of the Act, that whoever after having been convicted of an offence referred to in Cl. (c) of sub-s. (1) continues to commit such offence shall be punished, becomes a dead letter because no one can commit such offence. It is said then a conviction under S. 488 (2) of the Act is possible even in that case, if a fresh requisition under R. 4 (1) of Sch. 18 of the Act is given. But then, noncompliance with such fresh requisition will always be an offence under S. 488 (1) (c) of the Act and not under S. 488 (2) thereof.

(9) This disposes of all the arguments made on this Rule.

(10) On behalf of the Corporation a reference was made to the case of — 'Phani Bhusan v. Corporation of Calcutta', 55 Cal W N 712. In that decision Roxburgh J. observes that where the accused has been punished under S. 488 of the Act it is no part of the Magistrate's business either to purport to impose daily fine for offences not yet committed or to make threats about what may happen in future. In that case the Municipal Magistrate committed the error of adding to his order of fine in respect of a conviction under Ss. 271/488, Calcutta Municipal Act an order of threat that the accused

would be penalised daily on the prayer of the Corporation. In that case Roxburgh J. holds that

> "If the order is not complied with it is for the Corporation to apply for a separate summons in a separate case and the Magistrate may then if satisfied that the offence has been committed for any number of days impose a further fine appropriate to that number of days and so on 'ad infinitum' or until the party does comply with the order."

This view is in accord with the view that I have taken. Here also there was a separate summons in a separate case under S. 488 (2) of the Act and the conviction properly made upon such summons. In the order of the Municipal Magistrate in this case he has properly sentenced petitioner to pay a fine of Rs. 180-4-0 for the period from 14-3-1950 which was the date of the first conviction until the date of 4-3-1952 being the date of this order of the Magistrate which is now complained of at a rate of As. 4 per day. That is a justifiable punishment under column 4 to sub-s. (2) of S. 488 of the Act and is well and very reasonably within the limits imposed by the statutory table.

(11) For the reasons stated above I discharge the Rule and vacate the 'ad interim' order of stay.

B/D.H. Rule discharged.

AIR 1953 CALCUTTA 361 (Vol. 40, C. N. 134)

BOSE, J.

K. S. Joneja, Petitioner, v. P. M. Das Gupta and another Opposite Party.

Civil Rule No. 1384 of 1952, D/- 9-12-1952.

(Bengal) Civil Service (Classifications, Control and Appeal) Rules R. 55 — Departmental Enquiry — Inspection and production of documents. — (Constitution of India, Art. 226.)

Though no question of demanding production or inspection of documents can arise in terms of Rule 55 of the Classification Rules, the principles of natural justice do cast a duty upon the Government to specify and produce for inspection the documents asked for or such of them as are available, in order to enable an officer to defend himself properly against the charges levelled against him in the departmental enquiry. (Para 6)

A writ in the nature of Prohibition prohibiting the Government from proceeding with the departmental enquiry without specifying the particular documents which were going to be produced at the hearing and without giving inspection thereof to the petitioner beforehand was passed under Art. 226 of the Constitution. (1867) 2 H. L. 239 and O. S. App. No. 37 of 1952 (Cal), Rel. on. (Para 8)

Kalyan Kumar Basu, with Purnendu Sekhar Basu, for Petitioner; Advocate General, Jagneswar Majumdar and Smriti Kumar Ray Chaudhury, for Opposite Party.

REFERENCES: Courtwar /Chronological/Paras.

('52) O. S. Appeal No 37 of 1952 (Cal) 6
(1867) 2 H. L. 239: (36 L. J. (Ex) 225) 6

ORDER: This is an application under Art. 226 of the Constitution for a Writ in the nature of Mandamus directing the respondents to withdraw two notices dated 26-4-1952 and 29-4-1952 intimating that certain departmental proceedings will be proceeded with against the petitioner and for a writ in the nature of Prohibition prohibiting the respondents to proceed with the enquiry without complying with the statutory provisions governing the matter of holding such inquiries.

(2) The case of the petitioner is that on or about 3-2-1951 the petitioner was transferred from the post of Manager, Government Cinchona Plantation, Munsong, to the post of General Manager. Government Cinchona Plantation, Mangpoo, and was directed to take over charge from the outgoing General Manager, one Mr. Fothergill. The petitioner was appointed to act as such General Manager with effect from 15-2-1951. The petitioner took charge of his new post as General Manager from Mr. Fothergill on 15-2-1951 and it is alleged that in order to make up a shortage of cash to the extent of Rs. 1422-13-6, the petitioner lent the said sum to Mr. Fothergill at the latter's request for the purpose of making the cash tally with the relevant entry in the cash book. It is further alleged that at the time of taking over charge a sum of Rs. 10,280/- was shown in the books as advances to various parties which remained unrealized at the time. It is further the case of the petitioner that the sum of Rs. 1422/13/6 was subsequently repaid by Mr. Fothergill to the petitioner on or about 23-2-1951. Thereafter in or about the 1st week of May 1951 the petitioner came to know as a result of checking up of the accounts for 1950-51 that a sum of Rs. 10,280/- had been accounted for as expended and deducted from the closing balance of cash in hand. On 10-5-1951 the petitioner wrote a letter to Mr. Fothergill informing him about the position detected by the petitioner after checking of accounts and requested Mr. Fothergill to make up the deficit of Rs. 10,280/- and a copy of the letter was forwarded to the Director, Cinchona Plantations. On 11-5-1951 Mr. Fothergill wrote back stating that he was not prepared to make good any deficit before a proper audit was completed. It was also pointed out in this letter that while handing over charge, the charge sheets were signed by the petitioner and he apparently agreed to the accounts being correct. It appears that a copy of this letter was also forwarded to the Director, Cinchona Plantations. By a letter dated 15-5-1951 the petitioner pointed out that the taking over of charge did not mean that everything was alright and he requested Mr. Fothergill to make up the deficit. A copy of this letter was also forwarded to the Director, Cinchona Plantations.

On 29-5-1951 the Director sent a report to the Government about the shortage detected by the petitioner. It is curious that although in view of the impending retirement of Mr. Fothergill from the post of General Manager, the Director submitted a proposal to the Government for arranging a special audit of personal ledger account of Mr. Fothergill, no such audit was in fact done upto 23-7-1951 when Mr. Fothergill left India for England. On 10-9-1951 the petitioner handed over charge as the General Manager and reverted to his substantive post of Manager. On 16-11-1951 the accounts were audited and the report submitted to the Government by the auditor confirmed the fact that Mr. Fothergill defalcated a sum of Rs. 10,280/-. On 24-1-1952 certain charges of making fraudulent entries in the books of account at the time of taking over charge from Mr. Fothergill were made against the petitioner and the petitioner was further charged with

gross negligence and inefficiency in the discharge of duties as public servant. On the same date a suspension order was passed against the petitioner. On the 5th February the petitioner handed over charge as Manager. On 21-2-1952 the petitioner submitted his written explanation to the charges. On 26-3-1952 certain fresh charges were made against the petitioner.

On 21-4-1952 the petitioner intimated to the authorities concerned that he desired Dr. M. Sen, Director and Mr. Fothergill to be called as witnesses for the purpose of cross-examining them, upon being informed by letter of the Assistant Secretary dated 15-4-1952 that he was entitled to have such witnesses called as he might desire, at the enquiry, to be held. In answer to the said letter of the petitioner the Deputy Secretary wrote to the petitioner fixing 9 and 10-5-1952 as the dates for holding the enquiry and informed the petitioner that Dr. Sen would be called to give his evidence but as Mr. Fothergill was out of India it would not be possible to secure his attendance. It was further stated in the said letter that the documents desired to be produced would be produced during the enquiry. On 29-4-1952 the dates of enquiry were postponed till 15-5-1952 & 16-5-1952. On 30-4-1952 the petitioner again wrote to the Govt. stating that they would have to make arrangements for Mr. Fothergill's presence at the enquiry, and pointed out that it was not made clear by the Government as to what documents would be produced at the enquiry. The petitioner further complained that no inspection had been offered of such documents. On 8-5-1952 the Deputy Secretary replied to the letter of the 30th April and maintained the attitude taken up in the letter of 26-4-1952. By a letter of 10-5-1952 the petitioner again pressed for securing attendance of Mr. Fothergill and for inspection of the relevant documents. By letter of 13-5-1952 the Deputy Secretary pointed out that the departmental proceedings had been drawn up under the provisions of R. 55, Civil Service (Classification, Control and Appeal) Rules of the Government of Bengal and that the petitioner had no further rights in relation to the enquiry than what were allowed under the said R. 55. The petitioner thereupon obtained the present Rule on 15-5-1952.

(3) The only point which has been urged by Mr. K. K. Basu, the learned Counsel for the petitioner, is that without providing the petitioner with the facilities which are afforded to him under R. 55, Civil Service Rules, the respondents should not be allowed to proceed with the departmental enquiry. It is submitted that the holding of the departmental enquiry by the respondents without securing the attendance of Mr. Fothergill and without affording the petitioner opportunity to cross-examine him will mean violations of the provisions of R. 55, Civil Service Classification Rules. It is argued that the attitude adopted by the respondents in the correspondence does not amount to "refusal" to call Mr. Fothergill within the meaning of R. 55 and even assuming that the conduct of the respondents does amount to such refusal, the reasons put forward for not securing the attendance of Mr. Fothergill are not "sufficient reasons" within the meaning of the said Rule. It appears to me that this contention of Mr. Basu cannot be accepted. Although the word "refuse" has not been used, the substance and effect of the words used in the letters of the Deputy Secretary dated 26-4-1952, 8-5-1952 and 13-5-1952 is that the authorities concerned expressed their refusal to call Mr. Fothergill as a witness in the departmental enquiry.

(4) Although there is no doubt that but for the laches and slackness on the part of some of the officials of the Government, it would not have been possible for Mr. Fothergill to leave the shores of India without making good the defalcation or without making some arrangements for the purpose, yet I am unable to hold that sufficient reasons do not exist to justify the authorities in refusing to call Mr. Fothergill as a witness in the contemplated proceeding. It is just possible that as the suspicion raised against Mr. Fothergill had not been confirmed by a proper audit of the relevant accounts, it was found not advisable to put him under arrest or prevent him from leaving the shores of India at the time he actually left this country. Moreover, the fact remains that Mr. Fothergill is now in England and the enquiring or investigation officer in charge of the enquiry has no power to enfore the attendance of Mr. Fothergill at the enquiry by the issue of any summons or any other process. In the circumstances it cannot be said that the Government has no justifiable grounds for refusing to accede to the request of the petitioner to call Mr. Fothergill as a witness.

(5) It has been further contended by Mr. Basu that without producing for inspection of the petitioner the documents in respect of which notice to produce has been given by the petitioner, the respondents should not be allowed to proceed with the departmental enquiry inasmuch as refusal of such inspection and non-specification of the documents which are actually going to be produced by the respondents at the enquiry, amount to denial of justice to the petitioner. It is clear from the letter of the petitioner dated 21-4-1952 that the petitioner gave a specific list of the various documents on which he wanted to rely in support of his defence at the departmental enquiry and the relevant portion of the letter was worded as follows:

> "I shall rely amongst others on the following documents which you will kindly produce before the officer to enable me to make use of the same."

The reply that was given by the Deputy Secretary to this request in the letter of 26-4-1952 was as follows:

> "The documents mentioned in your letter under reference will be produced during the enquiry as desired provided they are readily available."

The unsatisfactory nature of the answer very naturally made the petitioner uneasy. While struggling to exculpate himself from very serious charges of misconduct brought against him, to be told, that the documents asked for would be produced if readily available, cannot be characterized as anything else but denial of justice and the fundamentals of fair-play. The petitioner was definitely told that he could not have the assistance of a lawyer to defend him against the charges. He was to conduct his own defence and if to add to this disadvantage the matter of production of the vital documents was left in a state of uncertainty and he is not afforded opportunity to refresh his money with regard to the contents of the documents which have a bearing on his defence, it is difficult to resist the conclusion that there has been flagrant violation of the principles of natural justice.

(6) It is true that no question of demanding production or inspection of documents can arise in terms of R. 55 of the Classification Rules but I have no hesitation in holding that the facts and circumstances of this case and the principles of natural justice do cast a duty upon the respondent to specify and produce for inspection the

documents asked for or such of them as are available, in order to enable the petitioner to defend himself properly against the charges levelled against him. In my view this is a case in which the respondent should not be allowed to proceed with the departmental enquiry without specification of the documents going to be produced at the hearing and without giving inspection thereof beforehand to the petitioner. See the case of — 'London Corporation v. Cox', (1867) 2 H. L. 239 at 276 and Halsbury Vol. 9, page 819, paragraph 1395 which principle received the approval of K. C. Das Gupta and P. N. Mookerjee JJ. in the case of — 'Purnendu Narain Bagchi v. R. S. Trivedi'. The learned Judges were inclined to take the view that Prohibition Quo Usque is not obsolete but can be issued in a case where production and inspection of documents is refused to a person called upon to show cause in a departmental enquiry. The learned Judges, however, did not deliver any judgment on the point. See 'Appeal No. 37 of 1952 O. S.'.

(7) It was contended by the learned Advocate-General that as there is no question of dismissal or removal of the petitioner in this case, R. 55 has no application. But it is clear from the correspondence of the Government officials that according to the practice obtaining in the department concerned, the procedure prescribed in R. 55 is followed in departmental enquiry of the nature with which this case is concerned. There is, therefore, no substance in the contention of the learned Advocate General.

(8) In my judgment this petition should succeed in part. The Rule is made absolute to the extent that the respondents are prohibited from proceeding with the departmental enquiry without specifying the particular documents which are going to be produced at the hearing and without giving inspection thereof to the petitioner beforehand.

(9) I make no order as to costs.

A/D.R.R. Rule made absolute.

AIR 1953 CALCUTTA 363 (Vol. 40, C. N. 135)

BOSE J.

Manmull Jain, Petitioner v. N. C. Putatunda, Opposite Party.

Civil Rule No. 1460 of 1952, D/- 16-12-1952.

Constitution of India, Art. 226 — Jurisdiction of Calcutta High Court over Chandernagore — (Chandernagore (Application of Laws) Order, 1950).

The High Court at Calcutta has no jurisdiction to interfere with a notice of demand of petrol duty issued by the appropriate authority in Chandernagore, in exercise of its powers under Art. 226. (Para 7)

Under the Chandernagore (Application of Laws) Order of 1950 the High Court has been given only a limited jurisdiction. The jurisdiction under Art. 226 which is a very special jurisdiction, does not seem to have been extended to Chandernagore. (Para 7)

G. P. Kar and Surathi Mohan Sanyal, for Petitioner; Hemendra Qumar Das and Smriti Kumar Roy Chowdhury, for Opposite Party.

REFERENCE ..... /Para

('52) 56 Cal WN 500: (AIR 1952 Cal 588: 1952 Cri LJ 1308 SB) 4, 7

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ directing the respondent to forbear from giving effect to a notice of demand dated 8-5-1952 and a summons dated 13-5-1952 issued by the respondent calling upon the petitioner to pay a certain sum by way of petrol duty, and also to forbear from giving effect to a resolution dated 19-12-1951 and an order dated 4-4-1952 under which the said petrol duty has been purported to have been imposed upon the petitioner.

(2) The case of the petitioner is that he carries on a business amongst other places in the city of Chandernagore as Agent of Burmah-Shell Oil Storage & Distributing Co. of India Ltd. under the name and style of Hind Trading Co. and as such runs a Petrol Pump at Burra Bazar, Grand Trunk Road in the City of Chandernagore. The said Petrol Pump yields a daily average cash sale of about Rs. 500/-. By a decree of the President of the Council of Ministers of the Republic of France, Chandernagore was declared a free city. In July 1949 there was a referendum in Chandernagore relating to the question of transfer of the City of Chandernagore to the Indian Union. By a provisional Franco-Indian treaty signed in Paris in the beginning of 1950 (and subsequently ratified) the territory of the City of Chandernagore was ceded to India subject to ratification by the Republic of France. In May 1950 the said city of Chandernagore was de facto transferred to the Indian Union by the President of the Council of Ministers, France, pending ratification of the said Treaty.

By a notification dated 1-5-1950, the Government of the Indian Union in exercise of the powers conferred by section 4, Extra Provincial Jurisdiction Act 1947 (47 of 1947) promulgated an Order called the Chandernagore (Application of Laws) Order 1950 and it was made operative from 2-5-1950. The said Order provided that certain enactments of the Indian Legislature which are mentioned in a schedule appended to the said Order would come into force in Chandernagore and the corresponding French Laws would cease to be operative in the said city. On or about 1-5-1950 the Government of India also appointed an Administrator and certain other officers to carry on the administration of the said city. The respondent was appointed Treasury Officer of Chandernagore with effect from 2-5-1950 and subsequently he was appointed Precepteur of the said City.

The case of the petitioner further is that the effect of the Chandernagore (Application of Laws) Order 1950 was that except matters which were governed by the various enactments specified in the Schedule of the said Order, all other matters were governed by French Laws which were in force prior to the commencement of the said Order and which remained in force even after promulgation of the said Order. The imposition of petrol duty was outside the purview of the Application of Laws Order 1950 and was a matter governed by French Laws. The respondent being an officer appointed by the Government of India had no power to administer French Laws and as such the order of imposition of the petrol duty and the notice of demand and summons issued by the respondent were all illegal and without jurisdiction, and therefore, unenforceable against the petitioner.

(3) It is also the case of the petitioner that the resolution passed by the Municipal Assembly of Chandernagore on 19-12-1951 and the order dated 4-4-1952 which made the said resolution operative, are invalid and have no force and effect, inasmuch as the prescribed procedure for making the said resolution a valid and effective piece of legisla-

tion was not followed in respect of the said resolution dated 19-12-1951, and consequently the levy of petrol duty and the steps taken for enforcing payment of such duty were entirely without jurisdiction.

(4) On the question whether the respondent has power to administer French Laws and to levy the petrol duty in question reliance has been placed by Mr. Kar the learned counsel for the petitioner on the case of — 'Sankar Mawli Dutt v. The State', 56 Cal. W. N. 500 (S. B.)

(5) In support of the contention that the resolution dated 19-12-1951 of the Municipal Assembly of Chandernagore is an invalid and ineffective piece of legislation, it is pointed out that by a decree of 7-11-1947 the Municipal Assembly of Chandernagore was given power to regulate by its deliberations all affairs regarding financial and administrative management of the City of Chandernagore on terms and conditions contained in the said Decree. By another Decree of 18-10 1948, the said Decree of 7-11-1947 was modified and Art. 28 was abrogated. Further by Art. 2 of the said Decree of 1948 it was provided that a resolution taken on the mode of collection and rules of levy of taxes, duties and contributions would take effect only after their approval by a Decree of the Council of State (Consul D'Etat) and as such Decrees must be taken within a period of 90 days from the date on which the resolution reaches the office of the French Overseas Ministry, which date is notified immediately to the President of the Municipal Assembly, and if the resolution is not annulled then it is considered as approved after the expiry of the said period of 90 days and it becomes final and operative as a valid piece of legislation.

In the present case, however, the resolution of 19-12-1951 was not sent to the President of the Municipal Assembly nor was it approved by Consul D'Etat but it was sent to the Government of India as it was not cancelled by the Government of India it was deemed to have been automatically approved on the expiry of the prescribed time limits and it was considered to have become a valid law. It is submitted that according to the decree of 1948 (Art. 2) it is Consul D'Etat which had the power to annul or approve the resolution of 19-12-1951 and consequently the Government of India's approval did not have the effect of giving the resolution any legislative force.

(6) Mr. Hemendra Kumar Das, the learned Government Advocate, has contended that the jurisdiction conferred on the High Court under Art. 226 of the Constitution does not extend to Chanderanagore and consequently this Court has no power in exercise of such jurisdiction to interfere with the notice of demand or the summons in respect of which relief is sought in this application. Mr. Das has referred to Art. 1 (2) and Art. 3 (b) of the Constitution and has argued that as the Parliament of India has not by any law brought the city of Chandernagore within the State of West Bengal, this High Court has no jurisdiction under Art. 226, over that territory. Reference has also been made by Mr. Das to Art. 230 and it is pointed out that it is only the Indian Parliament which can by law extend the jurisdiction of the High Court to any area not within any of the State of the Indian Union and as the Chandernagore (Application of Laws) Order 1950 is not a law made by Parliament, this High Court cannot exercise jurisdiction under Art. 226 in respect of the territory of Chandernagore. It is to be noted that there is no question of increasing the area of any State in the present case. There has been no declaration made that Chandernagore is a part of the State of West Bengal. In the circumstances, Arts. 1 (2) and 3 (b) have no application to the facts and circumstances of this case.

(7) The contention of Mr. Das that as the Indian Parliament has not extended the jurisdiction of the High Court under Art. 226, to Chandernagore, by any law, nor has the Indian Constitution been made applicable to Chandernagore, this High Court has no jurisdiction over that area to issue any writ or direction to any person or authority in Chandernagore, does not appear to me to be without substance. It is true that under Art. 372 of the Constitution all the laws in force in the territory of India at the time of the commencement of the Constitution including the Extra Provincial Jurisdiction Act 1947 (47 of 1947) continued in force after the commencement of the Constitution and under the said Act 47 of 1947 the Central Government had the power to determine which Court should exercise the auxiliary or incidental jurisdiction consequential on the jurisdiction exercised under the Extra Provincial Jurisdiction Act (S. 4 (2) (c) of Act 47 of 1947).

Article 260 of the Constitution also recognises this power of the Government of India to exercise Extra Provincial Jurisdiction in respect of an area outside the territory of India. But what the Chandernagore (Application of Laws) Order 1950 has purported to do is that it has determined, that, for the purpose of administering the laws which are specified in the Schedule to the Order, it is the High Court at Calcutta which will have the jurisdiction to administer such laws, and adjudicate upon questions arising in the application and enforcement of such laws. In the case — 'Sankar Mawli Dutt v. The State', 56 Cal. W N 500 this Court assumed jurisdiction under section 439, Criminal P. C. which has expressly been made applicable to Chandernagore by the Order of 1950. Under the Order of 1950 the High Court has been given only a limited jurisdiction. The jurisdiction under Art. 226 which is a very special jurisdiction, does not seem to have been extended to Chandernagore. Further, it appears that the President of India has assumed control and administration in respect of the territory of Chandernagore and in exercise of his power under Art. 243 (2) of the Constitution the President has promulgated the Chandernagore (Administration) Regulation 1952 (1 of 1952) which makes provision for the administration of Chandernagore and for matters connected therewith. It appears to me that this High Court has no jurisdiction to interfere with the notice of demand or the summons issued by the respondent, in exercise of the power conferred under Art. 226 of the Constitution of India.

(8) In view of my decision on this question of jurisdiction it is not necessary to determine the other questions which have been raised by Mr. Kar on behalf of the petitioner.

(9) In the result this petition fails. The Rule is discharged with costs. Hearing fee is assessed at five gold mohurs.

(10) It is stated before me by the learned Advocate of the petitioner that an appeal will be taken against this judgment and it is prayed that the operation of this order be stayed till 5-1-1953 to enable the petitioner to file the appeal.

(11) This prayer is allowed. Let the operation of this order be stayed till 5-1-1953, as prayed for.

A/K.S. Rule discharged.

AIR 1953 CALCUTTA 365 (Vol. 40, C. N. 136)

CHAKRAVARTTI C. J.
AND S. R. DAS GUPTA J.

Dharani Dhar, Petitioner v. Mrityunjoy Mukherjee and others, Opposite Party.

Civil Rule No. 1110 of 1951, D/- 29-8-1952.

Debt laws — Bengal Money-lenders Act (10 of 9140), S. 36 — Decree attached on subsequent reopening of decree — Attachment ceases.

Where a new preliminary decree is passed after the re-opening of the decree, the attaching decree-holder cannot ask for passing a final decree on the basis of the new preliminary decree. (Para 7)

Rabindra Nath Choudhury, for Petitioner; Amarendra Nath Bose with Hariprosanna Mukherjee and Jnanendra Mohan De, for Opposite Party No. 6

REFERENCE ..... /Para
('44) 48 Cal W. N. (F.R.) 36: (AIR 1944 F. C. 18) 5

CHAKRAVARTTI, C. J.: This Rule was issued at the instance of an attaching creditor and raises a somewhat novel point.

(2) The facts are as follows. It appears that opposite party 1, Mrityunjoy Mukherjee, obtained a mortgage decree against opposite parties 2 to 5 who are sons of one Rai Nalinaksha Dutta Bahadur, deceased. That decree was a kind of composite decree passed on 28-7-1934, by consent of parties. The predecessor-in-interest of the petitioner held a money decree against Mrityunjoy and on the strength of that decree he attached the mortgage decree held by his judgment-debtor Mrityunjoy. Thereafter, the judgment-debtor of the mortgage decree made an application under the Bengal Money-lenders Act for reopening the decree and the decree was in fact reopened. A new decree conforming to the provisions of the Bengal Money-lenders Act was passed on 19-11-1946. I might refer also to another fact which it would be necessary to consider if the second point raised by the petitioner had to be examined but in view of the conclusion at which we have arrived on the first point, it is not really necessary to refer to that fact. I might, however, mention that on 21-11-1946, that is, only two days after the new decree had been passed, it was assigned by the decree-holder Mrityunjoy to opposite party 6, one Gossain Jitendra Chaitanya Bharati. The Rule has been opposed before us only by that opposite party.

(3) The application out of which the present Rule has arisen was an application made by the petitioner for having a final decree passed in his own favour on the basis of the new preliminary decree passed on 19-11-1946. He made that application on the footing that his predecessor had attached the old decree and according to him the attachment had attached itself to the new decree when that decree was passed. Accordingly, on the footing of being an attaching creditor of the new preliminary decree, he applied for a final decree in his own favour. Two questions, therefore, arose, namely, (a) whether the attachment of the old decree was at all subsisting and whether it was available against the new decree, and (b) whether assuming the attachment subsisted and was available against the new decree, the petitioner could, as an attaching creditor apply for a final decree to be passed in his favour.

(4) The learned Subordinate Judge did not consider the second point, inasmuch as, on the first point he held against the petitioner. The view taken by the learned Judge was that the attachment of the old decree had come to an end as soon as that decree was set aside and reopened under S. 36(1), Bengal Money-lenders Act. The learned Judge added that if the petitioner had purchased some property in execution of the old decree, he would have been protected in respect of that property but he could not possibly contend that his old attachment was subsisting even after the decree attached had been replaced by a new decree, nor that after having gone into suspension for a certain time, the attachment was revived as soon as the new decree was passed. As regards the second point the learned Judge held that since on his finding on the first point, the petitioner had no 'locus standi' to make the application which he had made, the question did not arise, nor could the bona fides of the assignment be investigated at his instance.

(5) In support of the Rule it was contended by Mr. Choudhury that the learned Judge had erred in holding that by the process of passing a new decree, the entity of the old decree had been extinguished or destroyed. He referred us to certain observations of the Federal Court in the case of — 'Bank of Commerce Ltd. Khulna v. Amulya Krishna Basu', 48 Cal W. N. (F.R.) 36 at P. 43 and reminded us that when a decree was reopened under the Money-lenders Act, the parties were not relegated to their rights and liabilities on the original cause of action. Mr. Choudhury laid particular emphasis on the further observation made by the Federal Court that under the Act a decree was reopened only to the extent necessary to substitute the method of account taking sanctioned by the Act in place of the calculation on which the original decree was passed. What Mr. Choudhury contended was that those observations of the Federal Court must be understood to mean that the reopening of a decree did not in any way destroy the entity of the decree as such but consisted merely in substituting one figure for another in respect of the decretal amount. To use Mr. Choudhury's own language, the structure of the decree remained as it was, and what was altered was only the result of accounting.

(6) I am altogether unable to accept the contention of Mr. Choudhury as sound. It is perfectly clear from the scheme of the Bengal Money-Lenders Act and particularly from the provisions of section 36 that when a decree is reopened under those provisions the old decree no longer subsists, but disappears altogether and is either replaced by a new decree or is replaced by nothing at all, if the Court finds that no further sum is payable to the decree-holder. It is perfectly true that when a decree is reopened under the Bengal Money-Lenders Act, the parties are not relegated to their rights and liabilities on the original cause of action. But that only means that the parties are not to be allowed to go over the whole ground once again, and contentions such as that no money was advanced at all or that a part of the money had been repaid or that the suit was not properly constituted could not be urged or entertained. In other words, all disputed questions of fact and law must be treated as having been laid to rest by the findings arrived at the original hearing. But in so far as the quantum of the liability declared against the judgment-debtor is concerned, that is liable to revision and liable to be replaced by a different figure. An attaching creditor, however is concerned only with the monetary liability under a decree. He attaches the decree for the purpose of execution and he attaches either a decree for payment of money or a decree for sale. If that

part of the original decree which declares that a certain amount is due from the judgment-debtor to the decree-holder disappears, I cannot see to what a previous attachment will still be clinging and how such attachment can automatically attach itself to the new decree that may be passed.

As I happened to put it in the course of the argument, if the proceedings between the parties were to be taken as a tree, the decree would be the fruit of that tree and when the decree was reopened, the fruit would disappear and if a new decree was passed subsequently, there would be a new fruit on the old tree, but still a new fruit. Figures of speech apart, it seems to me that when a decree attached by a creditor of the decree-holder is reopened under the Bengal Money-Lenders Act the thing attached ceases to exist and it is meaningless to say that even thereafter the attachment subsists and the moment a new decree is passed, it gets attached to that decree. It should be remembered that after a decree is reopened, some interval must elapse before a new decree is passed. If Mr. Choudhury's contention was to be accepted, it would be difficult to say what would become of the attachment which, according to him, would be always subsisting during the interval before the old and the new decrees when there would be no decree in existence at all. It could hardly be said that the attachment would lie in a dormant state, a kind of attachment attached to nothing & that thereafter it would find a local habitation in the new decree that might subsequently be passed. It appears to me that from whatever point of view the matter may be examined, it is impossible to hold that an attachment of an old decree can subsist after the decree is reopened and can be available against the reopened decree. It is noticeable that sub- section (5) of S. 36, Bengal Money-Lenders Act which protects an assignee and a holder for value, does not extend the protection to an attaching creditor. In my opinion, the first contention of Mr. Choudhury must fail.

(7) The other point taken by Mr. Choudhury raises an equally important point, but in view of the conclusion I have arrived at on the first point, it is not necessary to deal with it. Speaking for myself, I have grave doubts as to whether an attaching creditor of a preliminary decree can apply for having a final decree passed in his own favour. But, as I have said, it is not necessary to consider or decide that point in the present case.

(8) For the reasons given above this Rule is discharged. But in view of the circumstances, we make no order as to costs.

(9) S. R. DAS GUPTA J.: I agree.

B/R.G.D. Rule discharged.

AIR 1953 CALCUTTA 366 (Vol. 40, C. N. 137)

CHUNDER J.

Union of India, Defendant, Petitioner; v. Brajen Saha Plaintiff-Opposite Party.

Civil Rule No. 2737 of 1951, D/- 1-8-1952.

(a) International Law — Private — (Civil P. C. S. 20) — (Contract Act (1872), S. 2(d)) — (Railways Act (1890), S. 80).

Plaintiff entered into a contract of carriage with the Government of Pakistan, as representing the Eastern Bengal Railway, at Faridpore, for carriage of some goods to Calcutta. The goods were seized by the Land Customs at the Indian Land Frontier and detained as a result of which they were damaged and had to be sold. The Union of India never denied the liability to pay over the actual sale proceeds but the plaintiff brought suit at Sealdah for non-delivery of goods. On objection of jurisdiction the trial Court decided that he had "ample jurisdiction". On revision by defendant.

Held (i) One independent sovereign power is not the agent of another independent sovereign power as far as municipal courts are concerned unless specifically such a state of agency is for a particular purpose assumed and the courts are given jurisdiction. Therefore the Government of India could not be sued in Indian Courts as an agent of the Pakistan Government; (Para 4)

(ii) It is an accepted principle of private international law that in a case of this nature the 'lex loci contractus' will apply. Section 80, Indian Railways Act as now in force in India cannot apply beyond its own territories to a foreing state, namely Pakistan. It is possible that there may be a corresponing law with a corresponding section applicable in Pakistan, but such law again cannot apply beyond the limits of Pakistan and give a right to sue an independent sovereign power outside Pakistan because of a Pakistani law. Under the circumstances S. 80, Indian Railways Act or for the matter of that any corresponding Pakistani law, was of no help to the plaintiff; (Para 4)

(iii) The ground that there may be some unknown arrangement was not tenable since no such arrangement had been alleged in the plaint between the Union of India and Pakistan as regards mutual liability. The plaintiff not being a party to any such arrangement or contract between the two sovereign powers, even if there was any such, could not take advantage of any contract to which he was not a party. His remedy, therefore, was either to sue the Union of India for the amount of money belonging to him actually held in their hands by the Union of India as representing the East India Railway or to sue at Faridpore on his contract of carriage the Pakistan Government as representing the Eastern Bengal Railway for the breach of the contract entered into at Faridpore; (Para 4)

(iv) The assumption of jurisdiction by the trial Court was therefore illegal. (Para 5)

Anno. Civil P. C. S. 20 N. 17, S. 115 N. 12; Railways Act (1890) S. 80 N. 1; Contract Act, S. 2(d) N. 12.

(b) Civil P. C. (1908), S. 115 — Scope — Decision of a part of a case is also a decision of a case within S. 115. Thus when the Munsif assumed jurisdiction where he had no such jurisdiction in law, clearly a revision would lie because that part of the order claiming "ample jurisdiction" was not subject to an appeal as such. (Para 3)

Anno. Civil P. C., S. 115 N. 4, 7, 12.

Bhabesh Narayan Bose, for Petitioner; Somendra Chandra Bose, for Nani Bhushan Mukherjee, for Opposite Party.

ORDER: This Rule was issued at the instance of the Union of India, as representing

the East Indian Railway Administration. After the division of British India into two independent territories, namely, the Union of India and Pakistan, the plaintiff, the opposite party in the present case, one Brajen Saha, entered into a contract of carriage with the Government of Pakistan, as representing the Eastern Bengal Railway, at Faridpore for carriage of some goods to Calcutta. It appears from the plaint that the goods were not delivered. It is now clear that the goods were seized by the Land Customs at the Indian Land Frontier and detained there as a result of which when the goods were released they were found in such a condition that they had to be sold. The Union of India, as pointed out by Mr. Bose never denied the liability to pay over the actual sale proceeds held by them but the present suit is not for realisation of the same.

(2) The plaintiff Brajen Saha brought the suit against the Union of India for non-delivery of the goods and claimed damages. Objection was taken by the Union of India of the jurisdiction of the Court. The learned Munsif, 1st Court, of Sealdah decided that he had "ample jurisdiction" to try this suit. Hence the revision petition to this Court.

(3) It has been urged on behalf of the opposite party that no revision lies in the present case. I have been referred to a Full Bench decision of the Allahabad High Court and a Lahore decision to the effect that when the whole case is not decided but only a particular issue thereof, it is not a decision of the case and therefore S. 115, Civil P.C. will not apply. It is unnecessary for me to go into the question whether those two decisions are correct law or not. As far as this Court is concerned, it has been the uniform decision of all the Courts that decision of a part of a case is also a decision of a case within S. 115, Civil P.C. Under the circumstances, as by this decision the Munsif assumed jurisdiction where he has no such jurisdiction in law, clearly a revision will lie because that part of the order claiming "ample jurisdiction" is not subject to an appeal as such.

(4) It is clear law that one independent sovereign power is not the agent of another independent sovereign power as far as Municipal Courts are concerned unless specifically such a state of agency is for a particular purpose assumed and the Courts given jurisdiction. This has to be pointed out, because it is said, that the Government of India may be sued here as an agent of the Pakistan Government. This is not good law as the two countries are independent sovereign powers. The second ground for assuming jurisdiction in the present case is said to be because such jurisdiction is given under S. 80, Indian Railways Act. It is an accepted principle of private international law that in a case of this nature the 'lex loci contractus' will apply. Section 80, Indian Railways Act as now in force in this country cannot apply beyond its own territories to a foreign state, namely Pakistan. It is possible that there may be a corresponding law with a corresponding section applicable in Pakistan, but such law again cannot apply beyond the limits of Pakistan and give a right to sue an independent sovereign power outside Pakistan because of a Pakistan law. Under the circumstances S. 80, Indian Railways Act or for the matter of that any corresponding Pakistani law, is of no help to the opposite party. Finally the order has been sought to be supported on the ground that there may be some unknown arrangement; no such (ground?) has been alleged in the plaint between the Union of India & Pakistan as regards mutual liability. The short answer to this is that the plaintiff opposite party not being a party to any such arrangement or contract between the two sovereign powers, even if there is any such, cannot take advantage of any contract to which he is not a party. His remedy, therefore, was either to sue the Union of India for the amount of money belonging to him actually held in their hands by the Union of India as representing the East Indian Railway or to sue at Faridpore on his contract of carriage the Pakistan Government as representing the Eastern Bengal Railway for the breach of the contract entered into at Faridpore.

(5) The result, therefore, is that it must be held that the learned Munsif had no jurisdiction to entertain the present suit and as the assumption of jurisdiction was illegal, the order of the learned Munsif must be set aside and the suit must be dismissed on the ground of absence of jurisdiction.

(6) This Rule is, therefore, made absolute. Each party will pay his own costs throughout.

B/H.G.P. Rule made absolute.

AIR 1953 CALCUTTA 367 (Vol. 40, C. N. 138)

HARRIES C. J. AND BANERJEE J.

Mehtab Chand Appellant; v. Shriratan Mohta and others Respondents.

A. F. O. O. No. 117 of 1950, D/-28-11-1950.

Civil P. C. (1908), O. 22 R. 9(2) — Sufficient cause — Meaning — Unreasonable delay — Effect.

What is sufficient cause is difficult and undesirable to attempt to define precisely. It depends on the circumstances of each case. But one thing is clear that though the Court does not apply too exacting a standard of diligence, if there is a delay, which in the circumstances of the case the Court thinks unreasonable, the Court does not exercise the discretion conferred on it under O. 22 R. 9 sub-R. (2). (Para 3)

Anno: C. P. C. O. 22 R. 9 N. 8.

A. N. Sen, for Appellant; P. Mallick and B. Choudhury, for Respondents.

BANERJEE J.: This suit was filed on 14-8-1945 for redemption of certain jewellery. The written statement was filed on or about 19-11-1945. The defendant died intestate on 15-12-1949, leaving him surviving a widow, Sm. Tarabai and two sons, Sri Ratan and Brij Ratan and his heirs and legal representatives.

(2) On 16-12-1949, the plaintiff's attorney was informed of the death and on 20-12-1949, the names of the heirs and legal representatives of the deceased were furnished to the plaintiff's attorney. On 4-1-1950, the plaintiff's attorney wrote to the defendant's attorney that he had "written to his client for information". On 28-2-1950, the plaintiff's attorney wrote to the defendant's attorney asking for information about the date of the death of the defendant. That was duly supplied. On 20-3-1950, the defendant's attorney wrote to the plaintiff's attorney that the suit had abated. To that the plaintiff's attorney replied:

"I have now been instructed to make the necessary application to the Court."

The notice of motion of the application out of which this appeal arises was taken out on 8-5-1950, and the application for setting aside the abatement was moved before Bachawat J. on 10-5-1950 when it was noted as made on that day. The application was heard on 23-5-1950 and was dismissed by his Lordship. No judgment was delivered. The petition in support of the notice of motion is not verified by the petitioner himself but by one Janaki Nath Roy who is a clerk in the employ of the plaintiff's attorney. The relevant paragraph in the petition is para 8 in which it is stated that the petitioner on that date, namely, the date when the petition was affirmed, was at Jaipur: he was informed of the death of the defendant on or about 22-12-1949 and

"as your petitioner has been suffering from rheumatism the application for recording the death, the substitution of the defendants and the consequent amendment of the plaint as aforesaid could not be made within 90 days from the said 15-12-1949."

This paragraph is verified upon information received from the plaintiff. When we asked Counsel for the plaintiff as to how that information was received he said that a relation came from Jaipur and gave information, a story which is often said in Court, but which is never believed unless there is corroborative evidence. In this case there is no such evidence.

(3) In the affidavit in reply the plaintiff sets out a medical certificate which runs as follows:

"This is to certify that Setji Mehtab Chand Dhandia (plaintiff) is suffering from chronic rheumatoid anthrities of the knee-joints and that he is not fit to get about for the present (for about a month). He is advised complete rest and adequate treatment."

This certificate is not strictly admissible in evidence. The statement in the certificate has not been verified by anybody. But assuming that we take the certificate into consideration—what information does it convey to Court? The information conveyed is that the plaintiff was suffering from chronic rheumatoid anthrities. It does not say that he was unable to verify a petition. All that the certificate says is that he was not fit to get about, which we understand means that he was not fit to walk about. But the plaintiff's attorney had all the informations he required for a petition for substitution. He could make the petition ready and send it to Jaipur to be verified by the petitioner, but that was not done. We cannot see how his illness could prevent the plaintiff from continuing the suit. After 90 days, the Code of Civil Procedure says that the suit abates and O. 22 r. 9(2) gives the plaintiff an opportunity to make an application for setting aside the abatement; but the condition is that he must satisfy the Court that he was prevented by any sufficient cause from continuing the suit. It is then and then only that the Court sets aside the abatement. What is sufficient cause is difficult and undesirable to attempt to define precisely. It depends on the circumstances of each case. But one thing is clear that though the Court does not apply too exacting a standard of diligence, if there is a delay, which in the circumstances of the case the Court thinks unreasonable, the Court does not exercise the discretion conferred on it under O. 22 r. 9 sub-r. (2). In this case in my view the plaintiff has not shown sufficient cause. In fact he has not shown any cause at all. He says that he was suffering from a chronic illness. That did not prevent him from continuing the suit. The delay therefore has not been explained at all and we are disposed to take the view that the plaintiff has been dilatory in the conduct of the suit. The learned Judge has exercised a discretion in the matter and we think he has exercised his discretion rightly.

(4) The appeal, therefore, is dismissed with costs.

(5) HARRIES C. J.: I agree.

C/D.R.R. Appeal dismissed.

AIR 1953 CALCUTTA 368 (Vol. 40, C. N. 139)

CHAKRAVARTTI AND S. R. DAS GUPTA JJ.

Assam Bengal Cement Co., Ltd., Calcutta, Applicant v. Commissioner of Income-tax, West Bengal, Calcutta, Respondent.

Income-tax Ref. No. 60 of 1950, D/- 7-6-51.

(a) Income-tax Act (1922), S. 10 (2) (XV) — Capital expenditure.

It is not necessary that some asset or advantage should actually be brought into existence. Expenditure is to be attributed to capital, if it is made with a view to acquiring some asset or advantage of enduring benefit; it is not further necessary that it should have that result. (1932) 1 KB 124, Rel. on. (Para 12)

Anno: Income-tax Act, S. 10 N. 13.

(b) Income-tax Act (1922), S. 10 (2) (XV) — Revenue expenditure.

Expenditure for the purposes of a business can only be capital or revenue expenditure and any expenditure that cannot be brought under the first category must necessarily fall under the second. One is practically the converse of the other. If a positive definition of business expenditure of a revenue character is required, it may perhaps be said that it must belong to the operational expenses of the business, laid out either to meet a continuous business demand or to get rid of some particular trading liability or to meet the normal day to day occasions for outlay in carrying on the business, but always related to the working of the organisation for producing profits and the process of production. (Para 15)

Anno: Income-tax Act, S. 10 N. 13.

(c) Income-tax Act (1922), S. 10 (2) (XV) — Capital expenditure — Expenditure to be made "once and for all" explained: Case law discussed. (Para 18)

Anno: Income-tax Act, S. 10 N. 13.

(d) Income-tax Act (1922), S. 10 (2) (XV) — Capital expenditure or revenue expenditure.

Where an expenditure was for maintaining the strength of the capital structure of the company, the organisation set up for the earning of profits and not an expenditure connected with the process by which the organisation operated to obtain regular returns for regular outlay, it was an expenditure for the benefit of the business as a whole and not an expenditure for meeting any of the wide variety of working needs which had to be met out of the returns of the trade. The benefit it conferred on the business was enduring and it was made under a provision which was made finally and once for all for the continuance of the benefit during the

period of the lease. Case law discussed. (Para 29)

Anno: Income-tax Act, S. 10 N. 13.

(e) Income-tax Act (1922), S. 10 (2) (XV) — Capital expenditure or revenue expenditure.

Where before starting on its business venture and by way of setting the stage, as it were, for its business operations, a newly-formed company takes steps to ensure for itself certain conditions of security which will last throughout the life of the project or during a substantial part of it and undertakes to pay a consideration to the grantor of the security, the expenditure on account of such consideration, although it may take the form of yearly or half-yearly payments, is in the nature of an initial outlay and the payments, having no connection with the carrying on of the business, cannot properly be debited against the revenue receipts. (Para 19)

Anno: Income-tax Act, S. 10 N. 13.

(f) Income-tax Act (1922), S. 10 (2) (XV) — Capital expenditure or revenue expenditure — Competition cases.

The competition cases fall broadly into three groups. There is a class where two or more rival traders came to an arrangement about the prices to be charged for their goods and thereby avoided competitive price-cutting or one put himself in such a position in respect of another that he could control the prices to be charged by both. There is another class where competition is avoided altogether by elimination of the competitor himself. There is also a third class where the main transaction is that managing or selling agency is terminated by the principal on paying a certain sum to the agents but there is a subsidiary term that the agents would not set up business of the same kind in competition. Expenditure laid out in the first and third class of cases is revenue expenditure, while that in the second class is of a capital nature. (Para 23)

Anno: Income-tax Act, S. 10 N. 13.

Sukumar Mitra, for Company; E. Meyer, for Income-tax Dept.

REFERENCES: Courtwise/Chronological/ Paras

('37) 64 Ind App 215: 1937-5 ITR 202: (AIR 1937 PC 139) 14, 17, 18
('50) 1950-18 ITR 13: (AIR 1950 All 295) 24
('35) 62 Cal 87: (39 Cal WN 70) 24
('49) 1949-17 ITR 317: (AIR 1952 Cal 414) 25
('51) 1951-19 ITR 425: (AIR 1951 Cal 149) 26
('46) 1946-14 ITR 66: (AIR 1947 Lah 82) 24
('28) AIR 1928 Mad 902: (110 Ind Cas 629) 27
('34) 1934-2 ITR 395 (Mad) 27
('37) 1937-5 ITR 70: (AIR 1937 Mad 300 SB) 27
('1921) AC 13: 12 Tax Cas 266 16
(1926) AC 205: 10 Tax Cas 155 12, 16, 21, 29
(1935) AC 431: 19 Tax Cas 390 16, 17
(1945) 2 All ER 535 25
61 CLR 337 28
(1910) 1 KB 713: 5 Tax Cas 511 24
(1915) 3 KB 267: 6 Tax Cas 671 12
(1932) 1 KB 124: 16 Tax Cas 253 12, 16, 24
(1938) 1 KB 477: 21 Tax Cas 400 12, 21, 25, 27
(1940) 2 KB 295: 23 Tax Cas 462 18, 27
(1887) 2 Tax Cas 239 14
(1905-11) 5 Tax Cas 529: (1910-SC 519) 12
(1915) 6 Tax Cas 501: (8 F 1129) 24
(1934) 18 Tax Cas 230: (103 LJKB 619) 16
(1942) 24 Tax Cas 453: (111 LJKB 497) 12, 13, 18, 27
(1945) 27 Tax Cas 103: (1946) 1 All ER 68 12, 21, 25, 27

CHAKRAVARTTI, J.: The question involved in this Reference is whether in the computation of its taxable profits for two successive accounting years, the assessee company was entitled in each case to a deduction of two sums of Rs. 5,000/- and Rs. 35,000/- which it had paid to its lessor in each of those years under certain special terms of the lease. The deduction was claimed under S. 10(2) (xv), Income-tax Act & the dispute is as to whether the payments were of the nature of a business or capital expenditure.

(2) The facts are as follows. On 14-11-1938, the assessee company obtained from the Government of Assam a lease of certain limestone quarries, known as the Komorrah Quarries, which are situated in the Khasi and Jaintia Hills district and cover an area of 594.40 acres. The actual lessee under the deed of lease was the Eastern Corporation Limited, but we were informed that they were only the managing agents of the assessee company and had assigned the lease almost immediately to the latter under a vermissive clause contained in the deed itself. For all practical purpose therefore, the assessee company was the lessee. The lease is for 20 years, commencing on 1-11-1938 and ending on 31-10-1958, but there is a renewal clause under which the lessee may ask for a lease for a further term of 20 years and the Assam Government may grant such lease upon such conditions as they may deem fit to impose.

The right conveyed to the lessee is the right to quarry limestone and to convert it into lime or cement & to dispose of the manufactured articles at its will and pleasure. The rent reserved is a half yearly rent certain of Rs. 3000/- for the first two years and thereafter a half-yearly rent certain of Rs. 6000/- which are in the nature of minimum royalties, payable in any event; but provision is also made for the payment of further royalties in the event of extraction of limestone in excess of a certain quantity. In addition to these rents and royalties, two further sums are payable under two special covenants, contained in cls. 4 and 5 of the deed. One is a sum of Rs. 5000/-, payable annually during the whole period of the lease as a "protection fee" and the protection is that in consideration of that payment, the lessor undertakes not to grant any lease, permit or prospecting licence regarding limestone to any other party in respect of another group of quarries, called the Durgasil area, without a condition that no limestone shall be used for the manufacture of cement. The second sum is a sum of Rs. 35,000/- also payable annually, but only for five years from 15-11-1940, as a "further protection fee" and the lessor, in consideration of that payment, gives a similar undertaking in respect of the whole of the Khasi and Jaintia Hills district.

There are certain conditions as to rebate and termination of the agreement, attached to the covenant regarding the second sum, but it is not necessary to set them out at this stage. In accordance with these two covenants, the company paid its lessor a sum of Rs. 40,000/- in the accounting year 1944-45 and a similar sum in the year 1945-46. The present reference relates to a claim of deduction made by the company in respect of those two sums in the assessments for the assessment years 1945-46 and 1946-47.

(3) The company based its claim on the ground that the sums concerned actually represented

"item of royalties as enumerated in the deed of lease" and accordingly, in the computation of its business profits, they were liable to be deducted under the provisions of S. 10(2) (xv) of the Act. The Income-tax Officer did not accept that view of the payments and held that though annual, they were payments for the acquisition of a right or privilege rather than for meeting working expenses and as such they were not revenue, but capital payments. The privilege, he held, was that no other manufacturers of cement could be brought within the orbit of the company's activities. In accordance with that view, he disallowed the claim and his order was upheld both by the Appellate Assistant Commissioner and the Appellate Tribunal. The latter wrote an extremely cryptic order and expressed its finding in the form that the sums concerned were not "expenditure wholly and exclusively spent for the purpose of carrying on the business."

(4) In due course, the company applied for a reference to this Court and being apparently in some doubt as to what the Tribunal had actually held, framed a question in a comprehensive form so as to ask whether the payments had been rightly disallowed "as not being an expenditure wholly and exclusively spent for the purpose of the business or as being expenses of a capital nature". The apprehension, we were told, was that if the first ground was not included in the question, it might be said that apart from whether the payments were capital or revenue payments, the Tribunal had found that they were not expenditure laid out wholly and exclusively for the purposes of the business and the claim of deduction might be held to be concluded by that finding. The question actually referred by the Tribunal includes the first ground but omits an express reference to the second and is in the following terms:

"Whether, in the circumstances of the case, the Tribunal was right in disallowing two payments of Rs. 5,000 and Rs. 35,000, known as protection fee, as not being an expenditure wholly and exclusively laid out for the purpose of the business."

(5) There can be little doubt as to what question, the Tribunal intended to refer, but it must be said that the question, as drawn up, is neither correctly framed, nor accurately worded. The only question ever raised in the case was whether the payments were capital payments or revenue expenditure; it was never disputed that they had been made for the purposes of, that is to say, in the interest and for the furtherance of, the business or that they had been made solely for that purpose. Yet, the question, as framed, would suggest that the latter is the only question in the case. Even before the Tribunal all that was contended was that the payments had been made in order to prevent competition in the trade and such payments constituted revenue expenditure.

The Tribunal's finding in repelling that contention was that the sums had been spent wholly and exclusively "for the purpose of 'carrying on' the business", which apparently meant that they had not been spent for the necessities of actual business operations, as distinguished from securing rights and opportunities for conducting the business. It was only another way of saying that the payments were capital payments. But because the finding was so cryptically expressed, it was misunderstood by the company's advisers and as they thought the finding to be that the payments had not been made for the purposes of the business at all at least wholly and exclusively they presented to the Tribunal a question which embodied that assumption. As a result, the Tribunal itself appears to have become confused and what it did was merely to take some of the words of section 10 (2) (xv) and put them in the negative, without realising that by omitting the crucial words "not being in the nature of capital expenditure", it was excluding the question which really arose out of its order and importing one which did not.

(6) It was agreed before us that the question should be re-cast so as to clarify its meaning. On behalf of the assessee, Mr. Mitra submitted that if the question was read as comprising the point as to whether the sums concerned had at all been spent for the purposes of the business, wholly, and exclusively, he would welcome a decision on that point as well. It appeared to us, however, that the question could not properly be read as comprising a point which had never been in issue and about which nothing had been found and no case stated and before us as well, it was admitted on behalf of the Commissioner of Income-tax by Mr. Meyer that it had never been questioned that the sums had been wholly spent for the purposes of the business in the broader sense. We accordingly re-framed the question in the following form to which the parties agreed:

"Whether, in the circumstances of the case, the two sums of Rs. 5,000 and Rs. 35,000 paid under clauses 4 and 5 of the deed of 14-11-1938, were rightly disallowed as being expenditure of a capital nature and so not allowable under section 10 (2) (xv), Income-tax Act".

(7) Apart from the terms of the lease, there are no facts in the case, except that at the time the lease was taken, the company had just been formed. Of this we were informed from the Bar. The only finding of fact recorded by the Tribunal, if it can be called a finding, is one of a negative character, viz., there were no materials to establish that there was any competition at all or any likelihood of any competition. The character of the payments must, therefore, be ascertained from the terms of the deed itself, as has always been done in similar cases. The lease shows that even in carrying on its day to day operations, the company would have to work under severe supervision and control of the lessor, but apart from imposing such conditions which were perhaps more or less normal, the lessor Government placed the company under certain special restrictions.

The lease, as has already been stated, commenced on 1-11-1938. By 31-12-1940, the company would have to erect in the Sylhet district a cement factory, capable of an average output of 250 tons of cement per day and in case it failed to do so, the deposit of Rs. one Lakh made by it would be forfeited (Cls. 9 and 10). Without the permission of the Deputy Commissioner, Khasi and Jaintia Hills, it would have no right to sell any limestone to anybody, except to the Sylhet Lime Co. Ltd., but for sales even to that company of any quantity in excess of one lakh maunds per year, permission would be required. Such permission might be withheld by the Deputy Commissioner if in his opinion it would affect adversely the interests of other local limestone quarry-holders (Cl. 32). The lessor would have the right to cancel the lease at any time in case any of the conditions was broken (Cl. 38), but the lessee was given no right to terminate it.

(8) Against the background of such conditions, cls. 4 and 5 of the lease, which are material for our purpose, may now be read. They run as follows:

4. The lessee shall pay to the lessor Rs. 5,000/- (Rupees five thousand) only annually during the

period of the lease on November 15th starting from 15-11-1938 as a protection fee. In consideration of that protection fee the lessor undertakes not to allow any person or Company any lease permit or prospecting licence for limestone in the group of quarries as described in Sch. 2 and delineated in the plan thereto annexed and therein coloured blue called the Durgasil area without a condition in such lease, permit or prospecting licence that no limestone shall be used for the manufacture of cement.

In the event of any quarry in the Durgasil area not being worked the lessor may allow the lessee to work such quarries under the terms and conditions of working in force for this area.

5. Besides the above protection fee the lessee shall pay to the lessor annually the sum of Rs. 35,000/- (Rupees thirty five thousand) only for five years starting from 15-11-1940 as a further protection fee so long as the total amount of limestone quarried by the lessee in a year does not exceed 22,00,000 maunds per year whether quarried in the area of this lease or elsewhere or obtained by purchase from other quarries in the Khasi and Jaintia Hills by the lessees. If, however in any year the total amount of limestone converted into cement at the lessee's Sylhet Factory exceed 22,00,000 maunds the lessee will be entitled to an abatement at the rate of Rs. 20/- for every 1,000 maunds quarried in excess of 22 00,000 maunds and the lessee shall pay the sum of Rs. 35,000 less the abatement calculated on the basis hereinbefore mentioned. Limestone which is not converted into cement at the lessee's Factory in Sylhet district will not entitle the lessee to any abatement in the protection fee. The lessor in consideration of the said payment undertakes not to allow any person or Company any lease permit or prospecting licence for limestone in the whole of Khasi and Jaintia Hills district without a condition in such lease permit or prospecting licence that no limestone extracted shall be used directly or indirectly for the manufacture of cement. The lessor will be empowered to terminate this agreement for the payment of a protection fee at any time after it has run for 5 years by giving six month's notice in writing by registered letter addressed to 11 Clive Street Calcutta but the lessee will not be entitled to terminate this agreement during the currency of the lease except with the consent of the lessor.

(9) By these clauses the company acquired a protection against other parties being introduced by the lessor in neighbouring limestone quarries to start similar cement-making ventures. Clause 4 requires no explanation. The "protection fee' payable under it is to be paid from the beginning and during the entire period of the lease. The protection secured by the clause is limited to the Durgasil area. Payment of the "further protection fee" provided for in clause 5 is to commence after two years and continue for five years. The protection secured by that clause extends to the whole of the Khasi and Jaintia Hills. The clause provides for a rebate in case, any year, the company quarries limestone in excess of 22.00,000 maunds and actually converts it into cement.

(10) Certain conditions are attached to the agreement contained in cl. 5 by cl. 11 of the deed. The latter clause provides that after the erection of the company's cement factory has been completed (which, as has been seen, must be done by 31-12-1940) it must be brought into full operation within a year and it must not cease operation "for a period of or periods aggregating twelve months within any two calendar years", unless such cessation is caused by upheavals of nature or other circumstances beyond the control of the company. In case of default in either respect, the lessor shall have the right to terminate the agreement contained in cl. 5 although it may not have run for five years. This provision, which has reference to the period of the currency of the agreement, is intelligible, but it is not easy to see what the last sentence contained in cl. 5 itself means. The sentence states that the lessor shall have the right "to terminate this agreement for the payment of a protection fee after it has run for five years" but the lessee shall have no right to terminate it during the currency of the lease, except with the consent of the lessor. If this sentence refers to the agreement contained in cl. 5 as by all indications it does, it appears to be meaningless, for the agreement itself is limited to five years. Neither party could enlighten us as to the meaning of the sentence and although we asked them to produce either the original deed or an authentic copy so that we might see if there was any error or omission in the Paper Book none was produced. We are, however, not much concerned with the meaning of the sentence, for the payments we have to consider were made within five years and it is nobody's case that the agreement had been terminated.

(11) The question before us is whether the amounts of the two protection fees, agreed to be paid in the circumstances I have explained and paid under cls. 4 and 5 of the deed for the benefits there mentioned, were capital payments or payments in the nature of revenue expenditure. The question arises because under section 10 (2) of the Income-tax Act, the assessable profits from business are to be computed after making several allowances, one of which, mentioned in cl. (xv) of the sub-section, is

> "any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purposes of such business...."

As already stated, there is no question that the payments in the present case were made wholly and exclusively for the purposes of the assessee's business and so they answer the description contained in the last part of the clause. The only question is whether they come under the first of the exceptions and are therefore disallowable.

(12) The distinction between capital and revenue expenditure is often fine & in some cases so fine that a decision in favour of either can be given with almost equal plausibility, according as one or other characteristic or effect of the expenditure is emphasised. The decided cases furnish abundant illustration of the extremely delicate balance on which the question often rests. Nevertheless, certain general tests have now been evolved. Almost the first attempt to lay down anything like a principle was made by Lord Dunedin in the Scottish case of — 'Vallambrose Rubber Co. Ltd. v. Farmer', (1905-11) 5 Tax Cas 529 where he said that in a rough way it would not be a bad criterion to say that capital expenditure was a thing that was going to be spent once for all whereas an income expenditure was a thing that was going to recur every year. That test was considered by the House of Lords in the case of — 'British Insulated and Halsby Cables, Ltd. v. Atherton', (1926) AC 205 : 10 Tax Cas 155 where Viscount Cave said that the criterion suggested by Lord Dunedin, although it embodied a material consideration, would not be a decisive one in every case.

He then proceeded to formulate a proposition of his own which has since become the root authority on the subject. "When", he said,

> "an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, ... there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital".

To a certain extent this proposition was founded on what Scrutton L. J. had said in the same case in the Court of Appeal and it had been anticipated by Rowlatt J in —'Ounsworth v. Vickers Ltd.', (1915) 3 KB 267: 6 Tax Cas 671. But it was the first full statement of the whole principle and it has since served as the basic text of the rule, subsidiary propositions being added from time to time by way of explanation or commentary. Thus, with reference to "enduring benefit", Rowlatt J. said in the case of — 'Anglo-Persian Oil Co. v. Dale', (1932) 1 KB 124: 16 Tax Cas 253 that the benefit must endure in the way that fixed capital endures and not in the sense that for a good number of years, it relieves the business of a revenue payment.

This interpretation of "enduring benefit" has been universally accepted and approving of it in the same case in the Court of Appeal, Romer, L. J. said that the benefit secured to the business must be a capital benefit. "Enduring", however, it was explained by du Parcq, L.J. in the case of —'Henriksen v. Grafton Hotel Ltd.', (1942) 24 Tax Cas 453 does not mean " everlasting", but only means that the benefit must be of sufficient durability to justify its being treated as a capital asset. The asset need not be anything tangible (Per Lawrence J. in — 'Collins v. Adamson & Co', (1938) 1 KB 477:21 Tax Cas 400, nor capable of being shown at a value in the balance sheet (per Lord Greene M. R. in — 'Associated Portland Cement Manufacturers Ltd. v. Kerr', (1946) 27 Tax Cas 103: (1946) 1 All ER 63 but may even be of a negative character (per Romer L. J. in — 'Anglo Persian Oil Co. v. Dale', (1932) 16 Tax Cas 253.) Again, it is not necessary that some asset or advantage should actually be brought into existence. Expenditure is to be attributed to capital, if it is made with a view to acquiring some asset or advantage of enduring benefit, it is not further necessary that it should have that result (Per Romer L. J. 'ibid').

(13) So much about the intention and effect of the expenditure. What must be its form? In the language of the proposition of Viscount Cave, it must be made "once and for all". That does not mean that the payment must always be in one lump-sum. If the consideration be of the nature of premium or purchase-price and thus a capital consideration, it may be paid in instalments and the false appearance of periodicity will not make it any the less a payment once and for all. The test is whether it is an expenditure made to meet a continuous business demand or in other words a recurrent expenditure to meet a recurrent business need arising in the course or process of profit-making or an expenditure which disposes of, by one stroke as it were, a capital need or acquires once and for all a capital requirement or advantage. If it be an expenditure of the latter kind, the manner in which the actual payment is made, whether it is made at one time or distributively, is immaterial (Per Lord Greene, M. R. in—'Henriksen v. Grafton Hotel Ltd', (1942) 24 Tax Cas 453).

(14) Taken literally, the test laid down by Viscount Cave would seem to apply both to cases where the expenditure is made at the inception of a business and those where it is made when the business is running, but it is more suited to the latter type of cases and has generally been applied in relation to them. As regards expenditure laid out or undertaken at the initiation of a business, a test has been laid down in another form. A terse statement of it is to be found in the well-known words of Bowen L. J. in the case of — 'City of London Contract Corporation Ltd. v. Styles', (1887) 2 Tax Cas 239

> "You do not use it 'for the purpose of' your concern, which means for the purpose of carrying on your concern, but you use it to acquire the concern".

In other words, if the expenditure is not for meeting the working expenses of a business after it has been started, but is for the acquisition of the initial assets or advantages on the basis of which the business is to be launched, it is a capital expenditure. A comparatively modern restatement of the principle occurs in the judgment of the Privy Council in the case of —'Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income-tax Bombay Presidency and Aden.', 64 Ind App 215:1937-5 ITR 202 (PC) where certain payments were held to be capital payments in the view that the obligation to make them had been undertaken by the company

> "in consideration of their acquisition of the right and opportunity to make profits, that is, of the right to conduct the business and not for the purpose of producing profits in the conduct of the business."

(15) Unlike capital expenditure, revenue expenditure has not been the subject of judicial definition in a crystallised form. But the definition of capital expenditure itself suggests what revenue expenditure is. Expenditure for the purposes of a business can only be capital or revenue expenditure and any expenditure that cannot be brought under the first category must necessarily fall under the second. One is practically the converse of the other. If a positive definition of business expenditure of a revenue character is required, it may perhaps be said that it must belong to the operational expenses of the business, laid out either to meet a continuous business demand or to get rid of some particular trading liability or to meet the normal day to day occasions for outlay in carrying on the business, but always related to the working of the organisation for producing profits and the process of production.

(16) I may add, however, what indeed is obvious, that as the forms in which money may come to be expended for the purposes of business are of an infinite variety it is impossible to devise a test for capital or revenue expenditure which will be applicable in all its details to all cases. Pollock. M. R., who had himself dealt with —'Atherton's case', (1926) A. C. 205: 10 Tax Cas 155, in the Court of Appeal, did not apparently find the test formulated by Viscount Cave to be satisfactory and in the subsequent case of the —'Anglo-Persian Oil Co. Ltd.', (1932) 1 KB 124, suggested another. He repeated his preference for his own test in —'Golden Horse Shoe (New) Ltd. v. Thursgood', (1934) 18 Tax Cas 230. The same test was referred to by Lord Haldane in —'Smith & Son v. Moore', (1921) A. C. 13: 12 Tax Cas 266, apparently with approval, but did not find favour with Lord Macmillan in —'Van den Berghs Ltd. v. Clark', (1935) A. C. 431: 19 Tax Cas 390. I need not, however,

discuss other tests. The present case was argued by reference to the test of Viscount Cave and for the problem in this case at least, that test supplies a satisfactory solution.

(17) What is the expenditure which the assessee company is seeking to deduct in computing its assessable profits and gains? In order to understand its true character, we must go back to the time when the obligation to make the expenditure was undertaken, the surrounding circumstances existing at the time and the benefit which the expenditure was expected to secure. Leaving aside for the time being the question as to whether it was an expenditure made 'once and for all', the first enquiry under Viscount Cave's test is, with what view was the expenditure undertaken? At the time the lease was obtained the company had just been formed. It was intending to commence business as miners of limestone and manufacturers of cement and to that end was taking a long term lease of certain limestone quarries. The lease was being granted under terms and conditions of great stringency, both as to the actual operations of the business and as to the sale of its products.

The lessor had other limestone quarries in the neighbourhood which were potential sites for similar industries that might be set up by other parties and which exposed the infant company to the risk of serious competition. In these circumstances, the company undertook to make two payments to its lessor in order to buy up his option to let out the neighbouring quarries to other parties for the manufacture of cement. There can be little doubt that the company undertook that expenditure, not with a view to meeting any expenses of carrying on the business, but with a view to securing conditions of security in which its business might be carried on. That such conditions would be an advantage to the company, cannot possibly be disputed.

Passing on now to the second enquiry under the test, how long was the advantage going to endure? There can be no question that the advantage procured by the payment under cl. 4 of the deed was going to endure for the entire period of the lease. The same appears to be the position under Cl. 5 as well, for although the lessee's covenant in that clause is limited to five years, the lessor's covenant does not appear to be similarly limited. The bargain appears to be that the lessee undertakes to make a payment for five years and in consideration of that payment the lessor undertakes not to let out to third parties any of the quarries in the whole district during the entire period of the lease, without a restriction against manufacture of cement. In any event, the advantage was going to last for five years by which time the company might be expected to be well on its feet. It is important to notice that under the terms of the deed, the advantage is not one annually renewable, but an advantage for the whole period of the lease or for the whole period in one case & for five years in another and no right is reserved to the lessor to withdraw it in default of the annual payment. The advantage thus was going to be of sufficient durability.

Proceeding to the third enquiry under the test, what was the benefit that the advantage was going to confer on the business? It was not providing any part of the means for carrying on the business or providing any relief regarding the conduct of the organisation for producing profits. It was securing better prospects for the venture as a whole. It was, to use an expression of Lawrence J., "sterilising" the neighbouring quarries as potential resources of possible competitors; it was eliminating chances of rivalry and securing for the company a monopoly for the whole district; it was adding to the value of the company's own capital assets, the Komorrah quarries, by acquiring for them a privileged status and enlarging their profit-yielding capacity; and it was, in the words of Lord Macmillan in —'the Van den Berghs Ltd case', (1935) 19 Tax Cas 390— strengthening the "permanent structure" of the company's business organisation. Benefits of this nature are undoubtedly capital benefits and since they were, under the terms of the deed, to be of an enduring character, an expenditure made with a view to acquiring an advantage from which such benefits would flow, was under Viscount Cave's test a capital expenditure. So it was under the test laid down by the Judicial Committee in the case of 'Tata Hydro-Electric Agencies Ltd.', 64 Ind. App. 215 (P.C.), for, it was an expenditure for the acquisition of some rights and opportunities for conducting the business.

(18) But granting that the expenditure secured an advantage of enduring benefit to the business, was it an expenditure made "once and for all"? It was to be annual payment of equal sums and we are concerned in the present case with such payments for two years. If there be any difficulty in the case at all, it lies in this point. But, in my view, there is really no difficulty. That the expenditure should be one made once and for all, does not mean that it must be made in a single sum and at one time. It is well-settled that a mere lump sum payment, by itself, proves nothing as to the character of the payment, because a capital payment may be made in instalments and a number of revenue payments may be compressed into a single sum. It is true that where the consideration is fixed at a single sum and then its payment in instalments is arranged for, the case is simple. Of that class are the monopoly value cases, such as — 'Kneeshaw v. Abertolli', (1940) 2 K. B. 256 — 23 Tax Cas, 462 and — 'Henricksen v. Grafton Hotel Ltd.', (1942) 24 Tax Cas 453.

But it cannot be said simply because the arrangement was for the payment of an annual sum, without a total consideration being fixed and named, that the payments are not capital payments. It seems to me that when an expenditure is made or undertaken for the acquisition of an asset or advantage and when on the one hand, the acquisition is an outright acquisition, not subject to any annual or periodical contingencies and, on the other hand, the consideration for the whole acquisition together with the obligation to pay it, is definitely fixed so that there is an irrevocable commitment then, although the consideration may take the form of a named sum to be paid at stated intervals, there is still an expenditure made once and for all; and so if it appears from the facts that what is being paid at intervals is price and not hire the payments must be taken to be capital payments.

In the present case the assessee company has no right to terminate either the lease or the agreements contained in cls. 4 and 5 of the deed. It is liable and shall remain liable, under the obligation it has undertaken, to make the payments stipulated in cls. 4 and 5 during the whole of the periods stipulated. Neither has the lessee any right to withdraw the protection provided for in cl. 4 at any time during the period of the lease or the protection promised by cl. 5 at any time within five years, except in some exceptional contingencies which need not be considered. The protection is not one annually renewable

suc has been accorded and purchased for the whole period; the expenditure therefor is not recurring, but has been undertaken once and for all; and the payments, though yearly, are not annual payments in the sense in which rent is an annual payment. That regular periodical payments which are not instalments of a total consideration fixed at a named sum, can yet be capital payments, is well illustrated by the case of 'Tata Hydro-Electric Agencies Ltd.', 64 Ind App 215 (PC). There an agency for a term had been purchased from the holders for a consideration which included certain percentages of the commission that would be received from the principals in the course of the agency and the periodical payments of such percentages by the purchaser were held to be capital payments which he was not entitled to deduct in computing his taxable profits.

(19) Apart from any authority or test, it appears to me on a plain view of the facts that where, as here, before starting on its business venture and by way of setting the stage, as it were, for its business operations, a newly-formed company takes steps to ensure for itself certain conditions of security which will last throughout the life of the project or during a substantial part of it and undertakes to pay a consideration to the grantor of the security, the expenditure on account of such consideration, although it may take the form of yearly or half-yearly payments, is in the nature of an initial outlay and the payments, having no connection with the carrying on of the business, cannot properly be debited against the revenue receipts.

(20) On behalf of the assessee company, it was contended by Mr. Mitra that the payments were items of revenue expenditure, because the object with which they were made and the result which they produced was that by them competition was avoided and the company was enabled to obtain remunerative prices for its goods. They were not payments once and for all, but periodical payments made year to year in order to obtain for each year a chance of making higher profits in that year. They were thus directed at augmentation of profits and were revenue expenditure. They could not be regarded as capital expenditure, because by them or by the undertaking to make them, no capital asset or advantage, nor anything in the nature of goodwill had been acquired.

The lease in fact contained three agreements, by the first of which, contained in cls. 1, 2 and 3, the lease proper was obtained and the right to carry on the business of manufacturing cement acquired for the consideration of royalties. Then there were two further agreements, contained in cls. 4 and 5, by each of which freedom from competition was secured in return for an annual payment. The bearing of these agreements was on profit-making. They brought no capital asset into existence, which could be seen from the fact that in no form could the advantage secured by them be shown as a part of business capital in the company's accounts. The payments were not capital payments, because it was not that a liability for Rs. 1,00,000 in one case and for Rs. 1,75,000 in the other was undertaken and that the annual payments were instalments of such fixed sums. In particular, the payment under cl. 5 was clearly a revenue payment, because it was subject to a rebate which, in turn, was dependent on production.

(21) In my opinion, these contentions are not correct. I have already given my reasons for holding that the payments are no part of the operational expenses of the business and in no way connected with the process of profit-making, but they are the price of the restrictive covenant by which the lessor bound himself not to allow the neighbouring quarries to be turned into seats of competing concerns and the obligation to make them was undertaken at the inception for the business for the purpose of securing for it the advantage of stable conditions under which its operations might be carried on. That advantage is not an annual advantage, granted on annual payments, for, the deed does not indicate that the protection is to be for one year at a time under either of the two clauses, but indicates the contrary. That the advantage is not capable of being shown in the accounts at a money value on the side of capital, is immaterial, as was explained by Lawrence J. in — 'Collins v. Adamson & Co.', (1938) 1 K. B. 477 : 21 Tax Cas 400 and Lord Greene M. R. in — 'Associated Portland Cement Manufacturers Ltd. v. Kerr', (1945) 27 Tax Cas 103.

It is true that in — 'Atherton's case', (1926) 10 Tax Cas 155, Lords Carson and Blanesburgh who were the dissenting Judges, asked by what assets the advantage would be represented in the event of winding up of the company, but that has never been regarded as a true test of an advantage being a capital asset or the payment for it being a capital nature. The advantage may be inpalpable, intangible or incalculable and yet be a capital asset. The argument that the payments in the present case were aimed at earning higher profits, is pointless, for the object of all business outlay, whether capital or revenue, is production of profits. Nor can it be said that, in any event, the payment under clause 5 must be held to be revenue expenditure, because, in regard to it, a rebate is to be allowed in case the production exceeds a certain quantity. That provision relates only to the measure of the payment and has nothing to do with its character. The payment being agreed to for other purposes and its amount being otherwise fixed, the fact that a variation is provided for and the measure of the variation is fixed by reference to the figure of production, does not make it a cost of carrying on the business.

(22) Mr. Mitra took us practically through the whole range of cases on the subject and very fairly, drew our attention not only to cases in his favour, but also to some that might be cited against him. The cases are merely illustrations of various kinds of expenditure which were held to be of either a capital or a revenue character and unless a case be found of which the facts are identical, a study of other cases can hardly furnish any real guidance. I shall not therefore make any attempt to examine all the cases, but as the chief point of Mr. Mitra was that expenditure laid out to avoid trading competition was revenue expenditure, I shall deal briefly only with those cases where avoidance of competition was the direct or indirect object of the payment.

(23) Before taking up the cases, I might make one general observation. It seems to me that the competition cases, if I may so call them, fall broadly into three groups. There is a class where two or more rival traders came to an arrangement about the prices to be charged for their goods and thereby avoided competitive price-cutting or one put himself in such a position in respect of another that he could control the prices to be charged by both. There is another class where competition was avoided altogether by elimination of the competitor himself.

There is also a third class where the main transaction was that a managing or selling agency was terminated by the principal on paying a certain sum to the agents but there was a subsidiary term that the agents would not set up business of the same kind in competition. Expenditure laid out in the first and third class of cases has been held to be revenue expenditure, while that in the second class has been held to be of a capital nature. The cases relied on by Mr. Mitra belong to the first and third classes except two cases of this Court which will require special consideration.

(24) The first case relied on by Mr. Mitra was — 'Guest, Keen & Nettlefields Ltd. v. Fowler', (1910) 1 K. B. 713: 5 Tax Cas. 511. There, a number of steel hoop manufacturers formed an association & agreed between themselves to adhere to fixed prices for their goods and in consideration of that agreement by which fixed prices were assured and competitive price-cutting avoided, a pool system was introduced by which each member was allotted a fixed proportion of the totality of the orders received, with the condition that, if any member invoiced more than his proportion of the orders, he would have to pay to the Association a certain sum per ton of the excess invoiced and such sums received by the Association would be distributed among members who would have invoiced in less than their proportions. The expenditure which fell to be considered in the case was the amount which a particular member had paid to the Association in a certain year under this arrangement.

Very similar was the case of — 'Gulabsingh & Sons v. Commissioner of Income-tax, Lahore', 1946 14 I. T. R. 66 (Lah), also relied on by Mr. Mitra where the owners of three rival concerns in the printing and publishing trade entered into an arrangement by which they agreed to quote uniform rates in the tenders submitted by them for Government orders and in consideration of that agreement each (see the judgment, though the head-note mentions the assessee only) undertook to pay the others a certain share of the estimated profits from such Government orders as might be secured and executed by him, the estimate being made by deducting certain agreed costs from the tendered cost. The expenditure that fell to be considered in this case was the amount paid in a certain year by one of the parties to the agreement. It is clear that these were cases where, in the course of carrying on their respective businesses and the actual process of profit-making, certain rival traders in the same line of business came to an arrangement between one and another as to the regulation of prices and the consideration which each paid for the forbearance of the others from under-bidding or under-selling was directly related to the operational part of the business and was properly held to be revenue expenditure.

As Bray J. said in the first case the arrangement was "part of the business part of the trade". These cases bear no analogy to the case before us and are of no assistance to the assessee company. Mr. Mitra also relied on the case of — 'John Moore v. Stewarts & Lloyds Ltd', (1915) 6 Tax Cas 501. That was a case where a company entered into an agreement with another in the same line of business and in return for an undertaking to make half yearly payments to the latter, so as to make up the deficiency in its profits and enable it to declare half-yearly dividends on its preference shares, obtained the right to nominate a majority of members on its Board of Directors. The payments made by the first company were obviously the expenses of a working arrangement between the two companies and so an administrative expense, as Lord M' Laren pointed out. But it was also held, though nothing about competition was mentioned in the agreement, that the effect of the arrangement would be that the two companies would co-operate instead of competing and that it was obviously intended to prevent the cutting down of prices by competition.

On that basis, the case is of the same type as the other two, already discussed, and a payment made in the course of carrying on the businesses to a rival trader, as the consideration for an arrangement with him which would help in keeping up prices, was clearly a revenue expenditure, as was held Mr. Mitra next referred to two cases of termination of agency, the well-known case of — 'Anglo Persian Oil Co. Ltd. v. Dale', (1932) 16 Tax Cas 253, a case of managing agency and — 'In re Imperial Chemical Industries (India) Ltd', 62 Cal 87 a case of 'del credere' agents. These cases, so far as payments were made in them to the outgoing agents for loss of service and consequent loss of commission, have no bearing whatever on the present case and I need not refer to the grounds on which they were held to be items of working expenses and so of revenue expenditure. In each case however, there was an undertaking given by the outgoing agents not to engage in similar business on their own account in the old zones of their agencies, but this term was not given any consideration in either of the cases except that in the case of — 'Anglo Persian Oil Co., Ltd.', one of the Judges in the Court of Appeal, Lawrence L. J. mentioned it and observed that it did not alter the character of the payment which was otherwise a payment for the cancellation of a service agreement in order to effect a saving in the working expenses of the employer.

These two cases, therefore, have no relevancy to the case before us. Nor is the case of — 'Jagat Bus Service, Saharanpur v. Commissioner of Income-tax U. P. and Ajmere-Merwara Lucknow', (1950) 18 I. T. R. 13 (All.) of any assistance. There a firm obtained a monopoly of the right of plying motor vehicles on hire on a certain road for a period of five years on condition of paying a certain fixed sum every year, but a rebate was allowable in case the roads remained impassable for a certain number of days. The expenditure which fell to be considered was the payment made in a particular year of the annual sum, less rebate, and it was held to be of the nature of revenue expenditure. A payment of that kind is very different from the payment we have to consider because there was no fee or rent apart from the annual payment and the payment thus comprised not only the monopoly value but also the fee for the use of the road and was thus, in part at least, an expenditure for the actual carrying on of the business. As the Court pointed out, without making the payment the business could not have been carried on at all.

In the present case, apart from other distinctions, the payments were in no way necessary for the carrying on of the company's operation on the Komonah quarries, but were made for the acquisition of certain supplementary advantages in respect of certain other quarries of the lessor. I may add that if the payment in the Allahabad case was for the right of carrying on the business the decision is not correct.

(25) It remains to deal with two recent decisions of this Court which I have reserved for separate consideration. The first is the case of

— 'Commissioner of Income-tax, Calcutta v. Piggot, Chapman & Co', 1949-17 I. T. R. 317 (Cal) where a firm of exchange-brokers purchased the goodwill of another similar firm, together with its seats on the Calcutta Exchange Brokers' Association, for which the consideration was a sum certain. But by the same deed, a partner of the transferor firm also agreed not to work in future at any time as an exchange broker or compete with the transferee firm and the consideration for that agreement was an annuity of a gradually diminishing amount, payable to the contracting partner for life and after his death to his wife, but subject to the condition that the annuity would be payable only so long as the brokerage received by the transferee from Ralli Brothers and two other firms was not less than double the amount of annuity payable in a year and would altogether cease if Ralli Brothers discontinued business. It was held by Das and Mookerjee JJ. that the payment of the annuity was a revenue expenditure. With great respect, I confess the reasoning of the decision is not at all clear to me, because after referring to a large number of Indian and English cases and particularly to — 'Collins v. Joseph Adamson & Co.', (1938) 1 K. B. 477:21 Tax Cas 400 and — 'Associated Portland Cement Manufacturers Ltd. v. Kerr', (1945) 2 All E. R. 535 the learned Judges distinguish them and place their own decision on the sole ground that the payment of the annuity was contingent upon the receipt of brokerage from Ralli Brothers.

What the last circumstance had to do with the payment, as made by the transferee firm, being of a capital or revenue nature is not easy to see. But, in any event, even if the decision be right, I feel in no way embarrassed by it in deciding the present case, where the payment is not to a person, previously engaged in the same line of business, in consideration of his withdrawing therefrom. I may add that the learned Judges appear to have had before them only the decision of the High Court in — 'the Associated Portland Cement Manufacturers' case', and not also the decision of the Court of Appeal, reported in (1946) 1 All E. R. 68:27 Tax Cas 103.

(26) The other decision is that in —'Commissioner of Income-tax, West Bengal v. Lahoty Brothers Ltd.', (1951) 19 ITR 425 (Cal). The facts of that case are not at all clear, for, although it is stated that a joint family transferred a kerosene agency business to the assessee company for a certain consideration and then undertook not to compete with the company for a further consideration, it appears from cl. 5 of the agreement, reproduced in the judgment, that one of the reasons for which the joint family was forbearing to compete was that it would be benefited by the agreement "by way of more efficient management, lesser establishment charges and better rate of profits". How these could be any concern of the joint family when it was surrendering the agency and withdrawing from business, is not clear. However that may be, the payment of the consideration to the joint family for not competing, which was an annual sum, was held to be revenue expenditure. Banerjee J., who delivered the judgment of the Court, the learned Chief Justice concurring, observed that the payment was made to keep a competitor out of the area where the assessee was carrying on its business and the case was plain. It is difficult to believe that their Lordships intended to lay down any general proposition and dissent from a long line of cases of very high authority where similar payments had been held to be capital expenditure. But again, the payment being of a kind different from that in the present case, the decision does not create a difficulty so far as the present case is concerned.

(27) As regards the cases which support the view I have taken of the payments in the present case, I shall only make brief references to them. No case is exactly in point, but a case which comes very near is the case of — 'Collins v. Joseph Adamson & Co.', (1938) 1 KB 477: 21 Tax Cas 400. There, a number of firms and companies, carrying on business as boiler-makers had formed a trade association in order to maintain prices by a pooling scheme and when one of the members, a company, began to make preparations to sell its business to a hostile non-member, the association purchased the business for a certain sum and closed it down and for another sum, obtained from the owner of the land on which the business had been carried on, an agreement not to use it or allow it to be used, for boiler-making for twenty years. The sums were payable in annual instalments and each member of the association had to pay a share.

A question having arisen in the case of one of the members, a firm, as to whether its share of the annual payment was an allowable deduction in computing its profits for tax purposes, Lawrence J. decided that it was not. He held that the payments created for the members of the association advantages of an enduring nature in that the result in one case was the removal or prevention of an unfriendly competitor and in the other case it was that the land which was a potential site for a competing concern, was sterilised for purposes of boiler-making for a period of twenty years. The payments in the present case also prevented the emergence of competitors in the other quarries of the district and sterilised them for purposes of cement making for a period of twenty years, at least some of the quarries for that period and some for five years. The case of —'Associated Portland Cement Manufacturers Ltd. v. Kerr', (1945) 27 Tax Cas 103, has already been referred to. There, large sums were paid to two retiring directors of a company in consideration of their agreeing not to carry on or be concerned in the manufacture or the selling of cement — the business of the company in any part of the world without the company's consent and the payments were held to be capital expenditure. "It seems to me" observed Lord Greene M. R.

> "that the effect of buying off potential competitors must of its very nature affect the company's goodwill. If all potential competitors could be bought off, the goodwill of the business would obviously be very greatly benefited".

In the present case also, all the potential competitors were bought off, though indirectly and although there was no existing goodwill, foundations of a goodwill were laid. Some assistance can also be drawn from the cases of monopoly value. The effect of the licensing laws of England is to grant to the licensee of a hotel what, for practical purposes & in respect of a particular area, is a monopoly & the monopoly value is the price or fee paid for this privilege which, when the license is for a number of years, is paid in annual instalments. In —'Kneeshaw v. Abertotli', (1940) 2 K.B. 295; 23 Tax Cas 462, and —'Henricksen v. Grafton Hotel Ltd.', (1942) 24 Tax Cas 453, payments of monopoly value were held to be capital expenditure. Indian cases to which reference may be made are —'Commissioner of Income-tax

Madras v. Chengalvoroya Mudaliar', (1934) 2 ITR 395 (Mad), and —'Chengalvoroya Chettiar v. Commissioner of Income-tax, Madras', (1937) 5 ITR 70 (Mad) (S.B.) — cases of an exclusive privilege of excavating lime shells during a certain period in a certain area for a certain sum payable in instalments and —'Commissioner of Income-tax, Madras v. A. S. Alaganan Chetty', AIR 1928 Mad 902, a case of payment of a lump sum to rival contractor for not competing.

(28) In the Australian case of —'Sun Newspapers Ltd. and Associated Newspapers Ltd. v. The Federal Commissioner of Taxation', 61 CLR 337, where a valuable exposition of the law is to be found, the facts were that the owners of a rival evening paper which was sold at the same price, granted an option to certain third parties for a lease of the paper and the optionees began to make preparations to bring out in the place of the old paper a lower-priced paper. Thereupon, in order to prevent the threatened competition by a cheaper paper, a payment was made to the optionees for their interest in the existing rival paper and for an undertaking that they would not publish any paper at the place or within three hundred miles for three years, as a result of which the existing rival paper necessarily went out of existence and the publication of a new competitive paper was prevented. It was held that though no material asset was acquired and the payment was made, while carrying on business, to safeguard the profits by securing a monopoly and preventing competition, the outlay was capital expenditure, because, apart from other reasons, it concerned the reinforcement of the profit yielding subject, the instrument for earning profits and was not concerned with the use or employment of that instrument for the profit-earning purpose.

The true meaning of the expression "once and for all" was also explained and it was observed that the test was not recurrence, but whether what had been done was to provide for a periodical reward or outlay to cover the use and enjoyment of the subject for periods commensurate with the payment or whether final provision had been made so as to secure future use and enjoyment of the subject for the stipulated period.

(29) Judged by these tests, which are all deductions from —'Atherton's case', (1926) 10 Tax Cas 155, the expenditure in the present case is capital expenditure. It is, to use the words of Dixon J. an expenditure for maintaining the strength of the capital structure of the company, the organisation set up for the earning of profits and not an expenditure connected with the process by which the organisation operates to obtain regular returns for regular outlay. It is an expenditure for the benefit of the business as a whole and not an expenditure for meeting any of the wide variety of working needs which have to be met out of the returns of the trade. The benefit it confers on the business is enduring and it is made under a provision which was made finally and once for all for the continuance of the benefit during the period of the lease.

(30) The answer to the question referred, as re-cast by us, must accordingly be in the affirmative.

(31) The Commissioner is entitled to the costs of this Reference and will have them. Certified for two Counsel.

(32) S. R. DAS GUPTA J.: I agree.

B/D.H. Answer in the affirmative.

A.I.R. 1953 CALCUTTA 377 (Vol 40 C. N. 140)

K. C. DAS GUPTA AND LAHIRI JJ.

Umapati Choudhuri and others, Plaintiffs Petitioners v. Subodh Chandra Choudhuri and others, Defendants-Opposite Party.

Civil Rule No. 2637 of 1951, D/- 16-5-1952.

(a) Civil P.C. (1908), O. 39, R. 1 — Scope of.

Where a partition decree is obtained in absence of necessary parties, the decree is ineffective and the parties who were absent have got a good prima facie case for restraining the decree-holders from giving effect to that decree. (Para 4)

Anno: Civil P. C. (1908), O. 39, R. 1 N. 3.

(b) Civil P.C. (1908), O. 39, R. 1 — Injunction in respect of judicial proceedings.

The prevention of multiplicity of proceedings is one of the purposes for which orders of restraint can be legitimately passed. (Para 4)

Anno: Civil P.C. (1908), O. 39 R. 1 Ns. 3 and 7.

(c) Civil P.C. (1908), O. 39, R. 2 — "Or other injury of any kind" — (Specific Relief Act (1877), S. 56).

The court should give the widest interpretation to the word 'injury' appearing in O. 39, R. 2, for doing justice even if the injury which the plaintiffs may suffer is not injury within the meaning of R. 2. (Para 5)

Anno: Civil P.C., O. 39 R. 2 N. 4.

(d) Civil P.C. (1908), O. 39, R. 1 and S. 151 — Scope of O. 39, R. 1 — (AIR 1926 Mad 258 Dissented from).

Order 39 does not exhaustively deal with the matter of granting of temporary injunction. Apart from those provisions the court can grant temporary injunction in the exercise of its inherent jurisdiction: AIR 1952 Cal 560, Ref. AIR 1917 Cal 44 (FB), Foll. (Para 5)

Anno: Civil P.C. (1908), O. 39 R. 1 N. 3; S. 151 N. 2.

(e) Civil P.C. (1908), O. 39, R. 1 — Scope and principles of.

Delay in filing a suit or an application is no reason why the parties should not get a temporary injunction. (Para 8)

Anno: Civil P.C. (1908), O. 39 R. 1 N. 3.

(f) Specific Relief Act (1877), S. 56 — Scope of — (Civil P.C. (1908), O. 39, R. 1).

There is nothing in S. 56 to prevent the court from restraining a party from proceeding with judicial proceedings. (Para 9)

Anno: Specific Relief Act, S. 56 N. 1; Civil P.C., O. 39 R. 1 N. 7.

A. C. Gupta, Binayak Nath Banerji and Sushil Kumar Biswas, for Petitioners; A. N. Bose, Dwijendra Nath Mukherji and Anil Kumar Das Gupta, for Opposite Party.

CASES CITED:

(A) ('26) AIR 1926 Mad 258: 92 Ind Cas 615
(B) ('52) AIR 1952 Cal 560: 7 DLR (Cal) 56
(C) ('17) AIR 1917 Cal 44: 44 Cal 929 (FB)

K. C. DAS GUPTA, J.: The petitioners instituted a suit which has been numbered as Suit No. 12 of 1950 for partition of properties belonging originally to four brothers, Nandalal, Amritalal, Motilal and Mohitlal. The petitioners are the sons and legal representatives of Panchkori, one of the six sons of Amritalal. It is

not disputed that Panchkori did acquire by inheritance an interest in the joint properties. Sometime before 1932, he lost that interest and that interest passed to another son Amritalal, Lalit. The petitioners have brought the suit on the averment that thereafter they have reacquired an interest in the properties and found their case on deeds of transfer from Lalit. They have also asked for a permanent injunction restraining the defendants from executing the decree passed in an earlier suit for partition instituted by Subodh who is the son of Mohitlal. In this earlier suit which was numbered 39 of 1945 the present plaintiffs were not made parties. It is on that ground that the plaintiffs urged that the previous partition decree is ineffective and that its execution should be prevented. A preliminary decree was passed in that earlier suit on 15-11-1946. A commissioner was appointed on 18-2-1948 for giving effect to the preliminary decree. On 10-9-1948 before the Commissioner had completed his labours, the present petitioners filed an application before the Commissioner in which they claimed an interest in the properties on the basis of the deeds of transfer from Lalit which have been mentioned above and prayed that an allotment may be made in their favour. The Commissioner rightly put up this application before the court. The application was however dismissed on 14-9-1948, not in the view that the story of transfer was false or doubtful but in the view that as it was not the case of some of the defendants in that suit that the proposed added defendants had got interest by succession or assignment since the institution of the suit, the prayer for adding them could not be allowed. It is not disputed before us that the order passed by the learned Judge was based on a misappreciation of the law. The present plaintiffs however took no further steps in the matter till they filed the suit on 14-3-1950. Before that date much progress had been made in the earlier suit. The Commissioner filed his report on 16-9-1948 and the final decree was passed on 21-1-1950. After the present suit had been filed on 14-1-1950, the stamps for the final decree were put in by the plaintiffs on 15-3-1950.

(2) On 16-3-1950, the plaintiffs, i.e., the present petitioners, filed their application for temporary injunction restraining the opposite party Subodh from executing the decree in the partition suit. The application was rejected by the learned Subordinate Judge on 27-9-1950. An appeal against this order of rejection was dismissed by the learned District Judge on 31-8-1951. The opposite party filed his application for execution of the final decree in that earlier partition suit on 11-9-1951. Writ was issued on 14-9-1951 and in his report of 17-9-1951 the Commissioner stated that he had "given delivery of possession of the sadar rooms and the land adjoining the said sadar room, kitchen, store room etc., to the decree-holder, subject to the right of the judgment-debtors to use the existing passage used by them for the ingress and egress of their house till the common passage is formed according to the decree by breaking open the portion of the wall just to the south of the stair case....." He mentioned further in the report that as regards the other properties possession would be given gradually.

(3) It is obvious that to the extent the final decree in favour of Subodh has already been executed, the present Rule is infructuous. Clearly, however, the decree has been executed only in part and as regards the part which has not been executed, it is necessary for us to consider whether we shall interfere with the decision of the courts below that the plaintiffs are not entitled to any order restraining Subodh from executing the remaining portion.

(4) It must be pointed out at the outset that Lalit from whom the plaintiffs claim their present interest in the properties does not challenge the validity of the transfers made by him. While we are anxious to say nothing that might embarrass the court below in judging the issues between the parties, we are bound to say that there is nothing 'prima facie' that would entitle us to hold that the story of transfer by Lalit is not true. If there was a good and valid transfer from Lalit in about 1941, as is alleged, they were obviously necessary parties in the partition suit that was instituted by Subodh. The decree for partition obtained in the absence of necessary parties cannot be effective, and the fact that the learned Judge refused the application of these persons to be added as parties will not alter the situation. If they are necessary parties and the partition decree that was obtained in Suit No. 39 is ineffective, it must be held that the present plaintiffs have got a good prima facie case and a reasonable chance of success in their present suit. I am unable to see also how the learned Judge in the court below thought that the plaintiffs would not be entitled to an order permanently restraining the defendants who had obtained the decree in their favour in the earlier partition suit from giving effect to that decree. There can be no doubt also on a consideration of the question of balance of convenience that the balance is in favour of an order of restraint. If finally the plaintiffs fail in their suit, the parties who had obtained the decree in the previous suit will suffer nothing more than the delay in getting the fruits of their litigation, as a result of the injunction order being granted. If, on the other hand, the plaintiffs win the suit and the opposite party has not been restrained from executing his decree — so far as it remains to be executed, — there are bound to be many complications, for the solution of which both parties will have to come to court. The prevention of such multiplicity of proceedings is one of the purposes for which orders of restraint can be legitimately passed. I have no doubt therefore that if there be no bar in law to the granting of an order of injunction it is fit and proper that the defendant opposite party should be so restrained from executing the decree in the previous case.

(5) It is contended, however, and this contention appears to have been accepted by the learned court below, that in law the plaintiffs are not entitled to such an order of injunction. It is stated in the first place that the provisions of O. 39, R. 2, Civil P. C. on which the applicants relied do not apply to this case & secondly that if these do not apply there is no scope for the exercise by the court of its inherent jurisdiction under S. 151 Civil P. C. Order 39, R. 2 provides:

"In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the

suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right."

It is argued that the injury which the plaintiffs say they will suffer if the opposite party No. 1 executes his decree, is not injury within the meaning of the above provision of law. I do not see why the meaning of word "injury" should be limited in this manner. I am inclined to think that the court should give the widest interpretation to the word, for doing justice. Supposing however that the injury which the plaintiffs may suffer in this case is not injury within the meaning of R. 2, O. 39, it by no means follows that the court's hands are tied. It has been argued on the authority of a case decided in — 'Varadacharlu v. Narasinha Charlu, AIR 1926 Mad 258 (A) that as the matter of temporary injunction has been dealt with by Civil P. C. under O. 39 there is no scope for the court to exercise its inherent jurisdiction. We are unable to accept this view. As was held by this Court in — 'The Chinese Tannery Owners Association v. Makhan Lal Ganguli', AIR 1952 Cal 560 (B) (order 39 does not exhaustively deal with the matter of granting of temporary injunction) and so on the authority of the Full Bench decision in — 'Abdul Karim Abu Ahmad Khan v. The Allahabad Bank Ltd.', AIR 1917 Cal 44 (C), it should be held that apart from the provisions of O. 39 the Court can grant temporary injunction in the exercise of its inherent jurisdiction.

(6) It was next argued that the plaintiffs have not come with clean hands and so the court should not interfere in their favour. Stress was laid by Mr. Bose on the fact that the present plaintiffs did not themselves come forward with a prayer to be added as parties during all the time from August 1945 till September 1948. He contends that as the plaintiffs and the defendants of the suit were living in the same house they must have had full knowledge of the suit and still they stood by allowing Subodh to spend a considerable sum of money. Assuming that the present plaintiffs did know of the previous litigation, we do not think that they had any duty of coming forward to the court at the very early stage. As their claim to a share in the properties on the basis of transfer from Lalit was not being challenged by Lalit, the only question they were concerned with was the question of proper allotment. They came in and filed their application to be added as parties before the allotments had been made. It is not their fault that their application was dismissed.

(7) Next, it is argued that they should have moved a higher court against the order rejecting their prayer or at least they should have brought the suit that they did ultimately bring in 1950 much earlier than that. If they had done so it may well be that Subodh would have been spared much of the expenses he has incurred. It is well to notice however that Subodh himself did not apparently challenge the validity and truth of the story of transfer. When therefore the court refused the application of these plaintiffs to be added as parties it is difficult to say why Subodh also did not take steps to get that order set aside and to have the present petitioners added as parties. After all, Subodh was the plaintiff and should have known very well that in the absence of necessary parties — and he obviously thought that these plaintiffs were necessary parties — the partition would be ineffective.

(8) While it may be true to say that the petitioners would have been better advised to bring the suit much earlier than they did, I am unable to accept Mr. Bose's contention that that is a reason why they should not get the assistance of the Court, in the form of a temporary injunction.

(9) The learned Additional District Judge also thought that the provisions of S. 56 of the Specific Relief Act were a bar to the present prayer for injunction. He was obviously wrong as there is nothing in that section to prevent the court from restraining a party from proceeding with judicial proceedings.

(10) We have come to the conclusion that there is no legal bar to the success of the petitioners' present petition. On the contrary, we are clearly of opinion that the learned Judge refused to exercise his jurisdiction in the matter on a wrong view of the law. We think it proper and necessary that the opposite party No. 1 should be restrained from executing that portion of the decree he has obtained in the previous partition suit which has not yet been executed, except that the opposite party will be free to execute the decree in so far as it is for costs.

(11) The Rule is made absolute in part. The parties will bear their own costs in these proceedings.

(12) Let the records be sent down without delay.

(13) LAHIRI, J.: I agree.

A/H.G.P. Rule made absolute.

A.I.R. 1953 CALCUTTA 379 (Vol. 40 C. N. 141)

DAS GUPTA AND LAHIRI JJ.

Sree Agrasen Stores, Petitioner v. Ramrichpal Jhunjhunwala, Opposite Party.

Civil Rule Nos. 274 and 275 of 1952, D/- 23-5-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act, 17 of 1950 — S. 9 (1), clauses (f) and (g) — Applicability — Words 'entire construction' in proviso to S. 9 (1) (f) — Meaning of — Construction completed of part of a building — Portions of such completed construction let out — Application for fixation of fair rent — Clause (f) and not (g) of S. 9 (1) applies. AIR 1953 Cal 47, Dissented from. (Paras 3, 6 and 10)

(b) Interpretation of Statutes — Adding of words — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act, 17 of 1950, S. 9(1)(f)).

Court should not put in the word 'proposed' in between the words "entire construction" in S. 9(1)(f), West Bengal Premises Rent Control Act, 1950, where the legislature did not use that word. The fact that curious consequences will follow can be no reason for ignoring the provisions of law. (Para 8)

Dwijendra Nath Das and Radhapada Banerjee, for Petitioner; A. K. Sen and Sushil Kumar Biswas, for Opposite Party.

CASE CITED:

(A) ('53) AIR 1953 Cal 47: (Civil Revn. Cases Nos. 2228 to 2242 of 1951)

K. C. DAS GUPTA J.: These two Rules arising out of the same application raise an interesting point of law whether the provisions of S. 9(1)(f), West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, are applicable for the purpose of fixing standard rent under that Act when the premises for which standardisation is sought, though constructed after 31-12-1949, form part of a proposed building which has not been completed.

(2) The tenant petitioner filed an application for fixation of rent in respect of one shop room which was numbered as shop room no. 4, at P. 30A, Kalakar Street. This room is one of the 8 rooms which have been constructed after 31-12-1949, on the ground floor of a proposed building. The proposal according to the evidence was to erect a six storeyed structure. It appears that some other rooms on the first floor have been only partially constructed. The Inspector who was asked by the court to make an enquiry as regards the costs of construction reported that the costs of construction could not be ascertained in view of the inability of the opposite party to show details of work done to the building regarding its plinth and as the opposite party was unable to give vouchers and other things necessary for the ascertainment of costs. It appeared that thereupon the parties agreed that the court should fix the standard rent in accordance with the provisions of S. 9(1) (g) of the said Act. On applying those provisions, the learned Rent Controller fixed the rent at Rs. 103/-. On appeal, the learned Judge also applied the provisions of S. 9(1)(g) but held that there was no scope for reduction of rent from the agreed rent and that the tenant had not shown anything so as to justify fixing of standard rent at a lower rate. He held that the agreed rent was just and fair and fixed that amount, viz., Rs. 250/- per month, as the standard rent.

(3) Obviously if in law the provisions of S. 9(1)(f) apply, the court has no right to apply S. 9(1)(g) merely because the parties have agreed that S. 9(1)(g) should be applied. The question to be considered is whether the provisions of S. 9(1)(f) do apply. The mere fact that the parties did not or could not adduce sufficient evidence to enable the court to apply the provisions of S. 9(1)(f) did not make the provisions of cl. (g) applicable. Clause (g), it may be mentioned, is in these words,

"where no provisions of this Act for fixing standard rent apply to any premises, by determining the standard rent at a rate which is fair and reasonable."

To say that because the parties did not or could not adduce sufficient evidnce for fixation of standard rent under any of the previous clauses (a), (b), (c), (d), (e) or (f), the court will apply Cl. (g) is to put a premium on a refusal to adduce evidence and to defeat the entire scheme of the Act that under certain circumstances the special provisions set out in Cls. (a) to (f) will apply and only in circumstances other than those, the provisions of Cl. (g) will apply. It is, in my judgment, entirely unreasonable to read into the words "where no provisions of this Act for fixing standard rent apply to any premises", the words "where there is no sufficient evidence for the application of other provisions of this Act."

(4) This brings us to the crucial question in this case, viz., whether the provisions of cl. (f) apply. Admittedly the premises in question have been wholly constructed after 31-12-1949. Prima facie, therefore, the provisions of cl. (f) which are in these words,

"Where any premises have been wholly or substantially constructed after the 31st day of December, 1949, by fixing the standard rent payable for one year at a rate equal to six per centum of the actual cost of construction as determined by the Controller added to the market price as on the 31st day of December, 1946, of the land included in the premises or to the market price of the said land as on the date of the completion of the construction, whichever is less:

Provided that where the premises whose standard rent is to be fixed form a part of the construction the standard shall be fixed at a rate which is fairly proportionate to the total standard rent of the entire construction"

apply.

(5) Two grounds are put forward by Mr. Sen on behalf of the opposite party for his contention that though the premises were constructed after the 31-12-1949, the provisions of cl. (f) did not apply. His first contention is that as some rooms have been half finished on the first floor and also the foundation has been laid for a six-storied building it is impossible to calculate the "actual" costs of construction of the rooms that have been constructed. His second contention is that "the entire construction" used in the proviso to cl. (f) should be read to mean the entire proposed construction.

(6) Taking the second point first, I see no reason why we should put in the word "proposed" into the section when the legislature did not use that word. "The entire construction" means the entirety of what has been constructed. This has to be considered on the background of the fact that the question is of fixing a rent. Therefore, if some rooms have been partly constructed or if some portion has not been completed so as to make it fit to be let out, that would not be considered to be 'construction' within the meaning of the section. The reasonable view, in my judgment, is to read the word "entire construction" to mean such portion of the building, the construction of which has been completed to such an extent as to make it reasonably fit to be let. If certain rooms have not been completed, they are not part of "entire construction". Mr. Sen has pointed out that the view I have indicated will create an anomalous situation. Suppose, he says, a person proposes the construction of a two storey building and when only the ground floor has been constructed consisting of 10 rooms, the tenant of one of those rooms applies for standardisation of rent. Taking the value of the land at Rs. 50.000/- and the actual costs of construction at Rs. 30.000/- the standard rent of the entire construction would, at 6 per cent of the capital invested, be Rs. 4800/-, each tenant having had to pay a portion of the interest of the value of the land. When thereafter the second storey is completed, say, at an actual costs of further Rs. 20,000/-, the

actual costs of construction of the entire ground floor and the first floor, together with the value of the land, would be a lac of Rupees and the standard rent for that entire construction would at 6 per cent of that sum, Rs. 6000 per annum. If, on the application of the tenants of the first floor, the rent is standardised according to the provisions of clause (f), the curious consequence will be that the landlord will get interest on the value of the land twice over; another consequence will be that the tenants of the ground floor whose rents have been already standardised will have to pay much greater portion of the interest of the value of the land than the tenants on the first floor.

(7) That this curious result may happen is quite clear, but that result cannot be avoided by taking the view suggested by Mr. Sen on behalf of his client that when a bigger building is proposed only a portion of which has been constructed, cl. 9(1)(f) will not apply. Suppose only a two storied building is proposed and constructed after the 31-12-1949 and the rent is standardised, as it must be in that position, in accordance with the provisions of S. 9(1)(f). Thereafter the landlord builds another storey on the former building and completes it. The provisions of S. 9(1)(f) will clearly apply to the standardisation of rents for the third storey and the curious consequence we have already indicated will necessarily follow.

(8) In my judgment, the fact that such curious consequence will follow can be no reason for ignoring the provisions of law. In my judgment we shall be guilty of putting our own view of what the law should be instead of restricting ourselves to our proper task of interpreting law as it has been made if we put with a view to avoiding consequence which we do not like, the word "proposed" before the word "construction" which the legislature in its wisdom has used.

(9) The first ground on which Mr. Sen laid very great stress must therefore fail.

(10) As regards the second ground viz., the difficulties of ascertaining the actual costs of construction I am unable to see that that can be any reason for failing to apply the section. It may appear to be unfair to include in the actual costs of construction of the rooms on the ground floor the costs that had been incurred in laying the foundation of this building. When however one or two storeys have been constructed out of six storeys, I do not see how in calculating the actual costs of construction, any portion of the costs of laying the foundation can be left out. In any case, the difficulties in finding the actual costs of construction cannot give the court justification for refusing to apply the clause. Our attention was drawn to the judgment of Mr. Justice P. N. Mookerjee in — 'A. N. Chatterjee v. Sampatmull', AIR 1953 Cal 47 (A) in which he took the view that where a considerable portion of the proposed building remains to be completed the proviso to S. 9(1)(f) cannot apply and he came to the conclusion that in such cases the main portion of S. 9(1)(f) will apply. For the reasons I have already mentioned, I respectfully differ from the view taken by Mookerjee J.

(11) I would accordingly make this Rule absolute, set aside the order passed by the court below and direct that the application filed by the tenant for standardisation of rent be disposed of in accordance with law in the light of the directions given above. There will be no order as to costs.

(12) LAHIRI J.: I agree.

B/H.G.P. Rule made absolute.

A.I.R. 1953 CALCUTTA 381 (Vol 40 C.N. 142)

P. B. MUKHARJI J.

National Industries, Plaintiff v. Sassoon Rice Mills Ltd., Defendant.

Suit No. 987 of 1945, D/- 22-8-1951.

(a) Civil P.C. (1908), O. 1, R. 10(2); O. 6 R. 17 — Amendment of plaint by seeking to delete word "limited" affixed to defendant company so as to make suit one against firm — Case held one of misdescription of defendant — Such amendment held could be allowed. (Para 7)

Anno: Civil P.C., O. 1 R. 10 N. 37, O. 6 R. 17 N. 4, 11.

(b) Civil P.C. (1908), O. 6 R. 17; O. 1 R. 10 — Delay — Ordinarily delay will defeat application for amendment, when question of limitation arises — There are, however, some exceptions when amendment would be allowed even after period of limitation, in special cases — Error of misdescription of defendant which was sought to be corrected by amendment not being deliberate, case held to be such a special case. AIR 1921 PC 50, Rel. on. (Para 8)

Anno: Civil P.C., O. 6 R. 17 N. 5, 19; O. 1 R. 10 N. 3, 6, 37.

Sisir K. Mukherjea, for Plaintiff; A. N. Sen, for Defendant.

CASES CITED:

(A) (1948) 2 All ER 482: (1948) 2 KB 436
(B) (1920) 2 Ch 24: 89 LJ Ch 465
(C) ('34) AIR 1934 Bom 385: 58 Bom 536
(D) ('21) AIR 1921 PC 50: 47 Ind App 255 (PC)

ORDER: This is the plaintiff's summons for an amendment of the plaint by deleting the word 'Limited' and the word 'Company' from the plaint. It is stated that the description of the defendant as Sassoon Rice Mills Limited was an error and the proper defendant is Sassoon Rice Mills. This summons was taken out by the plaintiff's Solicitor on 21-2-1951.

(2) In the affidavit of Laburam Jain, a partner of the plaintiff firm, affirmed on 21-2-1951, in support of the summons, the allegation is that the defendant at all material times represented themselves as a limited concern or held themselves out as such and in fact in the correspondence and documents they described themselves as Sassoon Rice Mills Limited and that the plaintiff bona fide believing on the said representation sued them as a limited company. In that affidavit reference is made to correspondence and documents, some of which were produced at the time of the hearing of this application and learned counsel appearing in opposition has also seen them. I find from the disclosed documents in the suit that there are rubber stamps and letter heads describing the defendant as Sassoon Rice Mills Ltd.

(3) On behalf of the defendant an affidavit in opposition has been filed which is affirmed by one Nagarmul Jajodia on 3-3-1951. Nagarmul Jajodia describes himself in that affidavit as one of the Directors of the "now defunct Sassoon Rice Mills Ltd." In a letter of their Solicitor for the defen-

at dated 17-12-1946, addressed to Messrs. S. C. se & Co., supplying particulars under orders of urt the Director Nagarmul Jajodia is stated in ra 2 as (since deceased). Learned counsel for applicant naturally has been anxious to explain me how it was possible for a dead man to make affidavit. I direct that this letter of the Soli- or of the defendant be filed with the records this application. There is, therefore, really no per affidavit in opposition.

(4) Nevertheless, I have heard learned counsel . Amarendra Sen appearing on behalf of the endant. It was difficult and embarrassing for n to say whom he represented. On the one nd he was supporting the affidavit of a person o it transpires had died before the affidavit was de by him and on the other he was disputing identity of the defendant. In the written tement filed in this suit, it is stated "writ- statement on behalf of the defendant company ow defunct) abovenamed". In para 2 of the tten statement it is alleged that the name and scription of the defendant as given in the cause e are wrong inasmuch as the name of the endant company which was incorporated and istered as limited company at the office of the gistrar Joint Stock Company, Calcutta, had en struck off the register of companies der S. 247, Indian Companies Act before March 3, and long before the institution of the suit. is further alleged in para 2 of the written state- nt that the company was dissolved and ceased have any registered office since the date of dissolution of the company. It is difficult to derstand how the written statement was filed d if so on whose behalf. Either the company sts or it does not.

(5) The main point which was argued by Mr. n is that the amendment will introduce a new rty and will, therefore, mean altering the whole t. The basis of his argument is that the Sas- on Rice Mills Ltd. is an incorporated concern d was entirely different from Sassoon Rice Mills, ich is the substitute intended to be introduced the amendment. The argument is plausible but sound specially in the fact and context of this se.

(6) In my judgment, this is not introducing a w party or altering the whole suit but making e parties proper so as to bring the controversy tween the proper parties into clearer relief. is is a case of misnomer or misdescription of e defendant. Under sub-r. 2, O. 1, R. 10, as well O. 6, R. 17, Civil P. C., the Court has in my w ample powers to make those amendments. e recent decision of the English Court of Ap- al reversing the decision of Lord Goddard the rd Chief Justice of England is relevant on this nt. That decision is of —'Alexander Mountain & v. Rumere Ltd.', (1948) 2 All E R 482 (A). is was an appeal from the decision of Lord ddard C. J. refusing an application by the exe- rix of Mr. Alexander Mountain that the writ this action should be amended by substituting the description of the plaintiff, "Alexander untain & Co", the words "Doris Mountain, dow, executrix of Alexander Mountain, deceas- '. There learned Lord Chief Justice refused e application on the basis of the decision of ssel J. in —'Tetlow v. Orela, Ltd', (1920) 2 Ch (B). That decision of the Lord Chief Justice s set aside by the Court of Appeal and Cohen J. after quoting from the Law Journal of 9-5- 42 at page 150, on misnomer of plaintiff obser- d:

"That the statement of law, with which I respectfully agree, was not brought to the attention of the Lord Chief Justice, and I cannot help thinking that, if it had been, a different result might have ensued. Having regard to the affidavits, I think we can properly treat this case as one of misnomer, and allow the writ to be amended by substituting the executrix as plaintiff."

Scott, L. J., observes:

"It is a case of misnomer and that passage in that judgment of Russel J., shows that he was not addressing his mind to the question which arises in this case."

(7) On the facts here before me, I have no doubt in my mind that it is the clearest possible case of misnomer or mis-description of the defendant. There can, in my opinion, be no difference on this account between a case of misnomer or mis-description of the plaintiff and a case of misnomer or mis-description of the defendant. I can discover no principle by which the Court will have power to amend a misdescription of the plaintiff but will not have the equal power to amend the misdescription of the defendant. The defendant was sued as a company and the persons who are contending to appear in pursuance to the writ state in the written statement that the company is defunct and have come forward to oppose this application. There is, therefore, no doubt about the defendant the plaintiff intended to mean or indicate. It was, therefore, a case of misdescription or misnomer of the defendant. I consider that the express and clear language of O. 1, R. 10(2), Civil P. C. gives power to the Court to amend any misdescription of the defendant. Under that sub-rule the name of a defendant improperly joined can be struck out and the name of any person who should have been joined as a defendant or whose presence before the Court is necessary to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, can be added by the Court. That being so I do not see any reason why the amendment should not be allowed. Mr. Sen referred me to the case of —'Krishnaji v. Hanmaraddi', reported in AIR 1934 Bom 385 (C), but that case does not deal with this question of misnomer or misdescription of the party. That authority, therefore, is of no assistance to Mr. Sen.

(8) The other argument advanced by Mr. Sen is one of limitation. Mr. Sen has rightly criticised the delay in moving this application for amendment. This is a commercial cause instituted in the year 1945 and is still pending. The point was taken in the written statement which was filed on 19-11-1945. That criticism is perfectly justified but the delay in his case should not be allowed to defeat this application for amendment. Delay will ordinarily defeat an application for amendment when any question of limitation arises. It has been contended by Mr. Sen that here the question of limitation does arise and I believe he is right in that contention. But then again that is the ordinary rule and there are exceptions to it. The Judicial Committee of the Privy Council points out in —'Charandas v. Amir Khan', AIR 1921 PC 50 at p. 52(D) that amendment may be allowed even after the period of limitation in special cases. I cannot imagine a more special case on the facts as this one. It is not an error which was deliberate on the part of the plaintiff. The documents which have been shown indicate that the defendants described themselves as a limited concern. But when the written statement was filed the point was taken but then again written statement need not be taken on its face value by the plaintiff. Added to this, I find that it is only a case of misnomer

or mis-description of the defendant and I am satisfied that it is one of those special cases where amendment can be allowed in spite of limitation. But having regard to the delay the applicant will have to pay the costs of this application which I would otherwise have reserved because of defendant's conduct having misled the plaintiff in describing the defendant as a limited company.

(9) There will, therefore, be an order allowing the amendment in terms of cls. 1, 2, 3, 4 and 6 of the summons. This order should be expedited and the amendment will be effected after the completion of the order. Certified for counsel.

B/R.G.D. Order accordingly.

A.I.R. 1953 CALCUTTA 383 (Vol 40 C. N. 143)

K. C. DAS GUPTA AND P. B. MUKHARJI JJ.

Hussain Sk. and others, Appellants v. The State.

Criminal Appeal No. 217 of 1950, D/-27-4-1951.

(a) Criminal P. C. (1898), S. 297 — Jury relying on dying declaration — Omission by judge to caution — Misdirection.

The omission by the Judge to caution the jury that it is ordinarily unsafe to base a conviction on the mere evidence of a dying declaration amounts to misdirection. (Para 4)

Anno: Cr. P. C. S. 297 N. 11.

(b) Evidence Act (1872), S. 32 — Dying declaration — Conviction based on — Soundness of.

When the evidence of dying declaration is admitted under the provisions of S. 32 it is necessary for the Jury as judges of facts to take this into consideration along with other evidence, and they are entitled in law to base a conclusion on it. But the experience of Judges has been responsible for the evolution of the rule of prudence that it is ordinarily unsafe to base a conviction on the mere statement of the dead man, as this was not tested by cross-examination and was not made on oath and the jury had no opportunity of seeing the demeanour of the maker. (Para 4)

Anno: Ev. Act S. 32 N. 2.

S. S. Mukherjee for Appellants; N. K. Sen, Deputy Legal Remembrancer for the State; M. K. Ghose for Sm. Basanti Kumari Dasi.

JUDGMENT: The appellants were tried by the learned Assistant Sessions Judge, Alipore, with the aid of a jury on a charge under S. 304, Penal Code read with S. 34, Penal Code. The jury returned a unanimous verdict of guilty against both these appellants under S. 304 Part II, Penal Code. In accordance with that verdict the learned Judge convicted these appellants under S. 304, Penal Code and sentenced each of them to undergo rigorous imprisonment for five years.

(2) It may be mentioned that another person named Fani Mondal was also tried along with these persons on the same charge and the Jury returned a unanimous verdict of guilty against him under S. 324, Penal Code and in accordance with that verdict he was convicted and sentenced to rigorous imprisonment for two years. He is not one of the appellants before us.

(3) The prosecution case was that on 29-3-1950, when Nani Haldar was seated along with these two appellants and one Fani Mandal near the house of one Sabur Ali, Nani Haldar demanded payment of the monies due to him and during the altercation which ensued Karam Shaikh alias Karam Ali, Hussain Sheikh and Fani Mandal struck him with the hesuas in their hands. A large number of injuries were inflicted as a result of which Nani Haldar died. Shortly after the occurrence Nani Haldar was discovered lying there in a moribund condition. He received medical attention and it was said that he was able to name his assailants. The defence of the accused who pleaded not guilty was that they were falsely implicated in the case because of their enmity with certain persons including one Bajesh.

(4) Mr. Mukherjee appearing for the appellants contended that the learned Judge's charge to the jury was vitiated by a number of misdirections. One of the misdirections, according to him, was that the omission of the learned Judge to caution the jury that it is ordinarily unsafe to base a conviction on the mere evidence of a dying declaration. In my judgment this contention should succeed. When the evidence of dying declaration is admitted under the provisions of S. 32, Evidence Act it is necessary for the Jury as judges of facts to take this into consideration along with other evidence, and they are entitled in law to base a conclusion on it. But the experience of Judges has been responsible for the evolution of the rule of prudence that it is ordinarily unsafe to base a conviction on the mere statement of the dead man, as this was not tested by cross-examination and was not made on oath and the jury had no opportunity of seeing the demeanour of the maker. It has been laid down in a number of cases that it is necessary for the Judge when a case is being tried by the jury to tell the jury of all these considerations in deciding what weight should be attached to the evidence of a dying declaration. If and when the Judge gives such a caution and in spite of this the jury bases a conclusion on a mere dying declaration there can be no justification for interfering with that verdict. The omission to give such a caution has, however, been held to amount to a misdirection and I respectfully agree with that view. Our conclusion, therefore, is that the learned Judge has misdirected the jury in not cautioning them in the way as mentioned above.

(5) It is necessary, therefore, to go into the evidence to see whether the verdict of the jury is justified by the evidence on the record. If the evidence on record does justify such a conclusion then it must be held that the misdirection has not resulted in the failure of justice. If on the other hand the verdict of the jury is not justified by the evidence on record it is equally clear that there has been a failure of justice. (Accordingly after discussing the evidence their Lordships concluded:) We are bound, therefore, to hold that the evidence on the record does not justify the verdict of guilty against the accused persons that has been returned by the jury and consequently, to hold that the misdirection in the learned Judge's

charge to the jury has resulted in the failure of justice. The order of conviction and sentence, passed on such verdict of the jury cannot be allowed to stand.

(6) Accordingly, we set aside the order of conviction and sentence passed by the learned Assistant Sessions Judge against the appellants and order that the appellants Hussain Sheikh and Karam Sheikh be acquitted. They must be set at liberty at once.

B/V.S.B. Conviction set aside.

A.I.R. 1953 CALCUTTA 384 (Vol 40 C.N. 144)

K. C. CHUNDER J.

Shree Shew Sakti Oil Mills Ltd. and another, Accused-Appellants v. Corporation of Calcutta, Respondent.

Criminal Appeal No. 149 of 1951, D/- 11-7-1952.

Municipalities — Calcutta Municipal Act (3 of 1923), S. 412 — Mixture of argemone oil with mustard oil.

The mustard oil with which there is an admixture of argemone oil is unsound, unwholesome and unfit for consumption as human food even if one per cent of argemone used for 20 days does not produce palpable bad results, according to some scientists still experimenting in the matter. (Para 4)

N. K. Basu, S. S. Mukherji and Debendra Kumar Bhattacharjya, for Appellants; S. M. Bose, Advocate-General and J. M. Banerji, for the State; Anil Ch. Roy Choudhury and Ajay Kumar Basu, for Respondent.

JUDGMENT: This is an appeal against the conviction of the appellants under S. 488 read with S. 412, Calcutta Municipal Act. The appellants, it is said, had exposed for sale about 200 maunds of mustard oil on 30-6-1949. The Food Inspector, Dr. Saha, the District Health Officer District No. 1, and Dr. S. K. Dey, the Public Analyst of the Calcutta Corporation visited the mill premises at 153, Upper Circular Road and took three samples in the presence of the officers of the Company. One sample according to the rules was left with the appellants and it is now said that the sample was lost. The other two samples were analysed by the Public Analyst and they had also been analysed by the Director of Public Health and both found that the reaction by ferric chloride test, which is a specific for argemone oil, was positive and both found that argemone oil was present in those samples of mustard oil. It appears that sometime after the case had been proceeding the accused persons suddenly applied to the learned Magistrate for taking a fresh sample from a sealed tank and the learned Magistrate only assuring himself that the seal had not been tampered with had samples taken which on examination are said by the Director of Public Health not to be samples of the same oil and which showed no presence of argemone oil and the ferric chloride test proved negative. The learned Magistrate very rightly refused to place any reliance upon this sample taken so long after when the tank had remained in the custody of the appellants even though the seals had not been found tampered.

(2) Mr. Basu appearing on behalf of the appellants contended that this was not proper. As there is nothing in the evidence to show that the samples examined by the Analyst and by the Director of Public Health were not the actual samples taken on 30-6-1949 from the Company, the samples taken by them and examined as such are entitled to be considered as proper samples and if the learned Magistrate preferred the analytical results from those samples, I am not in a position to say that the learned Magistrate erred in any way whatsoever.

(3) Mr. Basu's next contention was as regards the saponification value etc. but in the present case the question does not appear to me to be very relevant because it is not for the deficiencies in saponification value or anything of that nature that the accused persons were being prosecuted. It is for mixing argemone oil along with mustard oil causing the same to be unsound, unwholesome and unfit as human food. Dr. Ahmed, the Health Officer of the Calcutta Corporation testified that as argemone oil has a cumulative deleterious effect, its presence even in the smallest quantity is the cause of much human suffering. The symptoms produced by argemone oil according to him are eye-trouble, heart-trouble and the swelling of the legs. The only thing that was urged against him was that he derived his knowledge from books. Mr. Basu produced before me a published report by some scientist still experimenting in the matter, according to whom, if there is a mixture of one per cent. argemone oil then for 20 days it does not produce any evil effect. This does not make argemone oil anything but unwholesome, unsound or unfit as human food even in that small quantity when its cumulative effect is of the kind described by Dr. Ahmed though no effect may be produced for 20 days. Arsenic administered for a period in very small doses is enough often to kill a man and no one would contend that although a very small quantity of arsenic may not at first have any palpable evil effect, arsenic is anything but unwholesome, unsound or unfit as human food. In the report relied upon by Mr. Basu it is not contended that argemone oil is not unsound, unwholesome or unfit as human food.

(4) Under the circumstances, I see no reason not to accept Dr. Ahmed's opinion and to hold that the mustard oil with which there was an admixture of argemone oil was unsound, unwholesome and unfit for consumption as human food even if one per cent used for 20 days does not produce palpable bad results. The elements required under S. 412, Calcutta Municipal Act were satisfied. The learned Magistrate, therefore, rightly convicted the appellants. Considering the evil effect of so much argemone mixed mustard oil viz., 200 maunds on hundreds of persons in this city, the sentence calls for no interference. The appeal is, therefore, dismissed. The fines may now be realised.

B/H.G.P. Appeal dismissed.

A.I.R. 1953 CALCUTTA 385 (Vol. 40, C. N. 145)

BACHAWAT J.

Probodh K. Sarkar Petitioner v. Union of India Respondent.

Arbitration No. 244 of 1950, D/- 23-5-1951.

(a) Arbitration Act (1940), S. 8 — Disagreement between arbitrators — Jurisdiction of umpire.

If there is disagreement between the arbitrators there is no award and the jurisdiction of the umpire is attracted. In the absence of a contrary provision in the arbitration agreement the umpire must adjudicate upon the whole case even if the arbitrators disagree on the point. 11 Jurist 542 and (1858) 27 LJ EX 301, Rel. on. (Para 7)

Anno: Arb. Act, S. 8 N. 1.

(b) Arbitration Act (1940), S. 8 — Powers of umpire — Umpire dying pending reference — Appointment of another umpire.

It is for the umpire to decide if there is a compromise or a withdrawal which cannot be retracted and whether he should make an award confirming the report of one of the arbitrators. He has the power to allow the party applying for withdrawal to abandon his application and to proceed with the reference. Even if there is a compromise the umpire may make an award in accordance with the compromise. In fact the umpire ought to embody the admitted claim or compromise in the award unless the parties invite him not to do so.

Where, therefore, an umpire dies without making an award and the reference is pending it cannot be said that it is unnecessary to appoint another umpire. Case law referred. (Paras 8 & 9)

Anno: Arb. Act, S. 8 N. 1.

(c) Arbitration Act (1940), S. 8 — Scope.

Section 8 empowers the Court to appoint an arbitrator or an umpire in certain cases so that the arbitration agreement may not become abortive. It provides a machinery for effectively working out and enforcing the arbitration agreement. The umpire appointed under this section has the like power to act on the reference and to make an award as if he were appointed by consent of the parties. (Para 14)

Anno: Arb. Act, S. 8 N. 1.

(d) Arbitration Act (1940), S. 8 — Application under section — Who can make — Application by receiver in his own name — (Civil P. C. (1908), O. 40 R. 1(d))

The scheme and object of the section shows that the application under the Section can be made by persons by and against whom the arbitration agreement is mutually enforceable. The party who invokes section 8 must not only be entitled to enforce the award but must also be bound to perform it. The award must be mutually binding.

The receiver may institute legal proceedings in his own name for the recovery of the claim if he is empowered to do so in a suit in which the ownership is completely represented. In such proceedings he has a capacity apart and distinct from the owner. The owner is not the person who has instituted the proceedings. An application by the receiver invoking S. 8 cannot, therefore, be said to be an application by the owner of the claim who as a party to the arbitration agreement can invoke the machinery of S. 8. The receiver himself also cannot be said to be a party within the meaning of S. 8. He is entitled to enforce the claim arising out of the contracts containing the arbitration clauses, but he is not bound to carry out the obligations under the contract. (Paras 14, 15, 16 & 17)

Anno: Arb. Act, S. 8 N. 1, C. P. C. O. 40 R. 1 N. 22.

Ranadeb Chaudhuri for Petitioner. A. K. Sen for Respondent.

CASES CITED:
(A) 11 Jurist 542
(B) (1858) 27 LJ EX 301
(C) (1950) 1 All ER 341: 1950-1 KB 585
(D) ('23) AIR 1923 Mad 246: 71 Ind Cas 288
(E) (1900) 22 All 224: 1900 All WN 52
(F) (1849) 13 QB 955
(G) ('16) AIR 1916 All 113: 38 All 380
(H) ('21) AIR 1921 All 384: 43 All 108
(I) (1929) 1 Ch 238: 98 LJ Ch 101
(J) (1694-1732) 2 Raym 1039
(K) (1844) 1 M & G 354
(L) (1819) 3 Moore 674: 21 R R 636
(M) ('98) 25 Cal 642: 2 Cal WN 469
(N) ('07) 34 Cal 305: 5 Cal LJ 270
(O) ('37) AIR 1937 Mad 589: 171 Ind Cas 220
(P) ('16) AIR 1916 Cal 51(2): 19 Cal WN 45
(Q) ('49) 53 Cal WN 713
(R) ('46) AIR 1946 Cal 127: 49 Cal WN 808

ORDER: This is an application by Mr. B. K. Ghose, Receiver, appointed in Suit No. 420 of 1950 for the appointment of an umpire in place and stead of the late Sri Sarat Chandra Bose and for other reliefs.

(2) There were three contracts between Probodh Kumar Sarkar and the respondent Union of India. Each contract contains an arbitration clause providing for reference to two arbitrators one to be appointed by each and in the event of disagreement between them to an umpire appointed by them.

(3) Sarkar claimed that large sums of money were due to him from the Union of India under the contracts. The disputes were referred to the arbitration of two arbitrators, one arbitrator being nominated by each party. Both arbitrators were unable or unwilling to act and on 9-3-1949 there was an order referring the disputes to the arbitration of Bakshi Shib Charan Singh and Sri S. C. Mitter and in case of difference of opinion between them, to an umpire to be nominated by the joint arbitrators. On 21-3-1949 the arbitrators appointed Sri Sarat Chandra Bose as umpire. There was disagreement between the arbitrators. Sri S. C. Mitter was in favour of awarding a sum much larger than what Bakshi Shib Charan Singh was prepared to award. Eventually there was a reference to the umpirage of Sri Sarat Chandra Bose.

(4) It appears that Das Bank Ltd. advanced large sums of money to Probodh Kumar Sarkar. To secure the repayment of such loans & advances there was an equitable assignment of the moneys payable under the contracts by Sarkar in favour of Das Bank Ltd.

(5) On 20-1-1950 Das Bank Ltd. instituted a suit against Sarkar claiming over Rs. 94000 and a declaration of charge over the moneys due under the contracts.

(6) On 21-1-1950, Messrs. A. P. Roy & Co., forwarded to Sri Sarat Chandra Bose an application

by Probodh Kumar Sarkar for withdrawal of the pending reference and a request by him to confirm the report by Bakshi Shib Charan Singh. On the same day Mr. P. K. Bose, attorney for Das Bank Ltd., informed A. P. Roy & Co. of the institution of the suit and requested them not to take any steps prejudicial to Das Bank. On 25-1-1950 there was an injunction restraining Sarkar from withdrawing the arbitration proceedings. On 30-1-1950 the applicant Mr. B. K. Ghose was appointed receiver of the claim of Sarkar in respect of the contracts with power to collect the outstandings and with full power under O. 40, R. 1(d), Civil P. C. and the power of bringing and defending suits in his own name and with the further power that the receiver was at liberty to prosecute in place of the defendant the pending reference before the umpire. This appointment of receiver was made in the suit instituted by Das Bank against Sarkar. On 20-2-1950 Sri Sarat Chandra Bose died. On 1-4-1950, Mr. P. K. Bose the attorney for Messrs. Das Bank Ltd. sent a notice for appointment of an umpire to the arbitrators and also to Mr. S. K. Mondal, solicitor for the respondent. In reply the arbitrators stated that they were 'functus officio' and could not appoint an umpire. Mr. S. K. Mondal stated that the reference could not proceed at the instance of a third party and also because the decision of Bakshi Shib Charan Singh had been accepted. The present notice of motion was taken out on 11-8-1950.

(7) If there is disagreement between the arbitrators there is no award and the jurisdiction of the umpire is attracted. In the absence of a contrary provision in the arbitration agreement the umpire must adjudicate upon the whole case even if the arbitrators disagree on one point. — 'Wicks v. Cox', 11 Jurist, 542 (A). — 'Winteringham v. Robertson', (1858) 27 L. J. Ex. 301 (B).

(8) It is said that the reference has stood withdrawn and also that the offer of withdrawal has been accepted by the Union of India and therefore there is a compromise and the report of Bakshi Shib Charan Singh has stood confirmed. It is really for the umpire to decide if there is a compromise or a withdrawal which cannot be retracted and whether he should make an award confirming the report of Bakshi Shib Charan Singh. He has the power to allow the party applying for withdrawal to abandon his application and to proceed with the reference. See — 'James Lamont & Co. v. Hyland', (1950) 1 All ER 341 (C); — 'Lakshmana Pillai v. Appalwar Alwar', A. I. R. 1923 Mad. 245 (D). The umpire made no award and when the umpire died the reference was pending before him.

(9) Even if there is a compromise the umpire may make an award in accordance with the compromise; — 'Gobordone Das v. Jai Kissen', 22 All 224 (E). In fact the umpire ought to embody the admitted claim or compromise in the award unless the parties invite him not to do so. Russel on Arbitration, 14th Edition, page 64 — 'Hutchinson v. Shepperton', (1849) 13 Q. B. 955 (F). — 'Hari Kunwar v. Lakshmi Ram', A. I. R. 1916 All 113 at p. 116 (G). — 'Harakh Ram v. Lakshmi Ram', AIR 1921 All 384 (H). It cannot, therefore, be said that it is unnecessary to appoint an umpire. There has been as yet no award which is final and binding upon the parties.

(10) It is next contended on behalf of the respondent Union of India that the applicant is not a party and that, therefore, this application is not maintainable.

(11) This application is made under section 8, Arbitration Act, 1940. The conditions mentioned in the section must exist before the Court can bind an umpire. The notice of appointment must be served by and the application must be made by "a party".

(12) Section 8, Indian Arbitration Act, 1940, corresponds to section 5, English Arbitration Act, 1889. Referring to the section in the English Act, Maugham, J. — 'In Re Franklin and Swathling's, Arbitration' (1929) 1 Ch. 238 at pp. 240—41 (I) observed as follows:

> "An application under section 5, Arbitration Act, 1889, is one which can only be made by a party to the submission. * * * The Arbitration Act, 1889, is, in my view, a technical statute; it is a statute which provides for the ousting of the jurisdiction of the Court; the language of it has to be carefully observed, and it is not open to me to give it any meaning except that which is expressly provided for in the various clauses".

(13) In that case certain articles of partnership entitled a partner to nominate a qualified person as partner and the admission of the nominee to the partnership was subject to the consent of the other partners which was not to be unreasonably withheld. The articles gave the nominee the right to require reference to arbitration if he was of the opinion that the consent was unreasonably withheld. The articles further provided for reference to a single arbitrator of differences arising during the continuance of the partnership or afterwards between the partners or their representatives. The consent to the admission of a nominee to a partnership being withheld the nominee applied for appointment of a sole arbitrator under section 5, English Arbitration Act, 1889. It was held that he had no right to make the application. He was not a party to the original partnership deed. Until it was decided that the consent was unreasonably withheld it could not also be said that there was a trust in his favour with reference to the partnership assets. The question whether a person in whose favour there was such a trust could apply under section 5 was left open. I think Maugham, J., recognised that persons other than the original contracting party may in certain cases have the right to apply under section 5, Indian Arbitration Act, 1889.

(14) Section 8 Indian Arbitration Act, 1940, empowers the Court to appoint an arbitrator or an umpire in certain cases so that the arbitration agreement may not become abortive. It provides a machinery for effectively working out and enforcing the arbitration agreement. The umpire appointed under this section has the like power to act on the reference and to make an award as if he were appointed by consent of the parties. The scheme and object of the section shows that the application under the section can be made by persons by and against whom the arbitration agreement is mutually enforceable.

(15) A submission is a mutual promise to perform the award. — 'Purslow v. Bailey', (1694-1732) 2 Raym. 1039 (J); — 'Sharpe v. Hancock', (1844) 1 M & G 354 (K) —'Winter v. White', (1819) 3 Moore, 674 (L). The party who invokes section 8 must not only be entitled to enforce the award but must also be bound to perform it. The award must be mutually binding.

(16) Now the applicant in this case is the receiver of a claim for a sum of money due to Sarkar from the Union of India under contracts containing arbitration clauses. He has invoked section 8 by serving the notice and applying in his own name. The suggestion that this application is substantially by and on behalf of Sarkar is unsound. The receiver may institute legal proceedings in his own name for the recovery of the claim if he is empowered to do so in a suit in which the ownership is completely represented. — 'Fink v. Maharaj

Bahadur', 25 Cal. 642 (M); — 'Jagattarini v. Naba', 34 Cal. 305 (N) — 'Ankayya v. Official Receiver', A. I. R. 1937 Mad 589 (O), — 'Cassim Mamooji v. K. B. Dutta', AIR 1916 Cal 51 (2) (P). This power of a receiver to institute proceedings in his own name is an exceptional power necessitated by the exigencies of convenience. He is said to be a quasi assignee of the claim — 'Jagattarini v. Naba', 34 Cal. 305 (N). In such proceedings he has a capacity apart and distinct from the owner. The owner is not the person who has insituted the proceedings. — 'Per Curiam Jyotirmoy v. Biswanath', 53 Cal W. N. 713 (Q) where it was held that the proceedings instituted by the receiver in his own name did not abate on the death of the owner. This application, therefore, cannot be said to be an application by Sarkar who is the owner of the claim and who as party to the arbitration agreement could invoke the machinery of S. 8.

(17) The receiver himself also cannot be said to be a party within the meaning of S. 8. He is entitled to enforce the claim arising out of the contracts containing the arbitration clauses, but he is not bound to carry out the obligations under the contract. He is in no better position than a mere assignee of a debt arising out of a contract who cannot enforce the arbitration clause contained in the contract. Russel on Arbitration, 14th Edn. page 73. The arbitration clause is not mutually enforceable by and against the receiver. If an application were made by the Union of India under section 8 Sarkar would be the necessary respondent. The receiver as respondent to such application would not effectively represent Sarkar. See — 'Md. Kader Ali v. Gobindabandhu', AIR 1946 Cal 127 (R). The mutuality which is the very essence of arbitration is non-existent.

(18) The application, therefore, is not maintainable. In saying this I do not want it to be supposed that the receiver having the requisite power and invoking section 8 in the name of the party to the arbitration agreement cannot do so. I am dealing with a case in which the machinery of S. 8 is invoked by the receiver in his own name.

(19) Mr. A. K. Sen, counsel for the respondent Union of India also contended that the application is not maintainable because (a) no proper notice was served on the Union of India in the manner provided in S. 42 of the Act; and (b) the Court appointing the receiver has not even purported to confer the requisite power upon the applicant so as to enable him to invoke the machinery of S. 8. Having regard to my finding it is not necessary to express any opinion on this point.

(20) The application must, therefore, be dismissed with costs.

B/V.R.B. Application dismissed.

A.I.R. 1953 CALCUTTA 387 (Vol. 40, C. N. 146)

P. B. MUKHARJI J.

In the matter of Ko-Ku-La Ltd., Petitioner.

Company Matter No. 529 of 1951, D/- 22-8-1952.

(a) Companies Act (1913), S. 163(1)(i) — Demand notice.

Where the demand notice was duly addressed at the registered office of the company and the acknowledgment was duly returned to the sender, the presumption that it was duly delivered must operate until rebutted. (Para 8)

Anno: Companies Act, S. 163 N. 1.

(b) Companies Act (1913), S. 163(1)(i) — Court's power to go behind judgment debt.

While the judgment of a Court is a very strong presumptive evidence that the debt exists, it is not conclusive in a bankruptcy Court and Court will go behind a judgment debt in a proper case on proper grounds being shown that the decree or the judgment debt is tainted with fraud or collusion. The allegation must be attended with such particulars as will not only amount to a proper averment in law of fraud but also show a prima facie case of fraud requiring investigation. Even if the petition for winding up is allowed to stand over the respondent should undertake to bring an action to set aside the judgment. (Paras 14, 15, 17)

Anno: Companies Act, S. 163 N. 1.

(c) Companies Act (1913), S. 163(1)(i) and (ii) — Proof to satisfaction of Court.

Proof to the satisfaction of the Court is not required in the events mentioned in cls. (i) and (ii) of S. 163(1). (Para 19)

Anno: Companies Act, S. 163 N. 1, 2.

R. Chaudhuri, for Petitioning Creditor; B. C. Dutt, for Company.

CASES CITED:

(A) (1886) 16 QBD 315: 55 LJ QB 45
(B) (1917) 2 Ch 115: 86 LJ Ch 530
(C) (1865) 11 HLC 389: 35 LJ Ch 574
(D) (1870) 5 Ch 363: 39 LJ Ch 737
(E) (1869) 5 Ch App 309: 22 LT 284
(F) (1884) WN 251
(G) ('27) AIR 1927 Cal 625: 54 Cal 345

ORDER: This is an application by the judgment-creditor for the winding up of the company called Ko-Ku-La Ltd. The grounds on which the petition is being prosecuted by the judgment-creditor are first, that the company is unable to pay its debts and secondly, that the statutory notice of demand was given to the company as required by S. 163, Companies Act. The statutory demand is pleaded in para. 9 of the petition and a copy of the demand is annexed to the petition as Ex. B and it is pleaded that it was sent by registered post.

(2) The facts briefly are as follows: The petitioner instituted a title suit in 1947 in the Subordinate Judge's Court at Asansol claiming possession of certain lands which the company had contracted to purchase from her and Rs. 10,000/- for breach of contract, Rs. 4,000/- for price of cattle and Rs. 1,000/- for deterioration of the cattle and Rs. 2,000/- as the value of the produce of the arable lands and Rs. 1,000/- as damages for demolition of certain buildings. There was a written statement by the defendant company, but at the time of the hearing it did not appear and on 26-5-1949, a decree was passed in that suit in favour of the petitioner against the company for the sum of Rs. 18,000/- and for Rs. 3419/3/3 for costs, aggregating to Rs. 21,419/3/3.

(3) This decree of 26-5-1949 still remains unsatisfied. Certain steps were taken in execution of this decree. In execution the petitioner caused certain lands belonging to the company to be attached. The lands were attached and sold by the executing Court by public auction and the petitioner was the highest bidder purchasing the same for Rs. 9,000/-. The executing Court allowed the purchase money to be set off in part satisfaction of that decree. The sale was duly confirmed and a sale certificate has since been issued.

(4) It is now said that in spite of demand the company did not pay the balance of that decree which including interest calculated upto 29-8-1951, amounted to Rs. 11,976/9/6, for which sum the statutory notice was given on that date, i.e. 29-8-1951. In that notice given by the petitioner herself the demand is clearly made for the sum of Rs. 11,976/9/6 being the balance of the decretal amount in Title Suit No. 33 of 1947 of the Court of the Subordinate Judge, Asansol and the company was also notified that on failing to pay this amount within three weeks, the petitioner will consider the company to be unable to pay its debts.

(5) On these allegations the petition was presented by the judgment-creditor on 20-11-1951.

(6) In the affidavit-in-opposition filed on behalf of the company by Sunil Krishna Roy Chowdhury he described himself to be at present the Manager in the "New Selected Dhori Colliery". This affidavit-in-opposition was filed on 16-2-1952. According to this deponent he was the Managing Director of the company at the relative period. His whole case on behalf of the company is that the petitioner would not have got a decree if he had not tendered his resignation and left the company when the said decree was obtained. Although he was not in the company when, according to him the ex parte decree was obtained, he is not slow to make the vaguest allegation that the decree was falsely and fraudulently and/or in collusion or conspiracy obtained by the petitioner with some officers and employees of the company.

No mention of any particular officer or employee is made to even remotely suggest by way of particulars of bona fides regarding the allegation that is made against the petitioning creditor who happens to be also the judgment-creditor, so that she is not even in a position to meet such allegation. The execution is admitted by him. But that also is charged as being false and fraudulent. No particulars are given and no grounds are shown on which such allegations of fraud are made. It is admitted in the affidavit-in-opposition that execution was levied pursuant to the decree, that attachment was levied under that decree and that a tractor was sold. The allegation again is made that the tractor was sold at an undervalue. It is admitted that the decree remains unsatisfied.

(7) While the decree is being challenged as fraudulent, no step whatever has been taken to set aside the ex parte decree which, according to this deponent, came to be passed because he happened to be ill and was absent at the time. An application under O. 9, R. 13, Civil P. C. would have been the simplest way to get the ex parte decree set aside if the company could have proved that it could not appear because the deponent happened to be ill and there was none in the company who could come and appear in Court because of the illness of a certain individual. An allegation is made that necessary legal action for setting aside the execution proceedings and sale has been taken.

But Mr. Dutt has failed to furnish any particulars at all on the point and in fact has submitted before me that he is not in a position to say what steps, if any at all, had been taken in this respect. This much is quite clear that neither an application to set aside the ex parte decree nor even a suit to set aside the decree has been filed by the company against the petitioning creditor, although this decree was passed on 26-5-1949 and although even the presentation of this petition was on 20-11-1951 and although today it is August, 1952.

(8) On the question of the service of the statutory notice of demand under S. 163, Companies Act, the traverse by this deponent is most curious. What he says in affidavit-in-opposition is to be found in para. 20 and the only illumination one gets from this particular paragraph is "Save as aforesaid, I deny the allegations contained in paras. 7, 8, 9 and 10 of the said petition". Paragraph 9 of the petition for winding up specifically pleaded this notice mentioning that it was sent by registered cover. I would have normally expected a stricter and a more pointed denial and not a vague denial in an omnibus statement as the one I have just quoted including many other paragraphs.

The reason for vagueness of the denial has been apparent now although it was not apparent at the time when the affidavits were filed. Since these affidavits were filed an affidavit was affirmed by Narendra Nath Palit on 18-8-1952, in these proceedings disclosing the registered acknowledgment. Narendra Nath Palit has given evidence in support of his affidavit today, as Mr. Dutt suggested that Banerjee J. wanted to be satisfied about the service of the statutory notice, although Mr. Chowdhury, appearing for the company, has denied that there was any question of trial on evidence. In the list of course the matter does not appear as one to be tried on evidence.

Nevertheless, accepting Mr. Dutt's position, Mr. Chowdhury for the petitioning creditor called Narendra Nath Palit to the box. His evidence is that the notice of demand, dated 29-8-1951 addressed to the company was duly posted by him, it was addressed to the company at its registered address and he received back the acknowledgment due in the usual course of business on or about 30-8-1951, which is also the date borne on the rubber stamp seal of the company on the acknowledgment. Mr. Dutt, appearing for the company, has cross-examined Mr. Palit and has said that it has not been duly proved because Mr. Palit could not say as to whether the signature on the acknowledgment due was by someone on behalf of the company.

It would be the most unreasonable law to assume that a person sending a letter by registered post would have to know each and everyone of the company's employees to be able to say as to who has signed any particular letter and Mr. Palit rightly and frankly said that he could not say who signed it but he was satisfied that it bore the rubber stamp seal of the company which he had seen on many other occasions in the usual course of business and he had inferred that it must have been duly delivered because it was duly addressed at the registered office and duly returned to him through the post office. Mr. Dutt has argued that this presumption can be rebutted. That is an acceptable proposition, but his difficulty is that it has not been rebutted.

On the one hand, I find a postal acknowledgment duly sent and addressed and duly returning in the usual course of business, and on the other the sworn evidence of the person who actually sent the letter and actually posted that letter and the presumption must operate until it is rebutted by someone coming from the company to deny and dispute the receipt of such letter. Here is the crux of the matter. But

no one has come forward on behalf of the company to dispute the receipt of this statutory demand notice, although according to Mr. Dutt this was the very point which was to be tried on evidence.

Therefore, not only the presumption must prevail but I must come to the finding that the service was proper and effective in the absence of any proof to the contrary and having regard to the evidence already given by Mr. Palit. This explains why there has not been a direct denial by Sunil Krishna Roy Choudhury affirming the affidavit on behalf of the defendant company on this point of the receipt of this statutory demand notice. I unhesitatingly accept in this context the evidence given by Narendra Nath Palit.

(9) It is necessary to refer at this stage also to the language of S. 163 (1) (i), Companies Act which requires such demand notice to be "delivered by registered post or otherwise at its registered office". The best evidence available on behalf of the petitioning creditor has been given by calling the person who actually delivered the letter to the post and sent it by the post and got the acknowledgment back in due course by postal administration. On the side of the petitioning creditor nothing more could have been done. Mr. Dutt suggests that the peon should have been called. I do not see any reason why the peon should be called as the ordinary presumption is that a letter duly addressed and posted would reach the address which is given in the envelope and confirmed in this case by return back through the post. If delivery was to be disputed, the company to whom it was intended to be delivered was the best authority to dispute it. But no one from the company has come to pledge his oath to say that there was no delivery of this letter.

(10) I, therefore, hold that there was proper delivery by registered post of the statutory demand notice contemplated under S. 163 (1) (i), Companies Act.

(11) The main argument advanced on behalf of the company is on the basis of the observations of Lord Esher, M. R. in — 'Ex parte Lennox', (1886) 16 QBD 315 (A). There it is said by that very eminent Master of Rolls that the Bankruptcy Court can enquire into a judgment debt. To use his exact language at p. 323 which has been quoted out of context by Mr. Dutt,

> "The Court is entitled to enquire into the alleged debt and the Court exercising a judicial authority, is bound to do so upon a 'sufficient' case being shewn. Circumstances may be alleged which would show that the judgment ought to be disregarded in bankruptcy."

This has been relied upon by Mr. Dutt as an open invitation to the bankruptcy Court to undermine the basis and the validity of every judgment debt that happens to be questioned by the judgment-debtor, disregarding the wholesome observation of the Master of Rolls at the beginning of the paragraph in which that passage occurs and which I find necessary to quote:

> "It cannot be doubted that a judgment is prima facie evidence of a debt, and that judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him."

This will show that there cannot be any doubt that a judgment debt will carry a great weight even in a bankruptcy Court and it is the presumptive evidence of the highest order. and even on the passage quoted by Mr. Dutt, mere allegations and assertions of fraud or collusion will not justify upsetting and reopening a judgment debt. It is there said by the Master of Rolls that a "sufficient case" must be made out. A difference is made between the case of fraud and the case of collusion to which I will make a reference. But in no view of either the Insolvency Law or general jurisprudence can it be suggested that the mere assertion of fraud will at once in every case entitle the judgment-debtor to an enquiry into the validity of the judgment debt on the basis of which a petition for insolvency is presented.

(12) The reason why a judgment debt may be enquired into by a bankruptcy Court is obvious and that reason must be clearly understood in order to discover the limits of this seductive doctrine that a bankruptcy Court can go behind a judgment debt. On the petition of one single creditor the bankruptcy Court is asked to make an order in insolvency or as in the case of a company, an order for winding up, which means that all the creditors will be affected and that is the reason why a single judgment debt may be questioned lest a spurious or fraudulent or collusive debt of a party should be the foundation for making the debtor bankrupt for all other creditors and for the rest of the world.

But that does not mean that the judgment debt is of no value and is no evidence and it can be just disregarded by the judgment-debtor by merely making an allegation that it has been obtained by fraud or collusion. I should have thought that such baldest and vaguest allegations which I have found in this affidavit of the company challenging the decree do not even amount in law to an averment of fraud or collusion. That is all that I need observe on this case of 'Ex Parte Lennox (A)' except saying also that this is not a case under the Companies Act and not a case in the winding up of a company but relates to the bankruptcy of an individual.

(13) The law appears to me to be clearly and correctly stated in the case of — 'In re, Amalgamated Properties of Rhodesia (1913) Ltd.', (1917) 2 Ch 115 (B) where Sargant J. observes at p. 121 that

> "the petitioners, as judgment-creditors for this very large sum, are prima facie entitled 'ex debito justitiae' to a winding up order, and it seems to me to be impossible to displace that prima facie position without the 'very strongest proof' that the petition is being improperly made use of for some ulterior motive."

(14) While, therefore, the correct view is that the judgment of a Court is a very strong presumptive evidence that the debt exists, it is not conclusive in a bankruptcy Court and although the bankruptcy Court as a Court of conscience can enquire into the basis of and in that sense go behind a judgment debt it will equally as a Court of conscience do so only in a proper case on proper grounds being shown that the decree or the judgment debt is tainted with fraud or collusion. This branch of the law in England is to be found also from the leading case on the point of — 'Bowes v. Hope Life Assurance and Guarantee Co.', (1865) 11 H L C 389 (C) and in such well-known cases on the point as — 'In re. General Company for Promotion of Land

Credit', (1870) 5 Ch 363 (380) (D) and — 'In re. National Permanent Benefit Building Society', (1869) 5 Ch App 309 (E).

(15) I should like to insist here that on my reading of the cases I have come to the conclusion that the mere allegation that the judgment was obtained by fraud does not require the bankruptcy Court to enquire into its foundation and validity. The allegation must be attended with such particulars as will not only amount to a proper averment in law of fraud but also show a prima facie case of fraud requiring investigation. It appears to me quite clear from the observations of Lord Esher, M. R. in the case of—'In re Ex Parte Lennox (A)'. The latest legal position is clearly stated in Buckley's Companies Act, Edn. 12, edited in 1949, p. 453. The learned editor of that great work says:

> "If the petitioner has already obtained a judgment in his favour, he cannot, upon an allegation that the judgment was obtained by fraud, be called upon as a preliminary to his right to an order to go into further evidence in support of his claim. But upon the respondents undertaking to bring an action to set aside the judgment, the petition may be ordered to stand over. If, however, the judgment is shewn to have been obtained by collusion, the petition may be dismissed although the judgment has not been impeached in an action."

(16) It is fundamental to remember that even in the case of charge of collusion it must be 'shown' that the judgment was obtained by collusion. The authorities quoted in support of that proposition are the decisions of the House of Lords which I have mentioned, and — 'In re United Stock Exchange Co.', (1884) W N 251 (F); — '(1886) 16 QBD 315 (A)' and — '(1917) 2 Ch 115 (B)'.

(17) Now from the statement of the law in Buckley it is quite clear that even if the petition for winding up is allowed to stand over the respondent should undertake to bring an action to set aside the judgment. But no such undertaking has been offered by Mr. Dutt's client probably for the reason that he feared that such an action had perhaps become barred by limitation. Ever since May 1949 when the decree was passed more than three years ago from now and from the presentation of this winding up petition in November 1951 there has been neither an application to set aside the ex parte decree nor even a suit to set aside the ex parte decree.

(18) The position under S. 163, Companies Act, is quite clear on the point. The petition in this case before me comes within the two grounds for winding up expressly stated in that section. The fact remains that execution of this decree is admitted and that it has remained unsatisfied. That obviously brings this case within the clear provision of S. 163 (1) (ii), Companies Act. Then again there is in this case the statutory demand notice as required under S. 163 (1) (i), Companies Act. The company must therefore be deemed to be unable to pay its debts under the statute. The language of the section is that in the events mentioned in three different cases under S. 163 the company shall be deemed to be unable to pay its debts.

One such event is when the creditor to whom the company is indebted in sum exceeding Rs. 500/- then due, has served on the company by causing the same to be delivered by registered post or otherwise at its registered office, a demand requiring the company to pay the sum that was due and the company has for three weeks thereafter neglected to pay the same or to secure or to compound for it to the reasonable satisfaction of the creditor. There is no doubt in this case that this demand remained unsatisfied for three weeks.

On this point I do not want to discuss in detail the well-known case of — 'Japan Cotton Trading Co. Ltd. v. Jajhodia Cotton Mills Ltd.', AIR 1927 Cal 625 (G). Yet it is necessary only to observe that in that case at p. 352 Rankin C. J. makes it quite clear that sub-s. (i) to S. 163 means that the company has to be served with a demand notice under rather special precaution so that if it makes further default for a period of three weeks "the question of the inability to pay its debts" is set at rest. That as I read the judgment means that the inability to pay the debt must be deemed to be there under the language of S. 163 when such a demand notice duly delivered remains unsatisfied for three weeks.

(19) Secondly under sub-s. (ii) of S. 163 (1) the other event 'when the company shall be deemed to be unable to pay its debt' is

> "if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part."

Here the decree is there and it is also admitted that it has remained unsatisfied even after attachment of the properties. It is true that the decree has been challenged but I have already observed that nothing has been shown in the affidavit which will even justify any enquiry to go behind the decree.

Before I leave this branch of the law I should like to observe that the moving consideration in this branch of law as laid down by Lord Esher in — 'Ex Parte Lennox (A)', was the language of the particular Bankruptcy Act which his Lordship was considering, namely, that the Court had to be 'satisfied'. This expression is not used in Cls. (i) and (ii) of S. 163 (1) but is used only in Cl. (iii) where the company cannot be deemed to be unable to pay its debts unless it is proved to the satisfaction of the Court that the company is unable to pay its debts. That proof to the satisfaction of the Court is not in my judgment required in the events mentioned in Cls. (i) and (ii) of S. 163 (1), Companies Act.

(20) For these reasons there will be an order for winding up of the company. Certified for counsel. Costs to come out of the assets of the company.

A/V.R.B. Order accordingly.

A.I.R. 1953 CALCUTTA 390 (Vol. 40, C. N. 147)

G. N. DAS AND SEN JJ.

Indian Electric Works Ltd., Appellant v. Bhabataran Sinha, Respondent.

Letters Patent Appeal No. 9 of 1951, D/- 25-11-1952, from judgment of Mookerjee J. in S. A. No. 2139 of 1946.

Limitation Act (1908), Art. 32 — Starting point.

A selling lands held in occupancy right to B — B erecting structures on it — No steps taken by A although he had full knowledge of erection — Subsequently

land sold under S. 37, Bengal Land Revenue Sales Act (11 of 1859) for arrears of revenue and purchased by C — C within less than two years of the revenue sale filing suit for injunction restraining B from erecting structures — The act of the defendant in putting up the structures held was not an incumbrance within the meaning of S. 37, Bengal Land Revenue Sales Act (11 of 1859) — Time held began to run from the date when the perversion first came to the knowledge of A — Fact that present plaintiff is not successor-in-interest of the defaulting proprietor held did not allow time to run again — Plaintiff's claim therefore held barred under Art. 32, Limitation Act.

(Para 12)

Anno: Lim. Act, Art. 32 N. 5.

Atul Ch. Gupta with Ajit Kumar Dutt, for Appellant; Hiralal Chakravarty and Bijan B. Das Gupta, for Respondent.

G. N. DAS J.: This is an appeal against a judgment of Mookerjee J. remanding the plaintiff's suit for further consideration.

(2) The only question which was in controversy before Mookerjee J. and which is now in dispute before us relates to a question of limitation.

(3) In order to understand the implication of the arguments addressed at the Bar, it is necessary to state the nature of the relief claimed by the plaintiff in his suit and the facts which preceded it.

(4) The disputed plots are C. S. dags Nos. 270 and 274. Plot No. 270 is stated in the plaint schedule to be a homestead plot which was held by the defendant's predecessor Upendra Nath Mukherji as a mokarari raiyat under the proprietors of touzi No. 3 of the 24-Parganas Collectorate. Plot. No. 274 is stated in the plaint schedule to be Sali (arable land) which was held by the said Upendra Nath Mukherji in occupancy right under the said touzi No. 3 of the 24-Parganas Collectorate. It appears that Upendra Nath Mukherji sold the disputed items to the defendant in March, 1939. The defendant thereafter proceeded to erect certain structures for the purposes of the electric factory of the defendant. No steps were however taken by Upendra Nath Mukherji either for the issue of an injunction or for relief by way of ejectment although as the Courts below have found, he had full knowledge of the erection of the structures, in the year 1939. On 24-9-1942, the said touzi No. 3 was sold for arrears of revenue and was purchased by the plaintiff. The plaintiff instituted the present suit on 3-11-1943, that is, within less than two years of the date of the revenue sale. In the plaint the plaintiff prayed for a permanent injunction restraining the defendant from erecting any pucca structures or from changing the character of the land which was said to be agricultural. The plaintiff also prayed for a temporary injunction during the pendency of the suit. The plaintiff also prayed for a mandatory injunction requiring the defendant to remove the pucca structures already erected or any other structures which may be put up by the defendant during the pendency of the suit.

(5) The suit was contested by the defendant and one of the pleas taken was the plea of limitation.

(6) The learned Munsif, 2nd Court, Alipur, who tried the suit repelled the defendant's contention and decreed the plaintiff's suit.

(7) On appeal by the defendant the learned 1st Additional District Judge, Alipur, 24-Parganas, reversed the decree of the trial Court and dismissed the plaintiff's suit on the ground of limitation.

(8) Against the decision of the lower appellate Court an appeal was taken to this Court. Mookerjee J. who heard the appeal was of the opinion that limitation under Art. 32, Limitation Act ran from the date of the plaintiff's purchase and that as such the suit was not barred and in this view remanded the case for further consideration by the Court below.

(9) It is the propriety of this judgment which is in question in the Letters Patent appeal.

(10) It is not disputed that the proper Article which governs the present case is Art. 32 of Sch. 1, Limitation Act. It is also common ground that so far as the defaulting owner of the touzi is concerned, his right to the relief contemplated by Art. 32, Limitation Act was barred by lapse of time. The question which has been debated before us is whether Art. 32 can avail the defendant as against the plaintiff who is the purchaser of the touzi within which the disputed plots lie at a sale for arrears of revenue.

(11) As I read the judgment of the learned Judge, it seems to me that the learned Judge was of the opinion that as the plaintiff is not the successor-in-interest of the defaulting Zemindar and as by the revenue sale he acquired the interest of the Crown subject to payment of Government revenue no act or inaction on the part of the defaulting proprietor could stand in the way of his getting relief in this suit. It seems to me that this line of reasoning proceeds on a misconception.

(12) Under S. 37 of Act 11 of 1859 the purchaser at a sale for arrears of revenue acquires the estate free from all incumbrances which may have been imposed upon the estate since the date of the settlement and is entitled to avoid or to annul all under-tenures, subject to the exceptions mentioned in the section. It is not suggested that the act of the defendant in putting up the structures on the disputed property was an incumbrance within the meaning of S. 37. It cannot therefore be said that merely because the plaintiff purchased the touzi at a revenue sale he acquired the right to take the property free from the burden imposed upon the property by the erection of the structures. The right which the purchaser acquires under section 37 has, in my opinion, nothing to do with the applicability or otherwise of Art. 32, Limitation Act. Article 32 does not specify any extension of period of limitation provided therein in case of a revenue sale purchaser. Article 32 provides a period for limitation for relief against a person who having a right to use the property for specific purposes diverts the same for other purposes. In such cases time begins to run from the date when the perversion first comes to the knowledge of the person injured by the perversion. The date from which limitation runs is a specific date, namely, the time when the person injured first derives his knowledge of the perverted user and not from any other subsequent date. Article 32 prescribes a short period of limitation and it cannot be suggested that fresh periods of limitation would run against a subsequent purchaser at a revenue sale of the property or against successive purchasers at a revenue sale of the property.

It was contended that as the present plaintiff is not the successor-in-interest of the defaulting proprietor during whose tenure the perversion first took place, Art. 32 would again commence to run

against him when the purchaser himself acquires knowledge of the perversion for the first time. If this view is accepted, the result would be that years afterwards, whenever the property would be put up to revenue sale, the purchaser would be entitled to avail of the remedy against a perverted user, although limitation in respect of the perverted user may have commenced to run when the perversion first came to the knowledge of the defaulting proprietor. The cases referred to on behalf of the respondent merely explain the effect of section 37 of the Revenue Sale Law in cases of suits for ejectment instituted against a person in adverse possession of a part of the estate which has been brought to revenue sale. The general observations made in the judgment referred to must be read in the light of the facts of those cases. In my opinion it would be illogical to apply those general observations to explain the import of Art. 32, Limitation Act. Nor is it, in my opinion, proper to apply the observations which are made in connection with the applicability of the doctrine of 'res judicata' to purchasers of revenue sale in order to understand the meaning of Art. 32, Limitation Act. Article 32, Limitation Act bars the remedy in case of a perverted user of the property in question and for that purpose the Code has prescribed a definite period of time from which limitation would commence to run, that period being the date when the perverted user first comes to the knowledge of the person injured thereby. This must refer, in my opinion, to the person whose rights had been infringed by the perverted user at the date of the perversion.

In this view, limitation would commence to run when the person whose rights were first infringed by the act of perversion came to know of such perversion for the first time and not from any later date. The learned Judge's view that limitation would run from the date of the revenue sale is, in my opinion, opposed to the clear terms of Art. 32, Limitation Act. The view taken by the learned Judge cannot therefore be accepted and the plaintiff's prayer for an injunction, permanent or mandatory, as prayed for in the plaint, must be held to be barred under Art. 32, Limitation Act. The suit must therefore be dismissed on this ground.

(13) The result is that this appeal is allowed. The judgment of the learned Judge is set aside and the plaintiff's suit dismissed. In view of the facts of this case, we direct that the parties would bear their own costs in all Courts.

(14) SEN J.: I agree.

C/H.G.P. Appeal allowed.

A.I.R. 1953 CALCUTTA 392 (Vol. 40, C. N. 148)

GUHA AND RENUPADA MUKHERJEE. JJ.

Satish Chandra De and another, Petitioners v. State of West Bengal.

Civil Revn. Case No. 2860 of 1951, D/- 22-12-1952.

Civil P. C. (1908), S. 115 — 'Exercised a jurisdiction not vested in it by law'.

Land acquisition proceedings — Under Government order, arbitrator called upon to assess compensation on footing that acquisition had been made under Requisitioned Land (Continuance of Powers) Act, 1947 — Arbitrator in assessing compensation on footing that acquisition was really under Defence of India Rules, acts beyond his authority. (Para 4)

Anno: C.P.C., S. 115 N. 10.

Purushottam Chatterjee, and Rameswar Saha, for Petitioners; J. Majumdar, Asst. Govt. Pleader, for the State.

GUHA J.: This is an application under S. 115, C. P. C., at the instance of certain claimants directed against an order of Mr. N. K. Ghose who was appointed an Arbitrator under orders of Government dated 31-7-50. The subject matter of dispute is portion of 3 C.S. plots which had been requisitioned by Government under R. 75A. Defence of India Rules, on 2-11-43. It appears that subsequently these lands were acquired by Government. In the order of Government dated 31-7-50 mentioned above it was mentioned 'inter alia' that the said properties were requisitioned under S. 3, Requisitioned Land (Continuance of Powers) Ordinance, 1946, (Ordinance 19 of 1946) and under S. 3, Requisitioned Land (Continuance of Powers) Act, 1947, and have been acquired. It appears further that there was also a Notification published in the Calcutta Gazette on 17-7-47 stating inter alia that the disputed lands had in supersession of previous orders been acquired under S. 5 (1), Requisitioned Land (Continuance of Powers) Act, 1947. It appears that before the Arbitrator the present petitioners claimed compensation on the basis of the Requisitioned Land (Continuance of Powers) Act, 1947, i.e., under sub-s. (2) of s. 6 of that Act. It was argued, however, before the Arbitrator on behalf of the Government that the acquisition of the lands was really on 24-9-46 under sub-r. (2) of R. 75A, Defence of India Rules. This contention on behalf of the Government found favour with the Arbitrator and he awarded compensation on the footing that the acquisition was really on 24-9-46 under the Defence of India Rules and not on 17-7-47 under Requisitioned Land (Continuance of Powers) Act, 1947. The Arbitrator has accordingly held that the petitioners before us are entitled to compensation on the basis of S. 19 (1) (e). Defence of India Act, 1939, and he has assessed compensation in respect of the disputed lands at Rs. 4060/3/6.

(2) On behalf of the petitioners it has been contended before us that the Arbitrator was wrong in holding that the acquisition of the disputed land was under the Defence of India Rules and not under the Requisitioned Land (Continuance of Powers) Act, 1947. It has, therefore, been argued that the fundamental basis of the decision of the Arbitrator in regard to the assessment of compensation is erroneous.

(3) On behalf of the State it has been argued before us, as it was argued before the Arbitrator, that the acquisition was really under the Defence of India Rules and not under the Requisitioned Land (Continuance of Powers) Act, 1947, and that the decision of the Arbitrator on the point is quite correct and that the Arbitrator was right in holding that the Collector must have acquired the land again under the Requisitioned Land (Continuance of Powers) Act 1947 under some misconception.

(4) It has been pointed out before us on behalf of the petitioners that in view of the order of Government dated 31-7-50 whereby authority was given to Mr. N. K. Ghose to act as an Arbitrator in this case it was not within his powers, in view of the clear terms of that order, to assess compensation on the basis that the acquisition was not under the Requi-

sitioned Land (Continuance of Powers) Act, 1947, but under the Defence of India Rules. It appears to us that there is much substance in this contention. Under the Government order in question the Arbitrator was called upon to assess compensation on the footing that the acquisition had been made under the Requisitioned Land (Continuance of Powers) Act, 1947, and if on a consideration of all the circumstances the Arbitrator came to the conclusion that the acquisition was not under that Act but under the Defence of India Rules under which no reference had been made to him, he could not assess compensation on the footing that the acquisition was really under the Defence of India Rules. In making assessment of compensation on that basis the learned Arbitrator has obviously acted beyond the scope of his authority and as such his order assessing compensation at Rs. 4060/3/6 has got to be set aside on that ground alone. His order dated 30-7-51 must accordingly be vacated.

(5) If it be the stand of the State that the acquisition in the present case was really under the Defence of India Rules and not under the Requisitioned Land (Continuance of Powers) Act, 1947, under which it purported to be, a fresh reference to an Arbitrator under the appropriate law will have to be made by Government.

(6) With these observations the Rule is made absolute and the order of the Arbitrator dated 30-7-51 is set aside.

(7) The parties will bear their own costs in this Rule.

(8) We express no opinion on the point whether the acquisition in the present case was under the Defence of India Rules or under the Requisitioned Land (Continuance of Powers) Act, 1947.

(9) RENUPADA MUKHERJEE J.: I agree.

B/V.B.B. Rule made absolute.

A.I.R. 1953 CALCUTTA 393 (Vol. 40, C. N. 149)

K. C. CHUNDER J.

Basanta Kumar Maity, Complainant v. Kenaram Maity, Accused.

Criminal Ref. No. 50 of 1952, D/- 4-12-1952.

Criminal P. C. (1898), S. 522 — "At any time within one month of conviction".

A complainant filed a petition under S. 522 for restoration of possession within one month of conviction of the accused. As the accused had gone to higher Court against his conviction the magistrate suo motu, without any express order of the Higher Court adjourned further proceedings pending its decision. When the higher Court decided against the accused the Magistrate passed an order for restoration nearly three months after the order of conviction and possession was restored to the complainant accordingly. The accused then moved the Sessions Judge who made a reference to the High Court on the ground that the order for restoration was bad on the ground of limitation.

Held (i) that the order of restoration passed by the Magistrate after one month was wrong in law. (Para 1)

(ii) that the Sessions Judge as a Court of reference had power to pass an order under S. 522 even after one month of the conviction and there was nothing to prevent his validating the order of the Magistrate which was a just order. The Sessions Judge not having done so the High Court as a Court of revision had power under S. 522 to make such an order. (Para 1)

(iii) that the whole proceedings were misconceived as possession had already been delivered when the Sessions Judge was moved and made the reference. There was no provision in S. 522 of restoring such possession back to the accused person. (Para 1)

Anno: Cr. P. C., S. 522 N. 5, 10.

Shambhu Nath Banerji, for Complainant; Manishi K. Das, for Accused.

CASE CITED:

(A) ('49) AIR 1949 Cal 111: 50 Cri LJ 172

ORDER: This is a Reference made by the Sessions Judge of Midnapore against an order under S. 522, Criminal P. C. passed by a Magistrate, 1st Class, of Contai. The facts are that the accused person in whose favour the Reference has been made was convicted under S. 323, Penal Code, that is, of using force and this force was used in connection with dispossession of the complainant from C. S. plot No. 2827. The learned Magistrate definitely found dispossession of the complainant and disbelieved the accused's case that they were fencing their own land and were protected by the right of private defence. Therefore all the elements necessary for S. 522, Criminal P. C. were present. The decision of Harries C. J. in — 'Samdhu Roy v. Mati Khatik', AIR 1949 Cal 111 (A), has therefore no application as the whole judgment proceeded on the ground that S. 522, Criminal P. C. did not apply in that case because there was no use of force or show of force or criminal intimidation. The learned Sessions Judge made the Reference not on this ground of show of force but on the ground of limitation.

Section 522 lays down that a Magistrate can make the order within one month of conviction. In the present case, the complainant filed a petition to be restored to possession within one month of conviction but as the accused opposite party had gone up to the higher Court, the learned Magistrate, 'suo motu', it appears, without any express order of the higher Court, adjourned further proceedings pending the decision of the higher Court. The petition for Reference by the accused opposite party was rejected by the learned Sessions Judge and the learned Magistrate after one month from the date of conviction passed the present order. It was approximately three months after the order of conviction. Technically, the learned Magistrate was wrong in passing such an order as he is empowered to pass the order within one month. This has been a decision of the revisional Benches of this Court to that effect. No such decision, if I may say so with respect, was at all necessary to be cited because the period is fixed in the Code itself. What was not noticed by the learned Sessions Judge in making this Reference was that as a Court of reference he is empowered to pass that order after one month and therefore there was nothing to prevent his validating the order of the learned Magistrate as the order appears to have been a just order. The learned Sessions Judge did not do so but has made the Reference to this Court and it appears from S. 522 that as a Court of Revision this Court has power to make such an order. Therefore, the order made by the learned Magistrate is made by this

Court exercising its power of revision, as the revisional Court mentioned in S. 522, Criminal P. C. It may also be mentioned that the whole of the proceedings were entirely misconceived as possession had already been delivered when the learned Sessions Judge was moved and made the Reference. There is no provision in S. 522 of the Code of restoring such possession back to the accused person.

(2) Under the circumstances, the Reference is rejected.

B/K.S. Reference rejected.

A.I.R. 1953 CALCUTTA 394 (Vol. 40, C. N. 150)

J. P. MITTER AND SEN JJ.

Badri Prasad Missir and another, Accused-Petitioners v. The State.

Criminal Revn. Case No. 495 of 1952, D/-10-2-1953.

(a) Constitution of India, Art. 14 — Reasonable classification not barred.

The fundamental right as to the equal protection of the laws and equality before the law only means that there should be equal operation of law in respect of all persons similarly circumstanced. The Legislature may make special laws applicable to particular classes provided there is a reasonable basis for the classification. (Para 5)

(b) Criminal P.C. (1898), S. 269(1) — Validity — Does not contravene Art. 14 — (Constitution of India, Art. 14).

Section 269(1), Cr. P. C. does not empower the State Government to deal with individual cases but compels the State Government to deal with all offences or particular classes of offences within a district all at once. There is therefore, no contravention of the fundamental right of the equal protection of the laws guaranteed by Art. 14 of the Constitution, in the state of the existing law under the Criminal Procedure Code, which enables the accused concerned in particular class of cases to be tried by jury and the accused concerned in other class of cases to be tried with the aid of assessors. AIR 1952 Cal 150 (FB); AIR 1952 Cal 639 (SB) and AIR 1952 SC 75, Explained and Distinguished; AIR 1952 SC 123, Ref. (Para 10)

Anno: Cr. P. C., S. 269 N. 2, 3.

(c) Constitution of India, Art. 14 — Principle of classification.

The principle that the classification should be deducible from the terms of the Act itself including the preamble is applicable only in respect of Special Acts seeking for the purpose of a particular class of cases to supersede the ordinary criminal law of the country as contained in the Criminal Procedure Code and substitute therefor a procedure less advantageous to the accused. The rule does not affect the question of validity of the ordinary criminal law of the land as contained in the Criminal Procedure Code. AIR 1952 SC 123, Rel. on. (Para 9)

S. S. Mukherjee and Subimal Som, for Petitioners; J. M. Banerjee, for the State.

CASES CITED:

(A) ('52) AIR 1952 Cal 150: 1952 Cri LJ 450 (FB)

(B) ('52) AIR 1952 SC 75: 1952 Cri LJ 510

(C) ('52) AIR 1952 SC 123: 1952 Cri LJ 805

(D) ('52) AIR 1952 Cal 639: 1952 Cri LJ 1441: 56 Cal WN 659 (SB)

SEN J.: This revisional application is directed against the order committing the petitioners Badri Prasad Missir and Lakshmi Narayan Dey to sessions in respect of the offence under S. 7(2) proviso of the Essential Supplies Act 1946 and against the order of the Sessions Judge directing that the trial of the case be held with the aid of assessors. The prosecution case briefly is that on 4-10-51 the petitioners were taking 151½ mds. of rice by a lorry bearing No. C. H. 1746 when the Police Patrol Party at Adisaptagram, P. S. Magra, in the district of Hooghly stopped the lorry and found that it contained rice and they arrested the petitioners who were found in the lorry. They were charged under S. 7(2) of the Essential Supplies Act for possessing rice much in excess of the maximum quantity which could be lawfully possessed by any person. The punishment prescribed for the offence by the section as amended is imprisonment which may extend to 7 years and a fine not less than 20 times the value of the foodgrain found in the possession of the accused. The committing Magistrate found that the facts outlined above were sufficiently proved by evidence and he committed the two petitioners to sessions. The sessions trial was taken up by B. P. Bakshi, the Assistant Sessions Judge, to whom the case was transferred by the Sessions Judge. Before him the petitioners filed a petition to the effect that the case should be tried with Jury and not by the aid of assessors. The Assistant Sessions Judge rejected the petition on the ground that under the existing law the case was triable with the aid of assessors and not by Jury. Thereupon a petition under S. 526, Cr. P. C. was moved and the case was stayed and this Court was moved in revisional application.

(2) As regards the first point that the commitment of the petitioners to the Court of Sessions under S. 7(2) proviso of the Essential Supplies Act 1946 was illegal, it is not seriously pressed by Mr. Mukherjee appearing on behalf of the petitioners. In view of the fact that the maximum punishment prescribed for the offence is 7 years, the case is triable by the Court of Sessions by Sch. 2, Cr. P. C. It is provided therein that if any offence under any law other than the Indian Penal Code is punishable with death or transportation or imprisonment of 7 years or upwards, the case is triable only by the Court of Sessions. This case was therefore rightly committed to the Court of Sessions.

(3) As regards the second point, viz., that the Sessions Judge's order that the case be tried with the aid of assessors is illegal, Mr. Mukherjee appearing on behalf of the petitioners does not press that point also seriously. Section 268, Cr. P. C. provides that all trials before a Court of Sessions shall be either by jury, or with the aid of assessors. Section 269, sub-s. 1 provides that the State Government may by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Sessions, shall be by jury in any district. The necessary implication is that only the classes of offences so notified by the State Government as triable by jury shall be tried by jury and that all other offences shall be

tried with the aid of assessors. This is the accepted law and it is admitted that there is no notification that the trial of offences under the Essential Supplies Act should be by jury. It is clear therefore that the learned Sessions Judge was quite right in directing that the case be tried with the aid of assessors.

(4) Mr. Mukherjee however has raised a point of constitutional law and has urged it strenuously, namely, that all accused committed to the Court of Sessions may demand equal treatment and that it amounts to discrimination if some accused committed to Sessions are tried by jury and other accused also committed to sessions are tried with the aid of assessors and there is no fair and reasonable basis for this difference as to the mode of trial of different accused committed to the Court of Sessions; and as the order of the learned Sessions Judge that the trial be held with the aid of assessors amounts to discrimination before the law, the petitioners are entitled to claim that they should be tried by jury.

(5) Article 14 of the Constitution is the Article relating to equality before the law and equal protection before the laws. This Article runs as follows:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is however well-recognised that there may be differences in the law applicable to different classes. The fundamental right as to the equal protection of the laws and equality before the law only means that there should be equal operation of law in respect of all persons similarly circumstanced. The Legislature may make special laws applicable to particular classes provided there is a reasonable basis for the classification. The Criminal Procedure Code contains the ordinary law of the land relating to criminal trials. As I have stated before, in respect of trials before the Court of Sessions, trial with the aid of assessors is the common rule. It is only when the State Government issues notification in respect of the trial of all offences in any district or of any particular class of offences in any district being triable by jury, that such offences become triable by jury and they are taken out of the common rule that all cases before the Sessions Court shall be tried with the aid of assessors. The Government has been given no power to provide that in individual cases the trial shall be by jury. The Government has to provide by notification that the trial of all offences or of particular classes of offences in any district shall be by jury. Therefore as regards the accused concerned in any particular class of offences, there is no discrimination; according as the class of offences is or is not included in the Government notification relating to trial by jury, such accused will be tried by jury or with the aid of assessors. It is therefore difficult to accept the argument advanced by Mr. Mukherjee that the trial of some persons committed to the Court of Sessions by jury and of other persons committed to the Court of Sessions with the aid of assessors constitutes a breach of Art. 14 relating to the equal protection of the laws within the territory of India. The accused concerned in any particular class of offences like offences under the Essential Supplies Act constitutes a special class. It cannot be said that there is no reasonable basis for these classifications. Accordingly, it must be held that there is no breach of the fundamental right of the petitioners guaranteed by Art. 14 of the Constitution.

The Court cannot compel the Government to issue a notification providing that offences under the Essential Supplies Act shall be tried by jury. If the power given by S. 269(1) to the State Government were an arbitrary power, it would rather follow that the State Government could not issue a notification providing that any particular class of offences in any district should be tried by jury. Therefore the common rule of trial before the Sessions Court would be applicable and all cases would have to be tried with the aid of assessors. But we must hold that the power given to the State Government by S. 269(1) is not an arbitrary power and that exercise of that power by the State Government does not constitute a breach of the fundamental right as to equal protection of the laws guaranteed by Art. 14 of the Constitution.

(6) Mr. Mukherjee has referred to certain rulings in this connection. In the case of — 'Anwar Ali Sarkar v. State of West Bengal', AIR 1952 Cal 150 (A) a Full Bench of this Court was concerned with the question whether the West Bengal Special Courts Act (1950) violated the fundamental right as to the equal protection of the laws guaranteed by Art. 14 of the Constitution. The majority of the Full Bench held that sub-s. 1 of S. 5 of the West Bengal Special Courts Act (1950) offended against Art. 14 of the Constitution in so far as it empowered the State Government to direct any case to be tried by a Special Court and the power given in the section and the notification made under the powers so given were ultra vires Art. 14 of the Constitution and therefore the Special Court had no jurisdiction to try persons in pursuance of the powers under the notification and to convict and sentence them. It was however held that the Act so far as it authorised its application to offences or classes of offences or classes of cases was not obnoxious to Art. 14 of the Constitution.

(7) This Full Bench decision really goes against the contention of Mr. Mukherjee because in S. 269(1), Cr. P. C., we are not concerned with particular cases but with all offences or any particular class of offences within a district. By the criterion adopted by the Full Bench of this Court in — 'Anwar Ali v. State of West Bengal', (A), Section 269(1), Cr. P. C. does not offend against Art. 14 of the Constitution. Mr. Mukherjee has however urged that the Supreme Court in dealing with the case in appeal went further than the Calcutta High Court and held that unless the basis of classification was laid down in the Act itself the Act must be held to contravene Art. 14 of the Constitution. In the Supreme Court decision — 'The State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (B) the Hon'ble Judges of the Supreme Court gave separate judgments and it cannot be said that they came to a unanimous or even majority conclusion that the basis of classification of offences should be laid down in the Act itself. The effect of the different judgments given by the Hon'ble Judges of the Supreme Court in that cases is summarised by Mukherjea J., in

another Supreme Court case, viz., — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (C). The following extract from the judgment delivered by B. K. Mukherjea J. will clarify the points stated above.

"In the Calcutta cases referred to above, the notification under S. 5(1) of the West Bengal Act directed certain individual cases in which specified persons were involved to be tried by the Special Court and it was held by the High Court of Calcutta that S. 5(1), West Bengal Special Courts Act to the extent that it empowers the State Government to direct any case to be tried by Special Courts was void as offending against the provision of the equal protection clause in Art. 14 of the Constitution; and this view was affirmed in appeal by a majority of this Court. With regard to the remaining part of S. 5(1), which authorises the State Government to direct, offences, class of offences ... or class of cases for trial by Special Courts the majority of the Judges of the Calcutta High Court were of opinion that it was not obnoxious to Art. 14 of the Constitution. In the present case, the notification, that was issued by the Saurashtra State Government on 9/11-2-1951, did not relate to individual cases. The notification constituted in the first place a Special Court in the areas specified in the schedule. It appointed in the next place a Judge to preside over the Special Court and finally gave a list of offences with reference to appropriate sections in the Indian Penal Code which were to be tried by the Special Judge. If the view taken by the Chief Justice of the Calcutta High Court and the majority of his colleagues is right, such notification and that part of S. 11 of the Ordinance, under which it was issued, could not be challenged as being in conflict with Art. 14 of the Constitution. This point did come up for consideration before us in the appeals against the Calcutta decision with reference to the corresponding part of S. 5(1), West Bengal Act, but although a majority of this Court concurred in dismissing the appeals, there was no such majority in the pronouncement of any final opinion on this particular point."

Thus the Supreme Court decision in — 'The State of West Bengal v. Anwar Ali Sarkar', (B) does not go further than the Full Bench decision of this Court.

(8) Mr. Mukherjee on behalf of the petitioners has urged that in 'the Saurashtra case' (C) from which the above extract has been taken their Lordships of the Supreme Court did go a little further and said that a special Act providing a special Tribunal should give some idea of the basis of the classification of the offences which are intended to be tried by the Special Tribunal. It has been urged that as S. 269(1), Cr. P. C. gives no indication of the basis of classification of the class of offences which may be notified for trial by jury, the provision contravenes the fundamental right guaranteed by Art. 14 of the Constitution. We should point out however that the Supreme Court was concerned with Special Acts providing for trial in a Special Court by a special procedure by suspending the operation of the ordinary mode of criminal trial provided by the Criminal Procedure Code, and of the ordinary criminal Courts of the land set up under the Criminal Procedure Code. The decision of the Supreme Court relating to the Special Act containing some basis of the classification of the offences which are intended to be tried by the Special Tribunal must be read in that context. Thus, it appears that in — 'the Saurashtra case', (C) it was contended on behalf of the appellant that S. 11 and the notification issued thereunder were discriminatory in that the offences alleged to have been committed by the appellant within the specified areas were required to be tried by the Special Judge under the special procedure, while any person committing the same offence outside the area would be tried by the ordinary Court under the ordinary procedure. It is clear, therefore, that there was no attempt to challenge the validity of the ordinary procedure for trial of sessions cases by the ordinary Courts set up under the Criminal Procedure Code. All these cases were concerned with Special Act which sought to supersede the ordinary criminal Courts of the land and the ordinary mode of criminal trial provided by the Criminal Procedure Code. This point would be made clearer by reference to certain portions of the judgment of the Supreme Court in — 'the State of West Bengal v. Anwar Ali Sarkar', (B). At p. 84, there is the following observation by Fazl Ali J.:

"The Act itself lays down a procedure which is less advantageous to the accused than the ordinary procedure, and this fact must in all cases be the root-cause of the discrimination which may result by the application of the Act."

At p. 92, there is the following observation by Mukherjea J.:

"As I have said already, in the present case, the discrimination arises on the terms of the Act itself. The fact that it gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory."

(9) So, it was only in respect of Special Acts seeking for the purpose of a particular class of cases to supersede the ordinary criminal law of the country as contained in the Criminal Procedure Code and substitute therefor a procedure less advantageous to the accused that the Supreme Court has laid down in 'the Saurashtra case', (C) that the principle of the classification should be deducible from the terms of the Act itself including the preamble. This decision, therefore, does not affect the question of validity of the ordinary criminal law of the land as contained in the Criminal Procedure Code.

(10) I need refer to only another case cited by Mr. Mukherjee, namely, — 'Ram Kissen v. State of West Bengal', AIR 1952 Cal 639 (D). In this case, the Special Bench of this Court was concerned with the validity of S. 12(1) of the West Bengal Black Marketing Act. That provision empowers the Government to transfer any case under the West Bengal Black-Marketing Act to a Special Tribunal. The wording of the relevant portion is as follows:

"The Provincial Government may, from time to time by notification in the Official Gazette, allot cases for trial to each Special Tribunal, and may also from time to time by like notification transfer any case from one Special Tribunal to another or withdraw any

case from the jurisdiction of a Special Tribunal ....."

Thus the Government could transfer any case they liked under the West Bengal Black Marketing Act to a Special Tribunal and leave other cases under the West Bengal Black Marketing Act to be dealt with by the ordinary Courts. Their Lordships, therefore, held that the discriminatory power of withdrawal and transfer given to the Government, involved discrimination violating the provision of Art. 14 of the Constitution. This was also a case like S. 5(1) of the West Bengal Special Courts Act (1950), and the State Government in its discretion might withdraw individual cases from the ordinary Courts governed by the ordinary procedure and send it to a Special Tribunal or Special Court governed by special procedure. As I have already pointed out, that decision in such a case does not really support the contention of Mr. Mukherjee, because S. 269(1), Cr. P. C. does not empower the State Government to deal with individual cases but compels the State Government to deal with all offences or particular classes of offences within a district all at once.

We are, therefore, unable to accept the contention of Mr. Mukherjee that there is any contravention of the fundamental right of the equal protection of the laws guaranteed by Art. 14 of the Constitution, in the state of the existing law under the Criminal Procedure Code, which enables the accused concerned in particular class of cases to be tried by jury and the accused concerned in other class of cases to be tried with the aid of assessors.

(11) Accordingly, this Rule stands discharged.

(12) J. P. MITTER J.: I agree.

A/D.R.R. Rule discharged.

A.I.R. 1953 CALCUTTA 397 (Vol. 40, C. N. 151)

MITTER AND SEN JJ.

Turu Majhi and others, (2nd party) Petitioners v. The State (Bimal Mukherjee, 1st party) Opposite party.

Criminal Revn. No. 497 of 1952, D/- 6-2-1953.

(a) Criminal P. C. (1898), Ss. 144 and 145 —Effect of prior order in proceedings under S. 144 on subsequent proceedings under S. 145.

Prior proceedings under S. 144 in respect of certain land — Order dissolving proceedings on finding that possession was with particular party — Such finding is not binding in subsequent proceedings under S. 145 in respect of same land and as such it is no bar to initiation of S. 145 proceedings if on proper material Magistrate is satisfied that there is a likelihood of breach of peace. (Para 2)

Anno: Cr. P. C. S. 145, N. 44.

(b) Criminal P. C. (1898), S. 145 —Parties.

There is no legal bar to a landlord being represented by his employee in S. 145 proceedings. (Para 2)

Anno: Cr. P. C. S. 145 N. 19. Pts. 9, 10.

(c) Criminal P. C. (1898), S. 145 — Likelihood of breach of peace.

Initiation of proceedings under S. 145 in respect of several plots — No material on record to show that there was likelihood of breach of peace in respect of certain plots — Report showing that some plots were in possession of one party for more than six months prior to order — Proceedings should be quashed as bad. (Paras 4, 5)

Anno: Cr. P. C. S. 145 N. 12.

S. S. Mukherjee, and Subimal Shome, for Petitioners; S. K. Basu, for Opposite Party.

SEN J.: This revisional application is directed against the order of the Sub-Divisional Magistrate, Vishnupur, drawing up proceedings under S. 145, Criminal P.C. in respect of certain lands of Mouza Kanaipur, Police Station Sonamukhi, measuring about 62.80 acres. It appears from the reports of the Circle Officer, South, on the basis of which the proceedings were started, that the petitioners Turu Majhi and others, who are Sonthals and men of the second party, obtained settlement of the lands in 1927, but after cultivating the lands for some years, they abandoned the lands and left the locality about 15 years ago, but about June 1951, they returned to the locality and took possession of some of the disputed lands and cultivated some of them and erected huts in others. On 14-6-1951, the opposite party started proceedings under S. 144, Criminal P. C. and an order was issued under that section restraining the parties from entering the lands. But that order was dissolved on 16-8-1951 — the Sub-Divisional Magistrate recording a finding that the second party, Sonthals were in possession. Thereafter, however, on the application of the opposite party, who is the first party, proceedings under S. 145, Criminal P.C., were started after obtaining further reports from the Inspector of Police and the Circle Officer, South.

(2) Two grounds were taken in the application for quashing the proceedings under S. 145, Criminal P. C. These grounds were also taken before the Sub-Divisional Magistrate, Vishnupur, on 7-4-1952, where the objections were overruled. The first point is that in view of the finding which was recorded when dissolving the order under S. 144, Criminal P. C., no fresh proceedings under S. 145, Criminal P.C., should have been started in respect of the same lands. On this point I must agree with the learned Magistrate that the recording of a finding in a proceeding under S. 144, Criminal P. C. would not bar the drawing up of proceedings under S. 145, Criminal P.C. in respect of the same lands, and the observation as to possession in a proceeding under S. 144, Criminal P. C. would not be binding in a subsequent proceeding, and if the Magistrate is satisfied on a proper material, that there is a likelihood of the breach of the peace over the disputed lands, he may draw up proceedings under S. 145, Criminal P. C. The second point taken was that the opposite party being an employee of the landlord was not competent to figure as a party in the proceedings under S. 145, Criminal P. C. There appears, however, no legal bar to a landlord being represented by his employee.

(3) It appears, however, that there is a more cogent objection to the proceedings under S. 145, Criminal P. C. as drawn up by the learned Magistrate. Two reports of the Circle Officer, South, dated 5-12-1951 and 24-12-1951 show that in about five bighas in the south-western part of Plot No. 5 of Mouza Kanaipur, the Sonthals or the petitioners obtained possession about six months before the proceedings were drawn up, by cultivating the lands, and in a portion of Plot No. 13 of the same Mouza, they similarly obtained possession about six months before the proceedings were

drawn up by constructing huts thereon. The report also shows that the petitioners felled some trees standing on Plots Nos. 4 and 5. But the proceedings include many other plots, namely, Plots Nos. 3, 6, 12 and 198 of Khatian 20 of Mouza Kanaipur and the total area of land brought within the scope of the proceedings is 62.80 acres, although it appears that the petitioners have taken actual possession of only a few bighas out of that land.

(4) We must hold, therefore, that the proceedings as drawn up are open to objection, because there is no material on record to show that there is any dispute likely to result in breach of the peace relating to Plots Nos. 3, 6, 12 and 198 of Mouza Kanaipur.

(5) As regards the portions of the remaining plots in which the petitioners obtained possession about six months before the proceedings were drawn up, the proceedings would be infructuous in view of the proviso to sub-s. (4) of S. 145, Criminal P. C., which provides that the Magistrate may restore lands to the original owner only if wrongful dispossession took place within two months next before the date of the proceedings. Therefore, the Magistrate could not restore lands of which the petitioners obtained possession about six months before the proceedings.

(6) In the circumstances, the proceedings must be quashed. It would, however, be open to the opposite party to institute fresh proceedings in respect of lands about which there is a present apprehension of breach of the peace, provided it is found on enquiry that the petitioners have not been in clear possession of the same for more than two months.

(7) Subject to the above observation, the Rule is made absolute and the proceedings under S. 145, Criminal P. C. are quashed.

(8) MITTER J.: I agree.

B/K.S. Rule made absolute.

A.I.R. 1953 CALCUTTA 398 (Vol. 40, C. N. 152)

G. N. DAS AND SEN JJ.

Sree Sree Radha Ballav Jiu Thakur, Appellant v. Shebaits of Sri Sri Iswar Lakshmi Janardan Thakur and another, Respondents.

Letters Patent Appeal No. 1 of 1952, D/- 27-11-1952 against a judgment of P. N. Mookerjee J. in S. A. No. 897 of 1948.

(a) Landlord and Tenant — Rent decree — Execution — Decree for rent against some defendants and for costs against all.

Where the claim under execution was one for rent and the defendants who were made liable to pay the same were all the putnidars recorded in the landlord's sherista, an execution of the decree for this sum must be regarded as an execution of a decree for rent against all the recorded tenants. The fact that by the same decree some of the recorded tenants were made liable for a prior period did not make this part of the decree under execution nonetheless a decree for rent. No question of splitting up the decree for costs arose. The decree specifically made all the recorded tenants liable for the costs. (Para 7)

(b) Landlord and Tenant — Rent decree — — Decree against all recorded tenants — Civil P. C. (1908), O. 1 R. 10.

A decree for rent obtained against all the recorded putnidars would be a rent decree even though the landlord has failed to implead certain part-transferees of an interest in the putni, who were not recognised by the landlord. AIR 1943 Cal 319, Rel. on.: AIR 1944 Cal 219, Disting. (Para 11)

Anno: C. P. C., O. 1 R. 10 N. 20.

Atul Ch. Gupta and Purushottam Chatterji, for Appellant; Apurbadhan Mukherjee and Chandra N. Laik, for Respondents.

CASES CITED:

(A) ('44) AIR 1944 Cal 219: 48 Cal WN 312
(B) ('43) AIR 1943 Cal 319: 47 Cal WN 186

G. N. DAS J.: This is an appeal by defendant 1 Sree Sree Radha Ballav Jiu Thakur by his shebait Uday Chand Mahatab, Maharajadhiraj Bahadur of Burdwan, against a judgment of P. N. Mookerjee J.

(2) The facts which led up to this litigation may be stated as follows. The plaintiffs claimed to be under tenants in respect of a putni mehal which was held by the 'pro forma' defendants as putnidars under the Zemindar, viz., the debottar estate of the Maharaja of Burdwan. In 1934 a suit for rent for the years 1337 to 1340 B.S. was instituted by the Zemindar against the then holders of the putni in question. Plaintiff 1 of the Rent Suit was described as the deity Sree Sree Radha Ballav Jiu Thakur by the shebait Maharaja of Burdwan represented by the Manager, Court of Wards, and plaintiff 2 was described as the said deity represented by the Maharaja of Burdwan simpliciter. The suit was decreed in favour of plaintiff 1. It was dismissed as against plaintiff 2. The decree which was drawn up in the suit stated that the rents for the years 1337 to 1340 B.S. aggregating the sum of Rs. 4085-2-1 were decreed against all the defendants and a sum of Rs. 3599-9-8 was decreed against defendants 10 and 11 for the period 1338 to 1340 B.S. There was a decree for costs to the tune of Rs. 528-10-6 against all the defendants. This decree was passed on 5-12-1934. It was executed as Rent Execution Case No. 13 of 1938 by plaintiff 1 as aforesaid and the execution prayed for was by a sale of the putni in arrears, the sum claimed in the execution petition being the entire sum decreed, namely, Rs. 4085-2-1 plus costs and interests.

(3) In the execution proceeding various objections were raised by the different judgment-debtors. One of the objections taken by judgment-debtor Bhudar Chandra Mukherjee was that the decree could not be executed as a rent decree. This objection was overruled in part by the learned trial Judge. The order is dated 25-7-1938, Ex. K(1). By this order the Court held that the claim for rent for the year 1337 could be executed only as a money decree, but the claim for the years 1338 to 1340 B.S. together with costs could be executed as a rent decree. The Court specifically held that a sum of Rs. 3599-9-6 together with costs would be executable as a rent decree. This order was affirmed on appeal, Ex. K(3).

(4) The other set of objections which was filed by some other judgment-debtors related to the absence of Satkori Roy and Jogendranath seems (sic) unrecorded transferees from the recorded tenants as parties defendants in the rent suit. It was contended that as such the decree in question could not be executed as a rent decree, because Satkari Roy and Jogendra Nath Banerjee were not impleaded as parties defendants in the rent suit. This objection was

overruled by the learned Judge. Thereafter Rent Execution Case No. 13 of 1938 was allowed to be dismissed for default on 10-9-1943, and a fresh execution case was started by plaintiff 1 of the rent suit being Rent Execution Case No. 47 of 1946 praying for execution only in regard to the claim for the years 1338 to 1340 B.S., namely, a sum of Rs. 3599-9-6 together with costs. The prayer was made for realisation of the sum by a sale of the putni in arrears. Meanwhile, in March 1940, the present suit was instituted by the under-tenants praying for a declaration that the decree that was executed in Rent Execution Case No. 13 of 1938 was not a rent decree in the proper sense of the word and for an injunction restraining the decree-holder, defendant 1, from proceeding with the execution. This suit was contested by the defendant 1, i.e., the present appellant. The learned trial Judge decreed the plaintiffs' suit being of opinion that the decree under execution was not a rent decree. An appeal was taken by the present appellant to the lower appellate Court which was dismissed. On a second appeal being taken to this Court the judgment and decree of the lower appellate Court were set aside and the case was remanded to the lower appellate Court for a re-hearing of the appeal.

As a result of the hearing after remand the lower appellate Court reversed the judgment of the learned trial Judge and dismissed the plaintiffs' suit. Against that judgment and decree the plaintiffs preferred a second appeal to this Court. This appeal was heard by P. N. Mookerjee J. and was allowed and the plaintiffs' suit was decreed with costs in this Court and in the Court below. It is against this judgment that the present appeal has been taken. P. N. Mookerjee J. allowed the appeal preferred before this Court by the plaintiffs solely on the ground that the decree could not be split up so far as the costs are concerned and as such the execution could not be regarded as a rent execution. On all other points the learned Judge agreed with the lower appellate Court.

(5) Mr. Gupta, learned Advocate appearing on behalf of the appellant, has contended that the view taken by P. N. Mookerjee J. is not correct. In order to decide this contention it is necessary to consider the precise effect of the decree which was passed in Rent Suit No. 11 of 1934.

(6) I have already set out the terms of the decree that was passed in the rent suit. It has to be noted that a decree for a sum of Rs. 4085-2-1 being the claim for rents from 1337 to 1340 B. S. was purported to have been passed against all the defendants. This was followed by a direction that as against defendants 10 and 11 the claim decreed was for the years 1338 to 1340 B. S. and that those defendants were liable for a sum of Rs. 3599-9-8. This was followed by a further direction that all the defendants were liable to pay the costs of the suit.

(7) In my opinion, the decree, read as a whole, implies that there was a decree for the rent of 1337 B. S. so far as defendants 1 to 9 are concerned and there was a decree for the rents of 1338 to 1340 B. S. against all the defendants coupled with the decree for costs against all of them. P. N. Mookerjee J. was of the opinion that on a proper interpretation of the decree, the decree for costs read in the light of the judgment passed in the rent suit must be regarded as a decree for costs for the year 1337 B. S. only against defendants 1 to 9 and as a decree for the remaining portion of the costs against all the defendants. In his opinion, the decree was ambiguous and it was permissible to refer to the judgment for the purpose.

In so far as the decree for costs is concerned, the decree is specific and clearly makes all the defendants liable for the costs of the suit. Whether such a decree should have been made or not is not the point before us. The decree, as it stands, in my opinion, must be regarded as a decree making defendants 1 to 9 liable for the rent for 1337 and a decree making all the defendants liable for the years 1338 to 1340 B. S. together with costs. The execution which was proceeded with sought to realise the claim for rent for 1338 to 1340 B. S. together with costs in respect of which all the defendants were liable. The claim under execution was one for rent and the defendants who were made liable to pay the same were all the putnidars recorded in the landlord's sherista. An execution of the decree for this sum must be regarded as an execution of a decree for rent against all the recorded tenants. The fact that by the same decree some of the recorded tenants were made liable for a prior period does not make this part of the decree under execution nonetheless a decree for rent. It must, therefore, be held that the execution which was being proceeded with by the landlord was one for realisation of the rent due by all the tenants vis-a-vis the landlord. No question of splitting up the decree for costs arises. The decree specifically made all the recorded tenants liable for the costs. The ground on which the learned Judge proceeded must, therefore, be overruled.

(8) Mr. Mukherjee, learned Advocate for the plaintiffs-respondents, sought to support the decree on certain other grounds which were decided against the respondents by P. N. Mookerjee J. In the first place, he contended that the decree which was being executed was not a rent decree because the decree-holder was not the landlord. He suggested that the Record-of-Rights records the Maharaja of Burdwan partly as shebait of the deity and partly in his own personal capacity. The lower appellate Court found that the zemindary interest was acquired by Maharani Kamal Kumari as the shebait of the deity as far back as the year 1235 B. S. from the then proprietor Guruprosad Ghose. The landlord's interest was, therefore, vested in the deity represented by the shebait. The Record-of Rights in so far as it records the Maharaja of Burdwan in his personal capacity as a co-proprietor must be taken to be an erroneous description of the capacity in which it was held by the Maharaja.

(9) It was then contended that all the co-sharer landlords were not impleaded. It was suggested that the Mitters of Bagbazar were also interested in the superior right. In support of this Mr. Mukherji referred to the Record-of-Rights as also to the D register. The lower appellate Court considered this matter and was of opinion that the Record-of-Rights is not correct. The lower appellate Court pointed out that the original purchase of the superior right was by Maharani Kamal Kumari as shebait of the deity. The lower appellate Court also pointed out that there have been several proceedings for recovery of rent under the Putni Regulation & no objection was ever taken that the debottar estate was not solely interested in

the superior right. The lower appellate Court also pointed out that the debottar has been realising rents from the putnidars all along and from all these facts the lower appellate Court inferred that the Mitters of Bagbazar had no subsisting interest in the putni. There is, therefore, no substance in the contention raised that all the co-proprietors were not impleaded as plaintiffs in the suit for rent.

(10) It was next contended by Mr. Mukherji that the decree as passed was not a decree in favour of the debottar estate. It was pointed out that the suit was dismissed so far as plaintiff is concerned. It was decreed in favour of plaintiff 1. Plaintiff 1 was described as the deity represented by the shebait Maharaja of Burdwan represented by the Manager, Court of Wards. The question is whether the plaintiff 1 correctly represented the debottar estate. A perusal of the judgment clearly indicates that the plaintiff was seeking to realise the rent which was payable by the recorded putnidars to the debottar estate. The mere fact that the Maharaja of Burdwan as shebait of the deity was represented by the Court of Wards did not show that it was not the debottar estate in whose favour the decree was being passed but that the decree was being passed personally against the Maharaja of Burdwan. The question is whether the deity was seeking to realise the rent from the tenants. In fact, the suit was framed with a view to show that it was the deity who was seeking to realise the rent from the putnidars. The fact that the suit was dismissed as against plaintiff 2 does not show that the debottar estate did not obtain a decree in respect of the putni. A reference to the judgment indicates that the Court was of the opinion that the debottar estate was properly represented by plaintiff 1. I am, therefore, in agreement with P. N. Mookerjee J. when he holds that the deity was properly represented by plaintiff 1 and that the decree as passed must be regarded as a decree in favour of the debottar estate.

(11) Mr. Mukherjee next contended that the tenants' interest was not fully represented by the defendants to the suit for rent. It was argued that certain purchasers of fractional shares of the putni, namely, Satkari Roy and Jogendra Nath Banerjee, were not impleaded as parties defendants. It is not disputed that the tenancy in suit was a putni tenure, and that Satkari Roy and Jogendra Nath Banerjee were not the recorded putnidars in the landlord's sherista. What is contended for is that even so, as Satkari Roy and Jogendra Nath Banerjee were interested in the putni as cosharer putnidars, and as they were not impleaded, the putni tenure could not be regarded as properly represented by the ex-putnidars whose interests had devolved on Satkari Roy and Jogendra Nath Banerjee. Reliance is placed for this proposition on a decision of this Court in the case of — 'Pulin Behari v. Ram Ranjan', AIR 1944 Cal 219 (A). That was an appeal from a decision passed in a suit for rent. The claim for rent was for the years 1339 to 1340 B. S. The original tenants were certain Mitters, Tewaris and Kabirajes. The interest of the Tewaris was sold on 2-1-1935, that is, 18th Pous 1341 B. S. The question which came up for decision in the appeal was whether the Tewaris were liable for the rent which fell due after their interest had been sold and had passed on to one Nistarini Debi. This Court held that the moment the interest of the Tewaris was sold and had visited (vested?) in Nistarini Debi, their liability to pay the rent of the putni ceased and since the purchase the purchaser Nistarini Debi was liable for the rent.

In that view, this Court modified the decree passed by the Court below and absolved the Tewaris from the liability to pay rent for the period since 2-1-1935. It was in that connection that it was observed that the moment a transfer takes place, the old putnidar ceased to be liable for the rent and the liability to pay rent attached to the transferee. No point was raised in that case as to the effect of the decree that was passed in the rent suit. The only question debated was whether the effect of the transfer was to absolve the transferor from the liability to pay rent. It is not necessary for us to consider whether the decision reached in that case is correct or not. It is sufficient to say that that decision is an authority for what it actually decided, namely, that by the effect of a sale the co-sharer ex-putnidar ceased to be liable for the rent. It is to be observed that the decision in the case cited was a decision to which Mitter J. was a party. In an earlier case, namely, the case of — 'Jatish Chandra v. Kshirode Kumar', AIR 1943 Cal 319 (B) the question with which we are not concerned came up for consideration before a Bench presided over by the same learned Judge. In that case one of the putnidars was Nafar Chandra Pal Choudhury. Nafar Chandra Pal Choudhury had made a gift of a share in the putni interest to his sons, who were not recognised by the Zemindar. A suit for rent was instituted against all the recorded putnidars including Nafar Chandra Pal Choudhury but to that suit for rent the donees from Nafar Chandra Pal Choudhury were not impleaded.

The suit for rent was decreed. A question arose whether that decree for rent had the effect of a rent decree or not. It was contended that because the donees from Nafar Chandra Pal Choudhury were not impleaded and as they were interested in a part of the putni, the decree that was passed could not be regarded as a rent decree. This contention was overruled by this Court, the judgment being delivered by Mitter J. who was a party to the decision in the case reported in — 'AIR 1944 Cal 219 (A)', referred to above. This decision clearly covers the present question and I respectfully agree with the view taken in this case. The result of the decision is that a decree for rent obtained against all the recorded putnidars would be a rent decree even though the landlord has failed to implead certain part transferees of an interest in the putni, who were not recognised by the landlord. There is, therefore, no force in the contention raised by Mr. Mukherjee on this point.

(12) I have dealt with all the grounds on which Mr. Mukherjee sought to support the decree passed by this Court, and I have held that there is no substance in these contentions.

(13) In the result, as we disagree with the view taken by P. N. Mookerjee J. on the point on which he based his judgment, this appeal must be allowed. The judgment and decree passed by P. N. Mookerjee J. are set aside and the plaintiffs' suit is dismissed with costs in all Courts.

(14) SEN J.: I agree.

B/D.H. Appeal allowed.

A.I.R. 1953 CALCUTTA 401 (Vol. 40, C. N. 153)

P. N. MOOKERJEE J.

Nishikanta Ghosh and another, Appellants v. The Corporation of Calcutta, Respondent.

Criminal Admitted Appeal No. 125 of 1952, D/- 9-12-1952.

(a) Municipalities — Calcutta Municipal Act (33 of 1951), S. 5(1)(c)(vi) and (viii) — Applicability.

Poori fried in ghee adulterated with foreign fat (not butter fat) sold as 'poori fried in ghee' — Poori held to be "adulterated food" within S. 5(1)(c), sub-cls. (vi) or (viii) — Fact that no standard has been prescribed for poori or poori fried in ghee as such, is no bar to applicability of the sub-clauses: Case law discussed. (Paras 12, 13, 14, 20)

(b) Evidence Act (1872), S. 105 — Onus to bring case within proviso — (Municipalities — Calcutta Municipal Act (33 of 1951), S. 461 Proviso).

Provisos engrafted on main parts of penal sections to the effect that under certain conditions the offences, mentioned in the said penal portions, would not be deemed to have been committed — Onus with regard to such provisos is on the accused. AIR 1936 All 86, Rel. on. (Para 20)

Anno: Evidence Act, S. 105 N. 1.

(c) Evidence Act (1872), Ss. 101-103 — Criminal trial.

In the case of municipal statutes intended to preserve City's health, the object and purpose would be clearly frustrated unless the statutory checks are rigidly enforced. (Para 21)

Anno: Evidence Act, Ss. 101-103 N. 3.

(d) Bengal General Clauses Act (1 of 1899), S. 8, Cls. (d) and (e) — Repeal of penal statute pending trial — (General Clauses Act (1897), S. 6 — (Municipalities — Calcutta Municipal Act (3 of 1923), S. 406) — (Municipalities — Calcutta Municipal Act (33 of 1951), S. 461.)

Prosecution under Calcutta Municipal Act (1923) — Statute repealed pending conclusion of trial and replaced by new Act (W. B. Act, 33 of 1951) — Proceedings do not lapse — Old offences can be dealt with under old Act even if new Act has made changes in procedure for prosecution. (1920) 2 Ch 377; AIR 1946 Cal 339 (FB), Rel. on. (Para 25)

Anno: Gen. Cls. Act, S. 6 N. 4, 5.

Ajit Kumar Dutta, for Appellants; Santosh Kumar Basu and Sunil Kumar Bose, for Respondent-Corporation; Bireswar Chatterjee, for the State.

CASES CITED:

(A) ('39) AIR 1939 Mad 375: 40 Cri LJ 513
(B) ('46) AIR 1946 Mad 44: 47 Cri LJ 351
(C) ('40) AIR 1940 Cal 577: 42 Cri LJ 322
(D) ('41) 45 Cal WN 661
(E) ('43) AIR 1943 Cal 88: 43 Cri LJ 896
(F) ('19) AIR 1919 Cal 862: 19 Cri LJ 753
(G) ('47) AIR 1947 Mad 428: ILR (1948) Mad 437
(H) ('49) AIR 1949 All 35: 50 Cri LJ 105
(I) ('39) AIR 1939 Sind 337: 41 Cri LJ 246
(J) (1928) 44 TLR 238
(K) ('36) AIR 1936 All 86: 37 Cri LJ 360
(L) (1916) 2 KB 446: 85 LJ KB 1360
(M) ('40) AIR 1940 Mad 173: 1939 Mad WN 1128: 41 Cri LJ 377
(N) (1920) 2 Ch 377: 37 RPC 171
(O) ('46) AIR 1946 Cal 339: 50 Cal WN 502 (FB)

JUDGMENT: The appellants before me have been convicted by the local third Municipal Magistrate under Ss. 461/537 of the new Calcutta Municipal Act (1951) corresponding to Ss. 406/488 of the old Act of 1923. Appellant 1, Nishi Kanta Ghosh, is the Managing Director of Dwarik's Sweets (India) Ltd., a well-known confectionary firm of this city and the other appellant, Paritosh Banerjee, is the salesman at the Harrison Road shop of that firm. On 10-4-1951, at the instance of food inspector Sailesh Sen a complaint was lodged against the accused under Ss. 406/412/488 of the old Calcutta Municipal Act, 1923, then in force, for an alleged offence of

"storing for sale on 20-2-1951, Poori fried in ghee, the ghee extracted from which on analysis was found to be adulterated with foreign fat not exclusively derived from milk",

and after some procedural delay summonses were issued and served upon them, and on 16-11-1951, they entered appearance, — accused 1 Nishi Kanta through an agent, and accused 2 Paritosh personally, — and at the examination under S. 242, Criminal P. C. they both pleaded 'not guilty'. On 4-1-1952, accused Nishi Kanta appeared personally, and on this date both the accused repeated their plea of 'not guilty' and then the trial proceeded in the presence of accused Paritosh and of the agent of the other accused Nishikanta who, upon his own application, was granted personal exemption from appearance and was allowed to be represented by an agent.

(2) On 16-2-1952, the prosecution witnesses were examined and cross-examined, and then there was the usual examination under S. 342, Criminal P. C., and the plea of 'not guilty' was reiterated by the defence. The case was then adjourned to 14th March for defence and argument, and on the said date the accused filed a joint written statement. No defence witnesses were tendered or examined, but, after several adjournments, granted on the prayer of the defence lawyer, arguments were heard on 24th and 30th May 1952, and on this latter date judgment was delivered by the learned Magistrate convicting the accused under Ss. 461/537 of the new Calcutta Municipal Act, 1951, which had come into force in the meantime on 14-2-1952, and sentencing them, — the managing director accused 1 and the seller accused 2, — to pay fines of Rs. 500/- and Rs. 25/- respectively. The present appeal is directed against these convictions and sentences.

(3) It will be convenient to state now certain broad facts which appear on the record and which are not disputed before me and/or not challengeable on the evidence given in the case. There is no dispute that the accused 1 Nishikanta was the managing director of Dwarik's Sweets (India) Ltd., and that accused 2 Paritosh was the seller of the firm's shop at No. 89 Harrison Road, Calcutta, on the date of the alleged offence. It has also been abundantly proved by the prosecution — and this is not challenged by Mr. Dutt who appears for the appellants — that on 20-2-1951, the complainant food inspector Sailesh Sen purchased a quantity of 'Poori', — the sample Poori in the

case — worth Rs. 1/14 as. from the seller accused Paritosh at the said Harrison Road shop which Poori was divided into three equal parts as samples, and "one such sample was sent to the Corporation Laboratory for analysis", "the second sample was left with the accused" (Paritosh), and the third one was "retained with the Corporation of Calcutta for future reference". The evidence (Vide P. W. 1) further shows that the complainant food inspector was given (sold) the sample Poori on asking for "Poori fried in ghee", his actual words being "घी ए भाजा पूरी दाव" and the further evidence is that before asking for "Poori" he asked the seller accused Paritosh, "Are all your foodstuffs prepared with ghee?" "आपना देर शब खबर घी ए तोयारीतो ?" —and got an answer in the affirmative. It has also been well and sufficiently established by the materials on record, — and this also is not denied or disputed by the defence, — that upon analysis of the sample sent to him as aforesaid the Corporation analyst submitted his report to the effect that "the sample is a sample of puri prepared in ghee which is adulterated with foreign fat". The report is dated 16-2-1952, and it has been marked as Ex. 2 in the case. The Corporation analyst has been examined by the prosecution as prosecution witness No. 2 and the other prosecution witness is the food inspector Sailesh Sen who figures as prosecution witness No. 1.

(4) As already stated, no witnesses were examined by the defence, but the accused filed a joint written statement on the date fixed for defence and arguments, and the learned Magistrate found the accused guilty of storing for sale "adulterated food" under the municipal law of the city, and convicted and sentenced them thereunder. It is just necessary to state here that the learned Magistrate in passing sentences took into consideration the fact that appellant 1 was the managing director of the confectionary firm involved in this case and appellant 2 was only its salesman at the shop where the offence, as found by him, was committed, and he also refrained from passing upon the director accused the severer sentence, prescribed under the new Calcutta Municipal Act, 1951, as, in his opinion, the offence having been committed and the prosecution launched when the old Act was in force the lesser maximum under that Act ought to be the outer limit of punishment.

(5) In support of the appeal three main points have been urged before me. It was first contended that there was no proper or sufficient analysis or examination of the 'ghee content' of the sample Poori to justify the report (Exhibit 2) that it was "adulterated with foreign fat" or to warrant any conclusion to that effect. It was argued, therefore, that the appellants' conviction was unsustainable and should be quashed. It was next contended that even assuming that the 'ghee content' of the sample Poori was "adulterated with foreign fat" that would not make the Poori "adulterated food" within the meaning of the Municipal Law and would be wholly insufficient to support the appellants' conviction as they were not selling or storing for sale 'ghee' but 'Poori', and although the 'ghee' might be adulterated, 'Poori' fried in it would not necessarily be an 'adulterated food' under the Municipal Law so as to give rise to an offence thereunder. The third contention was sought to be founded on the legislative change which intervened during the pendency of the appellants' prosecution, viz., the introduction of the new Municipal Act of 1951 on 14-2-1952, which repealed the old Act of 1923 under which the prosecution had begun. It was contended under this head that with the death of the old Act the present prosecution had or must be deemed to have lapsed, the machinery and procedure, set up and prescribed for initiation and conduct of such prosecutions, apart from anything else, being under the new Act essentially, if not entirely, different, and, in any event, so argued Mr. Dutt, there ought to be a retrial, as, in this case, on a prosecution started and proceeded with for offences under Ss. 406/488 of the old Act, the appellants have been convicted and sentenced for offences under Ss. 461/537 of the new Act. These arguments require careful consideration as the manifold importance of the points raised can hardly be exaggerated, and I proceed now to consider them seriatim in the order in which they have been set out above.

(6) Upon the first point, the record stands thus: The analyst's report (Ex. 2) describes the alleged adulteration of the sample Poori in the following terms, viz., "a sample of puri prepared in ghee which is adulterated with foreign fat." (After discussing the evidence the judgment proceeded:) In the above view of the matter, I am not inclined to reject the report (Ex. 2) and accept the appellants' first contention which I, accordingly, overrule and I agree with the learned Magistrate in holding that the 'ghee content' of the sample Poori was "adulterated" (Vide, in particular, Sub-cl. (v) of Cl. (c) of the relevant definition Section (S. 2(3) of the old Act — S. 5(1) of the new)).

(7-10) Let me turn now to the second submission of Mr. Dutt. This submission has to be examined in the light of the relevant provisions of the Municipal Law of this city. In the Calcutta Municipal Act of 1923 the term "adulterated" was defined in S. 3(2), where cl. (c) dealt specifically with the case of 'food' and food was defined in S. 3(31), and the same definitions have been retained in the new Act of 1951 (Vide Ss. 5(1)(c) & 5(33)). Under this statutory definition,

> "'food' includes every article used for food or drink by man, other than drugs or water, and any article which ordinarily enters into or is used in the composition or preparation of human food; and also includes confectionary, flavouring and colouring matters and spices and condiments."

There is no question, therefore, that Poori is 'food' under the Municipal Act.

(11) It is to be seen next whether the sample Poori in the present case was "adulterated" within the meaning of the statutory definition. That definition, as above stated, is contained in S. 3(2) of the old Act which clearly corresponds — almost word for word — with S. 5(1) of the new.

(12) Upon the arguments advanced before me and in the facts of this case, four sub-clauses of the said definition section — namely, sub-cls. (i), (ii), (vi) and (viii) of cl. (c) require consideration. The appellants, of course, argue that none of the clauses or sub-clauses of the said definition section here applies to make the sample Poori "adulterated food", even assum-

ing that its 'ghee content' was adulterated, but the Corporation maintains that on that assumption — and that, indeed, is my finding on the first point, — namely, that the 'ghee content' of the sample Poori was adulterated" this case would attract sub-cls. (i), (ii), (vi) and (viii) of S. 3(2)(c) of the old Act of 1923, corresponding to the same or similar sub-clauses of S. 5(1)(c) of the new Act of 1951, which run as follows:

"(c) in the case of food—

(i) if any substance has been mixed and packed with it so as to reduce or lower or injuriously ('harmfully' in the 1951 Act) affect its quality or strength, or

(ii) if any substance has been substituted wholly or in part for the article, or

....

(vi) if it contains or is mixed or diluted with any substance in any quantity to the prejudice of the purchaser or consumer or in any proportion which diminishes in any manner its food value or nutritive properties as compared with the same in a pure or normal state and in an undeteriorated and sound condition, or

....

(viii) if it is not of the nature, substance or quality which it purports or is represented to be:"

There is force in this latter contention, so far as it is sought to be founded on the two sub-cls. (vi) & (viii), and, in my opinion, it ought to prevail to that extent.

(13) The Corporation analyst (P. W. 2) who is also a medical man — an M.B. of the Calcutta University — deposed 'inter alia' as follows:

"My opinion is that the sample of 'Poori' was fried in ghee which ghee is adulterated with foreign fat. By foreign fat I mean fat which is not butter fat. Ghee must consist of butter fat. Normally butter fat should melt between 28°C and 36°C.....I analysed the fat which I got by extracting the sample of Poori .....If the sample was made of pure ghee it should have melted between 28°C and 36°C. In this case the sample did not melt up to 40°C.....As a doctor I can say that if the sample of ghee in question does not melt up to 40°C it will not be fully absorbed in the body."

This evidence read in its proper light and context is, in my view, sufficient to justify the conclusion that the food in question, namely, the so-called 'Puri fried in ghee' "घ ए भाजा पूरी" contained "some substance in a certain quantity to the prejudice of the purchaser or consumer or in a

"proportion which diminishes its food value or nutritive properties as compared with the same in a pure or normal state and in an undeteriorated and sound condition."

In any event, on the evidence, led in this case, it is abundantly clear that Poori fried in 'adulterated ghee' or, to be more precise, in ghee "adulterated with foreign fat", that is, adulterated with "fat which is not butter fat" was sold as 'Poori fried in ghee' "घी ए भाजा पूरी" which latter, namely, ghee "must consist of butter fat". The sample Poori, therefore, may safely be held to be "adulterated food" within the statutory meaning as it comes well within the terms of sub-cl. (vi) of cl (c) of the definition section or, as. in any event, it certainly satisfies the tests or requirements of sub-cl. (viii).

Mr. Dutt's answer that there is no prescribed standard for 'Poori' or 'Poori fried in ghee' "घी ए भाजा पूरी" and that in the absence of such a standard, the sub-clauses, referred to above, cannot apply does not appear to be sound as. in my opinion, that argument is relevant only when the case is sought to be brought directly under sub-cl. (v) and it does not really touch the other sub-clauses, although, as in this case, that sub-cl. (v) may be a necessary step to lead to these other sub-clauses, and it seems to me that there being a standard prescribed for 'ghee' under the Municipal Law (Vide S. 407(1)(iii) of the old Act — and S. 462 (1)(v) of the new — and the relevant statutory notification under that section) and the 'ghee content' of the sample Poori not conforming, upon the evidence on record, to that standard and being thus "adulterated" (Vide sub-cl. (v)) there would be no bar to the applicability of the other sub-clauses of S. 3(2)(c) of the old Act or S. 5(1)(c) of the new. merely because no standard has been prescribed for 'Poori' or 'Poori fried in ghee' " घी ए भाजा पूरी " as such. It thus follows that, although the sample Poori may not be "adulterated" within the meaning of sub-cl. (i) or sub-cl. (ii) of cl. (c) of the definition section, — and I ought to make it clear that I am not impressed by Mr. Basu's argument to the contrary, — it would, in my opinion, come within the mischief of the language of sub-cl. (vi) or, at any rate, of sub-cl. (viii) and if this conclusion be not opposed to authorities, that would be enough for the prosecuting Corporation on this part of the case. In this view of the matter it becomes wholly unnecessary to consider in any detail sub-cl. (iii) on which the learned Magistrate relied but which has not been attempted to be pressed into service before this Court for apparently good reasons as the said sub-cl. (iii) does not appear to be at all relevant to this case.

(14) On the merits, therefore, I am not inclined to accept Mr. Dutt's second submission, or the appellants' second point, as noted above, but before I record my final conclusion upon the same I have to consider the cases, cited at the bar on behalf of the respective parties.

(15) On behalf of the appellants, Mr. Dutt drew my attention to the cases reported in — 'In re K. S. Ambi Iyer', AIR 1939 Mad 375 (A) and — 'Crown Prosecutor, Madras v. V. R. Ramanatha Aiyar', AIR 1946 Mad 44 (B) and to the three cases of this Court reported in — 'Abala Kanta Ghose v. Corporation of Calcutta', AIR 1940 Cal 577 (C); — 'Firm Ballavdas Iswardas v. Sanitary Inspector, Howrah Municipality', 45 Cal W N 661 (D) and — 'Joykali Ganguly v. Sanitary Inspector, Howrah Municipality', AIR 1943 Cal 88 (E). The learned Advocates, appearing for the Corporation and the State, referred me on the other hand to the cases reported in — 'Grande Venkata Ratnam v. Corporation of Calcutta', AIR 1919 Cal 862 (F); — 'Public Prosecutor Madras v. Parameswara Aiyar', AIR 1947 Mad 428 (G); — Deo Mitra v. Rex', AIR 1949 All 35 (H); — 'Nebhandas Hollaram v. Emperor', AIR 1939 Sind 337 (I) and also to the English case of — 'Riley Bros. (Halifox) Limited v. Hallimond', (1928) 44 T L R 238 (J).

(16) I have examined the rulings cited, and it seems to me that of them the two reported in 'AIR 1919 Cal 862 (F)' and 'AIR 1947 Mad 428 (G)' and cited by the respondent's Counsel can be dismissed forthwith as not — even remotely — touching the point now before me. The case in 'AIR 1919 Cal 862 (F)' just contains a timely warning against indiscriminate and irresponsible use of passages from scientific treatises or text books and the growing tendency to place undue reliance upon the same or to give preference to them — in wholly unsuitable or unjustified circumstances — over expert evidence, actually adduced in the case, and the Madras decision 'AIR 1947 Mad 428 (G)' really turns on a particular Government notification which nullified the effect of the earlier pronouncement of that Court, reported in 'AIR 1946 Mad 44 (B)'. This latter case also although it may apparently at first sight lend some support to the appellants' second contention really turned on the meaning of the word 'ingredient' in R. 28B, Madras Prevention of Adulteration Act (3 of 1918), and thus, upon a close analysis, it appears to have little bearing or relevancy on the present prosecution.

(17) The other cases, cited on the appellants' behalf, are also distinguishable in that in the — ''Kajoor' case', AIR 1939 Mad 375 (A) the prosecution was under S. 5(1)(d), Madras Prevention of Adulteration Act, which clearly depended upon the standard prescribed by the local Government and in the absence of such prescribed standard the prosecution under that section was held to be not sustainable; in the earlier of the Calcutta cases cited, namely, 'AIR 1940 Cal 577 (C)', the prosecution was for selling adulterated ghee, that is, under S. 407 of the old Calcutta Municipal Act as distinct from S. 406 and what was alleged and proved to have been sold was Singara said to have been fried in adulterated ghee and, in these circumstances, this Court quashed the convictions and the sentences, made and awarded by the learned Municipal Magistrate, with the very relevant observation that "if the petitioners were selling Singara they were not selling Ghee": in the later Calcutta case '45 Cal W N 661 (D)' also this Court held that upon a complaint "for selling adulterated mustard oil itself" a conviction for stocking or selling food cooked in adulterated mustard oil was bad (see page 662) and further that

> "in the absence of any evidence and of a finding to the effect that the food value of 'alur dam' was deteriorated to the prejudice of the purchaser or consumer"

no conviction could properly be made under S. 406 of the (old) Act read with S. 3(2)(c) (see page 663), their Lordships observing in the course of their judgment that

> "in order to convict under S. 406, Calcutta Municipal Act, it must be proved that the food was adulterated; in the present case, that on account of the action of the accused the quality or strength or value of the food was reduced or lowered or injuriously affected to the prejudice of the consumer, — S. 3(2)(c) of the Act; as to this there is neither any evidence nor any finding by the learned Magistrate" (Vide p. 662 of the Report);

and in the other Calcutta case cited, namely, 'AIR 1943 Cal 88 (E)', although the prosecution appears to have been under S. 406 of the old Calcutta Municipal Act for selling or storing for sale 'luchis' fried in adulterated ghee, the 'luchis' were not seized or analysed, but a sample of the ghee in which, it was so alleged, the 'luchis' were being fried was taken by the sanitary inspector and analysed by the public analyst which ghee was on such analysis found to be adulterated, and Henderson, J. acquitted the accused for lack of requisite evidence to support the prosecution, the relevant passage occurring in the judgment as below:

> "Now it is not the prosecution case that the ghee formed one of the constituents of the luchis. Their case is that the luchis were fried in it. The luchis were not seized or analysed. In the absence of such evidence, there is nothing to show that any of this ghee was in the luchis. Then, in the second place, it has to be shown that luchis fried in this ghee would be of an inferior quality to those fried in ghee which the public analyst would describe as unadulterated. There is no such evidence. The Rule is accordingly made absolute, the conviction and sentence are set aside, and the fines, if paid, will be refunded." (Vide the last paragraph of the judgment at page 88 of the report).

Clearly, therefore, none of the cases, cited by Mr. Dutt, is of any real assistance to his clients.

(18) The Sind decision 'AIR 1939 Sind 337 (I)', cited on behalf of the respondents, has a striking similarity to the present case, and although I am not prepared to agree with the learned Judges of that Court and go to the length of holding that the fact that the ghee alleged to be adulterated

> "was taken from a shop where sweetmeats and pakoras were offered for sale and indeed from a frying pan in which other sweatmeats and pakoras were being made, it is quite clear that the sweetmeats and pakoras in his (accused's) shop had been manufactured for sale within the meaning of S. 4(1)(b) and that he was manufacturing and offering for sale sweetmeats and pakoras as containing pure ghee which contained impure ghee" (Vide p. 338 of the report)

and this is not material in the present case — I do feel that that case was rightly decided and the correct view was there taken of the true scope of the relevant statutory provision, namely, S. 4, Bombay Prevention of Adulteration Act (5 of 1925).

(19) The Allahabad case of 'AIR 1949 All 35 (H)', also propounds a view counter to the appellants' second contention, and the reason and principles underlying the English decision cited, namely, '(1928) 44 TLR 238 (J)', largely support the present prosecution, the statute there examined being, in its material part, essentially similar to the provisions of our municipal law now under consideration. In this state of the authorities, and there being no merit, as already indicated, in the appellants' second contention it can only be rejected. I, accordingly, overrule Mr. Dutt's second point too

(20) I ought to refer here to one connected argument of Mr. Dutt founded on the provisos, particularly, the first proviso to S. 406 of the old Act and the similar or corresponding proviso or provisos to S. 461 of the new Act. In this argument which, however, was not persisted in till the last, the appellants claimed protection or immunity from the present prose-

cution upon the plea that the prosecuting Corporation not having placed any materials before the Court to exclude the possibility of the application of the said provisos to this case, no offence under either of the said sections could be held to have been committed by them. In ultimate analysis this plea raises the question of onus, and in substance the contention is that to succeed under S. 406 of the old Act or S. 461 of the new the prosecution must establish not only that the case comes within the mischief of the main part of the said section or sections, but also that the provisos thereto are inapplicable.

For this argument reliance was sought to be placed on a broad proposition that in all criminal trials the onus is on the prosecution not only to establish the guilt of the accused, but also to show affirmatively a negative state of things, namely, that conditions do not exist which would entitle him (the accused) to any protection under the law. To this broad argument, I am unable to accede. I am not inclined to hold that where in a statute provisos are engrafted on main parts of penal sections to the effect that under certain conditions the offence or offences, mentioned in the said penal portions, would not be deemed to have been committed, the onus is on the prosecution to show the absence or non-existence of those conditions and such onus must be discharged before a person can be convicted of the said offence or offences. In my view, the onus with regard to such provisos is on the accused and it is for him to establish affirmatively the conditions thereunder in order that the said provisos may be attracted to the case, and their benefits made available to him. The provisos indeed offer a special defence to the accused and the onus is on him to establish the same if the prosecution is to be thrown out under the said provisos. A similar view was taken by the Allahabad High Court in the case of — 'Rameshwar Das v. Emperor' AIR 1936 All 86 (K), and I have no reason to doubt its correctness. I am further of the opinion that the materials on the present records are inconsistent with the existence of any of the conditions contemplated in the provisos to the penal section or sections relevant in this case. I, accordingly, hold that the appellants are not entitled to the protection of the statutory provisos upon which reliance was sought to be placed by Mr. Dutt in the course of this argument.

(21) The statutory provisions, with which we are here concerned and which I have sufficiently set out above, are intended to root out "adulterated food" from this city. With that object in view the term "adulterated" has been defined in the Act and the manufacture, sale and storage for sale, etc., of such "adulterated food" have been made offences thereunder. The whole object of this branch of the law — at any rate, its chief purpose, — is to protect the consumer and preserve the city's health and that object and purpose would be clearly frustrated unless the statutory checks are rigidly enforced. The accused can certainly call to his aid the general presumption of innocence, namely, that he is to be presumed innocent until his guilt is established and demand of the prosecution that the alleged offence must be proved to the hilt. He is also entitled to claim protection under the special defence or defences, afforded by the relevant statute or statutes. But if the prosecution succeeds in proving the elements of the alleged offence and thus rebutting the general presumption of innocence and the accused fails or is unable to establish any of the special defences, open or available to him, the law must take its course and it must be strictly applied & the conviction must follow, though in awarding sentences the Court may take into consideration the circumstances under which the offence was committed and adjust the statutory punishment — within the prescribed limits — to the requirements of the particular case. In answering the appellants' second contention and the connected submission, as noted above, I have carefully borne in mind and permitted myself to be guided by these considerations and, in my opinion, they indicate the proper approach to problems like the present. The appellants' submissions on this part of the case are, accordingly, rejected.

(22) I have held above that the sample Poori on which the present prosecution is based is "adulterated food" under the municipal law of this city and in so holding I have relied particularly upon sub-cl. (viii) of cl. (c) of the statutory definition under which "food" which "is not of the nature, substance or quality which it purports or is represented to be" is deemed to be "adulterated". The view, so taken, is not, in my opinion, opposed to the decision of the English Court in the case of — 'Hunt v. Richardson', (1916) 2 K B 446 (L). In that case the three learned Judges (Darling, Lawrence and Avory, JJ.) who formed the majority and allowed the appeal and quashed the appellant's conviction, holding that no offence had been committed, either found that "the milk supplied" was "genuine milk" and "there was no demand by the purchaser of any particular quality but only of 'new morning milk' which was in fact supplied" and "there was no evidence upon which the Justices could find it was not of the nature, substance and quality of the article demanded" (Vide page 453 — per Avory, J.) 'or' that "it was genuine new milk" and not "injurious to health" and the appellant "was selling as 'new milk' that which was in fact milk as recently taken from a healthy cow" (Vide pages 467 and 468 — per Lawrence, J.), 'or' that the statutory presumption against the genuineness of the milk supplied arising from its deficiency in mlik fat as compared with the prescribed standard had been rebutted and the milk supplied was proved to be "genuine" and "in its natural state" (Vide pages 474 and 475 — per Darling, J.).

In the present case the sample Poori was clearly "not of the nature, substance or "quality which it" purported or was "represented to be", namely, " घी ए भाजा पूरी " or "Poori fried in ghee", — which was the article demanded, — its 'ghee content' not being, as found above, of the standard quality, as prescribed by the statute, and so "adulterated", (Vide sub-cl. (v) of cl. (c) of S. 3(2) of the old Act of 1923 and S. 5(1) of the new Act of 1951) that is, not genuine. 'Hunt's case' (L) is, therefore, plainly distinguishable, & the majority decision cannot be applied here to the appellants' benefit, far less the minority judgments of Scrutton and Bray, JJ., according to which even the genuineness of the milk supplied might not have been by itself any sufficient answer to the appellant's prosecution there and he might have been convicted of the offence of selling milk which was not of the nature, substance or

quality demanded notwithstanding the fact that it was genuine milk.

(23) There is one other case to which I ought to refer before closing the discussion on this part of the case. That is a decision of the Madras High Court — the judgment was delivered by Lakshman Rao, J. — reported in — 'Public Prosecutor v. Narayana Ayyar', AIR 1940 Mad 173 (M) which fully supports the view I have taken above.

(24) I shall now take up the appellants' third point or the final submission of Mr. Dutt. As already indicated, this submission comprises a double or twofold argument, namely, first, that by reason of the repeal of the earlier statute, under which this prosecution had begun, pending the conclusion of the trial, the proceedings lapsed and could not be continued, and so the appellants' conviction and sentence should be quashed and they should be acquitted and, secondly, that, in any event, the present appeal should be allowed and a retrial ordered on charges, duly framed, under the new Act.

(25) To the first part of this argument S. 8, Bengal General Clauses Act (I of 1899), affords a sufficient answer (Vide Cls. (d) and (e)), and no question of the lapsing of the proceedings does at all arise. I am not also convinced — and nothing could be placed before me by Mr. Dutt in support of his relative contention—that there has been any change, made by the new Act, in the procedure for prosecutions like the present, but even if there be any, that should not be of much significance as, in my opinion, the old offences would still be dealt with under the old Act and only the new offences under the new as both the Acts — the old and the new — deal with the respective offences, penalties and procedure in a connected series thus attracting the principle laid down in — 'In re Hale's Patent', (1920) 2 Ch 377 (N), and underlying also cls. (d) and (e) of S. 8, Bengal General Clauses Act, already cited. (Vide also in this connection — 'Jatindra Nath v. Jetu Mahato', AIR 1946 Cal 339 (O)).

The true position then is that the appellants' conviction would properly be not under the new Act but under the old and their sentences also on that footing. When, however, it is remembered that same are the ingredients for offences under Ss. 406/488 of the old Act and Ss. 461/537 of the new, it is idle to contend that the appellants have been prejudiced by the trial and that the proceedings should be quashed and their conviction and sentence set aside and they should be acquitted. In the premises it is also hardly possible to claim a retrial as envisaged in the second part of the appellants' third contention, and as, in inflicting punishment, the learned Magistrate, although he has chosen to convict the appellants under the new Act, has confined himself within the lesser limits prescribed by the old statute, and the sentences do not at all appear to be severe, the only thing that requires to be done in this appeal, in the circumstances of this case, is to alter the appellants' conviction from one under Ss. 461/537 of the new Act to one under Ss. 406/488 of the old Calcutta Municipal Act of 1923. The appellants' third contention also, therefore, fails in both its parts and it is rejected.

(26) In the result, this appeal is dismissed, the appellants' conviction being merely altered to one under Ss. 406/488 of the Calcutta Municipal Act of 1923 but their sentences confirmed.

B/V.B..B. Appeal dismissed.

AIR 1953 CALCUTTA 406 (Vol. 40, C. N. 154)

K. C. DAS GUPTA AND LAHIRI JJ.

Ram Saran, Accused-Petitioner v. The State.

Criminal Revn. No. 329 of 1951, D/- 2-7-1951.

(a) West Bengal Cotton and Yarn Control Order (1948), Cl. 18 — Non-display of price list — Accused cannot be assumed to have had cloth stamped with price in his shop at the relevant time — In the absence of evidence he cannot be held to have contravened the provisions of clause. (Para 2)

(b) West Bengal Cotton Cloth and Yarn Control Order (1948), Cl. 19 — Production of duplicate cash memo.

Prosecution must establish that there was sale of cloth before question of production of duplicate cash memo can arise. (Para 3)

S. S. Mukherjee and Pritibhusan Barman, for Petitioner.

ORDER: The petitioner was convicted under section 7 (1), Essential Supplies Act for failure to keep the price list as required by Rule 18, West Bengal Cotton Cloth and Yarn Control Order, 1948, and for failure to produce the duplicate cash memos for sales of cloth as required by Rule 19.

(2) It has been contended on behalf of the petitioner that he cannot be said to have contravened Rule 18 of the aforesaid Order unless it is shown that he had in his shop cloth with the price stamped thereon. The rule is in these words:

"A dealer other than a hawker shall display in a conspicuous position at his place of business a list in the most commonly understood language of the locality showing the maximum legal price in respect of all such kinds of cloth in his shop or store as have prices stamped thereon and shall not withhold from sale any such cloth to any person on demand and offer of the maximum legal price".

It is contended that as no evidence has been given that there was in the shop at that time any kind of cloth with the price stamped thereon the accused cannot be said to have contravened Rule 18. In our judgment this contention must prevail. We cannot assume that the accused being a dealer in cloth must have had in his shop cloths with prices stamped thereon. For all that is known he may have had in his shop at that time only handloom products which have not their prices stamped thereon. The failure to maintain a list in these circumstances did not amount to a contravention of Rule 18.

(3) On the question whether Rule 19 was contravened it is necessary to notice that the rule requires first that every dealer shall issue a cash memo or credit note with respect to every sale and shall keep a duplicate which shall be produced by such dealer. Before the question of production of a duplicate arises there must be a sale of cloth. There was no evidence in this case of any sale of cloth between April 1950 and the date on which the Enforcement Officer made his inspection namely 31-8-1950, nor is there any evidence of any sale on 31-8-1950. As regards sales in April 1950 or before that the evidence indicates that there was in the shop an old cash memo book with duplicates. The evidence is

therefore not very clear as to whether there were such sales after the period to which the old cash memo book related as would require a duplicate to be produced. We have therefore come to the conclusion that the prosecution has not been able to show that the accused-petitioner contravened Rule 19 mentioned above.

(4) We therefore set aside the order of conviction and sentence passed by the learned Magistrate and order that the accused-petitioner be acquitted and discharged from his bail bond.

C/M.K.S. Conviction and sentence set aside.

AIR 1953 CALCUTTA 407 (Vol. 40, C. N. 155)

P. B. MUKHARJI J.

Ramesh Chandra Nath, Defendant-Petitioner v. Santi Chemical Works, Plaintiff-Opposite Party.

Civil Rule No. 2251 of 1951, D/- 20-6-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 14 (4) — Court has no power to demand the tenant to deposit rent higher than the standard rent. (Para 5)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 17 (1) — Standardised rent prevails until new standard is fixed by appellate authority — Matter is not at large during pendency of appeal against order of Rent Controller which had fixed standard rent — (Civil P. C. (1908), S. 96). (Para 6)

Purnendu N. Nath, for Petitioner; Kamal Kumar Palit, for Opposite Party.

ORDER: This Rule is directed against the order of the Small Cause Court Judge made on 16-8-1951 under S. 14 (4), Rent Act of 1950. The order that he made was in these terms:

"Parties present as before. Parties heard, through pleaders. Parties do not examine themselves. The rents in arrears amount to Rs. 469/1/-. The defendant to deposit this sum within 31-8-51 to 1-9-51 for order."

(2) It is said now on behalf of the petitioner-tenant that the order to deposit rent was made on the basis of the contractual rent of Rs. 60/- per month including electricity. This, it is contended, is illegal, because in this particular case on 16-8-1951 when the Judge made the order there was a standard rent fixed by the Rent Controller at Rs. 21/4/-. It is, therefore, contended that he should have required the tenant to deposit at the rate of this standard rent. It is the case of the petitioner that he had been depositing rent with the Rent Controller for at least ten months before the suit for ejectment by the opposite party was instituted.

(3) In answer to this argument the learned Advocate on behalf of the opposite party contends that the language used in S. 14 (4) of the Rent Act of 1950 is "to deposit month by month rent at a rate at which it was last paid". It is said that there is a distinction made throughout the Rent Act between "payment" and "deposit". That such a distinction is made in the Act in some of the sections there can be no doubt. The question, however, is, is that distinction to be applied in interpreting S. 14 (4) of the Rent Act. It is contended, as the last payment was to the landlord, the rate of payment should be on the basis of Rs. 60/- per month.

(4) To concede to this argument and to uphold this contention will mean that at a time when standard rent was operating it is within the competence of a Civil Court in an ejectment action to order rent to be deposited under S. 14 (4) at a rate higher than the standard rent. The result will be not only severe on the tenant but will cut across other different sections of the Act which make recovery or claim of rent higher than the standard rent illegal. Section 3 (1) of the Rent Act provides that subject to the provisions of this Act any amount in excess of the standard rent of any premises shall be irrecoverable notwithstanding any agreement to the contrary. Under S. 10 of the Act the provision is made whereby the Controller specifies the date on which such standard rent is to take effect. By the next section which is S. 11 of the Act it is clearly provided that nothing in the provisions of this Act shall entitle the landlord to claim rent from the tenant at a rate different from that at which it is being paid at the time, except by agreement with the tenant, valid in law including this Act, or unless a different rate is fixed under S. 9. Now, the rate fixed under S. 9 by the Rent Controller here is quite clear and that is Rs. 21/4/- per month with effect from 1-7-1950. Section 17 of the Rent Act goes on to provide that such portion of the rent as exceeds the standard rent determined according to the provisions of this Act shall be irrecoverable from the month of the tenancy next after the month in which this Act comes into force. Having regard to these provisions it is quite clear that to permit under S. 14 (4) the Court by an order to demand any deposit of rent at a rate higher than the standard rent will be to fly in the face of these statutory provisions.

(5) In this case the fact further is that the last payment of rent before the suit was by deposit with the Rent Controller and not by payment to the landlord. I would, therefore, hold that the rent that the tenant could be called upon to deposit, once a standard rent is fixed under the Act of 1950, can under no circumstances be even under S. 14 (4) of the Act a rent higher than the standard rent.

(6) On behalf of the landlord opposite party it is contended that on 18-6-1951 when the order complained of was made an appeal was pending against the standard rent fixed by the Controller. Therefore, it is argued that there being an appeal it made the whole of the standard rent at large. An ordinary appeal from an order or a judgment of Court might endorse this argument that the lower Court's order is at large, and the decision is at large until the appellate Court comes to its final decision. Such an analogy, however, is inapplicable to a case like this where the statute itself provides that the Rent Controller's standardisation will be final subject to its being revised or modified in the manner laid down in the statute. Specially this is so having regard to S. 17 (1) of the Rent Control Act of 1950. Until the new standard rent is fixed by the Appellate Authority under the Act the standard rent fixed by the Rent Controller remains good, valid and effective. Therefore, the rent standardised at the rate fixed by the Rent Controller was the ruling standard rent on 16-8-1951 when the order complained of was made, although there was a pending appeal against the order of the Rent Controller.

(7) For these reasons the Rule is made absolute and order of the learned Judge made on 16-8-1951 is set aside. There will be no order as to costs.

B/M.K.S. Rule made absolute.

AIR 1953 CALCUTTA 408 (Vol. 40, C. N. 156)

DAS GUPTA AND DEBABRATA MOOKERJEE JJ.

Anil Kumar Ghosh a d others, Accused-Petitioners v. The State, Opposite Party.

Criminal Revns. Nos. 587 to 590 of 1952, D/-9-1-1953.

(a) West Bengal Foodgrains (Movement Control) Order (1951), Para 3 (2) and (3) — Bona fide resident.

The question whether a person is a bona fide resident or not of the corridor area is relevant only in connection with movement from one point of the corridor to another point in the corridor under sub-para (3). That question is entirely irrelevant in connection with movement under sub-para. (2) from outside the corridor into the corridor. (Para 3)

(b) West Bengal Foodgrains (Movement Control) Order (1951), Para. 3 (3) — Burden of proof — (Evidence Act (1872), S. 105).

Where a person is charged for con ravening Para. 3, sub-para. (3) of the Order, the burden of proving that the accused person is not a bona fide resident of the area is on the prosecution. That this requirement is contained in the proviso to sub-para. (3) does not turn it into an exception so as to shift the burden on the accused. (Paras 8, 9)

Anno: Evi. Act S. 105 N. 1.

S. S. Mukherjee and K. P. Mukherjee, for Petitioners; N. C. Sen for the State.

DAS GUPTA J.: These four Rules which were obtained by four persons tried separately for offences under S. 7, Essential Supplies Act were heard together as they raised the same question of law. The charge against each accused was that he on 29-5-1951, moved several bags of paddy in a cart without permit from outside the corridor to a place inside the corridor, not being a 'bona fide' resident of the corridor area, in contravention of Government Order No. 512 F. D. dated 15-1-1951 and thereby committed an offence punishable under S. 7(2) of the Act 24 of 1946. All the four were convicted under S. 7 (2) of the Act 24 of 1946 and each was sentenced to rigorous imprisonment for three weeks and to pay a fine of Rs. 60/- in default, to rigorous imprisonment for three weeks more, and the paddy seized was forfeited.

(2) There can be no doubt that the charge as framed is defective. The accusation was that an order under S. 3. Essential Supplies Act had been contravened. The relevant order relating to the movement of the foodgrains was in this case Order No. 512 F. D. of 15-1-1951 as mentioned in the charge. Paragraph 3 of this Order is in these words:

"3. (1) No person shall move or transport or cause to be moved or transported or offer for movement or transport by rail, road or water any foodgrain from any place within West Bengal to any place outside West Bengal except under and in accordance with a permit issued in this behalf by the Director:

Provided that nothing in this sub-paragraph shall apply to the movement or transport of foodgrains—

(a) not exceeding three seers in weight in the aggregate by a bona fide traveller as part of his luggage.

(b) under and in accordance with Military Credit Note, or

(c) under and in accordance with a permit issued before by the State Government or by the Director.

(2) No person shall move or transport or cause to be moved or transported or offer for movement or transport by rail, road or water any foodgrain into any place within the corridor from any place in the State outside the corridor except under and in accordance with a permit issued in this behalf by the Director.

(3) No person shall move or transport or cause to be moved or transported or offer for movement or transport by rail, road or water any foodgrain from any place in the corridor to any other place within the corridor except under and in accordance with a permit issued in this behalf by the Director:

Provided that nothing in this sub-paragraph shall apply to any movement of foodgrain within the corridor by road, other than by motor vehicle, if the person moving the foodgrain is a bona fide resident of such area.

(4) The Director may, by general or special order, exempt from the provisions of sub-paras (1), (2) and (3), the movement or transport of foodgrains to such extent and in such manner and for such period as may be specified in the order.

(5) If it appears to the Director that a permit issued by him under sub-para. (1) is not likely to be utilised or that there are sufficient reasons for requiring its cancellation, he may cancel the permit and on such cancellation the holder of the permit shall forthwith return it to the authority issuing it."

(3) In this case we are not concerned with 1st, 4th or 5th sub-para. of this Paragraph. It is necessary, however, to consider sub-paras. (2) and (3). In sub-para (2) the order in substance is that no person shall move foodgrain from outside the corridor into the corridor except under a permit. Sub-paragraph (3) regulates movement of foodgrain from one point to another point within a corridor area. The question whether a person is a bona fide resident or not of the corridor area is relevant only in connection with movement from one point of the corridor to another point in the corridor. That question is entirely irrelevant in connection with movement from outside the corridor into the corridor. The accusation in the charge framed being that the paddy was being moved from outside the corridor into the corridor, no question arose whether the person was a bona fide resident of the area or not. The allegation in the charge that the person was not a bona fide resident of the area was, therefore, clearly wrong and confusing.

(4) At the trial no attempt appears to have been made to prove that the movement of the paddy was from outside the corridor to any point inside the corridor. The evidence in substance was that the accused person was seized with paddy in a cart at a point inside the corridor far from the line which distinguishes

the corridor area from the area outside it. Clearly therefore, no case that the accused committed an offence by contravening sub-para. (2), Para. 3 of the Order was established. We have, however, to consider in view of the circumstances of the case whether the evidence on record makes out a case of contravention of the directions in sub-para. (3).

(5) As we have already indicated, it was proved in each of these cases the accused person was found moving foodgrain from one place in the corridor to some other place in the corridor. It was also proved that he was doing so without any permit. What, however, was not proved in three of these cases, namely, the one in which Sankar Ghosh, Abdul Azim Sheikh and Niranjan Ghosh are accused, was that the accused person was not a bona fide resident of the area where he lived.

(6) The question arises whether there is any burden on the prosecution to prove in a case of accusation of the contravention of sub-para. (3) that the person is not a bona fide resident of the area.

(7) It was contended by Mr. Sen on behalf of the State that the words in the proviso really set out an exception to the ordinary rule and therefore the burden of proving the application of the exception was on the accused person. If sub-para. (3) of the Order had itself defined an offence I might have been disposed to agree with this view. It is important to remember, however, that sub-para. (3) does not define an offence. The offence is defined in S. 3, Essential Supplies Act. If any exception was provided to the definition of the offence in S. 3 the burden of proving the existence of circumstances bringing his case within the exception would clearly be on the accused. It is equally clear that the burden of proving all the ingredients of the offence as defined is on the prosecution. The main ingredient here is that an order under S. 3 has been contravened. The order under S. 3 in the case we are considering is that: (His Lordship then quoted the text of sub-para. (3) already reproduced in para 2 of this judgment).

(8) What is required by this Order? The order requires on any reasonable interpretation of the words used that a person who is not a bona fide resident of a corridor area shall not move foodgrain from one point in the corridor to another point in the corridor without a permit. The fact that the intention of the rule-making authority is expressed by the use of a proviso to a main clause cannot alter the position that the rule-making authority was directing the requirement of a permit for movement from one point of the corridor to another point of the corridor only for the persons who are not bona fide residents of the area. I do not know of any canon of construction which should make the Court think that though the Order states in substance that only persons who are not bona fide residents of the area would be required to take out permits for movement within the area, the mere fact that a proviso has been used should have the effect that whether or not the person is a bona fide resident of the area is not an ingredient of the offence under S. 3, for contravention of sub-para. (3) of the above Order.

(9) I have no doubt in my mind that on a proper construction of the words used in the sub-paragraph, it should be held that, that the accused was not a bona fide resident of the area is as much an ingredient of the alleged offence as the facts that he moved paddy and that he did so without permit. The burden of proving that the accused person was not a bona fide resident of the area was, therefore, on the prosecution.

(10) As has already been noted, this ingredient has not been proved as regards three of the accused persons, the conviction of these three cannot, therefore, stand. I would accordingly set aside the order of conviction and sentence passed on them and order that they be acquitted. I would also set aside the order of forfeiture of the paddy seized from them.

(11) There remains for consideration the case of Anil Kumar Ghosh. Against him evidence has been given by the dafadar of Korui village that Anil Kumar Ghosh lives in Korui and also Korui is well outside the corridor. In my judgment this evidence must be held to have proved the ingredient mentioned above that Anil Kumar Ghosh was not a bona fide resident of the corridor area.

(12) The evidence shows that he contravened the order contained in sub-para (3) of the Order mentioned above and has, therefore, committed an offence under S. 7 (2), Essential Supplies Act. In my judgment the defect in the framing of the charge which has been pointed out above has not resulted in any prejudice to the accused. I would, therefore, maintain his conviction under S. 7 (2), Essential Supplies Act.

(13) We are informed that he has served a week's imprisonment. In view of the fact that he is 20 years of age, I would reduce the sentence to the period of imprisonment already undergone. The order of forfeiture of the paddy would stand.

(14) DEBABRATA MOOKERJEE J.: I agree.

B/V.S.B. Ordered accordingly.

AIR 1953 CALCUTTA 409 (Vol. 40, C. N. 157)

CHAKRAVARTTI C. J. AND SINHA J.

D. R. Gellatly, Petitioner v. J. R. W. Cannon, Opposite Party.

Civil Rule No. 2063 of 1952, D/-9-1-1953.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) S. 14 (4) — Scope.

The Rent Act can apply only to tenants. If the person, sued as a tenant, pleads that he is not a tenant, then till that question is decided against him, there can be no question of proceeding against him as a tenant or applying to him S. 14 (4) or any other provision of the Rent Act. (Para 2)

(b) Evidence Act (1872), S. 115 — Estoppel by pleading and conduct — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 14 (4)).

Application under S. 14(4), West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) — Tenant contesting on footing that he was tenant — Order under S. 14(4) passed — Tenant submitting to it by making payment or rent month by month — Tenant committing default in payment — Tenant cannot turn round and avoid result of his default by setting up plea that S. 14(4) does not apply to

his case as he was not a tenant. (Para 3)
Anno: Evi. Act, S. 115 N. 3, 24.

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 14(4) — Defence contemplated by section.

Section 14(4) contemplates not only defence against ejectment on the ground mentioned in S. 12 (1) (i) of the Act being struck out but also other defences against ejectment as well. (Para 4)

Bimal Chandra Bose with Rabindra Nath Mitra, for Petitioner; Rabindra Nath Bhattacharya, for Opposite Party.

CHAKRAVARTTI C. J.: Certain attractive questions of law were raised in this Rule, but in our view the petitioner is debarred from urging them in view of the facts of the case.

(2) An order under S. 14(4) was made against the petitioner on 17-8-1951. It appears that in his defence in the suit, he has taken a plea that there is no relationship of landlord and tenant between him and the opposite party. Mr. Bose, who appears for the petitioner, contended that since that defence had been taken in the written statement, there could not be any question of making any order under S. 14 (4) till the issue raised by that defence was decided against his client and it was held that he was, in fact, a tenant. That contention appears to be right. The Rent Act can apply only to tenants. In fact, S. 14 (4) itself says that an order under that section will be made if the 'tenant' contests the suit. If the person, sued as a tenant, pleads that he is not a tenant, then till that question is decided against him, there can be no question of proceeding against him as a tenant or applying to him S. 14 (4) or any other provision of the Rent Act. While that is quite true, it appears to me that the petitioner has precluded himself by his own act from raising the plea against the order now made against him. It appears that although he has taken in his written statement the defence, to which I have already referred, he practically abandoned it in his objection to the application made by the opposite party for an order under S. 14 (4). Apart from that, he seems himself to have been the petitioner in a proceeding for standardisation of the rent which could be only on the footing that he was putting himself forward as a tenant under the opposite party. In his objection to the application of the opposite party for an order under S. 14 (4), he did not say that he was not a tenant, but only said that the rent was not what the opposite party was asserting it to be, but a lower amount. He even referred to the proceeding for standardisation which he himself had initiated and to an application for revision which was then pending in this Court.

(3) The position, therefore, is that the petitioner contested the application under S. 14(4) on the footing that he was a tenant and, secondly, after the order was made against him, he submitted to it and went on making payments under it for quite a considerable length of time. If his contention was, as now urged before us, that order under S. 14 (4) could not have been made against him at all till his defence that he was not a tenant was overruled, he should have moved this Court against the order made on 17-8-1951. Not having done so and, in fact, having submitted to it during a number of months, it is not open to him to turn round at this stage and avoid the result of the default he has admittedly committed by setting up the plea that S. 14 (4) does not apply to his case at all.

(4) It was further contended that even if his defence was liable to be struck out, it could not be the whole defence, nor could it be the whole defence against ejectment. But the defence against ejectment only has been struck out and not the whole defence. The contention was that what S. 14 (4) contemplated was only defence against ejectment on the ground mentioned in S. 12 (1) (i) of the Act and not also other defences against ejectment. I am unable to give effect to that contention. The language of S. 14 (4) is in no way qualified. The policy of the section or, indeed the whole Act seems to be that the Legislature is not minded to protect a tenant who will not even pay the monthly rent regularly. If the tenant, on being directed to pay the current rent month by month, does not do so, the Act quite clearly provides that he will by such conduct forfeit the special protection which the Act confers on tenants and will be relegated to his position under the general law. I do not find any justification in the language of S. 14 (4) to limit the defence against ejectment contemplated by it to defence against ejectment only on the ground mentioned in S. 12 (1) (i) of the Act.

(5) For the reasons given above, this Rule is discharged with costs — the hearing fee being assessed at two gold mohurs.

(6) SINHA J. : I agree.

B/K.S. Rule discharged.

AIR 1953 CALCUTTA 410 (Vol. 40, C. N. 158)

DAS GUPTA AND DEBABRATA MOOKERJEE JJ.

Panchu Gopal Mondal and others, Petitioners; v. Corporation of Calcutta and others, Opposite Party.

Criminal Revn. No. 223 of 1952, D/-13-1-1953.

†**(a) Municipalities — Calcutta Municipal Act (3 of 1923), S. 363 —Order under — (Criminal P. C., S. 439).**

The Magistrate dealing with an application under S. 363 is an inferior criminal Court within the meaning of S. 439, Cr. P. C.: AIR 1925 Cal 1251 and AIR 1927 Cal 509, Disting, and Expl. (Paras 4, 5, 6, 8, 9)
Anno: Criminal P. C., S. 439 N. 8.

(b) Municipalities — Calcutta Municipal Act (3 of 1923), S. 363 — Notice, necessity of.

It is now settled law that before an order of demolition is passed, the Magistrate must give the occupiers as well as the owners sufficient opportunity to show cause against the proposed order. (Para 10)

M. M. Sen and Surathi M. Sanyal, for Petitioners; Monmohan Mukherjee, for Opposite Party.

CASES CITED:
(A) ('52) AIR 1952 Cal 683: 56 Cal WN 558: 1952 Cri LJ 1364
(B) ('25) AIR 1925 Cal 1251: 52 Cal 962: 26 Cri LJ 1533
(C) ('27) AIR 1927 Cal 509: 54 Cal 532: 28 Cri LJ 407

DAS GUPTA J.: This application for revision is directed against an order passed by a Magistrate appointed under the provisions of the

Calcutta Municipal Act on an application under S. 363 of that Act.

(2) Before going into the merits of the application in revision it is necessary to dispose of a preliminary objection raised on behalf of the opposite party, the Corporation of Calcutta. The objection is that the order passed by a Magistrate dealing with an application under S. 363, Calcutta Municipal Act, is not subject to revision under S. 439, Criminal P. C.

(3) The decision of this objection depends on the answer to the question whether a Magistrate dealing with an application under S. 363, Calcutta Municipal Act is a criminal Court. If it is, this Court has jurisdiction under S. 439, Cr. P. C. to revise in suitable cases orders passed by the Magistrate. If it is not a criminal Court, this order cannot be revised under S. 439, Cr. P. C. whether or not it might be subject to revision under other provisions of law.

(4) That a Magistrate dealing with an application under S. 363, Calcutta Municipal Act is a 'Court' cannot be seriously disputed and it has not been disputed before us. In exercising powers under S. 363, Calcutta Municipal Act the Magistrate is exercising judicial functions and not executive or administrative functions. This conclusion necessarily follows from the manner in which the power has to be exercised, viz., the provisions as regards hearing of the party against whom relief is sought by the Corporation. It is also clear that in exercising such judicial functions the Magistrate is acting as only part of the machinery constituted by the sovereign authority of the State for exercise of judicial functions. Without attempting the difficult task of defining a 'Court', I think it can safely be laid down that an authority exercising judicial functions judicially as a part of the machinery which the State has set up for the exercise of judicial functions is a Court. My conclusion therefore is that the Magistrate appointed under the Calcutta Municipal Act acts as a Court in dealing with an application under S. 363, Calcutta Municipal Act.

(5) A more difficult question is whether the Magistrate thus acting as a Court is a criminal Court. In — 'Bhadreswar Majhi v. Corporation of Calcutta', AIR 1952 Cal 683 (A) it was held on a consideration of previous authorities of this Court, that so far as this Court is concerned the law must be taken to be settled that the disposal of an application under S. 363, Calcutta Municipal Act is not trial for an offence. I was a party to that decision and nothing has been said before us to induce us to differ from that decision.

(6) If the only function of a criminal Court were the trial of offences, we would therefore have been bound to hold that the Court of the Magistrate dealing with an application under S. 363, Calcutta Municipal Act is not a criminal Court. The functions of a criminal Court are not however limited to the trial of offences. The Criminal Procedure Code empowers certain criminal Courts to exercise functions wholly unconnected with the trial of offences. Thus, under Ss. 144 and 145, Cr. P. C. a criminal Court takes action to prevent breach of the peace without trying any person for any offence. Under S. 133 of the Code, a criminal Court takes action to remove unlawful obstructions or nuisance from public places, to prohibit or regulate trades or occupations injurious to health or physical comfort, to prevent the construction of any building or structure likely to occasion conflagration or explosion, and on a number of other matters, for the purpose of ensuring safety or convenience of the public. Other provisions entrusting to criminal Courts functions not connected with the trial of offences are contained in Ss. 107, 108, 109 and 110, Criminal P. C.

(7) It is obvious therefore that the fact that the proceedings under S. 363, Calcutta Municipal Act are not trials for offences is no reason to think that the Court in dealing with these proceedings is not a criminal Court.

(8) From what has been said above, it is clear that the functions performed by a Magistrate in proceedings under S. 363, Calcutta Municipal Act are very similar in nature to the functions of a criminal Court under S. 133, Cr. P. C. Remembering further that the object of the Corporation of Calcutta in starting proceedings under S. 363, Calcutta Municipal Act is not the recovery of any property, or the enforcement of a right, for the advantage of the Corporation authorities — either of which objects is ordinarily to be found in all proceedings of a civil nature — the reasonable conclusion, in my judgment appears to be that the Magistrate is discharging the functions of a criminal Court in dealing with an application under S. 363, Calcutta Municipal Act. Mention should be made of certain observations on the question now before us in two cases of this Court. In — 'Ram Gopal v. Corporation of Calcutta', AIR 1925 Cal 1251 (B), when the question was raised whether the Court of a Municipal Magistrate dealing with an application under S. 363, Calcutta Municipal Act is an inferior Court within the meaning of S. 439, Cr. P. C., Sanderson C. J. expressed his view in these words.

> "I think it may be said that the Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act is a Court constituted under a law other than the Code for the time being in force, and comes within S. 6. Consequently, I am not prepared to hold that Ss. 435 and 439, Criminal P. C., do not apply to these proceedings."

Apart from the fact that the view was expresed by the learned Chief Justice in the negative form, it is to be noticed that this observation was followed by words which take away from the authoritative value thereof. The words are these:

> "This point, however, is not of any real importance, for in my judgment the order of the Municipal Magistrate was a judicial order, and it was made by him either in the exercise of criminal jurisdiction or in the exercise of civil jurisdiction, and this Court would have jurisdiction to interfere by way of revision under one Code or the other."

The decision in — 'Ram Gopal Goenka's case' (B), is not therefore an authority on the question now before us. Two years later, in — 'Krishen Doyal v. Corporation of Calcutta', AIR 1927 Cal 509 (C), Suhrawardy and Cammiade JJ. had before them the question whether the party against whom orders of demolition of structures are sought, was an accused person within the meaning of the Code of Criminal Procedure. They came to the conclusion that he was not an accused. In that connection the Court made observations which have been relied upon by the learned Advocate for the Corporation of Calcutta before us as an autho-

rity for the proposition that S. 439, Cr. P. C. does not apply to these proceedings. I find, however, that what Suhrawardy and Cammiade JJ. stated about the view of Sanderson C. J. in — 'Ram Gopal Goenka's case', (B) is that that case was no authority for the broad proposition that because the Municipal Magistrate happens to be a Presidency Magistrate, the Code of Criminal Procedure will apply to all proceedings before him. Their Lordships had no occasion to consider or decide whether S. 439, Cr. P. C. applies to these proceedings. What was pressed before the Court on that occasion on the authority of — 'Ram Gopal Goenka's case' (B) was that the Criminal Procedure Code would apply to proceedings under S. 363, Calcutta Municipal Act, in all its details and that submission was negatived by their Lordships. In my judgment — 'Jalan's case' is no authority for the proposition that S. 439, Cr. P. C. does not apply to proceedings under S. 363, Calcutta Municipal Act.

(9) I have therefore come to the conclusion for the reasons earlier mentioned that the Magistrate dealing with an application under S. 363, Calcutta Municipal Act is an inferior criminal Court within the meaning of S. 439, Cr. P. C. and so any order passed by a Magistrate in such proceedings is subject to the revisional jurisdiction of this Court under S. 439, Cr. P. C.

(10) Coming now to the merits of the case, the question we have to consider is whether the Magistrate proceeded in an irregular or illegal manner in omitting to give notice upon the present petitioners who claim to be occupiers of the premises sought to be demolished. It is now settled law that before an order of demolition is passed, the Magistrate must give the occupiers as well as the owners sufficient opportunity to show cause against the proposed order. The petitioners' case is that they have been occupying these premises since 1939. This statement is supported by an affidavit. There is no counter-affidavit filed on behalf of the Corporation of Calcutta. Indeed there is no attempt by the Corporation of Calcutta to challenge the correctness of the case that these three persons were occupiers at the relevant date of the case in question. The papers on the record of the proceedings in the Court of the Municipal Magistrate indicate that no attention was directed at all to the question as to who the occupiers were. Notices were issued on the owners of the land and also the owners of the structures, the case of the occupiers being entirely overlooked. In these circumstances I think it is reasonable to hold that the case of the petitioners that they were occupiers of the premises at the relevant date is true, and consequently, they were entitled to notice of the proceedings for demolition.

(11) Admittedly, no such notice was served and the petitioners got no opportunity to present their case before the Municipal Magistrate. We accordingly set aside the order passed by the learned Magistrate and direct the Magistrate to dispose of the proceedings in accordance with law after giving these petitioners a proper opportunity as required under S. 363, Calcutta Municipal Act.

(12) The Rule is accordingly made absolute.

(13) DEBABRATA MOOKERJEE J.: I agree.

B/H.G.P. Rule made absolute.

AIR 1953 CALCUTTA 412 (Vol. 40, C. N. 159)

P. N. MOOKERJEE AND GUHA RAY JJ.

Gobordhan Dutta and another, Plaintiffs-Appellants v. Promotha Nath, Defendant-Respondent.

A. F. A. O. No. 7 of 1952, D/- 11-9-1952.

Civil P. C. (1908), Ss. 2 (2), 96 and 115 — Right of appeal — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 6) — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18).

Application under S. 6, West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950) read with S. 18(1), West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) — Decision thereon is appealable — Appellate Court's failure to consider appeal on merits — Revision lies — Case law Rel. on. (Para 9)

Anno: C. P. C., S. 2 (2) N. 3; S. 96 N. 2; S. 115 N. 11.

Nirmal Chandra Chakravartti and Satyasanti Mukherji, for Appellants; Hemendra Nath Banerjee, for Respondent.

CASES CITED:

(A) (1877) 3 QBD 1: 47 LJ QB 10
(B) ('12) 39 Ind App 197: 40 Cal 21 (PC)
(C) ('48) AIR 1948 PC 12: 74 Ind App 264 (PC)
(D) ('51) Civil Revn Case No 1465 of 1951, D/- 10-9-1951 (Cal)

P. N. MOOKERJEE J.: This is the landlords' second miscellaneous appeal — and there is also an application in the alternative under S. 115, Civil P. C. — arising out of the tenant's application under S. 6, West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (West Bengal Act 62 of 1950) read with S. 18 (1), West Bengal Premises Rent Control (Temporary Provisions) Act 1950 (West Bengal Act 17 of 1950). The application was allowed by the trial Court and the landlords' appeal against that decision was dismissed by the lower Appellate Court not upon the merits but upon the preliminary ground that under the law no appeal lay against an order passed under S. 6, Rent Control (Amendment) Act, 1950 or S. 18 (1), Rent Control Act, 1950. On the merits the learned Subordinate Judge expressed himself tentatively in favour of the appellants-landlords but as in his view the appeal before him was incompetent he did not pursue that matter to its final conclusion. Against the dismissal of their appeal by the learned Subordinate Judge the landlords have preferred this second miscellaneous appeal and in the alternative they have also filed an application under S. 115, Civil P. C. for revision of the adverse orders of both the Courts below.

(2) The suit for ejectment was instituted on 13-5-1949 and the relevant ground under the Rent Control Act of 1948 (West Bengal Act 37 of 1948) which was then in force and was, therefore, applicable to the case, was 'ipso facto' determination of the defendant's tenancy on account of non-payment of rent for more than three months, or, rather, three consecutive months, that is, the ground under S. 12 (3) of the said Act of 1948. The suit was decreed ex parte on 28-8-1950 but admittedly the defendant remained in possession in spite of the

said decree and after an unsuccessful attempt to get the decree set aside under O. 9, R. 13, Civil P. C. the tenant-defendant made an application under S. 18 (1), Rent Control Act, 1950 on 20-1-1951. This application was registered as Misc. Judicial Case No. 16 of 1951 and was eventually allowed by the learned Munsif by his order dated 10-2-1951 which ran as follows:

"Miscellaneous Case will be allowed on contest without cost and the decree will be rescinded on applicant's depositing in Court within forty days from the date Rs. 1,581-10-4 only. Put up for further order on 24-3-1951."

The deposit was made in time on 22-3-1951 and the plaintiffs-decree-holders' further objection to the tenant's application under S. 6, Rent Control (Amendment) Act, 1950 and S. 18 (1), Rent Control Act of 1950 and the former's prayer for reconsideration of the above order dated 10-2-1951 were rejected by the learned Munsif on 7-4-1951 when he allowed the Miscellaneous Case (Misc. Judl. Case No. 16 of 1951), accepted the tenant's deposit and rescinded the ejectment decree. Thereupon the landlords appealed and the learned Subordinate Judge having, as stated above, dismissed this appeal on the preliminary ground that the same was not maintainable in law and having thus upheld the rescission of the ejectment decree, the unsuccessful plaintiffs-landlords have now come up to this Court in second appeal and alternatively in revision.

(3) We have already said that the learned Subordinate Judge expressed no final opinion on the merits of the tenant's application under S. 6, Rent Control (Amendment) Act, 1950 and S. 18 (1), Rent Control Act, 1950 although his tentative observations were against the same, and he dismissed the landlords' appeal only on the ground that it was not maintainable in law. If, therefore, we find that that appeal was not incompetent we would remit the same to the learned Subordinate Judge for consideration on the merits. In case, however, we agree with the learned Judge in his view that the appeal before him was not competent, the landlord's appeal before us and his application for revision against the decision of the learned Subordinate Judge must fail. But we shall then have to consider the landlords' revisional application under S. 115, Civil P. C so far as it relates to the learned Munsif's order.

(4) The first question, therefore, that requires determination is whether the landlord's appeal before the lower Appellate Court was maintainable in law. There is no dispute as to the relevant facts. Admittedly there was an ejectment decree and an application under S. 6, Rent Control (Amendment) Act, 1950 read with S. 18 (1), Rent Control Act, 1950. Admittedly also that application succeeded before the trial Court and the ejectment decree was rescinded. The adjudication rescinding the decree of ejectment was, as stated above, made by the learned Munsif on 7-4-1951 and the relevant expression of that adjudication appears in the record as follows:

"The Miscellaneous Case No. 16 of 1950 is allowed with costs. The deposit made by the applicant is accepted. The decree of ejectment passed in Title Suit No. 785 of 1949 is rescinded."

The question now is whether an appeal lies from this adjudication, or, rather, this expression of adjudication, and upon the answer to that question depends the fate of this appeal and to some extent also of the revisional application.

(5) It is well settled that an appeal is a creature of statute vide — 'Sandbach Charity Trustees v. North Saffordshire Railway Co.', (1877) 3 Q B D 1 (A); vide also — 'Rangoon Botatoung Co. Ltd. v. Collector, Rangoon', 39 Ind App 197 (PC) (B). It is also equally well established that

"Where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal." Vide — 'Adaikappa Chettiar v. Chandrasekhara Thevar', AIR 1948 P C 12 (C).

An adjudication under S. 6, Rent Control (Amendment) Act, 1950 or under S. 18 (1), Rent Control Act, 1950 has not been expressly made appealable by any statute but nonetheless it involves determination of legal rights in dispute and by the application under that section the Civil Court is called upon to make this determination. It thus follows that an adjudication under S. 6, Rent Control (Amendment) Act, 1950 or under S. 18 (1), Rent Control Act, 1950 is an adjudication or determination by the Civil Court of legal rights in controversy between the parties. The Code of Civil Procedure contains the general provisions for appeals from adjudications by the Civil Court (vide Ss. 96, 100, 104 and O. 43, R. 1 of the Code). We are thus led to consider whether the learned Munsif's adjudication of 7-4-1951 satisfies the test of appealability under the Code of Civil Procedure. If it does an appeal will lie from that adjudication, otherwise the learned Subordinate Judge's view will have to be upheld as there is no other provision in law under which a right of appeal can be claimed by the landlords-appellants before us.

(6) Under the Code of Civil Procedure adjudications of Civil Courts are classified under two heads, viz., decrees and orders. Section 2 (2) defines a decree as

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit,"

all other adjudications, to be precise, the formal expressions thereof being 'orders' under the residuary definition clause in S. 2(14) which says that an "order" means the formal expression of any decision of a Civil Court which is not a decree." Section 2 (9) of the Code defines a "judgment" and this definition runs as follows:

" 'judgment' means the statement given by the Judge of the grounds of a decree or order."

(7) The application under S. 6, Rent Control (Amendment) Act, 1950 or S. 18 (1), Rent Control Act, 1950, for "vacating the decree for ejectment" has to be made to the trial Court, and obviously, therefore, in the suit for ejectment wherein the decree in question was passed. The matter in controversy arising on this

application is whether the decree for ejectment should be vacated or not — upon which plainly depends the ultimate decision of the suit itself and which may thus, not very inappropriately be termed a "matter in controversy in the suit" vide — 'AIR 1948 P C 12 (C)' already cited — and it is this controversy which the Court is called upon to decide on such an application. In the learned Munsif's adjudication the Court decided — and decided finally so far as that Court was concerned — this controversy or matter in controversy between the parties and the adjudication, therefore, is an adjudication of a matter in controversy in the suit. The question, however, still remains whether the expression of that adjudication as quoted above is a formal expression within the meaning of the definition of "decree" as contained in S. 2 (2) of the Code.

(8) The terms of the definitions of "judgment", "decree" and "order" under the Code have been sufficiently set forth above. From them it is abundantly clear that both decrees and orders are formal expressions of adjudications of the Civil Court and the grounds or reasons thereof constitute the judgment. It has also been recently held by a Bench of this Court, relying on the decision of the Judicial Committee in the case in 'AIR 1948 P C 12 (C)', that there may be a composite document embodying the judgment and the order or the judgment & the decree, as the case may be, and neither S. 33 of the Code nor any other provision of law contains any bar to the adoption of such a course: vide — 'Sm. Radharani v. Sisir Kumar', Civil Revn. Case No. 1465 of 1951, D/- 10-9-1951 (Cal) (D). In the above context the expression of the learned Munsif's adjudication dated 7-4-1951 as contained in the record and quoted above may well be termed as "formal expression", as contemplated in S. 2(2) of the Code.

(9) In the light of what has been stated above, the learned Munsif's adjudication dated 7-4-1951 is a decree under the Code. So far as the learned Munsif is concerned, he has by that adjudication conclusively determined the rights of the parties with regard to the question under S. 6, Rent Control (Amendment) Act, 1950 read with S. 18, Rent Control Act, 1950 that is, with regard to one of the matters in controversy in the suit as explained above. It also contains a formal expression of that adjudication — may be with some of the grounds of that adjudication — and is thus or, at least, comprises within it, a decree under the Code. It is, therefore, appealable under the law and the learned Subordinate Judge was not right in throwing out the landlords' appeal on the preliminary ground that it was not maintainable. The decision of the learned Subordinate Judge must, accordingly, be set aside and the case remanded to that Court for a proper hearing of the landlords' appeal before it in accordance with law. As the error committed by the learned Subordinate Judge, obviously affected the exercise of his jurisdiction it is revisable by this Court whether an appeal lies to it under the law or only its revisional powers can be invoked, and it is thus immaterial whether we interfere in this case in appeal or in revision.

(10) This appeal and the connected revisional application are disposed of as above. The decision of the learned Subordinate Judge complained against therein is set aside and the case is sent back to that Court so that the landlords' appeal before it may be dealt with and determined in accordance with law and in the light of the observations contained in this judgment.

(11) The parties will bear their own costs in these proceedings before this Court. Other or further costs will abide the final result.

(12) GUHA RAY J.: I agree.

B/D.H. Order accordingly.

AIR 1953 CALCUTTA 414 (Vol. 40, C. N. 160)

CHUNDER J.

D. K. Sen Gupta, Petitioner v. Ananta Lal Das, Opposite Party.

Civil Revn. Case No. 3064 of 1951, D/- 16-12-1952.

(a) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 — (Civil P.C. (1908), S. 9).

The fact that on the side of the landlord, the landlord and another witness were examined and on the other side of the tenant, the tenant examined himself alone, does not make the order of the Rent Controller without jurisdiction. (Para 2)

Anno: Civil P.C., S. 9 N. 4.

(b) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 47 — Rules under, R. 9 — Validity — (Criminal P. C., S. 5).

Rules made under S. 47 of the Act being statutory rules are a part of the enactment itself. Therefore S. 5, Criminal P. C. is to be read subject to the rules, instead of the rules being read subject to S. 5 of the Code. Hence R. 9 framed under S. 47 of the Act which does not offend against S. 5, Criminal P. C., is not 'ultra vires.' (Para 3)

C. C. Ganguly, Kiran Bandhu Mukherji and Chandra Chur Sen Gupta, for Petitioner; Nani Gopal Das, for Opposite Party.

ORDER: This Rule is at the instance of a tenant who complained under S. 34 of stoppage of water by the landlord. He mentioned 25-1-1951, as the time when this was done. His petition before the Rent Controller under S. 34, West Bengal Premises Rent Control (Temporary Provisions) Act of 1950 was on 29-1-1951. 'Prima facie', no question of limitation arises. No issue as to limitation under S. 34 was ever raised before the Rent Controller. The learned Subordinate Judge without proper appreciation of what was being done by the Rent Controller held that the occurrence related to violation of an order passed in 1949 by Mr. S. K. Neogi but the judgment of the learned Rent Controller itself will show that what the Rent Controller meant was that instead of carrying out what Mr. Neogi had previously ordered in 1949 the landlord further harassed his tenant by an additional act of plugging the tenant's pipe this time. He says: "it appears that the landlord instead of plugging his pipe plugged the pipe of the petitioner." It is abundantly clear therefore that the question of limitation was misunderstood by the learned Subordinate Judge.

(2) The learned Subordinate Judge's second reason for upsetting the order of the learned Rent Controller was that the Rent Controller's order was without jurisdiction. His argument

is this: On the side of the landlord, the landlord and another witness were examined. On the side of the tenant, the tenant examined himself. From this if the learned Subordinate Judge had said that he was not accepting the tenant's story one could have understood what he meant. He goes on to say that it is because of this that the order of the Rent Controller was without jurisdiction. Obviously, the learned Subordinate Judge after so many years of service has not a clear idea of what the word 'jurisdiction' means. It is time that he began to learn the meaning of that word.

(3) Another reason given by the learned Subordinate Judge in upsetting the learned Rent Controller's order was that R. 9 framed by the local Government under S. 47, Rent Control Act of 1950 was 'ultra vires' as it offended against S. 5, Criminal P.C. I need not go into the question whether S. 34, Rent Control Act of 1950 creates an offence or not. Even assuming without deciding that point, that it is an offence, S. 5 is definitely made "subject to enactment for the time being in force regulating the manner or place of investigating, enquiring into or trying or otherwise dealing with such offences." Rules made under S. 47 of the Act being statutory rules are a part of the enactment itself. Therefore, S. 5 is to be read subject to the rules, instead of the rules being read subject to S. 5. It is unnecessary for me to examine some decisions under the 1920 Act, which dealt with a quite different matter, discussed by the learned Subordinate Judge. The whole discussion is irrelevant because the clear wording of S. 5 even if S. 34 creates an offence, would save what has been done under the statutory power by the local Government, instead of making it 'ultra vires'.

(4) It therefore appears that the learned Subordinate Judge is very much confused about the whole case and his decision cannot stand. His order is therefore set aside. The Rule is made absolute and the appeal is sent back to be heard by some other competent Court. Costs will abide the result.

A/H.G.P. Rule made absolute.

AIR 1953 CALCUTTA 415 (Vol. 40, C. N. 161)

BACHAWAT J.

Nand Kishore, Applicant v. International Mercantile Corporation (India) Ltd., Respondent.

In the matter of Arbitration in Suits Nos. 825 and 3220A of 1951, D/- 9-9-1952.

(a) Arbitration Act (1940), S. 30 — Procedure before arbitrator — Arbitrator has power to regulate — Award cannot be challenged on ground of irregularity unless it amounts to no proper hearing — Arbitrator keeping one set of minutes for several arbitrations between parties with consent of parties — Irregularity, if any, held cured by consent AIR 1914 PC 105, Relied on. (Para 40)

Anno: Arbitration Act, S. 30 N. 6, 11.

(b) Arbitration Act (1940), S. 30 — Award challenged on ground that arbitrator was influenced by his conclusions in respect of dispute not subject-matter of suit — Charge has to be established from terms of award or some intrinsic evidence — Charge held not established. AIR 1925 PC 293, Distinguished. AIR 1927 Cal 52, Ref. AIR 1940 Lah 186 Affirmed in AIR 1945 PC 85, Relied on. (Para 41)

Anno: Arbitration Act, S. 30 N. 6, 10.

(c) Arbitration Act (1940), Ss. 2 and 21 — One of considerations of agreement to refer, dropping of pending criminal prosecution for non-compoundable offence — The whole agreement and reference is illegal and void — Fact that criminal prosecution would have failed is immaterial — Though motive for contract is not necessarily its considerations, yet where promise to drop prosecution was given and accepted as conventional inducement for several promises, it is one of the considerations for agreement to refer — (Contract Act (1872), S. 23). Case law discussed. (Paras 55-62)

Anno: Arbi. Act, S. 2 N. 4; S. 21 N. 14; Contract Act, S. 23 N. 15.

(d) Arbitration Act (1940), Ss. 23, 28 and 30 — Agreement to refer illegal, consideration being illegal — Order of reference upon such agreement is also illegal — Subsequent proceedings in pursuance of order do not make legal what was illegal — Order for extension of time under S. 28 does not amount to fresh submission — Whole award thus is a nullity — Contract Act (1872), S. 23. (Paras 64-67)

Anno: Arbi. Act, S. 23 N. 5; S. 28 N. 1; S. 30 N. 6; Contract Act, S. 23 N. 15.

A. C. Mitra with M. Harsh, for Applicant; Advocate-General with A. K. Sen, for Respondent.

CASES CITED:

(A) ('14) AIR 1914 PC 105: 36 All 336 (PC)
(B) ('25) AIR 1925 PC 293: 53 Ind App 1 (PC)
(C) ('27) AIR 1927 Cal 52: 44 Cal LJ 224
(D) ('40) AIR 1940 Lah 186: 190 Ind Cas 399
(E) ('45) AIR 1945 PC 85: 1945 Pesh LJ PC 85
(F) ('30) AIR 1930 PC 100: 57 Ind App 117 (PC)
(G) ('41) AIR 1941 PC 95: 68 Ind App 144 (PC)
(H) ('38) AIR 1938 Cal 840: 43 Cal WN 147
(I) ('26) AIR 1926 Cal 59: 53 Cal 51
(J) ('31) AIR 1931 Cal 421: 35 Cal WN 26
(K) ('31) AIR 1931 Cal 416: 35 Cal WN 28
(L) ('17) AIR 1917 Pat 454: 2 Pat LJ 630
(M) ('08) 28 All 718: 3 All LJ 506
(N) ('29) AIR 1929 Lah 564: 117 Ind Cas 74
(O) ('27) AIR 1927 Lah 465: 101 Ind Cas 786
(P) ('33) AIR 1933 Bom 413: 57 Bom 678
(Q) ('26) AIR 1926 Cal 519: 91 Ind Cas 624
(R) (1874) 30 LT 469: 43 LJ MC 111
(S) ('04) 28 Bom 326: 6 Bom LR 73
(T) ('47) AIR 1947 All 317: 1947 All LJ 113
(U) (1868) 3 QB 404: 37 LJ QB 121
(V) ('46) AIR 1946 PC 72: 73 Ind App 52 (PC)

JUDGMENT: This is an application to revoke an order of reference in these suits and to set aside and declare invalid an award made by the arbitrator to whom the disputes in these suits were referred for arbitration.

(2) The central figures in this litigation are Nanda Kishore Jhajharia and Jagannath Agarwalla. They were directors of and in control of various limited companies including the International Mercantile Corporation (India) Ltd. They also carried on a co-partnership business under the name and style Agarwalla-Jhajharia & Company which had its head office at No. 370

Upper Chitpore Road as exporters, importers and general merchants.

(3) There is relationship by marriage between Nandkishore and Kamlaprosad who is son of Jagannath Agarwala. The wives of Nandkishore and Kamalaprosad are sisters.

(4) The relationship between Nandkishore and Jagannath is strained since the latter part of 1950. There are serious disputes between them with regard to various matters. The most serious dispute which precipitated litigation between them relates to a holding of 42200 shares in Ryam Sugar Co., Ltd. Nandkishore Jhajharia purchased and obtained delivery of these shares from Gaya Sugar Mills Ltd. during the second and third week of January 1950. On or about 21-1-1950, 37,900 shares were registered in the name of International Mercantile Corporation (India) Ltd. (hereinafter referred to as the company). It is said that the balance of 4,300 shares also with blank transfer deeds were delivered to the company by Nandkishore Jhajharia. The case of Nandkishore Jhajharia is that the company was really his benamidar and that the name of the company was utilized by him for his own purposes. The case of the company is that the shares were transferred by Nandkishore Jhajharia to the company for a sum of Rs. 11,39,400/- in part liquidation of a much larger dept due to the company from Nandkishore Jhajharia.

(5) On 24-1-1950, 24,000 shares standing in the name of the company were hypothecated with the National Bank of India and the balance 18,200 shares were hypothecated with the National City Bank of New York. By such hypothecations overdrafts were obtained from these Banks in the name of the company. The case of Nandkishore Jhajharia is that he utilized the name of the company for his own purposes whereas the case of the company is that these loans were raised on their own account. In or about May 1950, Nandkishore Jhajharia obtained delivery of 18,200 shares from the National City Bank of New York and 12,000 shares from the National Bank of India. The case of the company is that Nandkishore fraudulently transferred the said shares from the said Banks to his own account in the United Commercial Bank and thereafter wrongfully purported to sell 26100 of the said shares to one M. L. Jhunjhunwala and thereby committed criminal breach of trust and that the company came to know of these underhand dealings by Nandkishore for the first time in December 1950 when it started correspondence with Ryam Sugar Co. and requested the latter not to register the transfer in favour of M. L. Jhunjhunwala, but the transfer of the shares in favour of M. L. Jhunjhunwala was eventually registered. In the meantime on 6-10-1950 the company through Messrs. Jagannath Agarwala & Sons Ltd. obtained delivery of the remaining 12000 shares from the National Bank of India. In early January 1951, Nandkishore wrote to Jagannath Agarwala asking for delivery of the balance 12,000 shares and apparently also gave a notice dissolving the partnership firm of Agarwalla Jhajharia & Co.

(6) On 10-1-1951, Mr. P. N. Chatterjee, who is a Director of the company lodged a complaint against Nandkishore Jhajharia and M. L. Jhunjhunwala charging them with offences under Ss. 120B 406, 411 and 414, Penal Code, in respect of their dealings with the shares in Ryam Sugar Co. This complaint was registered as Case No. C/86 of 1951 in the Court of the Chief Presidency Magistrate, Calcutta.

(7) On 13-1-1951, the board of directors of the company by resolution removed Nandkishore from his office as a Director of the company.

(8) On 5-2-1951, Nandkishore Jhajharia launched a petition for winding up of the company and on that obtained an order of appointment of Provisional Liquidator with power of initialling certain books of the company. On the same date, Nandkishore instituted Suit No. 825 of 1951 against the company and J. Agarwalla & Sons Ltd. claiming a declaration that the shares in Ryam Sugar Co. Ltd. belonged to Nandkishore, decree for delivery of 12000 shares, injunction, damages and consequential reliefs.

(9) On the same date viz., on 5-2-1951, Nandkishore Jhajharia filed another suit against Jagannath Agarwalla and Ramkaran Parasurampuria claiming dissolution of the firm of Agarwala Jhajharia & Co. and consequential relief. There is a dispute whether Ramkaran had a share in the profits of that firm.

(10) On 16-2-1951, the company applied for stay of the winding up petition and obtained from this Court an injunction restraining advertisement of the presentation of the winding up petition. The application for stay of the winding up petition was later on dismissed. An appeal from that order was filed and was pending when the order of reference in these suits was made. In the third week of March 1951, written statements were filed in Suits Nos. 767 of 1951 and 825 of 1951. On 19-3-1951, a consent order was made in Suit No. 767 of 1951 appointing Receiver of certain books.

(11) On 16-2-1951 Case C/86 of 1951 was transferred to the Court of Sri K. K. Das Gupta, Additional Chief Presidency Magistrate, for disposal. The case was opened on 3-4-1951. Prosecution witnesses were examined on 4th, 5th, 6th, 7th, 17th, 19th, 20th and 23rd April, 1951. On 4-5-1951, the Magistrate held that there was prima facie evidence for framing charge against Nandkishore under S. 406, Penal Code, and charges against him were framed accordingly. The Magistrate held that there was no sufficient evidence against accused M. L. Jhunjhunwala who was accordingly discharged under S. 253 (1), Criminal P. C. Nandkishore Jhajharia pleaded not guilty to the charge.

(12) On 8-5-1951, Jagannath Agarwalla instituted Suit No. 2020 of 1951 against Nandkishore Jhajharia asking for a decree for about Rs. 2,50,000/- in respect of 'khata peta' account and for declaration of charges on certain shares. On the same date, the company instituted Suit No. 2307 of 1951 claiming Rs. 1,70,000/- with interest as loan against Gobardhanbhai Ambalal and in the alternative as damages for conversion and breach of trust against Nandkishore Jhajharia.

(13) On 9-5-1951, further witnesses were examined in Criminal Case c/86 of 1951 and on 10-5-1951, the case was adjourned till 10-6-1951 for cross-examination. On 4-6-1951, the case was adjourned till 29-6-1951 and again on 16-6-1951, the case was adjourned till 10-7-1951 on the petition of the accused, the complainant not objecting.

(14) In the meantime mutual friends were trying to settle these civil and criminal disputes. At first one Prahlad Churiwala intervened but he could not negotiate an effective

settlement. The first effective talk of settlement took place through one Sohanlal Murarka in a marriage procession towards the end of June, and beginning of July 1951. In the meantime on 10-7-1951 one of the prosecution witnesses was examined and the case was adjourned till 18-7-1951. Simultaneously talks of settlement were going on. On 13-7-1951 Nandkishore Jhajharia applied for extension of the time for filing written statements in Suits Nos. 2020 of 1951 and 2307 of 1951. It was stated in the petition in support of that application that through the intervention of mutual friends, talks of settlement of all disputes were going on.

(15) On 16-7-1951 there was a conference at the residence of the learned Advocate-General. Kamalaprosad gave the 24th July as the date of this conference but I think he was under a misapprehension with regard to the date. The conference was attended by Kamalaprosad and his lawyers Messrs. S. P. Misra, Mahadeb Hazra, Brojen Mitra and his employee Madanlal Purohit and by Nandkishore and his lawyers Messrs. J. P. Mitter and K. P. Khaitan. The brief to the learned Advocate-General was delivered by the lawyers for Kamalaprosad who paid his fees. The advice of the learned Advocate-General was sought with regard to the procedure for dropping the prosecution and also with regard to the validity of the proposed settlement. All disputes civil and criminal were going to be settled and the parties were alive to the danger that the settlement might be invalid on the ground that it stifled criminal proceedings and was against public policy. The learned Advocate-General gave his advice and the conference broke up. No settlement was concluded on that day.

(16) On 18-7-1951 there was a consent order in Suits Nos. 2020 of 1951 and 2307 of 1951 extending the time to file written statement up to 6-8-1951. On the same date the complainant and the accused filed a joint petition before the Additional Chief Presidency Magistrate for change of date and the proceedings were adjourned till 23-7-1951. The parties were coming nearer to settlement and by 24-7-1951 a draft of the proposed terms of settlement was made ready by the lawyers of Nandkishore.

(17) On the 23rd as also on the 24th July 1951 Kamalaprosad was partly cross-examined by Mr. J. P. Mitter, counsel for Nandkishore. After the hearing on 24-7-1951 was over the parties agreed to meet at the office of Sohanlal Murarka in the afternoon with the object of settling the disputes.

(18) Mr. Krishna Khaitan and Mr. N. K. Jhajharia had a lunch at Firpos with Mr. J. P. Mitter and Nandkishore and thence went to the office of Sohanlal Murarka. It was suggested to Kamalaprosad during his cross-examination that he and Madanlal had come in a car for the purpose of fetching Mr. Krishna Khaitan from Firpos. The suggestion cannot wholly be correct because Mr. Krishna Khaitan stated that he found Kamalaprosad at the office of Sohanlal on his arrival there. The recollection of Mr. Krishna Khaitan is that Madanlal Purohit had come for the purpose of taking him and Nandkishore to the office of Sohanlal. This is denied by Madanlal. Whatever the true position might have been on that date Sohanlal, Jagannath Agarwalla, Kamalaprosad Agarwala, P. N. Chatterjee, Nandakishore Jhajharia, Madanlal Purohit and Krishna Khaitan met at the office of Sohanlal Murarka. Kamalaprosad says that Mr. Bhagabati Prosad Khaitan was also present but this is denied by Mr. Krishna Khaitan.

(19) At this meeting Jagannath Agarwala, Nandkishore Jhajharia and P. N. Chatterjee for himself and on behalf of the company signed a document which contains a certain terms of settlement. This document reads as follows:

TERMS OF SETTLEMENT

1. The criminal proceedings shall be dropped in a way advised by lawyers of both sides. Mr. Jhajharia will give such undertaking as may be required that he will not take any step for malicious prosecution or for damage by reason of the criminal proceedings.

2. The winding up petition and the appeal will be withdrawn, each party paying its own costs.

3. In the declaratory suit filed by Mr. Jhajharia against International Mercantile Corporation (India) Ltd., and Anr., a declaration will be made that 42,200 shares in the Ryam Sugar Co. Ltd., are the property of Mr. Jhajharia, but Mr. Sohanlal Murarka will be appointed Receiver and will hold the said shares pending adjustment of accounts in the matters which would be referred to the arbitration of Mr. Sohanlal Murarka. The Receiver will hand over the shares to Mr. Jhajharia in the event of it being found after accounting that Mr. Jhajharia is not liable to pay anything to the International Mercantile Corporation (India) Ltd., or Jagannath Agarwalla and in the event of any money being found due from Mr. Jhajharia, upon Mr. Jhajharia paying the same. In default the Receiver will be entitled to sell the shares and out of sale proceeds pay the amount so found due and payable to the parties and the balance, if any, to Mr. Jhajharia.

4. The other suits filed in the High Court by the respective parties including the suit for accounts of Agarwala Jhajharia & Co., shall be referred to the arbitration of Mr. Sohanlal Murarka.

5. All other disputes and accounts and interests of N. K. Jhajharia and Jagannath Agarwala and International Mercantile Corporation (India) Ltd., and in respect of any other concern or of any nature whatsoever shall be referred to the arbitration of Mr. Sohanlal Murarka.

6. In case of any difficulty in settling the drafts incorporating the above arrangement, the same will be referred to Mr. Advocate-General whose decision shall be accepted by the parties.

Dated this 24th day of July, 1951.

Sd/- J. Agarwalla

Sd/- N. K. Jhajharia

International Mercantile Corporation (India) Ltd.

Sd/- P. N. Chatterjee,
Director,

Sd/- P. N. Chatterjee.

(20) The signed terms were left with Sohanlal Murarka.

(21) On 25-7-1951 the complainant in Case No. C/86 of 1951 prayed for time to settle and the Magistrate adjourned the case till 31-7-1951 observing that it was said that the terms had already been settled.

(22) On 30-7-1951 Nandkishore Jhajharia apparently wrote a letter to the company stating

that he will not take any steps for malicious prosecution or for damages pursuant to cl. (1) of the terms of settlement. On 31-7-1951 the complainant filed a petition in Case No. C/86 of 1951 stating that he did not want to proceed any further with the case and did not tender any further evidence begging leave of the Court to drop the same and adding that the accused joined in the application. This petition is signed by the complainant and Nandakishore and their lawyers. Upon this petition, the learned Magistrate acquitted the accused under S. 258, Criminal P. C., observing that he did not think it necessary in the interest of justice to proceed further

(23) On the same date, namely, on 31-7-1951 the company instituted Suit No. 3220A of 1951 against Nandkishore Jhajharia and Mahadeolal Jhunjhunwala claiming a declaration that the company was the owner of the entire block of 42200 shares in Ryam Sugar Co., Ltd. and consequential reliefs as also a decree for the sum of Rs. 10,94,672-3-5 alleged to be due to the company from Nandakishore in respect of certain dealings had between them on the footing that the shares had been sold to the company and in the alternative for the sum of Rs. 2,23,473-3-3 in case it was held that the shares had not been so sold. It was alleged that Mahadeolal Jhunjhunwala was merely the nominee of Nandakishore Jhajharia.

On the same date Nandkishore, Jagannath and the company executed an agreement referring all disputes between them other than those which were the subject-matter of the pending suits to the arbitration of Sohanlal. On the same date petitions for reference to arbitration in all the suits and terms of settlement in Suits Nos. 825 & 3220A of 1951 were all affirmed and signed so that they might be filed in Court on the next day. On 1-8-1951 terms of settlement were filed and a compromise decree was passed in Suits Nos. 825 and 3220A of 1951. By these terms, the two suits were consolidated. The suits were withdrawn against J. Agarwala & Sons Ltd. and M. L. Jhunjhunwala. It was declared that the 42200 shares in Ryam Sugar Co., Ltd. belong to Nandkishore. Sohanlal Murarka was appointed Receiver of these shares and was to hold them as security for the discharge of the liabilities to be ascertained by him.

Both parties gave suitable undertakings for delivery of the shares to Sohanlal. If on the taking of accounts in respect of all the matters referred to the arbitration of Sohanlal any sum was found due from Nandakishore to the company or to Jagannath Agarwala, Nandakishore would within one month of the final judgment on the award pay the net amount due and in default of payment the Receiver would be entitled to sell the shares and to pay the dues out of the sale proceeds; but in case Nandakishore paid off the dues or in case no sum was found due and payable by him the Receiver would hand over the shares to him.

(24) On the same date a petition was filed in these consolidated suits praying for reference to arbitration and thereupon except as provided in the terms of settlement all other matters in dispute between the parties in both the suits including the question of costs of the suits and of the reference were by an order of the same date referred to the arbitration of Sohanlal Murarka.

(25) In suits Nos. 767 of 1951 and 2020 of 1951 also petitions were filed and orders were passed for reference to disputes to the arbitration of Sohanlal Murarka. On the same date Suit No. 2307 of 1951 was withdrawn as against Goberdhan Bhai Ambalal and the company was directed to pay their costs in the first instance and all matters in difference in the suit including the question of costs of the suit and the reference and the costs to be paid by the company to Goberdhan Bhai Ambalal in the first instance was referred to the arbitration of Sohanlal.

(26) The arbitrator commenced his work on 14-8-1951 on which date he held his first sitting. By common consent all disputes between the parties were taken up and discussed simultaneously. On 28-9-1951 the time to make the award was extended until 30-12-1951 by orders made in the several suits. The arbitrator seems to have carefully gone into the disputes and the minutes record elaborate discussions with regard to accounts. The arbitrator held twenty meetings up to and including 1-12-1951. These twenty meetings are admitted by the petitioner and the correctness of the minutes of these meetings are not challenged.

(27) It is the case of Nandkishore that formal meetings were also held by the arbitrator on 13th, 14th, 15th and 19th December 1951. It is the case of the petitioner that no meeting was held by the arbitrator after 1-12-1951 and that no notice of the alleged meetings on 13th and 14th, 15th and 19th December was given to the petitioner.

(28) The minutes of the arbitration meetings dated 13th, 14th, 15th and 19th have been produced and exhibited. The correctness and genuineness of these minutes are challenged by the applicant.

(29) The minutes of the meeting dated 13th December show that the meeting was held at the office of the arbitrator and that Nandkishore Jhajharia, Kamalaprosad Agarwalla, Sewprosad Agarwalla and Madanlal Purohit were present and that amongst other matters the Pakistan joint business matters were discussed and certain statements were exchanged between the parties. The minutes dated 14-12-1951 show that the meeting was held at the office of the arbitrator and that Nandkishore, Kamalaprosad, Sewprosad and Madanlal were present that Jhajharia supplied certain information with regard to several items in the list submitted by Agarwalla. The minutes of the meeting dated 15-12-1951 show that the meeting was held at the office of the arbitrator and that Kamalaprosad, Madanlal, Nandkishore, Ramkaran with a Munim were present, that there was discussion with regard to the joint venture and that the arbitrations had reached their concluding stage. The minutes of the meeting of 19-12-1951 show that the meeting was held at the office of the arbitrator and that Nandkishore, Ramkaran, Sewprosad, Madanlal were present. The minutes show that there were discussions but no new points were raised and the arbitrator stated that he would make his award by the 30th instant but as a matter of precaution the time should be extended up to 15-1-1952 and the parties agreed to apply for extension up to 15-1-1952.

(30) By several orders dated 21-12-1951 the time to make the award in the several suits

was extended until 15-1-1952. The orders were made upon petition presented by Nandkishore and consented by the other party stating that the arbitration was proceeding and had not then been completed and was not expected to be finally disposed of by 30-12-1951. On 29-12-1951 the arbitrator made five awards in the several arbitrations and sent the four awards made in the several suits to the Registrar of this Court by registered post. On the same date he sent a formal notice to the parties stating that he had made his award under the agreement dated 31-7-1951. This notice was received by the parties on that very date. The arbitrator delivered the shares in the Ryam Sugar Co. Ltd. to Nandkishore on 30-12-1951.

(31) There is a dispute between the parties as to the exact happenings on 28th, 29th and 30th December 1951. It is the case of the petitioner that inspection of the accounts between Nandkishore and the company was going on and had not been completed and that on 28-12-1951 Kamalaprosad went to the office of the arbitrator for inspection whereupon the arbitrator produced before him 6 exercise books said to have been given by Nandkishore Jhajharia and that thereupon inspection was taken until 9 p.m. on that date and it was arranged that further evidence and submission will be placed before the arbitrator on the following day at 9 a.m. All this is denied by the arbitrator. The case of the petitioner is also that on the morning of 29th December at 9 a.m. Nandkishore Jhajharia, Jagannath Agarwalla, Sewprosad and Kamalaprosad called at the resident of the arbitrator and were informed that the arbitrator had gone to the place of one Chiranjanlal and after waiting for half an hour they dispersed. This again is denied by the arbitrator.

(32) It is the case of Nandkishore that at an interview at the residence of the arbitrator in the evening of 29-12-1951 the arbitrator communicated to Nandkishore and Jagannath the purport of the several awards and informed them that he was going to return the shares. This interview is denied by Kamalaprosad.

(33) The arbitrator sent formal notices of the making of the award in the several suits on 31-12-1951. On the same date the petitioner sent a letter to the arbitrator acknowledging receipt of the notice dated 29-12-1951 stating its version of the happenings on that date and requesting the arbitrator not to communicate the contents of or to supply a copy of the award to any party before sending a reply and added "it is needless to say that you will not part with the Ryam shares which you are holding as a Receiver until further orders of the Court." Copy of this letter was sent to Nandkishore Jhajharia. Nandkishore Jhajharia did not sent any reply but the arbitrator sent one on 3-1-1952. He generally denied the allegations contained in the letter under reply and added "As regards your request re scrips of the Ryam Sugar Mill I regret that there is no occasion to ask for any direction from the Court."

(34) On or about 18-1-1952 Messrs. Khaitan & Co. requested the arbitrator to file the award under the agreement dated 31-7-1951. On 24-1-1952 Messrs. Mookerjee & Biswas wrote to the arbitrator requesting him to forward to the Registrar the minutes of the 20 sittings of the arbitration meetings and the exhibits and expressing surprise that they had not been filed so far. They sent another letter to the arbitrator on the same date asking him whether he was still holding the shares of the Ryam Sugar Mills as Receiver or whether he had already made the same over to Nandkishore Jhajharia and if so when. The arbitrator sent replies on 28-1-1952. By one of the letters he stated that by common consent minutes were kept in the private arbitration under the agreement dated 31-7-1951 to be read and treated as evidence in each of the 5 matters submitted for arbitration and that there were altogether 24 and not 20 meetings and that the minutes were being sent by him to the Registrar. By another letter of the same date he stated that he made over the shares to Nandkishore Jhajharia on 30-1-1951 against his receipt. On or about 11-2-1952 the arbitrator sent the minutes and the award under the agreement dated 31-7-1951 to the Registrar.

(35) The awards have been impeached on several grounds. I will first of all deal with the grounds which are peculiar to this case.

(36) By the award in this case the arbitrator directed Nandkishore to pay Rs. 56,000/- to the company in full satisfaction of their claim stating that the figure had been arrived by taking into consideration the sum of Rs. 9,76,000/- payable by N. K. Jhajharia and Co. in his firm N. K. Jhajharia & Co. (Pakistan) to the company and several other sums of money.

(37) The first ground upon which the award is challenged is that in making this award the arbitrator took into account the sum of Rs. 1,70,000 claimed by the company in Suit No. 2307 of 1951. This objection is not specifically taken in the petition but it is alleged generally that the award purported to include matters which are outside the scope of the suit. The award on the face of it does not show that this sum was taken into consideration by the arbitrator in making this award but that he did so appears from paras. 2(k) and 18 of the affidavit of Nandkishore filed in the connected proceedings in Suit No. 2307 of 1951.

(38) (His Lordship considered this objection and held that there was no substance in it. His Lordship then proceeded).

(39) The next objection to this award is that in making this award the arbitrator had no jurisdiction to take into account the sum of Rs. 9,76,000/- payable by N. K. Jhajharia & Co. in his firm of N. K. Jhajharia & Co., Pakistan to the company. It is contended that N. K. Jhajharia & Co., Pakistan is a firm and an entity separate and distinct from N. K. Jhajharia & Co., and that the claim of the company against N. K. Jhajharia & Co. only was the subject-matter of these consolidated suits. This objection is not specifically taken in the petition. It is not alleged by the petitioner that N. K. Jhajharia & Co. (Pakistan) is a firm and an entity separate and distinct from N. K. Jhajharia & Co. Reliance is placed in sub-para. 2(j) of the affidavit of Nandkishore filed in the proceedings in Suit No. 2307 of 1951 to show that there were outside partners in N. K. Jhajharia & Co. (Pakistan) but the allegations in that sub-paragraph are denied in sub-para. 4(h) of the affidavit of Kamalaprosad affirmed on 18-7-1952 in the said proceedings in answer to the affidavit of Nandkishore. The case of the company, therefore, is that N. K. Jhajharia is the sole proprietor of the business

of N. K. Jhajharia & Co., Pakistan. The company alleges in para. 1 of the plaint that N. K. Jhajharia himself carried on business under the name and style of N. K. Jhajharia & Co. in India and Pakistan. There is, therefore, no foundation for the argument of Mr. Mitra that N. K. Jhajharia & Co., Pakistan, is a firm distinct and separate from N. K. Jhajharia & Co., India. The arbitrator had jurisdiction to deal with the claim of the company against N. K. Jhajharia and carrying on business under the name and style of N. K. Jhajharia & Co. in Pakistan and to decide whether Nandkishore was liable in respect of these dealings.

(40) The next ground of attack is that there were mixed sittings of arbitration with regard to the reference in the several suits and under the agreement dated the 31st July. It is contended that the arbitrator wrongfully mixed up and kept one set of minutes for the several arbitrations. This charge, in my judgment, is entirely unfounded. The company at no point of time objected to the keeping of one set of minutes or to the consideration of the subject-matter of the different arbitrations in the same meeting. In the letter dated 28-1-1952, the arbitrator clearly stated that one set of minutes had been kept by common consent to be read and treated as evidence in each of the five matters submitted to arbitration. No reply was sent to this letter and no exception was taken to this statement. The charge that the petitioner never agreed to the keeping of one set of minutes is entirely untrue. No doubt, by the order of reference in the consolidated suits only some of the disputes in these suits had been referred to his arbitration and under that order he could only deal with those disputes. But it was for the arbitrator to regulate the procedure with regard to the arbitration. In order to succeed the company must establish that there were irregularities in procedure amounting to no proper hearing of the matter. Such case is not made out by the company. The company consented to the particular mode of procedure adopted by the arbitrator and cannot now turn round and object to that mode of procedure. Even assuming that the consideration of several matters at the same sitting was irregular, such irregularity was cured by the consent of the parties. 'Mt. Amir Begam v. Syed Badruddin', AIR 1914 P C 105 (A).

(41) The next charge is that the award in these suits was based on conclusions which were coloured by the view taken by the arbitrator in respect of disputes which are not the subject-matter of these suits and that the arbitrator has not discriminated between disputes which were in issue in these suits and those which were not and reliance is placed upon the observations of Lord Blanesburg in the well known case of — 'Ram Protap Chamaria v. Durga Prosad Chamaria', AIR 1925 P C 293 at pp. 296, 297 (B). This charge must be established either from the terms of the award or from intrinsic evidence. In my opinion there is nothing in the award or any intrinsic evidence to establish this charge, — 'Jatindra v. Manindra', AIR 1927 Cal 52 (C). The arbitrator has not in this case as in — 'AIR 1925 PC 293 (B)' made an award dealing with disputes some of which were the subject-matter of the suit and some of which were not, See — 'Raminder v. Mohinder', AIR 1940 Lah 186 at page 190 (D) affirmed — 'Trinidad Lake Asphalt Operating Co. Ltd. v. Commr. of Income-tax for Trinidad and Tabago', AIR 1945 P C 85 (E). The charge, therefore, fails.

(42) The next ground upon which this award is impeached is that contained in paras. 26 and 35 (b) (ii) of the petition. It is said that no meetings were held on the 13th, 14th, 15th and 19th December 1951 and that in any event the petitioner had no notice of the several meetings and that the minutes of those meetings are not correct. The petitioner admits that the parties met in the office of the arbitrator in course of inspection of accounts during this period but the petitioner's case is that no formal meeting was filed.

(43-46) (After going through the evidence his Lordship held that the petitioner had notice of all these meetings).

(47) It is the case of the petitioner that during the middle or the 3rd week of December 1951 the parties agreed to apply for extension of time to make the award till 15-1-1951. Kamalaprosad swore that the extension was suggested by the arbitrator during inspection in the presence of Kamalaprosad, Nandkishore, Ramkaran and a moonim of Nandkishore. This evidence strongly corroborates the minutes of the meeting of 19-12-1951 which records an agreement to apply for extension in the presence of Kamalaprosad, Madanlal, Nandkishore and Ramkaran. I am satisfied that the parties agreed to apply for extension at the formal meeting dated 19-12-1951. Indeed Madanlal at one stage of his evidence stated that the extension was agreed to at the meeting of 19th December but later on he said that there was a talk with regard to the extension between Nandkishore and Kamalaprosad in the presence of the arbitrator.

(48) It was suggested to the arbitrator that he had fabricated the minutes of the disputed meetings. There is no charge of fabrication in the petition. The only charge is that the minutes are not correct. The petitioner had inspection of the disputed minutes before this application was made yet no letter was written to the arbitrator charging him with fabrication. Kamalaprosad is very evasive with regard to the date of this inspection. He caused Messrs. Mukherji & Biswas to write a letter requesting the arbitrator to send the minutes of 20 meetings. The arbitrator distinctly stated in his reply dated 28-1-1951 that there were altogether 24 meetings and that he was sending all the minutes to the Registrar. To that letter no answer was sent by Messrs. Mukherji & Biswas and it was never suggested that 24 meetings had not been held nor was it suggested that the minutes of the disputed four meetings had been fabricated by the arbitrator.

(49) In my view formal meetings were held on the 13th, 14th, 15th and 19th December 1951 and the minutes correctly record what had transpired at those meetings. The arbitrator had indicated on 15-12-1951 that the matter had reached the concluding stage and on 19-12-1951 the arbitration was formally closed.

(50) The next charge is contained in paras. 30, 35 (b) (1) and 35 (b) (3) of the petition. The charge is that the arbitrator wrongfully received certain exercise books behind the back of the petitioner and that he wrongfully did not allow the petitioner to give evidence and make submissions although he had made an appointment for that purpose at 9 a. m. on

29-12-1951. The arbitrator denies both these charges and I believe the arbitrator. In my view these charges are unfounded.

(51) Mr. Mitra also contended that it was definitely decided that the arbitrator could not make his award on 30-12-1951, that the time to make the award was accordingly extended till 15-1-1952, and that in making the award before that date the arbitrator was colluding with Nandkishore. The true position is recorded in the minutes of the meeting dated 19-12-51 which shows that the arbitrator indicated that he would make his award by 30-12-1951 and that he recommended extension only by way of abundant precaution. Mr. Mitra contended that there was a discrepancy between the minutes of the meeting dated 19-12-1951 and the petition of Nandkishore dated 21-12-1951. I do not find any material discrepancy.

(52-53) The next charge is that the arbitrator in making the award colluded with Nandkishore and that such collusion is shown by the fact that the arbitrator parted with the shares to Nandkishore on 30-12-1951. The petitioner contends that the arbitrator did so illegally and behind the back of the petitioner when the petitioner was not even aware of the making of all the awards. It is said that on a true construction of the decree dated 1-8-1951 the arbitrator had no power to deliver the shares until after judgment on the several awards were passed. I refuse to decide the question of construction in these proceedings. The only question is whether the proved facts warrant the conclusion that the arbitrator was actuated by improper motives in making the awards. I am satisfied that no such conclusion can be drawn from the facts on the record.

I am satisfied that the arbitrator in the evening of 29-12-1951 had informed the parties of the general result of the several awards and of his intention to deliver the shares. He acted unwisely in parting with the shares without calling a formal meeting and before sending formal notice of the making of all the awards. But I am satisfied that when the petitioner wrote the letter dated 3-1-1952 it was aware of the making of and of the general result of the several awards and that such result was adverse to the petitioner. (His Lordship reviewed the evidence and the conduct of the petitioner and proceeded). In my view therefore the charge of fraud and collusion fails.

(54) The next charge is that that arbitration agreement and the order of reference are illegal and against public policy. The petitioner's case is that it agreed to withdraw and drop the criminal proceedings against Nandkishore Jhajharia as part of the consideration for the several agreements for reference to arbitration and that the agreements were entered into inter alia with the object of stifling the criminal proceedings.

(55) There is no doubt that the agreement of reference to arbitration is void if either the consideration or object thereof is the dropping of prosecution for a non-compoundable offence. The relevant principles admit of no doubt and are now settled by the highest judicial authority. Sir Benod Mitter in — 'Kamini Kumar v. Birendra Nath', AIR 1930 PC 100 at p. 102 (F) states the law succinctly as follows:

"If it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful."

(56) Lord Atkin discussing the matter more elaborately in — 'Bhowanipur Banking Corporation Ltd. v. Durgesh Nandini Dassi', A. I. R. 1941 P C 95 at p. 96 (G) observes thus:

"But the defence remained x x x x that the mortgage bond in question was given as part of the consideration for a promise by the bank to withdraw criminal proceedings against one Kalidas the mortgagor's husband. If established, this would plainly afford a defence under S. 23 of the Indian Contract Act (IX of 1872).

x x x x It is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him, either not to bring, or to discontinue, criminal proceedings for some alleged offence. x x x x x Proof that there has actually been a crime committed is obviously unnecessary. But it is also, of course, necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. In all criminal cases reparation, where possible, is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand, to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts, they have to be inferred from the conduct of the parties after a survey of the whole circumstances."

(57) In this case prosecution for an offence under S. 406, Penal Code, was pending against Nandkishore Jhajharia. Nandkishore had been charged with that offence on the complaint of P. N. Chatterji, a director of the petitioner company. An offence under S. 406, I. P. C., is not compoundable by the complainant. The complainant P. N. Chatterji for self and on behalf of the petitioner company the accused Nandkishore as well as Jagannath Agarwala signed a document dated 24-7-1951 recording certain terms of settlement. Clause 1 of these agreed terms is that the criminal proceedings shall be dropped in a way advised by the lawyers. Clauses 4 and 5 of these terms record an agreement to refer all the civil disputes to the arbitration of Sohanlal Murarka. All these terms were agreed to simultaneously as a result of prolonged talks of a settlement of all disputes both civil and criminal. The subsequent petition before the Magistrate asking for leave to drop the prosecution and the subsequent petitions in the pending suits for reference of the disputes to arbitration only incorporate and implement the firm arrangement recorded in the document dated 24-7-1951. The Magistrate was informed of the settlement on 25-7-1951 and on 31-7-1951 the complainant and

the accused filed a joint petition for the dropping of the criminal proceedings. On the same date the parties signed petitions of compromise and of reference to arbitration as also the agreement of reference of the other disputes. The petitions are filed in Court the next day. The entire arrangement recorded in the document dated 24-7-1951 was intended to be and was in fact carried out. There was one settlement of all disputes. The settlement of the civil dispute was dependent on the settlement of the criminal proceedings. The document was kept with Sohanlal Murarka with a view to see that all its terms were carried out. The dropping of the prosecution was part of one entire bargain, including the bargain for reference to arbitration. It was well understood that the promise of Nandkishore for reference to arbitration was in part exchange for the promise not to continue the prosecution. There were several considerations for the promise of Nandkishore Jhajharia to refer one of which was the illegal promise to drop the criminal proceedings. The consequence is clearly stated in CHITTY on Contract—28th Edition—p. 469, thus:

"If a contract is made on several considerations, one of which is illegal, the whole contract is unenforcible."

Where there are several considerations the illegality of one of them vitiates the whole contract. Lord Atkin in — 'AIR 1941 P C 95' observed at p. 98 (G):

"Their Lordships, therefore, agree with the decision of the High Court, though they do not follow the reasoning of one of the learned Judges that the money consideration to the wife was illusory. It was real enough; but it was not the only consideration. They desire also to point out that the learned Subordinate Judge has attached undue weight to the fact that here there was a debt really due from Kalidas. In this class of case that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt."

There are similar observations in the judgment of Mr. Justice B. K. Mookerjee in — 'Sudhindra Kumar v. Ganesh Chandra', AIR 1938 Cal 840 at p. 851 (H).

(58) It is true that a motive for a contract is not necessarily one of its considerations. At the same time a consideration of the contract is always a conventional motive or inducement for entering into the contract.

"It is of the essence of a consideration that by the terms of the agreement it is given and accepted as the motive or inducement of the promise."

Holmes Common Law page 293. The promise to drop the prosecution was given and accepted here as a conventional inducement for the several promises by Nandkishore and is, therefore, one of the considerations for the promise to refer to arbitration.

The cases relied upon by the learned Advocate-General, viz., — 'Dwijendra Nath v. Gopiram', AIR 1926 Cal 59 (I); — 'Deb Kumar v. Anath Bandhu', AIR 1931 Cal 421 (J); — 'Gafoor Shaikh v. Mt. Hemanta Shashi Debya', AIR 1931 Cal 416 (K); — 'Sukhdeo Dass v. Mangal Chand', AIR 1917 Pat 454 (L); — 'Jai Kumar v. Gaurinath', 28 All 718 (M); — 'Tek Chand v. Harjos Rai Arjan Das', AIR 1929 Lah 564 (N); — 'Harjas Rai Arjan Das v. Tekchand', AIR 1927 Lah 465 (O) are distinguishable. In these cases clear proof of a bargain to drop the prosecution was lacking. It was not established in those cases that the impugned promise was given in exchange or part exchange for a promise to discontinue the prosecution. In some of these decisions undue weight was given to the existence of the civil liability of the accused. The existence of such liability is not relevant if it is established that an illegal promise to drop the prosecution is also one of the considerations for the impugned promise. I think that the best explanation of the decision in — 'AIR 1926 Cal 59 (I)' is that given by the learned editor of Sir D. F. Mulla's Transfer of Property Act, 3rd Edition — p. 75 which is as follows:

"In a Calcutta case — 'AIR 1926 Cal 59 (I)' the relations of a prisoner executed a mortgage in favour of the prisoner's employer for a large part of the employer's money which the prisoner had misappropriated, in consideration of the employer agreeing not to object to the prosecution being withdrawn by the Commissioner of Police. The Court held that the mortgage was valid, but it is clear from the judgment that the mortgage would have been invalid, if the consideration had been that the employer should himself withdraw the prosecution."

The parties here also agreed to a declaration that Nandkishore Jhajharia was the owner of the disputed shares. This declaration cuts at the root of the prosecution case. If Nandkishore Jhajharia was the owner of the shares he could not have committed criminal breach of trust. But this declaration itself springs into existence as part of the illegal bargain to discontinue the criminal proceedings. The declaration, no doubt, shows that the prosecutor was anxious to drop the criminal proceedings. The holding of the shares gave the holder the controlling interest in Ryam Sugar Mill and consequently valuable advantages which were not confined merely to earning dividends on the shares. The prosecutor was forgoing those valuable advantages. It is possible that the prosecution case was rather weak. But the fact that the evidence would not have established the charge is irrelevant. 'Sayamma v. Punamchand', AIR 1933 Bom 413 (P). In — 'Birendra Nath v. Basanta Kumar', AIR 1926 Cal 519 (Q) Walmsley J. in coming to the conclusion that the impugned agreement was not illegal relied upon the fact that the Magistrate had expressed doubts about the complaint but his judgment was reversed on appeal in — 'AIR 1930 P C 100' (F) and this fact was treated as irrelevant. Proof of the commission of offence is not a necessary part of the defence under S. 23, Contract Act: per Lord Atkin in — 'AIR 1941 PC 95' at p. 96 (G).

(59) The principle is that "you shall not take a trade of a felony". Such trading need not necessarily be upon the assumption that the felony is committed. Thus an agreement by the accused to give up all claims for false imprisonment and malicious prosecution in exchange for the promise of the prosecutor not to prosecute is illegal. 'Rawlings v. Coal Consumers Asso. Ltd'. (1874) 30 L T 469 (R); — 'Dalsukhram v. DeBretton', 28 Bom 326 (S).

(60) There is trading on a felony if discontinuance of prosecution is made the subject-matter of private bargain. The prosecutor makes a trade of the felony when he barters his promise not to prosecute. The policy of the

law is not to permit any citizen to interfere with the progress of the prosecution by any private arrangement. The effect of such arrangement is to defeat the provisions of law that such offence is not compoundable. A I R 1933 Bom 413 (P).

(61) The learned Advocate-General relied upon the case of — 'Jagadish v. Mt. Kausilla', AIR 1947 All 317 (T). The Court there by a majority held that the compounding of the non-compoundable offence of dacoity was not illegal having regard to the circumstances of that case. With due respect I prefer the minority judgment of Mathur J. Technically the responsibility of summoning a witness rests upon the Magistrate but for all practical purposes the choice of proceeding with the prosecution or dropping it rests with the complainant. The agreement to drop a non-compoundable offence is illegal because it necessarily interferes with the administration of justice by the Magistrate and also because it is opposed to the policy of the law that such offence is not to be compounded. Where such agreement is part of the consideration for the corresponding bargain that bargain is illegal notwithstanding that there are other lawful considerations for the bargain. It is not for the Court to decide on investigation of the facts of each case whether or not the criminal charge is of interest not only to the prosecutor but also to the public at large. The reason is given in the observations of Chandawarkar J. in — '28 Bom 326' at p. 328 (S) thus:

"The legislature has laid down in that Code the test for determining the class of offences which concern individual only as distinguished from those which have reference to the interests of the state; and the Courts of Law cannot go beyond that test and substitute it for one of their own."

The legislature has ordained that some offences are compoundable and that some are not. Section 345, Criminal P. C., does not permit of the compounding of an offence under S. 406, I. P. C. The agreement for compounding and the corresponding bargain given in exchange or part exchange of that agreement are illegal.

(62) The agreement to refer, therefore, is illegal and void and cannot be recognised in any way. It is void for all purposes and not enforcible by and against either party.

(63) What then is the effect of the finding that the arbitration agreement was illegal and void at its inception. The learned Advocate-General argued that the agreement was legal and the award was, therefore, void. He did not contend that the award was valid if it is found that the arbitration agreement was illegal. He did not contend that the subsequent acquiescence of the petitioner in the arbitration proceedings and the several orders for extension in any way affect the position or validate the award. He said that hardly anything remained if I found that the arbitration agreement was illegal. I must, therefore, consider the effect of the subsequent proceedings and acts without the assistance of argument of learned counsel.

(64) The agreement to refer is the very foundation of the order of reference. The Court has no option but to make an order of reference if all parties interested agree to refer and apply to the Court for an order of reference. The order of reference is the creation of the agreement and has no greater validity than the agreement on which it is based. The agreement to refer being illegal and invalid the order of reference based upon that agreement is also invalid. Plainly the Court had no jurisdiction to make an order of reference if the parties did not agree to refer to arbitration. The order is equally without jurisdiction if the agreement is illegal and invalid and, therefore, non-existent.

(65) The subsequent acquiescence of the petitioner in the arbitration proceedings cannot validate the invalid agreement and order of reference. A void act cannot be ratified. Subsequent consent cannot confer jurisdiction which the Court did not originally possess.

(66) The subsequent applications and orders for reference to arbitration also do not validate the originally invalid agreement and order of reference. They do not amount to a fresh submission or a fresh order of reference. In — 'Lord v. Lee', (1868) 3 Q B 404 at pp. 408 and 409 (U) Blackburn J. observed thus:

"It was argued for the defendants that such an enlargement of the time amounted only to the making of a fresh submission; but that is not so; the act having been done under the proposed authority of the previous submission the enlargement of the time is 'ratification in the shape' of the continuation of the original authority x xx x The effect of the enlargement of the term under the statute would be the same as at common Law, that is it makes it as if the extended time had been originally inserted in the submission. x x x x It must have the same effect as enlargement by consent, namely, amounts to ratification."

Similarly, the effect of orders for extension of time under S. 28, Arbitration Act, is that the extended time is inserted in the original order of reference. They do not amount to fresh submissions or fresh orders of reference. They could continue the original authority if there was one. They cannot establish a new authority where authority was originally lacking.

(67) As there is no valid reference the award is a nullity: — 'Chhabbalal v. Kallu Lal', AIR 1946 P C 72 (V). The reference being tainted with illegality at the root subsequent consent does not cure the defect. I, therefore, declare and adjudge that the award is invalid and a nullity. I also declare and adjudge that the order of reference was and is invalid and a nullity and I revoke it.

(68) The petitioner wins not because it has superior moral principles but because its technical points are better than its morals. The petitioner voluntarily entered into and on the strength of that bargain allowed the arbitrator and the opposite party to continue the arbitration proceedings and at no stage raised any objection that the agreement or the order of reference was illegal. Now that the petitioner is disgruntled with the award it has thought fit to shelter behind the plea of illegality. On the materials on record I have been constrained to give effect to its legal contentions but I have no doubt that in view of all circumstance it should be made liable to pay the costs of these proceedings. The petitioner has lost on the other issues. In the exercise of my discretion I order that the petitioner must pay the entire costs of these proceedings which will be as of a hearing. Certified for two counsel.

(69) There will be no judgment upon award. Each party will pay and bear his or its own costs of the proceedings for judgment on award.

B/R.G.D. Order accordingly.

A.I.R. 1953 CAL. 424 (Vol. 40, C.N. 162)

P. N. MOOKERJEE J.

Mulchand Bulakhidas, Petitioner v. Arya Bandhu Ltd., Opposite Party.

Civil Revn. Case No. 1672 of 1952, D/- 10-9-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 17(2) — "Fixed" — Meaning of.

The word "fixed" in S. 17(2) was used in the broader sense of including cases of a standard rent fixed, strictly so-called, that is, fixed under S. 9, as also cases of standard rent determined, that is, fixed in the wider sense, under the other provisions of the Rent Control Act of 1948. The latter determination of fixation of standard rent is therefore liable to be re-opened and the standard rent re-fixed under S. 17(2). (Para 5)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 17(2) and Sch. A, Paras 1(a), 1(b) and 3(b) — Fixation of standard rent.

Where the standard rent has been fixed under the Calcutta Rent Ordinance, 1946, on an application under S. 17(2), the standard rent has to be fixed under Sch. A, Paras 1(a) and 3(b) and not under para 1(b) read with para 3(b) and consequently the rent of December 1941 is wholly irrelevant for the purposes of the proceeding under S. 17(2). (Para 6)

Bankim Chandra Roy and Sudhansu Sekhar Mukharji, for Petitioner; Charu Chandra Ganguly & Prafulla Kumar Chatterji (Jr.), for Opposite Party.

CASE CITED :

(A) ('23) AIR 1923 Cal 33: 27 Cal WN 50

ORDER : This Rule arises out of a proceeding for standardisation of rent and it raises an interesting question.

(2) The petitioner is the landlord and the opposite party the tenant under him in respect of the disputed premises, viz., a shop room in the ground floor of premises No. 191, Harrison Road, Calcutta. This tenancy commenced sometime in the year 1945 and the contractual rent was Rs. 500/- per month.

(3) On 22-2-1948 the tenant-opposite party applied for standardisation of rent under the Calcutta Rent Control Ordinance 1946 which was then in force and the Rent Controller by his order dated 15-7-1948 fixed the standard rent at Rs. 425/- per month with effect from April 1948. From this decision there was no appeal taken by the tenant but the landlord preferred an appeal on 14-8-1948. This appeal was heard on 24-3-1949 by the learned Chief Judge, Court of Small Causes, Calcutta, who delivered his judgment on 25-3-1949.

(4) From the materials before me it appears clear that by his judgment dated 25-3-1949 the learned Chief Judge dismissed the landlord's appeal and upheld the Rent Controller's order fixing the standard rent at Rs. 425/- per month under the Ordinance but he gave effect to this standard rent from March 1948 till November 1948 and also granted the landlord the statutory enhancement of rent from December 1948 under the Rent Control Act 1948 which had come into force in the meantime on 1-12-1948. Thereupon the tenant applied for review of this judgment but the said application was dismissed on 6-8-1949. On 10-5-1950 after the Rent Control Act 1950 had come into operation the tenant applied for re-fixation of standard rent under S. 17(2) of this latter Act and in support of his contention that the standard rent should be re-fixed at Rs. 302-8-0 per month with effect from April 1950 he produced a rent receipt alleged to have been granted by the landlord in respect of the disputed premises showing a rental of Rs. 275/- per month in December 1941.

The Rent Controller was apparently not satisfied with the genuineness of this rent receipt and he was not inclined to rely upon the same. He, accordingly, by his order dated 31-8-1950, re-fixed the standard rent at Rs. 488-12-0 per month with effect from June 1950 on the footing that S. 9(1)(a) of the Rent Control Act 1950 applied to the case and the rent of the disputed premises having been standardised at Rs. 425/- per month under the Calcutta Rent Ordinance 1946 in the previous proceeding that was the basic rent under Sch. A, para 1(a) of the Act of 1950 and the standard rent would thus be Rs. 425/- per month plus 15 per cent. under para 3(b) of the said Schedule.

This decision has now been upset by the learned Appellate Judge who has fixed the standard rent at Rs. 347-14-0 per month with effect from June 1950 on the view that the rent receipt for December 1941 produced by the tenant was genuine and had been duly proved and the case came under paras 1(b) and 3(b) of Sch. A, Rent Control Act 1950 and the standard rent would thus be Rs. 275/- per month plus 15 per cent. under S. 9(1)(a) of the Act read with the said provisions, viz., paras 1(b) and 3(b) of Sch. A thereof. The propriety of this decision is the subject-matter of the present Rule.

(5) The petitioner's first contention is that there was in this case no fixation of the standard rent under the Act of 1948 and, therefore, the application for re-fixation of the standard rent was misconceived and was not maintainable in law. I am unable to accept this extreme contention. It is true that the original application for fixation of the standard rent was made under the Calcutta Rent Ordinance 1946 and on that application the Rent Controller standardised the rent at Rs. 425/- per month on 15-7-1948. True also that in the appeal which followed what was really done was affirmance of the Rent Controller's decision and thus maintaining his fixation of the standard rent under the 1946 Ordinance while giving the landlord the benefit of the 1948 Act in regard to the statutory increment for the period of this latter Act, viz. from December 1948.

That seems to be the position when we remember that there was — and, indeed, there could have been — no application for fixation of standard rent under the 1948 Act as none of the clauses of S. 9 thereof could be attracted to the case and when we remember further that the learned Appellate Judge in ex-

press terms dismissed the landlord's appeal maintaining the standard rent fixed under the Ordinance for the period February to November 1948 and gave the landlord the statutory increments under the 1948 Act from December 1948. The Appellate decision properly read amounted, therefore, to a fixation of the standard rent under the 1946 Ordinance plus also a determination of the standard rent under Ss. 2(10)(b) and 8 and the Schedule, Part A, paras 1(a) and 3(d) of the 1948 Act.

This determination was certainly not fixation of the standard rent under S. 9 of the 1948 Act but nevertheless it was also, broadly speaking, fixation of standard rent inasmuch as determination of standard rent may, not inappropriately, be called fixation of standard rent vide the case of —'Asutosh Chatterjee v. Upendra Chandra', AIR 1923 Cal 33(A). I am not unmindful of the fact that in the Act of 1948 in relation to standard rent the word "fix" is used in s. 9 and not in the other provisions under which standard rent can be determined under the Act (vide Ss. 2(10)(b) and 8 and the Schedule) and that a distinction is drawn between fixation of standard rent under S. 9 and determination of standard rent (vide S. 2(10) cls. (a) & (b)).

But it seems to me that in providing for refixation of standard rent in S. 17(2) of the Act of 1950 in cases where the standard rent had been fixed under the 1948 Act the Legislature had in mind not merely cases where standard rent had been fixed under S. 9 of the 1948 Act but also cases where such rent had been determined under the other provisions of that Act. In other words, the word "fixed" in the phrase "fixed under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act 1948" as used in S. 17(2) of the 1950 Act was used in the broader sense of including cases of standard rent fixed, strictly so-called, that is, fixed under S. 9, as also cases of standard rent determined, — that is, fixed in the wider sense, — under the other provisions of the Act of 1948.

In the instant case, therefore. the nett position was that by his judgment dated 25-3-1949 the learned Chief Judge fixed the standard rent under the 1946 Ordinance so far as the period February to November 1948 was concerned and also determined — that is, 'fixed' within the meaning of S. 17(2) of the Act of 1950 — the standard rent under the 1948 Act from December 1948. This latter determination or fixation of standard rent was thus clearly liable to be reopened and the standard rent re-fixed under S. 17(2) of the Act of 1950 and the opposite party's application under that section was, therefore, quite in order and maintainable in law. The petitioner's first contention must, accordingly, fail and it is overruled.

(6) The petitioner next argues that with regard to the disputed premises the standard rent had been fixed under the 1946 Ordinance and, therefore, under the 1950 Act and on the application under S. 17(2) thereof, the standard rent had to be fixed under Sch. A, paras 1(a) and 3(b) of the said Act and not under the residuary provision, viz. Sch. A, para 1(b), read with para 3(b) thereof and the alleged rent of December 1941 was, therefore, wholly irrelevant for the purposes of the present proceeding. In my opinion, this argument ought to succeed. It is clear from Sch. A of the Act of 1950 that where the standard rent of the premises in question has been fixed under the 1946 Ordinance, para 1(a) is at once attracted and cl. (b) of para 1 is necessarily excluded as this latter clause applies only when the earlier one does not, and, the said residuary cl. (b) being thus excluded, the rent of December 1941 becomes, in such cases, wholly irrelevant for the purpose of standardisation of the rent or re-fixation of the standard rent.

That being the position in law and there being clearly a standard rent fixed under the 1946 Ordinance in respect of the present premises, as already noticed, the Rent Controller was right in ignoring the evidence of the alleged rent of December 1941 and in fixing — or, rather, 're-fixing', as the present case is one under sec. 17(2) — the standard rent under Sch. A, paras 1(a) and 3(b) of the Act of 1950 and the learned Appellate Judge was not justified in reversing the said decision and in fixing the standard rent under Sch. A, paras 1(b) and 3(b) of the said Act on the basis of the alleged rent of December 1941. The Appellate decision must, therefore, be set aside and the standard rent as fixed by the Rent Controller by his order dated 31-8-1950 must be restored.

(7) In the result, therefore, I accept the petitioner's second contention, make this Rule absolute, set aside the decision of the learned Appellate Judge and restore that of the Rent Controller.

(8) There will be no order for costs in this Rule.

B/V.R.B. Rule made absolute.

A.I.R. 1953 CAL. 425 (Vol. 40, C.N. 163)

CHAKRAVARTTI AND S. R. DAS GUPTA, JJ.

Kazem Sardar Accused Petitioner v. The State.

Criminal Revn. No. 12 of 1951, D/- 18-6-1951.

(a) Criminal P. C. (1898), S. 297 — 'Laying down the law by which the jury is to be guided' — Appreciation of evidence.

Where the Judge, in course of his charge to the jury, had stated that if any particular witness was found to have spoken an untruth on a particular point, they should not reject the whole of his evidence but should scrutinise it minutely and accept only so much of it as tallied with the circumstances and the probabilities of the case and other evidence.

Held that no objection could be taken to the statement of the law made and as such there was no misdirection to the jury. (Para 6)

Anno: Cr. P. C., S. 297 N. 9, 11.

(b) Criminal P. C. (1898), S. 297 — Misdirection — Omission to point out importance of discrepancy between F. I. R. and petition of complaint — Effect.

Where the story put forward in the first information report is incredible and the prosecution in order to make it credible put forward a supplementary story in the petition of complaint, the omission of the Judge to draw particular attention of the Jury to the importance of the new story introduced by the petition of complaint and its bearing on the credibility or otherwise of the original story given in the first information report is a misdirection affecting the verdict of

the Jury. If in such a case the accused has been convicted on a majority verdict of 3 to 2 which is precariously poised on a very delicate balance the omission of the Judge to draw attention of the Jury to this essential fact which might have tilted the balance on the other side, must be treated as a material misdirection vitiating the verdict and if it has caused a failure of justice in the sense that the accused did not get a fair trial under a proper direction from the Judge the conviction must be set aside. (Paras 10, 11)

Anno: Cr. P. C. S. 297 N. 11, 13.

S. S. Mukherjee for Petitioner; Chintaharan Roy and Arun Kumar Das Gupta, for Opposite Party.

CHAKRAVARTTI J.: The petitioner Kazem Sardar was placed on his trial along with his son Moslem for an offence of arson in respect of a hut belonging to one Narendra Haldar. Moslem is about 14 years of age. The allegation against him was that he actually set fire to the hut and the allegation against Kazem was that it was at his instance that Moslem did so. The trial was held by an Assistant Sessions Judge of Alipore with the aid of a jury and resulted in a verdict of guilty by a majority of 3 to 2. The learned Judge accepted the verdict and sentenced the petitioner to rigorous imprisonment for two years and also a fine of Rs. 250/- in default rigorous imprisonment for six months more. It was also directed that if the amount of fine was realised, half of it was to be paid to the complainant as compensation. In the case of Moslem, the learned Judge took into account his extreme youth as also the fact that he had acted under the orders of his father and so he passed on him only a sentence of detention till the rising of the Court.

(2) Against his conviction and sentence Kazem Sardar appealed to the Sessions Judge, Alipore, but the appeal was dismissed summarily. Thereupon the present Rule was obtained. The State did not appear to oppose the Rule, but the complainant appeared to oppose it.

(3) In order to appreciate the grounds which were urged on behalf of the petitioner, it is necessary to state a few facts. The prosecution case was that Kazem Sardar became strongly desirous of acquiring a plot of homestead land, but the owner of the land, one Nilambar, settled it with Narendra Haldar, much to Kazem's 'chagrin'. To the west of this homestead land there is another plot of land, about which also there was some dispute between Kazem and Nilambar. Narendra Haldar built a hut on the homestead land, already referred to, and began to live on it. The relations between Kazem and Nilambar had at one time been friendly, but because of these land disputes they had recently become strained to the point of a bitter quarrel. There had been litigation with respect to the homestead land, and there were two suits, one of which had resulted in Nilambar's favour and another in favour of Kazem or his benamdar and both were under appeal. These facts, according to the prosecution, formed the background of the occurrence which took place on 9-9-1949. On that day, so it was alleged, Kazem went to the plot of land lying to the west of the homestead land with a mob of about 100 or 125 men, variously armed, and carried out an operation of 'Khopi' which has been explained as retransplantation of paddy seedlings. After finishing that job, the mob marched back and while they were returning, Kazem halted near the hut of Narendra and ordered his son Moslem to set fire to it. Moslem did so, with the aid of a bundle of burning straw which he was carrying or which was handed over to him by his father. At the time Narendra was not at home, having gone to a 'hat', but a son of his, one Adrista, a boy of about 10 or 12 years, was at home. He had come back from school during the midday break for his meal and had not gone back and at the time the hut was set on fire, he was seated in the varandah, engaged in conversation with three co-villagers. The thatch of the hut immediately caught fire, one thatch being completely burnt out and another partially gutted. Some of the articles inside the hut, but not very many, were damaged. On that very day Adrista lodged a First Information at the Police Station and thereupon Police Investigation started. Within a few days, however, Narendra began to think that the Police were not doing all that they should have done and he filed a petition of complaint on 24-9-1949. The police submitted a final report on the 20th of October and the case then proceeded on the basis of the petition of complaint. In due course Kazem and Moslem were committed to the Court of Session with the result I have already stated.

(4) As regards the First Information, it is necessary to state a few more facts. It was lodged, as I have already stated, by Adrista, but it begins by saying that Narendra was among the men with whom Adrista had gone to the Police Station. In the petition of complaint filed a fortnight later, Narendra himself stated that he was present at the time the First Information was lodged. Subsequently, however, for reasons best known to them, Narendra and his son began both to prevaricate, and the son, after stating in the trial Court that Narendra came to the Police Station when the Inspector was recording the First Information, stated before the Sessions Court that Narendra came after the First Information had been recorded. Narendra himself in his evidence before the Sessions Court stated that he did not enter the Police Station at all.

(5) As regards the contents of the First Information Report, it is noticeable that almost as much of it is devoted to elaborate details of the litigation that was going on between Nilambar and Kazem as to the actual occurrence. As regards the latter, Adrista only mentions Kazem and his son as the persons who had gone to the land lying to the west for retransplantation of paddy and as the men who had come near the hut at the time it was set on fire. The time at which the incident took place was given as 2-30 or 3 p.m. Nothing was said about Kazem having gone with a mob of armed men to the land lying to the west and of returning with the same mob and of setting fire to the house in the course of the return journey. These details were introduced a fortnight later in the petition of complaint which Narendra filed in Court. Then for the first time the skeleton account given by Adrista in the First Information Report was padded over with a considerable mass of incriminating matter.

(6) In support of this Rule Mr. Mukherjee urged four grounds, three of which can be dis-

posed of at once. His first contention was that the learned Judge, in course of his charge to the Jury, had stated that if any particular witness was found to have spoken an untruth on a particular point, they should not reject the whole of his evidence but should scrutinise it minutely and accept only so much of it as tallied with the circumstances and the probabilities of the case and other evidence. I cannot imagine what possible objection one could take to that statement to the Jury. What the learned Judge meant obviously was that if a particular witness was found to have spoken an untruth with regard to one matter, the rest of his evidence did not necessarily become liable to be thrown out at once but was still to be judged on its merits. I do not think any exception can be taken to this statement of the law. In any event, this statement occurred in the general discourse with which the learned Judge prefaced his charge on the actual facts of the occurrence and I am not prepared to say that the misdirection, even if there was any, was such as influenced the verdict of the Jury unfavourably to the accused or caused any failure of justice.

(7) The next ground urged by Mr. Mukherjee was that the learned Judge did not stop the Public Prosecutor when he started making allegations against the Police. With regard to this ground again, I do not see what the learned Judge could actually have done. The Public Prosecutor made certain allegations against the Police, presumably in the course of his address to the Jury. The learned Judge, when dealing with that matter, gave careful directions so that the Jury might not be misled into thinking that there was some kind of collusion between the Police and the accused and that if the Police had not done their duty, it was because the accused had influenced them. He specifically and expressly directed the Jury to eschew all suspicion from their minds, and the passage to which Mr. Mukherjee took objection was rather strongly in favour of the accused and likely to do him good than the contrary.

(8) The third objection urged was that the learned Judge ought not to have referred to the litigation between the parties, at any event, ought not to have mentioned the result of the civil suits, collected from oral evidence, in the absence of the decrees which had not been produced. Once again, I fail to see any substance in the objection of Mr. Mukherjee. The allegation of the prosecution was that the accused had set fire to the house, because of the enmity existing between him and Narendra and Narendra's landlord Nilambar. The litigation was the expression of that enmity and I cannot see how the learned Judge acted improperly in referring to the fact of the litigation. As regards the result of the two suits, there again, the learned Judge merely stated the fact that the suits had ended in a particular way and it was not alleged by Mr. Mukherjee that the statement he made was a miss'atement. Inasmuch as the prosecution had alleged the litigation and the enmity arising therefrom as the reason which had moved the accused to commit the offence alleged against them, reference to that litigation was, in my judgment, inevitable. This ground urged by Mr. Mukherjee must also fail.

(9) The fourth ground urged by Mr. Mukherjee, however, requires serious consideration. As I have stated already, what was given in the First Information Report was an extremely thin story and by itself hardly credible. The story put forward was that Kazem and his son, man and boy, had openly retransplanted paddy in one of the fields belonging to Nilambar and thereafter had openly come in broad daylight at about 3 p.m. to Narendra's hut and set fire to it in the presence of witnesses. If the prosecution story remained, as it was put in the First Information Report, it is not difficult to imagine what its fate would have been at the hands of any Jury. But subsequently care was taken to supplement the account by an elaborate story of a march of armed men to the land lying to the west of the hut, the exultant return of those men after completing the retransplantation and the setting fire to the house while they were returning triumphantly and still in a mood of exultation. The effect of the addition of that story was certainly to make credible what would otherwise be almost incredible and to bestow at least a semblance of probability on what was otherwise an improbable story. Mr. Mukherjee's complaint was that in his charge to the Jury, the learned Judge had not referred to this discrepancy between the First Information Report and the petition of complaint. It was pointed to him that the learned Judge had in fact mentioned the matter and Mr. Mukherjee then urged that, in any event, he had not placed that discrepancy before the Jury in the manner in which he ought to have done it. In my opinion, this criticism is well-founded. As I have stated already, the importance of the supplementary story which was introduced by the petition of complaint cannot be overestimated. It goes to the very root of the credibility of the prosecution case and it was certainly the duty of the learned Judge to remind the Jury forcibly of the belated introduction of details which only made the prosecution story credible. It is true that he has referred to the omission of any reference to the armed mob in the First Information Report, but he has done so only by way of making a bald statement of facts. The manner in which he put it before the July was not, in my opinion, calculated to bring home to their minds the importance of the discrepancy between a First Information Report and the petition of complaint by which the supplementary story was introduced. They were not directed as they ought to have been, that it was important to consider whether the story of the expedition to the paddy field was not a deliberate invention, thought of much later, for the reason that, without it, the original story might not receive any credence at all and that if the Jury found that it was afterthought, they would then have to consider to what condition the prosecution case was reduced and whether they would still believe it. It was certainly not the duty of the Judge to press upon the Jury any particular view of the facts, nor was it his duty to overemphasise any of the elements of the particular story or any of the defects in it. But it was certainly his duty to help the Jury in making a proper arrangement of the facts in their minds in accordance with their relative importance so that they might view the incidents in their true perspective and draw therefrom the inference that commended itself to them. That is the task of the Judge, to furnish skilled direction to laymen in the handling and assessment of facts. In my opinion in that task the learned

Judge failed, although his charge in other respects was an admirable one.

(10) In my opinion, the omission of the learned Judge to draw the particular attention of the Jury to the importance of the new story introduced by the petition of complaint and its bearing on the credibility or otherwise of the original story given in the First Information Report was a misdirection which affected the verdict of the Jury. The case, as the learned Judge himself says, was not free from difficulty. His charge gives ample indication that he was feeling considerably oppressed by the various improbabilities of the case, and it is important to remember that the verdict of the Jury was only a majority verdict, a verdict of 3 to 2. In such a case, where the verdict of the Jury was precariously poised on a very delicate balance, any omission to draw attention to some essential fact which might have tilted the balance on the other side, must be treated as a material misdirection. In my opinion such a misdirection occurred in the present case and in consequence thereof the verdict of the Jury cannot be upheld.

(11) Having regard to the evidence as a whole, I am also of opinion that not only has the misdirection affected the verdict of the Jury, but it has also caused failure of justice in the sense that the accused did not get a just and proper trial under a proper direction from the Judge. The conviction and sentence of the petitioner cannot, therefore, be upheld. In the circumstances of the case I do not think that this is a fit case in which a retrial should be ordered. The Rule is accordingly made absolute. The conviction and sentence of the petitioner are set aside and he is acquitted. He will be discharged from his bail bond and will be set at liberty forthwith. The fine, if paid, will be refunded.

(12) S. R. DAS GUPTA J.: I agree.

C/K.S. Accused acquitted.

A.I.R. 1953 CAL. 428 (Vol. 40, C.N. 164)

R. P. MOOKERJEE AND LAHIRI JJ.

Lalchand & Sons, Plaintiff-Appellant; v. Corporation of Calcutta, Defendant-Respondent.

A. F. O. O. No. 23 of 1951, D/- 3-4-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), S. 141 — Appeal by assessee — Question as to value of land — Burden of proof — (Evidence Act (1872), Ss. 101 to 103).

When an appeal is preferred by the assessee under S. 141 it is up to the assessee to show that the annual value fixed by the Corporation was not a proper one. But if the annual value had been raised by the Corporation on the ground that there had been since the last general revaluation a rise in the rental value of the premises or of land value, the Corporation is to lead evidence to show that there had really been such an increase from what was ruling at the time of the previous general revaluation. AIR 1953 Cal 327, Expln. and Disting. (Para 11)

Anno: Evidence Act, Ss. 101 to 103 N. 10.

(b) Municipalities — Calcutta Municipal Act (3 of 1923), S. 127 — Rental value of neighbouring premises — Evidentiary value — (Evidence Act (1872), S. 9).

The market rate of land and of the rental value of neighbouring lands or houses are admissible for determining the value of land and buildings to be fixed under S. 127. But their evidentiary value depends on the circumstances of each case. (Paras 12 and 13)

Anno: Evidence Act, S. 9 N. 1.

(c) Municipalities — Calcutta Municipal Act (3 of 1923), S. 127(b) — Method of assessment — Rental value or evidence relating to nature of user — Relevancy.

The method of assessment to be followed under S. 127(b) does not justify the importation of rental value or relevant evidence relating to the nature of the user of the building by the owner. The Court has to proceed to determine the estimated present value of the land valued with the building as part of the same premises and add it to the present value of the structures less depreciation. 'Case law discussed'. (Para 30)

(d) Municipalities — Calcutta Municipal Act (3 of 1923), S. 127(b) — Present value of land — Fixing of.

For fixing the present value of the land, the value of bare land is not to be the sole criterion which is to be the basis for the calculation. Modifications are to be introduced dependent upon the character of the buildings and the nature of the structures. (Para 33)

Probhat Kumar Sen Gupta; Sudhir Ranjan Banerjee, and Soumendra Nath Mukherjee, for Appellant; Krishnalal Banerjee, for Respondent.

CASES CITED:

(A) ('27) AIR 1927 Cal 802: 31 Cal WN 1040
(B) ('28) AIR 1928 Cal 450: 32 Cal WN 378
(C) ('53) AIR 1953 Cal 327: 55 Cal WN 145
(D) ('40) AIR 1940 Cal 47: 44 Cal WN 165
(E) (1922) 91 LJKB 891: 1922-2 KB 471
(F) (1932) 101 LJKB 632: 1932-2 KB 679
(G) ('37) AIR 1937 Cal 14: 41 Cal WN 200
(H) ('27) AIR 1927 Cal 659: 31 Cal WN 864
(I) (1874) 9 QB 134
(J) (1886) 17 QBD 738
(K) ('42) AIR 1942 Cal 455: 46 Cal WN 637
(L) ('43) AIR 1943 Cal 166: 47 Cal WN 119
(M) ('50) AIR 1950 Cal 121: 53 Cal WN 620

R. P. MOOKERJEE J.: The principal question raised by the assessee in this appeal under S. 142(3), Calcutta Municipal Act is as to how the "estimated present value of the land valued with the building as part of the same premises" is to be made under cl. (b) of S. 127 of the same Act. Premises No. 76, Lower Circular Road covers an area of over 184 cottas and is in the occupation of the owner. There are three different kinds of buildings; one two-storeyed building of which the upper floor is used for residential purposes and the ground floor for the location of a press and godown — belonging to the owner; certain big corrugated iron sheds are also used by the owner for business purposes; and over another portion there is a bustee, the structures having been condemned by the Corporation as being dangerous, but still occupied. As the premises continued to be in the occupation of the owners the determination of the rates must be under cl. (b) of S. 127, Calcutta Municipal Act, and the premises had all along been assessed as such.

(2) During the general revaluation which came into effect from the second quarter of 1936-37 the annual value of the property was fixed at Rs. 24645/- on the basis of Rs. 1600/- per cotta being the land value. At the next general revaluation which came into effect

from the second quarter of 1942-43 the land value was fixed at a slightly lower figure, viz., Rs. 23876/-. It does not appear at what rate per cotta or on what basis the land value was fixed. The next general revaluation was from the second quarter of 1948-49 and this is the subject matter of the present appeal.

(3) On behalf of the Chief Executive Officer the lands were valued at Rs. 4500/- per cotta and the value of the buildings was fixed at Rs. 346141/-. Objections were raised by the assessee about the land value. After hearing the objections the Special Officer reduced the land value to Rs. 3200/- per cotta; consequently Rs. 46857/- was fixed as the value of the land. The assessee filed an appeal under S. 141, Calcutta Municipal Act before the Court of Small Causes in Calcutta. No objection was raised by the assessee with regard to the annual value fixed for the buildings. The assessee claimed that the land should not be valued at over Rs. 2500/- per cotta, i.e. the annual value so far as the land is concerned is to be Rs. 40392/- as against Rs. 46857/- fixed by the Special Officer. The learned Chief Judge of the Court of Small Causes found that the value of the land as fixed by the Special Officer was a proper one and the appeal was dismissed.

(4) In the appeal now before us the principal grounds urged are relating to the method which should be adopted for valuing the land under cl. (b) of S. 127, Calcutta Municipal Act.

(5) Before we deal with the principal point urged about the method of valuation and whether the character or nature of the use to which the building is put is to be taken into consideration for determining the annual value or not we shall dispose of two other points which had also been taken before us.

(6) The first question is on whom does the onus lie when an appeal is preferred by the assessee. According to the assessee appellant the initial onus is on the Corporation, and it is for the latter to satisfy the Court as to how the annual value had been fixed by the Chief Executive Officer, or by the Special Officer as the case may be. This question was covered by a long line of decisions of this Court. It was, however, contended that a divergent view has been taken in one of the more recent decisions. It is, therefore, necessary to examine the question at some length.

(7) The determination of the annual value for the purpose of assessment by the Chief Executive Officer is in the first instance to be made under S. 131, Calcutta Municipal Act. The person affected may file an objection under S. 139, Calcutta Municipal Act. The Executive Officer, or the Special Officer under the amended provisions, will have to dispose of the objection after giving a hearing. That decision is final subject to the provisions contained in Ss. 141 and 142 of the Act.

Section 141 allows the assessee to take the matter to the Court of Small Causes; sub-s. (2) provides that an order passed by the Executive Officer under S. 140, after the determination of the objection raised by the assessee shall, subject to the provisions of S. 141, be final. Subsection (3) of S. 142 permits a further appeal to the High Court. So what is allowed under S. 141 is an opportunity to the assessee to prove before the Court of Small Causes that the decision reached by the Executive Officer was an erroneous one. When the matter comes before the Court of Small Causes the assessee is in the first instance to show that the valuation fixed by the Corporation was not a correct or proper one.

(8) In — 'Corporation of Calcutta v. Keamuddin', AIR 1927 Cal 802 (A), this point was specifically raised and an attempt was made to place the onus during the hearing of the appeal before the Court of Small Causes on the Corporation of Calcutta. This was negatived. This question was again more fully considered in — 'Corporation of Calcutta v. Jalajbasini', AIR 1928 Cal 450 at pp. 453 and 455 (B).

(9) On behalf of the appellant reliance, however, was placed on — 'Samarendra v. Corporation of Calcutta', AIR 1953 Cal 327 (C). It was urged that in this case the Court had placed the onus upon the Corporation and not on the assessee. It is, therefore, necessary to refer to the facts which gave rise to the decision aforesaid. In the first place it is to be noticed that this was an assessment under cl. (a) of S. 127, Calcutta Municipal Act. The property in question was admittedly let out on the basis of a written lease fixing the monthly rent at Rs. 1300/-. At the general revaluation which took effect from the fourth quarter of 1939-40 the Corporation allowed a remission of Rs. 160/- per month out of the stipulated rent before the annual value for determining the rates was fixed.

The case on behalf of the assessee was that such deduction had been made because of a share of the rent paid by the tenant was for the use of the furniture which had been supplied by the owner for the tenant. The next general revaluation was in 1945. The same written lease was still in force with the same stipulated rent of Rs. 1300/- per month was being paid by the tenant. The Corporation, however, allowed a deduction of Rs. 75/- per month on account of the hire charges for the use of the furniture etc. On behalf of the assessee evidence was led before the Court of Small Causes that there had been no change in the quantity or quality of the furniture which was being allowed to be used by the tenant from 1939-40 to 1945.

What this Court held was that as the Corporation had allowed a deduction at the rate of Rs. 160/- per month for the purpose of the previous revaluation, it was up to the Corporation to show that there had been more change in the quantity or quality of the furniture made available, to justify reduction of the amount from Rs. 160/- to Rs. 75/- per month. In the first place, the rates were being determined under cl. (a) of S. 127, Calcutta Municipal Act. The Court has to determine the rent which can be reasonably expected to be paid by a tenant who would take it in the existing condition. On the admitted fact that the Corporation had allowed a larger deduction for the hire of the furniture at the previous general revaluation, it was for the Corporation to show how much lower deduction was now justifiable.

The penultimate paragraph in the judgment of this Court makes it abundantly clear as to the stage when and the purpose for which the Corporation is required to prove what the increased rental is to be. If there is to be a fresh assessment on the ground of an increased rate of rent, it is for the Corporation to show that there has been an increase; that is what the Corporation failed to prove in the case above mentioned.

(10) If reference is made to the observations in AIR 1928 Cal 450 (B), towards the conclud-

ing portion of the judgment of Rankin C. J. it will be noticed that although the Letters Patent Appeal Bench agreed with Graham J. that the onus was on the assessee appellant in the Court of Small Causes to prove that the annual value fixed by the Chief Executive Officer was an erroneous one still when the Corporation proceeded to make a new assessment on an increased valuation and sufficient materials were not placed before the Court of Small Causes about locality, the site, market value of plots similarly situated and other particulars it was up to that Court to put a figure on the value of the property in question.

(11) The real position, therefore, is that when an appeal is preferred by the assessee under S. 141, Calcutta Municipal Act before the Court of Small Causes it is up to the assessee to show that the annual value fixed by the Corporation was not a proper one. But if the annual value had been raised by the Corporation on the ground that there had been since the last general revaluation a rise in the rental value of the premises or of land value, the Corporation is to lead evidence to show that there had really been such an increase from what was ruling at the time of the previous general revaluation. The Court is not to proceed merely upon the abstract rule of onus. But once it is shown that there had been an increase in value from what it was previously, it is up to the Court again to decide on the materials placed before it as to whether the value as fixed by the Chief Executive Officer is a proper one or not. We shall have to keep this in view when we are to decide on the facts of the present case whether on the materials placed before the Court of Small Causes it was justified or not in fixing the land value at Rs. 3500/-.

(12) Another short point which was raised was whether evidence about the market rate of land and of the rental value of neighbouring lands or houses are admissible for determining the value of land and buildings to be fixed under S. 127, Calcutta Municipal Act.

(13) In the — 'Corporation of Calcutta v. The Province of Bengal', AIR 1940 Cal 47 (D) (the Writers' Buildings case) the annual value was required to be fixed under cl. (b) of S. 127, Calcutta Municipal Act. Evidence was led about the valuation of neighbouring premises, both from returns submitted by parties as also from certain accepted assessments. They were held to be relevant facts and admissible under S. 9, Evidence Act. In our view, reliance was rightly placed upon — 'Norwich Assessment Committe v. Pointer', (1922) 2 KB 471 (E) and — 'Ladies Hosiery and Underwear Ltd. v. West Middlesex Assessment Committee', (1932) 2 KB 679 (F).

In the former case, the evidence of rateable value of other similar premises situated within the same union was held to be in point of law admissible. It has, however, to be borne in mind that merely because such pieces of evidence are admissible, the evidentiary value of such pieces of evidence must depend on the circumstances of each particular case. To what extent they resemble one another and also whether the value of one may be any criterion for determining the value of another must be decided on the facts of each case. Such evidence, therefore, is admissible, but to what extent it can be used will be considered at the proper place.

(14) We now take up the principal question as to the interpretation of cl. (b) of S. 127, Calcutta Municipal Act. It is now well settled that the method for determining the annual value for fixing the rates as prevalent in England is fundamentally different from that which is to be found in S. 127 of the Act. Confusion had been attempted to be raised in the past by trying to import the notions of English rules into the framework of the Calcutta Municipal Act. The fundamental proposition which is laid down in English cases is that the assessment of rates is dependent upon beneficial occupation, — neither upon ownership nor upon notional occupation. In various cases in England, therefore, the Courts had repeatedly been called upon to decide whether a person is really the occupier of the premises or not, and whether such occupation is sufficient to attract the provisions of the local laws imposing rates. We are not, however, called upon to import that test as three distinct methods are introduced in Ss. 127 and 128 of the Calcutta Act.

(15) Lands which are lying vacant or buildings which have been erected for letting purposes or are ordinarily let attract cl. (a) of S. 127. The annual value in such cases is deemed to be

> "the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year."

The annual value to be ascertained for determining the rates payable is irrespective of the fact whether such land or such building is actually used or occupied or not. We are not, however, concerned at this stage with the other provisions in the Act under which the assessee may subsequently claim for remission of a portion of the rates under certain conditions during such period as the lands or buildings may remain unoccupied. At the time of the fixation of the annual value and the determination of the rates payable the question whether the assessee will be entitled in future to claim vacancy remission is not at all relevant.

(16) A different method is laid down for determining the annual value of buildings not erected for letting purposes and which are not ordinarily let. In other words, they are buildings in the occupation of the owners themselves or are meant to be used by them. The method to be followed is as laid down in cl. (b) of S. 127. This is not on the rental basis as in cl. (a) of that section. Two items are to be added up for arriving at the total annual value, viz., the present cost for erecting the building less depreciation and the "estimated present value of the land valued with the building as part of the same premises."

(17) There is no difficulty so far as the determination of the present costs for erecting the building is concerned, and there is no objection in the present case to the value of the building as fixed by the corporation authorities. Difficulties may, however, arise for determining the present value of the "land valued with the building." It is really the interpretation of this last clause on which would depend the method of valuing the premises as a whole.

(18) The third method for fixing the valuation for the purpose of rates is in respect of properties belonging to the Calcutta Improvement Trust. This is to be determined neither on the rental value as in cl. (a) of S. 127, Calcutta Municipal Act, nor on the present value of the building or of the land as in cl. (b) of

the same section, but on the basis of the cost of acquisition.

(19) Various attempts had been made in the past for offering a satisfactory interpretation of the last portion of cl. (b) of S. 127. I shall not refer at this stage to the decisions which cover assessment under cl. (a) of S. 127, but the observations made in some of these cases will have to be considered later.

(20) In — 'Corporation of Calcutta v. Jardine Skinner & Co.', AIR 1937 Cal 14 (G), a case where assessment had been made under cl. (b) of S. 127, an attempt was made to import the rental test or the structures method, as it has been called by some, into this clause. It was argued that it was not possible to determine the present value of the "land valued with the buildings as part of the same premises" except by fixing the total annual rent which may be payable for the entire premises, including the land and building and deducting therefrom the present value of the building less depreciation. It was pointed out that the total value of the premises as a whole can be determined with some reasonable precision only if one takes the rental value thereof. This was, however, rejected by a Division Bench of this Court, and in our view rightly.

(21) This view was followed in AIR 1940 Cal 47 (D).

(22) Clause (b) of S. 127, Calcutta Municipal Act deals with residential buildings not meant to be let out. Under this provision the yearly rent which a hypothetical tenant would pay for the premises is not definitely made the basis for determining the annual value. There is no indication in cl. (b) that the owner in occupation is to be considered as a tenant as is considered in England for the purpose of ascertaining what the rental value is to be. No doubt in England the methods employed vary according to the nature of the property concerned, but whatever may be the difference with regard to the details in each particular case, the annual rental value of the land or of the premises has to be determined in some form or other.

As stated already, it is the beneficial occupation of the premises which determines the letting value in England. The State Legislature had definitely adopted a distinctly different method in cl. (b) of S. 127 of the Calcutta Municipal Act. In Calcutta bare ownership would sustain a liability to rates, whereas in England the owner of a house cannot be compelled to pay rates if such an owner allows the property to lie barren and unoccupied. We have no doubt that the opinion expressed in the two cases mentioned above is the only view possible so far as cl. (b) of S. 127, Calcutta Municipal Act is concerned.

(23) What is being attempted in the present case by the assessee is that he wants the present value of the 'land valued with the building as part of the same premises' to be ascertained with reference to the nature of the use to which the property is put by the owner. He wants to rely on the extent of the income which he derives or the benefit which accrues in his favour from the business or from the other uses of the property. This is 'prima facie' untenable. The nature of the user of the property is relevant only for the purpose of determining whether cl. (a) or cl. (b) of S. 127, Calcutta Municipal Act will be attracted. If the property is used by the owner, cl. (b) is applicable. If it is or is meant to be let out cl. (a) will be attracted. There ends the relevancy or importance of the nature of the user of the property in question.

(24) The annual value thereof under cl. (b) is then to be ascertained without any further reference to the nature of the user of the property. What this clause requires is that the present value of the land is to be determined not as a bare piece of land. It is to be taken in its present disposition. It is the nature of the building or of any other structure which may be thereon which may either increase or decrease the value of a bare plot of land of a similar nature. How this is to be determined is a matter for the expert valuer to do. When such materials are placed before the Court it is ultimately the latter which decides as to what the proper value of the building in such context is to be. Mr. Parks who has been examined as an expert by the assessee in the present case has given his opinion in a book published by him, "The Principles and Practice of Valuations" at pages 296-297. While dealing with cl. (b) of S. 127, Calcutta Municipal Act he remarks:

> "The point to remember in this case is that the land value is the value of the land encumbered with a building and not clear site value. It may be that the value will be higher if the land is well and fully developed by a building which is in turn well let; whilst on the other hand, if the land is encumbered by buildings which do not fully develop the land and can never do so without completely demolishing and rebuilding, then the land may have a slightly lower value than clear site value."

(25) It will be noticed that according to this expert the difference between the clear site value and the value of the land valued with the building is not a very material difference. What that slight difference will be must depend on the circumstances of each case.

(26) We may now refer to two other decisions on which great reliance was placed on behalf of the appellant. It is contended that in these Bench decisions it had been clearly laid down that the test of beneficial user is to be introduced under both cls. (a) and (b) of S. 127, Calcutta Municipal Act.

(27) In — 'Corporation of Calcutta v. Ashutosh De', AIR 1927 Cal 659 (H), the Court was called upon to consider a case admittedly under cl. (a) of S. 127, Calcutta Municipal Act. Mukerji J. (at page 865 of the report) after referring to the phrase "reasonably be expected to let" appearing in cl. (a) of S. 127, Calcutta Municipal Act compares the same with the same phrase appearing in the Parochial Assessments Act (6 and 7 Will, IV, Cap. 96). He proceeds to refer to the interpretation put on this clause by the English Courts, and refers to — 'The Queen v. London and North-Western Railway Company', (1874) 9 QB 134 (I) and — 'The Queen v. The School Board for London', (1886) 17 QBD 738 (J).

In these cases it had been held that the standard value upon which the rates have to be calculated is the value of the property to the owner which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant. Roy J. at page 868 of the report also refers to the provisions in cl. (a) of S. 127, Calcutta Municipal Act, and indicates that the rent from which the annual value is to be determined is

the rent payable by a hypothetical tenant and a hypothetical rent. The ground of a man's liability is that he is in beneficial occupation.

This reference to beneficial occupation is clearly on the footing that the premises were one governed by cl. (a) of S. 127, Calcutta Municipal Act. The Court was not called upon to consider and did not apply its mind at any stage in the two judgments to the implications contained in or the requirements under cl. (b) of S. 127. The observations made by the learned Judges are clearly referable to the English decisions wherein the method for determining the annual value is analogous to, if not practically the same as in cl. (a) of S. 127. This case, therefore, is of no assistance to the appellant. It may be noted in passing that the point on which the learned Judges differed was one relating to the effect of S. 126, Calcutta Rent Act of 1920, and the judgment of the Letters Patent Bench deals with this point only and specifically leaves open the observations of the Court with regard to the point previously mentioned.

(28) —'B. N. Rly. Co. Ltd. v. Corporation of Calcutta', AIR 1942 Cal 455 (K), and — 'Royal Calcutta Turf Club v. Corporation of Calcutta', AIR 1943 Cal 166(L) were both cases under cl. (a) of S. 127, Calcutta Municipal Act, and no assistance can be obtained from the decisions in these two cases.

(29) —'Dominion of India v. Corporation of Calcutta', AIR 1950 Cal 121(M), was also a case where assessment had been made under cl. (a) of S. 127, and the Court found that the assessment could not be sustained because of the circumstances of that case.

(30) In this view, we hold that the method of assessment to be followed under cl. (b) of S. 127, Calcutta Municipal Act does not justify the importation of rental value of relevant evidence relating to the nature of the user of the building by the owner. The Court has to proceed to determine the estimated present value of the land valued with the building as part of the same premises and add it to the present value of the structures less depreciation.

(31) Let us now see whether in the present case the assessment made satisfies the conditions above mentioned. The notice which had been issued on the assessee was on the basis that there has been an increase in the land value in the locality. As held by us some evidence would be necessary to justify an increased assessment on that basis. Evidence was led for the purpose of showing that there has been since the last general revaluation a general rise of land value near about the locality.

(32) Premises No. 72, Lower Circular Road was sold for Rs. 12000/- in 1946. In 1948 the same property was sold for Rs. 25000/-. Premises No. 61, Lower Circular Road which fetched Rs. 15000/- in 1944 was sold in March, 1948, for Rs. 55000/-. Premises No. 82, Lower Circular Road was valued at Rs. 5,500/- per cotta during the present general revaluation as against Rs. 5000/- at the previous stage. For this part of the case it is not necessary to discuss the nature of the properties; that there has been a general increase in the land value in the locality is substantially proved by these instances. On behalf of the assessee no attempt was made to prove to the contrary. It must, therefore, be held that there was an increase in the land value since the last general revaluation. But, the question is to what extent is that increase to reflect on the annual value to be fixed for the premises in question.

(33) As we have already held, for fixing the present value of the land, the value of bare land is not to be the sole criterion which is to be the basis for the calculation. Modifications are to be introduced dependent upon the character of the buildings and the nature of the structures. The Assessor to the Corporation states that he had valued the land with the buildings, but when he was asked to give the details, he pointed out how he had valued the large plot, dividing the same into two different belts & how the price for each one of those belts had been fixed. The average price after taking the value of each belt comes up to Rs. 5400/-. He then continues to state that after allowing deduction for the largeness of area, the price was fixed at Rs. 5400/- per cotta. The cross-examination was directed to the valuation as fixed by the assessor of the different belts, but on this point it is not for the Corporation to justify how the rates were fixed with reference to the belts or for the land taken as a whole.

(34) The expert examined on behalf of the assessee. Mr. Parks, has now, however, given any indication as to the basis of the rate per cotta, as proposed by him. He has also divided the lands into different belts. During the examination-in-chief, no reference was made to any particular contiguous plot on the basis of which the rates have been suggested by him. Further, it is to be pointed out that although he suggests Rs. 1787/- or Rs. 1800/- is round sum as the value per cotta on the average, the assessee himself in his memorandum filed before the Court of Small Causes as also before this Court agrees to a maximum rate of Rs. 2500/- per cotta. It must be held that the assessee has not been able to discharge the onus which lies upon him to show that the rate fixed by the Executive Officer was not a proper one.

(35) Criticism was directed to that part of the evidence of the assessor to the Corporation where he referred to a deduction owing to the largeness only for fixing the value at Rs. 4500/- per cotta. This criticism is to some extent justified as the assessor did not indicate in his deposition as to whether he had, in reducing the amount from Rs. 5400/- to Rs. 4500/- per cotta, remembered that the land was to be valued not at bare land but as land with the buildings. Mr. Banerjee on behalf of the Corporation points out that just above this statement the assessor had stated that he had valued the land with the building.

This point, however need not be laboured much as after giving a hearing on the objection raised by the assessee, the Special Officer reduced the rate per cotta from Rs. 4500/- to Rs. 3200/- per cotta. Mr. Parks himself stated that owing to the disposition of the building the difference between the market rate of vacant plot and the present value of the land valued with the building was only a slight one. As a substantial reduction was allowed by the Special Officer, we do not feel justified in reducing the rate fixed by him.

(36) All the grounds urged in this appeal fail, and this appeal is dismissed with costs.

(37) LAHIRI, J.: I agree.

B/V.R.B Appeal dismissed.

****A.I.R. 1953 CAL. 433 (Vol. 40, C.N. 165)**

(SPECIAL BENCH)

CHAKRAVARTTI C. J., DAS, BANERJEE, DAS GUPTA AND S. R. DAS GUPTA JJ.

Chairman, Budge Budge Municipality, Appellant v. Mongru Mia and others, Respondents.

A. F. O. O. No. 77 of 1951, D/- 10-9-1952.

†**(a) **Constitution of India, Art. 226 — Appeal — (Letters Patent (Cal.), cl. 15).**

Per Chakravartti C. J., Das, Banerjee and Das Gupta JJ. (S. R. Das Gupta J. contra) : A judgment of a single Judge on an application under Art. 226, whether in a matter arising within the original jurisdiction or in a matter arising outside, is a judgment pursuant to S. 108, Government of India Act, 1915 and therefore is appealable under cl. 15 of the Letters Patent. There is nothing in Art. 226 to exclude such an appeal if the rules of the High Court and the Letters Patent provide for it. AIR 1952 Mad 300, Rel. on; AIR 1951 Bom 25 (FB), Dist. and A. A. O. No. 26 of 1952 (Cal), Approved. (Paras 5, 26, 65, 70 and 77)

Anno: C.P.C., L.P. (Cal), Cl. 15 N. 4.

†**(b) Letters Patent (Cal), Cl. 15 — Scope.**

It is unarguable that nothing but judgments given in exercise of the jurisdictions specifically conferred by and mentioned in the Letters Patent is contemplated by Cl. 15. In actual fact, judgments given in exercise of several jurisdictions not expressly mentioned in the Letters Patent have been held to be appealable. (Para 12)

Anno: C.P.C., L.P. (Cal), Cl. 15 N. 4.

(c) Letters Patent (Cal.), Cl. 15 — Scope.

It is not correct to say that in order to come under Cl. 15, a judgment must be one given in exercise of a jurisdiction existing at the date of the Government of India Act of 1915, or at the most, at the date of the Act of 1935. (Para 13)

Anno: C.P.C., L.P. (Cal), Cl. 15 N. 4.

(d) Letters Patent (Cal), Cl. 15 — "Pursuant to S. 108, Government of India Act 1915" — (Interpretation Act (1889), S. 38(1)) — (General Clauses Act (1897), S. 8).

By virtue, first, of S. 38(1) of the Interpretation Act, 1889, which applied to the Government of India Act of 1935 and then of S. 8 of the General Clauses Act which applies to the Constitution, the reference to S. 108 of the Government of India Act in Cl. 15 must now be construed as a reference to Art. 225 of the Constitution. (Para 18)

(e) Constitution of India, Arts. 225 and 226 — Scope.

Article 225 defines the whole jurisdiction of the existing High Courts and its effect is to provide that such High Courts shall have all their existing jurisdictions, so far as they are not inconsistent with the provisions of the Constitution and such further jurisdictions as are being conferred by the Constitution itself or may be conferred in future either by Parliament under the provisions of the Constitution or by laws of the appropriate Legislature provided that by such laws the jurisdiction may also be curtailed. It is not correct to read the Article as solely concerned with the preservation of the existing powers and the provision introduced by the words "subject to" as merely providing that the High Courts shall have their existing jurisdiction only so far as it is not being curtailed by the Constitution or may not be curtailed in future by laws of the appropriate Legislature. Hence the jurisdiction conferred by Art. 226 is a jurisdiction within Art. 225 and therefore, in so far as jurisdiction is concerned, a judgment given in exercise of the jurisdiction conferred by Art. 226 is a judgment pursuant to Art. 225. (Para 19)

The nature and limits of the power given by Art. 225 to make rules for the regulation and distribution of the business of the Court must be sought in S. 108 of the Government of India Act, 1915. (Para 20)

Since the power conferred by S. 108 is power to frame rules for the exercise of all jurisdictions, whether existing at the date of the Act of 1915 or subsequently vested, and that power has been preserved by Art. 225 of the Constitution, a judgment of a single Judge, in exercise of the jurisdiction conferred by Art. 226, is, even in respect of the rule assigning such jurisdiction to him, a judgment pursuant to S. 108 or Art. 225. (Para 24)

Section 108(2) is the only provision which empowers the Chief Justice to determine what Judge shall sit singly and what Judges shall constitute the Division Courts. That part of the section also is now incorporated in Art. 225. Outside S. 108(2), (now Art. 225), there never was and there is not now any other provision which gives power to the Chief Justice to nominate from time to time particular Judges for particular Courts or Benches. When therefore a particular Judge sits in a particular Court, he does so under a determination by the Chief Justice, whatever jurisdiction he may exercise and since such determination can only be made under S. 108(2), now Art. 225, he sits and exercises jurisdiction, pursuant to S. 108. (Para 25)

(f) High Court Rules and Orders — Calcutta High Court Appellate Side Rules, Chap. II, R. 8.

Rule 8 under which a single Judge hears applications under Art. 226 of the Constitution in matters arising outside the original jurisdiction of the Court was not and could not have been framed under S. 129, Civil P. C. because that section only preserves the power of the High Court, given by Cl. 37 of the Letters Patent, to make rules for regulating the procedure in the exercise of its original civil jurisdiction and has nothing to do with the power to make rules for the exercise of both original and appellate jurisdiction by Judges sitting singly or by Division Courts which is the subject-matter of Cl. 36, read with S. 108 of the Government of India Act, 1915. (Para 27)

(g) Constitution of India, Art. 226 — Scope.

All that Art. 226 does is to empower the High Courts to give relief in a new form and in accordance with a more direct procedure or, in other words, it puts the High Courts in possession of a new remedy for grievances which previously had to be redressed in other ways. In exercising jurisdiction under Art. 226, the High Courts do not act as special tribunals. They still function as ordinary Courts and it is only the procedure in respect of matters lying within their ordinary jurisdiction and the form of relief that may be given which are changed. (Paras 28, 60)

(h) Constitution of India, Art. 226 — Scope.

The jurisdiction exercised by the High Courts under Art. 226 is neither revisional as contemplated by S. 115, Civil P.C. nor does it appertain to the general power of superintendence conferred by S. 107, Government of India Act, now Art. 227. It is however not original, in the case of the Presidency High Courts in the limited and technical sense of the ordinary, original, civil jurisdiction of the Letters Patent which carries certain territorial limits, but it is original as distinguished from appellate. AIR 1947 PC 90 and AIR 1930 Mad 896, Ref. (Para 29)

(i) Limitation Act (1908), Art. 151 — Applicability — (Constitution of India, Art. 226) — (Letters Patent (Cal), Cl. 15).

Article 151 is applicable to an appeal against the judgment or order of a single Judge passed in exercise of his jurisdiction under Art. 226, Constitution of India. AIR 1941 Lah 257 (FB), Rel. on. (Para 38)
Anno: Limitation Act, Art. 151 N. 2.

(j) Limitation Act (1908), S. 5 — Sufficient cause.

Confusion prevailing in the matter and mistaken practice was held to be a sufficient cause for condoning delay in filing appeal against judgment of single Judge passed under Art. 226 of the Constitution. (Para 39)

(k) Constitution of India, Art. 226 — Alternative remedy.

The existence of alternative remedy is not an absolute bar against an application for writ or order under Art. 226. (Para 46)

(l) Municipalities — Bengal Municipal Act (15 of 1932), Ss. 370, 408 and 418 — Refusal to issue licenses. Per Chakravartti C. J. (Das, Banerjee and Das Gupta JJ., concurring, S. R. Das Gupta J. dissenting).

Section 370(2) applies only to licenses under S. 370(1). It is no doubt true that a license under S. 370(1) cannot be withheld on grounds foreign to S. 370(2) and on extraneous considerations. (1898) 1 QB 802, Ref. But a municipal resolution which decides not to issue licenses under Ss. 408 and 418, cannot be held to be bad because grounds mentioned in S. 370(2) do not exist. (Paras 47, 49)

(m) Municipalities — Bengal Municipal Act (15 of 1932), Ss. 402, 403 — Discretion to maintain slaughter-house — Interference — (Constitution of India, Art. 226).

Under Ss. 402 and 403, Bengal Municipal Act, it is discretionary with the Commissioners to maintain a slaughter-house and no one has a right to insist that they must maintain a slaughter-house in order to supply him with meat for the purpose of his trade. No writ or direction will issue for the enforcement of a statutory right unless it appears that the statute in question imposes a duty on, and does not merely vest a discretion in the respondent. Hence, where a municipality decides to close down its slaughter-house, no writ will be granted to cancel the resolution. (1920) 1 KB 155, Applied. (Para 50)

Atul Chandra Gupta, Noni Coomar Chakravartti and Benode Behari Haldar, for Appellant; G. P. Kar and Nirmal Chandra Chaudhuri, for Respondents.

CASES CITED:
(A) ('51) AIR 1951 Bom 25: 52 Cri LJ 305 (FB)
(B) ('52) AIR 1952 Mad 300: ILR (1952) Mad 698
(C) ('67) 7 WR 52(2) (FB)
(D) ('14) AIR 1914 Cal 388(2): 41 Cal 323
(E) ('98) 25 Cal 236
(F) ('31) AIR 1931 PC 149: 58 Ind App 259 (PC)
(G) ('41) 45 Cal WN 181
(H) ('45) 49 Cal WN 10
(I) ('47) AIR 1947 Cal 49: 51 Cal WN 42
(J) ('51) AIR 1951 Bom 147: ILR (1952) Bom 344
(K) ('52) A O O No 26 of 1952, D/- 9-6-1952 (Cal)
(L) (1913) AC 546: 82 LJ KB 1197
(M) ('48) AIR 1948 PC 12: 74 Ind App 264 (PC)
(N) ('47) AIR 1947 PC 90: 51 Cal WN 716 (PC)
(O) ('30) AIR 1930 Mad 896: 53 Mad 979
(P) ('52) AIR 1952 Cal 753: (A A O No 87 of 1952)
(Q) ('69) 12 WR 458
(R) ('69) 11 WR 107
(S) ('41) AIR 1941 Lah 257: ILR (1941) Lah 191 (FB)
(T) (1898) 67 LJ QB 632: 1 QB 802
(U) (1920) 89 LJ KB 116: 1920-1 KB 155
(V) (1877) 47 LJ QB 10: 3 QBD 1

CHAKRAVARTTI C. J.: This is an appeal under Cl. 15 of the Letters Patent against a judgment and order of Bose J. by which the learned Judge held a certain resolution adopted by the Commissioners of the Budge Budge Municipality and a notice served on the respondents in pursuance of that resolution to be both invalid and directed their cancellation under Art. 226(1) of the Constitution of India. The learned Judge also directed the Commissioners to determine according to law the applications made by the respondents for renewal of their licenses. Against that decision the Commissioners have, by their Chairman, appealed.

(2) The appeal came up for hearing in the first instance before a Division Bench constituted of S. R. Das Gupta J. and myself when two questions of general importance were raised on behalf of the respondents. The Budge Budge Municipality exercises jurisdiction in an area which lies outside the ordinary original civil jurisdiction of this Court. It was contended that no appeal lay from a decision of a single Judge, given on an application under Art. 226 of the Constitution, at any rate in a matter coming from outside the original jurisdiction. It was contended in the second place that the present appeal was barred by limitation. The judgment of Bose J. was delivered on 16-3-1951, but the appeal was

not filed till 5th June following. It was contended that the period of limitation was 20 days from the date of the order under Art. 151 of the Limitation Act and therefore the appeal was time-barred.

(3) As these questions might arise in any appeal against an order made under Art. 226 and a large number of such appeals were pending, the Division Bench thought that they ought to be decided finally by a larger Bench. Thereafter I constituted the present Special Bench and directed all appeals from orders made under Art. 226, which were ready for hearing, to be placed before it so that all parties might make their submissions on the two preliminary points. The appeals placed before us included both appeals arising out of matters which had taken place within the ordinary original civil jurisdiction of the Court and appeals arising out of matters which had taken place outside. We had thus the advantage of hearing the questions argued from all possible points of view and in their relation to all possible sets of circumstances, except that we had no case involving a purely criminal matter.

(4) It will be convenient to deal first with the two general questions before entering upon the special facts of the present case.

(5) The first question is whether an appeal lies to the High Court itself from a judgment of a single Judge of the Court, given under Art. 226 of the Constitution. The Constitution provides for no appeal within the High Court, but merely empowers the High Court to issue directions, orders or writs, including writs of certain specified kinds, for the enforcement of the fundamental rights or for any other purpose. It was accordingly contended that when a single Judge dealt with an application under Art. 226, he dealt with it as the High Court and after he had so dealt with it, there was no warrant for the High Court itself dealing further with it by way of hearing an appeal. The power given by Art. 226, it was argued, was given to the High Court and as soon as a Judge of the High Court exercised it, it was exhausted, whether he issued a writ or order or refused to do so.

I am unable to accept that contention as sound. It is true that the power given by Art. 226 is given to the 'High Court', but in the absence of any special direction in the Constitution as to how the power is to be exercised, it must be exercised by each High Court according to its own rules and to the provisions of its Letters Patent, like any other power given to the High Court in general terms. If a High Court makes a rule that applications under Art. 226 shall be heard by one Judge, sitting as a Court of first instance and if the Letters Patent of the Court makes the judgments of such Judge given on such applications, appealable to the High Court itself, then by the entertainment of appeals from such judgments, the power given by Art. 226 to the High Court will not be exceeded. The Appellate Division of the High Court is also the High Court. It seems to me to be perfectly clear that when some law simply gives some power to the High Court, such power becomes liable to be exercised in accordance with the rules of the Court and only in accordance with such rules can the power be exercised. There is nothing in such a case to require that the power must be exercised by a Judge or a Bench of the High Court once and for all. Whether under its rules, taken along with the Letters Patent, a High Court exercises the power in each case once for all or whether it exercises it by stages, as it were, first exercising it through a Judge sitting singly and then examining the correctness of such exercise through an Appellate Bench, is a question of the manner of exercising the power within the Court and not a question of the power itself. When, in the second case, an appeal is entertained, the High Court is only continuing and completing the exercise of the power and not exercising it a second time.

The case of 'In re. Prahlad Krishna' AIR 1951 Bom 25 (F. B.) (A), on which the respondents relied, was a case of the latter kind where the right sought to be asserted was a right to make successive applications for a writ of 'habeas corpus' to different Judges of the same High Court and it was that right which was negatived. The case is authority only for the proposition that the several Judges of a High Court are not each a separate High Court for the purposes of Art. 226, exercising equal, independent and co-ordinate jurisdictions, but it does not hold that a judgment under Art. 226 is exceptional in respect that no appeal lies from it, although under the Letters Patent, an appeal would lie from judgments given in similar circumstances. I am accordingly of opinion that there is nothing in Art. 226 to exclude an appeal within the High Court from a judgment given under the Article by a single Judge. I find that the same conclusion was reached by the Madras High Court in the case of — 'M. Ramayya v. State of Madras', AIR 1952 Mad 300 (B) though on different grounds.

(6) Passing now to the rules of the Court, the right to appeal from a decision of a single Judge is given by Cl. 15 of the Letters Patent which provides that subject to certain exceptions, an appeal shall lie to the High Court

"from the judgment ..... of one of the Judges of the said High Court, ... pursuant to S. 108 of the Government of India Act."

The Government of India Act referred to is the Act of 1915, as amended by the Acts of 1916 & 1919. Although that Act was replaced by the Act of 1935 & the latter Act also has since been replaced by the Constitution, the reference in Cl. 15 to the 'Government of India Act' has remained unaltered. It may be pointed out that though the year of the Act is not given, the Act of 1915 is correctly referred to, because under S. 45 of the amending Act of 1919, the mode of citation for the principal Act of 1915, as amended by the two later Acts, is simply the 'Government of India Act.'

(7) The main argument against the maintainability of an appeal was that in order to be appealable under Cl. 15, a judgment must be a judgment pursuant to S. 108 of the Government of India Act, but a judgment given by a single Judge of this Court, on an application under Art. 226, was not a judgment so pursuant. Section 108 of the Government of India Act is in the following terms:

"108 (1). Each High Court may, by its own rules, provide as it thinks fit for the exercise by one or more Judges, or by division Courts constituted by two or more Judges, of the High Court, of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts".

(8) Various reasons were given as to why a judgment given by a single Judge under Art. 226 of the Constitution was not pursuant to the

above section and not a judgment under Cl. 15. It was said that Cl. 15 only contemplated judgments given in exercise of such jurisdictions as were expressly mentioned in the Letters Patent itself and S. 108 also was limited to the distribution of business in respect of those jurisdictions. Exercise of any new jurisdiction conferred on the Court, such as the jurisdiction under Art. 226, was not within the contemplation of S. 108 and accordingly a judgment, given in exercise of such jurisdiction, was not a judgment within the meaning of Cl. 15. In any event, it was further contended, S. 108 of the Government of India Act was limited to jurisdictions existing at the date of the Act and any jurisdiction subsequently conferred on the Court was outside its ambit. The argument was completed by saying that the rule under which a single Judge exercised jurisdiction under Art. 226 had not been made under S. 108 of the Government of India Act, but under S. 129, C. P. C., at any rate so far as he exercised such jurisdiction the limits of the original jurisdiction of this Court.

(9) The argument that the jurisdiction under Art. 226 was a new jurisdiction was developed by saying that it was not only a new but also a special jurisdiction, in exercising which the High Court acted as a special Court. Accordingly, neither Cl. 15, nor S. 108 of the Government of India Act would apply to judgments given in exercise of such jurisdiction and no appeal could lie from them, as no right of appeal had been specifically given.

(10) A last argument was based on two of the exceptions contained in Cl. 15, viz., "an order made in the exercise of revisional jurisdiction" and "an order passed in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act." It was contended that at least when issuing writs or orders under Art. 226 outside the original jurisdiction, the Court exercised not original jurisdiction, but revisional jurisdiction or the power of superintendence and therefore in such cases the judgment was not appealable.

(11) I shall take these contentions in the order I have stated them. As regards the first of the contentions, it might seem strange that whether an appeal lay or not would depend upon the rule under which the work was assigned to the Judge. A right of appeal, however, does not exist in the nature of things, but is a creature of enactment and therefore if a right under Cl. 15 of the Letters Patent is to be made out in the present case, the judgment in respect of which the right is claimed must be shown to be "pursuant to S. 108 of the Government of India Act," as contended by the respondents.

(12) The contention that Cl. 15 only contemplates judgments given in exercise of one or other of the jurisdictions specifically mentioned in the Letters Patent is plainly unsustainble. As long ago as in 1867, it was said by a Full Bench of seven Judges in the case of — 'Ranee Shurno Moyee v. Luchmeeput Doogur', 7 WR 52(2) (FB) (C) that it would not be proper

> "to take away a right of appeal given by the words of S. 15, if read in their ordinary and natural sense, by giving them a narrow and restrictive construction".

But the matter does not rest merely on general observations of high authority or considerations of a general character. Before the amendment of 1928, Cl. 15, so far as is material, provided that an appeal would lie to the High Court "from the judgment ..... of one Judge of the said High Court ..... pursuant to S. 13 of the said recited Act". The "said recited Act" was the High Courts Act of 1861, or as it is generally called, the Charter Act, and S. 13 of that Act provided that the High Court might, by its own rules, provide for the exercise by one or more Judges or by Division Courts, of the original & Appellate Jurisdiction vested in the Court. The jurisdiction specifically mentioned in the Letters Patent were the same as now and did not include revisional jurisdiction over Courts subordinate to the High Court. Yet it was held in — 'Shew Prosad v. Ram Chunder', A. I. R. 1914 Cal. 383 (2) (D) by Jenkins, C. J. and Woodroffe J. that an order made by a single Judge under S. 115, C.P.C., interfering with a judgment of the Presidency Small Cause Court, was appealable under Cl. 15 of the Letters Patent. A judgment given in exercise of a jurisdiction not expressly mentioned in the Letters Patent was thus held to be a judgment, pursuant to S. 13 of the Charter Act, i. e., pursuant to the rules made for the exercise of the original and appellate jurisdiction of the Court and therefore to be appealable under Cl. 15.

The same view was taken in other cases in Calcutta and in Madras, but a contrary view was taken in Bombay. But the former view as to the effect of Cl. 15, as it then stood, was accepted as correct and judgments given in exercise of the revisional jurisdiction were specifically excluded from Cl. 15 by an amendment of the Letters Patent in 1919. There could have been no need of such amendment if judgments given in exercise of jurisdictions not specifically mentioned in Cl. 15 were already outside the ambit of the clause. Besides, if Cl. 15 was intended to be limited to judgments given in exercise of jurisdictions specified in the Letters Patent itself, there could be no reason to introduce a reference to S. 13 of the Charter Act in that clause and Cl. 36 and it would have been sufficient and more appropriate to authorise the framing of rules by the latter clause itself for the exercise of the specified jurisdictions of the Court by single Judges or Division Courts. The effect of the reference to S. 13 of the Charter Act and to the exercise of the original and appellate jurisdiction vested in the Court thereunder was to import jurisdictions other than those expressly conferred by the Letters Patent, e. g., the jurisdiction of the Supreme Court vested by Ss. 9 and 10. The latter jurisdiction, as is well known, has been preserved by a series of subsequent enactments.

In my opinion, it is unarguable that nothing but judgments given in exercise of the jurisdictions specifically conferred by and mentioned in the Letters Patent is contemplated by Cl. 15. In actual fact, judgments given in exercise of several jurisdictions not expressly mentioned in the Letters Patent have been held to be appealable. One instance is a judgment in exercise of the jurisdiction to punish for contempt of the Court — 'Mohendra Lall v. Anundo Coomar', 25 Cal 236 (E).

(13) The second contention on behalf of the Respondents that in order to come under Cl. 15, a judgment must be one given in exercise of a jurisdiction existing at the date of the Government of India Act of 1915, or at the most, at the date of the Act of 1935, appears to me to be equally untenable. It was contended that Cl. 15 expressly required judgments contemplated by it to be pursuant to S. 108 of the Act of 1915, and since the repeal of that Act did not affect its existence, as incorporated in Cl. 15, — 'Secy. of State v. Hindustan Co-operative Insurance Society Ltd', AIR 1931 P. C. 149 (F), the condition that such judg-

ments must be pursuant to S. 108 of the Act of 1915 was still a valid and operative condition. That contention appears to me to be fallacious, because although S. 108 of the Act of 1915 might be alive within Cls. 15 and 36 of the Letters Patent, it was not alive outside and I cannot see how in 1951 or 1952, the High Court could at all make rules under S. 108 or the Chief Justice could assign jurisdictions to single Judges or Division Courts under that section. Before coming within Cl. 15, a judgment must already have been given in pursuance of rules made under S. 108, which means and involves that S. 108 must independently exist as a provision in force at the time in order that the High Court may frame rules under it or the Chief Justice may determine under it which Judge shall sit on which Bench. A further difficulty must also be reckoned with. If the reference to S. 108 of the Government of India Act in Cl. 15 is to be taken literally and if the effect of that section, read with S. 106 (1), be that by S. 108 the High Court was empowered to make rules only with regard to jurisdictions vested in the Court at the commencement of the Act, as contended by the respondents, a judgment given in the exercise of any jurisdiction subsequently conferred would undoubtedly not be a judgment within the meaning of Cl. 15 & no appeal would certainly lie from such a judgment. But that would not be the only result. Another result would be that if the subsequent law conferring such further jurisdiction did not itself empower the High Court to make rules for the exercise of the jurisdiction by one or more Judges or by Division Courts, the High Court would have no power to make any such rules at all and the whole Court would have to sit in order to exercise such jurisdiction. Clause 36 of the Letters Patent would offer no solution of the difficulty, for that clause also speaks of performance of the functions of the Court by any Judge or any Division Court, "appointed or constituted for such purpose in pursuance of S. 108 of the Government of India Act, 1915". A construction which leads to so extraordinary a result cannot possibly be the true construction of Cl. 15.

(14) The respondents did not abandon their contention that Cl. 15 only contemplated judgments given in exercise of jurisdictions existing at the commencement of the Government of India Act of 1915, but they were prepared to concede that, at the highest, judgments within the meaning of the clause could be judgments in exercise of one or other of the jurisdictions existing at the commencement of the Act of 1935. That concession was made, because the Act of 1935, which repealed the Act of 1915, contained a saving provision in S. 223 which preserved the jurisdiction and powers of the Court,

> "including any power to make rules of Court and to regulate the sittings of the Court and members thereof sitting alone or in Division Courts",

as they were immediately before the commencement of the Act. That section was virtually a re-enactment in a combined form of S. 106 and 108 of the repealed Act and therefore by virtue of S. 38 (1) of the Interpretation Act, 1889, the reference to S. 108 in Cl. 15 would have to be read as a reference to S. 223 of the Act of 1935. If so, a judgment given in exercise of a jurisdiction existing at the commencement of the Act of 1935 and given in pursuance of rules made under S. 223 of that Act would be a judgment within the meaning of Cl. 15, but a judgment given in exercise of the jurisdiction conferred by Art. 226 which came later would still be outside the ambit of the Clause. As in the case of S. 108 of the Act of 1915 so in the case of S. 223 of the Act of 1935, the respondents' line of reasoning would certainly lead to the result contended for by them, but the difficulty that such construction would leave the High Court powerless to make any rules for the exercise of jurisdiction subsequently vested, unless such power was specifically given by the law vesting the jurisdiction, would still remain.

(15) Strong reliance was placed by the respondents on the decisions in — 'Dhirendra Kumar v. A. Latiff', 45 Cal. W. N. 181 (G) and — 'Nur Mohammed v. S. M. Solaiman', 49 Cal. W. N. 10 (H), and stronger reliance was placed on the decision in — 'India Electric Works Ltd. v. Registrar of Trade Marks', A. I. R. 1947 Cal. 49 (I). In my view, properly regarded, the first two decisions only construed the Calcutta Municipal Act of 1923 and held that the Act did not intend election disputes, which it directed to be tried by the High Court, to go beyond the Court of first instance and to be further agitated in appeal. It is true that one of the grounds given in the second case was that the Act did not add a new subject-matter to the ordinary, original jurisdiction of the Court but conferred a special jurisdiction and therefore a judgment given in exercise of such jurisdiction would not be a judgment, as contemplated by Cl. 15. But that ground has reference not to the date of the jurisdiction but to its character and will have to be considered in connection with another contention of the respondents. Neither of the first two cases, in my opinion, touches the present question.

In the third case, the learned Judges proceeded on the view that the rule under which the trial Judge had exercised jurisdiction in an appeal under the Trade Marks Act had in fact been made under a provision of that Act and not under the general provision contained in S. 108 of the Government of India Act of 1915 or S. 223 of the Act of 1935. On that view, it was not necessary for the learned Judges to consider what jurisdictions were contemplated by S. 108 of the one Act or S. 223 of the other or whether Cl. 15 was limited to judgments given in exercise of jurisdictions existing at the commencement of the one or the other Act. The observations made by them on the meaning of "pursuant to S. 108 of the Government of India Act" were therefore only 'obiter dicta'. I am referring to that fact not for the purpose of suggesting that the well-considered opinion of the learned Judges may be disregarded, but only for the purpose of pointing out that if we find ourselves unable to accept that opinion as correct, it will not be necessary for us to make a reference to a Full Bench.

With the greatest respect to their Lordships, I am unable to agree that they took a right view. It has been dissented from by the Bombay High Court in the case of — 'James Chadwick and Bros. Ltd. v. National Sewing Thread Co. Ltd.', AIR 1951 Bom 147 (J), reported since judgment was reserved in the present case, but I do not think that the learned Judges of the Bombay High Court were correct in saying that S. 38(1) of the Interpretation Act had been "completely overlooked", in the Calcutta case. At least one of the learned Judges, Das J., referred to the rule of construction embodied in S. 38(1), though he did not name the section (See P. 60, 2nd column, first paragraph of the report in the 51 Calcutta Weekly Notes) and he also considered what the effect would be if for S. 108 of the Act of 1915, S. 223 of the Act of 1935 were substituted. As he was of opinion that even then, only rules framed for the exercise of jurisdictions existing at the date of the Act of 1935 would be included, he felt bound to hold that a jurisdiction conferred by

an Act of 1940 could not have been assigned to the trial Judge by a rule framed under S. 223. The Bombay High Court did not agree that a jurisdiction conferred after the commencement of the Act of 1935 could not be a jurisdiction contemplated by S. 223, but it found it unnecessary to discuss that question, as Art. 225 had since come into force in 1950 and since that Article preserved all jurisdictions of the High Court existing at the date of the Constitution, the jurisdiction under the Trade Marks Act, conferred in 1940, could well be regarded as a jurisdiction vested by Art. 225. If so and if Art. 225 was now to be read for S. 108 in cl. 15 by virtue of S. 8 of the General Clauses Act, which was identical with S. 38(1) of the Interpretation Act, a judgment in an appeal under the Trade Marks Act would be a judgment pursuant to Art. 225 and therefore appealable under Cl. 15.

(16) I am not sure if this reasoning of the Bombay High Court by itself solves the problem. The rules framed by the Calcutta and Bombay High Courts for exercise of the jurisdiction under the Trade Marks Act were in fact framed at a time when Art. 225 was not in existence. In view of that fact, I am doubtful if, simply because Art. 225 preserves the jurisdiction under the Trade Marks Act and absorbs it, as it were, into the jurisdictions warranted by the Constitution itself, as distinguished from any jurisdiction that may be conferred by particular legislative enactments or simply because Art. 225 is now to be read for S. 108 in Cl. 15, it can be said that the rules framed under the Trade Marks Act are now to be treated as framed under Art. 225 and that therefore a judgment given by a Judge to whom jurisdiction under the Trade Marks Act was assigned by those rules is a judgment pursuant to Art. 225 and so a judgment within the meaning of Cl. 15. The argument has always been that there is a distinction between the jurisdictions which the High Court may possess at any given point of time and the sources from which the rule-making power with regard to those jurisdictions is derived and while that argument may not be available in respect of any rules for the exercise of jurisdiction under the Trade Marks Act, framed after the Constitution, in respect of rules framed before the Constitution, it is not disposed of by the mere enactment of Art. 225. But, in any event, the Bombay decision only covers jurisdictions existing upto the date of the Constitution. The present case concerns a jurisdiction conferred by the Constitution and its exercise, so far as matters outside the limits of the original jurisdiction of the Court are concerned, in accordance with rules framed after the Constitution had come into force. The question whether a judgment given by a single Judge in exercise of the jurisdiction conferred by Art. 226 is a judgment within the meaning of Cl. 15 of the Letters Patent is not directly covered by any decided case.

(17) The only aspect of the question with which we are concerned at the present moment is whether such a judgment is a judgment "pursuant to S. 108 of the Government of India Act", according to the present meaning of that phrase. But before entering upon a discussion of that question, it is necessary to remind ourselves how a single Judge comes to deal with applications under Art. 226. That Article confers a general power on the High Court to issue directions, orders or writs throughout the territories subject to its jurisdiction. An application under the Article may therefore concern a matter arising within the limits of the Court's original jurisdiction or it may concern a matter arising outside. For applications of the former class, no new rules have been framed and they are to be made in accordance with the provisions for rules nisi contained in Chapter XX of the Original Side Rules. For applications of the latter class, a rule, being Rule 8 of Chapter II of the Appellate Side Rules, has been framed and that rule directs such applications to be made before "the Judge of the Original Side taking interlocutory applications or such other Judge as the Chief Justice may appoint". Under what power the rule was framed, it has not been expressly stated.

(18) When a single Judge deals with an application under Art. 226 by reason of an assignment of business made under these rules, is the judgment passed by him a judgment "pursuant to S. 108 of the Government of India Act"? By virtue, first, of S. 38(1) of the Interpretation Act, 1889, which applied to the Government of India Act of 1935 and then of S. 8 of the General Clauses Act which applies to the Constitution, the reference to S. 108 of the Government of India Act in cl. 15 must now be construed as a reference to Art. 225 of the Constitution. What does "pursuant to Art 225" mean? Two requirements are involved : the judgment must be one given in the exercise of a jurisdiction conferred or warranted by Art. 225 and it must be one given by a Judge, acting under a rule made or maintained under the authority of the Article. It is therefore necessary to see what the provisions of Art. 225 in those two respects are.

(19) Directly, Art. 225 deals only with the existing High Courts in Part A States and its provisions fall into three parts. It preserves the jurisdiction which such High Courts had immediately before the commencement of the Constitution; preserves the power they had at that date "to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts"; and it makes such prior jurisdiction and power "subject to" the provisions of the Constitution and to the provisions of any law of the appropriate legislature. In my opinion, the words, "subject to" are not merely restrictive of the jurisdiction and rule-making power of the existing High Courts but connote enlargements of or additions to them as well. Certain enlargements of jurisdiction have been made by the Constitution itself in Arts. 226 and 227 and future enlargements of territorial jurisdiction are contemplated by Art. 230. Again, appropriate Legislatures may by law confer new jurisdictions or powers in future.

Article 225, it appears to me, defines the whole jurisdiction of the existing High Courts and its effect is to provide that such High Courts shall have all their existing jurisdictions, so far as they are not inconsistent with the provisions of the Constitution and such 'further jurisdictions as are being conferred by the Constitution itself or may be conferred in future either by Parliament under the provisions of the Constitution or by laws of the appropriate Legislature, provided that by such laws the jurisdiction may also be curtailed. I do not think it is correct to read the Article as solely concerned with the preservation of the existing powers and the provision introduced by the words 'subject to' as merely providing that the High Courts shall have their existing jurisdiction only so far as it is not being curtailed by the Constitution or may not be curtailed in future by laws of the appro-

priate Legislature. Such reading of the Article would lead to the result that with regard to new powers conferred on the High Courts by the Constitution itself or conferred subsequently by legislative enactments, there would be no provision in the Constitution, vesting them jurisdiction in the High Courts.

Assuming that the relevant provisions in the Constitution conferring new powers on the High Courts may themselves be regarded as conferring jurisdiction, the same cannot be said of future legislative Acts and if the words 'subject to' are only restrictive and only contemplate curtailment of the jurisdiction, there would be no provision in the Constitution itself for jurisdictions conferred by subsequent laws of the appropriate Legislature. It is true that Art. 246, read with the Lists in Sch. 7, confers on the Legislatures the power to make laws regarding various matters and the appropriate Legislature may, in exercise of that power, confer new jurisdictions on the High Court. But Art. 246 is concerned with the powers of the Legislature and I do not think that provision regarding new jurisdictions of the High Court, derived from future legislative Acts, is to be sought for there. It cannot be correct to read the Constitution in such a way as to lead to the result that the provisions contained in it regarding the jurisdiction of the High Courts do not themselves comprise any provision for new and further jurisdictions that may be conferred by future legislative Acts, but if such provision is to be found anywhere in Chapter V of Part VI which deals with High Courts, it can be found only in opening words of Art. 225. It would thus seem to be inescapable that with regard at least to laws of the appropriate Legislature, the words "subject to" in the opening clause of Art. 225 cover also enlargement of jurisdiction by such laws. Obviously, the words cannot bear a different meaning with regard to "the provisions of this Constitution" and must have the effect of importing into Art. 225 the enlargements of jurisdiction made by the Constitution itself. If so, the jurisdiction conferred by Art. 226 is a jurisdiction within Art. 225 and therefore, in so far as jurisdiction is concerned, a judgment given in exercise of the jurisdiction conferred by Art. 226 is a judgment pursuant to Art. 225.

(20) But is it also pursuant to Art. 225 in so far as it is given by a single Judge under the rules assigning the jurisdiction to him? If the Article had simply said that the High Courts would have power to make rules for regulating the sittings of the Court and of members thereof there would have been no difficulty. But under Art. 225

> "the power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts".

is what it was immediately before the commencement of the Constitution. Immediately before the Constitution, that power was, under S. 223 of the Government of India Act of 1935, as amended by the India (Provisional Constitution) Order, 1947, what it had been immediately before the establishment of the Dominion. Immediately before the establishment of the Dominion, the power was, under S. 223 of the Act of 1935, as it originally stood, what it had been immediately before the commencement of that Act. Immediately before the commencement of the Act of 1935, the power was as provided for in S. 108 of the Government of India Act of 1915, which is the section to which the Letters Patent still refers. The nature and limits of the power given by Art. 225 to make rules for the regulation and distribution of the business of the Court must therefore be sought in S. 108 of the Government of India Act. Although I have held that the jurisdiction contemplated by Art. 225 is not limited to jurisdictions existing at the date of the Constitution and although Art. 225 is now to be read for S. 108 in Cl. 15, still, since the power to make rules for the sittings of the Court and of the Judges is not given by Art. 225 directly and in general terms but is made to depend ultimately on S. 108 of the Act of 1915, it must be seen whether the power under that section covers power to make rules and determinations for the exercise of all the jurisdictions contemplated by Art. 225.

(21) The terms of S. 108 of the Act of 1915 have already been quoted. Before proceeding to consider their effect, it will be useful to recall at this stage that in respect of matters arising within the original jurisdiction of the Court, a single Judge deals with applications under Art. 226 under the ordinary rules of the Original Side and that it is only with respect to matters arising outside the original jurisdiction that he deals with such applications under a rule newly made. There can be no doubt that the Original Side Rules were made or can be treated as having been made under Cl. 36 of the Letters Patent in pursuance, as the clause requires, of S. 108 of the Government of India Act. In the case of a judgment on an application under Art. 226 given by a single Judge as a Judge sitting on the Original Side, there would thus seem to be no difficulty in holding that it is a judgment pursuant to S. 108 even as respects the rule under which the Judge was so sitting and dealing with the application. I am not forgetting the objection that S. 108 empowered the High Court to make rules only for the exercise of those jurisdictions which existed at the commencement of the Act of 1915, but if, in fact, jurisdiction under Art. 226 was assigned to a single Judge and he exercised it under a rule framed in pursuance of S. 108, that is one of the old Original Side Rules, it seems to be immaterial for the present purpose whether he did so correctly or not or whether the jurisdiction was correctly so assigned. Since, however, the present case is not a case which was dealt with on the Original Side, the special argument that might be available in Original Side cases would be of no assistance to the appellants. The general question as to the true scope of S. 108 of the Government of India Act of 1915 with regard to the rule-making power of the High Court has therefore to be gone into.

(22) The section consists of two sub-sections, the first corresponding to S. 13 of the Charter Act and the second corresponding to S. 14. Subs. (1) gives power to the High Court to make rules for the exercise of "the Original and Appellate Jurisdiction vested in the Court" by one or more Judges or by Division Courts. Subs. (2) makes it the duty of the Chief Justice to determine what Judge is to sit alone and what Judges are to constitute the Division Courts. It will thus be clear that a particular class of business is to go to a single Judge Court or to a Division Bench under rules framed by the Court, but a particular Judge is to sit in a particular Court and exercise the jurisdiction assigned thereto, either singly or jointly with one or more Judges, under a nomination to be made by the Chief Justice. Section 13 of the Charter Act to which Cl. 15 of the Letters Patent previously referred, contained only the first provision

but not the second. Section 108 of the Government of India Act contained both. The importance of that distinction will appear later.

(23) The argument before us and the decision in 'AIR 1947 Cal 49 (D)' on which the argument was mainly based, was confined to sub-s. (1) of S. 108. Because Cl. 15 speaks of judgments 'pursuant to S. 108', because S. 108(1) speaks of rules for the exercise of "the Original and Appellate Jurisdiction vested in the Court" and because S. 106(1) of the Act of 1915 declares the jurisdiction of the High Courts to comprise all such jurisdictions as were vested in them by Letters Patent and "all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act", it was said that any rule framed for the exercise of any jurisdiction not existing at the date of the Act of 1915 would not be a rule authorised by S. 108 and accordingly a judgment, given by a single Judge in exercise of such a jurisdiction and under the authority of such a rule, would not be a judgment pursuant to that section. I have already pointed out the absurd position which such construction of S. 108 and Cl. 15 would create. If I have referred to the matter again, it is for the purpose of indicating two more answers to the argument of the respondents.

(24) In my opinion, it is a mistake to construe the Letters Patent in the manner of an ordinary legislative Act giving certain specified powers to the Court. The Letters Patent of a Court gives its constitution & powers in general & its object is to set up the structure of a judicial machine with functions defined in general terms which must be comprehensive & elastic enough to admit all specific powers & jurisdictions that may be conferred from time to time. Such also must be the nature of provision in a Constitution Act which sets up a Court of judicature and defines its jurisdictions and powers. Since the Letters Patent of a Court and the provision in the Constitution Act creating it are the fundamental sources from which the Court derives its authority to exist & to function, such provisions must in the very nature of things be regarded as exhaustive and contain in them room for all the jurisdictions that the Court may ever legally exercise. It was for that reason that Sir Lawrence Jenkins C. J. said in AIR 1914 Cal 388 (2) (D) that S. 13 as also the scheme of the Charter Act and that of the Letters Patent showed that they recognised and spoke in terms of only one principal division of the jurisdiction of the High Court, viz., the Original and the Appellate, and what the learned Chief Justice obviously meant was that the specific mention of only those two jurisdictions did not mean that any jurisdiction which could not be regarded as included within those jurisdictions on a strict, technical view, was excluded. The two terms used were intended to cover, as between them, all jurisdictions.

It appears to me that when S. 108(1) of the Government of India Act of 1915 spoke of "the Original and appellate jurisdiction vested in the Court", it meant such jurisdictions belonging to those categories, as might be vested from time to time or, to be more particular, such jurisdiction as might be found vested in the Court at any time when rules were framed. A provision in a Constitution Act empowering the High Court to make rules for the exercise of its jurisdiction by single Judges or Division Courts could not possibly have intended to leave out jurisdictions that might be vested after the date of the Act and the language it used must be construed as comprising all such jurisdictions.

Similarly, when Cl. 15 of the Letters Patent speaks of "the judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to S. 108 of the Government of India Act", all that it, in my view, means is that such Judge must function as a single Judge or as a member of a Division Court under a rule framed by the Court and not otherwise. The reference to S. 108, it appears to me, is only a reference to the general provision under which rules of the Court are framed and is not intended to limit the judgment to judgments given by a Judge, acting under a rule properly framed under S. 108. Even if such be the intention, the position would not be different, because the power conferred by S. 108 is power to frame rules for the exercise of all jurisdictions, whether existing at the date of the Act of 1915 or subsequently vested. If that be so and if that power has been preserved by Art. 225 of the Constitution, a judgment of a single Judge, in exercise of the jurisdiction conferred by Art. 226, is, even in respect of the rule assigning such jurisdiction to him, a judgment pursuant to S. 108 or Art. 225.

(25) The other answer to the argument of the respondents is that S. 108(2) is the only provision which empowers the Chief Justice to determine what Judge shall sit singly and what Judges shall constitute the Division Courts. That part of the section also is now incorporated in Art. 225. Outside S. 108(2), now Art. 225, there never was and there is not now any other provision which gives power to the Chief Justice to nominate from time to time particular Judges for particular Courts or Benches. It is inconceivable that any Legislative Act should purport to give such power to the Chief Justice in respect of any new jurisdiction that it may confer and no Act has ever sought to do so. When therefore a particular Judge sits in a particular Court, he does so under a determination by the Chief Justice, whatever jurisdiction he may exercise and since such determination can only be made under S. 108 (2), now Art. 225, he sits and exercises jurisdiction, pursuant to S. 108. Even if it be conceded that the exercise of a particular jurisdiction may reach the stage of S. 108(1) otherwise than under rules made under that section, it can never reach the stage of S. 108(2). All judgments of Judges of a High Court must therefore be pursuant to S. 108 in this sense, except in the not easily conceivable case of a Judge or Judges usurping some jurisdiction. Even if a case goes to a single Judge Court or a Division Bench under rules framed not under S. 108 but under some particular Act, still the particular Judge or Judges sitting in that Court or on that Bench will do so under a determination made under S. 108(2) and to that extent at least, the judgment must always be pursuant to S. 108.

(26) For the reasons I have given, I am of opinion that it cannot be said that a judgment of a single Judge on an application under Art. 226, whether in a matter arising within the original jurisdiction or in a matter arising outside, is not a judgment pursuant to S. 108 and therefore not appealable. The same view was taken by K. C. Das Gupta and P. N. Mookerjee. JJ. in — 'Commercial Tax Officer, West Bengal v. Shree Ganesh Jute Mills Ltd.', A. O. O. No. 26 of 1952 D/- 9-6-1952 (Cal) (K). In my opinion, that case was rightly decided and if I have not made a more detailed reference to it, it is because the decision was not discussed before us.

(27) I do not think that there is any substance in the contention that Rule 8 of Chapter II of the Appellate Side Rules under which a single Judge hears applications under Art. 226 in matters arising outside the original jurisdiction of the Court was framed under S. 129, C. P. C. It was pointed out that the rule had been published in the Calcutta Gazette, as rules framed in accordance with S. 129 were required by S. 130 to be, and that the editor of the Quarterly Legislation Recorder, a Government publication in which the rule had been published along with other rules and Acts in a book-form, had described it as made under the Civil Procedure Code by inserting a heading to that effect. Publication in the Calcutta Gazette does not indicate that the rule was made under the Civil Procedure Code, since rules not framed under the Code are also published in the Gazette. The heading in the Government publication means nothing. On the other hand, the rule could not have been made under S. 129, C. P. C., because that section only preserves the power of the High Court, given by Cl. 37 of the Letters Patent, to make rules for regulating the procedure in the exercise of its original civil jurisdiction and has nothing to do with the power to make rules for the exercise of both original and appellate jurisdiction by Judges sitting singly or by Division Courts which is the subject-matter of Cl. 36, read with S. 108 of the Government of India Act.

(28) It was also contended that the jurisdiction conferred by Art. 226 was a new and special jurisdiction in respect of which the High Court was constituted a special tribunal and, therefore, on the one hand, Cl. 15 which was applicable to the High Court as a High Court would not apply and, on the other hand, no appeal would otherwise lie, as no right of appeal had been specifically given. Strong reliance was placed on the case of '49 Cal. W. N. 10 (H)' in support of the argument that the jurisdiction under Art. 226 was not merely an extension of the ordinary jurisdiction of the Court by the addition thereto of a new subject-matter nor was the effect of the Article merely to change the procedure in respect of matters within the ordinary jurisdiction of the Court. On behalf of the appellants, reference was inevitably made to — 'National Telephone Co. Ltd. v. Post Master General, (No. 2)', (1913) A. C. 546(L) —'Adaikappa Chettiar v. R. Chandrashekhara Thevar', A. I. R. 1948 P. C. 12 (M) and other cases of that class in order to establish the proposition that where, as in the case of Art. 226, a question was referred by a Statute to an established Court within any further provision, the ordinary rules of procedure applicable to that Court would apply and an appeal would lie, if authorised by such rules.

I am prepared to concede that to a certain extent and in a certain sense, the jurisdiction under Art. 226 is a new jurisdiction. The Article applies of its own force to all existing High Courts in Part A States, it applies to the High Courts in Part B States by virtue of Art. 238 and may apply to High Courts in Part C States by virtue of Art. 241. Of these, only the three Presidency High Courts of Calcutta, Bombay and Madras had power to issue certain writs within the limits of their ordinary original civil jurisdiction, whereas Art. 226 empowers all High Courts to which it applies to issue directions, orders and writs of certain specified kinds throughout the territories subject to their respective jurisdictions. We need not consider here whether apart from the power given by Art. 226, the power to issue writs of certiorari, quo warranto and prohibition within the limits of their original jurisdictions still survives in the case of the High Courts of Calcutta, Madras and Bombay. The power given by Art. 226 is not that power, but a power to issue writs of habeas corpus and mandamus which even the Presidency High Courts had no longer any power to issue and also a power to issue directions and orders "to any person or authority including, in appropriate cases, any Government". Such a power given to all the High Courts is undoubtedly a new power. But while it is new in the sense that the power to act or give relief in such manner or according to such procedure did not exist before, it is not new or special in the sense that it vests the High Courts with a new function outside and unrelated to the jurisdiction they normally exercise and constitute them special tribunals for a special purpose. All that Art. 226 does is to empower the High Courts to give relief in a new form and in accordance with a more direct procedure or, in other words, it puts the High Courts in possession of a new remedy for grievances which previously had to be redressed in other ways. I do not therefore think that the argument that in exercising jurisdiction under Art. 226, the High Courts act as special tribunals, has any force. They still function as ordinary Courts and it is only the procedure in respect of matters lying within their ordinary jurisdiction and the form of relief that may be given which are changed. There is thus no reason why an appeal should not lie from a judgment given in exercise of the jurisdiction under Art. 226, if under the rules of the Court an appeal lies. I also think that a Constitution giving the existing Courts new or wider powers of giving relief is a very different thing from a statute referring some special kind of dispute to established Courts and decisions bearing on the latter class of cases are altogether beside the point.

(29) It was lastly argued that the jurisdiction under Art. 226 was a revisional jurisdiction, at least when exercised outside the original jurisdiction of the Court and, therefore, judgments given in exercise of that jurisdiction came within a specific exception contained in cl. 15 of the Letters Patent. That argument was sought to be supported by reference to another new rule, R. 15A, added to Chap. 5 of the Appellate Side Rules, which says that applications for the issue of writs or orders outside the Original jurisdiction of the Court shall be treated as revisional applications and the procedure relating to revisional applications on the Appellate Side shall apply. If a particular jurisdiction is not in fact revisional, the Court could not make it so by calling it by that name in rules framed by it. But R. 15A does not say that applications under Art. 226 of the kind mentioned by it are revisional applications: what it says is only that they shall be treated as such. It was pointed out by the Privy Council in— 'Hamid Hasan v. Banwarilal Roy', that the issue of high prerogative writs was exercise of original jurisdiction, AIR 1947 PC 90 at p. 93(N). The writs contemplated by Art. 226 are of the same nature and it is also clear that whatever may be the nature of the jurisdiction involved in the issue of the writs, the same will be the nature of the jurisdiction as respects the issue of directions or orders. In England also, the issue of the prerogative writs is treated as a matter of original jurisdiction, (Halsbury, Hailsham Edition, Vol. 9 pp. 701 et seq.) It is, however, not original, in the case of the Presidency High Courts, in the limited and technical sense of the ordinary original civil jurisdiction of the Letters Patent which carries certain territorial limits, but it is original as distinguished from appellate — 'Venkataratnam v. Secretary of State', AIR 1930 Mad. 896 (O). The jurisdiction cannot

be revisional, because it is not concerned with revising any order of a Court subordinate to the High Court, as contemplated by S. 115, Civil P. C., nor does it appertain to the general power of superintendence conferred by S. 107, Government of India Act, now Art. 227. The argument that a judgment given on an application under Art. 226 is a judgment given in exercise of a revisional jurisdiction and, therefore, not excepted from Cl. 15 of the Letters Patent, is thus not sustainable.

(30) All grounds taken in support of the contention that no appeal lies thus fail.

(31) The next contention was that assuming an appeal lay from the judgment of Bose, J. on the basis that it was a judgment of a single Judge given in exercise of an original jurisdiction, Art. 151, Limitation Act, would apply to the appeal and, therefore, not having been filed within a period of 20 days from the date of the order, as prescribed by Art. 151, the appeal was barred by limitation.

(32) The judgment in the present case was delivered on 16-3-1951, but the appeal was not filed till the 5th June. It was not disputed by the Appellant that if 20 days' limitation applied, the appeal was time-barred. On the other hand, the respondents conceded that if the period of limitation was 60 days which had been adopted in practice in the case of such appeals, the appeal was in time, in view of the period taken for obtaining a certified copy of the judgment.

(33) It appears that the practice of treating such appeals as governed by a 60 days' rule of limitation is based on a very circumlocutory process of computation. No period of limitation has been directly prescribed. But the new R. 8 of Chapt. 2 which deals with applications for the issue of orders or writs outside the Original Side of the Court, has said that the Judge, hearing them, shall do so "as a Judge sitting on the Appellate Side and as matters appertaining to that Side". Because such applications are heard by a Judge, sitting singly and because R. 8 says that the Judge hearing such applications will do so as a Judge on the Appellate Side, it has been thought that R. 2 of Chap. 8 of the Appellate Side Rules might be applied. That rule, so far as is material, says that

> "every appeal to the High Court under Cl. 15 of the Letters Patent from a judgment of ....a Judge sitting singly, on the Appellate Side of the High Court, shall be presented within sixty days from the date of the judgment appealed from."

It has been thought that a judgment on an application under Art. 226, in a matter outside the original jurisdiction of the Court, is a judgment of a Judge, sitting singly on the Appellate Side and, therefore, R. 2 of Chap. 8 of the Appellate Side Rules applies.

(34) There can be no doubt that R. 2 can have no application and the Court has not said that it would apply. It has undoubtedly said by R. 8 of Chap. 2 that the Judge, dealing with the kind of applications concerned, shall sit as a Judge on the Appellate Side, but if one has to go by rules, the Court has also said by another rule, R. 15A of Chap. 5, that the applications shall be treated as revisional applications. If they are revisional applications on the Appellate Side, R. 2 of Chap. 8 would not apply, because so far as Judges sitting singly are concerned, Chap. 8 only contemplates Judges, sitting in second appeal, who are the only Judges sitting singly on the Appellate Side contemplated by cl. 15 of the Letters Patent. Whether a Judge, sitting singly and dealing with applications for the issue of writs or orders outside the Original jurisdiction, exercises original or revisional jurisdiction, he does not, in any event, exercise "appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court" and, therefore, there can be no question of applying the rules contained in Chap. 8 of the Appellate Side Rules. But even assuming that under R. 8 of Chap. 2, read with R. 2 of Chap. 8 the judgment of a Judge, dealing with applications under Art. 226 in respect of matters outside the Original jurisdiction of the Court, is "a judgment of a Judge sitting singly on the Appellate Side", the period of limitation prescribed by R. 2 cannot still apply, because if the Judge in fact exercises original jurisdiction, as I have held he does, the application of Art. 151, Limitation Act, cannot be excluded by any rule made by the Court. Nor is the matter advanced by the direction given that appeals from such judgments shall be treated as appeals from original orders for the purposes of nomenclature and the preparation of the Paper-book. The Court cannot override a Statute. The same view was taken by Das Gupta and Lahiri, JJ. in — 'Belait Sheikh v. State of West Bengal', AIR 1952 Cal 753 (P), a decision which was merely mentioned before us, but not discussed.

(35) It was however, contended that while R. 2 of Chap. 8 of the Appellate Side Rules might not apply, Art. 151, Limitation Act, would not apply either, because the jurisdiction exercised under Art. 226 was not original jurisdiction, as contemplated by the Article. The conclusion which that argument led up to was that there was at present no period of limitation and so long as the Legislature or the Court did not prescribe a period, there would be none.

(36) Article 151, as it stands now or as it stands in the latest form that it was possible to trace, speaks of "a decree or order of any of the High Courts of Judicature at Fort William, Madras, Bombay, East Punjab, and Nagpur in the exercise of its original jurisdiction". The period of limitation is 20 days from the date of the decree or order.

(37) In support of the argument on behalf of the Appellant, we were referred to the history of the Article. It appears that before the Limitation Act of 1877, there was no such Article in the Acts of 1859 and 1871. In this Court, the period of limitation for appeals under Cl. 15 of the Letters Patent would seem to have been prescribed by rules made by the Court, for the judgment of Peacock C. J., in — 'Huruck Singh v. Toolsee Ram Sah', 12 W. R. 458 (Q), refers to certain Rules framed on 5-8-1867 under which the period was 30 days. The appeal in Huruk Singh's case was an appeal from a judgment of a Division Bench, as would appear from the report of 'In the matter of Hurruck Singh' 11 W. R. 107 (R) and it was an appeal on the Appellate Side, as would appear from the judgment of Sir Barnes Peacock in 12 W. R. 458 (Q). But presumably, the rules of the 5-8-1867 covered all appeals under the Letters Patent. The presumption is strengthened by para 2 of S. 6, Limitation Act, 1871, which provided that nothing contained in the Act would affect periods of limitation prescribed for appeals from any decree, order or judgment of a High Court in the exercise of its original jurisdiction. Obviously, the period of limitation for such appeals was left to rules made

by the Courts. Article 151 was first introduced in the Act of 1877 and was then confined to the three Presidency High Courts at Calcutta, Bombay and Madras. In the same year, by the Punjab Courts' Act (17 of 1877), s. 18, the "Chief Court of Punjab" was added. Subsequently, the Chief Court of Lower Burma was also added by the Lower Burma Courts' Act (6 of 1900), s. 47. By the Repealing and Amending Act (8 of 1930), Sch. I, Item 2, the reference to the Chief Courts of the Punjab and Lower Burma was changed into "or Lahore and Rangoon." as those Courts had in the meantime become High Courts. After the separation of Burma from India, the reference to Rangoon was deleted by the Government of India (Adaptation of India Laws) Order, 1937. Thereafter, after the partition of India, the reference to the Lahore High Court was converted into "the High Court of East Punjab" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. When exactly or by what enactment Nagpur was added, it was not possible to trace.

(38) On the basis of the history of Art. 151 set out above, it was contended that the "original jurisdiction" contemplated by it was the original jurisdiction as specified in the Letters Patent of each High Court and, therefore, the jurisdiction under Art. 226, although it might be original in nature, as distinguished from appellate, was outside it. I can see no ground for accepting that construction of the Article as correct. It was said that the three Presidency High Courts with which the Article began, had various kinds of original jurisdiction at that time, specified in their Letters Patent and an attempt was made to show that whenever the Article was extended to a new Court, the Court was one which had some original jurisdiction of a foundational kind under the Act or instrument constituting it.

It was contended that the Chief Court of Lower Burma had such jurisdiction and reference was made to ss. 16 and 17, Punjab Courts' Act, for showing that some original jurisdiction was possessed also by the Chief Court of the Punjab. Section 16 of the Act cited deals only with the Court's power to transfer suits or civil proceedings from subordinate Courts, either to itself or to another Court, and corresponds in part to Cl. 13 of the Calcutta Letters Patent. It is true that S. 17(b) speaks of "any other original jurisdiction of a civil nature", but no such jurisdiction could be traced in the Act itself which created the Court. I have already pointed out that the Article has now been extended also to the Nagpur High Court. In view of the manner in which the Legislature has dealt with the Article and also of the fact that there are other kinds of original jurisdiction than those specified in the Letters Patent, it cannot be reasonable to suppose that the Legislature, when providing for a period of limitation for appeals from judgments of certain High Courts in the exercise of their original jurisdiction, intended to provide only for judgments given in the exercise of some original jurisdictions and left the rest unprovided for and still to be dealt with by the rules of the Court. It was held in the case of — 'Punjab Co-operative Bank Ltd. Lahore v. Punjab Cotton Press Co. Ltd.', AIR 1941 Lah 257 (F.B.) (S), that Article applied to appeals from judgments and decrees made by the specified High Courts in the exercise of the original jurisdiction, whether ordinary or extra-ordinary or specially conferred by statutes. Although there is some difference of judicial opinion as to whether an appeal lies at all from judgments given in the exercise of all those jurisdictions, the view taken as to the period of limitation applicable, if an appeal lies, is, in my opinion, the correct view.

(39) The result is that the present appeal must be held to have been filed out of time. But in view of the confusion prevailing in the matter and the mistaken practice which has come to be adopted, I consider it to be a fit case in which the period of limitation should be extended under s. 5, Limitation Act. A verbal application in that behalf was made. I would allow that application and condone the delay.

(40) Turning now to the merits of the appeal, it arises out of an application made by the Respondents for an order on the Commissioners of the Budge Budge Municipality to forbear from giving effect to a resolution, dated 24-2-1950 passed by them and to cancel or recall a notice, dated 27-2-1950, served on the respondents. The respondents who are three in number alleged in their application that they owned two beef-shops, situated on Banjan Haria Trunk Road in Ward No. 4, Charial, Budge Budge in the district of 24 Parganas and had been carrying on business for a long time under licenses under s. 370(1), Bengal Municipal Act, granted to them by Budge Budge Municipality. Their shops served the local Mohammedans who were the principal inhabitants of the locality where the shops were situated and whose staple food, particularly in the case of the poor section, was beef. The conditions of the licenses, it was said, had never been violated. But after one Pandit Ram Chandra Awasti, an orthodox, up-country Brahmin, had become Chairman of the Municipality, the Commissioners, at a meeting held on 24-2-1950, adopted a resolution for closing down the municipal slaughter-house with effect from 1-3-1950 and for discontinuing the issue of licenses under ss. 408 and 418 of the Act for the slaughter of draught animals and sale of beef or the flesh of such animals within the municipal area, except on bona fide religious festivals and ceremonial occasions.

Thereafter a notice, dated 27-2-1950 was served on the respondents by which they were informed that "no license for slaughtering or for sale of beef or flesh of buffaloes etc." would be issued from 1-3-1950. It was alleged that the resolution and the notice were ultra vires and mala fide and constituted a violation of the fundamental right of the petitioners, guaranteed by Art. 19(1)(G) of the Constitution. They had made various representations to the Municipality and to other authorities, but without any effect. They had also made several applications for a renewal of their licenses, the last having been made on 22-2-1950, but those applications had not been entertained. Accordingly they prayed for the reliefs I have already mentioned and certain other incidental reliefs.

(41) The commissioners in their reply denied that their action had been mala fide and claimed that the resolution passed by them was based on reasonable grounds and was valid in law. They alleged that Ward No. 4 was a Hindu majority area. They did not deny the allegation that applications for renewal of the licenses had been made, but stated that in view of the resolution passed, no question of renewing the licenses arose.

(42) The resolution was in the following terms:

"In view of the fact that due to indiscriminate slaughter depletion of cattle wealth — the backbone of this country—has become the order of the day and inasmuch as acute shortage of draught animals and paucity in milk supply

has brought in their wake woes and miseries in abundance and because providing an adequate diet full of milk is one of the main factors in building up a strong nation of healthy and happy inhabitants, resolved that with a view to increasing the yield of milk and cattle wealth and their progeny for the general economic uplift of the masses specially the agricultural producers of the country, the municipal slaughter house for slaughtering cow, bull, bullock or buffaloes be closed down with effect from 1-3-1950 and further resolved that no licence under ss. 408 and 418 be issued for slaughtering or for sale of beef or flesh of such animals within the municipal area, excepting on bona fide religious festivals and on ceremonial occasions.

It is also resolved that the services of the watchman of Municipal slaughter house be dispensed with from 1-3-1950 in payment of one month's salary in lieu of notice".

(43) The notice read as follows:

"Dear Sirs,

With a view to increase the supply of milk and cattle wealth and their progeny, the commissioners of the Budge Budge Municipality in their special meeting held on 24-2-1950 have decided to close down the Municipal slaughter house and no license for slaughtering or for sale of beef or flesh of buffaloes, etc., will be issued henceforth. This will come into effect from 1-3-1950, which please note."

(44) Bose, J. held that a license could be withheld only on the grounds mentioned in s. 370(2), Bengal Municipal Act, but the Municipality, in passing the resolution and issuing the notice in pursuance thereof, had proceeded on wholly extraneous considerations. The learned Judge did not think that the allegation of mala fides had been proved, but he held that the Commissioners who were bound to keep within the four corners of the statute under which they functioned, had in fact gone outside them and their excesses were liable to be corrected. The learned Judge repelled an argument advanced on the basis of Art. 48 and also the argument that the respondents had an alternative remedy in an appeal. In the result, he made an order cancelling the resolution of 24-2-1950 and the notice dated 27-2-1950, directing the Commissioners to forbear from giving effect to the resolution and the notice and directing them further to determine the applications for renewal of the licenses according to law.

(45) I may point out in the first place that in passing the final order, the learned Judge went far beyond the terms of the Rule he had issued. The Rule only called upon the Commissioners to show cause why a writ of or in the nature of Prohibition or Certiorari or Mandamus should not be issued, restraining them from further proceeding with the matter referred to in the petition. There was, of course, the usual general term, "or why such other or further order be made as to this Court may seem fit and proper," but in matters in the nature of high prerogative writs, it is desirable to be precise as to the case which the opposite party is called upon to answer.

(46) The argument based on Art. 48 was not repeated before us, but it was contended that the respondents had the alternative remedy of an appeal under s. 531, Bengal Municipal Act, and, therefore, could not be allowed to claim relief under Art. 226. In my opinion, the learned Judge rightly decided that contention against the Municipality. There can be no appeal under s. 531 unless there is an order to appeal against, but in the present case no order refusing to issue a license had been passed. Besides, the existence of an alternative remedy is not an absolute bar against an application for a writ or order under Art. 226.

(47) The main question is whether the learned Judge was right in making the first two parts of his order, cancelling the resolution and the notice and directing the Commissioners to forbear from giving effect to them. I feel bound to say that on that question all the relevant sections of the Act do not seem to have received attention from the learned Judge. He had before him a license under s. 370 and if the Commissioners were not giving consideration to applications for a renewal of that license, he was entitled to direct the Commissioners to do so. But the resolution does not deal with licenses under s. 370 but with licenses under ss. 408 and 418 and the notice also, since it was given in pursuance of the resolution, must be taken as contemplating licenses under those sections. To hold a refusal to issue licenses under ss. 408 and 418 to be bad because the grounds mentioned in s. 370(2) do not exist, cannot be right, because s. 370(2) applies only to licenses under s. 370(1).

(48) The Bengal Municipal Act contemplates different licenses under Ss. 370, 407 and 418 and also a further license under s. 182. The license, last mentioned is a trade or profession license, to be taken out in respect of trades and professions mentioned in Sch. IV of the Act. One of the items in Sch. IV is retail trader or shopkeeper. But because a person takes out a license under s. 182, he does not become entitled to keep a shop for the retail sale of beef or other meat. For carrying on a retail trade in that form, he must take out a license under s. 418(1)(b). But because he takes out a license under s. 418(1)(b) as well, he does not become entitled to keep a meat shop at any place within the municipality he likes. Certain activities are of such a nature that their pursuit in certain areas requires to be controlled. Section 370(1), therefore, sets out a number of purposes and provides that no one shall use any place, within such limits as may be fixed by the Municipality, for those purposes, except under a license from the Commissioners. Keeping a meat shop comes under cl. (xiii) of s. 370(1), as a business from which offensive or unwholesome smells are likely to arise and indeed it is mentioned in the standard form of a license under the section under the heading 'G'. The license under s. 370(1) may be called the site or place license. If the limits of a certain area within the municipality have been fixed by the Commissioners for the purposes of s. 370(1), a person desiring to keep a meat shop within that area must take out a further license under that section. Section 408 to which the resolution refers does not provide for the issue of any license. The correct provision is s. 407 which provides for the issue of a license for a private slaughterhouse.

(49) It will thus appear that the learned Judge has held the resolution to be bad on considerations which are not relevant, since he has applied to licenses under ss. 407 and 418 considerations applicable to licenses under s. 370(1). It was said that the only license ever issued to or held by the respondents was a license under s. 370(1). If so, the resolution does not affect them and indeed no mere resolution ever affects anybody till it is applied and given effect to. The learned Judge is certainly right in holding that a license under s. 370(1) could not be withheld on grounds

foreign to s. 370(2) and on extraneous considerations — 'R. v. Cotham', (1898) 1 Q. B. 802 (T), but he overlooked the fact that the resolution did not refer to licenses under s. 370(1).

(50) There is another reason why, in any event, the learned Judge was not right in cancelling the whole resolution. A part of it is concerned with closing down the municipal slaughter house. Section 402(1)(b) provides that the Commissioners may from time to time build and maintain slaughter-houses & s. 403 provides that they may at any time close down any municipal slaughter-house. It is thus discretionary with the Commissioners to maintain a slaughter-house and no one has a right to insist that they must maintain a slaughter house in order to supply him with meat for the purpose of his trade. It is well settled that no writ or direction will issue for the enforcement of a statutory right unless it appears that the statute in question imposes a duty on, and does not merely vest a discretion in, the respondent, 'R. v. Marshland Smeath and Fen District Commissioners', (1920) 1 K. B. 155 at p. 165 (U). The learned Judge was, therefore, not right in cancelling at least that part of the resolution which related to the closing down of the slaughter-house.

(51) For reasons I have already given, he was also not right in cancelling the rest of the resolution. The resolution, as such, does not affect the respondents, since it speaks only of licenses under ss. 408 and 418 which they do not hold and do not claim. If they ever apply for a license under s. 418 or under s. 407 and such application is refused or not considered, occasion will arise to consider their claim to such licenses.

(52) But according to their application, they did apply for the renewal of their licenses under s. 370(1) and those applications have not yet been considered. The right to have those applications considered cannot be disputed. Although I have held that the notice served on the respondents perhaps contemplates only licenses under ss. 407 and 418, the sections are not mentioned in the notice and the general language "licence for sale of beef" may have been intended to cover the license under s. 370(1). In the circumstances, the consideration of the applications may in actual fact be unreal, if the notice be allowed to stand. I would, therefore, maintain the learned Judge's order cancelling the notice and directing the consideration of the applications.

(53) In the result, the appeal is allowed in part. The judgment and order of the learned Judge, in so far as they deal with & direct the cancellation of the resolution of 24-2-1950, are set aside & the rest of the judgment and order are maintained. Each party will bear its own costs in the appeal.

(54) DAS J.: I agree.

(55) S. N. BANERJEE J.: I agree.

(56) K. C. DAS GUPTA J.: I agree.

(57) S. R. DAS GUPTA J.: I am unable to agree with the view expressed by my Lord the Chief Justice. In my opinion no appeal lies from an order passed by a single Judge under Art. 226 of the Constitution.

(58) In order to determine whether or not there is right of appeal to this High Court from an order passed under Art. 226 by a single Judge, the first question which arises for our consideration is whether or not Art. 226 conferred a new jurisdiction on the High Court. It has been urged on behalf of the respondents that the Constitution by its Art. 226 has conferred a new jurisdiction, and as no provision for appeal has been made in the Constitution itself, there is no right of appeal from an order passed under Art. 226 by a Single Judge to a Bench of this Court. Again, in order to determine whether or not Art. 226 has conferred a new jurisdiction, we have first of all to see what is meant by "jurisdiction". When asked as to what is meant by "jurisdiction", Mr. Advocate General and Mr. Gupta both answered by saying that jurisdiction is power, but they at the same time contended, as I have understood them, that what has been done under Art. 226 was mere extension of power. Once it is admitted that "jurisdiction" is "power", then it must logically follow that any extension of power would amount to conferring new jurisdiction. But is "jurisdiction" the same thing as "power"? To my mind "jurisdiction", is certainly not identical with "power".

Although it is difficult to give an exact definition of the word "jurisdiction", it is possible to give an idea as to what is meant by saying that a Court has a particular jurisdiction by reference to the provisions of the Letters Patent of 1865. The said Letters Patent has conferred on High Courts of the Presidency towns various kinds of jurisdiction. Clauses 11 and 12 provided for Ordinary Original Civil Jurisdiction of the High Courts. The effect of these two clauses is that a High Court will have within a particular area jurisdiction to receive, try and determine suits of every description, subject, of course, to the conditions mentioned in cl. 12. It is, therefore, the jurisdiction to receive and to try suits which is known as Ordinary Original Civil Jurisdiction. In exercising such jurisdiction High Courts may have various powers under various statutes, but they are not to be confounded with jurisdiction. For example, the West Bengal Rent Control Act conferred upon the Courts power to grant various reliefs and make various orders which the Courts did not possess before. But those powers are certainly not the same thing as jurisdiction. Similarly, High Courts have been vested with Extraordinary Original Civil Jurisdiction, Infancy and Lunacy Jurisdiction, Insolvency Jurisdiction, Testamentary and Intestate Jurisdiction, and various other jurisdictions mentioned in the Letters Patent. In exercising such jurisdictions Courts may have power to grant various reliefs and those powers are enlarged or abridged from time to time, but they are not the same thing as jurisdiction.

(59) Having dealt with the question as to what is meant by "jurisdiction", I shall now proceed to consider whether Art. 226 has conferred any new jurisdiction or there has been mere extension of power, the jurisdiction having been already vested in the High Courts. What the learned Advocate General meant to say in his argument is that jurisdiction in this case is the jurisdiction to issue writs and that jurisdiction was already there. He further contended that Art.226 has not conferred any new jurisdiction, but there has been mere extension of power in the exercise of such jurisdiction. Mr. Kar, on the other hand, contended that Art. 226 has conferred a new jurisdiction. According to him in view of the provisions contained in Art. 226, whatever jurisdiction High Courts had in the matter of issuing writs disappeared and the Constitution conferred a new jurisdiction by the said Article. The question now is which of these two contentions is sound?

(60) In my opinion Art. 226 conferred on High Courts a new jurisdiction. It is no doubt true

that by the Charter establishing Supreme Court, dated March 26, 1774, the Supreme Court of Judicature at Fort William in Bengal was empowered and authorised to award and issue writs of mandamus, certiorari, procedendo or error, and by the Act establishing High Courts of Judicature in India, dated August 6, 1861, all jurisdiction and every power and authority already vested in any of the High Courts to be established in each Presidency town were preserved. Subsequently, of course, by legislative enactments some of those jurisdictions, powers and authority, for example, as to the writs of habeas corpus and mandamus, have been taken away. But the jurisdiction which has been conferred by Art. 226 is a new jurisdiction. It is a jurisdiction not only to issue writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them but also to issue to any person or authority including Government any directions or order for enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose. Thus, in the first place, the jurisdiction conferred by Art. 226 is not limited only to issuing writs. By the said Article jurisdiction has been conferred upon the High Courts to issue any direction or order and upon any person or authority. Even in the matter of issuing writs High Courts have been empowered to issue new writs which is evidenced by the use of the expression "writs, including writs in the nature of". There has not been merely extension of power as contended by Mr. Advocate General, but a new jurisdiction has been created in High Courts by Art. 226.

In the second place, jurisdiction conferred by Art. 226 has been conferred upon every High Court in India. Even if it be assumed that the High Courts of Calcutta, Madras and Bombay had, prior to the Constitution, the jurisdiction to issue writs and, therefore no new jurisdiction has been conferred by Art. 226, that cannot be the position so far as the other High Courts are concerned, because these High Courts had no power to issue writs. Therefore the result, if Mr. Advocate General's argument be accepted, would be that so far as the High Courts of Calcutta, Madras and Bombay are concerned there has been mere extension of power, whereas so far as the other High Courts are concerned a new jurisdiction has been conferred upon them. This certainly is a very anomalous position. In fact Mr. Gupta, who also appeared in support of the view that an appeal lies, conceded that no High Court had the right to issue writs under Art. 226 and this right is new to all High Courts and it cannot be, that Art. 226 has extended the power of some High Courts while conferring new jurisdiction on others. Of course, he argued, whether or not the extended power of the three High Courts still exists or not is a different question. I, therefore, hold that Art. 226 has conferred a new jurisdiction on the High Court.

(61) Having come to the conclusion that Art. 226 conferred a new jurisdiction on all High Courts, I shall now proceed to consider whether in that event an appeal lies from an order made by a Judge sitting singly to a Division Bench of this High Court. The Constitution itself does not provide for any such right of appeal. "An appeal", as observed by Bramwell, L. J., in the case of — 'Sandbach Charity Trustees v. North Staffordshire Railway Co.', (1877) 3 QBD 1 (V)

"does not exist in the nature of things: a right to appeal from any decision of any tribunal must be given by express enactment."

If the Constitution itself which conferred such jurisdiction has not given any such right of appeal, how then is such a right created? Mr. Advocate General and Mr. Gupta contended before us that such a right is derived from cl. 15 of the Letters Patent. In short, their argument is that such a order made by a Judge, sitting singly, under Art. 226 is a judgment of one Judge of the High Court, and is pursuant to S. 108, Government of India Act, 1915, as contemplated in cl. 15 of the Letters Patent and is, therefore, appealable under the said clause. Mr. Kar and Mr. Basu on the other hand contended that a judgment contemplated in cl. 15 must be a judgment passed in the exercise of any of the jurisdictions vested in the High Courts by the Letters Patent of 1865. In the second place, they argued that a judgment passed by a single Judge under Art. 226 is not a judgment "pursuant to S. 108, Government of India Act, 1915", and is, therefore, not a judgment as contemplated in the said clause. They further contended that the determination by the Chief Justice that Bose J. would hear those matters is a determination which could have been made only under S. 129, Civil P. C.

(62) Thus, two questions arise for our consideration: (1) Should a judgment as contemplated in cl. 15 of the Letters Patent be a judgment passed in the exercise of any of the jurisdictions already vested in the High Court by Letters Patent of 1865? (2) Is the judgment passed by a single Judge under Art. 226 a judgment pursuant to S. 108, Government of India Act, 1915?

(63) I shall first of all deal with the question as to whether or not a judgment passed by a single Judge under Art. 226 of the Constitution is a judgment pursuant to S. 108, Government of India Act, 1915. It is conceded by the learned Advocates for all the parties that a judgment of a single Judge in order to be appealable under the Letters Patent must be "pursuant to S. 108, Government of India Act, 1915". The relevant sections of the Government of India Act which are necessary to be considered are S. 106(1) and S. 108, Government of India Act, 1915. The said sections read as follows:

Section 106(1): "The several High Courts are Courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the Court, and power to make rules for regulating the practice of the Court, as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction. powers and authority as are vested in those Courts respectively at the commencement of this Act."

Section 108: "(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court, of the original and appellate jurisdiction vested in the Court.

(2) The chief justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several Division Courts."

(64) Reading the said sections together it seems to me that under S. 106(1) the High Courts were given such jurisdiction, power and authority as were already vested in them at the commencement of the said Act, and it was with regard to these jurisdictions that the power to make rules was given to High Court under S. 108 of the said Act of 1915.

(65) If this is the correct view to take — which I think it is — as to the effect of the said Act on the rule making power of High Court, then the rules framed for dealing with matters coming to High Court under Art. 226 of the Constitution could not have been framed under S. 108 of the said Act because the jurisdiction conferred by Art. 226 is a new jurisdiction and the judgment of a single Judge disposing of those matters cannot be said to be a judgment pursuant to S. 108, Government of India Act, 1915. The view which I am taking in this matter is fully supported by a decision of a Division Bench of this Court given in 'A. I. R. 1947 Cal 49 (I),. Both Gentle J. and S. R. Das J. who decided that case came to the same conclusion, namely, that the rule-making power vested in the High Court under S. 108, Government of India Act, is only with regard to those jurisdictions that were already vested in the High Court at the commencement of that Act. Gentle J. in the course of his judgment observed as follows:

"The authority, given by S. 108 (1) of the 1915 Statute to make rules for the exercise by one or more Judges of the Court's appellate jurisdiction, is limited to the jurisdiction then vested in the Court, that is to say, the jurisdiction conferred by S. 106 (1). Such rules, therefore, cannot relate to jurisdiction conferred by an Act passed after the commencement of the 1915 Statute nor to an appeal heard by the Court pursuant to such an Act since the jurisdiction to hear such appeal is conferred by the particular Act giving the right to such appeal and was not conferred upon or vested in the Court by S. 106 (1)".

(66-69) Das J. also came to the same conclusion. After quoting S. 106 (1) and S. 108, Government of India Act, 1915, his Lordship observed as follows:

"The position at the commencement of the 1915 Act was, therefore, that under S. 106 (1) this High Court had such jurisdictions, powers and authority as—

(i) it got under the Letters Patent;

(ii) it inherited from the Supreme Court, in so far as they had not been taken away by Indian Legislative enactments;

(iii) it derived from Indian Legislative enactments up to that date.

It was with regard to these jurisdictions, original and appellate, that the High Court was empowered by S. 108 to make rules".

(70) I am unable to see any reason for dissenting from the view taken by their Lordships in that case. In this connection it should be mentioned—and S. R. Das J. has also mentioned it in his judgment in that case — that although the 1915 Act was repealed by Government of India Act, 1935, but as no corresponding amendment was made in Cls. 15 and 36 of the Letters Patent and reference to S. 108 of the 1915 Act still remained in those clauses, "the appealability", to use the words of Das J.

"under Cl. 15 of a judgment of a single Judge must yet be pursuant to S. 108, Government of India Act, that is to say, passed in the exercise of the original and appellate jurisdiction vested in it at the commencement of 1915 Act and passed by one Judge sitting singly under Cl. 36 in pursuance of the provisions of the rules made under S. 108".

If, then, the rule making power vested in the High Court under S. 108, Government of India Act, 1915, is with regard to those jurisdictions that are already vested in the High Court at the commencement of the Act, that rule-making power cannot extend to and cannot be exercised with regard to the new jurisdiction conferred by Art. 226 of the Constitution and, therefore, a judgment passed by a Judge sitting singly under Art. 226 of the Constitution will not be a judgment pursuant to S. 108, Government of India Act, 1915. It is conceded that if a judgment is not pursuant to S. 108, Government of India Act, then no appeal lies under Cl. 15 of the Charter.

(71) As against this view it was argued before us that if the rules made by this Court relating to disposal of matters coming up before it under Art. 226 and authorising a single Judge to decide such matters could not have been rules framed under S. 108, Government of India Act, 1915, then the result would be that this High Court could not frame any rules for disposal of such matters. Under what authority then — it was argued — could the High Court frame rules at all for disposal of such business. The result would be, according to the said argument, that the High Court would not be able to frame any such rules and in that event all the Judges of the High Court will have to sit together to dispose of matters under Art. 226 and that would lead to an absurd situation.

(72) This argument, although attractive, cannot, in my opinion, be accepted. It overlooks the fact that S. 108, Government of India Act, is not the only source from which the High Court derives its rule-making power. The question as to the different sources from which this High Court derives its rule-making power was also fully considered in the said case of 'A. I. R. 1947 Cal 49 (I). Das J. in his judgment discussed this question at some length and has shown the different sources from which this High Court derives its rule-making powers and his Lordship further pointed out that although the High Court derives its rule-making powers under different enactments, Cl. 15 of the Letters Patent refers only to a particular section, S. 108 of the 1915 Act and a judgment to be appealable under Cl. 15 has to be pursuant to S. 108, Government of India Act, 1915. I cannot do better than set out the position of Das J's judgment where he dealt with this question. His Lordship observed as follows:

"As regards the Supreme Court, Cl. 38 of its Charter of 1774 empowered the said Court to frame such rules of practice, make such standing orders for the administration of justice, and the due exercise of the civil, criminal, admiralty and ecclesiastical jurisdiction thereby created and to do all such other things as shall be found necessary thereunto. The rules, however, had to be approved by the King with the advice of the Privy Council. The Act of Settlement of 1781 by S. 19 made it lawful for the Supreme Court to frame processes & make rules and orders in suits, civil or criminal against the orders in suits, civil or criminal, against the natives of Bengal, Behar and Orissa consistent with their religion and manners. Section 21 of the Act of Settlement continued the powers of the Governor-General and Council to determine appeals and references from the

country and provincial Courts and made them a Court of record and S. 23 empowered the Governor-General in Council to frame regulations for the provincial Courts and Councils subject to the approval of the King in Council. The High Courts Act, 1861, authorised Her Majesty to establish High Courts at Calcutta, Madras and Bombay by S. 8 provided for the abolition, upon the establishment of the High Courts, of the Supreme Court and the Sudder Courts.

Section 11 of that Act, however, continued all Acts of Parliament, Orders in Council and Charters and Acts of Indian Legislature then in force, so far as they might be consistent with the provisions of that Act and the Letters Patent to be issued and subject to the legislative powers in relation to those matters of the Governor-General of India in Council, and S. 12 provided for the continuation of the proceedings pending in the abolished Courts as if they were instituted in the High Court but under and according to the practice of the abolished Courts respectively. Section 13, I have already mentioned, authorised that subject to any laws or regulations of the Governor-General in Council the High Court might, by its own rules, provide for the exercise, by one or more Judges or by Division Courts, of the original and Appellate Jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice. Section 14 authorised the Chief Justice to determine what Judges should sit alone or in Division Courts. Section 15 conferred power of superintendence on the High Court over all Courts which may be subject to its appellate jurisdiction and to make and issue general rules of practice for the subordinate Courts. The Letters Patent of 1865, by Cl. 10 empowers the High Court to make rules for admission of Advocate, etc., and by Cl. 37 empowers the High Court to make rules and orders for regulating all proceedings in civil cases brought before the High Court consistent with the provisions of the Code of Civil Procedure, 1859.

Section 122, Civil P. C. 1908, gives powers to the High Courts and the Chief Court of Oudh to make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence and to annul, alter or add to the rules in Sch. 1 and S. 129 gives power to the Chartered High Courts to make rules regulating their own procedure in the exercise of their Original Civil Jurisdiction. The 1915 Act reproduces in S. 107 the rule-making power given to the High Court by S. 15 of the Charter Act of Courts subject to its superintendence and S. 108 the provisions of Ss. 13 and 14 of the Charter Act. Section 223 of the 1935 Act preserves all the powers of the judges including their power to make rules, and S. 224 replaces S. 107 of the 1915 Act. Besides these rule-making powers, different Indian Statutes have given rule-making powers to the High Court, e. g., Specific Relief Act, Transfer of Property Act, Guardian and Wards Act, Arbitration Act and other Acts. These are the several sources from which this High Court derives its rule making powers".

(73) His Lordship then proceeded to observe as follows:

"It will be noticed that although the High Court derives its rule-making powers under different enactments, Cl. 15 of the Letters Patent refers only to a particular section, namely S. 108 of the 1915 Act and a judgment, to be appealable under Cl. 15, has to be one "pursuant to S. 108". Clause 36 of the Letters Patent declares amongst other things, that any function which is thereby directed to be performed by the High Court in exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose "in pursuance of S. 108, Government of India Act, 1915". Therefore when a Judge sits singly under Cl. 36 in pursuance of a rule made under S. 108 and in exercise of jurisdiction assigned to a single Judge by such rule passes a judgment, not being of the kinds expressly excepted, such judgment becomes appealable under Cl. 15. If a Judge sits singly under any rule made by the High Court in pursuance of any other rule-making power derived from any other source such Judge does not sit singly under Cl. 36 in pursuance of S. 108 and a judgment passed by the Judge so sitting singly does not satisfy the requirements of Cl. 15 for such judgment is not passed "pursuant to S. 108". I am not unmindful of the far reaching consequences of this conclusion but logically I see no way out of this position in view of the wording of Cl. 15".

(74) Thus it appears that S. 108, Government of India Act, is not the only source from which the High Court derives its rule-making power. If S. 108 is clearly inapplicable — as in my opinion it is — then it must be presumed that rules framed for disposal of matters coming under Art. 226 must have been framed under any one of the other provisions giving powers to the High Court to frame rules to regulate its own procedure. If, then, the rules framed by this High Court for disposal of matters coming up under Art. 226 are not rules framed under s. 108, Government of India Act, 1915, then no appeal would lie from an order passed by a Judge sitting singly under cl. 15 of the Charter, because it is conceded that an appeal from a judgment of a Judge sitting singly under cl. 15 of the Charter would only lie if it is a judgment by one Judge pursuant to s. 108, Government of India Act.

(75) As for the other question namely whether a judgment as contemplated in cl. 15 of the Letters Patent must be a judgment passed in the exercise of any of the jurisdictions already vested in the High Courts by the Letters Patent of 1865, I accept the opinion expressed by my Lord the Chief Justice and I cannot hold that a judgment as contemplated in cl. 15 of the Letters Patent must be a judgment passed in the exercise of any of the jurisdictions already vested in the High Courts by Letters Patent of 1865. I need not say anything further on this point.

(76) In the premises as aforesaid, I am of opinion that no appeal lies from the order passed by Bose J. under Art. 226 of the Constitution.

(77) Having come to the aforesaid conclusion, it becomes unnecessary for me to give my decision on the merits of this appeal. But as the matter has been argued fully before us and as my Lords have given their decisions on it, I shall also shortly indicate my views thereon. In my opinion the decision of Bose J., except certain portions thereof should be upheld. My reasons for the aforesaid conclusion are shortly stated as follows: In the first place, the resolution purports to be under sub-s. (2) of s. 370, Bengal Municipal Act. But sub-s. (2) of s. 370 of the said Act authorises the municipality to withhold licenses only if the commissioners at a

meeting have reasons to believe that the business intended to be established or maintained would be the cause of annoyance, offence or danger to persons residing in or frequenting the immediate neighbourhood or that the area should be for general reasons kept clear of the establishment of such business. But as the learned Judge pointed out, it is clear from the resolution itself and the notice, dated 27-2-1950, that the reasons for not renewing or issuing licenses are not those specified in the said section. The learned Judge, in my opinion, was right in his view that the municipality has taken into consideration extraneous matters in passing the resolution and has exceeded its jurisdiction or powers conferred by the statute.

(78) In the second place, the said resolution is to the effect, namely, that in future no licence under ss. 408 and 418 be issued for slaughtering or for sale of beef or flesh of such animals within the municipal area except on bona fide religious festivals and occasions. Again it seems to me that the municipality in passing the said resolution exceeded its powers conferred by the Statute. Section 407, Bengal Municipal Act, provides that the commissioners may at a meeting grant or withdraw licences for the use of any premises for the slaughter of animals for the sale of their flesh for human consumption. Section 408 provides that no person shall slaughter for the sale of its flesh for human consumption at any place other than a municipal slaughter house or a slaughter house licensed under s. 407. It seems to me that the municipality has to consider each individual case as it comes up before it and should consider whether it should grant licences or withdraw licences already granted for use of any premises for the slaughter of animals for the sale of their flesh for human consumption. It cannot decide that no licences whatsoever to any person for slaughtering or for sale of beef or flesh of buffaloes will be issued in future.

(79) Section 407 does not, in my opinion, authorise the municipality to take up that attitude. The result of doing so would be to make the provisions of s. 407 so far as it relates to the municipality wholly nugatory. In other words, it would mean that so far as the Budge Budge Municipality and its area are concerned s. 407 is non-existent. So far as that part of the resolution, which says that in future no licence under s. 418 shall be granted, is concerned the position is also the same. Here again I hold that the municipality exceeded its power and jurisdiction. It has to decide each case on its merits and to hold whether or not licence under s. 418 shall be granted. It cannot pass a resolution, giving effect to which would result in making the provisions of s. 418 wholly inapplicable to the municipality.

(80) Mr. Kar in support of his contention that the municipality should be restrained from giving effect to the said resolution and notice also contended that the said resolution and notice interfered with his clients' fundamental rights as citizens of the Indian Union. In other words, the effect of the said resolution is that his clients are for all time to come prevented from carrying on their occupation, trade or business of butcher and seller of beef. Therefore, he urged, the said resolution should not be allowed to be given effect to. This no doubt raises a constitutional point of some importance, which can by no means be lightly brushed aside. But having regard to the fact that in my opinion the resolution on other grounds mentioned is clearly ultra vires the provisions of the Municipal Act, I do not think that I should express any opinion on this part of Mr. Kar's contention.

(81) On behalf of the appellants it has been urged before us that this application out of which this appeal arises was in any event premature and, therefore, misconceived. It was contended that all that the municipality has done is merely to pass a resolution and, therefore, it is not a specific act within the meaning of s. 45, Specific Relief Act, which the Court may require to be foreborne. In other words, it is contended that what the appellants should have done was to apply for renewal of their licences and if the municipality still refused to renew, it is then only that they could come before this Court and ask for an order under s. 45, Specific Relief Act. Merely because of the fact that the municipality has passed such a resolution, it is contended, the appellants cannot seek the assistance of this Court.

(82) In the first place, it seems to me that it would not be correct to say that the municipality has merely passed a resolution. The municipality has done something more. The municipality has served the appellants with a notice intimating that no licences for slaughter or for sale of beef or flesh of buffaloes would be issued thereafter and the said order would come into effect from 1-3-1950. Thus the municipality was not content with merely passing a resolution, but was going to give effect to the same and has notified its intention to do so to the appellants. Representations were made by the appellants to the municipality asking for reconsideration of its decision, but with no results. In the premises it may well be contended that the specific act which is required to be forborne is giving effect to the said resolution, and the facts and circumstances of this case show that cause of action for making an application for that purpose has arisen. In this case the very first prayer of the petition is for an order commanding the municipality to forbear from giving effect to the said resolution or the said notice, and the learned Judge has also by his said order 'inter alia' directed the municipality to forbear from giving effect to the same and this portion of the order of the learned Judge, in my opinion, should stand.

I cannot persuade myself to hold that it would still be necessary for the appellants to apply for renewal of the licence and the municipality to refuse it before any application for the reliefs claimed can be made. In this connection I would refer to the case which is made by the municipality in its affidavit-in-opposition filed before the learned Judge. In para. 11 of the affidavit filed on behalf of the municipality before the learned Judge it is stated that the question of renewal of licence does not arise at all in view of the resolution and the other remedies being available in law and in the light of the facts stated in the preceding paragraphs. Thus even before the learned Judge the municipality was relying on the resolution itself and was contending that in view of the said resolution no question of renewal of licence would arise. As I said before, the municipality has not only passed a resolution, but has given notice of it to the appellants and has informed them in the clearest possible terms that the municipality is going to give effect to the same and that in future no licence would be issued. The appellants thereafter asked the municipality several times in writing to revise their decision, but with no results. In the circumstances, in my opinion, an application

would lie for an order directing the municipality not to give effect to the said resolution and the notice.

(83) There is still a better reason for holding that the appellants were entitled to make such an application and the learned Judge could give them the said relief asked for. The application is purely an application under Art. 226 of the Constitution. It has been intituled as such. It does not seem to be an application under S. 45, Specific Relief Act, and it has not even been intituled as such. Thus, the conditions appertaining to an application under S. 45, Specific Relief Act, would not be strictly applicable to an application under Art. 226 of the Constitution. Under the said Article this Court has 'inter alia' power in appropriate cases to issue to any person or authority any directions or orders for any purposes. Thus Art. 226 has conferred almost unlimited powers on the High Court to make suitable orders or to give suitable directions which it can exercise in appropriate cases. The present case is, in my opinion, an appropriate case where the jurisdiction conferred by Art. 226 can be exercised. The Budge Budge Municipality has passed a resolution which is beyond the powers conferred on it by the Bengal Municipal Act. It intends to give effect to the said resolution and act upon it. It has in effect already put the said resolution in action and has notified in the clearest possible terms to the appellants the contents of the said resolution and the effect of it and asked them to make a note of it. In spite of several representations made in writing by the appellants to revise such decision, it has still stuck to it. It has relied on the said resolution even at the hearing before the learned Judge. In all these circumstances the Court, in my opinion, can ask the municipality not to give effect to the said resolution and the notice under Art. 226 of the Constitution.

(84) In the result, therefore, this appeal, in my opinion, should fail on a preliminary ground, namely, that no appeal lies from an order passed by a single Judge under Art. 226 of the Constitution. As for the merits of the order passed by Bose, J. that portion of the order which directs the municipality to forbear from giving effect to the resolution and the notice, except the portion of it which deals with the question of closing down of the municipal slaughter-house, should stand. The rest of the order of the learned Judge should be set aside and the appeal disposed of on those terms.

A/K.S. Appeal partly allowed.

A.I.R. 1953 CALCUTTA 450 (Vol. 40, C. N. 166)

CHAKRAVARTTI C. J. AND SARKAR J.

Birla Jute Manufacturing Co., Ltd., Appellant v. Dulichand Pratapmull, Respondent.

Award No. 7 of 1952; A. F. O. O. No. 36 of 1952, D/- 5-3-1953.

(a) Arbitration Act (1940), S. 34 — "Matter agreed to be referred."

However wide the terms of an arbitration agreement may be, a dispute as to the validity of a contract cannot be held to be within an arbitration agreement contained in the contract itself and such a dispute cannot be referred to arbitrators or dealt with by them under such an agreement on the basis that it is a "matter agreed to be referred." (Para 15)

Anno: Arbitration Act, S. 34 N. 8.

(b) Arbitration Act (1940), S. 34 — "Matter agreed to be referred"—(West Bengal Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance (17 of 1950), S. 5(2).)

When a jute contract is impugned as invalid on the ground that it was entered into in violation of the Ordinance, an arbitration agreement contained in the contract is not severable and capable of having independent effect and accordingly it cannot sustain a reference of the dispute to arbitrators. (Para 19)

Anno: Arbitration Act, S. 34 N. 8.

(c) Contract Act (1872), S. 23 — "Forbidden by law" — (West Bengal Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance (17 of 1950), S. 5(2)) —(Arbitration Act (1940), S. 34).

An arbitration agreement regarding an unlawful jute contract would attract the ban imposed by S. 23, Contract Act. (Para 19)

Anno: Contract Act, S. 23 N. 2; Arbitration Act, S. 34 N. 8.

(d) Arbitration Act (1940), S. 34 — Stay — Court's discretion.

Section 34 confers a discretion on the Court, but it is only a discretion to stay or not to stay the suit after the conditions laid down in the section are found to be satisfied but it is not a discretion to stay the suit even if one of the conditions may be unsatisfied. (Para 22)

Anno: Arbitration Act, S. 34 N. 3.

(e) Arbitration Act (1940), S. 34 — A decision as to validity of arbitration agreement.

No useful purpose can be served by the Court proceeding to decide on the application under S. 34 whether there is a valid arbitration agreement and necessarily, except where the alleged invalidity of the contract cannot affect the agreement, whether there is a valid contract. 53 Cal W N 505, Not approved. (Para 22)

Anno: Arbitration Act, S. 34 N. 3.

(f) Arbitration Act (1940), S. 34 — Question of arbitrator's jurisdiction raised in suit — Other questions also raised — Proper procedure. (Para 24)

Anno: Arbitration Act, S. 34 N. 8.

P. P. Ginwalla, for Appellant; A. C. Mitra with D. C. Sethia, for Respondent.

CASES CITED:

(A) (1942) AC 356: 111 LJKB 241
(B) (1854) 3 El & Bl 642: 97 RR 701
(C) (1863) 2 H & C 339: 133 RR 707
(D) ('49) 53 Cal WN 505

CHAKRAVARTTI C. J.: This is an appeal from an order of S. R. Das Gupta J., dated 11-2-1952, by which the learned Judge dismissed the appellant's application under S. 34, Arbitration Act, and refused to stay a suit instituted by the respondent.

(2) The facts are as follows: On 8-1-1951, the appellant, Birla Jute Manufacturing Co. Ltd., entered into a contract with the respondent, Dulichand Protapmull, for the purchase of 250 bales of jute, each weighing 400 lbs., at Rs. 225/- per bale, the goods to be delivered free at the buyer's Mill Ghat for shipment within

one month. The Sold Note was signed by a firm of brokers, named Jaichandlal Dugar.

(3) At the relevant time, the Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance, West Bengal Ordinance No. 17 of 1950, was in force. Section 6 (1) of that Ordinance required any person intending to enter into a contract for the sale of raw jute with the owner of a jute-mill to apply to the Central Jute Board,

"specifying the quantity, quality and trade description of such jute and such other particulars in respect thereof, if any, as may be prescribed".

Section 6 (2) provided that the Board

"shall, after considering the application, select an owner of a jute-mill ..... with whom the seller shall enter into a contract for the sale ..... of raw jute within a date specified by the Board".

Under S. 6 (3) (i) the applicant and the selected owner of a jute-mill were to enter into the contract within the date specified by the Board and the contract was to be

"on such terms and conditions ..... as may be agreed upon between them, and in the event of there being no such agreement, as may be prescribed".

Section 14 (1) authorised the State Government generally to make rules for carrying out the purposes of the Ordinance and S. 14 (2) provided that, in particular, such rules might provide for any of the matters which, under the Ordinance, were "required to be prescribed".

(4) In exercise of the powers conferred by S. 14, read with S. 6 (1) of the Ordinance, the State Government prescribed a Form for offers of baled jute which contained at the top a space marked as "Messrs .....", obviously intended for the name of the offerer and a space was marked at the bottom for his signature. The Form contained a number of columns, one of which bore the heading 'Delivery'. The form of contract, prescribed under S. 14, read with S. 6 (3) (i), did not mention the period of delivery and left the relevant space blank. But R. 12 of the Rules framed under S. 14 (1) provided that the

"delivery period for all offers accepted by the Board and directed to the mills shall be one month from the date of the offer".

The contract form, which was a form for a Sold Note, contained at the top the words, "We have this day sold by your order and for your account to" and at the bottom the words "Seller's Brokers".

(5) The offer in the present case was made on 2-1-1951 and it was made by Messrs. Jaichandlal Dugar. The form bore their name at the top and at the bottom it was signed by them. It was an offer of a composite kind, comprising six separate quantities of jute, each of 1250 maunds but not all of the same kind or of the same price. Under each of the 1250 maunds, the name of the seller was shown. One such name was that of the respondent, under the entry "1250 maunds, Mill Reds 2/3 at Rs. 225/- per bale". There was another entry in the same terms over the name of another seller, but without the figures "2/3".

(6) On 5-1-1951, the Central Jute Board directed an offer of "1250 mds., Mill Reds at Rs. 225/-" to the appellant company. In the communication addressed to Jaichandlal Dugar as brokers, by which that was done, occurred the words 'one month', which was obviously the period of delivery, because a note at the bottom said that if the broker failed to deliver the jute within the specified time, the Board was to be informed.

(7) Thereafter, on 8-1-1951, a contract was entered into between the appellant and the respondent, as already stated, the period of delivery stipulated being one month.

(8) No delivery at all was made under the contract, though an extension of time was asked for and granted. Ultimately, by a letter dated 13-3-1951, the respondent stated to the appellant that the contract had automatically come to an end and it had no liability thereunder. Thereupon, the appellant claimed from the respondent a sum of Rs. 37,500/- as damages, but the respondent refused to pay the same and returned the bill.

(9) The contract contained an arbitration clause in the usual form to be found in the Indian Jute Mills Association contracts and covering

"all matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to"

the contract. In pursuance of the agreement contained in that clause, the appellant referred the dispute to the arbitration of the Bengal Chamber of Commerce on 29-8-1951.

(10) In November 1951, the respondent filed the suit which the appellant wants to be stayed. In that suit, the respondent has prayed for a declaration that there was and is no valid or binding contract between the parties and a further declaration that the contract of 8th January, in its entirety and including all its terms and conditions, was and is void 'ab initio' and of no effect. Alternatively, it has prayed for a declaration that the contract "became frustrated, has come to an end, has become null and void and is of no legal effect whatever" and also for an adjudication as to the rights and liabilities of the parties.

(11) The prayer for a declaration of the nullity of the contract is based on S. 5(2) of the Ordinance which provides that any contract entered into for the sale of raw jute with the owner of a jute-mill, "save and except in the manner provided in S. 6, shall be void and of no effect". It is said that S. 6(1) was not complied with, because it was not the respondent who made the offer to the Board; S. 6(2) was not complied with because the Board did not specify a date within which the contract was to be entered into; and S. 6(3)(i), read with R. 12, was not complied with, because the period of delivery was in excess of one month from the date of the offer to the Board.

(12) The plea of frustration is based on the fact that at the date of the contract, the price of jute was a controlled price under West Bengal Act 6 of 1950, but it was suddenly decontrolled with effect from 9-3-1951.

(13) The appellant did not take any steps in the suit, but on 21-1-1952, it made an application for staying it under S. 34, Arbitration Act. As already stated, S. R. Das Gupta J. dismissed the application. He did so on the ground that the dispute in the suit being as to whether the contract was void 'ab initio' and of no effect, that dispute could not be within the jurisdiction of the arbitrators and therefore the subject-matter of the suit was not within the arbitration

clause. The learned Judge declined to hold that the arbitration clause could be treated as severable and could be invoked for settling the dispute raised in the suit. He also declined to decide on the application whether the contract was void 'ab initio' in the view that the important issues relating to that question could be more conveniently tried in the suit.

(14) In support of the appeal, Mr. Ginwalla contended in the first place that simply because the dispute in the suit concerned the validity of the principal contract itself, it could not be held that that dispute was necessarily outside the arbitration clause. Parties, Mr. Ginwalla argued, might submit to arbitration any question they liked and there was no reason why they could not validly and effectively submit even the question of the legality of the principal contract, if they used sufficiently wide language, as the parties in the present case had done. In support of his contention, Mr. Ginwalla referred to certain observations of Lords Wright and Porter in the case of — 'Heyman v. Darwins Ltd.', (1942) A C 356 (A).

(15) The precise argument was advanced before the learned trial Judge and he repelled it on grounds which appear to me to be cogent. It is true that the learned Lords whom Mr. Ginwalla quoted did make some observations which lend support to his argument, but the majority of the House, constituted of Lords Simon, Macmillan and Russell of Killowen, took a contrary view. "If", observed Viscount Simon, L. C.,

> "one party to the alleged contract is contending that it is void 'ab initio' (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for, on this view, the clause itself also is void."

"If", observed Lord Macmillan,

> "it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been, as part of it, an agreement to arbitrate."

Lord Russell of Killowen agreed with Lord Macmillan. The simple logic of that view is that in order to be effective, an agreement to refer must be a valid agreement, but if the agreement be contained in the very contract, disputes concerning which are agreed by it to be referred, it cannot be a valid agreement if the contract itself be invalid, because it must fall along with the contract, being contained in it. When, therefore, the dispute is as to the validity of the principal contract, there is necessarily also a dispute as to the validity of the arbitration agreement and, consequently, there cannot be a reference to arbitration on the basis of an agreement of such disputed validity, because, in the first place, if the principal contract be invalid, the agreement can be of no effect, and, in the second place, in deciding the dispute, the arbitrators will be deciding their own jurisdiction. A dispute as to the validity of a contract cannot therefore be held to be within an arbitration agreement contained in the contract itself and such a dispute cannot be referred to arbitrators or dealt with by them under such an agreement on the basis that it is, to adopt the language of S. 34, Arbitration Act, a "matter agreed to be referred".

(16) Lords Wright and Porter, however, expressed the view in the case cited that the question was always one of the scope of the arbitration clause. "It is all", observed Lord Wright,

> "a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality or, being voidable, was avoided, because induced by fraud or misrepresentation or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction."

And again:

> "I should prefer to put it that the existence of his (i.e. the arbitrator's) jurisdiction in this, as in other cases, is to be determined by the words of the submission. I see no objection to a submission of the question whether there ever was a contract at all, or whether if there was, it had been avoided or ended."

To the same effect was the view expressed by Lord Porter. "If two parties", observed his Lordship,

> "purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, I see no reason why they should not refer that dispute to arbitration. Equally I see no reason why, if at the time they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so.....It may require very clear language to effect this result."

And again:

> "where the contract itself is repudiated in the sense that its original existence or its binding force is challenged, e.g., where it is said that the parties were never 'ad idem', or where it is said that the contract is voidable 'ab initio' (i.e., in cases of fraud, misrepresentation or mistake), and that it has been avoided, the parties are not bound by any contract and escape the obligation to perform any of its terms, including the arbitration clause, unless the provisions of that clause are wide enough to include the question of jurisdiction."

(17) With great respect, except in regard to cases where the alleged illegality of the contract is not such as would affect every one of its terms, the majority view appears to me to be the obviously preferable view. Parties may undoubtedly, by a separate agreement, submit to arbitration a dispute as to whether a particular contract between them was valid, but we are not considering that case. We are considering a case where the arbitration agreement is contained in the very contract which is repudiated. In such a case, if the contract is repudiated on, for example, the ground that the parties were not 'ad idem', they were in that case also not 'ad idem' with regard to the arbitration agreement and consequently it is impossible to see how the arbitration agreement can be relied on in such a case to sustain a reference, however wide its terms may be. No width of language can make up for the alleged defect in the foundation.

Suppose the arbitration clause comprised in express terms a dispute as to whether the contract was valid or not. Yet, if the contract was impugned on the ground that one of the parties

was a minor or insane at the time or that the whole contract was procured by fraud, even the express provision in the arbitration clause could not possibly authorise a reference of that dispute to arbitration, because on the case made, the arbitration agreement would be equally invalid and inoperative in law. It does not therefore seem correct to say that the parties can always include in the arbitration agreement a dispute as to the validity of the contract, if only they use sufficiently wide language and that when they have done so, there can always be a valid reference of the dispute to arbitration, even when the agreement is contained in the repudiated contract itself. I must therefore overrule the first contention of Mr. Ginwalla, based merely on the generality of the language used in the arbitration clause.

(18) There might, however, be cases where the alleged illegality, although it goes to the root of the contract, is not such as would necessarily affect even the ancillary terms. Such would be a case where there is no question of any contractual incapacity of the parties or of any basic defect which, if it vitiates the contract at all, vitiates the whole, but only a non-compliance with some provision of law which affects the principal contract, but does not affect the arbitration agreement. It has been said that in such a case, the question is whether the arbitration agreement is severable. Lord Wright, who said generally in the passages I have quoted from his speech in — 'Heyman v. Darwins Ltd. (A)' that he saw no reason why there could not be a valid submission of a question as to whether there had been a contract at all, made an exception in another part of his speech in respect of cases where the allegation might be that there had been no 'consensus ad idem' but he added that in other cases of repudiation of the contract,

> "it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute."

Mr. Ginwalla urged it as his second point that the arbitration clause in the present case was severable and could have independent effect.

(19) The learned trial Judge repelled the contention of Mr. Ginwalla in the view that an arbitration agreement presupposed a valid contract and that it was for that reason that it had been held that when the contract containing the arbitration clause was void 'ab initio', because the making of such a contract was illegal, the arbitration also became ineffective. He pointed out that Viscount Simon had pronounced on the precise case and had not said that the principal contract might in certain cases be void 'ab initio', being in contravention in law, but the arbitration agreement contained in it might still survive. That is one way of looking at the matter, but on the facts of the present case, there is another.

It is true that S. 5(2) of the Ordinance only makes a jute-contract, entered into otherwise than in the manner laid down in S. 6, void but it does not make arbitration agreements relating to such contracts void. Can it therefore be said that the invalidity, if any, attaches only to the principal contract, arising out of the manner of making it, but there having been no contractual incapacity in either of the parties, nor any mistake or fraud, they could validly agree to refer to arbitration disputes as to the validity of the contract, as they had done, and that there is thus no bar to the agreement taking effect, even if the contract be challenged? The answer, in my view, must be in the negative.

From one point of view, the arbitration agreement can be treated as severable, because the alleged contraventions of the Ordinance which are said to have made the principal contract void, do not apply to the arbitration agreement. Judged by the Ordinance alone, the arbitration agreement stands apart & unaffected. But really it is not severable and cannot escape the effect of the prohibition contained in the Ordinance, because it relates to the principal contract and thereby comes under the mischief of S. 23, Contract Act. That section provides that every agreement of which the object or consideration is unlawful is void and, further, that the consideration or object of an agreement is unlawful, if it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law. The wide terms of the section cover a large variety of cases, but the principle underlying its application to cases of the present type has been thus stated:

> "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void, if it appears from the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction" — Pollock on Contract, 11th Edition, 277.

I do not think there is any reason for saying that the enumeration of the objects of the Legislature, as given in the above passage, is exhaustive. The Ordinance, as its preamble states, was promulgated for ensuring an equitable supply of raw jute to the owners of different jute mills, because a crisis had arisen in the jute industry on account of owners of jute mills not being able to secure adequate supplies of raw jute at the controlled prices. In view of that object of the Ordinance which was to avert a disaster to a vital industry of the State, an agreement in connection with a sale of jute in breach of the Ordinance would clearly attract the ban imposed by S. 23, Contract Act. Nor is there any reason for saying that S. 23 would invalidate only the contract for sale itself but not also any ancillary agreement connected with it.

If the giving of security for money purporting to be due under an agreement which had an unlawful object, is itself unlawful, 'Fisher v. Bridges', (1854) 3 El & Bl 642 (B); — 'Geere v. Mane', (1863) 2 H & C 339 (C), an arbitration agreement regarding an unlawful jute contract which has the effect of withdrawing the contract from the view of the Court and enabling the parties to carry through an unlawful jute deal, settling such disputes as may arise through the agency of a private tribunal of their own choice, must also be unlawful. Such an agreement aids the transaction of jute business in a manner forbidden by the Ordinance. The other condition, viz., a penalty should be attached to the transaction, is also satisfied, because S. 5 (3) of the Ordinance makes the conclusion of

a contract for the sale or purchase of jute, otherwise than in the manner prescribed by S. 6, a criminal offence, punishable with imprisonment or fine or both.

In my opinion, it is clear that when a contract for the sale of jute contravenes the Ordinance, an arbitration agreement relating to it is also unlawful and that being so, when a jute contract is impugned as invalid on the ground that it was entered into in violation of the Ordinance, an arbitration agreement contained in the contract is not severable and capable of having independent effect and accordingly it cannot sustain a reference of the dispute to arbitrators. The second contention of Mr. Ginwalla must therefore also be overruled.

(20) It appears to me further that even assuming that the arbitration clause is severable and the agreement therein contained can have independent effect, a dispute as to whether the contract is void is not comprised within the clause. It is true that 'all' disputes are comprised. It is also true that the disputes which are intended to be within the ambit of the clause are described as disputes 'arising out of or concerning or in connection with or in consequence of or relating to' the contract. But however widely various, they are to be disputes about or under 'this contract'. It appears to me that when the parties used the expression 'this contract' they were not thinking merely of the form of contract entered into by them, whether it was valid or not, but of a valid contract. The learned trial Judge proceeded substantially on the same ground, but he did not deal with the question as a question of construction of the clause, at least directly.

It is noticeable that the parties had present to their minds a contingency when the contract, as such, might not be in force and operative and provided that even in such contingency, disputes between them would be referable to arbitration. They inserted the clause 'whether or not the obligations of either or both parties under this contract be subsisting' and also the clause 'whether or not this contract has been terminated or purported to be terminated or completed'. The first clause pre-supposes that certain obligations arose under the contract and the second pre-supposes that a contract came into existence. But the parties did not provide that disputes between them would be referable to arbitration, whether or not in law any obligation ever arose under the contract or whether or not the contract ever came into legal existence at all. I would therefore conclude that even as a matter of construction, the arbitration clause must be held to contemplate a valid contract and not to cover a dispute as to whether or not the contract was valid.

(21) Mr. Ginwalla lastly contended, as he had done before the learned trial Judge, that the question as to whether the contract was void 'ab initio' or not, ought to be decided on the present application under S. 34. In support of this contention, he relied on the decision of S. R. Das J. in the case of — 'Khusiram Benarsi Lal v. Hanutmal Boid', 53 Cal. W. N. 505 (D). In that case, it was undoubtedly held that when on an application being made under S. 34 for the stay of a suit, the plaintiff raised the plea that there was no valid arbitration agreement, because the contract containing it was itself void, as he was saying in his suit, an issue arose between the parties as to whether there was a valid and operative agreement which was the same thing as whether there was a valid contract and the Court not only had jurisdiction to decide the issue but also could not stay the suit or any part of it without deciding the same.

But it was added that while it would be necessary to decide the issue if a stay was to be ordered, it would be necessary to decide it if the Court thought it proper not to order a stay for other reasons and such reasons might be the complicated nature of the issue which could be more conveniently tried in the suit or the fact that the only relief asked for in the suit was a declaration that the alleged contract, including the arbitration clause as a term thereof, never came into existence as a valid contract. In such a case, the Court might decline to embark upon a consideration of the question of the formation, existence and validity of the contract in the exercise of its discretion.

It was however also said that when it was patent that the objection to the validity of the contract was not genuine and raised in good faith but only a device to avoid arbitration, the Court would act properly in exercising its discretion in favour of deciding the issue on the application by way of deciding the validity of the agreement and if the decision went against the plaintiff, he would have only himself to thank. That course might particularly be adopted in cases where the suit included other claims which would be within the arbitration agreement, if the agreement subsisted and where the basic objection to the validity of the contract, and of the agreement as a part of it, appeared to be disingenuous and frivolous. With great respect, I find it difficult to accept all of these propositions without further consideration but, in any event, they are of no assistance to Mr. Ginwalla in the present case.

(22) It is true that on an application under S. 34, the following three questions arise for decision of the Court, viz., (i) whether the plaintiff in the suit sought to be stayed is a party to the arbitration agreement, (ii) whether the applicant under S. 34 is a party and (iii) whether the claim in the suit is in respect of any matter agreed to be referred. When the claim in the suit is for a declaration that the alleged contract is void 'ab initio', the third question means a question whether a dispute as to the validity of the contract is within the arbitration agreement; and when the arbitration agreement is contained in the contract and is also, so far as its language goes, wide enough to cover any dispute, the question narrows down to a question whether there is any valid agreement to refer. That question arises because, in the first place, the contract which contains the agreement is itself impugned as invalid and because, in the second place, if there was no valid agreement, nothing was validly agreed to be referred.

But as I have already shown, the question whether there was ever a valid contract between the parties can never be a question for the arbitrators, when the arbitration agreement which gives them jurisdiction is contained in the very contract which is impugned, not because such a question cannot be within the

words of the arbitration clause, but because decision of such a question by the arbitrators which would involve a decision of whether the arbitration agreement from which they derive their authority is valid, is in the nature of things impossible. In those circumstances, it appears to me, as at present advised, that no useful purpose can be served by the Court proceeding to decide on the application under S. 34 whether there is a valid arbitration agreement and necessarily, except where the alleged invalidity of the contract cannot affect the agreement, whether there is a valid contract.

Suppose it holds that the agreement and the contract containing it are valid. Can it, on the basis of that finding, hold that the dispute raised in the suit as to whether the contract is valid is within the arbitration clause and a matter agreed to be referred? Obviously it cannot, because such a dispute can never be within the jurisdiction of arbitrators. If it cannot so hold, it cannot stay the suit, because S. 34 does not empower the Court to stay the suit on its own view that there is a valid contract and that the plaintiff's contention to the contrary is unfounded. If the dispute raised in the suit as to whether there is a valid contract must remain outside the arbitration agreement, however unsubstantial it may be, that dispute can be finally decided only in the suit and the Court cannot lay it to rest by finding on the application under S. 34 that there is a valid contract, nor can it stay the suit on such a finding. So long as any one of the conditions laid down in S. 34 remains unsatisfied, the suit cannot be stayed.

The section undoubtedly confers a discretion on the Court, but it is only a discretion to stay or not to stay the suit after the conditions laid down in the section are found to be satisfied or a discretion not to stay the suit in view of the difficulty of the questions on the facts of a case, but it is not a discretion to stay the suit even if one of the conditions may be unsatisfied.

It follows that the moment it appears that the dispute raised in the suit is not a dispute in respect of a matter agreed to be referred, e. g., a dispute as to whether the alleged contract is void, there can no longer be any question of staying the suit. To proceed thereafter to decide, in a case where the arbitration agreement is contained in the impugned contract, whether the arbitration agreement or the contract containing it is valid, can be productive of no practical result except perhaps that if the contract is found to be valid, the plaintiff will have a short shrift in the suit. It also appears to me that the whole scope of S. 34 is an enquiry as to whether the suit will be stayed and the moment it appears that the suit cannot be stayed, because the dispute raised by it is not a dispute agreed to be referred, the section exhausts itself and there is no warrant in its provisions for proceeding further to decide any other issue.

One must hesitate to differ from so eminent and experienced a Judge as S. R. Das J., but before assenting to some of his propositions, I should require to have my doubts dispelled. His Lordship relied on certain observations of Lord Porter in — 'Heyman v. Darwins Ltd', (A)' but those observations were certainly influenced by the view of the learned Lord that even a dispute as to whether there was any contract at all could be submitted to arbitration and that by an agreement contained in the contract itself.

(23) But even accepting every one of the principles laid down by S. R. Das J., I do not think that this is a proper case where we should take it upon ourselves to decide on the application under S. 34 whether the contract, including therein the arbitration agreement, was valid. There is no reason for saying that the question is not a serious question and that it has not been raised in the suit in good faith. Whether the signature of a broker is sufficient for the purposes of an offer under the Ordinance, whether the fixation of a period for the conclusion of a contract is mandatory and whether the period of delivery prescribed by R. 12 applies only when there is no agreement between the parties or whether any agreement as to the period of delivery must be subject to maximum laid down in R. 12, are all difficult and substantial questions. In my opinion, the learned Judge exercised his discretion properly in leaving them to be decided in the suit.

(24) This, however, does not dispose of the case. The suit not only asks for a declaration that the contract was void 'ab initio' but also, alternatively, for a declaration that the contract has become frustrated and for a declaration and adjudication of the rights of the parties. The last two matters are clearly within the jurisdiction of arbitrators, if there is a valid arbitration agreement. There is certainly a danger, to which Lord Porter adverted, of a party defeating an arbitration agreement by simply bringing a suit and putting in there a claim for a declaration that the alleged contract was void, "at any rate until the question of jurisdiction had been decided".

A stoppage of the arbitration proceedings till the question of jurisdiction has been decided in the suit cannot, I apprehend, be avoided, but when there are other questions raised by the suit, there is no reason why the plaintiff should be allowed to avoid arbitration even with regard to them, if jurisdiction is found. The proper course to adopt in such a case is either to keep the application under S. 34 pending till the question of jurisdiction is decided in the suit or to make a conditional order. The latter appears to me to be the more convenient course.

(25) In the result, the appeal is allowed in part. In modification of the order of S. R Das Gupta J., declining to stay the suit, I direct that the suit shall proceed for a decision, in the first instance, of the claim to the first two declarations asked for in the plaint. If it be held that there never was a valid contract between the parties and that the alleged contract, including all its terms, was void ab initio', the suit will necessarily be decreed and will come to an end. If, however, it be held that the contract was valid, the rest of the suit shall be stayed. Each party will bear its own costs in this appeal. The appellant will be entitled to file its written statement within three weeks, as prayed for.

(26) SARKAR J.: I agree.

A/V.R.B. Appeal partly allowed.

A.I.R. 1953 CALCUTTA 456 (Vol. 40, C. N. 167)

CHAKRAVARTTI AND SINHA JJ.

Nityananda Roy Accused-Petitioner v. Rashbehari Roy ... Complainant-Opposite Party.

Criminal Revn. No. 940 of 1951, D/- 19-2-1952.

(a) Evidence Act (1872), Ss. 65(a) and 66 — Original in possession of opposite party.

In order that secondary evidence of documents mentioned in S. 65(a) may be given, it is essential that the procedure laid down in S. 66 should be strictly complied with. Where no notice as required by S. 66 is given the secondary evidence is not admissible. (Para 5)

Anno: Evidence Act, S. 65 N. 3; S. 66 N. 1.

(b) Evidence Act (1872), S. 67 — Carbon copies — Use for comparison.

Carbon copies, particularly copies made on carbon paper used in this country, cannot generally be relied upon for purposes of comparison, because the impression made upon such carbon paper is generally irregular and blotched. (Para 6)

Anno: Evidence Act, S. 67 N. 3.

Gurudas Bhattacherjee, for Petitioner.

CHAKRAVARTTI, J. : The petitioner has been convicted of two offences under S. 406, Penal Code under two separate counts. The acts charged against him are that he committed criminal breach of trust in respect of 3 tolas and 5 annas of gold on 5-2-1951 and that similarly he committed the same offence in respect of a further quantity of 26 tolas and 9 annas of gold on 2-3-1951. The learned Magistrate has accepted the prosecution case and sentenced the petitioner to rigorous imprisonment for 4 months and 2 months respectively — the sentences to run concurrently.

(2) The proceedings were commenced on the complaint of one Rashbehari Roy who alleged that he was a goldsmith, carrying on business at Cuttack and that he used to get the articles of his trade manufactured by workmen in Calcutta of whom the petitioner was one. The petitioner is also related to the complainant, being his nephew. The complainant's case further was that he had entrusted 29 tolas 14 annas and 3 pies of gold on 2-3-1951, and that the ornaments manufactured with that gold were due to be delivered in about a fortnight's time. When, however, the complainant demanded delivery of the ornaments he was put off from time to time and ultimately, on 28-3-1951, the petitioner denied having received any gold from the complainant at any time at all. This story was slightly varied in the course of the evidence when the petitioner stated that 29 bharies 14 annas and 3 pies of gold had not been entrusted all at the same time but that out of the total quantity, 3 tolas and 5 annas had been entrusted on an earlier occasion, namely, on 5-2-1951.

(3) In support of his case the petitioner (sic) relied upon a receipt alleged to have been granted by the petitioner at the time the gold had been delivered to him. There was some oral evidence as well, particularly, of a brother-in-law of the complainant who carries on the profession of a Dentist. The learned Magistrate relied principally upon the receipt which is Ex. 1 in the case and which was alleged by the prosecution to bear the signature of the petitioner.

(4) It was contended on behalf of the petitioner that the learned Magistrate had erred in law in relying upon Ex. 1 at all, inasmuch as it was not admissible in evidence. In order to appreciate this argument of the petitioner, it is necessary to remember that Ex. 1 is merely a carbon copy of the original receipt which is said to have been written out by the complainant himself but signed by the petitioner. It was contended that on the prosecution's own case, Ex. 1 was a copy and it could not be admitted in evidence unless the rules regarding the user of the secondary evidence were strictly complied with. In our opinion this contention is well-founded.

(5) As I have already stated, what was sought to be proved out of Ex. 1 was the signature which the petitioner was alleged to have affixed to it. It is, however, not the original signature but a copy appearing on a carbon copy. This carbon copy of the signature may be a piece of secondary evidence within the meaning of S. 63(2), Evidence Act, being a copy made by a mechanical process which ensures its correctness, but simply because it is secondary evidence of a proper form, it does not follow that the prosecution was entitled to adduce it in evidence all at once. According to the prosecution, the original was in the possession of the petitioner and the case, therefore, came under S. 65(a), Evidence Act which speaks of documents in the possession of the party against whom they are sought to be used. But in order that secondary evidence of such documents may be given, it is essential that the procedure laid down in S. 66 of the Act should be strictly complied with.

The procedure there prescribed is that the party desiring to make use of secondary evidence must, in the first instance, serve a notice upon the party in whose possession the original may be, requiring him to produce the original and it is only when such notice is not complied with that the right to give secondary evidence arises. There are certain exceptions to the rule laid down in S. 66, but it is perfectly clear that none of them applies to the present case. It is equally clear from the records that no notice of any kind was ever served on the petitioner. In those circumstances, it follows that the carbon copy of the signature, appearing on Ex. 1, never became admissible in law and in so far as the learned Magistrate's conclusion is based upon Ex. 1, it is plainly erroneous.

(6) It appears to me further that even if the question be regarded as a pure question of fact, the learned Magistrate clearly misdirected himself in arriving at the conclusion that he did. The complainant came to the Court with the somewhat strange story that he entrusted to the petitioner a quantity of gold of the value of about Rs. 3000/- and took care to obtain a receipt from him, but that, at the same time, he allowed the petitioner, who was the grantor of the receipt, to keep the original with him and was himself content to receive only a copy. The manifestly unusual character of a transaction of that kind was commented on by the defence, but the learned Magistrate paid no attention whatever to it. He simply referred to the contention advanced on behalf of the accused that the case put forward by the complainant bore

patent marks of artificiality but beyond making a reference to the contention, he did not consider it necessary to deal with it.

It was also contended before the learned Magistrate that if the signature appearing on Ex. 1 was to be foisted upon the petitioner, it could be done only if a proper comparison of that signature with the admitted signature of the petitioner was possible. No such comparison, however, was possible in the present case inasmuch as the disputed signature was only a carbon copy. It was argued that no opinion about pen pressure or pen stroke or alignment could properly be formed upon a carbon copy. The learned Magistrate, dealing with that argument, simply observed that he did not know if there was any authority for that proposition. If he did not know, he might have referred to some authoritative work like Osborn or Brewester and if he did so, he would have found that carbon copies, particularly copies made on carbon paper ordinarily used in this country, could not generally be relied upon for purposes of comparison, because the impression made upon such carbon paper was generally irregular and blotched.

Further, the deposits on the carbon paper were generally wiped off when the paper was folded with the result that all traces of the distinctive characteristics of the writings on it became blurred. A further point which, it seems to us, escaped the notice of the learned Magistrate is that, according to the complainant, the petitioner signed his name on the original of Ex. 1 with a fountain pen. That again, is a feature of the prosecution case which appears to me to be somewhat strange. It is but ordinary experience that if anybody wants a particular document to be duplicated or triplicated with the aid of carbon paper, he writes the original with a pencil in order that a necessary amount of pressure may be put upon the original. It is hardly that anybody ever will be found writing the original with a fountain pen, if the intention is that some copies will have to be made.

The learned Magistrate again did not examine the characteristic features of the disputed signature and those of the admitted signatures of the petitioner, nor had he any expert assistance. He simply proceeded on the visual similarity of the disputed signature with the signature appearing on a bail bond. He overlooked altogether the fact that the disputed signature before him was a carbon copy which afforded a very special opportunity for tracing out some original signature which might be in the possession of the forger. The visual similarity by itself, therefore, established nothing. But it is not necessary to pursue the question as a question of fact any further, as I have already pointed out that the signature appearing on Ex. 1 was not admissible at all.

(7) The question, we have next to consider, is whether excluding Ex. 1, there was sufficient other evidence in the case which might by itself support the conviction. In my opinion there is none. There is only the very general and inconclusive evidence given by the Dentist brother-in-law on which no conclusion can be properly based.

(8) The result, therefore, is that the finding recorded by the learned Magistrate is based on no legal evidence or at least not legally sufficient evidence.

(9) For the reasons given above, this Rule must be and is made absolute. The conviction of and the sentence passed upon the petitioner are set aside and he is acquitted.

(10) The petitioner will now be discharged from his bail bond.

(11) SINHA, J. : I agree.

C/D.H. Rule made absolute.

A.I.R. 1953 CALCUTTA 457 (Vol. 40, C. N. 168)

CHUNDER J.

Jyoti Bhusan Das and another, Petitioners v. The State.

Criminal Revn. No. 854 of 1951, D/- 23-11-1951.

Criminal P. C. (1898), S. 539B — Local inspection — Drain trespassing accused's land — Measurements carried by unauthorised person — Accused not supplied with inspection report on request — Conviction of accused for destroying drain cannot be sustained — Penal Code (1860), Ss. 96, 97. (Paras 2, 3, 4)

Anno: Criminal P. C., S. 539B N. 10; Penal Code, S. 97 N. 5.

S. S. Mukherjee for Kishore Mukherjee, for Petitioners; Samarendra Nath Mukherjee (No. 2), for the State.

ORDER: This Rule was issued at the instance of two persons who were convicted by a Magistrate, First Class, Contai, and given a non-appealable sentence. A petition of motion before the Sessions Judge was rejected by the Additional Sessions Judge of the district.

(2) The facts briefly are that the Union Board had cut a drain which carried water and fouled the tank of the petitioners. I do not understand how in these civilised times the water of a reservoir could be so fouled by the action of a public body. Anyway, that was what was done. The petitioners considered that this drain trespassed upon a portion of the slope of their tank and the Union Board had no authority to trespass upon the slope of their land in that way by cutting a drain. The petitioners gave evidence of a proper pleader commissioner who had surveyed the lands to the effect that according to what he found the portion of the drain was on the petitioners' land. The petitioners therefore destroyed that portion of the drain. The learned Sessions Judge did not reject altogether the story of the claim over the land of the petitioners but he was of opinion that assuming that the drain was over their land, they should have waited and not taken the law into their own hands to undo the effect of the trespass. I do not pretend to understand the reasoning of the learned Sessions Judge and understand why they should submit to an act of trespass.

(3) Further, it appears that the learned Magistrate went and held a local inspection. At the time of the local inspection an unauthorised Amin on behalf of the complainant carried out certain measurements and it appears that as a result of that the learned Magistrate was of opinion that the portion of the drain was not on the petitioners' land but was on Union Board land. The petitioners wanted a copy of inspection report but they did not get it before judgment was delivered so that they had no opportunity to rectify any erroneous impression that the unauthorised measurements may have made in the mind of the learned Magistrate.

(4) Considering all these reasons. I think that the convictions and sentences cannot

stand and must be set aside. The Rule is made absolute. The fines, if paid, will be refunded.

C/K.S. Conviction and sentence set aside.

A.I.R. 1953 CALCUTTA 458 (Vol. 40, C. N. 169)

(SPECIAL BENCH)

CHAKRAVARTTI C. J., DAS GUPTA AND SARKAR JJ.

Albion Jute Mills Co. Ltd., Petitioner v. Jute and Gunny Brokers Ltd., Respondent.

Arbitration No. 105 of 1952, D/- 28-1-1953.

(a) **Raw Jute (Central Jute Board and Miscellaneous Provisions) Act (6 of 1951) — Validity of the Act — (Constitution of India, Sch. VII, List II Item 26).**

The Act, in its pith and substance, is legislation in respect of 'Trade and Commerce within the State' which belongs to Sch. VII, List II Item 26 and, as such, it was within the competence of the State Legislature. (Para 12)

(b) **Raw Jute (Central Jute Board and Miscellaneous Provisions) Act (6 of 1951), Ss. 5, 6, 7 and 2(1) — "Appointed day."**

The effect of S. 2(1) is to require that for the expression 'the purpose of this Ordinance', "the purpose of this Act" should be read and if so read the notification of 29-12-1950 must be taken as specifying the day mentioned in it as the appointed day for the purposes of Ss. 5, 6 and 7 of the Act and not of the Ordinance.

(30-12-1950 held was the appointed day for the purposes of the Act). (Para 14)

(c) **Arbitration Act (1940), S. 2(a) — Arbitration agreement — Form of.**

Where the parties did not go to the arbitration under an independent agreement after discarding the contract it was not right in law or correct in fact to treat them as having gone to arbitration under a further agreement for which they utilised the piece of writing in which the arbitration clause was expressed. (Para 15)

Anno: Arbitration Act, S. 2 N. 4.

(d) **Arbitration Act (1940), S. 2(a) — Arbitration agreement — Dispute.**

A dispute as to whether there had been a contract at all, cannot be a dispute arising out of or concerning a contract and, therefore, for an agreement to refer to such a dispute the language of the arbitration clause cannot be appropriated. (Para 15)

Anno: Arbitration Act, S. 2 N. 2.

(e) **Evidence Act (1872), S. 115 — Estoppel against statute.**

There can be no estoppel against a statute. Therefore, a party who has gone to arbitration under the contract which was void under some Act (in this case, Raw Jute (Central Jute Board and Miscellaneous Provisions) Act (6 of 1951)) cannot plead that his opponent having taken part in arbitration proceedings could not later on repudiate the award as void. (Para 17)

Anno: Evidence Act, S. 115 N. 50.

Advocate General with A. C. Mitra and D. C. Sethia, for Petitioner; S. Chaudhry with P. Ginwalla, for Respondent.

CHAKRAVARTTI, C. J.: This is a reference under Chap. 5, R. 2, Rules of the Original Side, by Bachawat J. of an application made to him, praying that a certain award be declared null and void or, alternatively, that the validity and existence of the contract to which the award related, be adjudged and determined and that the award be set aside. The learned Judge thought that the questions raised before him were such that they might be dealt with more advantageously by a larger Bench, particularly in view of the fact that no appeal would lie from his decision on those questions. He thought further that the whole application might be dealt with by the larger Bench, because on the remaining questions too, the parties had agreed to proceed only on the affidavits.

(2) The facts are simple, but in order to set out intelligibly the questions of law which have arisen out of them, it is necessary to refer first to the relevant provisions of law and their history.

(3) In 1950, the West Bengal Legislature passed an Act, called the West Bengal Jute (Control of Prices) Act, which was directed as regulating prices of jute and empowered the Government to fix maximum prices by notification. The Act, which was Act 6 of 1950, came into force on the 15th March of that year and maximum prices were fixed by certain notifications. On 14-12-1950, the Governor of West Bengal promulgated an Ordinance, called the Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance (17 of 1950), for the better regulation of the jute trade. It was stated in the preamble 'inter alia' that the owners of the jute mills were not being able to secure adequate supplies of jute at the maximum prices fixed under Act 6 of 1950 and it had become expedient to set up a Central Jute Board in West Bengal for ensuring an equitable supply of raw jute to the owners of the different jute-mills. Accordingly, S. 4 of the Ordinance provided for the constitution of a Central Jute Board "as soon as may be" after its commencement. By S. 6, provision was made for the manner in which contracts for the sale and purchase of raw jute between sellers and owners of jute-mills were to be entered into and it was laid down that such contracts would have to be made through the Central Jute Board according to a certain procedure. Section 5(1) prohibited the sale and purchase of raw jute to and by owners of jute-mills except in pursuance of a contract entered into in the manner provided for in S. 6 and S. 7(1) imposed a similar prohibition on giving and accepting delivery. Section 5(2) declared that any contract entered into for the sale or the supply of raw jute with the owner of a jute-mill except in the manner provided in S. 6 would be void and of no effect. Section 7(3) provided that Ss. 5, 6 and 7 would come into effect on and from "the appointed day" which, under S. 2(1), meant the day specified by the State Government by notification in the Official Gazette as the appointed day for the purpose of the Ordinance. By a notification dated 29-12-1950 and published in an extraordinary issue of the Calcutta Gazette of the same date, 30-12-1950 was specified as the appointed day for the purposes of Ss. 5, 6 and 7.

(4) The Ordinance which consisted of 15 sections was subsequently replaced by an Act, called the Raw Jute (Central Jute Board and

Miscellaneous Provisions) Act (6 of 1951) which added one more section. The Act came into force on 21-3-1951. The first fifteen of its sections were virtually verbatim reproductions of the corresponding sections of the Ordinance and S. 16, newly added, read as follows:

"16. The Central Jute Board constituted, any rule made, any notification or license issued, any direction given, any contract entered into, any minimum price fixed, anything done or any section whatsoever taken under the Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance, 1950, shall, on the said Ordinance ceasing to operate, be deemed to have been constituted, made, issued, given, entered into, fixed, done or taken under this Act as if this Act had commenced on the 14th day of December, 1950.

(5) At all times material for the purposes of the present case, it was the Act which was in force. It has since been repealed by Act 14 of 1952 which came into force on 5-8-1952, but nothing turns on that circumstance.

(6) One other fact requires to be referred to. S. 6 of the Ordinance and the same section of the Act provided that any person, desiring to sell or supply raw jute to the owner of a jute-mill, must apply to the Board, giving all particulars, that the Board would thereafter select an owner of a jute-mill (who had signified his intention to buy raw jute to the Board in writing) with whom the applicant might enter into a contract, that the parties would have thereafter to enter into the contract by a date specified by the Board and that the prices for raw jute fixed under such contract were not to exceed the maximum prices, if any, as might be fixed under the West Bengal Jute (Control of Prices) Act, 1950. It appears that by a notification, dated 10-3-1951 and published in the Calcutta Gazette on 15-3-1951, the notifications, fixing the maximum prices, were rescinded. Thereafter, both when the Ordinance was in force and after the Act had come into operation, the Central Jute Board issued a series of Circulars by which it authorised owners of jute-mills to purchase raw jute up to the extent of the quotas respectively allotted to them "through normal trading channels", subject to their furnishing particulars of the contracts and of deliveries under them to the Board. Such Circulars were issued on 12-3-1951, 19-3-1951, 6-4-1951 and 5-7-1951, to mention only a few. Those Circulars were clearly inconsistent with the provisions of the Ordinance and the Act.

(7) The facts relating to the dispute between the parties may now be stated. On 6-4-1951, which was after the Act had come into force, the petitioner, Albion Jute Mills Company, Ltd., entered into a contract with the respondent, Jute and Gunny Brokers Ltd., for the purchase from the latter of 5000 maunds of 'Nikhil and/or Ashuganj Jute', at certain prices according to quality, "shipment during July and/or August, 1951, guaranteed." That contract was entered into by the parties acting for themselves through their brokers and not through the Central Jute Board. When shipping documents, together with the Bill, were presented to the petitioner by the respondent's Bankers, they were not accepted on the plea that the documents were not in order and delivery of the goods was not taken. The last date on which the documents were presented was 17-9-1951. On 26-9-1951, the Solicitors for the respondent wrote to the petitioner to say that the respondent had exercised its option of cancelling the contract and to demand payment of a sum of Rs. 1,95,000/- as damages suffered, computed at the difference between the contract price and the market price as on 17-9-1951. By a letter dated 5-10-1951, the petitioner denied liability to pay the amount claimed and thereafter, on 2-11-1951, the respondent referred the dispute to the arbitration of the Bengal Chamber of Commerce under the arbitration clause contained in the contract. The petitioner appeared before the Tribunal of Arbitration constituted by the Bengal Chamber, filed statements and adduced evidence, but did not attend the last sitting of the Tribunal which was held on 19-2-1951. An application for an adjournment made on that very day was refused and the Tribunal proceeded with and concluded the hearing. On 29-2-1952, the Arbitrators signed their award by which they allowed the respondent's claim in full, with interest and costs. The award was filed in this Court on 23-4-1952 and on 9-6-1952, the present application was made.

(8) Broadly speaking, it is prayed by the application that the award be declared void, because it was given with reference to a contract which was itself void by reason of not having been entered into in compliance with S. 6, Raw Jute (Central Jute Board and Miscellaneous Provisions) Act, 1951, and that it be set aside on certain grounds of misconduct on the part of the arbitrators, as also a certain illegality. Before us, the learned Advocate-General, who appeared on behalf of the petitioner, conceded that as to the merits of the award, his client had no case at all and he stated that, accordingly, he would not urge any ground other than the ground that the award was void and had no existence in law. The other questions raised in the application, the learned Advocate-General conceded, related to matters which were clearly within the jurisdiction of the arbitrators and for them to decide and he also did not think that he could rely on the refusal to grant an adjournment on 19-2-1952 as an instance of misconduct.

(9) On the only ground urged by the learned Advocate-General, he referred to the provisions of S. 5(2) of the Act by which all contracts of the specified kind, not entered into in the manner prescribed by S. 6, were declared to be void and of no effect. The present contract being of the specified kind and not having been entered into in compliance with S. 6, was, therefore, void and if it was void & of no effect, an award in relation to it was also void. Besides, the contract being void, the arbitration clause contained in it was also void and accordingly there was no valid arbitration agreement under which there could be a valid reference and no valid reference upon which there could be a valid award.

(10) Before Mr. Justice Bachawat, it was contended on behalf of the respondent that by the Circulars issued from time to time, the Central Jute Board had introduced an alternative method of selecting owners of jute-mills with whom contracts for the sale or supply of raw jute could be entered into and authorised such owners to enter into contracts through their normal trade channels, subject only to particulars of all transactions being furnished

to the Board, and that, therefore, the present contract, having been entered into through the normal trade channel, was valid. Before us, Mr. Chaudhuri, appearing on behalf of the respondent, expressly abandoned that contention. He conceded that the Central Jute Board, being a statutory body, could act validly only if it acted within the rights and functions conferred on and assigned to it by statute and anything done by it in excess of its powers under the statute, like the issuing of the Circulars in question, was clearly without jurisdiction. It was therefore not possible for the respondent to plead the Circulars in answer to the petitioner's contention. Mr. Chaudhuri,however, contended that Act 6 of 1951 was itself ultra vires the State Legislature, that even if it was not ultra vires, Ss. 5, 6 and 7 of it were not in force on the date of the contract and in fact not in force at any time at all and that even assuming the contract and the arbitration clause, as a part of it, were void, there was still on the facts of the case a valid reference to arbitration and a valid award which the petitioner could not question in view of the part it had taken in the arbitration proceedings.

(11) It is perfectly clear that if the Act was a valid Act and it was in force on the date of the contract, there can be no escape from the conclusion that the contract is void. The learned Advocate-General referred to the rules framed under the Ordinance which were to be deemed to have been framed under the Act and which required the application containing the offer for sale to be in the prescribed form and the delivery period to be one month from the date of the offer. But if the respondent did not apply to the Board at all and the contract was not entered into through the intermediation of the Board, no question of the application not having been in the prescribed form or of the delivery period not having been one month from the date of the offer, arises. Necessarily, the rules as to the details of the procedure to be followed in cases where the contract was entered into through the Board were not complied with. The only relevancy of the rules is that, read with section 6 which requires the application to contain the prescribed particulars and the contract to be on such terms and conditions as may be prescribed and with S. 14(2) which authorises the State Government to provide by rules for all or any of the matters required to be prescribed under the Act, they are equally mandatory. A contract, in order to be valid, must not only be entered into through the Board, as laid down in the Act, but it must also be entered into in the form and in accordance with the procedure and on the terms and conditions prescribed by the rules, where, as to them, there is no agreement. Neither of the requirements having been complied with in the present case, the contract is plainly void and of no effect by reason of the provisions of S. 5(2) of the Act, provided the Act itself was valid and operative.

(12) Mr. Chaudhuri, who did not lay much stress on his first and third points, contended that the Act was not valid, inasmuch as it was a piece of legislation relating to "Trade and Commerce with foreign countries: import and export across customs frontiers", which belonged to Item 41 of List I in Schedule 7 to the Constitution. I am entirely unable to accept that view of the Act. Asked how it related to import and export, Mr. Chaudhuri instanced the case of an Indian citizen of West Bengal owning a jute-mill situated in Pakistan and another Indian citizen having raw jute to sell in that country and their entering into a contract in West Bengal. If both the Mill and the jute be in Pakistan, as in the case posed by Mr. Chaudhuri if I understand him aright, I do not see how any question of import or export arises. Assuming, however, that the mill is in West Bengal and the jute in Pakistan, and the owners of both the mill and the jute are West Bengal citizens who enter into a contract in West Bengal, even then I do not see that any question of import is involved in the provisions of the Act. The Act only deals with the manner in which and the party with whom a contract of sale shall be entered into, the price that shall be charged and the conditions as to the time of delivery and other details, such as may be prescribed by the rules, which shall be complied with. The right to import jute from outside India, the manner of importing it or the duties payable are not dealt with by the Act at all. In the converse case of the jute being in India and the mill being in Pakistan also, no question of export is involved in the provisions of the Act, besides that the Act does not appear to be concerned with the owner of a jute mill situated in Pakistan, although he may be a citizen of West Bengal. It may be said that if such an owner is not selected by the Board, sale to him and consequently the export of any raw jute to his mill is made impossible, but even then the Act does not aim at producing any such result by means of controlling export and even if the 'owner of a jute-mill', as contemplated by the Act, means the owner of a jute-mill situated in West Bengal or in India, which appears to be the meaning by reason of the definition of 'jute-mill' in S. 2(5), control of export of raw jute is not the subject-matter of the Act, though some indirect control may be an incidental result in certain cases. In fact, export of raw jute out of India is controlled by other Acts and other regulations. In my opinion, the pith and substance of the present Act is clear. The preamble sets out the aims and objects of the Act and states that it was being passed in order to make adequate supplies of raw jute available to the owners of jute-mills at the maximum prices fixed by Act 6 of 1950 which they were finding it difficult to secure, to set up a Central Jute Board for ensuring an equitable distribution of raw jute between owners of the different mills, for better regulation of the jute trade and for the protection of the cultivators of jute. The Act itself provides for the constitution of a Jute Board, vests the Board with the control of sales of raw jute to mill-owners, makes it compulsory to enter into contracts for such sales through the Board, prescribes the method of entering into and carrying out such contracts, regulates the price chargeable under such contracts, provides for the fixation of a minimum price payable to cultivators and authorises the Government to control stocking of raw jute. Quite clear, the Act, in its pith and substance, is legislation in respect of 'Trade and Commerce within the State' which belongs to Item 26 of List II and, as such, it was within the competence of the State Legislature.

(13) Mr. Chaudhuri laid the greatest emphasis on his second point which was that Ss. 5, 6 and 7 of the Act never came into force at

all, not to speak of their having been in force on the date of the contract. Section 7(3) of the Act provides that Ss. 5, 6 and 7 shall have effect on and from the appointed day and the point canvassed was whether any appointed day had been ever specified for the purposes of the Act. According to the definition of 'appointed day' in S. 2(1), it means "the date specified by the State Government by notification in the Official Gazette as the appointed day for the purpose of this Act". The definition in the Ordinance was the same, except that instead of 'this Act', it said 'this Ordinance'. It will be remembered that for the purposes of Ss. 5, 6 and 7 of the Ordinance, a notification, dated 29-12-1950, specified 30-12-1950 as the appointed day. Under S. 16 of the Act which has already been quoted in full, that notification must be deemed to have been issued under the Act, as if the Act had commenced on 14-12-1950. The contention of Mr. Chaudhuri was that although the Act might have to be deemed to have commenced on 14-12-1950 and although the notification of 29-12-1950 might have to be deemed to have been issued under the Act, still the notification could not suffice to make 30-12-1950 the appointed day for the purposes of Ss. 5, 6 and 7 of the Act, because it said and continued to say that the day specified in it was the appointed day "for the purposes of Ss. 5, 6 and 7 of the said Ordinance". According to Mr. Chaudhuri, there was nothing to require the word 'Act' to be read for the word 'Ordinance', as occurring in the notification and therefore the notification, although it was to be deemed to have been issued under the Act, remained a notification specifying an appointed day for the purposes of the Ordinance. The result was that no appointed day was ever fixed for the purposes of the Act at all and therefore Ss. 5, 6 and 7 of the Act never came into force.

(14) In my opinion, the contention of Mr. Chaudhuri carried technicality beyond reasonable limits and even as a technical argument, will not bear examination. If the notification of 29-12-1950 is to be deemed to have been issued under the Act, it must be deemed to have been issued under S. 2(1) thereof. Section 2(1) speaks of a notification, specifying a particular day "as the appointed day for the purpose of this Act" and, therefore, the notification of 29-12-1950, if it must be taken as a notification issued under S. 2(1) of the Act, must be taken as specifying the day mentioned in it as the appointed day for the purposes of Ss. 5, 6 and 7 of the Act and not of those of the Ordinance. Mr. Chaudhuri appeared to contend that S. 16 brought only the issuing of the notification under the purview of the Act, but the text of the notification remained unaffected. In my opinion, that contention fails to take note of the effect of S. 2(1) of the Act on any notification which is or must be deemed to be, issued under it, specifying an appointed day. Besides, if the Act is to be deemed to have commenced on 14-12-1950, which was the date on which the Ordinance came into force, the Ordinance could not co-exist with the Act and the Ordinance being out of the way under the fiction created by S. 16, the Act remained as the only enactment in force on 29-12-1950 when the notification was issued. If in that context, the notification is to be read as issued under S. 2(1) of the Act, the effect, in my view, is to require that for 'the purpose of this Ordinance', 'the purpose of this Act' should be read. In my opinion, it is unnecessary to pursue further what appears to me to be only a verbal quibble and not an argument of substance. With regard to notifications issued under the Ordinance, the plain meaning and effect of S. 16 is that they are to be treated as issued under the Act and for the purposes of the Act. If so, 30-12-1950 being the appointed day for the purposes of the Act, Ss. 5, 6 and 7 were in force on 6-4-1951 and consequently they hit the contract.

(15) The last contention of Mr. Chaudhuri was that although the contract might be void and the arbitration clause as a part of it might fail, still the piece of writing in which the arbitration clause was embodied remained and since the parties had in fact gone to arbitration, they ought to be regarded as having done so, not under the arbitration agreement as contained in the contract, but under a further agreement for which they utilised the piece of writing in which the arbitration clause was expressed. I confess I find some difficulty in working out that argument. Mr. Chaudhuri had to find a written agreement in view of S. 2(a), Arbitration Act, but I do not see how he could requisition the arbitration clause contained in the contract for the purposes of an independent agreement. In the first place, the parties did not, in actual fact go to arbitration under an independent agreement after discarding the contract and it cannot therefore be right in law or correct in fact to treat them as having done what they did not in reality do. In the second place, the arbitration clause speaks of "all matters, questions, disputes, differences and/or claim arising out of and/or concerning and/or in connection with and/or consequence of or relating to this contract" and, therefore, that clause could not be availed of for the purpose of an independent agreement. Mr. Chaudhuri contended that the presence of the words "this contract" was no obstacle in his way, because there could be a dispute regarding an invalid contract and a reference to arbitration of such dispute and, therefore, one could reasonably imagine in the present case that there was a dispute about the invalid contract and a subsequent agreement to refer that dispute to arbitration. The answer to that contention is that in fact there was no such subsequent agreement in the present case and, secondly, that a dispute as to whether there had been a contract at all, could not be a dispute arising out of or concerning a contract and therefore for an agreement to refer such a dispute, the language of the arbitration clause could not be appropriated. Mr. Chaudhuri then referred to the additional arbitration clause contained in clause 14 of the contract and contended that that clause at least furnished him with an agreement to refer a subsequent dispute about the invalid contract. Clause 14 is in the following terms:

> "14. Additionally, the respective rights and obligations of the parties shall, in respect of all other pending or future contracts between them be such as if the preceding clause were specifically included in such contracts."

(16) What this clause really means is not very clear. The plain meaning is that although an arbitration clause in terms of cl. 13 may not be contained in other pending contracts or in future contracts, nevertheless, such

a clause shall be deemed to be included in them. In regard to future contracts, the clause seems to contain a contract to enter into another contract, which is a strange provision and in regard to pending contracts also, the position is very much the same or at least there is a contract to add a term to them. Be that as it may, this clause also, being equally contained in the contract, fell along with it and even if it were open to Mr. Chaudhuri to utilise it as a piece of writing, giving the form of an agreement, he would require to find a subsequent contract to which it could be attached. There was no such contract in this case. In my opinion, to try to make out the arbitration proceedings in the present case as having taken place in pursuance of a subsequent and independent agreement, is a vain endeavour.

(17) Mr. Chaudhuri also contended, though very faintly, that the petitioner having taken part in the arbitration proceedings without protest, could not now turn round and repudiate the award as void. In effect, he pleaded estoppel. In my opinion, that argument does not require serious examination. It was the respondent who went to arbitration and the petitioner made no representation to it of anything unknown to it by reason of which it was induced to alter its position. In any event, the contract and the award in relation to it are void under Act VI of 1951 and there could be no estoppel against a statute.

(18) The sympathy of the Court must, however, be wholly with the Respondent. As the learned Advocate-General himself conceded, the petitioner's case was utterly unmeritorious on the facts. Having contracted to purchase the jute, it failed to take delivery on the disingenuous plea that documents were not in order, simply for the reason that instead of being consigned to the mill, the goods were consigned to the mill's jetty; and having taken the fullest part in the arbitration proceedings, it is turning round when the award has gone against it and repudiating the award. It is not difficult to guess the reason why delivery of the jute was not taken. The Jute Board is not without responsibility for the unfortunate position in which the Respondent finds itself, for, instead of enforcing the provisions of the Ordinance and thereafter of the Act, it sought to introduce an alternative procedure by Circulars of its own which it had no jurisdiction to do and which created an impression that despite the Act, private contracts were permissible and would be valid in law. That the Board knew that it was going against the Act and that the trade was paying no attention even to the modified procedure laid down by the Circulars, but was going in its own way or ways, as the parties did in the present case, appear sufficiently from a Circular, dated 17-8-1951. The act was disregarded by the petitioner as much as by the Respondent. In spite of all this, since the law allows the petitioner to take the plea of the invalidity of the contract and the award, the Court has no alternative but to give effect to the plea, if taken. The only relief which the Court can give to the Respondent is in the matter of costs.

(19) In the result, we allow the application and declare the award to be null and void and the arbitration agreement to be invalid. But we direct that each party will bear its own costs, both before Mr. Justice Bachawat and before us.

(20) DAS GUPTA J.: I agree.

(21) SARKAR J.: I agree.

A/H.G.P. Application allowed.

A.I.R. 1953 CALCUTTA 462 (Vol. 40, C. N. 170)

DAS AND DEBABRATA MOOKERJEE JJ.

Satipada Chatterjee, Defendant-Appellant v. Annakali Debya, Plaintiff-Respondent.

A. F. O. D. No. 134 of 1951 (Probate), D/-20-2-1953.

(a) Succession Act (1925), S. 63(c) — Scribe as attesting witness.

The question whether a scribe can be regarded as an attesting witness has to be gathered from the circumstances of each case, the main test being whether the scribe signed the document with the intention of attesting the signature of the executant. The mere fact that the scribe wrote out the entire will as also the endorsement "Ishadi Lekhak" does not necessarily lead to the conclusion that he has signed before the testator. (Para 5)

Anno: Succession Act, S. 63, N. 7.

(b) Succession Act (1925), S. 63(c) — Presumption as to attestation — (Evidence Act (1872), S. 114).

In cases of wills the presumption is that the attesting witnesses signed after the testator had signed. The presumption is based on the maxim 'Omnia praesumuntur rite esse acta.' (Para 7)

Anno: Succession Act, S. 63 N. 6; Evidence Act, S. 114 N. 13.

(c) Succession Act (1925), S. 63(c) — Proof of attestation.

In cases where the evidence of the attesting witnesses is not specific but vague or doubtful or even where it is conflicting upon the same material facts, the Court may take into account the surrounding circumstances of the cases and judge from the same, whether the requirements of the statute have been complied with. (Para 11)

Anno: Succession Act, S. 63 N. 11.

(d) Succession Act (1925), S. 63(c) — Proof of attestation.

Having regard to the circumstances of a case it is open to the Court to discard that part of the testimony of a witness whereby he repudiates the fact of attestation of the will. (Para 12)

Anno: Succession Act, S. 63 N. 4.

(e) Succession Act (1925), S. 63(c) — Endorsement by Registrar.

In the absence of evidence showing that the Registrar signed in the presence of the executant and that the executant signed in the presence of the Registrar no inference can be drawn from the mere signature of the Registrar that he is an attesting witness. (Para 13)

Anno: Succession Act, S. 63 N. 8.

(f) Succession Act (1925), S. 59 — Testamentary capacity.

The testamentary capacity of the testator who makes a sane disposition and

knows what he is about to do, might be presumed. (Para 14)

Anno: Succession Act, S. 59 N. 1.

J. M. Sen Gupta, Jnanendra Nath Mukherjee and Satya Priya Ghose, for Appellant; Sailendra Nath Roy, for Respondent.

CASES CITED:

(A) ('50) AIR 1950 Cal 401: 54 Cal WN 455
(B) (1858) 12 Moore PC 158
(C) (1884) 53 LJP 49: 9 PD 149
(D) (1900) 4 Cal WN 204
(E) ('09) 3 Ind Cas 427: 10 Cal LJ 499
(F) ('16) AIR 1916 Cal 374: 20 Cal WN 192
(G) (1865) 11 Jur (NS) 248
(H) ('47) AIR 1947 PC 15: 51 Cal WN 175 (PC)
(I) ('74) 22 WR 189
(J) (1900) 27 Cal 190
(K) ('39) AIR 1939 PC 117: 43 Cal WN 669 (PC)

DAS J.: This is an appeal by the objector Satipada Chatterjee against the decision of N. Chakravarty, the learned District Judge of Nadia, dated 26-4-1951, granting letters of administration to the estate of Akshoy Kumar Chatopadhaya, with a copy of the will annexed.

(2) The testator Akhoy Kumar Chatopadhaya executed his last will and testament on 26-8-1939. It was registered on the same date at Krishnagar. The testator survived the will by about 10 years and died on 16-1-1949. The present application for the grant of letters of administration was made on 15-12-1949, the applicant being one Annakali Debya. The application was opposed by the appellant Satipada Chatterjee, nephew of the testator. His objection was pressed on two grounds (1) that the will was not duly attested and (2) that the testator had no testamentary capacity.

(3) As a result of contested hearing the learned District Judge found in favour of the genuineness of the will and of its due attestation and also of the testamentary capacity of the testator.

(4) In this appeal Mr. Sen Gupta, learned advocate appearing on behalf of the objector appellant, has raised two points: In the first place, he has contended that the will was not duly attested and in the second place he has contended that the testator has not been proved to be possessed of testamentary capacity at the date of the will. I shall take up these points in the above order.

(5) The first question to be considered is whether the will was duly attested. The execution of the will is not disputed. The will purports to bear the attestation of 4 persons: (1) Barkatulla Sarkar, (2) Narayandas Choudhury, (3) Radhika Prosad Das and (4) Ahibhusan Chattopadhaya. Of these 4 persons whose names appear on the will under the head attesting witness, the first three hail from Krishnagar and the last one hails from Billagram, the ordinary place of residence of the testator. Mr. Sen Gupta has contended that the attestation of Barkatulla Sarkar cannot be regarded as that of an attesting witness. His contention is founded on the ground that Barkatulla was the writer of the will. At the end of the will the following words occur:

"Ishadi Lekhak Sri Barkatulla Sarkar."

On this it is contended that the intrinsic evidence afforded by this entry, amounts to this that Barkatulla wrote out the will and by way of anticipation wrote out the words "Ishadi Lekhak". The suggestion is that Barkatulla signed before the testator put his signature on the will and as such, cannot be regarded as an attesting witness. This contention is rested mainly on a Bench decision of this Court in the case of — 'Nirode Mohan Roy v. Charu Chandra Majumdar', AIR 1950 Cal 401 (A). That decision does not lay down any inflexible rule. It is there pointed out that the question whether a scribe can be regarded as an attesting witness has to be gathered from the circumstances of each case, the main test being whether the scribe signed the document with the intention of attesting the signature of the executant. The mere fact that the scribe wrote out the entire will as also the endorsement " Ishadi Lekhak" does not necessarily lead to the conclusion that he has signed before the testator.

Reference to the deposition of Barkatulla, P. W. 1, does indicate that he signed after the testator. No question was put to him in cross-examination to this end. We are, therefore, left to speculate in this matter. In my opinion, the normal course of event is that the executant of a document first signs the document and this is followed by the signatures of the attesting witnesses. The name of Barkatulla on the will appears after the word, "Ishadi" and this, in my opinion, is sufficiently indicative of the fact that he purported to attest the will and did in fact put his signature on the will after the testator had signed the will. I shall quote the evidence of Barkatulla in connection with the second branch of the first contention put forward by Mr. Sen Gupta. The second branch of the contention is that there is nothing to show that the requirements of attestation as provided in S. 63, Succession Act were complied with so far as Barkatulla is concerned. The testator was a literate person and in his case the requirements of S. 63, Succession Act were as follows:

(a) That the testator must have signed the will.

(b) That his signature should have been so placed that it shall appear therefrom that he intended to give effect to the writing as a will.

(c) That his signature must bear the attestation of at least two witnesses both of whom must have seen that the testator signed the will in their presence or must have received an acknowledgment of his signature from the testator and further that the attesting witnesses must have signed the will in the presence of the testator.

(6) It is contended that the deposition of Barkatulla does not show that the attesting witnesses did sign the will after the testator had put his signature. I might quote at this stage the relevant portion of the deposition of Barkatulla. In his examination-in-chief Barkatulla said as follows:

"....I wrote out the will at the instance of the testator. He himself read the will. He signed his name in the presence of attesting witnesses Radhikha Prosad Pal, Ahi Bhusan Chatterjee, Narayan Das Chowdhury and myself. The testator saw the attesting witnesses sign."

(7) In cross-examination the witness said:

"....I have no independent recollection about this will."

As regards this cross-examination it must be remembered that the witness was deposing to events which had taken place more than 10 years ago. He was a deed-writer at the Sub-Registrar's office and in normal course of events it is likely that he might have drawn up documents or attested the same many times. The mere fact that he had no independent recollection does not render his evidence inadmissible. In fact, he said that he refreshed his memory by looking at the will.

In my opinion, therefore, there is no reason to discard the evidence given by the witness in his examination-in-chief. A comment, however, is made that even assuming that what he stated in his examination-in-chief is correct there is nothing to show that the witness spoke to the attesting witnesses' signing the will or the signatures being made in the presence of the testator. It is to be noted that the witness states that the testator saw the attesting witnesses sign. This clearly implies that the attesting witnesses did sign.

In ordinary course of events the attesting witnnesses would sign after the testator himself had signed. The argument put forward by Mr. Sen Gupta loses sight of the presumption which attaches in cases of wills 'ex facie' regular. The presumption in such cases is based on the maxim 'Omnia praesumuntur rite esse acta', that is, the presumption of the regularity of acts which have been done. This maxim was applied in the case of wills as early as the case of —'Lloyd v. Roberts', (1858) 12 Moor PC 158 (B). The above decision was referred to and cited with approval in a later decision of the Court of Appeal in England, — 'Wright v. Sanderson', (1884) 9 P. D., 149 (C). At p. 163 Fry L. J. observed as follows:

"The decisions cited in argument, and referred to by the Lord Chancellor, show that the Judges who have presided in the Court of Probate have long been accustomed to give great weight to the presumption of due execution arising from the regularity 'ex facie' of the testamentary papers produced, where no suspicion of fraud had occurred. In so doing they have, in my opinion, acted rightly and wisely."

(8) The facts of that case are somewhat similar to those before us. In that case the testator executed the will in 1878 about 4 years before his death. The testator was in hospital. He intended to make a will and for that purpose called in his nurse and a nursery governess. At the trial these two attesting witnesses, viz. the nurse and the nursery governess, stated in their evidence that the testator took his own pen inside the room. The attesting witnesses then signed the will. None could, however, say that the testator's signature was there before they signed. They both said that they did not see him sign. Even so, the President of the Probate Division held that the evidence led, taken along with the circumstances was sufficient to establish the due execution and attestation of the will. The decision of the Probate Court was affirmed by the Court of Appeal.

(9) This case illustrates the length to which Judges presiding over Courts of Probate have gone in affirming the due execution and attestation of a will 'ex facie' regular. The view taken by the Courts of England has been applied in this country consistently ever since. I shall refer to a few of these cases in our Court. In the case of — 'Sibo Sundari Debi v. Hemangini Debi', 4 Cal WN 204 (D) a Bench held that an affirmative proof of due attestation is not absolutely necessary in cases of wills but that the Court can make a reasonable inference. In that case there were 7 attesting witnesses. One of the attesting witnesses deposed that he had signed before the testator had put his signature. Two other attesting witnesses deposed that the testator merely acknowledged his signature. They stated that at the time there were other signatures on the will. Three attesting witnesses were dead, but their signatures were proved. One was not called. In these circumstances, the Court applied the presumption that the attestation was regular and was sufficient in law.

In a later decision viz. the case of — 'Netai Chand v. Nagani Dassya', 10 Cal LJ 499 (E) the facts were as follows: All the attesting witnesses except one were dead. The attesting witness who was alive stated that the will was executed in the assembly when the attesting witnesses were present. The witness did not depose to the requirements as mentioned in S. 63, Succession Act. The evidence merely was that the testatrix who was an illiterate lady had touched the pen and thereafter the scribe Kalicharan signed the testatrix's name. The evidence was held to be sufficient in proof of attestation. Mookerjee J. who delivered the judgment made the following pertinent observation at page 501:

"Under these circumstances, we think that this is a case in which the presumption arises, in the absence of evidence to the contrary, that the will was duly executed and attested."

(10) In a still later case, —'Brahmadar Tewari v. Chaudan Bibi', AIR 1916 Cal 374 (F), to which our attention was drawn by Mr. Roy, learned advocate for the respondent, the facts were as follows: There were 13 attesting witnesses 6 of whom were dead, 3 were not examined, 2 proved hostile and only two were examined and these latter witnesses merely stated that they signed as witnesses but they had no recollection if they saw the testator sign or that they received an assurance from the testator of his signature. The same learned Judge (Mookerjee J.) reiterated his views expressed in the earlier case and observed at page 376 as follows:

"It is necessary, however, that affirmative evidence should be forthcoming that the testator did as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively, or as Wilde J., said in 'Re Trimmell, (1865) 11 Jur. (N. S.) 248 (G)', the true test is whether the testator might have seen — not whether he did see — the witnesses sign their names."

In these cases to which I have referred, though the witnesses did not depose to the formalities required, the Court drew the presumption in favour of due attestation not only in cases where there was absence of any evidence to the contrary, but also in cases where the witnesses had perjured themselves but the circumstances indicated that their testimony was false and unreliable. The above presumption of regularity of acts is embodied in S. 114, Evidence Act and was applied by the Judicial Committee of the Privy Council in the case of — 'Munnalal v. Mst. Kashibai', AIR 1947 P. C. 15 (H), where the testamentary capacity of the testator was in controversy. The point to be noted, however, is that in regard to proof of wills the Judicial Committee applied the presumption of regularity of acts as enunciated in S. 114, Evidence Act.

(11) The above review of the cases, in my opinion, leads to the conclusion that in cases where the evidence of the attesting witnesses is not specific but vague or doubtful or even where it is conflicting upon the same material facts, the Court may take into account the surrounding circumstances of the case and judge from the same, whether the requirements of the statute have been complied with.

(12) In this case the evidence discloses and it is also borne out by the recitals in the will, the

execution of which is admitted, that the testator was a man advanced in years, that he had lost his wife and two sons, that his only surviving son was unheard of for several years and that the propounder of the will Sm. Annankali Debya who was a young widowed lady and was related to him as his sister-in-law, nursed him with care. The evidence also discloses that the objector was residing away from Billagram, the ordinary place of residence of the testator, and as such was not in a position to look after him.

In this state of his family the disposition in the will whereby he devised his estate to Sm. Annakali Debya was a natural disposition. The facts that the testator had gone all the way from Billagram to Krishnagar to have a will executed on the aforesaid terms, that at the time of execution the attesting witnesses were present and that it was presented for registration by the testator on the same day, all indicate that the testator duly executed the will and had it attested in accordance with law. The mere fact that there is a lacuna in the evidence of P. W. 1 is not conclusive of the matter.

This lacuna may be due either to the fact that the Judge before whom the trial took place was not cautious enough or that the learned pleader who conducted the case on behalf of the propounder did not take steps necessary in cases like this, to have the necessary evidence recorded. In my opinion the mere fact that the requisite evidence was not recorded does not establish that all the requirements of the Statute (sic. were not complied with?) and does not render the will ineffective. In my opinion, the evidence of Barkatulla in this case must be taken to be sufficient compliance with the requirements of S. 63, Succession Act.

One of the attesting witnesses Radhika is dead and so far as he is concerned the evidence of Barkatulla, in my opinion, proves the attestation by him also. Hence, in my opinion, the evidence of Barkatulla taken by itself establishes due attestation of the will by at least two attesting witnesses, viz., himself and Radhika. It is unnecessary, therefore, to consider the effect of the evidence of P. W. 2, Ahibhusan Chatterjee. But in my opinion, that evidence also lends support to the fact of execution and due attestation of the will by the testator. The evidence of Ahibhusan Chatterjee, P. W. 2, in his examination-in-chief is as follows:

".....I was an attesting witness to the will executed by him in favour of the propounder. ....Akhoy Chatterjee was present when I signed the will, I did not see Akhoy sign the will."

In cross-examination he stated that he did not see any other attesting witness sign the will. In other words, by his evidence the witness wanted to destroy the fact of execution by Akhoy and of his being an attesting witness. His evidence that he did not see the testator sign was obviously intended to that end. But, in my opinion, having regard to the circumstances of this case it is open to the Court to discard that part of his testimony whereby the witness repudiated the fact of attestation of the will. Such instances are not rare in the reports.

In the case of — 'Nubo Kishore v. Joy Doorga', 22 W. R. 189 (I), it was held that the mere fact that the attesting witnesses repudiated the will does not invalidate the will if it can be proved by evidence of a reliable character that they have given false testimony. Having regard to the circumstances disclosed in the evidence, the mere fact that the attesting witness Ahibhusan repudiated the execution of the will by the testator does not invalidate the will. In my opinion, the evidence of Ahibhusan Chatterjee must be regarded with supicion. I entirely distrust his statement that Annakali was present and actively interested herself in the matter of execution and attestation of the will.

It might well be that she had accompanied the testator to Krishnagar but, in my opinion, it is hard to believe as has been said by P. W. 2 that Annakali was present at the 'Majlis' where the will was being executed and attested. In my opinion, the presumption arising out of the will itself, supported as it is by the clear and convincing testimony of Barkatulla, leads me to hold that the evidence of Ahibhusan Chatterjee must be regarded with caution and can be believed to the extent to which it supports the fact of attestation of the will. In my opinion, the evidence on record clearly establishes that the will was duly executed and attested.

(13) Before I conclude this point it is necessary to refer to an argument put forward by Mr. Roy on behalf of the respondent that the Registrar must be regarded as an attesting witness. In support of his argument he referred us to a decision — 'Abdul Karim v. Salimun', 27 Cal. 190 (J), and to certain other cases. The view so taken has now been overruled by the Judicial Committee of the Privy Council in the case of — 'Surendra Bahadur Singh v. Thakur Behari Singh', AIR 1939 P. C. 117 (K), to which Mr. Sen Gupta drew our attention. As the Judicial Committee pointed out there must be evidence to show that the Registrar signed in the presence of the executant and that the executant signed in the presence of the Registrar. In the absence of such evidence no inference can be drawn from the mere signature of the Registrar that he is an attesting witness. It is to be noted that the law does not require the Registrar to sign in the presence of the executant and no such inference as aforesaid can be drawn. In my opinion, therefore, the first point raised by Mr. Sen Gupta must be overruled.

(14) The second point deals with the testamentary capacity of the executor. As has been observed by the Judicial Committee of the Privy Council in AIR 1947 P. C. 15 (H), the testamentary capacity of the testator who makes a sane disposition and knows what he is about to do, might be presumed. In this case apart from the presumption there is positive evidence of the objector himself that the testator used to come to Court and looked after his litigation and that he also used to look after his properties. The dispositions under the will are natural. There is thus no reason to suggest that the testator was not possessed of testamentary capacity at the time. The testator survived the will by about 10 years and he took no steps whatsoever to disaffirm the provisions contained in the will. The second contention must also be overruled.

(15) This appeal, therefore, fails and is dismissed with costs — hearing fee three gold mohurs.

(16) DEBABRATA MOOKERJEE, J.: I agree.

B/V.R.B. Appeal dismissed.

A.I.R. 1953 CAL. 465 (Vol. 40, C.N. 171)

HARRIES C. J. AND G. N. DAS J.

Nagendra Bhusan Beed and another Petitioners; v. Mrs. M. Parker and another Opposite Party.

Civil Rules No. 747 and 748 of 1951, D/- 18-5-1951.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act, S. 9(1)(a) and Sch. A para 4 — Fixation of standard rent — House let out to tenant on 1-12-1941 on certain rent — Basic rent of premises would be the rent payable in December 1941 plus ten per cent thereof — Basic rent being known Sch. A part. 4 can have no application and Court has got to proceed to standardise the rent under S. 9(1)(a).

(Paras 1 and 2)

Binayak Banerjee and Susil Kumar Biswas, for Petitioners; Nani Kumar Chakravarty with Sukriti Ganguly, for Opposite Party.

G. N. DAS J.: These are two petitions in revision on behalf of the landlords against an order of Mr. S. C. Talukdar, Judge Fifth Bench of the Court of Small Causes, Calcutta, reversing on appeal orders passed by the Rent Controller fixing the standard rent of premises Nos. 114C and 114D Ripon Street. It is abundantly clear that these two flats were let out to tenants on 1-12-1941, the respective rents payable being Rs. 110 and Rs. 125/-. It is therefore a case where the basic rent is known and the Court has got to proceed to standardise the rent under s. 9(1)(a) of the Act read with Sch. A.

(2) Paragraph 4 of Sch. A can have no application to this case where there was a basic rent in respect of the premises in question. The basic rent of the premises would be the rents payable in December 1941 plus ten per cent. The learned Judge of the Fifth Bench has entirely misunderstood the provisions of S. 9 read with Sch. A of the Act. He ought to have considered that the premises in question were let out on 1-12-1941 and para. 4 of the Schedule had therefore no application to this case. The Rent Controller was, in my opinion, perfectly right in finding out the basic rent and then adding ten per cent thereto.

(3) The result is that the orders passed by the learned Judge, Fifth Bench of the Court of Small Causes, Calcutta, are set aside and those of the Rent Controller restored.

(4) The Rules are made absolute with costs. There will be one set of hearing-fee for the two Rules.

(5) HARRIES C. J.: I agree.

C/K.S. Rules made absolute.

A.I.R. 1953 CAL. 466 (Vol. 40, C.N. 172)

RENUPADA MUKHERJEE J.

Atul Chandra Roy, Plaintiff-Appellant v. Sm. Charubala Dasi and others, Defendants-Respondents.

A. F. A. D. No. 1019 of 1948, D/- 2-2-1953.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), Ss. 6, 38 and 52 — Right of tenure-holder to reduction of rent.

The Bengal Tenancy Act contains no specific provision corresponding to S. 38 (1)(a) under which an ordinary tenure-holder may claim reduction of rent. But such a claim is founded on principles of natural justice and equity and is not repugnant to any of the provisions of the Bengal Tenancy Act, particularly those provisions which govern the incidents of an ordinary tenure. Hence, a tenure-holder is entitled to reduction of rent on account of deterioration of a portion of his land by deposit of sand: AIR 1936 Pat 341 (SB), Disting. (Paras 5, 6)

Arun Kumar Janah and Sarat Chandra Janah, for Appellant; Sambhu Nath Banerjee, for Respondents.

CASE CITED:

(A) ('36) AIR 1936 Pat 341:
15 Pat 594 (SB)

JUDGMENT: This second appeal has been preferred by the plaintiff landlord whose claim for produce rent has been proportionately reduced by the courts below owing to deterioration of a part of the tenancy land on account of deposit of sand. In the trial court, the plaintiff claimed cash rent at Rs. 24-12-17 gandas per year and the value of 'sanja' paddy at 1 ara 9 kuris and 3 mans for the years 1349 B. S. to six months of 1351 B. S. with cesses and damages.

(2) The suit was contested in the trial court on three questions, namely, (1) what was the measure of an ara, kuri and man in terms of maunds and seers, (2) what amount of cesses is recoverable by the plaintiff and (3) whether the defendants can get proportionate reduction of rent.

(3) The decision of the lower appellate court has not been challenged by the appellant as regards the first two questions. Only the third question viz., whether the defendants are entitled to reduction of 'sanja' rent on account of deterioration of the tenancy land was canvassed in this appeal by the appellant.

(4) It was held by both the courts below that 'sanja' paddy or produce rent is deliverable for 4 bighas 13 cottas and 8 chattacks of land out of which .81 of land corresponding to 2 bighas by local measurement have undergone deterioration by deposit of sand and could not be cultivated during the period in suit. So by allowing proportionate reduction of 11 kuris for the area which lay fallow during the years in claim the courts below allowed 'sanja' paddy at 14 kuris and 3 mans and the value of 'sanja' paddy was calculated on that basis. The plaintiff has appealed against this part of the judgment and decree of the lower appellate Court.

(5) The only point which requires decision is: are the respondents who are tenure-holders entitled to reduction of rent on account of deterioration of a portion of their land by deposit of sand?

(6) There can be no question that a portion of respondents' 'sanja'-paying land measuring 2 bighas by local measurement has undergone deterioration by a natural cause, namely, by deposit of sand. The deterioration is due to a circumstance over which the tenants had no control and the damaged land could not be cultivated for the years for which 'sanja' paddy has been claimed. It is not necessary here to determine whether the deterioration is of a permanent character and whether it would permanently debar the plaintiff landlord from claiming the full quantity of sanja rent. Suffice it to say that .81 acres of land of the tenancy could not be cultivated for the period of claim. The only contention urged on behalf of the appellant was that the defendants are tenure-holders and not occupancy raiyats, and so they are not entitled to get any reduction of rent for deterioration of the land by deposit of sand, a benefit which has been conferred upon occupancy raiyats only by S. 38(1)(a) of the Bengal Tenancy Act. It was urged on behalf of the appellant that

while reduction of rent for reduction of area has been expressly provided for in the case of all classes of tenants including tenure-holders under S. 52 of the Bengal Tenancy Act, no benefit corresponding to that mentioned in S. 38(1)(a) has been made available to tenure-holders, and so, they are not entitled to claim any reduction of rent for deterioration of land. In support of this contention, the case of — 'Dukha Lal v. Mt. Manabati', AIR 1936 Pat 341 (A) was cited by the learned Advocate for the plaintiff-appellant. This case, however, applies to an Istimrari mukarrari tenant whose rent is fixed in perpetuity and is not liable to alteration at the instance of the landlord on any ground except alteration in area. The defendants, on the other hand, are ordinary tenure-holders. Their rent is not certainly fixed in perpetuity and is liable to enhancement at the instance of the landlord under S. 6, Bengal Tenancy Act. That section runs as follows:

"Where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof—

(a) that the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held, or

(b) that the tenure-holder, by receiving reductions of his rent, otherwise than on account of a diminution of the area of the tenure, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."

The expression "by receiving reductions of his rent" in clause (b) of this section is important. This expression certainly contemplates reduction of rent by agreement between the parties. But it cannot be said that this expression excludes a case of reduction of rent by a suit for just and sufficient cause. The Bengal Tenancy Act no doubt contains no specific provision corresponding to S. 38(1)(a) under which an ordinary tenure-holder may claim reduction of rent. But such a claim is founded on principles of natural justice and equity and is not repugnant to any of the provisions of the Bengal Tenancy Act, particularly those provisions which govern the incidents of an ordinary tenure. There is nothing in the Act to indicate that either the landlord or the tenant would be precluded from claiming any right or relief under the general law or under equity unless such right or claim is specifically provided for in the Act itself.

(7) In these circumstances, the courts below have, in my opinion, applied correct principles of law in allowing proportionate reduction of 'sanja' rent for deterioration of a part of the tenancy land.

(8) In the result, the appeal must fail. The appeal is, accordingly, dismissed with costs and the judgment and decree of the lower appellate court are hereby confirmed.

B/V.S.B.

Appeal dismissed.

A.I.R. 1953 CAL. 467 (Vol. 40, C.N. 173)

G. N. DAS AND GUHA RAY JJ.

Sm. Tarulata Devi, Appellant v. Bibhuti Bhushan Roy and others, Respondents.

A. F. O. O. No. 55 and Civil Revn. Case No. 534 of 1951, D/- 29-8-1952.

(a) Civil P. C. (1908), O. 41, R. 5 — Effect of stay order.

The making of an 'ad interim' order for stay does not take away the jurisdiction of the Court below, but the effect of the order is, nevertheless, that an order of such Court in contravention of the order for stay is irregular or at the most illegal but not 'ultra vires'. (Para 4)

Anno: C.P.C., O. 41, R. 5 N. 16.

† **(b) Civil P. C. (1908), O. 41, R. 5 — Order for stay is direction to Court below — Direction not communicated to that Court — Any order made by it in ignorance of direction is valid. 33 Cal 927, Dissented from: Case law discussed. (Para 11)**

Anno : C.P.C., O. 41, R. 5 N. 17 Pts. 1 to 6.

Krishnalal Banerjee and Hari Charan Banerjee, for Appellant; Jitendra N. Guha and Paritosh Sarkar, for Respondents.

CASES CITED:

(A) ('49) Civil Revn. No. 2026 of 1949 (Cal)
(B) ('06) 3 Cal LJ 67: 33 Cal 927
(C) ('12) 14 Ind Cas 808: 15 Cal LJ 335
(D) ('97) 1 Cal WN 226
(E) ('43) AIR 1943 Cal 319: 47 Cal WN 186
(F) ('18) AIR 1918 Mad 391: 41 Mad 151 (FB)
(G) ('27) AIR 1927 All 401: 50 All 41
(H) ('33) AIR 1933 Rang 416: 11 Rang 410
(I) ('51) AIR 1951 Pat 130: 30 Pat 1018 (SB)

G. N. DAS J.: These two matters are interrelated and arise out of certain proceedings in execution of a decree which was obtained by respondents 1 and 2 against respondent 3 in Suit No. 16 of 1943. The decree was passed on 4-5-1943. The decree was for recovery of money which was due to respondents 1 and 2 in respect of a legacy given to them by one Srimati Saila Sudha Devi. The allegation was that the money due under the legacy, had been misappropriated by respondent 3 who was the executor under the last will of Srimati Saila Sudha Devi. This decree was executed on certain occasions. Ultimately, on 27-5-1948, the present appellant the petitioner stood surety for the due performance of the decree by her husband, respondent 3, the judgment-debtor.

The appellant agreed to pay the decretal dues in certain instalments and in case three consecutive instalments were unpaid she bound herself to pay the decretal dues and as security for payment of the said dues created a charge in respect of the property now in dispute. As was to be expected, three consecutive instalments were not paid with the result that the decree-holders proceeded to realise the unpaid decretal dues by a sale of the charged property after taking the necessary proceedings as contemplated by S. 145, Civil P. C. Ultimately, the executing Court directed the disputed property to be put up to sale. The order for sale was made on 19-11-1949. On 23-11-1949, sale proclamation was issued fixing the sale for 9-1-1950. On 22-12-1949, the appellant moved this Court in revision against the order of the executing Court dated 19-11-1949, directing the disputed property to be sold.

The appellant obtained a Civil Rule being No. 2026 of 1949, and an 'ad interim' order for stay of further proceedings pending in the Court below was made by this Court. It is common ground that the 'ad interim' order was not communicated by this Court to the Court below at any time before 9-1-1950. It appears that on that date the appellant's pleader wanted to move the Court below by an unverified petition praying for stay of the sale. The executing Court thereupon asked

the appellant's pleader to move the petition in the presence of the decree-holders. It is stated that the appellant's pleader failed to get in touch with the pleader for the decree-holders.

In consequence the petition was never moved in Court and the sale took place as scheduled on 9-1-1950. The property was knocked down to the decree-holders at the highest bid of Rs. 28,000/-. The bid however was not accepted till 25-5-1950. It does not appear that at that stage the appellant made any grievance before the executing Court that in view of the order for 'ad interim' stay the sale was not an effective one and should not be confirmed. It appears that Civil Revn. No. 2026 of 1949 (A), was ultimately heard by this Court and the Rule was discharged on 10-5-1950. Thereafter two applications were filed in the Court below on 22-6-1950. The first one was an application under S. 151, Civil P. C. asking the executing Court to set aside the sale which was held on 9-1-1950. The allegation made in the petition was that in view of the interim order for stay of further proceedings the sale was an illegal one and should be set aside.

The second application was under O. 21 R. 90, Civil P. C., seeking to set aside the sale on the ground of material irregularity and fraud in publishing and conducting the sale and consequent inadequacy of price. The first application was dismissed by the learned Subordinate Judge on 19-12-1950. The second application was also dismissed on 15-1-1951. Against the order of the learned Subordinate Judge dismissing the application under S. 151, Civil P. C. the appellant moved this Court in revision giving rise to Civil Revision No. 534 of 1951. Against the order refusing to set aside the sale under O. 21, R. 90, Civil P. C., the appellant preferred F.M.A. 55 of 1951.

(2) I shall first deal with the Civil Revision Case. Mr. Banerjee appearing for the petitioner (the surety) has contended that as the 'ad interim' order for sale was brought to the notice of the Court before the sale had taken place, the Court had no authority to hold the sale & the sale that was held on 9-1-1950, must be regarded as illegal and must be set aside. Before I deal with the effect of a sale held under such circumstances, it is necessary to point out whether the present case is a fit one in which this Court will exercise its power of revision. I have stated the circumstances under which the order for sale came to be passed as also the facts which have happened after an order for sale was made by the Court below. The order for sale was made on 19-11-1949. On 23-11-1949, the executing Court directed the issue of a sale proclamation fixing the sale for 9-1-1950.

The petitioner must have known that the sale would take place on 9-1-1951. She did not however act with commendable diligence but waited till 22-12-1949, the day this Court closed for the Christmas holidays and an order for stay was obtained. It is true, as the learned Advocate suggests, that the necessary process fees were deposited in Court. The petitioner however did not take care to see whether the order for stay reached the Court below in proper time. She did not make move further in this matter till 9-1-1950. On that date an unverified petition was sought to be moved in the executing Court. No prior notice of the application was given to the decree-holders. It does not appear whether the petition itself was moved in Court. The petition was an unverified petition and naturally the executing Court was anxious to see whether the statements made in the petition were correct or not. The Court therefore directed the pleader for the petitioner to move the petition in the presence of the pleader for the decree-holders. Nothing further was done.

The sale took place on 9-1-1950. The highest bid which was offered by the decree-holders came up for acceptance on 25-5-1950. At that stage no suggestion was made before the Court that the bid should not be accepted as the sale itself was an illegal one. In the meantime the Rule which the petitioner had obtained from this Court was discharged on 10-5-1950. The effect of the order discharging the Rule was that the order for sale was a valid and binding order. The petitioner filed the application under S. 151, Civil P. C., some time later.

In these circumstances Mr. Guha appearing for the opposite party has submitted that this is not a proper case in which this Court would exercise its revisional jurisdiction. The petitioner sought to invoke the inherent powers of the Court under S. 151, Civil P. C., with a view to having the sale set aside. In my opinion, the facts stated above sufficiently indicate that the petitioner has no just grievance. The order for sale which was challenged in the revision case and in which an 'ad interim' order was obtained was later on discharged. There was therefore no real justification for holding up the sale. In our opinion, this is not a fit case in which this Court should interfere in revision with the order complained of.

(3) The above conclusion is sufficient for the disposal of this revision case. As the following question has been canvassed at some length, we may proceed to record our opinion on the point. Mr. Banerjee contended that the moment 'ad interim' order for stay of proceedings is made by a superior Court, the Court below in which the proceedings are pending becomes incompetent to exercise its jurisdiction in those proceedings. It is contended that the effect of an order for stay, even though uncommunicated, is to suspend the operation of the proceedings in the Court below. In support of this submission reference has been made to the case of —'Hukumchand Baid v. Kamalanand Singh', 33 Cal 927(B). In that case 'ad interim' order for stay of delivery of possession had been obtained from this Court but before the order was communicated to the Court below, the Court below had delivered possession to the decree-holders.

Thereupon a further Rule was obtained from this Court calling upon the decree-holder to show cause why the decree-holder should not furnish security. At the time of the hearing of the Rules both parties were content with the maintenance of the order for delivery of possession. The only question debated was whether the Court was competent to require security from the decree-holder. This Court directed that security be taken from the decree-holder, the possession being retained by him. In the course of their judgments their Lordships Woodroffe and Mookerjee JJ. both dealt with the effect of an uncommunicated interim order for stay of delivery of possession. The observations made by the learned Judges in this behalf were therefore not necessary for the purposes of the actual order made by them.

The observations of Woodroffe J. are to be found at p. 934. The learned Judge was of the opinion that an uncommunicated order for stay of delivery of possession had the effect of rendering the delivery of possession itself as being in excess of jurisdiction. It was pointed out that

an interim order for stay of proceedings is not merely a prohibitory order addressed to a party but it is an order which takes away the power of the Court below to deliver possession, the Court below ceases to have authority to proceed further after a superior Court has made an interim order for stay of proceedings. In other words, the view of the learned Judge is that the subordinate Court which was entrusted with the duty of delivering possession loses jurisdiction the moment an order for stay of proceedings is made by a superior Court.

Mookerjee J. made similar observations at p. 944-45. The learned Judge observed that the delivery of possession was 'ultra vires' and illegal. The reason suggested was that the effect of the interim order was to arrest the execution proceedings, the property which was the subject-matter of execution being vested in the custody of the Court, the operation of the interim order retaining its full effect till it was discharged or vacated, as the case may be. The observations of the learned Judges to which I have adverted no doubt support the contention of Mr. Banerji but as these observations did not form the basis of their ultimate decision they are not binding on us.

(4) Reliance was also placed by Mr. Banerjee on a later Bench decision of this Court in the case of —'Sati Nath Sikdar v. Ratanmani Naskar', 15 Cal LJ 335(C). In that case this Court had made an interim order for stay of proceedings. Before the order of this Court reached the Court below a telegram sent by a Vakil of this Court supported by an affidavit of the party concerned was filed in the Court below and a request was made to the Court below to stay its hands. The Court below refused to do so. Thereupon this Court was moved by the party who had obtained an order for stay for vacating the proceedings in the Court below since the order. In that connection this Court observed while cancelling the order of the Court below that the arms of this Court were long enough to reach a subordinate Court which does not obey an interim order made by this Court.

In that case the Court below had disobeyed the order of this Court in spite of being duly apprised of it. In the course of the same proceedings this Court as a superior Court recalled the order made by the Court below and set it aside. The facts of this case are entirely different. In this case an attempt is made not in the course of those proceedings in which the stay order was obtained but in collateral proceedings to have the order for sale vacated. The above Bench decisions of this Court did not directly decide the present question. It is thus not necessary to refer this matter to a Full Bench in the view which we take of this matter.

The earliest reported decision of this Court which has a bearing on this question is the case of —'Bisseswari Choudhurani v. Horo Sundar Majumdar', 1 Cal WN 226(D). In that case an ex parte order for stay of proceedings had been obtained and before the order was communicated the sale had taken place and the property had been purchased by a stranger to the decree. Thereupon the judgment-debtor started a suit to have the sale set aside. Norris and Macpherson JJ. refused to set aside the sale. The reason given by the Court for its decision was that an interim order for stay is in the nature of a prohibitory order and like all such orders takes effect on the communication of such order. It was observed that the execution proceeds under the direction of the Court which makes the decree and the executing Court has full authority to execute the decree. An order under S. 545 Civil P. C., 1882, which corresponds to O. 41, R. 5, Civil P. C., 1908, does not cancel the order for sale nor does it purport to undo anything which it was doing. Its utmost effect is to stop further action in the direction of execution and it would only have that effect when it reaches the Court whose duty it is to obey it.

The reason for the decision therefore is that the executing Court retains its jurisdiction in spite of the making of an order by a superior Court for interim stay of proceedings. This is the principle which was later enunciated by Mitter and Biswas JJ. in the case of —'Jatis Chandra v. Kshirod Kumar', AIR 1943 Cal 319 (E). In that case a sale had already taken place. A stranger had bid at the sale but before the bid was accepted an application in revision was moved in this Court and an interim order was obtained from this Court staying acceptance of the bid. Thereafter the bid was accepted. In a later suit the sale was attacked as a nullity, the ground suggested being that in view of the order for stay the acceptance of the bid was in excess of jurisdiction and therefore there was no completed sale. Mitter J. who delivered the judgment of the Bench referred to the two lines of cases of this Court and other High Courts as regards the effect of communication or otherwise of an order for stay and then stated as follows :

> "In the view we are taking it is not "necessary to decide which of the aforesaid views is correct." (Page 324).

Mr. Banerjee has contended that this passage shows that the observations made by the Bench subsequent to the passage cited were 'obiter dicta', This however is not correct. The observations which followed were made in connection with a question raised before the Bench, namely, whether an order for stay of proceedings takes away the jurisdiction of the Court below, irrespective of the question whether the order operates from the date of its passing or the date of its communication. Their Lordships did not decide the last question but proceeded to make the observations which followed, on the assumption that the order for stay operated from the time it was made. The observations which are relevant for the present purpose are to be found later in the same page (page 324).

The substance of the observations is that in their Lordships' view the execution proceedings are not withdrawn the moment an order for stay is made, the matter covered by the stay order is only held in abeyance during the operation of the order for stay; an order passed by the Court in contravention of the stay order would be an irregular, or, at the most, an illegal exercise of the jurisdiction of the Court. In other words, the learned Judges drew a distinction between an entire absence of jurisdiction and illegality in the exercise of jurisdiction consequent on the making of an interim order for stay of proceedings. In their Lordships' view the effect of an interim order for stay of proceedings is that the jurisdiction of the subordinate Court is not entirely taken away but only its exercise is restrained by the order for stay. The jurisdiction remains vested with the executing Court and is not taken away.

Any proceedings taken by the Court below in derogation of the order for stay, as the learned Judges point out, would clearly be an irregular or illegal exercise of jurisdiction, but would not

be 'ultra vires' as was suggested in —'Hukumchand's case', (B). The observations made at page 324 were necessary for the purposes of the actual decision in that case, namely, whether the sale was a valid sale or not. They are the observations of a Bench of this Court and are binding on us unless we propose to differ from the same. We have given the matter our best consideration and we are clearly of opinion that the observations made by Mitter and Biswas JJ. in — 'Jatis Chandra's case (E), are based on sound reasons and there is no ground to depart from the view taken by them. These are all the cases of this Court to which our attention was drawn by either side.

(5) It remains for us to consider the decisions of other High Courts to which our attention was drawn. Reference was made on behalf of the respondents to the case of —'Venkatachalapatirao v. Kameswaramma', AIR 1918 Mad 391 (F.B.) (F). The opinion of the Full Bench was delivered by Seshagiri Ayyar J. The learned Judge dissented from the view taken by this Court in —'Hukumchand's case (B)', and suggested that —'Hukumchand's case (B)', proceeded on the view taken in American cases and in American text books. The learned Judge observed that an uncommunicated order for stay does not operate to take away the power of a subordinate Court. It was held that an order made by a subordinate Court in ignorance of an interim order for stay made by a superior Court cannot be said to be an entirely invalid one. This decision supports the position taken on behalf of the opposite party.

The case of —'Parsotam Saran v. Barhma Nand', AIR 1927 All 401 (F.B.) (G), concerns the effect of an order for stay of proceedings on a sale which takes place thereafter. The Full Bench drew a distinction between a decree-holder auction-purchaser and a stranger auction-purchaser. The Full Bench observed that a stranger auction-purchaser is absolutely protected and the sale at which he purchased cannot be attacked on the ground that it was held in contravention of an order for interim stay of proceedings. I may refer in passing to the following observations of Mukerji J. at p. 403 :

> "Now when an appellate Court orders stay of execution it gives a direction to somebody. The execution is not in the hands of the appellate Court. It has to tell the Court of first instance that it is to stay its hand in the execution of its decree. It necessarily follows that if the lower Court has no information of the order of the appellate Court it cannot stay execution and the execution must proceed."

This observation of Mukherji J. was approved by the Bench in —'Jatis Chandra's case (E)', already cited. The observation clearly implies that an order for stay is in the nature of a prohibitory order and unless the Court below which is prohibited from doing certain things is apprised of the order, the subsequent proceedings in execution and orders made in the course of that execution cannot be challenged as invalid. This case also supports the contention of the opposite party.

(6) On behalf of the petitioner Mr. Banerjee also referred us to a decision of the Rangoon High Court in the case of — 'Ma Ti v. Ma Thit', AIR 1933 Rang 416 (H). That case is clearly distinguishable. There a sale had been held by the Nazir in ignorance of an order made by the executing Court itself. The Bench decided that the Nazir was a ministerial officer and was the hand of the Court and as the Court itself had stayed the sale, the action of the Nazir in holding the sale was invalid. In the course of the judgment the Bench was careful to point out that they were not deciding the question as to the effect of an order for stay made by a superior Court 'viz-a-vis' the proceedings pending in a subordinate Court.

(7) Mr. Banerjee also referred us to a decision of the Patna High Court in the case of — 'Liakat v. Padampat', AIR 1951 Pat 130 (SB) (I). The Special Bench consisting of Reuben, Imam and Ramaswami JJ. were divided in their opinion. The majority view was in favour of the view taken in 'Hukumchand's case (B)'. Imam J. took a contrary view. As we have already stated, the view in 'Hukumchand's case (B)' is an obiter dicta' and has not been accepted by the later Bench decision in 'Jatis Chandra's case (E)'.

(8) Reference was made to the provisions of O. 41, R. 5, Civil P. C. The cases cited indicate a divergence of opinion as to the true construction of this Rule. A perusal of this rule does not in our opinion throw much light on the question before us. The rule does not state the effect of an order for stay. It only states that the appeal does not operate 'ipso jure' as a stay of proceedings and empowers the appellate Court after an appeal has been filed to direct stay of proceedings in certain circumstances.

(9) We have held that even if an order for stay of proceedings granted by a superior Court operates from the date of its passing its effect is not to take away the jurisdiction of the Court below. In this view, it is not necessary to consider whether the communication should be formally made by the superior Court. In this case however, there was no formal communication of the order for stay by this Court in this case. The petitioner did not file any verified statement or any affidavit in support of the fact that an order for stay had been passed by this Court, Communication must necessarily mean a communication on which the Court can act. In the absence of receipt of the order for stay or of an affidavit in support of the passing of the order, the Court was perfectly entitled to proceed on the footing that no order for stay had been made by this Court.

(10) We may however point out that though the making of an 'ad interim' order for stay does not take away the jurisdiction of the Court below, the effect of the order is nevertheless, to render an order of the Court below in contravention of the order for stay is irregular or at the most illegal but not 'ultra vires'.

(11) In our opinion, the order for stay is a direction to the Court below and if the direction is not communicated to that Court, any order made by it in ignorance of the direction is valid.

(12) In the result this revision petition must fail and the Rule is discharged. There will be no order for costs.

(13) Coming now to the appeal, the Court below has found that there was no inadequacy of price. In the Court below the appellant surety examined an engineer in support of the valuation of the property. The engineer's estimate was that the property was valued at Rs. 40,000/-. The cross-examination of the engineer clearly shows that he did not care to inspect the premises. He was not in a position to state the nature of the bricks or mortar employed in the building. He did not make the necessary measurement. It is difficult to say that the view taken by the Court below on this point is incorrect. In our opinion, the appellant has failed to prove

that there was any inadequacy of price. On this finding the application under O. 21, R. 90, Civil P.C. was rightly dismissed by the Court below.

(14) The appeal accordingly fails and is dismissed with costs, hearing fee being assessed at three gold mohurs.

(15) GUHA RAY J.: I agree.

A/V.R.B. Revision and appeal dismissed.

A.I.R. 1953 CAL. 471 (Vol. 40, C.N. 174)

DAS AND DEBABRATA MOOKERJEE JJ.

Sarat Chandra Mondal and others, Defendants-Appellants v. Panchanan Mondal and another, Plaintiffs-Respondents.

A. F. O. D. (Probate) No. 39 of 1951, D/-11-2-1953.

(a) Evidence Act (1872), S. 90 — Presumption under in case of will.

The presumption which arises under S. 90, Evidence Act, can also be drawn in case of a will the genuineness of which is in controversy in the Probate Court, though there is a possibility that the propounder may antedate the will and thereby call in his aid the presumption under the Section. AIR 1947 PC 15 and I L R (1943) 1 Cal 392, Rel. on. AIR 1927 Cal 102, Disting. (Para 4)

Anno: Evi. Act, S. 90, N. 8.

(b) Evidence Act (1872), S. 90 — Computation of thirty years.

As the rule embodied in S. 90 is based on the impossibility of obtaining living testimony to the signing or the handwriting of a document, it logically follows that time should run from the date which the document bears whether it is a will or any other document. Hence the period of presumption in case of will also begins from the date of execution and not from the date of the death of the testator which is the date from which the will becomes operative. Similarly, the outer limit of the period of thirty years is the date when the will is sought to be proved and not the date of its filing in Court. (1828) 8 B & C 22 and AIR 1936 PC 15, Ref. (Paras 5, 6)

Anno: Evi. Act, S. 90 N. 3.

(c) Evidence Act (1872), S. 90 — Extent of presumption in case of will — (Succession Act (1925), S. 59).

The presumption under S. 90 is one of due execution and attestation. This involves the idea that the document was executed duly and attested duly; in other words, that the document was validly executed. This involves a further conception that the testator had testamentary capacity to execute the will. Thus the Court may presume that the will in question was duly executed and attested in accordance with the formalities required by the Succession Act. AIR 1947 PC 15, Rel. on. (Para 7)

Anno: Evi. Act, S. 90 N. 6; Succ. Act, S. 59 N. 6.

(d) Evidence Act (1872), S. 90 — Presumption under, is rebuttable — Held, on the facts and in the circumstances of the case, presumption of due execution was not rebutted. (Para 8)

Anno: Evi. Act, S. 90 N. 1.

(e) Succession Act (1925), S. 61 — Proof of undue influence.

In order that the objector might successfully prove undue influence he must establish two facts, namely, that the propounder was in a position to dominate the will of the testator and that in point of fact he did dominate the will in the particular case. AIR 1919 PC 132, Rel. on. (Para 9)

Anno : Succ. Act, S. 61 N. 4.

(f) Succession Act (1925), S. 268 — Grant of Letters of Administration — Parties to proceedings — Omission to state some of the members of testator's family is not fatal to proceedings. (Para 12)

Anno: Succ. Act, S. 268 N. 1.

(g) Succession Act (1925), S. 232 — Universal legatee.

A universal legatee is undoubtedly one who by virtue of the will is entitled to the whole of the estate left by the propounder. (Para 13)

Where whole of the estate is not devised to a legatee but it is subject to two previous life estates and is subject also to the burden of providing for the funeral rites and sradhs of the testator and his widow and for the payment of the debts left by the testator, such a legatee cannot be called a universal legatee. (Para 13)

Anno: Succ. Act, S. 232 N. 1 Pt. 9.

(h) Succession Act (1925), Ss. 102, 103, 232 — Residuary legatee.

The statement of law that the residuary legatee must be vested with the surplus and residue of the property left by the testator at his death underlies Ss. 102 and 103 of the Succession Act. (Para 13)

A will conveyed the estate to A after two life estates, one in favour of the widow and another in favour of the widowed daughter, had come to an end. The will also directed A to perform the funeral rites and sradh of the testator and the testator's widow as well as to pay the debts in a certain manner indicated therein. The entire estate of the testator did not devolve on the testator's death on A but was subject to certain reservations made in the will.

Held that A merely got the rest and residue of the estate left after the two life estates have ceased and after the provisions contained in the will for payment of debts and sradh expenses had been complied with and was therefore a residuary legatee. 51 Cal WN 917, Rel. on. (Para 14)

Anno: Succession Act, S. 102 N. 1; S. 103 N. 1; S. 232 N. 1.

Amarnath Roy Choudhury, for Appellants; Mrinal K. Ghose and Jogesh Ch. Chatterji, for Respondents.

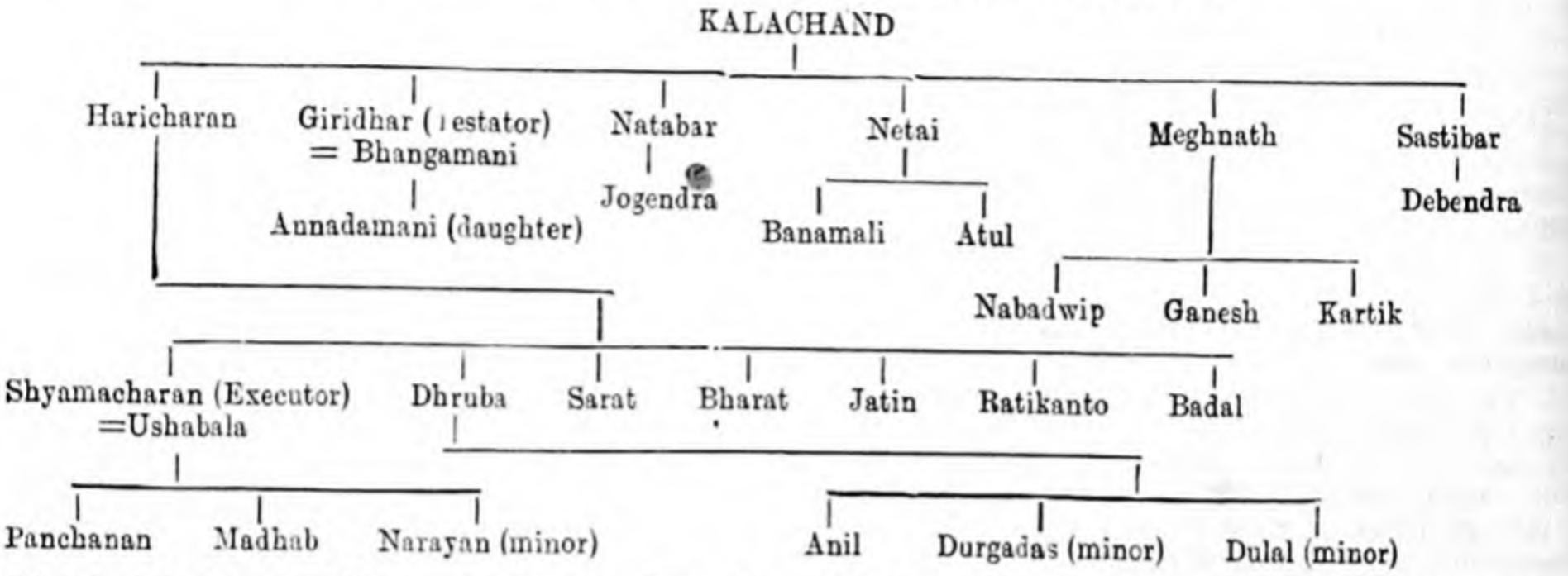
CASES CITED :

(A) ('16) AIR 1916 Cal 938: 23 Cal LJ 82
(B) ('27) AIR 1927 Cal 102: 31 Cal WN 215
(C) ('43) 47 Cal WN 359:
ILR (1943) 1 Cal 392
(D) ('47) AIR 1947 PC 15: 51 Cal WN 175 (PC)
(E) (1828) 8 B & C 22
(F) ('36) AIR 1936 PC 15:
40 Cal WN 226 (PC)

(G) ('47) AIR 1947 PC 15: 51 Cal WN 175 (PC)
(H) ('19) AIR 1919 PC 132: 1920 AC 349 (PC)
(I) ('47) 51 Cal WN 917

DAS J.: This is an appeal by the objectors against a decision of Mr. R. N. Roy, learned Subordinate Judge, 6th Court, 24-Parganas, granting Letters of Administration to the estate of Giridhar Mondal with a copy of the Will dated 18-2-1920, annexed.

(2) The Will which is in question in this appeal was executed by Giridhar Mondal on 18-2-1920, and was registered on 10-3-1920. The terms of the Will will be set out hereafter. In order to appreciate the contentions which have been urged in this appeal it is necessary to set out the genealogical tree.



The testator was suffering from dysentery for some time and it is admitted by the witnesses on behalf of the propounder that his hands and feet were swollen and that he was physically weak. No steps were taken to propound the Will till 1947. The testator died on 11-7-1921. The learned Subordinate Judge, as I have already said, granted Letters of Administration with a copy of the Will annexed. Mr. Roy Choudhury who has appeared in support of the appeal has raised several contentions.

(3) In the first place, he was contended that the Will has not been proved to have been duly executed and attested. In particular, he has admitted that there is no evidence that the formalities attending due attestation were complied with in this case. He has referred us to the evidence of the witnesses who had deposed to the attestation of the Will. The evidence of these witnesses merely shows that the testator signed the Will and that they attested the Will. It has not been definitely stated by them that they signed in the presence of the testator. On this submission, a question of law arises, namely, whether the Court is entitled to presume the due execution and attestation of a Will such as the present one is, under S. 90, Evidence Act. The Will bears the date 18-2-1920. It was registered on 10-3-1920. The testator died on 11-7-1921. The Will was tendered for proof on 27-6-1950 and on that date the Will was proved by P. W. 1 Jogendra and was marked as Exht. 1.

(4) Under S. 90, Evidence Act, the Court may presume that any document purporting to be, or proved to be, 30 years old, and produced from proper custody, was duly signed by the person by whom it purports to have been signed. There is also a presumption that in case of a document which purports to have been signed and attested the Court may presume that it was duly signed and attested. The question which has been canvassed in this appeal is that the presumption which arises under S. 90, Evidence Act, should not be drawn in case of a Will the genuineness of which is in controversy in the Probate Court. The reason suggested is that the propounder may antedate the Will and thereby call in his aid the presumption under S. 90, Evidence Act. Some support for this view may be found in a decision of this Court in the case of 'Shyam Lal Ghosh v. Rameswari Bosu', AIR 1916 Cal 938 (A). In a later decision of this Court in the case of — 'Gobinda Chandra Pal v. Pulin Behary', AIR 1927 Cal 102 (B), the view expressed in the above case of 'AIR 1916 Cal 938 (A)' was distinguished on the ground that the observations therein contained were 'obiter dicta'. The view taken in the case of 'AIR 1927 Cal 102 (B)' was affirmed by this Court in the case of — 'Mahendra Nath Surul v. Netai Charan Ghosh', ILR (1943) 1 Cal 392 (C). The view taken in the last two decisions of this Court has now been approved by the Judicial Committee in the case of — 'Munnalal v. Mst. Kashibai', AIR 1947 P C 15 (D).

(5) This, however, does not dispose of another contention which was raised on behalf of the appellants, namely, that the period of three (thirty?) years would run not from the date of the Will but from the date on which the testator died. The reason given for this contention is that the Will does not operate till the death of the testator. This submission cannot, however, be accepted. The reason for the rule embodied in S. 90, Evidence Act, is based on the impossibility of obtaining living testimony to the signing or the handwriting of a document. If this is a reason which underlies S. 90, Evidence Act, it logically follows that time should run from the date which the document bears whether it is a Will or any other document. Section 90 speaks generally of "any document". This view is supported by the decision in the case of — 'Doe v. Wolley', (1828) 8 B & C 22 (E). In my opinion, the view taken in the last cited decision is based on sound grounds and must be accepted.

(6) It was further contended that even assuming that the period of 30 years can be computed from the date the Will purports to bear. the outer limit of time is not the date when the document is sought to be proved but the date when the document is filed in Court. It was contended that as this document was filed for

the first time in 1947 and as the period of 30 years had not elapsed then, no presumption under S. 90. Evidence Act, can be drawn. This question, however, is no longer open to argument. In the case of — 'Surendra Krishna v. Mirza Mohammad Syed Ali', AIR 1936 P C 15 (F) it was decided by the Judicial Committee of the Privy Council that the material date is the date when the document is tendered in evidence. In this case, as I have said, the document was tendered in evidence on 27-6-1950. Thirty years had, therefore, elapsed at the date when the document was sought to be proved in Court. The presumption under S. 90 would therefore be attracted to the Will which is now in question.

(7) A further question arises as to the extent of the presumption which arises under S. 90, Evidence Act, in regard to Wills. The Statute says that when a document purports to be executed and attested, the presumption is one of due execution and attestation. This involves the idea that the document was executed duly and attested duly; in other words, that the document was validly executed. This involves a further conception that the testator had testamentary capacity to execute the Will. This view was taken by the Judicial Committee of the Privy Council in the case of — 'Munnalal v. Mst. Kashibai', AIR 1947 P C 15 (G). In this case Sir John Beaumont delivering the opinion of the Board observed that the presumption under S. 90, Evidence Act, connotes that the testator was of sound mind and knew that what he was about. This, the learned Judge went on to add, was fortified under the more general provisions of S. 114, Evidence Act

"since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about."

The result of the above discussion leads me to hold that the Court may presume that the Will in question was duly executed and attested in accordance with the formalities required by the Succession Act.

(8) Mr. Roy Choudhury, however, contends that the presumption that the Court may presume the due execution and attestation under S. 90, Evidence Act, is rebuttable and his submission has been that the evidence led on behalf of the propounder in this case rebuts the presumption which arises under S. 90 of the Evidence Act. He referred us to the evidence of P. W. 1 Jogendra, P. W. 2 Ganesh, P. W. 3 Kiran & P. W. 4 Bimal. He relied on the fact that P. W. 1 Jogendra and P. W. 2 Ganesh admitted that the Will was written by Nirod. The Will, however, shows that the writer was Satish Chandra Chatterji. His contention, therefore, is that the positive testimony of the two witnesses P. Ws. 1 and 2 contradicts the recital in the Will. This, however, does not demolish the presumption under S. 90, Evidence Act, for the reason that the recital in the Will that the writer was Satish Chandra Chatterjee may be an untrue one. The document is more than 30 years old, and it is difficult at this distance of time to explain under what circumstances the Will contained a recital that the writer was Satish Chandra Chatterjee. Mr. Roy Chodhury further pointed out that P. W. 3 Kiran deposed that the Will was written at one and the same sitting. He also pointed out that the will contained interlineations & that some of them were not in the handwriting of the writer of the Will. This, however, does not negative the presumption that the Will was duly signed & attested. It is possible that at the time when the Will was signed and attested some additions were made at the instance of persons present at the Majlis' one of whom was a Pleader Satyendra Nath Banerjee. In fact, the Will contains an interlineation by him.

Mr. Roy Choudhury also relied on the fact that P. W. 4 Bimal whose signature appears in the Will deposed in Court to say that he could not write. We have examined the signature of Bimal and the signature shows that he was practically illiterate. All these facts, therefore, do not rebut the presumption which the Court may draw under S. 90, Evidence Act. The Will was a registered one and was more than 30 years old and in the facts and circumstances of this case the Court should draw the presumption under S. 90, Evidence Act. It must therefore be held that the Will was duly executed and attested.

(9) Mr. Roy Choudhury also contended that the testator was under the influence of Shyamacharan, the legatee under the Will. His contention is that the evidence of the witnesses on behalf of the propounder shows that the propounder could not refuse a request made by Shyamacharan. He therefore contended that there was undue influence in this case. In order that the objector might successfully prove undue influence he must establish two facts, namely, that the propounder was in a position to dominate the will of the testator and that in point of fact he did dominate the will in the particular case. This view is supported by the decision in the case of — 'Craig v. Lamoureax', AIR 1919 P C 132 (H). In this case, there is no evidence whatsoever that in point of fact Shyamacharan used his influence, if any, and obtained from the testator the Will on the terms which it contains. This contention of Mr. Roy Choudhury must therefore be overruled.

(10) Mr. Roy Choudhury next contended that there are suspicious circumstances attending the execution and the attestation of the Will and he referred us to the fact that there was undue delay in the publication of the Will and in making the application for probate of the Will. He referred us to the evidence on record that the parties were living join'ly during all these years and that the Cadastral Survey Record of Rights recorded their joint possession. It appears, however, from the evidence of the objector Badal that Shyamacharan began to live separate 3 or 3½ years prior to the date of his deposition. This would take us to a date shortly before the first application for the grant of Letters of Administration by Shyamacharan himself. The explanation for the delay might have been that the parties were living on good terms and Shyamacharan did not care to take out probate. The above fact therefore cannot be regarded as a suspicious circumstance in the facts of this case.

(11) Mr. Roy Choudhury next contended that the present application for the grant of Letters of Administration must fail on the ground that administration of all the assets left by the testator had not been prayed for. It is submitted that the application for the grant of Letters of Administration does not mention the movables left by the testator. The testator died many years ago and it is difficult to say

that the movables which he might have possessed at the date of his death existed at the date when the application for Letters of Administration was made. This fact was not put to any of the witnesses examined on behalf of the propounder. It is therefore impossible to say that the application for the grant of Letters of Administration has omitted to mention any part of the estate left by the testator.

(12) It was also contended that the application suffered from the defect in not making the heirs of Dhruba as parties to the application for the grant of Letters of Administration. It must be observed however that the heirs of Dhruba are remoter heirs and citation on them was not necessary. In any event, the omission to state some of the members of the family of the testator is not a defect fatal to the proceedings to obtain the grant.

(13) Mr. Roy Choudhury lastly contended that the propounder had no locus standi to apply for the grant of Letters of Administration. This contention is based on the ground that Shyamacharan who was the executor appointed by the Will died before he obtained the grant and the present application for the grant of Letters of Administration was made by his heirs. It was contended that Shyamacharan was not a residuary legatee but was a universal legatee under the terms of the Will of Girdhar Mondal. As such, his legal representatives, namely, the present applicants, are not entitled to obtain a grant. It is not disputed that if Shyamacharan was a residuary legatee, then under the terms of S. 233, Succession Act, the present applicants would have locus standi to apply for the grant of Letters of Administration with a copy of the Will annexed. The question therefore is whether Shyamacharan was a residuary legatee or a universal legatee. Neither of these terms has been defined in the Succession Act. A universal legatee is undoubtedly one who by virtue of the Will is entitled to the whole of the estate left by the propounder. In the present case, the Will contained the following provisions. It sought to give a life estate to the widow which was followed by another life estate in favour of the widowed daughter and this was followed by an absolute bequest of the entire estate in favour of Shyamacharan. The Will contained provisions for the performance of the funeral rites and sradh of the testator and of his widow. Paragraph 4 of the Will provided for the appointment of Shyamacharan as executor. There was a further direction therein that Shyamacharan would collect the assets, manage the properties and pay the debts of the testator which amounted to Rs. 470/-. It also contained a provision that in case the income was insufficient, the executor would be entitled to sell or grant a lease of a part of the estate subject to the reservation that sufficient property is left for the maintenance of the widow and the widowed daughter. The above provisions clearly indicate that Shyamacharan was not the universal legatee. The whole of the estate was not devised to Shyamacharan. It was subject to two previous life estates and was subject to the burden of providing for the funeral rites and sradhs of the testator and his widow and for the payment of the debts left by the testator.

(14) The question, next arises whether Shyamacharan could be regarded as a residuary legatee. As I have already observed, the term "residuary legatee" is not defined in the Act. In Williams on Executors, 9th Edn. Vol. II, p. 1310 it is observed,

> "No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the Will, that the surplus of his estate after payment of his debts and legacies shall be taken by a person there designated".

It then follows that the residuary legatee must be vested with the surplus and residue of the property left by the testator at his death. This statement of the law underlies Ss. 102 and 103, Succession Act. Illustration (b) to S. 102 to which Mr. Ghose appearing for the respondent drew our attention seems to support the view that a legatee such as Shyamacharan is, is a residuary legatee. The illustration is in these words:

> "A makes his Will, with the following passage at the end of it: I believe there will be found sufficient in my banker's hands to defray and discharge my debts which I hereby desire B to do and keep the residue for her own use and pleasure. B is constituted the residuary legatee".

In the present case the Will conveys the estate to Shyamacharan but after two life estates, one in favour of the widow and another in favour of the widowed daughter, had come to an end. The Will also directs Shyamacharan to perform the funeral rites and sradhs of the testator and testator's widow as well as to pay the debts in a certain manner indicated already. The entire estate of the testator did not devolve on the testator's death on Shyamacharan. It was subject to certain reservations made in the Will. Shyamacharan merely gets the rest and residue of the estate left after the two life estates have ceased and after the provisions contained in the Will for payment of debts and sradh expenses had been complied with. In these circumstances, in my opinion, Shyamacharan must be regarded as a residuary legatee and as such under S. 233, Succession Act, his heirs are entitled to obtain Letters of Administration. The view taken by me is supported by a decision of this Court in the case of — 'Haripada Saha v. Gobinda Chandra Saha', 51 Cal. W. N. 917 (I).

(15) All the contentions raised on behalf of the appellants fail. This appeal is therefore dismissed with costs, hearing fee being assessed at two gold mohurs.

(16) DEBABRATA MOOKERJEE J.: I agree.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 CAL. 474 (Vol. 40, C.N. 175)

BACHAWAT J.

Great American Insurance Co., Ltd., Petitioner v. Hindusthan Flashlight Mg. Co., Ltd., Respondent.

Civil Suit No. 69 of 1952, D/-16-5-1952.

Arbitration Act (1940), S. 11(2) — Misconduct.

Arbitrator related to one of the parties — Evidence in the case highly technical and facts complicated — Arbitrator excluding short-hand writer of the other party and his attorney's clerk from the

meeting — Action of the arbitrator amounts to misconduct. (1862) 31 LJ Ch 420, Rel. on. (Para 8)

Anno: Arbitration Act, S. 11 N. 1.

S. B. Barman, for Petitioner; and R. C. Deb, for Respondent.

CASE CITED:

(A) (1862) 31 LJ Ch 420: 8 Jur (NS) 983

ORDER: This is an application for removal of the Arbitrator.

(2) Under the contract the arbitration was to be by two Arbitrators, one to be appointed by each party. In this case the petitioner did not appoint its Arbitrator because it was then under the impression that the arbitrator had no jurisdiction to deal with the matter in dispute. The result was the arbitrator appointed by the respondent became entitled to act as sole arbitrator. An application was made previously for determination of the scope and effect of the arbitration agreement but counsel for the petitioner did not then press for setting aside the appointment of this arbitrator.

(3) The arbitrator in this case is Ramnath Bajoria who is the father of the Managing Director of the respondent company. Having regard to this relationship Ramnath from the beginning had a peculiarly delicate task to discharge as an arbitrator. Every arbitrator is expected to conform to the fundamental rules relating to the administration of justice. Having regard to his special relationship the arbitrator was bound to be very particular and strict in maintaining his judicial and impartial attitude towards both parties.

(4) Now, what are the facts in this case? When the examination of witnesses started the petitioner requested the arbitrator to employ a short-hand writer stating that he was prepared to pay the entire costs of such employment if the arbitrator so directed. The arbitrator ruled at that time that he would not employ any short-hand writer even if the petitioner was prepared to pay the costs. The arbitrator has a discretion and this ruling by itself does not justify his removal. But as yet I see no reason why the arbitrator refused to employ a stenographer. He had of course no power to compel a party who was not agreeable to pay the expenses but he certainly had the power to employ a short-hand writer if one of the parties was prepared to pay the expenses.

(5) The evidence in this case seems to be highly technical in nature and there are complicated facts and I have no doubt that numerous witnesses have to be examined. It is almost impossible for any counsel or attorney who is conducting this case to go on with this arbitration unless short-hand notes of the proceedings are taken so that he might refresh his memory day to day and at the time of final argument. Although the witness has given evidence for several hours the arbitrator has not kept any notes of his evidence.

(6) The petitioner, therefore, employed a short-hand writer of its own to take down short-hand notes of the evidence. The arbitrator refused to allow the short-hand writer to take down the evidence and excluded him from the room where the meeting was held. I see no justification for this exclusion. It is said that the arbitrator may have been under the impression that his previous order was being flouted. I am sorry to hear that explanation. The arbitrator must be intelligent enough to understand what is happening before him. The short-hand writer was brought at the meeting not as the employee of the arbitrator but as the employee of the petitioner. Exclusion of the short-hand writer from the meeting was wholly improper and continued exclusion will result in miscarriage of justice. —'Haigh v. Haigh'. (1862) 8 Jur (N. S.) 983(A), is sufficient authority for the conclusion that such exclusion in the circumstances of this case is misconduct on the part of the arbitrator.

(7) One of the clerks of the petitioner's attorney was also excluded from the meeting.

(8) All the facts taken in conjunction with the special relationship of the arbitrator with the respondent show that the arbitrator is biased in favour of the respondent.

(9) I, therefore, remove Ram Nath Bajoria from acting as arbitrator under S. 11, Arbitration Act. In the circumstances it is my duty to appoint another arbitrator. By consent of the parties under S. 12, Arbitration Act I appoint Mr. Birendra Nath Bose, Attorney-at-Law as the sole arbitrator in place of the said Ramnath Bajoria.

(10) Having regard to the facts of this case, each party will bear its own costs.

B/D.H. Order accordingly.

A.I.R. 1953 CAL. 475 (Vol. 40, C.N. 176)

J. P. MITTER AND SEN JJ.

Shib Chandra Ghosh, Accused-Petitioner v. The State, Opposite Party.

Criminal Revn. No. 555 of 1952, D/- 16-2-1953.

Criminal P. C. (1898), Ss. 256 and 537 — Effect of non-compliance with S. 256.

Case remanded to trial Court for taking additional evidence on certain point — Prosecution evidence taken and accused allowed to cross-examine but accused not formally asked whether he wished to adduce any evidence as he had declined to enter upon his defence at the original trial — Omission not prejudicing accused and causing no failure of justice — Defect is curable and will not vitiate conviction. (Paras 2, 3)

Anno: Cr. P. C., S. 537 N. 20.

Ajit Kumar Dutta, for Petitioner; Harideb Chatterjee, for the State.

MITTER, J.: This is a petition for revision of an order of a learned Presidency Magistrate convicting the petitioner of an offence under S. 7(2), Essential Supplies Act, 1946, and sentencing him to rigorous imprisonment for three months. This conviction followed an order of this Court made in disposing of a Rule against a previous order of conviction. This Court then directed that the learned trial Court should take additional evidence on a specific matter, viz., as to whether or not the commodity concerned was flour. This Court also directed that upon such evidence, the Magistrate should decide if the petitioner was guilty or not. Pursuant to that order, the learned Magistrate took additional evidence and gave the accused an opportunity to cross-examine the witnesses who gave that evidence. The accused was also examined under S. 342, Criminal P. C., after such evidence had been taken.

(2) It does not appear from the record that the accused was then formally called upon to enter

upon his defence and produce his evidence. It is accordingly urged before us that the present conviction was illegal, in that the mandatory provisions of S. 256, Criminal P. C., had not been complied with. It seems to us, on a perusal of the evidence, that there was no doubt that the commodity concerned was flour. However, additional evidence on the point was adduced before the petitioner was again convicted. There is no doubt that an accused has a right under S. 256, Criminal P. C., to be called upon to enter upon his defence and adduce evidence. There is nothing before us to show that the accused, who was represented by a learned lawyer, desired to adduce any evidence on his behalf. It is true that a duty is cast upon the Court which tries him to observe the provisions of S. 256, Criminal P. C. The record shows that in the previous trial the petitioner had declined to call any evidence on his own behalf, and, therefore, the learned Magistrate did not formally ask the accused if he wanted to do so. The omission to so ask the petitioner, in our view, did not prejudice the accused. It appears to us that although what the learned Magistrate did was to carry out the directions of the High Court in the matter, the accused could not be deprived of his right and he would have been allowed to call evidence, if he was minded to do so. The additional evidence, however, was of such a formal kind that any evidence which the accused might have called would have made no difference to the outcome of the prosecution. It is for that reason that we are disinclined to send this case back for another retrial.

(3) Looking at the matter all round, we are of the view that the charge against the petitioner was amply proved and that in connection with the last trial no prejudice was in fact caused to him by not being asked formally if he desired to adduce evidence on his own behalf. In our view, the omission complained of did not, in all the circumstances of this case, cause any failure of justice, and therefore we are not prepared in this case to exercise our powers of revision. It appears that although a certain amount of time was given to the learned lawyer for the petitioner, the learned lawyer did not appear to argue his client's case.

(4) In these circumstances, this application fails and the Rule is discharged.

(5) The petitioner must surrender to his bail bond forthwith and serve out the remainder of his sentence.

(6) SEN, J.: I agree.

B/K.S. Rule discharged.

A.I.R. 1953 CAL. 476 (Vol. 40, C.N. 177)

MITTER AND SEN JJ.

Anil Kumar Samanta and another, Accused Petitioners v. The State, Opposite Party.

Criminal Revn. No. 100 of 1953, D/- 18-2-1953.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 7 (2) (b) — Proviso and Explanation — "Maximum quantity so prescribed" — (West Bengal Foodgrains Control Order, 1951).

The explanation cannot be read as providing a grace of five maunds above twice the maximum quantity prescribed as mentioned in the proviso to S. 7 (2) (b). It must mean a grace of five maunds above the maximum quantity prescribed by the West Bengal Foodgrains Control Order, 1951. (Para 4)

(b) West Bengal Foodgrains Control Order, 1951, Para 10 and Explanation — "Person" — (Essential Supplies (Temporary Powers) Act (1946), S. 7(2)(b) Proviso) — (General Clauses Act (1897), S. 3 (39).)

If two persons are in joint possession over twice the maximum quantity prescribed, they become liable for contravention of the Order if they do not belong to the same household and they cannot set up the fiction of being in separate possession of half the quantity each. (Para 5)

Anno: G. C. Act, S. 3 N. 20.

S. S. Mukherjee and Sukumar Mitra, for Petitioners; N. C. Sen, for the State.

SEN J.: This revision application is directed against an order of the Sub-divisional Magistrate, Arambagh, committing the petitioners Anil Kumar Samanta and another to the Court of Session in respect of two charges under S. 7(2), Essential Supplies Act, 1946.

(2) The prosecution case briefly was that in the afternoon of 26-6-1952, Anil Kumar Samanta and his brother Sunil Kumar Samanta moved 30 mds. of paddy in 20 bags from the western bank of river Mundeswari to its eastern bank, and later on the same day, 14 bags containing 21½ mds. of paddy were taken by them to Dehibatpur Hat-tola. Accordingly, there were two charges against the petitioners — one for violation of the Govt. of West Bengal Cordoning Order by moving the paddy across the river and one for possession of paddy in excess of the maximum quantity prescribed by the West Bengal Foodgrains Control Order, 1951, the maximum quantity prescribed thereunder being 10 mds. of paddy or rice. Under the proviso to S. 7 (2) (b), Essential Supplies Act, where a person contravening the order prescribing the maximum quantity of any foodgrains that may be lawfully possessed by any person or class of persons, is found in possession of foodgrain exceeding twice the maximum quantity so prescribed, the punishment shall extend upto seven years and, therefore, the offence is one triable by a Court of Session. Accordingly, the learned Magistrate committed both the petitioners, Anil Kumar Samanta and Sunil Kumar Samanta, to the Court of Session.

(3) In this revisional application for quashing the commitment two points have been urged. The first point urged is that in view of the explanation added to S. 7 (2), Essential Supplies Act, the person in possession of excess foodgrain will get a grace of 5 mds., and therefore, he will become punishable under the proviso to S. 7 (2) (b), only when the maximum quantity found in his possession exceeds 25 mds. This contention cannot, in our view, be accepted because the explanation is in the following terms:

"Explanation.— A person in possession of foodgrain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this sub-section."

(4) It appears that the explanation provides a special case only for those persons in whose possession the excess amount is not more than five maunds. The explanation does not say that the excess amount may exceed twice the maximum quantity prescribed, which is mentioned in the proviso to S. 7 (2) (b), but it mentions only "the maximum quantity so prescribed",

that is, the maximum quantity prescribed by the Foodgrains Control Order, 1951. Accordingly, this explanation cannot be read as providing a grace of five maunds above twice the maximum quantity prescribed as mentioned in the proviso to S. 7(2)(b). It must mean a grace of five maunds above the maximum quantity prescribed by the Order. Mr. Mukherjee on behalf of the petitioners has argued that, in that case, the explanation would become redundant, because the maximum quantity prescribed by the Foodgrains Control Order being ten maunds, when a person is found in possession of a quantity exceeding twice the maximum, the quantity in his possession will always exceed the maximum quantity prescribed by the Order by more than five maunds. For this reason, he would urge that the explanation must be read as providing a grace of five maunds in excess of twice the maximum quantity prescribed by the Order, and not merely in excess of the maximum quantity prescribed by the Order. But, clearly the words "twice the maximum quantity prescribed by the Order" cannot be substituted for the words occurring in the explanation, viz., "the maximum quantity prescribed by the Order."

It is to be remembered that the Essential Supplies Act, 1946 is an all India Act, and it provides for all States in the Indian Union. If any State prescribes the maximum quantity which may be lawfully possessed by any person as less than five maunds, this explanation to S. 7(2) will come into operation and control the proviso to S. 7(2)(b). For instance, if the maximum quantity prescribed were three maunds in any State, then taking the proviso to S. 7(2)(b) by itself, a person might be liable to seven years punishment if he were in possession of foodgrain exceeding six maunds. In view of the explanation, he will be liable to punishment of seven years only when the maximum quantity in his possession exceeds three plus five or eight maunds. Thus, it cannot be said that the explanation is altogether redundant. It has become redundant in West Bengal because the West Bengal Foodgrains Control Order provides the maximum quantity which may be lawfully possessed by any person as ten maunds. We, therefore, cannot accept the first contention raised by Mr. Mukherjee.

(5) The second point urged is that two brothers, Anil Kumar Samanta and Sunil Kumar Samanta have jointly been charged in respect of the offence under S. 7 (2), Essential Supplies Act for possession of a quantity of paddy exceeding twice the maximum quantity prescribed, that is, for possession of 21½ maunds of paddy; and it is urged that under the West Bengal Foodgrains Control Order, each person may possess upto ten maunds, and, therefore, the two petitioners could lawfully possess upto twenty maunds, and, therefore, 21½ maunds which they possessed do not exceed twice the maximum quantity which they could possess. Paragraph 10, West Bengal Foodgrains Control Order, 1951 provides that no person other than a person holding a licence issued or deemed to be issued under this Order or a producer shall have in his possession or under his control a quantity of rice or paddy exceeding ten maunds. But the words "a person" must be taken to include a group of persons who are in joint possession. In this connection, reference may be made to the definition of the word "person" in the General Clauses Act, 1897.

"'Person' shall include any company or association or body of individuals, whether incorporated or not."

Thus a body of persons in general is included within the definition of "person", and if two persons are in joint possession over twice the maximum quantity prescribed, they become liable for contravention of the Order; and they cannot set up the fiction of being in separate possession of half the quantity each.

Mr. Mukherjee has drawn our attention to the explanation to para. 10, West Bengal Foodgrains Control Order, which provides that any stock of rice or paddy in the possession or under the control of the members of a household shall be deemed to be in the possession or under the control of the head of the household. This only limits the liability in the case of the members of a household to the head of the household, and makes other members not liable. If it is established in the course of the trial that Anil Kumar Samanta and Sunil Kumar Samanta belong to the same household, then only the petitioner who is the head of the household will be liable in view of the explanation. But if they do not belong to the same household, then both would be jointly liable in view of the definition of "person" as contained in the General Clauses Act, 1897. That is a question that will have to be decided at the trial; but the contention raised by Mr. Mukherjee cannot be accepted in this Court.

(6) This Rule, is therefore, discharged.

(7) MITTER J.: I agree.

B/D.H. Rule discharged.

A.I.R. 1953 CAL. 477 (Vol. 40, C.N. 178)

CHAKRAVARTTI C. J. AND SARKAR J.

Moran and Co. Ltd., Appellant v. Anderson Wright Ltd., Respondent.

A. F. O. O. No. 19 of 1952, D/- 24-2-1953.

(a) Arbitration Act (1940), S. 34 — Questions to be decided under.

On an application under S. 34 of the Act, the Court must decide (i) whether the plaintiff in the suit sought to be stayed is a party to the agreement, (ii) whether the applicant under S. 34 is a party and (iii) whether the suit is "in respect of any matter agreed to be referred". Without deciding each of these questions and deciding it in the affirmative, the Court cannot make an order in the applicant's favour. (Para 7)

Anno: Arb. Act, S. 34 N. 2.

† **(b) Arbitration Act (1940), S. 34 — 'Matter agreed to be referred' — Broker's denial that he is party to the contract.**

Where it is agreed that the brokers were parties to the contract and the only dispute is a dispute as to the character in which they were parties, such a dispute is not a dispute as to whether there had been any contract at all and is within an arbitration clause. (Para 10)

Where, however, the dispute is as to whether the broker and the purchaser ever came together to contract at all, such a dispute, being a dispute as to the very existence of a contract and of an arbitration agreement between the parties, cannot be within the jurisdiction of the arbitrators and cannot be "a matter agreed to be referred."

It cannot be within the jurisdiction of the arbitrators, because their jurisdiction to decide any matter at all is itself derived from the existence of an agreement and it cannot be a matter agreed to be referred, because to agree by an agreement to refer a question as to whether that very agreement, or the contract containing it, has taken place is in the nature of things impossible. AIR 1951 SC 9, Explained and Distinguished; (1942) AC 356, Ref. Unreported Decision in Sp. Suit No. 3 of 1950, D/- 28-2-1951 (Cal), Distinguished.

(Paras 11, 14)

Anno: Arb. Act, S. 34, N. 8, 10.

(c) Arbitration Act (1940), S. 34 — Decision as to whether plaintiff is party to contract.

The Court has jurisdiction to decide on an application under S. 34 whether the plaintiff in the suit is a party to the arbitration agreement, even if it involves deciding whether he is a party to the principal contract. That question is one of the three questions under the section and in disposing of the application, it must be decided before the Court can make an order for stay.

But where the dispute raised in the suit is as to whether the plaintiff is at all a party to the principal contract such a dispute is obviously not one for the arbitrators and the suit can in no event be stayed. In those circumstances, the Court should not unnecessarily decide the issue by way of deciding the question of parties in relation to the agreement, particularly when there is no reason for saying that the dispute raised in the suit is a sham dispute.

(Para 15)

If the person whose concern with the agreement is in question is a signatory to the contract and formally a contracting party, that will be sufficient to enable the Court to hold, for the purposes of S. 34, that he is a party to the agreement.

(Para 19)

Anno: Arb. Act, S. 34 N. 14, 15.

H. N. Sanyal, for Appellant; Sankar Das Banerjee, for Respondent.

CASES CITED:

(A) ('51) AIR 1951 SC 9: 1950 SCR 792: 87 Cal LJ 123 (SC)
(B) (1942) 111 LJKB 241: 1942 AC 356
(C) (1923) SC (HL) 37
(D) ('51) Special Suit No. 3 of 1950, D/- 28-2-1951 (Cal)
(E) ('90) 17 Cal 449
(F) ('49) 53 Cal WN 505
(G) ('16) AIR 1916 Cal 548: 42 Cal 1050
(H) (1916) 85 LJKB 627: (1916) 1 KB 419
(I) (1936) (1936) 2 All ER 952
(J) (1915) 84 LJKB 1091: (1915) 3 KB 167
(K) ('49) AIR 1949 Cal 179: 52 Cal WN 137

CHAKRAVARTTI, C. J.: This is an appeal from an order of S. R. Das Gupta J. dated 23-8-1951, by which the learned Judge stayed a suit brought by the appellant Moran & Co. Ltd., against the respondent, Anderson Wright Ltd., upon an application made by the latter under S. 34, Arbitration Act.

(2) The facts are as follows: By two different contracts, both dated 7-7-1950, the respondent purchased 12,00,000 yards of Hessian Cloth, 6,00,000 yards under each of the contracts, delivery to be made at the rate of 1,00,000 yards per month from January 1951 and payment to be made in cash on delivery. Each delivery was to be treated as a separate and distinct contract. The Bought Notes, which were addressed to the respondent and signed by the appellant over the word 'Brokers', began with the sentence,

"Dear Sirs,

We have this day bought by your order and on your account from our Principals,"

and then it proceeded to set out the particulars of the goods and the terms and conditions of the contracts. Those terms included an arbitration clause in the standard form of Indian Jute Mills Association contracts and expressed as follows:

"All matters, questions disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of/or relating to this Contract, whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed, shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted".

(3) In pursuance of the said two contracts, delivery was duly given in all the months from January to June, 1951 except March, but goods due to be delivered in that month were not delivered. By a letter dated 27-3-1951, the appellant intimated to the respondent that its sellers had informed it that, according to them, the contract had been 'ipso facto' terminated by reason of the failure of the respondent to give at least seven days' notice to place goods alongside, as required by the contracts. The respondent apparently did not accept the position that the appellant had any principal or that any default on its own part had been committed. Thereafter, on 11-6-1951, the appellant brought a suit on the Original Side of this Court for a declaration that it had merely acted as a broker in respect of the two contracts, a further declaration that it had no liability under them and an injunction restraining the respondent from enforcing the contracts against the appellant and claiming any damages from it thereunder. It was stated in the plaint that the appellant had only "brought about" the two contracts, acting as a broker, between the respondent and one Gowarchand Dhanchand and that the respondent was wrongfully alleging that the appellant was a party to the contracts and as such liable for their performance and consequently liable for damages for non-delivery of the goods due in March, 1951.

(4) The Writ of Summons was served on the respondent on 23-6-1951, but it took no steps in the suit. Instead, on 19-7-1951, it filed an application under S. 34, Arbitration Act, for a stay of the suit, out of which the present appeal arises. It was stated in the application that the contracts were "principal contracts" by which the respondent had bought from the appellant and that the appellant was liable under the contracts as a principal. In one part of the application it was also stated that "even apart from any liability of any other person or persons", the appellant was liable under the contracts "by reason of well-established practice and custom in the market ..... as well as in law". It was alleged further that the appellant had failed to make the deliveries for March, 1951, then repudiated its liability to make such deliveries, next repudiated its liability to pay the damages suffered by the respondent and lastly brought the suit in order to prevent

arbirtation proceedings which the respondent was preparing to commence. The damages suffered were stated to be Rs. 1,13,042-3 as. The entire subject-matter of the suit, it was said, was covered by the arbitration agreement and accordingly it was prayed that the suit be stayed.

(5) The application came to be heard by S. R. Das Gupta J. He held that the question raised in the suit was whether, in relation to the two contracts, the appellant had acted merely as a broker and that, his Lordship thought, must be held to be a question of the appellant's liability under the contract and so a question of construction, as held by the Supreme Court in the case of — 'A. M. Mair & Co. v. Gordhandas Sagarmull', AIR 1951 S. C. 9 (A). The Supreme Court had also held that such a question came wholly within the arbitration agreement before it, which was in the same terms as the agreement in the present case. In the view of the learned Judge, the decision of the Supreme Court was undistinguishable and excluded the contention that such a question was a question as to whether any contract had ever been entered into at all between the parties and therefore outside the jurisdiction of arbitrators. Accordingly, he made the order appealed from, staying further proceedings in the suit.

(6) Before us, it was contended by Mr. Sanyal that the learned Judge had erred in holding that the decision of the Supreme Court concluded the matter. The error, it was said, was of a two-fold character. In the first place, the case before the Supreme Court was a case in which an application had been made for an adjudgment of the award to be void after the award had been made and all that the Supreme Court said was that the dispute being one within the arbitration agreement, the arbitrators had not acted without jurisdiction in deciding it. The Court did not say that the decision itself, holding the respondent before if to be liable to the appellant, although he pleaded that the appellant had only acted as a broker, was correct. In the present case, the question had arisen at an earlier stage on an application under S. 34 of the Act and, on such an application, the Court had itself to decide whether there was an agreement between the parties. The objection of the party who had brought the suit to the effect that he was not liable under the contract, not being a party thereto, could not be disposed of by saying that the question was within the arbitration agreement and therefore one for the arbitrators and that the Supreme Court had so held. The Court itself had to decide it in a proceeding of the present character. In the second place, the dispute which the Supreme Court had held to be within the jurisdiction of the arbitrators was, it was contended, of a different character.

(7) It cannot be disputed that on an application under S. 34 of the Act, the Court must decide (i) whether the plaintiff in the suit sought to be stayed is a party to the agreement, (ii) whether the applicant under S. 34 is a party and (iii) whether the suit is "in respect of any matter agreed to be referred". Without deciding each of these questions and deciding it in the affirmative, the Court cannot make an order in the applicant's favour. Directly, the decision of the Supreme Court can therefore be conclusive only on the third point in the present case, if indeed the question which was held by that decision to be within the arbitration agreement was in fact or in substance the same question as that raised in the suit here. But, indirectly, the decision is conclusive on the other two points as well, if it applies.

(8) In my opinion, Mr. Sanyal was not right in contending, as he did, that the other two questions would in any event remain for the Court to decide for itself. A dispute can be held to be within an arbitration agreement, binding on certain parties, only if it is an agreement between them. Consequently, once it is held that the dispute raised in the suit is within the arbitration agreement and therefore a dispute in respect of a matter "agreed to be referred", it is necessarily held that it was so agreed between the parties to the proceeding under S. 34. It will thus be seen that if the decision of the Supreme Court makes it obligatory to hold that the dispute in the suit in the present case is within the arbitration agreement, the question whether the appellant and the respondent are parties to that agreement, can no longer remain open for enquiry. If either of them was not, there could be no question of any dispute between them being referable to arbitration. Ordinarily, it is true, the enquiry under the third question will be regarding what the parties agreed to, whoever the parties were, and not regarding who agreed. In such a case, the first two questions may survive, even after the third has been answered in the affirmative, although, strictly speaking, they too will have been answered by implication. But if the dispute in the suit be as to whether the plaintiff or the defendant is a party to the contract and that dispute is held to be within an arbitration agreement contained in the contract itself, there will be a direct decision on the question of parties in respect of both the agreement and the contract. It may be that after such decision, nothing will be left of the dispute for the arbitrations to decide, but the fact that such a result will follow can only be an indication that a dispute of this character cannot be within an arbitration agreement: it cannot, if the decision is made, detract from its effect which will be to hold that the parties concerned are parties to the agreement and necessarily parties to the contract wherein it is contained. Thus, on the facts of the present case, the first two questions are not independent questions and they cannot survive after the third has been answered in the affirmative, if it is so answered.

(9) For the above reason, it will be convenient to take the third question first. I am unable to agree with Mr. Banerjee, who appeared for the respondent, that besides relying on the decision of the Supreme Court, the learned trial Judge had found for himself that the conditions precedent to his making an order for stay under S. 34 were satisfied. He, as I have already pointed out, has held that the dispute raised in the suit is not a dispute as to whether there was a contract between the parties at all, but a dispute as to whether the appellant was liable under the contract, as held by the Supreme Court and that since the Supreme Court had held such a dispute to be within the arbitration agreement, the suit was bound to be stayed. The decision of the Supreme Court must certainly be accepted and applied, but since 'prima facie' it might appear to be a decision which upsets all established notions as to the powers of arbitrators, it is necessary to examine it closely and see what exactly their Lordships held.

(10) In the case before the Supreme Court, a firm of brokers addressed a Sold Note to the sellers which commenced with the words:" we have this day sold by your order and for your account to the undersigned" and they signed the

document themselves, adding the word "brokers" below their signature. On the same day, they addressed a Bought Note to a third party which commenced with the words, "we have this day bought by your order and for your account from the undersigned" and that document also they signed themselves in a similar manner. The Sold Note contained an arbitration clause expressed in the same terms as the clause in the present case. The sellers having failed to deliver a part of the goods, the firm of brokers made a demand on them for damages and on their denying liability to pay the sum, the firm referred the dispute to arbitration and obtained an award in their favour. Thereafter, the sellers made an application to this Court, for adjudging the award to be void and for setting it aside on the ground that the purchaser being the third party and the firm having merely acted as brokers, they were not parties to the contract and accordingly were not entitled to invoke the arbitration clause. Sinha, J. dismissed the application but Harries, C. J. and myself reversed him, since on our reading of the affidavits, the firm's own case was that they had acted in the transaction only as brokers, but were entitled to enforce the terms of the contract by reason of the usage or custom of the trade. The Supreme Court held that our reading of the affidavits was not correct and that the firm had denied that they were not parties to the arbitration agreement and asked the Court to construe the contract, although they had also stated that they were entitled to enforce the contract according to the custom or usage of the trade. That finding took away the basis of the High Court's decision that on their own showing, the firm of brokers had not contracted as principals; and it was on that finding that the Supreme Court held, in a case where 'prima facie' the Sold Note was signed by the firm of brokers as purchasers, that the question whether they were 'parties to the contract in their own right as principals" or had entered into it on behalf of third party, was a question of the true construction of the contract and that such a question being one concerning the contract or arising out of it, it was within the arbitration clause.

As I read the decision of the Supreme Court, it only means that formal execution of the contract by the firm of brokers being admitted and apparent on the face of the contract and the question being one as to the effect or true intent of such execution, it was a question within the arbitration agreement and so a question for decision by the arbitrators. That such is the basis of the decision appears clearly from the manner in which their Lordships stated the dis pute which, according to them, was

> "that the brokers were not parties to the contract in their own right as principals but entered into the contract only on behalf of the Bengal Jute Mill Company."

It will be noticed that the statement assumes that the brokers were parties to the contract and the only dispute it speaks of is a dispute as to the character in which they were parties. That such a dispute is not a dispute as to whether there had been any contract at all and is within an arbitration clause expressed as widely as the clause in the present case, must be taken as settled by the decision of the Supreme Court, but the decision ought not to be taken as comprising anything wider. I cannot imagine the Supreme Court having intended to hold that a dispute as to whether there was any contract between the parties at all or whether the person going or sought to be taken to arbitration was a party to the agreement was also a question within the jurisdiction of arbitrators. Even Lords Wright and Porter who, in the leading case of —'Heyman v. Darwins Ltd.', (1942) A. C. 356 (B), expressed the view that a dispute as to whether there was a contract at all, could be within an arbitration agreement if it was severable and sufficiently wide, stated that rule only in relation to cases where the dispute was as to whether the contract had any legal existence and not in relation to cases where the dispute was as to whether one of the parties had at all entered into the contract.

(11) In my opinion, the question raised in the appellant's suit in the present case is a question of the latter kind. The plaintiff says that it only brought about the two contracts between the respondent and a third party acting as a broker and was not itself a contracting party, there can be no question that as the purchaser, the principal is the respondent, as the Bought Note shows and as the respondent itself asserts. It is not the respondent's case that the goods were purchased by the appellant as the principal. The appellant's case is that neither were the goods sold by it as a principal, which means that the contracts of purchase and sale were not between the respondent and the appellant, between whom there was no contract at all, but they were contracts between the respondent and the third party and since the arbitration agreement was contained in the contracts, it was an agreement only between them, & in no way binding or affecting the appellant. The case made by the appellant is therefore not that although a party to the contracts, it was not a party in its own right as the principal but only as a broker — as the case before the Supreme Court was understood to be — but the case is that the appellant was outside the contracts altogether. It is true that the Sold Note was not produced before the learned Judge and does not appear to have been disclosed or produced so far even in the suit and therefore we shall take no notice of it, although it was produced before us. But the absence of the Sold Note does not alter the character of the dispute. Even on the Bought Note alone, the dispute is as to whether the appellant and the respondent ever came together to contract at all and such a dispute, being a dispute as to the very existence of a contract and of an arbitration agreement between the parties, cannot be within the jurisdiction of the arbitrators and cannot be "a matter agreed to be referred". It cannot be within the jurisdiction of the arbitrators, because their jurisdiction to decide any matter at all is itself derived from the existence of an agreement and it cannot be a matter agreed to be referred, because to agree by an agreement to refer a question as to whether that very agreement, or the contract containing it, has taken place is in the nature of things impossible. I do not read the decision of the Supreme Court as throwing doubt on these fundamental propositions and I do not think the decision covers the dispute in the present case.

(12) But it may be said that the Supreme Court adopted the test laid down by Lord Dunedin, as quoted in '(1942) A. C. 356 (B)'. and judged by that test, the dispute in the present case would fall within the arbitration clause. The passage quoted from Lord Dunedin occurs in his speech in the case of —'Scott & Sons Ltd. v. Del Sel', (1923) S. C. (H.L.), 37(C), where he was dealing with a plea of frustration, advanced by the sellers under a certain jute contract, who were

saying that by reason of prohibition by Government of further export of jute, the contract had come to an end. Lord Dunedin pointed out that in order to sustain that plea, the sellers would have to show that the contract contained an express term which would have the effect pleaded or that it contained an implied term and that, in either case, they would have to have recourse to the contract. "And", he added,

"if they have got to have recourse to the contract, it seems to me that the dispute is a dispute under the contract".

The Supreme Court did not quote the words of Lord Dunedin verbatim, but there can be no doubt that this was the passage it purported to quote. But I should not like to think that the Supreme Court intended to attribute a general proposition to Lord Dunedin or was laying down a general proposition for itself in terms of the quotation. In the case of a plea of frustration, it is obviously necessary to see if the contract was such that its performance or further performance could be said to have been excused by the circumstances which had supervened and the dispute being as to the effect of its terms, it is intelligible why it is said that it is a dispute under the contract. But it cannot possibly be said that a dispute must be a dispute under or concerning the contract and therefore within the arbitration clause in every case when the contract has at all to be referred to. If, for example, a person says that he has nothing whatever to do with a contract, not having signed it himself and no one having signed it on his behalf or in his interest, the contract will have to be referred to in order to see if the case made is true, but it can by no means be said that such a dispute is within the arbitration clause, because the person concerned, if he had nothing to do with the contract, had also nothing to do with the agreement.

(13) Our attention was drawn to another decision of S. R. Das Gupta, J. in the case of — 'Luxmi Jute Mills Ltd. v. Messrs. T. Thomas & Co. (Jute and Gunnies) Ltd.', (Special Suit No. 3 of 1950, D/- 28-2-1951, unreported) (D), where, on an application under s. 20(1), of the Act to file an agreement, the learned Judge held that a dispute as to whether one of the parties had entered into the contract, not as the principal but only as a broker and was therefore not a party to the agreement was covered by the decision of the Supreme Court and was a dispute within the jurisdiction of arbitrators. That case is distinguishable and nearer to the case before the Supreme Court, because the Bought Note addressed to the purchasers commenced with the words, "we have this day bought by your order and for your account from selves for principals" and it was signed by the writers over the word 'brokers'. As the immediate sellers were the brokers and the contract which said so was signed by them, it might legitimately be said that the dispute in the case was, the brokers being a party to the contract, in what character they were a party and therefore the dispute was one covered by the decision of the Supreme Court. I do not think that in order to hold that the dispute in the present case is not covered by the Supreme Court decision, it is necessary to dissent from the decision of S. R. Das Gupta J. in the case cited. That case was of the nature of —'Gubhoy v. Avetoom', 17 Cal 449(E), where the contract note bore the endorsement "A. V. Avetoom for Principal".

(14) For all the reasons given above, I am of opinion that the third question in the present case stands clear of the decision of the Supreme Court and the dispute raised in the suit is not in respect of "a matter agreed to be referred". This is sufficient for a disposal of the appeal, but since the bulk of the argument addressed to us was on the first question, viz., whether the appellant is a party to the agreement, I may take that question by itself and examine the position. I have already pointed out that if the third question had to be answered in the sense that the dispute was within the jurisdiction of arbitrators, it would follow that the appellant was a party to the agreement. But if the first question survives, as it does on my finding on the third question, an answer to it in the negative will furnish an additional reason for not staying the suit. But I do not think we ought to proceed to search for an additional reason. The question whether the person who has initiated the legal proceeding is a party to the arbitration agreement is, under S. 34, undoubtedly a question for the Court to decide, for the section has not left it to arbitrators. But in proceeding to decide the question in a case of the present type, the Court will be faced with a difficulty, because although the question in the suit is whether the plaintiff is a party to the principal contract, while the question in the proceeding under s. 34 is whether he is a party to the arbitration agreement, the two questions are, when the agreement is contained in the contract, the same. To decide one will be to decide the other. It will thus appear that where the dispute raised in the suit is a dispute as to whether the plaintiff is a party to the contract and the defendant makes an application under s. 34 on the basis of an arbitration agreement which the contract contains, the Court, if it decides the first question under the section, will be virtually deciding the main or perhaps the only issue in the suit. If it holds that the plaintiff is not a party to the agreement, which will involve its holding that he is also not a party to the principal contract, such decision will be a reason, not for staying the suit, but for not staying it. The suit will remain alive and in it the same issue will be tried again in the form of an issue relating to the principal contract. Even if it holds that the plaintiff is a party to the agreement, it will again decide the main issue raised in the suit but will be equally unable to stay it, because the dispute as to whether the plaintiff is a party to the principal contract is not within the jurisdiction of arbitrators. In such circumstances, the inconvenience and undesirability of the decision of the main issue in the suit being forestalled by a decision on the application, is plain. When such a position is likely to result, the Court may properly desire to refrain from creating it. It cannot be said that by following that course, the Court may be helping a person who, desiring to avoid arbitration, resorts to the simple expedient of filing a suit and alleging therein that he is no party to the contract on which the defendant is seeking to make him liable. As I have already pointed out, a dispute as to whether the plaintiff is at all a party to the disowned contract can never be within an arbitration clause contained in it and since a stay must be refused and the suit allowed to proceed on that ground alone, the Court will provide no additional advantage to the plaintiff by not deciding on the application under S. 34 the question of his being a party to the agreement.

(15) It must, however, be conceded that the Court has jurisdiction to decide on an application under S. 34 whether the plaintiff in the suit is a party to the arbitration agreement, even if it involves deciding whether he is a party to the principal contract. That question is one of the three questions under the section and in disposing of the application, it may always be decided. Indeed, it must be decided before the Court can make an order for stay. In the case of — Khusiram Benarsi Lal v. Hanutmal Boid', 53 Cal WN 505 (F), it was held by S. R. Das, J. that where an illusory and demonstrably frivolous plea regarding the formation, existence or the validity of the contract was set up in the suit, the Court would act properly in deciding the matter on the application itself and if the decision went against the plaintiff and it prevented him from agitating the same issue in the suit on principles analogous to 'res judicata', he would have only himself to thank. The large question whether, when the contract is admitted but the question of its legal existence or validity is raised in some other form, the Court will or will not, in the exercise of its discretion, decide the question on the application under S. 34 by way of deciding it in relation to the agreement, does not arise in the present case. Here, the dispute raised in the suit as to whether the plaintiff is at all a party to the principal contract is obviously not one for the arbitrators and the suit can, in no event, be stayed. In those circumstances, the question is whether the Court ought still to decide the issue by way of deciding the question of parties in relation to the agreement. In my opinion, it ought not to do so unnecessarily, particularly when there is no reason for saying that the dispute raised in the suit is a sham dispute.

(16) Mr. Banerjee, who appeared for the respondent, did not contest the proposition that if the Court was to make an order for stay under S. 34, it had to decide whether the plaintiff was a party to the agreement. At the close of his argument he no longer contended that even that question was wholly concluded by the decision of the Supreme Court. But he argued that all that S. 34 required the Court to do was to see whether or not the plaintiff was 'prima facie' a party and not to decide finally whether he was in reality a party to a valid and subsisting agreement. Mr. Banerjee pointed out that the expression "any party to an arbitration agreement" which occurred in S. 34, occurred also in S. 33 where it could not possibly mean a party in fact and in law in all circumstances. Among the applications which S. 33 provides for, is an application challenging the existence or validity of an arbitration agreement and the person who can make such an application is described as "any party to an arbitration agreement". Mr. Banerjee contended that a person denying that any arbitration agreement with him existed or saying that the agreement was void, so that he was a party to nothing, could not be actually or legally a party to the agreement if his contention was correct and since even such a person could apply under S. 33 under the description "any party to an arbitration agreement", the expression could only mean formally and externally a party. The same meaning, Mr. Banerjee submitted, should be attached to the expression in S. 34.

(17) As I am not deciding the question whether the appellant is a party to the arbitration agreement, it is not really necessary to deal with the contention of Mr. Banerjee, but as the matter was argued at great length, I may briefly express my views on it.

(18) The question whether a person is a party to an arbitration agreement can arise in a proceeding under S. 34 in various forms. It can arise in relation to an agreement outside the contract asserted or challenged in the legal proceedings or it can arise in relation to an agreement contained in the contract. In the first case, the decision of the question on the application under S. 34 will not involve, at least ordinarily, a decision of any issue as to the contract, but in the second case it will. As to its nature, the question may simply be whether the plaintiff in the legal proceeding or the applicant under S. 34 is a signatory to the agreement at all; or it may be whether, being a signatory, he is a signatory in his own right and on his own account, or again, whether the agreement is not void, being contrary to law or founded on mistake or vitiated by fraud, so that although the person concerned is a signatory, there is no agreement in the eye of law to which he can be said to be a party.

(19) We are concerned here only with a case where the arbitration agreement is contained in the contract which has been put into issue in the legal proceedings. We are also concerned only with a case where the question is whether the agreement and the contract containing it were between the plaintiff in the suit and the applicant under S. 34 so that the plaintiff is a party to the agreement. As at present advised, I am inclined to agree with Mr. Banerjee that if the person whose concern with the agreement is in question is a signatory to the contract and formally a contracting party, that will be sufficient to enable the Court to hold, for the purposes of S. 34, that he is a party to the agreement. If a further question is involved as to whether the apparent contract, containing the agreement, is a valid contract having a legal existence, that may take out the case out of S. 34 on the ground that such a question can never be within the jurisdiction of arbitrators & never a matter agreed to be referred, but the first requirement of the section as to the plaintiff in the suit being a party to the agreement will be satisfied.

(20) Mr. Sanyal who urged strongly that we should decide the question as to whether the plaintiff is a party to the agreement, submitted that judged even by the narrow test I have mentioned, the plaintiff was not a party to the agreement as he was not a party to the contract. He referred us to the case of — 'Patiram Banerjee v. Kanknarrah Co. Ltd.,', AIR 1916 Cal 548 (G), where the Bought Note was in precisely the same terms and where it was held by Jenkins, C. J., Woodroffe, J. not dissenting, that such a note was only an intimation to the buyer that the writers had carried out their order by making a purchase on their account, not from themselves but from someone else. The Note did not, it was held, make the writers parties to the contract of purchase and sale to which it related, even as agents. In the course of the argument, I myself had occasion to refer to the decision in — 'Miller, Gibb & Co. v. Smith & Tyrer Ltd.,', (1916) 1 KB 419 (H), where the contract note was signed by the brokers on behalf of the sellers "by the authority of our principals as agents" and it was held that the brokers could not be taken to arbitration under an agreement contained in the contract. I do not, however, think that we should decide in the present proceeding whether the plaintiff is a party to the agreement when it is not necessary to do so and by decid-

ing that question, which is the only issue in the suit, create a bar of 'res judicata' against either the appellant or the respondent.

(21) In the result, I hold that the dispute raised in the appellant's suit is not within the jurisdiction of arbitrators and consequently the suit cannot be stayed. As no question other than the question of the appellant not being a party to the contract has been raised in the suit, it is not necessary to consider whether there could be a partial stay or whether the present application ought to be kept pending till the preliminary issue is decided in the suit. The appeal is accordingly allowed, the judgment and order of S. R. Das Gupta J. set aside and the respondent's application under S. 34 dismissed with costs here and below.

(22) Certified for two counsel.

(23) SARKAR J.: The question seems to me very simple.

(24) Moran & Co. Ltd., the appellant before us, delivered to Anderson Wright Ltd., the respondent to this appeal, two bought notes which were substantially identical in form. The bought notes, so far as is relevant for the present purpose, are in these terms.

Messrs. Anderson Wright Ltd.

Dear Sirs,

We have this day bought by your order, and on your account from our Principals, (Then follows the particulars of the goods, the price, the time of delivery and other terms of the purchase)

Yours faithfully,
Per Pro Moran & Co. Ltd.,
Sd/- (Illegible)
Brokers.

Part of the goods covered by the bought notes were not delivered to the respondent. The respondent made a claim on the appellant for damages for breach of contract by reason of the failure to deliver. The appellant denied liability for the claim. The bought notes contained an arbitration clause which has been set out in the judgment delivered by my Lord the Chief Justice. The respondent was contemplating referring its claim to arbitration under this clause but before a reference was actually made the appellant filed a suit against the respondent. The relevant portions of the plaint are set out below:

"1. On 7-7-1950 the plaintiff as brokers, brought about two principals contracts between the defendant and one Gewarchand Danchand being contract Numbers 98788 and 98789 whereby the said Gewar Chand Danchand sold and/or agreed to sell hessian cloth to the quantities and specifications mentioned in the said contracts on terms and conditions contained therein.

X X X X X

4. The defendant is wrongfully alleging that the plaintiff is liable for damages for non-delivery of the said quantities under the said contracts for the month of March 1951 and that the plaintiff is a party to the said contracts and is liable for the performance thereof. The plaintiff does not admit that the defendant has suffered any damages or has been justified in not issuing shipping instructions in time.

5. The plaintiff states that it merely acted as brokers in respect of the said contracts of sale and purchase. The plaintiff denies that it is a party to the said contracts or that it has any liability thereunder.

The plaintiff claims:

(a) A declaration that the plaintiff merely acted as broker in respect of the said contracts numbered 98788 and 98789 dated 7th of July 1950 and is not a party to the said contracts.

(b) A declaration that the plaintiff has no liability under the said contracts.

(c) Injunction restraining the defendant its servants and agents from claiming any damages from the plaintiff in respect of the said contracts and informing the same against the plaintiff."

(25) The respondent then applied for a stay of this suit under S. 34, Arbitration Act. S. R. Das Gupta J. allowed the application and ordered a stay. The question in this appeal is, should this order be maintained? The suit cannot be stayed unless it is in respect of matters agreed to be referred under the arbitration clause. This much is beyond question. The suit raises a dispute that the appellant is not a party to the contracts for sale which contracts contained the arbitration agreement as a term. Now, what is meant when a person says, "I am not a party to the contract"? Plainly that, he never made the contract. In other words, that so far as he is concerned, the contract does not exist. It comes to this then that a dispute that a person is not a party to a contract is a dispute that the contract does not exist, that is to say, with him. Such a dispute cannot be within any arbitration clause contained in the contract denied. I like to read here, not because something new was said but because of the manner in which it was said, what Greene L. J. said in — 'Toller v. Law Accident Insurance Society Ltd.', (1936) 2 All ER 952 at pp. 955-6(I):

"If the arbitrator (assuming it was referred to him) found that there was no contract in existence at all ..... he would be deciding that the very arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter."

Likewise, in this case if the dispute whether the appellant was a party to the contract containing the arbitration agreement, was within that agreement and this dispute was referred to an arbitrator under that agreement and the arbitrator found that the appellant was not a party to the contract and therefore to the arbitration agreement, he would have found that he had no jurisdiction to come to that finding. The other disputes raised in the suit, namely, the reliefs claimed under heads (b) and (c), are consequential to the dispute that the appellant is not a party to the contracts for it is claiming them on the basis that it was not such a party and not on any other basis. It only remains to state that even if it could be said that the dispute that the appellant was not a party to the contracts was idle and dishonest — which I am quite clear cannot be said in this case — that would have made no difference. It was said in — 'Monro v. Bognor Urban Council', (1915) 3 KB 167 at p. 173 (G),

"The only point is whether the claim which is brought — whether it is good, bad or indifferent — comes within the submission to arbitration".

See also — 'Johurmull Parasram v. Louis Dreyfus & Co. Ltd.,', AIR 1949 Cal 179 (K).

(26) In my opinion therefore the suit is not in respect of matters agreed to be referred and on that ground alone the stay must be refused.

(27) It was said that this case is governed by the judgment of the Supreme Court in 'AIR 1951 SC 9 (A). This contention was accepted by S. R. Das Gupta J., who ordered a stay feeling himself bound by the judgment of the Supreme Court to

do so. I am wholly unable to agree that the Supreme Court judgment covers the present case. What had happened in that case was that the appellants before the Supreme Court had delivered to the respondents there, a document in these terms:

> "We have this day sold by our order and for your account to the undersigned." (Then followed the particulars of the goods sold and the terms of the sale)."

The document was signed by the appellants and below the signature the word "brokers" was written. The word "undersigned" in the above quotation therefore meant the appellants. They also delivered a corresponding document to a firm called, Bengal Jute Mill Company stating:

> "We have this day bought by your order and for your account from the undersigned."

This also was signed by the appellants in the same manner as the first document. Part of the goods covered by the first mentioned document not being delivered by the respondents, the appellants preferred a claim against the respondents for damages for breach of contract which the respondents repudiated. The appellants then referred the dispute to arbitration under an arbitration agreement contained in that document. An award was thereupon made in favour of the appellants. The respondents then applied to have the award set aside on the ground that the arbitrators had no jurisdiction to arbitrate as the Bengal Jute Mill Company and not the appellants were the real parties to the contract for sale. The dispute raised by the respondent was that the

> "appellants were not parties to the contract in their own right as principals but entered into the contract on behalf of the Bengal Jute Mill Company":

See 'AIR 1951 SC 9 (A) at p. 11. Their Lordships of the Supreme Court held (at p. 11) that, the question whether the appellants had made the contract in their own right or on behalf of others is a matter

> "which turns upon the true interpretation of the contract, so that the respondents must have recourse to the contract to establish their claim that the appellants were not bound as principals while the latter say they were."

They added, (p. 128):

> "If that is the position, such a dispute, the determination of which turns on a true construction of the contract, would also seem to be a dispute, under or arising out of or concerning the contract."

In this view of the matter they refused to adjudge the award void and set aside the judgment of a bench of this Court from which the appeal had been taken. Their Lordships pointed out that,

> "The error into which the learned Judges of the Appellate Bench of the High Court appear to have fallen was their regarding the dispute raised by the respondent in respect of the position of the appellant under the contract as having the same consequence as a dispute as to the contract ever having been entered into."

It is therefore quite clear that the Supreme Court held that a "dispute as to the contract ever having been entered into" was a question outside the arbitration agreement contained in the contract. I have already shown that the dispute raised in the suit sought to be stayed in the present case is a dispute of this kind. The Supreme Court judgment therefore supports the view that I have taken. If it is necessary to do so, I may point out that, in the case in the Supreme Court, the party challenging the award had admitted that the other side was a party to the contract and the only dispute was whether it was a party in its own right or on behalf of some other person. With a dispute of that kind we have nothing to do in the present case.

(28) A point was made by Mr. Sanyal that before a Court can stay a suit under S. 34 it must find also that, the party whose suit is sought to be stayed is a party to the arbitration agreement. Mr. Banerjee accepted this contention. No doubt this is the correct position. Mr. Sanyal has invited us to hold that his client was not a party. I do not think it necessary to decide that question for the stay must in any event be refused on the ground that the suit is not in respect of matters agreed to be referred. It is true that if I am wrong in my view that the suit is not in respect of matters agreed to be referred, it may be necessary to decide whether Moran & Co. Ltd. was a party to the arbitration agreement. But if I am so wrong, it would follow on the facts of this case that, Moran & Co. Ltd. was a party to the arbitration agreement. In this view of the matter, it is not necessary to go into the question raised by Mr. Banerji that all that S. 34 requires before a stay can be ordered under it, is a finding that, the petitioner for the stay and the respondent to the petition are prima facie parties to the arbitration agreement and it need not go further and decide whether they are the real parties. I wish, however, to say that I do not appreciate the distinction between a prima facie party to a contract and a real party to it. In my view the making of such a distinction will lead to confusion being created.

(29) It was stated in the petition for stay that,

> "3. The said two contracts are principal contracts & the respondents in any event apart from any liability of any other person or persons are liable under the said two contracts, by reason of well established practice and custom in the market for the said goods as well as in law."

With regard to the liability under the custom thus alleged it is enough to say that, the suit does not raise any dispute about it. Even, therefore, if such a dispute is within the arbitration agreement, we have nothing to do with that in the present application for stay.

(30) I, therefore, agree that the appeal should be allowed.

B/D.R.R. Appeal allowed.

A.I.R. 1953 CAL. 484 (Vol. 40, C.N. 179)

CHUNDER J.

Ram Chandra Shau and others. 1st Party v. Madhab Nayek and others, 2nd Party.

Criminal Ref. No. 52 of 1952, D/- 5-12-1952.

Criminal P. C. (1898), S. 145 — Failure to produce evidence — AIR 1919 Pat 37, dissented from — (Evidence Act (1872), Ss. 101 to 103).

Party given repeated dates for producing evidence to establish allegations about possession and likelihood of breach of peace — Failure — Magistrate can dismiss his application. (Para 1)

Anno: Cr. P. C.. S. 145 N. 48; Evidence Act, Ss. 101 to 103 N. 6.

Manindra Krishna Ghose, for 1st Party; Sunil Mukherji, for 2nd Party.

CASE CITED:

(A) ('19) AIR 1919 Pat 37: 20 Cri LJ 464

ORDER: This is a Reference made by the Sessions Judge of Midnapore at the instance of the first party in a S. 145, Cr. P. C., pro-

ceeding. This first party was called upon to adduce evidence on more than one occasion and repeated dates were given to come with his evidence to establish allegations about possession and likelihood of a breach of the peace. I fail to see that if in spite of this the first party does not come forward to give evidence what else can the Magistrate do but to hold the allegations as not established and therefore take no further proceedings in the matter or in other words, as the learned Magistrate curtly wrote 'drop proceedings'. A decision of the Patna High Court reported in — 'Trilochan Das v. Jogeswar Das', AIR 1919 Pat 37 (A) was shown to me but in it no reason was given for holding the learned Magistrate's order directing the proceedings to be struck off as without jurisdiction. The first principle of the Evidence Act is that a party who is to prove an allegation must do so. The Court cannot imagine evidence in the absence of it. If there is no such evidence given by the party on whom the onus is to give evidence, I fail to see why a Court has got no jurisdiction to dismiss a case of the party who does not discharge the onus that is upon it or in other words, as it has been said by this Magistrate, 'drop proceedings'. Dismissal would be an exercise of ordinary common sense. No section of the Criminal Procedure Code need be cited for it.

(2) Under the circumstances, the order of the learned Magistrate was right except that he should have dismissed the application. The Reference is rejected.

B/D.H. Reference rejected.

A.I.R. 1953 CAL. 485 (Vol. 40, C.N. 180)

K. C. CHUNDER J.

Dr. Makhanlal Bhowmik, Complainant-Petitioner v. Ram Bhakat Sharma and another, Accused-Opposite Party.

Criminal Revn. No. 988 of 1952, D/- 18-2-1953.

(a) Bengal Food Adulteration Act (6 of 1919), Ss. 10 and 21 — Compulsory sale — (Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 424 and 488).

Section 424 of the Calcutta Municipal Act corresponding to section 10 of the Bengal Food Adulteration Act compels a man to sell to the officer concerned if he exercises his statutory powers. If no question arises of exercising of any such statutory powers the sale cannot be called a compulsory sale or it cannot be held to be a sale prohibited by punishment under S. 488, Calcutta Municipal Act, or under S. 21, Bengal Food Adulteration Act. AIR 1928 Cal 320; AIR 1933 Cal 598 and 51 Cal WN 260, Distinguished. (Para 4)

(b) Bengal Food Adulteration Act (6 of 1919), S. 6 — Storing for sale.

One can quite understand compulsory acquisition by exercise of statutory authority from being held not to be a sale at all but if without any such compulsion there has been a transfer of property in goods for price, it does not appear that there is any reason why it should be taken out of the Act. In case of storing there is no question of actual sale and therefore there is no question of compulsory acquisition vitiating any sale. The gist of the offence is in the storing itself. The purpose of the storing is that it is for future sale. Storing is storing whether the article is sold or not sold to the Sanitary Inspector. In a case where the sanction was general covering all the offences under S. 6, the Magistrate must consider the case of storing for sale. (Para 5)

(c) Bengal Food Adulteration Act (6 of 1919), S. 13 — (Cri. Ref. 43 and 44 of 1951, (Cal), dissented from).

The law does not authorise the Magistrate to order destruction or other disposal of seized adulterated article except at the cost of the person in possession of the same at the time of seizure. Cri. Ref. Nos. 43 and 44 of 1951 (Cal), Dissented from. (Para 7)

Ajit Kumar Datta, for Petitioner.

CASES CITED:
(A) ('28) AIR 1928 Cal 320: 30 Cri LJ 256
(B) ('33) AIR 1933 Cal 598: 34 Cri LJ 836
(C) ('47) 51 Cal WN 260
(D) ('51) Cri Ref Nos 43 and 44 of 1951 (Cal)

ORDER: This Rule was issued at the instance of the District Health Officer, Jalpaiguri, against an order of acquittal and an order under S. 13, Bengal Food Adulteration Act, passed by the Magistrate of the District.

(2) The facts are not seriously in dispute. The Sanitary Inspector seized the stock of mustard oil which was found stocked by a firm of merchants at Banerhat in that District. He took samples from different portions and in analysis it has been found that the whole of the oil was highly adulterated. He had after seizure offered the price. It must also be pointed out that in this case prosecution was sanctioned not merely for selling mustard oil but for all the offences connected with mustard in S. 6, Bengal Food Adulteration Act. The Magistrate found that the mustard oil was highly adulterated. He considered that because at a considerable distance the Firm had a factory for soap-making the storing might be for such purpose though the storing was not at the place of soap making and no proof at all was given on behalf of the Firm that storing was actually for any such purpose. The Magistrate therefore considered that as it was a compulsory sale to the Sanitary Inspector there can be no prosecution under S. 6 of the Act. He then ordered under S. 13 of the Act that "the seized oil shall be made unfit for human consumption and sold by the Chairman of the District Board and the sale proceeds may be made over to the accused Firm provided that if after the oil has been made unfit for human consumption the accused firm be desirous of using the said oil in their soap factory and satisfies the Chairman, District Board that the oil will be used only in soap making the oil shall be returned to the accused firm." In this Rule both the orders of acquittal and the order under S. 13 are called in question.

(3) We will, therefore, proceed to take them up one by one. As far as the acquittal is concerned it may be pointed out that the case on which the learned Magistrate has relied is not applicable to the present case, but at the same time it must be said that the position is not really very satisfactory as far as the case law is concerned. I shall proceed briefly to refer to the cases.

(4) In a decision reported in — 'Akhoy Kumar v. Corporation of Calcutta', AIR 1928

Cal 320 (A), a Bench of this Court consisting of Chotzner and Lort-Williams JJ. considered that there was no sale and they were of the opinion that a compulsory sale made under the provision of S. 424, Cl. (1), cannot make any person amenable to the punishment provided for under S. 488, Calcutta Municipal Act. With the actual decision there can be no dispute. In that case no question of sale at all arose. Therefore there could be no conviction for sale of the article. The Food Inspector seized a consignment of ghee at the railway station. The consignment was not sold to him nor was any sample taken out of it, so that no question of sale as mentioned in S. 424, cl. (1), Calcutta Municipal Act, arose. He removed the thing seized to the Municipal office and there he offered compensation in the shape of the price of the article to the person whose thing had been taken away by him either by force or under legal authority I need not decide. In any case, if any one takes away property without consent of the owner and subsequently pays him the compensation of the same it does not come within either the dictionary meaning or the legal meaning of sale which is based upon volition. Therefore all that was said in that case was simply 'obiter dicta'. No question under S. 424, Calcutta Municipal Act, really arose. Then again it is to be noted that the exact wording even in the 'obiter dicta' was not that every sale to a person who may hold the office of the Sanitary Inspector was either a compulsory sale or not a sale. A "compulsory sale" made under the provision of S. 424, cl. (1), does not according to the Court bring into operation S. 488 as such a compulsory sale is not a sale. Obviously, their Lordships were of the opinion that a sale must be a voluntary transfer of property in goods for price received. There may be also a voluntary transfer of goods to a Sanitary Inspector if it is not known that he is a Sanitary Inspector, or if he does not claim to exercise his powers of compulsory acquisition under S. 424, cl. (1). Section 424, Calcutta Municipal Act, corresponding to S. 10, Bengal Food Adulteration Act, compels a man to sell to the officer concerned if he exercises his statutory powers. If no question arises of exercising of any such statutory powers I fail to see how the sale can be called a compulsory sale or how such a sale cannot be held to be a sale prohibited by punishment under S. 488, Calcutta Municipal Act or under S. 21, Bengal Food Adulteration Act. This point certainly has been throughout overlooked in all the decisions I am going to refer.

(5) The obiter dicta in the case of Akhoy Kumar Ghose was dissented from and not considered to be binding by a Bench of this Court consisting of Sir Charu Chander Ghose, Acting Chief Justice and Mallik J. in the case of — 'Davis Hewlet & Co. v. Emperor', AIR 1933 Cal 598 (B). Their Lordships said that they did not consider themselves in that particular case bound by this authority and they were not prepared to follow the same. They gave no reasons whatsoever. Therefore as far as Divisional Benches are concerned the matter stands like this. There is a Single Judge decision by Lodge J. in — 'Narendra Nath Saha v. Emperor'. 51 Cal WN 260 (C). It appears that Lodge J. did not go into the question fully in that case but merely held himself bound by the Divisional Bench decision in Akhoy Kumar Ghose's case. He did not notice the other case at all. Obviously the dissenting decision was not placed before him. Then again he did not consider whether all cases of sales voluntary or compulsory were taken out of the Act altogether simply because a person had the misfortune to hold an official position like the Sanitary Inspector. One can quite understand compulsory acquisition by exercise of statutory authority from being held not to be a sale at all but if without any such compulsion there has been a transfer of property in goods for price it does not appear that there is any reason why it should be taken out of the Act. In any case Lodge J. was at pains to point out that there might have been a conviction for storing for sale but in that case there was the difficulty that the sanction only related to actual sales and not to storing. Under S. 15, Bengal Food Adulteration Act, sanction has go to be taken of the higher authority and it is clear law that there can be no conviction for any offence which is not covered by the sanction. In the case before Lodge J. he pointed out that as there was no sanction for prosecution for storing for sale the conviction could not be upheld on that ground showing that had there been any such sanction then even the authority of Akshoy Ghosh's case would not have stood in the way of the prosecution. In case of storing there is no question of actual sale and, therefore, there is no question of compulsory acquisition vitiating any sale. The gist of the offence is in the storing itself. The purpose of the storing is that it is for future sale. Storing is storing whether the article is sold or not sold to the Sanitary Inspector. In the present case as I have already pointed out that the sanction was general covering all the offences under S. 6. Therefore the Magistrate erred in law in not considering the case of storing for sale.

(6) The acquittal must, therefore, be set aside and the case sent back to the Magistrate to consider the case of storing for sale which is covered by the sanction. In this connection it must be pointed out to him that there is a statutory provision under S. 6, Cl. (4), i.e., a presumption, that if the articles mentioned are found in the possession of a person who is in the habit of manufacturing or storing like articles for sale then he is to be presumed to have manufactured or stored for sale such articles. It may be further pointed out that in this case the prosecution gave evidence that the accused firm did store for sale in their ordinary business such mustard oil. This proof given by the prosecution was not challenged by the accused, who in his statement under S. 342, Criminal P. C. held himself out as being a firm which stored mustard oil for sale. Therefore prima facie the presumption arises. The Magistrate will note this. When there is a presumption made by the Statute it is immaterial whether the accused might or might not have been able to do something, actual proof must be given that the accused did not store it for sale but have stored it for the purpose of soap making business. The presumption means that the duty to rebut what the statute considers should be taken as established by the Courts is on the accused himself. It is for him definitely to show that it is not so. I am drawing the Magistrate's attention to this because, —as I have pointed out— of some observations made by him in the judgment to which I have referred to previously in connection with the soap business of the accused.

(7) I now come to the question of disposal of the mustard oil actually found by the Magistrate to be adulterated under S. 13 of the Act.

As the order of acquittal is set aside the matter must be reconsidered by him but in re-considering the matter the Magistrate will have to consider that the law does not authorise the Magistrate to order destruction or other disposal of seized adulterated article except at the cost of the person in possession of the same at the time of seizure. This is clear from the law enunciated in the section itself. In the present case no such order for costs was provided for and the Magistrate's order amounted to this that if after all the costs had been incurred by the authorities, the Firm wanted to have the oil which has been rendered unfit at some cost for human consumption, then without paying anything for the cost incurred by the municipal authorities, the accused firm was to be made a present of the altered article. Such is not the law. I am aware in this connection that a Divisional Bench of this Court has held under S. 13 of the Act that the only proper order is the order for forfeiture of the oil to the local authority in order that it may be destroyed by that authority at the cost of the person in whose possession it was at the time of seizure. This was decided by K. C. Das Gupta and Sarkar JJ. in — 'Cri. Ref. Nos. 43 and 44 of 1951 (Cal) (D)'. I am not sure that the decision might not require reconsideration in a suitable case because it obviously overlooks the words "or otherwise disposed of". In the section they appear after the word 'destroyed'. The effect of the decision is to delete, as it were, these words in the statute itself. Therefore it must not be taken that I am expressing any concurrence with the decision given. In particular cases destruction may be the only proper order but in other cases there is authority for ordering disposal in some other way. At least such authority appears to be given by the legislature and it will be for the Courts to consider whether what has been given by the legislature can be taken away by decision of the Divisional Bench of this Court. -

(8) This Rule is accordingly made absolute and the order under S. 13 of the Act is set aside and the case is remanded to the Magistrate for proceeding further in the light of this judgment.

A/H.G.P. Rule made absolute.

A.I.R. 1953 CAL. 487 (Vol. 40, C.N. 181)

S. R. DAS GUPTA J.

In the matter of Suburban Bank Ltd.

Civil Appln., D/- 3-2-1953.

(a) Companies Act (1913), S. 230(a) — Taxes — (Income-tax Act (1922), S. 18A).

The sum demanded under S. 18A, Income-tax Act, is not a tax which became due and payable within the meaning of S. 230. (Para 1)

Anno: Companies Act, S. 230 N. 1.

(b) Companies Act (1913), S. 231 — Re-opening of assessment — (Evidence Act (1872), Ss. 101 to 103.

Where an assessee wants in winding up proceeding to reopen an assessment which has been made by the Income-tax authorities it must be established by the assessee that the assessment has been an improper one. (1875) 10 Ch A 373, Rel. on. (Para 3)

Anno: Companies Act, S. 231 N. 1; Evidence Act, Ss. 101 to 103 N. 4, 8.

A. N. Ray, for Liquidator; R. Choudhury, for Creditors; M. E. Meyer, for Income-tax Department.

CASE CITED:

(A) (1875) 44 LJ Bk 63: 10 Ch A 373

ORDER: I make the following order:

(a) The payment of the Provident Fund to Mr. Chowdhuri's clients will be made on the basis that the total amount, as appearing in the books of the Bank, contributed by the staff and by the Bank is Rs. 25,615-12-0.

(b) I declare that Mr. Chowdhuri's clients, namely —

1. Provash Chandra Cheena of No. 12, Proddonath Lane, Calcutta, 2. Amal Kumar Chatterjee of No. 23/1B, Jhamapukur Lane, Calcutta, 3. Ashit Ranjan Das of No. 57, Cossipore Road in the suburbs of Calcutta, 4. Dilip Kumar Ghosh of No. 17, Jhamaphukur Lane, Calcutta, 5. Rajendra Kumar Chakraborty of No. 6, Muralidhar Sen Lane, Calcutta, 6, Sushil Kumar Majumdar of No. 19, Strand Road, Calcutta., 7. Kanai Charan Maity of No. 12, Bipradas Street, Calcutta, are entitled to their wages from 1st May upto the end of August 1948 and they will rank as preferential creditors in respect of wages for the last two months i.e. July and August 1948 and for the wages for the remaining months they would be treated as ordinary creditors.

The Liquidator will be entitled to settle the claims of other employees if and when they make their claims. The Liquidator will write to Court and obtain directions.

(c) With regard to the sum of Rs. 11,017/- which was demanded by the Income-tax authorities on 14-1-1948 under S. 18A, Income-tax Act, I hold that the said authorities are not entitled to preferential payment under S. 230, Companies Act. In my opinion the said sum which was demanded under S. 18A, Income tax Act, was not a tax which became due and payable within the meaning of the said section. It is an amount payable in advance in respect of tax before it became due. It would become due after regular assessment. This in my opinion is the real character of the payment to be made under S. 18A, Income tax Act. This is also evident from the fact that if on regular assessment nothing or a lesser amount is found due and payable then the Government shall have to return the amount paid or the excess with interest at 2 p. c. per annum from the date of payment to the date of such assessment.

(2) In any event having regard to the fact that since the date of the issue of the notice under S. 18A a regular assessment has taken place on 20-12-1949 and a notice of demand dated 22-12-1949 for the sum of Rs. 26726/8/- found due on such assessment, has been issued on the Liquidator the question of compliance with notice under S. 18A dated 14-1-1948 no longer subsists and what is now due and payable is under and because of the assessment dated 20-12-1948 and the notice dated 22-12-1948. In my opinion, therefore, the Income-tax authorities are not entitled to claim the sum of Rs. 11,017/- in preference to the other creditors of the Bank. The Income-tax authorities are entitled to their claims, namely, to the sum of Rs. 18,848-10-0 Rs. 3,938-2-0 and Rs. 26,726-8-0 but they will rank as ordinary creditors.

(3) I cannot at the same time allow the contention of Liquidator namely, that the assessment in respect of the year 1947-48 for which a demand notice was given under S. 29 on 22-12-1949, should be re-opened by this Court. In the affidavit filed by the Liquidator before me he has not asked

for it, nor has any material been produced before me to support his present contention, namely, that the said assessment has not been a proper assessment. It was only at the hearing before me that Mr. Roy, appearing for the Liquidator, contended that the said assessment should be re-opened. I am unable to accept that contention. It must be established by the assessee that the assessment has been an improper one. As I said before, in the affidavit filed by the Liquidator it has neither been alleged that the assessment ought to be reopened nor has any material been given which would justify me in holding that the said assessment should be reopened. In this connection I would refer to the following observation of Cotton L. J. made in the case of —'ex parte Kibble'. In re Onslow' (1875) 10 Ch. A 373. (A).

"When a person is 'sui juris' judgment against him is very strong 'prima facie' evidence against him of the existence of a debt, if he disputes it, he must satisfy the Court that there is some reason which requires that the judgment should be set aside."

In my opinion, the same principle ought to apply in a case where an assessee wants in winding up proceeding to re-open an assessment which has been made by the Income-tax authorities. It is upto him to show that there is some reason which requires the assessment to be set aside. I, therefore, negative the contention of the Liquidator on this point.

(4) In making payment to any of the employees the Liquidator would be entitled to set off any claim which the Bank may have against the said employee.

(5) Mr. Das's client will be paid in accordance with the order of Bachawat J:

(6) Rupees 716/- be returned to the parties whose ornaments were pledged within the Bank and sold by the Bank.

(7) Mr. Das's client will pay his own costs, Mr. Chowdhury's clients are entitled to costs settled at Rs. 250/-. Government will pay its own costs. The Liquidator will get his costs of this application as between Attorney and client, certified for counsel, Liquidator will get his costs before the Referee assessed at Rs. 100/-. Let the application be taxed as of a motion.

B/D.H. Order accordingly.

A.I.R. 1953 CAL. 488 (Vol. 40, C.N. 182)

CHAKRAVATTI C. J. AND SARKAR J.

India Hosiery Works, Appellants v. Bharat Woollen Mills Ltd., Respondents.

Special Suit No. 1 of 1952; A. F. O. O. No. 67 of 1952, D/- 6-2-1953.

(a) Arbitration Act (1940), S. 20 (1) — Scope.

Section 20(1) contemplates agreements to which the provisions of Chapter II would also apply. And by virtue of S. 3 of that Chapter Rule 1 of Sch. I is attracted, unless otherwise provided by the agreement. (Para 7)

Anno: Arb. Act, S. 20 N. 1.

(b) Arbitration Act (1940), Ss. 20(1) and 3 — Validity of arbitration agreement.

An arbitration agreement, neither specifying the number of arbitrators, nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties, or, where the parties do not concur in making an appointment, to be appointed by the Court, except where the operation of Rule 1 of the First Schedule is excluded. (Para 7)

Anno: Arb. Act, S. 20 N. 1.

(c) Arbitration Act (1940), S. 8(1)(a) — Appointment of arbitrator: Award Case No. 226 of 1951 (Cal), Dissent from.

Consent of the parties is the very essence of arbitration. Where different arbitrators are not to be appointed by different parties and the intention is that all of them must concur in the appointment of the sole arbitrator or each of the arbitrators where there are more than one, it is not necessary to make any express provision in the agreement that the appointment or appointments are to be made "by consent of the parties." An agreement which merely provides for reference to arbitration is not therefore invalid or ineffective for the reason that it does not expressly provide for the appointment of the arbitrator or arbitrators to be made by consent of the parties. (Para 8)

Anno: Arb. Act, S. 8 N. 2.

(d) Arbitration Act (1940), S. 8 (1) — Arbitration agreement neither specifying number of arbitrators, nor mode of appointment — Procedure to be followed in such a case by party to agreement and by Court indicated. **(Paras 8, 11)**

Anno: Arb. Act, S. 8 N. 2.

(e) Arbitration Act (1940), Sch. I, Rule I — Scope.

It is not possible to conceive of an agreement which will come under Rule 1 of the First Schedule and yet be an agreement for appointment of arbitrators otherwise than by consent of all the parties. Where, therefore, the Rule applies, it can no longer be said that the agreement does not provide for appointment of the arbitrator by consent of the parties and is for that reason invalid. (1892) 1 QB 136, Expl. (Para 9)

Anno: Arb. Act, Sch. I, Rule 1 N. 1.

(f) Arbitration Act (1940), S. 1 — Interpretation of Act.

The Arbitration Act does not purport of its own force to restrict the contractual rights of parties, but only gives effect to restrictions which they may choose to impose on themselves as regards the forum to which their disputes shall be taken. (Para 12)

Anno: Arb. Act, S. 1 N. 1.

P. C. Mullick, for Appellants; A. K. Sen, for Respondents.

CASES CITED:

(A) (1892) 61 LJQB 438: 1892-1 QB 136

(B) ('52) Award Case No. 226 of 1951, D/- 29-1-1952 (Cal)

CHAKRAVARTTI C. J.: This appeal involves a short point under the Arbitration Act, 1940, arising out of the following facts.

(2) On 25-8-1951, a contract was entered into between the appellant, The India Hosiery Works, and the respondent, Bharat Woollen Mills Ltd., by which the respondent agreed to sell and the appellant agreed to buy 10,000 lbs. of woollen yarn at a certain price, the goods to be delivered by a certain date. The contract contained the following arbitration clause:

"All disputes whatsoever arising in or out of or in connection with the said contract or arising in any way whatsoever in connection with any other contract for the supply of goods by the Company to the Buyers shall be referred to arbitration at Calcutta. The

decision of its Tribunal of Arbitration shall be final and binding on both parties, either of whom may make the same a Rule of Court."

(3) On 26-3-1952, the respondent filed an application on the Original Side of this Court for an order under S. 20, Arbitration Act, that the arbitration agreement be filed in Court, for appointment of an arbitrator and for a reference of the dispute which had arisen out of the contract to the arbitrator so appointed. It was alleged in the application that the appellant had wrongfully failed and neglected to take delivery of the contracted goods whereupon the respondent had sold them on notice to the appellant and suffered damages to the extent of Rs. 35,000/- and that upon a deduction of Rs. 20,000/- which the appellant had paid as advance, the respondent was entitled to recover a sum of Rs. 15,000/-. It was alleged further that the appellant was wrongfully denying the respondent's claim and asserting that it had rightly cancelled the contract and had refused to concur in the appointment of one Hiralaljee whom the respondent had nominated in terms of the arbitration agreement to act as the sole arbitrator & was in fact denying the respondent's right to appoint any arbitrator at all.

(4) By the affidavit-in-opposition filed on its behalf, the appellant repudiated the respondent's claim for damages and took the further plea that the arbitration agreement was "vague, indefinite, void and unenforceable in law" and inasmuch as it did not provide for appointment of an arbitrator or arbitrators by consent of parties, the appellant could not, and had not to, concur in any appointment made by the respondent.

(5) The application came to be heard by Bachawat J. Before him it was argued that the arbitration agreement was void for uncertainty and the uncertainty alleged was that no arbitrator had been named in the agreement and the mode of the appointment of an arbitrator or arbitrators had also not been specified. The learned Judge held that in view of the definition of arbitration agreement, as contained in S. 2(a) of the Act, it was not necessary that any arbitrator should be named and since S. 20 of the Act expressly authorised the Court to make an order of reference to the arbitrator appointed by the parties or, in the absence of agreement between them, to an arbitrator appointed by the Court, such an appointment could be made in the case, inasmuch as the arbitration clause did not name any arbitrator and the parties were also not agreed. In that view, he directed the agreement to be filed and made an order of reference to one Ganeshlal Nahata. To the choice of that particular arbitrator, neither party objected.

(6) Before us, it was contended on behalf of the appellant that the arbitration agreement had been wrongly held to be valid. It was pointed out that S. 20(1) of the Act contemplated agreements in respect of which a party could proceed either under that section or under Chap. II, as the section itself stated, and on that basis it was contended that no agreement could be recognised and acted upon under S. 20 (1), unless it satisfied the requirements of Chap. II, that is to say, unless it was an agreement under which a party could apply to the Court for the appointment of an arbitrator under one or other of the sections of that chapter. The Act had not in view, it was further contended, any agreement which the detailed provisions of Chap. II, did not cover. The only relevant sections of that chapter were Ss. 8, 9 and 10, but of them, the last two sections had no application to the case, as S. 9 was concerned with agreements providing for the appointment of two arbitrators, one to be appointed by each party and S. 10 with agreements, providing for the appointment of three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed arbitrators. There remained only S. 8 which contemplated agreements providing for "one or more arbitrators to be appointed by consent of the parties." The agreement, therefore, had to provide for the consent of parties as the mode by which the arbitrator or arbitrators were to be appointed, but where it contained no such provision, as in the present case, it was incomplete and not valid. On general principles too, such an agreement was void for uncertainty, because one did not know by whom or in what mode the arbitrator or arbitrators were to be appointed. The objection, it was contended, was not that no arbitrator had been named in the agreement, as the learned trial Judge had wrongly assumed, but that no mode of appointment had been provided for.

(7) In my opinion, the contention of the appellant is not correct. As was rightly pointed out on its behalf, S. 20(1) contemplates agreements to which the provisions of Chap. II would also apply. Section 3 of that chapter makes the provisions of the First Schedule applicable to an arbitration agreement, unless a different intention is expressed therein and Rule 1 of that Schedule lays down that unless otherwise expressly provided, the reference shall be to a sole arbitrator. There is nothing in the agreement in the present case to exclude the First Schedule and since all that it says is that the disputes shall be referred to "arbitration at Calcutta", the effect of Rule 1 is to make it an agreement for reference to a single arbitrator. The next question is how that single arbitrator is to be chosen. The learned Advocate for the appellant contended that where the mode was not indicated in the agreement, it could nowhere be found and it was for that reason that agreements of this kind were bound to fail. He re-inforced his argument by saying that if the language of Rule 1 of the First Schedule had been "if no other mode of reference is provided", as in the Schedule to the Act of 1899, the Court could make an appointment in the absence of agreement between the parties, as stated in Russell on Arbitration, 14th Edition, p. 99 with reference to a similar provision in the English Act; but since the language of the present Rule was "unless otherwise expressly provided", it was to be presumed that the Legislature had made the change with some intention and the intention, according to the learned Advocate, clearly was that the Court was no longer to supply an omission in the agreement as to the mode of appointing an arbitrator. The argument does not appear to me to be tenable. In my opinion, it is clear that even under the present Act, an arbitration agreement, neither specifying the number of arbitrators, nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the Court, except where the operation of Rule 1 of the First Schedule is excluded.

(8) It is true that there is a difference in language between Rule 1 of the First Schedule,

as it stood in the Act of 1899 & as it stands now, but I do not see how that difference warrants the conclusion suggested on behalf of the appellant. The object of the Rule is only to supply the number of arbitrators where no number is specified in the agreement and if the language of the exception has been changed from "if no other mode of reference is provided" to "unless otherwise expressly provided", the change must have been made because the old language was clearly inappropriate. Mode of reference has nothing to do with whether there is to be one arbitrator or more. In any event, if it was possible under the old Act, or is possible under the corresponding provision in the English Act, for the Court to appoint an arbitrator even in the case of the agreement merely providing for reference to arbitration, the reason is not that Rule 1 of the Schedule contained, or the Schedule in the English Act contains, a reference to the absence of any provision for the 'mode of reference' in the arbitration clause. It is not as if the old Rule provided or the English rule provides that where the mode is not provided for in the agreement, the Court can supply the mode and appoint an arbitrator in the absence of concurrence among the parties. The real reason, which is equally valid under the present Act, is clear. Consent of the parties is the very essence of arbitration. Where the agreement provides for more than one arbitrator and they are not each to be appointed by all parties, it is necessary to provide expressly which of them will be appointed by whom, as in the case of the agreements contemplated by Ss. 9 & 10. But where different arbitrators are not to be appointed by different parties and the intention is that all of them must concur in the appointment of the sole arbitrator or each of the arbitrators where there are more than one, it is not necessary to make any express provision in the argument that the appointment or appointments are to be made "by consent of the parties". Without such consent, no arbitrator can be appointed or can act in such a case.

Where, therefore, the agreement does not assign the right of appointment distributively to different parties in respect of different arbitrators, it is inherent in the agreement that the appointment of the arbitrator or of each of the several arbitrators must be by the consent of all parties. There may be an express provision to such effect, but even in the absence of any express provision, such a provision must be taken to be necessarily implied. It is for that reason that where the agreement does not specify the number of arbitrators, nor specifies the mode of appointment, the Court first takes the agreement as providing for reference to a single arbitrator by reason of the provisions of Rule 1 of Schedule I, then takes the mode of appointment intended necessarily to be appointed by consent of the parties and, next, if it finds that the parties cannot concur in the appointment of an arbitrator, it appoints one itself. It takes and can take the agreement to be an effective agreement, because the mode of appointment by consent of the parties is implied in it and it is not required to supply the mode of appointment and does not require any provision enabling it to do so. I am therefore of opinion that the change of language in Rule 1 of the First Schedule has no bearing on the validity of an arbitration agreement which does not specify either the number of arbitrators or the mode of appointing them, nor has it any bearing on the Court's power of giving effect to such an agreement. I am further of opinion that where the intention is that the arbitrator or each of them shall be appointed by all the parties, it is not necessary that the agreement should say so expressly and that S. 8(1)(a) of the Act, where it speaks of an agreement which "provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties", should be read as "provides expressly or by necessary implication". An agreement which merely provides for reference to arbitration is not, therefore, invalid or ineffective for the reason that it does not expressly provide for the appointment of the arbitrator or arbitrators, to be made by consent of the parties.

(9) I am also inclined to agree with Mr. Sen, who appeared on behalf of the respondent, that it is not possible to conceive of an agreement which will come under Rule 1 of the First Schedule and yet be an agreement for appointment of arbitrators otherwise than by consent of all the parties. The Rule contemplates an agreement which is silent as to the number of arbitrators. If the agreement attempts to say that the appointment will be otherwise than by consent of all the parties, it cannot possibly do so without making some reference to the number. It will have to say that the arbitrator or arbitrators will be appointed by one or some of the parties or by a third party and as soon as it does so, it will go outside the Rule. If it speaks of the appointment of "the arbitrator", there will be no scope for the application of the Rule, because a single arbitrator will be indicated by the agreement itself. If it speaks of the appointment of 'arbitrators', then also will the Rule be excluded, because it will be "otherwise expressly provided" that there will not be a sole arbitrator. The only type of agreement which can come under the Rule is, therefore, an agreement which speaks expressly of 'arbitration by consent of the parties', in which case there is no reference to the number of arbitrators or an agreement which says nothing about the mode of appointment in which consent of all the parties will be a necessarily implied condition. It thus follows that where the Rule applies, it can no longer be said that the agreement does not provide for appointment of the arbitrator by consent of the parties and is for that reason invalid.

(10) In the course of his argument, Mr. Sen referred to the decision in — 'Eyre and Leicester Corporation', In re (1892) 1 Q. B. 136 (A). I do not think that case is of any real assistance. There, the contract provided for reference to "the arbitrator or umpire" to be appointed "in accordance with cl. 39 of the specification". It is thus clear that the appointment of only one person was intended and that was what the Courts held in the view that the word 'umpire' had been used to denote the same thing as 'arbitrator'. Clause 39 of the specification simply provided that every dispute would have to be "referred to arbitration" and if the case has any relevancy at all, it is only as showing that in spite of the agreement saying nothing about the mode of appointment, nobody said that it was bad and the parties as well as the Courts proceeded on the view that the appointment was to be made by consent of the parties and that, in the absence of concurrence between them, the Court could make an appointment. The case has thus only a negative value.

(11) I may,however, point out how the law is stated in Halsbury's Laws of England, because the provisions of the English Act are in all essential respects the same. In the Hailsham Edition, Vol. I, the following passage occurs at page 644-45:

The submission itself may name the arbitrator or arbitrators, or it may without naming them direct how they are to be selected or it may simply provide for a reference to arbitration without either naming the arbitrators or directing how they are to be selected.

In the last-mentioned case, if the submission is contained in a written agreement and does not express a contrary intention the following rules apply:

(1) The reference is to a single arbitrator.

(2) If the parties do not concur in the appointment of the arbitrator, any party may serve the other parties with a written notice to appoint an arbitrator; and if the appointment is not made within seven clear days after service of the notice, the Court may, on the application of the party who gave such notice, appoint an arbitrator.

The present case is exactly "the last-mentioned case" contemplated in the above passage and the respondent followed precisely the same procedure as indicated there. It served a notice on the appellant, requiring it to concur in the appointment of an arbitrator and on the appellant declining to do so, it applied to the Court.

(12) The learned Advocate for the appellant contended that the Arbitration Act was restrictive of the general rights of parties under the Contract Act and, therefore, it ought to be strictly construed and words ought not to be read into S. 8(1)(a) which were not there. I am not impressed by that argument. The Arbitration Act does not in fact purport of its own force to restrict the contractual rights of parties, but only gives effect to restrictions which they may choose to impose on themselves as regards the forum to which their disputes shall be taken. Secondly, to read S. 8(1)(a) as covering an implied provision for consent of the parties is not to import into the section anything foreign to it or to add to it in any manner, but only to take note of its necessary intendment. Thirdly, construction of S. 8(1)(a) became necessary only because of the appellant's own argument that the agreement must satisfy the test of that section. An agreement merely providing for reference to arbitration must in the very nature of things mean arbitration by arbitrators accepted by all the parties and it is not necessary to construe any section in order to extract or justify that meaning.

(13) On behalf of the appellant, our attention was also drawn to the decision of S. R. Das Gupta J. in the case of — 'Bharat Woollen Mills Ltd., v. Kumar Woollen Factory', Award Case No. 226 of 1951, D. 29-1-1952 (B), where the same arbitration clause came up for consideration and the learned Judge held it to be void for uncertainty. There was an appeal before us from that decision as well which we heard immediately after the present appeal, but we had to dismiss it, as no appeal lay. We may, however, consider the decision on the merits for the purposes of the present appeal. With great respect, I am unable to agree with the learned Judge in the view taken by him. He held that the agreement was bad, because it said nothing as to who was going to be the arbitrator and how he was going to be appointed and that S. 8 would not apply, as the agreement did not say that the arbitrator or arbitrators were to be appointed by consent of the parties. The same arguments were advanced by the appellant in the present case and I have already dealt with them.

(14) In the result, I hold that the agreement was a good agreement, amounting to an agreement for reference to a single arbitrator, to be appointed by consent of both the parties. As there was no such consent, the Court could appoint an arbitrator under the terms of S. 20(4) of the Act, which it did. The appeal is accordingly dismissed with costs. Certified for the counsel.

(15) SARKAR, J.: I agree.

B/ V.S.B. Appeal dismissed.

A.I.R. 1953 CAL. 491 (Vol. 40, C.N. 183)

K. C. DAS GUPTA AND DEBABRATA MOOKERJEE JJ.

Birdhaj Roy, Accused-Petitioner v. The State.

Criminal Revn. No. 829 of 1952, D/- 4-12-1952.

Criminal P. C. (1898), S. 107 — "Sufficient ground for proceeding."

Order of the Magistrate not indicating nature of information received to induce him to take action under S. 107 — Order is bad. (Para 1)

Anno: Cr. P. C., S. 107 N. 13.

S. S. Mukherjee and Kishore Mookerji, for Petitioner.

K. C. DAS GUPTA J.: The order against which this Rule is directed was passed by the Sub-Divisional Officer, Alipurduar and is in these words:

"Accused Birdhaj Roy brought under arrest under S. 151, Cr. P. C. in a Madarihat P. S. case under S. 107, Cr. P. C. by Alipurduar Police. Prayer for taking action under S. 117(3), Cr. P. C. is also made. Bail petition moved. He is allowed bail for Rs. 2000/- with two sureties of like amount. He is to show cause why he should not sign a bond for Rs. 2000/- under S. 107, Cr. P. C. with two sureties for the maintenance of peace for a period of one year. As there is apprehension of breach of peace in the locality as it is apparent from the reports of the police and the tea-garden manager, I further direct the said accused under S. 117, (3), Cr. P. C. to sign a bond of Rs. 2000/- with two sureties for the maintenance of peace until the conclusion of the enquiry. For 29-6-52."

The question we have to consider is whether the learned Magistrate acted in accordance with law in passing this order which clearly is not in conformity with the procedure laid down in the Code of Criminal Procedure. Under S. 107 of the Code when a Magistrate concerned is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, the Magistrate, if in his opinion there is sufficient ground for proceeding, may require such person to show cause why he should not be ordered to execute a bond. Section 112 of the Code provides that when a Magistrate deems it necessary to require only person to show cause in this manner, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties required. If the person in respect of whom such an order is made is present in Court, it shall be read over to him and the substance thereof shall be explained to him. This is provided by S. 113 of the Code. Section 114 of the Code provides that if such person is not present in Court, the Magistrate shall ordinarily issue a summons requiring him to appear, while under S. 115 of the Code every summons shall be accompanied by a copy of the order made under S. 112.

What is important is that the Magistrate should record in his order the nature of the information received. How important this is considered by the Legislature appears from the form which has been set out in Sch. V which contains all the forms for use for different purposes of the Code under S. 555, Cr. P. C. As the accused was in the present case brought up in custody, there was no occasion to issue summons under S. 114 of the Code, but that does not do away with the necessity of recording by the Magistrate of the substance of the nature of the information that he had received. It is important to notice that the amending Act of 1923 inserted in S. 107 the words "If in his opinion there is sufficient ground for proceeding". This undermines the importance of the Magistrate applying his mind to the facts of the matter and form his own opinion on the information available. We have looked in vain into the records in this case to discover whether the Magistrate did apply his mind to the facts of the case and form an opinion. The order of 16-6-1952, which has been set out above, does not indicate the nature of the information received to induce him to take action under S. 107, Cr. P. C. There is some indication that the learned Magistrate thought it necessary to act under S. 107, Cr. P. C. but that act would follow only if the Magistrate after applying his mind to the facts of the case had taken action according to law under S. 107, Cr. P. C. On consideration of the facts and circumstances of the case we have come to the conclusion that the learned Magistrate did not act in accordance with law and this omission has resulted in the miscarriage of justice.

(2) Accordingly we set aside the order passed by the learned Sub-Divisional Magistrate and order that the proceedings be quashed.

(3) If the petitioner is in custody, he must be set at liberty at once.

(4) DEBARATA MOOKERJEE J.: I agree.

B/D.H. Proceedings quashed.

A.I.R. 1953 CAL. 492 (Vol. 40, C.N. 184)

LAHIRI AND GUHA JJ.

Mulchand Khatar, Accused, Petitioner v. The State.

Criminal Revn. No. 225 of 1952, D/- 3-7-1952.

(a) West Bengal Cotton Cloth and Yarn Control Order (1948), Cl. 14 — Seizure of cloth by person not competent within meaning of Notification — It cannot affect validity of conviction for contravention of provisions regarding submission of monthly returns. (Para 5)

(b) Essential Supplies Act (1946), Ss. 3 and 4 — Delegation and sub-delegation — Sections are not ultra vires—West Bengal Cotton Cloth and Yarn Control Order (1948), Cls. 13 and 14 — Notifications under, are not invalid. AIR 1952 Orissa 87, Dissented from.

The power which has been conferred on the Central Government by sub-s. (1) of S. 3 is only an ancillary power. The essential function has been discharged by the legislature itself when it laid down its policy in however wide terms it may be, regarding the control of production, etc. But legislative policy has been declared in the preamble of the Act and the primary legislative standard has been laid down in sub-s. (2) of S. 3 of the Act and it is only powers ancillary to essential legislative power that have been conferred on the Central Govt. by S. 3 and on the State Government by S. 4 of the Act, though the latter can exercise the powers conferred upon it, that is, make orders under S. 3 only when directed to do so by the Central Government. The Ss. 3 and 4 therefore, do not amount to delegation or sub-delegation or double delegation at all, in spite of the inartistic expression, "Delegation of powers" — used as a marginal note to S. 4. That marginal note cannot be utilised to control the plain words of S. 4. After having derived its authority practically from the Central Legislature the State Government has made an Order, namely, the West Bengal Cotton Cloth and Yarn Control Order, 1948. Then by virtue of the power conferred upon him by paragraphs 13 and 14 of the Notification No. 10097, D. C. S., dated the 13th August 1948, the Director of Textiles, West Bengal, who is a Controller within the meaning of paragraph 3 (e) of the West Bengal Cotton Cloth and Yarn Control Order, 1948, has given certain directions by Notifications No. DT/TX/52/50/D/-13-10-1950 and No. 413/TX/P/SR/5/49/D/-1-9-1949. There is nothing in these Notifications going beyond the scope of the legislative policy as laid down in the relevant Statute, that is, Act 24 of 1946. They seek simply to carry out that policy and on the ultimate analysis they derive their authority from the Central Statute. They are, therefore, quite valid. It is immaterial that the Central Government did not directly clothe the Director of Textiles with necessary powers. AIR 1951 SC 332, Relied on. (Paras 16, 18, 19, 20)

Anil Kumar Das Gupta, for Petitioner; S. M. Bose, Advocate General, N. K. Sen, Deputy Legal Remembrancer, and Harideb Chatterjee, for the State.

CASES CITED:
(A) ('51) AIR 1951 SC 332: 1951 SCR 747
(B) ('39) AIR 1939 PC 36: (1938) AC 708
(C) (1883) 53 LJPC 1: 9 AC 117
(D) (1909) 8 CLR 626 (Aus)
(E) ('52) AIR 1952 Orissa 87: 1952 Cri LJ 431

GUHA J.: In the present case, the petitioner has been convicted under S. 7(1), Essential Supplies Act, Act 24 of 1946 and sentenced to detention till the rising of the court and to pay a fine of Rs. 200/- in default, to rigorous imprisonment for four months. An order has also been passed for forfeiture of a part of the seized cloths.

(2) Various points have been urged before us and there has been considerable argument before us in regard to the validity of certain orders and Notifications. Before I go into that question our conclusions regarding the facts of this case may be stated. Briefly, the prosecution case was that the petitioner contravened Cl. 13 of the W. B. Cotton Cloth and Yarn Control Order, 1948, read with Notification No. DT/TX/52/50 dated 13-10-1950, which may be compendiously described as Notification 'C' for failure to produce certain papers and documents in support of the acquisition of cloths as per Ext. I and also contravened Cl. 14, W. B. Cotton Cloth and Yarn Control Order, 1948, read with Notification No. 413/TX/P/SR/5/49 dated 1-9-1949 (compendiously described hereafter as Notification 'B') for failure to submit monthly return of stock of cloths for the months

ending in July and August, 1951. The case was tried by a Presidency Magistrate, who has come to the conclusion that the petitioner contravened paragraph 13 (1), W. B. Cotton Cloth and Yarn Control Order 1948, with respect to cloths mentioned in Ext. (I) which are not covered by Ext. (II). The learned Magistrate has further held that the petitioner's firm did not submit monthly return for the months ending July and August, 1951 and accordingly the petitioner has contravened the provisions of Cl. 14, W. B. Cotton Cloth and Yarn Control Order, 1948, read with Notification 'B'.

(3) As regards the facts of the case, it has been contended before us by Dr. Das Gupta on behalf of the petitioner that the Cash Memos Exts. 1 series, which were produced by the petitioner, go to indicate the innocence of the petitioner. As regards this contention, however, all that need be said is that for cogent reasons the learned Magistrate did not accept the Cash Memos, Exhibits I series, at their face value. He was not inclined to accept these Cash Memos as genuine and bona fide and we do not see sufficient reason to dissent from his finding on the point.

(4) Then as regards non-submission of monthly return of stocks of cloths by the petitioner for the months ending July and August 1951, it was argued that the petitioner had no stock during that period and as such it was not necessary for him to submit any return. The hollowness of this argument, however, has been pointed out by the learned Magistrate in his judgment where he has referred to the fact that in the monthly return of stocks of cloths submitted by the petitioner for the month ending June 1951, he showed closing balance of a considerable quantity of cloth — a fact which proves conclusively that the defence version that the petitioner had no stock of cloth in hand during the relevant period is false.

(5) The next argument advanced before us by Mr. Das Gupta turns upon the use of the phrase a 'competent officer' in Notification C. According to that Notification, however, licensed dealer shall preserve and produce on demand by a competent officer, cash Memo., Challan, invoice or other documents by virtue of which he acquired the textile goods that are in stock with him. Paragraph 22, W. B. Cotton Cloth and Yarn Control Order, 1948, lays down that the Director or the Deputy Commissioner or any Superintendent of Enforcement or the Controller or any officer authorised in writing by any of them in this behalf by general or special order may do certain things. It has been argued that there is no such order in writing. Our attention has, however, been drawn by the learned Advocate General to certain Notifications by the Deputy Commissioner of Police, Enforcement Branch which were published in the Calcutta Police Gazette dated 11-10-1949 giving authority to a Sub-Inspector of Police and other Police officers to do certain things. In the present case, the seizure of cloths as per Ext. I was by a Sub-Inspector of Police attached to the Enforcement Branch of the Calcutta Police. He was accordingly a competent officer within the meaning of Notification 'C'. Even apart from that fact and even assuming that the seizure of cloths was made by an officer who was not an officer competent within the meaning of Notification "C" that fact alone cannot have any bearing when the validity of the conviction of the petitioner is concerned. The cloths might have been seized illegally but that does not affect the question regarding the guilt of the petitioner in the present case when he has been convicted for contravention of certain provisions regarding the submission of monthly returns of his stock of cloths.

(6) So far, therefore, as the merits of the case go, apart from the validity or otherwise of certain Notifications and orders, we have reached the conclusion that the petitioner has been rightly convicted.

(7) This brings me to the main questions which have been canvassed before us at a considerable length. The questions are, no doubt, of some importance affecting, as they do, the validity or otherwise of certain provisions of the Essential Supplies Act, namely, Act 24 of 1946 and certain Notifications and Orders issued in connection therewith.

(8) On behalf of the petitioner, Mr. Das Gupta has argued this branch of the case from different stand points. At one stage in his argument he contended that sub-s. (1) of S. 3 of Act 24 of 1946, amounted to invalid delegation of legislative power and as such any action done by the Central Government in pursuance of the power purported to have been conferred upon it by that sub-s. was bad as such delegated legislation was bad. It may be observed, however, that this point was not stressed by Mr. Das Gupta later on in the course of his argument.

(9) Secondly, it has been argued by Mr. Das Gupta and on this aspect of the argument he has laid considerable stress that S. 4 of the Act constituted invalid sub-delegation of legislative power.

(10) Thirdly, it has been contended by Mr. Das Gupta that though the relevant Notifications, that is, Notifications 'B' and 'C' were issued by the Director in purported compliance with paragraphs 13 and 14, W. B. Cotton Cloth and Yarn Control Order, 1948, those paragraphs could not and did not confer any legal authority to the Director of Textiles, West Bengal, to issue those Notifications. The authority of the Governor of West Bengal in issuing Notification No. 10097D C. S. dated 13-8-1948 on the basis of which the W. B. Cotton Cloth and Yarn Control Order, 1948, was passed was also called in question by Mr. Das Gupta.

(11) As Mr. Das Gupta's arguments obviously raised points of considerable importance, it is necessary to examine the validity of his contentions. Both, Mr. Das Gupta on behalf of the petitioner and the learned Advocate General on behalf of the State, laid considerable stress upon the very important pronouncement of the Supreme Court in the case of — 'In re Art. 143, Constitution of India Delhi Laws Act, 1912', reported in 1951 S C R at pages 747 to 1125 (A). I shall have occasion to refer to certain passages of that judgment.

(12) It has been mentioned already that Mr. Das Gupta has, in directing his attack against the provisions of the Essential Supplies Act and the Notifications issued in connection therewith, relied upon the validity or otherwise of delegation or sub-delegation of legislative powers. He has drawn our attention to certain passages in the judgment referred to above. The answer of the learned Advocate General is broadly that the impugned legislation does not amount really to delegation or sub-delegation of essential legislative power. It

amounts, according to him, to really to the exercise of ancillary powers attaching to the essential legislative power. He has contended that neither S. 3 nor S. 4 of the impugned Act — as a matter of fact it was those provisions of that Act which were selected by Mr. Das Gupta for attack — amounts to delegation or sub-delegation at all in the strict sense of those terms. According to the learned Advocate General delegation in the present context means legislation outside the scope of the Act. In this connection, he has drawn our attention to the observations of Kania C. J. at pages 767 and 768 of the Delhi Laws Act, 1912 case (A) referred to before as regards the true meaning of the term 'delegation'.

> "When a legislative body passes an Act it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation as a rule of conduct. * *
>
> * * * *
>
> "While the so-called delegation, which empowers the making of rules and regulations, has been recognised as ancillary to the power to define legislative policy and formulate the rule of conduct."

(13) In this connection the learned Advocate General has also relied upon the following passage from Halsbury's Laws of England:

> "A duty imposed or a power granted by Parliament carries with it the power necessary for its performance or execution. Similarly an authority given by Statute to do certain work authorises the doing not only all things absolutely necessary for its execution but of all things reasonably necessary."

The learned Advocate General has urged further that all the learned Supreme Court Judges who decided the — 'Delhi Laws Act case', (A) referred to above are unanimous, at least, on the point that giving power to another body to carry out the policy laid down by the Legislature does not amount to delegation of essential legislative power which means a determination of the Legislative policy and the formulation of the same as a rule of conduct. In order to establish his proposition that the learned Supreme Court Judges are unanimous on that particular point, he has drawn our attention to various passages in the different judgments in the — 'Delhi Laws Act case' (A). It is not necessary for our present purposes to refer to all the passages. It will suffice if we refer to only a passage or two. The paragraph in the judgment of Kania C. J. at the bottom of page 798 beginning with "As a result of considering all these decisions....." and ending with "to have subordinate legislative powers" at p. 799 may be looked at.

Similarly, reference may be made to the observations of Mahajan J., at page 939 of the Report where he states:

> "Delegation is permissible in cases where there is a legal or physical necessity to do so because without trusting some person or persons it would be impossible efficiently to discharge the duties."

Then again, reference may also be made to the last paragraph in the judgment of Mukherjea J. at page 973 of the Report. In that paragraph, the learned Judge observes inter alia that

> "delegation of legislative authority could be permissible but only as ancillary to, or in aid of, the exercise of law-making powers by the proper legislature..... The primary or essential duty of law-making has got to be discharged by the legislature itself; delegation may be resorted to only as a secondary or ancillary measure."

It is unnecessary to multiply instances. The proposition contended for by the learned Advocate General may, therefore be held to have been accepted in the Delhi Laws Act case.

(14) The next point is whether that proposition is applicable to our present case. The learned Advocate-General contends that sub-s. (1) of S. 3 of the impugned Act does not amount to delegation at all in the strict sense of the term. The power which has been conferred on the Central Government by that sub-section is only an ancillary power. The essential function has been discharged by the legislature itself when it laid down its policy, in however wide terms it may be, regarding the control of production etc. But legislative policy has been declared in the preamble of the Act and the primary legislative standard has been laid down in sub-s. (2) of S. 3 of the Act and it is only powers ancillary to essential legislative power that have been conferred on the Central Government by S. 3 and on the State Government by S. 4 of the Act, though the latter can exercise the powers conferred upon it, that is, make orders under S. 3 only when directed to do so by the Central Government. The impugned sections, therefore, in the submission of the learned Advocate General, do not amount to delegation or sub-delegation or double delegation at all, in spite of the inartistic expression "delegation of powers" used as a marginal note to S. 4. That marginal note cannot be utilised to control the plain words of S. 4, according to which the State Government is acting simply to carry out the policy of the legislature or the powers which it derives directly from the legislature after having received directions from the Central Government.

This seems to be a legitimate construction of Ss. 3 and 4 and looked at from this stand-point no question of invalidity arises. Then, after having derived its authority practically from the Central legislature the State Government has made an Order, namely, the W. B. Cotton Cloth and Yarn Control Order, 1948. The terms used in the appropriate Notification by the Government, namely, Notification No. 10097 D.C.S. dated 13-8-1948 are significant. The Governor purports to make the order, namely, the W. B. Cotton Cloth and Yarn Control Order, 1948 in exercise of the powers conferred by sub-s. (1) of S. 3 of the Essential Supplies Act read with certain sub-clause of sub-s. (2) of S. 3 and also with Notification No. 173/1/TA/46 issued by the Central Government on 28-12-1946 under sub-s. (4) of the Act. Then by virtue of the power conferred upon him by paragraphs 13 and 14 of the former Notification, that is, Notification No. 10097 D.C.S. dated 13-8-1948, the Director of Textiles, West Bengal, who is a controller within the meaning of paragraph 3 (e), W. B. Cotton Cloth and Yarn Control Order, 1948, has given certain directions by Notifications B and 'C', referred to before. There is nothing in these Notifications going beyond the scope of the legislative policy as laid down in the relevant statute that is Act 24 of 1946. They seek simply to carry out that

policy and on the ultimate analysis they derived their authority from the Central Statute. They are, therefore, quite valid and the petitioner, who, it is pertinent to point out, has been convicted under S. 7 of the Central Statute cannot be permitted to challenge successfully the authority under which he has been convicted.

(15) The matter may be looked at from a different standpoint specially in view of the challenge offered by Mr. Das Gupta to the validity of what he has called sub-delegation or double delegation under S. 4, Essential Supplies Act. The general words describing the scope of Central Government's powers to legislate by means of notified orders is so wide as to authorise what has been done. Reference may in this connection be made to Section 3(1), S. 3(3) and S. 5, S. 3(1) specifically provides that notified orders may be passed by the Central Government to provide for regulation or prohibition of production etc., in other words, for carrying out the purposes of the Act as contained in S. 3(2). Therefore, even if the direction given by the Central Government to the State Government under S. 4, as contained in Notification No. 73/1-TA-46 dated 28-12-1946 be held to be an instance of sub-delegated legislation, it is not invalid on the simple ground that such delegation is unlawful. In the present case sub-delegation, if any, was authorised by the Act itself, and as such it is not invalid.

(16) That such sub-delegation is permissible is clear from the case of — 'Shannon v. Lower Mainland Dairy Products Board', AIR 1939 PC 36 (B). In that case, the validity of the relevant Act which permitted even sub-delegation of legislative power was questioned on the ground of delegation of legislative power to the Lieutenant Governor in Council and by the latter to the Marketing Boards. In delivering the judgment of the Privy Council Lord Atkins observed that the objection was "subversive of the rights which the Provincial Legislature enjoys." As pointed out by Das J. in the case of — 'In re: The Delhi Laws Act, 1912' (A), the Privy Council not only upheld the validity of a single delegation but also upheld the validity of a sub-delegation of power. (See page 1060 of the report). As pointed out by him further, the objection against delegation or sub-delegation was regarded by Lord Atkins in — 'Shannan's case' (B) "as subversive of the rights" of the Provincial Legislature (page 1070). Reference may also be made to the following passage in the judgment of the learned Judge at p. 1063:

> "We have seen that in — 'Shannon's case' (B) the power given to the Lieutenant Governor in Council expressly included a power of further delegation. And yet the Privy Council upheld the enactment. If power of legislation contains within itself the power of delegation then logically the donee of the legislative power must also have the power of delegation as part of the content of the power delegated to him. The reasoning adopted by the learned Judges in the last Canadian case appears to me to be perfectly logical".

Even assuming that the authority given to the State Government by S. 4 of Act 24 of 1946 upon direction from the Central Government to make order under S. 3, amounted to delegation or sub-delegation of legislative power such power or authority is ancillary to legislation and as pointed out in the case of — 'Hodge v. The Queen', (1883) 9 AC 117 (C) without such an authority an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail. Again, as pointed out in an Australian case, namely, — 'Baxter v. Ah Way', (1909) 8 CLR 626 (D), "The Federal Parliament has, within its ambit, full power to frame its laws in any fashion using any agent, any agency, any machinery that it thinks fit."

(17) The fact that — 'Shannan's case' (B) and — 'Hodge's case' (C) were from Canada does not make any real difference so far as the applicability of the principle in the present Statute that is, Act 24 of 1946 of an Indian Legislature is concerned. Reference may in this connection be made to the words of Das J. at page 1070 of the Report in — 'Delhi Laws case' (A) to the effect that "one cannot but concede the existence of the power of delegation in the legislative power itself of the Indian Legislature even though it was not a sovereign legislature like the British Parliament.

(18) Testing the impugned provisions, namely, Ss. 3 and 4 of Act 24 of 1948, therefore, in the light of the principles formulated above, even assuming that they amount to delegation and sub-delegation it is clear that they cannot be invalidated on that account.

(19) It remains now to notice an argument advanced by Mr. Das Gupta on the basis of certain observations made by Ray C. J. of the Orissa High Court in the case of — 'Fakir Mahammad v. King', AIR 1952 Orissa 87 (E) — a case which it may be noted was decided before — 'In re Delhi Laws Act, 1912 case' (A). It has been argued by Mr. Das Gupta on the strength of that decision that the Notifications B and C issued by the Director of Textiles, West Bengal, an authority or officer subordinate to the State Government was not by name or by designation specified in the direction, that is, the notified order, that is Notification No. 73/1-TA/46 dated 28-12-1946, issued by the Central Government. It is argued inter alia that unless and until the Director who is obviously an officer subordinate to the State Government has been specifically directed by the Central Government, he cannot exercise any power of the kind that he has done in the present case that is, issue Notifications B and C. Even assuming that this argument receives support from the Orissa case referred to above it loses its point in consideration of the view we have taken regarding the authority for the above Notifications. In our view those Notifications were issued by an officer subordinate to the State Government and he was purporting to exercise the powers which the State Government could and did lawfully confer upon him in exercise of its own powers derived from the Statute, that is, Act 24 of 1946. In this view of the case, it does not matter that the Central Government itself did not clothe him direct with the necessary powers.

In our view, the Provincial Government for the reasons which I have explained before, derived its authority to act within the scope of the Act from the legislature itself though it did so in pursuance of a notified order issued under S. 4 by the Central Government. In order to carry out the policy of the Act, the Provincial Government could, in our view, give necessary powers to its officers and this is what the Provincial Government thinks the Governor did by Notification No. 10097 D C.S. dated 13-8-1948 which has been referred to before. Under paragraph 13, W. B. Cotton

Cloth and Yarn Control Order, 1948 brought into existence by that Notification, the Controller was authorised to give certain directions to dealers. Similar powers are conferred upon the Controller by paragraph 14 of the W. B. Cotton Cloth and Yarn Control Order, 1948. It is in exercise of the powers conferred upon him that the Controller has issued Notifications B and C the validity of which have been questioned before us by Mr. Das Gupta. In our view, the Controller was quite competent deriving his authority direct from the Provincial Government to give such directions by issuing those Notifications. Neither paragraph 13 nor paragraph 14, W. B. Cotton Cloth and Yarn Control Order, 1948, nor the Notifications issued in pursuance thereof can, in our view, be invalidated on the ground alleged by Mr. Das Gupta. In exercise of the ancillary powers which had been conferred upon the Provincial Government, the Governor, clothed the Director with power to give certain directions in accordance with Paragraphs 13 and 14. Thus the Governor, in our view, was competent to do and the Director again, in our view, was quite competent to issue Notifications B and C on the basis of the power that he derived from the Governor. This is one of the circumstances which distinguish the present case from the Orissa case referred to before.

(20) We hold, therefore, that from whatever standpoint the impugned provisions, namely, Ss. 3 and 4, Essential Supplies Act and the impugned Notifications referred to above are considered they are quite valid and the conviction of the petitioner on basis of these Notifications cannot be successfully challenged.

(21) In the result this Rule must be discharged and the order of conviction and sentence passed by the learned Presidency Magistrate as also the order of forfeiture must stand.

(22) LAHIRI J.: I agree.

A/R.G.D. Rule discharged.

A.I.R. 1953 CAL. 496 (Vol. 40, C.N., 185)

GUHA J.

Hari Narayan Das and others, Petitioners v. The State.

Cri. Revn. No. 1007 of 1951, D/- 22-2-1952.

Criminal P. C. (1898), Ss. 253, 436 and 439 — Further inquiry.

Where the complainant persistently remains out of Court and does not offer himself for examination in spite of several opportunities given to him and the Magistrate discharges the accused under S. 253, it would not be in the interests of justice to set aside the order of discharge and order a further inquiry at the instance of the complainant especially when the State has not thought it necessary to intervene in the proceedings. (Para 2)

Anno: Cr.P.C., S. 253 N. 9; S. 436 N. 5, 30.

Ajit Kumar Dutt, for Petitioners; B. M. Sen, for the State.

ORDER: The petitioners were summoned under S. 411, Penal Code, to take their trial. It appears that the case dragged on for a very considerable period mainly owing to the complainant not offering himself for examination. Ultimately the trying Magistrate got exasperated and decided to hear arguments regarding the framing of the charge. By that time it may be mentioned 12 witnesses have been examined for the prosecution. Ultimately the trying Magistrate discharged the present petitioners under S. 253, Criminal P. C., holding that no case has been made out against them as the complainant had not been examined and it could not be said that the articles found with the present petitioners were properties which were stolen from the complainant. It was also held by the Magistrate that there was nothing to show that these articles were entrusted with the present petitioners by the complainant. Thereupon there was a petition before the Additional District Magistrate at the instance of the complainant for setting aside the order of discharge. It may be mentioned incidentally that in the proceedings before the Additional District Magistrate the State did not appear. The learned Additional District Magistrate came to the conclusion that an opportunity should be given to the complainant for his appearance and that it was essential in the interests of justice that the complainant should be examined. Accordingly he set aside the order of discharge and directed the trying Court to hold further enquiry into the case.

It has been contended before me on behalf of the petitioners that by his own conduct in keeping away from the Court continuously and persistently the complainant is mainly to blame and that he deserves no indulgence in the circumstances of the present case. I have been taken through the various orders passed by the trial Court in this case and I can only say that there was ample ground for the trying Court to take a strong step at the last moment and for his declining to show any further indulgence to the prosecution. The prosecution had no business whatsoever to waste public time and money ostensibly in the interests of justice by keeping back the complainant on so many occasions. It is strange that as soon as the trying Court passed an order of discharge the complainant thought it proper to come into the open and move the District Magistrate for interfering with the order of discharge. It is also noticeable that at that stage the State did not even consider it necessary in the interests of justice to intervene in the proceedings.

(2) On the facts of the present case and in view of what is palpable from the various orders passed by the trying Court I have no manner of doubt in my mind in holding that the complainant does not deserve any sympathy whatsoever, nor am I impressed by the argument that the interests of justice do really require that the order of discharge by the trial Magistrate should be interfered with.

(3) In this view of the matter the order of the learned Additional District Magistrate setting aside the order of discharge and directing further enquiry cannot be upheld.

(4) The Rule is made absolute accordingly. The order of the Additional District Magistrate is set aside and that of the trial Court restored.

B/K.S. Rule made absolute.

A.I.R. 1953 CAL. 497 (Vol. 40, C.N. 186)

DAS GUPTA AND GUHA RAY JJ.

Dwijendra Nath Singh and another, Defendants-Petitioners v. Govinda Chandra and another, Plaintiffs-Opposite Party.

Civil Rule No. 1264 of 1952, D/- 5-8-1952.

Partnership Act (1932), S. 69 — Scope of: 41 Cal WN 534, Overruled.

Suit brought by two persons described as owners of the firm — Firm not registered on the date of the institution of suit — Firm however registered on a later date before the suit came to be heard — Suit held did not become maintainable by the subsequent registration. Case law referred. (Para 13)

Anno: Partnership Act, S. 69 N. 1.

Ranjit Ghose, Manan Kumar Ghose and Nanigopal De, for Petitioners; Panchanan Samaddar, for Opposite Party.

CASES CITED:
(A) ('37) 41 Cal WN 534
(B) ('51) A.F.A.D. No. 405 of 1948, D/- 28-6-1951 (Cal)
(C) ('35) AIR 1935 Lah 893: 17 Lah 275
(D) ('36) AIR 1936 All 3: 58 All 495
(E) ('39) AIR 1939 Pat 239: 18 Pat 114
(F) ('51) AIR 1951 Bom 6: ILR (1951) Bom 101
(G) ('37) AIR 1937 Mad 767
(H) ('42) AIR 1942 Mad 252: ILR (1942) Mad 355
(I) ('36) AIR 1936 Mad 991: 71 Mad LJ 663

DAS GUPTA J.: The only question in this case is whether a suit which was not maintainable under the provisions of S. 69 of the Partnership Act at the time it was instituted because the firm was not registered, became maintainable at a later date when the firm was registered during the pendency of the suit.

(2) The suit was brought by two persons who are described as the owners of the firm Samanta Naskar and Co. On 8-6-1951, when the suit was instituted this firm had not been registered. It however was registered before the suit came to be heard. The learned Munsif relying on a decision of this Court in — 'Radha Charan Saha v. Matilal Saha', 41 Cal WN 534 (A), held that the suit was maintainable in spite of the fact that the firm was not registered on the date of institution of the suit and passed a decree in part in favour of the plaintiffs.

(3) It is contended before us that the decision in — '41 Cal WN 534 (A)', was not correct.

(4) The first and second sub-sections of S. 69 of the Partnership Act are in these words:

"(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm has been shown in the Register of Firms as partners in the firm."

(5) In — '41 Cal WN 534 (A)', the Court had to consider the provisions of S. 69 (2) of the Partnership Act. What happened there was that the plaintiffs' firm was registered on 20-6-1934, the suit having been instituted on 25-5-1934. D. N. Mitter J. said that there was no reason why he should not hold that the suit was properly instituted at any rate on 20-6-1934 when the firm was registered. He observed:

"The plaint in this suit was allowed to remain on the file and it did remain on the file till the date of registration. In such circumstances, the suit may be treated as though the plaint had been received and the suit instituted on the day following the day of registration."

He observed further:

"The defendant waited till the last stage of the second hearing and took the objection after the close of the plaintiff's case at the time of the argument. This objection has not been taken in the written statement which was filed in May 1934. There was nothing to prevent the plaintiffs from getting the firm registered immediately after the plea in bar had been taken in the written defence. But no such plea was taken."

(6) On a consideration of these circumstances, his Lordship came to the conclusion that it would be consonant with justice to hold that the suit was instituted after the registration and so did not offend against the provisions of S. 69 (2) of the Partnership Act.

(7) A contrary view has been taken by Roxburgh J. in an unreported decision in — 'Abdul Hayet Mondal v. Siddheswar Kumar', A.F.A.D. No. 405 of 1948, D/- 28-6-1951 (Cal) (B). After considering the decision in — 'Radha Charan Saha's case (A)', Roxburgh J considered the views taken by several other High Courts on this question and finally came to the conclusion that there was abundant weight of judicial opinion that S. 69 (2) of the Partnership Act was also to be interpreted in the same strict sense as the Privy Council had laid down for S. 80, C.P.C. and that the suit being bad at its inception was not made good by a subsequent registration of the firm. In that view his Lordship confirmed the order passed by the appellate Court dismissing the suit by the plaintiff firm when the same was registered sometime after the date of institution of the suit.

(8) These appear to be the only cases in which this question has been considered by our Court. The question however arose for decision in several cases before the Lahore, Allahabad, Patna and Bombay High Courts and it will be helpful to see the views taken by those Courts. In — 'Krishan Lal Ram Lal v. Abdul Ghafur Khan', AIR 1935 Lah 893 (C), the Court after rejecting the plaintiff's contention that S. 69 was not applicable to the suit by reason of S. 74 of the Act had to consider whether the suit should have been stayed to enable the plaintiff firm to get itself registered. The Court held that that could not be done as the institution of the suit itself was barred. Bhide J. observed:

"In the end, it was urged by the learned counsel for the appellant that the suit should have been at the most stayed to enable the plaintiff firm to get itself registered and not dismissed. But the Act does not seem to provide for a procedure of this kind. Section 69 clearly says that no suit falling within its purview shall be instituted. It is the institution of the suit that is barred."

(9) In — 'Danmal Parshotamdas v. Baburam Chhotelal', AIR 1936 All 3 (D), the main question was whether the right to enforce a suit prior to the coming of the Partnership Act saved it from the operation of S. 69. Bennet J. held it did not but he held also that though it appeared that the firm was registered on 27-6-1934 and the certificate of registration was filed in Court on 27-7-1934, two days before the case was heard the suit was rightly dismissed and that the suit could not have been deemed to have been instituted after registration of the firm. His Lordship pointed out that the terms of S. 69 were imperative and where a plaint is filed in breach of the provisions of that section the case is more parallel to the provisions for rejection of a plaint under O. 7, R. 11 on the ground that the suit appears from the statement of the plaint to be barred by any law, than to the provisions of S. 17 of the Small Cause Courts Act to which parallel was sought to be drawn by the learned counsel.

(10) In — 'Firm Laduram Sagarmal v. Jamuna Prasad', AIR 1939 Pat 239 (E), the question arose in exactly the same form as before us. After an exhaustive review of the case law Harries C. J. held that the trend of authority was in favour of the contention that a suit which was not maintainable by reason of non-compliance with S. 69 of the Partnership Act cannot become maintainable at a later stage by reason of registration and held that subsequent registration cannot cure the initial defect. His Lordship observed:

"In my view, subsequent registration cannot cure the initial defect. A plaint filed by an unregistered firm is in effect no plaint at all, because S. 69 makes claims arising out of a contract unenforceable if the firm is unregistered at the date of the institution of the suit. An unregistered firm has no right to sue, and, therefore, a plaint filed by it has no legal effect. If at the time the plaint is filed the claim is bound to fail, I cannot see how subsequent registration can improve the position. The single Judge of the Calcutta High Court held that there was no reason why the Court should not treat the plaint as filed on the date of registration. That is possibly a very fair view to take; but I know of no provision of law which permits a Court to treat the plaint as filed on a date subsequent to the date upon which it was actually filed. In neither of the cases cited on behalf of the appellant is any authority cited which would enable a Court to treat a suit as being instituted months later than the date upon which it was in fact instituted. In my view, the crucial date is the date of the institution of the suit. If on that date the suit was bound to fail nothing that happens subsequently can give the plaintiff a right to sue. The case is very similar to a case where a plaintiff brings a suit prematurely. If it is held that he had no cause of action at the date of the institution of the suit, then it does not avail him in the slightest to show that his cause of action did come into existence a few days after the filing of the suit. If the plaintiff had no cause of action when the suit was filed, then such a suit is bound to fail, though a cause of action might come into existence within a very short time after the institution of the suit. For the same reason, I cannot understand how an unregistered firm can file a suit and the defect be cured by subsequent registration. It appears to me that if the suit as filed is not maintainable, then it must be dismissed.

Varma J. in a separate judgment came to the same conclusion.

(11) The same view was taken by the Bombay High Court in — 'Prithvisingh v. Hasan Alli', AIR 1951 Bom 6 (F). There after an exhaustive discussion of different cases on the point their Lordships came to the conclusion:

"the plain terms of S. 69 (2), Partnership Act, bar the institution of a suit to enforce a right arising out of a contract unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm and a subsequent registration of the partnership firm cannot and does not cure the initial defect in the institution of the suit."

In the Madras High Court, Horwill J. in — 'Varadarajulu v. Rajmanika', AIR 1937 Mad 767 (G), took the same view as Mitter J. in — 'Radha Charan Saha's case (A)'. In other cases, however, the Madras High Court has taken the view that subsequent registration did not make the suit already filed maintainable (— 'Ponnuchami v. Muthusami', AIR 1942 Mad 252 (H); — 'Subramania Mudaliar v. East Asiatic Co. Ltd.', AIR 1936 Mad 991 (I)).

(12) I am in respectful agreement with the view taken in this matter by Roxburgh J. and by the Allahabad, Patna, Bombay and Lahore High Courts as mentioned above.

(13) When the Legislature forbids the doing of an act it is not proper for a Court to allow the doing of that act by subterfuge. Subsections (1) and (2) of S. 69 forbid the institution of a suit by or on behalf of an unregistered firm. With the policy underlying that legislation we are not concerned but we are bound to give effect to the fiat of the Legislature. The only way we can do it is by dismissing the suit. Not to dismiss such a suit by reason of the fact of later registration is really to relieve the party who has not carried out the requirements of the law by means of a subterfuge.

(14) It might seem hard and at first sight pointless to drive a party to bring a fresh suit but if the law requires that, I do not see that we should be justified in helping him to avoid that position by interpreting the law to mean something which it does not say. If later registration would have been sufficient compliance with the law, it was for the Legislature to say that the Legislature did not say that but said on the contrary that no suit shall be instituted by or on behalf of a firm in certain matters unless the firm has been registered. It is the duty of the Courts to carry out the law as it is and to resist the temptation of interpreting it to meet the hardship supposed or real of a particular case.

(15) I have therefore come to the conclusion that the suit as filed was not maintainable.

(16) I would therefore set aside the order passed by the learned Munsif and order that the suit be dismissed. The petitioners will get their costs in both the Courts.

(17) GUHA RAY J.: I agree.

A/H.G.P. Order accordingly.

A.I.R. 1953 CAL. 499 (Vol. 40, C.N. 187)

P. B. MUKHARJI J.

The Official Trustee of West Bengal, Petitioner v. Monmothonath Sadhukhan, Respondent.

Civil Suit No. 496 of 1946, D/- 5-6-1952.

Civil P. C. (1908), O. 21, Rr. 35 and 97 — Decree-holder taking out writ for possession — Obstruction — Fresh writ — Fresh obstruction — Second obstruction does not relate back to the original obstruction, even if it is by same person in same character — Time under Art. 167 begins to run from second obstruction — (Limitation Act (1908), Art. 167). 1 Ind Cas 785 (Cal.), Rel. on; A.I.R. 1933 Bom. 457, Held obiter and dissented from. Case law Ref.

(Paras 15, 16)

Anno: Lim. Act, Art. 167 N. 2; Civil P. C., O. 21, R. 97 N. 3, 4.

B. C. Dutt, for Petitioner; P. N. De, for Respondent.

CASES CITED:

(A) ('33) AIR 1933 Bom 457: 146 Ind Cas 11
(B) ('04) 1 All LJ 86: 26 All 365
(C) ('80) 5 Cal 331
(D) ('87) 11 Bom 473
(E) ('19) AIR 1919 Pat 425(2): 4 Pat LJ 94 (FB)
(F) ('90) 13 Mad 504
(G) ('09) 1 Ind Cas 785: 13 Cal WN 724
(H) ('82) 5 Mad 113
(I) ('96) 1896 All WN 84: 18 All 233
(J) ('21) AIR 1921 Mad 559: 66 Ind Cas 722
(K) ('49) AIR 1949 Mad 753: 1949-1 Mad LJ 656
(L) ('41) AIR 1941 Nag 322: ILR (1942) Nag 633

JUDGMENT : In this application the Official Trustee of West Bengal asks for an enquiry and investigation regarding resistance and obstruction offered by (1) Abdul Sukkur Mohammad Osman Khan, (2) Akhtar Hossain Khan and (3) Abdul Jalil when the applicant wanted the Sheriff to execute his decree for possession of premises No. 17, 17/1 and 17/1/1 Kashi Nath Mallick Lane, Calcutta. The application is made under O. 21, R. 97, C. P. C. The respondents have appeared and used their affidavits in opposition to this application.

(2) Before discussing the points of opposition, it will be necessary to state briefly the material and relevant facts.

(3) This suit was instituted by the Official Trustee on 15-3-1946 against the defendant for the recovery of possession of the said premises which had been let out to the defendant whose tenancy was later determined by notice to quit. The defendant contested that suit. But after some proceedings a decree for ejectment was made on 18-12-1946 in favour of the plaintiff Official Trustee. By that decree the defendant was ordered and directed to deliver quiet possession of the said premises to the Official Trustee. An appeal was preferred by the defendant and during the pendency of the appeal the defendant applied and obtained stay of execution of the decree for possession. The defendant also gave an undertaking to the Court of Appeal to deliver vacant possession if the appeal went against him, so that the Official Trustee would not have to adopt execution proceedings. The appeal was dismissed with costs on 8-4-1948. In spite of the dismissal of the appeal, and in spite of that undertaking, the defendant, however, failed to vacate the premises and give delivery of possession to the Official Trustee. It is alleged in the petition that the defendant avoided proceedings in contempt for breach of his undertaking by residing outside the jurisdiction of this Court. The Official Trustee thereafter started execution proceedings early in July, 1949 when the defendant made another application making the case that he was not liable to be ejected because he was a ticca tenant under the Calcutta Ticca Tenancy Act. Thereafter an issue was directed to be tried as to whether the defendant was a ticca tenant or not. That proceeding also went against the defendant, and by an order of Banerjee J. dated 2-2-1950 the defendant's application to be declared a ticca tenant was dismissed with costs.

(4) Then started the stage of execution and the difficulties still persist although more than 6 years have elapsed since the filing of the suit. The Official Trustee obtained an order directing the Sheriff to put him into possession. When the Sheriff went to give delivery of possession, he was resisted by some individuals and he reported on 5-7-1950 about such resistance. The Sheriff's report of 5-7-1950 which is annexed to the petition of the Official Trustee filed in this Court on 7-9-1950 discloses the following facts as will appear from the relevant extract which I am quoting from the report :

> "The defendant was not present but his representatives were there. Besides the defendant there were other sub-tenants coming through him, viz., (1) Sri Ramdeo Burman carrying on business with empty oil drums, (2) A. S. M. Akhtar Khan alias Akhtar H. Khan carrying on business in wooden goods such as planks, boxes etc., (3) Sri Jaisukhlal Doshi carrying on business as photographers, (4) Sheik Rajia carrying on business as musical suppliers, and (5) Sheik Aggar carrying on business in lorries. The above five sub-tenants stated that they pay rents to the defendant and some of them produced rent receipts and they stated that they were not bound by this order and they were not made parties to the suit and they refused to make over possession to the plaintiff or the Sheriff and, therefore, resisted the Sheriff from doing so."

Upon this the Official Trustee made a similar application as the present one for investigation into the resistance and obstruction complained of by the Sheriff in his report of 5-7-1950. This previous application of the Official Trustee met with bad fate on the ground of limitation. Sinha, J. on 13-12-1950 dismissed the application with costs on the ground that the application was barred by limitation under Art. 167 of the Limitation Act because resistance being offered on 5-7-1950 and the application not having been made before 6-9-1950, which was more than 30 days from the resistance.

(5) Then on or about 17-5-1951 the Official Trustee made an application for execution of the said decree asking that the Sheriff should make over vacant possession to him and obtained a fresh writ of possession for that purpose under O. 21, R. 35. This is the origin of the present application. The Sheriff again went to deliver possession upon this fresh writ of possession obtained by the Offi-

cial Trustee, but he was again obstructed. The report of the Sheriff dated 10-8-1951 appearing as Annexure 'A' to the petition of the Official Trustee in this application states :

"On my arriving at the site I met one Jonab Abdul Sukkur Mohammad Osman Khan being a tenant of Jonab Akhtar Hossain Khan — pays rent up to March 1951 at Rs. 180/- per month — also one Jonab Abdul Jalil, tenant of Sri R. D. Burman, pays rent up to June 1951 at Rs. 100/- per month. The abovementioned occupants resist the Sheriff or any one else from taking possession as they are not bound by the order which is not against them."

(6) Upon this resistance the Official Trustee has again made the present application for enquiry & investigation into the resistance or obstruction offered. This application this time has been made within time in the sense that the resistance was offered on 10-8-1951 & the application was made on 4-9-1951. Notice to the three respondents mentioned in the Sheriff's report requiring them under O. 21, R. 97 to appear in person before the Judge in chambers to answer the complaint was issued under date 4-9-1951.

(7) In pursuance of that notice the respondents have appeared. Two affidavits have been filed — one by Abdul Sukkur describing himself to be a partner of the firm of Abdul Sukkur Mohammad Osman, and the other by Abdul Jalil. The points made in their affidavits in opposition may be briefly summarised.

The first contention raised is that this application is also barred by limitation. This contention is based on the allegation of fact that (1) Abdul Sukkur and Mohammad Osman, the two partners of the firm of Abdul Sukkur Mohammad Osman, resisted possession on 5-7-1950 when the Sheriff's officer went to execute the decree and such resistance that has now been made on 10-8-1951 is by them in the same character as before, and (2) Abdul Jalil also resisted possession in the same character on the previous occasion on 5-7-1950. It is the case of Abdul Sukkur and Mohammad Osman & Abdul Jalil that they are not claiming title through the defendant at all but through one Gunendra Nath Sadhukhan who is said to be their landlord's landlord. The immediate landlord of Abdul Sukkur Mohammad Osman is said to be Aktar Khan and the immediate landlord of Abdul Jalil is said to be Ramdeo Burman. Rent receipts granted by Aktar and Ramdeo as well as by Gunendra Nath Sadhukhan appear in the annexure to those affidavits in opposition. Both these respondents make a further point in their affidavits that this application was dismissed for default on 13-3-1952 by Sarkar, J. but was subsequently restored by him. According to the point taken in their affidavits it is said that such restoration was without jurisdiction and, therefore, this application should be treated as having been dismissed. The fact, however is this that this application was adjourned by the learned Master till 29-4-1952 and notwithstanding such adjournment the matter was mentioned 'ex parte' on behalf of these resisters before Sarkar J. who was not informed of such adjournment and, therefore, Sarkar J. was induced to make the order for dismissal. When the matter was brought to his notice, Sarkar J. was pleased to restore the application and set aside the 'ex parte' order of dismissal for default. As no appeal was preferred from the order of restoration of Sarkar J. I hold that the respondents are concluded on this point and they cannot contend that such restoration was without jurisdiction and void and, therefore, not binding on them. I will, therefore, proceed on the basis that such restoration by Sarkar J. was good, valid, and binding on the respondents

(8) Mr. P. N. De who appeared for the respondents marshalled his attack upon this application mainly, if not wholly, on the ground of limitation. His argument is that this obstruction or resistance on 10-8-1951 is a continuation of the old resistance or obstruction on 5-7-1950. The present application should be regarded as barred by limitation under Art. 167 of the Limitation Act as it is made on 4-9-1951 and the limitation should be regarded as running from 5-7-1950, being the date of old obstruction.

He relied on the observations in the recent Full Bench decision of the Bombay High Court in — 'Mukunda Bapu v. Tanu Saku' reported in AIR 1933 Bom 457 (FB) (A). Beaumont, C. J. who delivered the leading judgment in that case observes at page 459:

"I think that if in fact the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant of possession would not make the obstruction a fresh obstruction."

(9) Murphy J. agreed with those observations of the learned Chief Justice but did not deliver a separate judgment. Broomfield J. another member of the Bombay Full Bench in that case, delivered a short judgment stating at page 460 of that report:

"I agree with the learned Chief Justice in holding that the question must depend on whether the obstruction now offered is an obstruction by a different person or an obstruction by the same person in different circumstances, that is, a fresh obstruction or whether it is merely a continuance of the same obstruction."

(10) The Bombay Full Bench in that case dissented from the view taken in — 'Kesri Narain v. Abdul Hassan', 26 All 365 (B); — 'Shoteenath Mukherjee v. Obhoy Nund Roy', 5 Cal 331 (C), and another Bombay decision in — 'Vinayak Rav v. Devrao', 11 Bom 473 (D). The Bombay Full Bench agreed with the view taken by the Patna Full Bench in — 'Raghu Nandan Prosad v. Ram Charan', AIR 1919 Pat 425 (2) (FB) (E) and by the Madras decision in — 'Muttia v. Appasami', 13 Mad 504 (F).

(11) The main feature of the Bombay Full Bench decision is that all these observations on the point were unnecessary and are 'obiter dicta'. There the applicant was asking only for a fresh warrant for possession under O. 21, R. 35. The Full Bench of the Bombay High Court held that he was so entitled. That would have disposed the appeal because they were not dealing on that application with the rights which might be contended for under that fresh warrant after it had been issued. This will be clear from the statements in the judgment of Beaumont, C. J. at page 458 of the report where the learned Chief Justice says:

"All that the applicant is asking at the moment is that a fresh warrant for possession may issue under Rule 35 and to that I think he is entitled. That really disposes of the

appeal, because we are not dealing today with the rights which may accrue under that fresh warrant. But as the whole question has been argued and as the rights accruing under the warrant will arise for a decision at a later stage of these proceedings, it is I think desirable that we should indicate our opinion upon the point."

(12) The result is that all these observations of the Bombay Full Bench are obiter dicta dealing with a hypothetical problem which did not call for determination.

(13) It is also unfortunate that this Bombay Full Bench failed to notice another ruling decision of the Court of Appeal of the Calcutta High Court in — 'Baranagore Jute Factory Co. Ltd. v. Raj Kumar Roy', reported in 13 Cal WN 724 (G). There it is clearly laid down that a decree-holder who has resisted in the execution of a decree for ejectment may apply for possession again and again and, if again resisted, may complain against the second resistance. In that case which was ably argued at the Bar, by Dr. Rash Behary Ghosh, the eminent Jurist of India, appearing with Mr. Manmatha Nath Mukherjee, later to become the Acting Chief Justice of this Court, for the appellants and by Sir S. P. Sinha (later Lord Sinha) the Advocate General, for the respondent. The Bench was composed by Chitty J., an eminent Judge with large experience, and Vincent, J. At page 727 of that report the Court states:

"Turning to the merits, the sole point for our determination is whether the present application under S. 328 (O. 21, R. 97) is barred by limitation. Must the time be reckoned from the first resistance to a writ or from the particular resistance of which the decree-holder complains? There is express authority for the proposition that the particular resistance must be regarded as the turning point, see — 'Rama Sekara v. Dharamaraya', 5 Mad 113 (H) and — 'Narajndas v. Hazarilal', 18 All 233 (I), and so far as we have been able to discover there is no case in which a directly contrary decision was arrived at. There are no doubt cases which decide that a purchaser who has applied for possession under S. 318, Civil P. C. (O. 21, R. 95) and been resisted, but who has not made a further application under S. 335 (O. 21 R. 97, R. 99 and R. 103) cannot be allowed to apply again for a fresh writ under S. 318 (O. 21, R. 95). These cases are, however, distinguishable from the present one. Not only is a purchaser on a different footing from a decree-holder in matters of execution but the procedure under S. 335 differs very materially from that under S. 331 (O. 21, R. 99). It might be said that the Court ought not to issue a second writ under S. 318 to a purchaser who has not availed himself to the full of the special procedure in execution allowed to him though in — '11 Bom 473 (D)', Sir Charles Sargent appears to have contemplated the issue of a second writ to a purchaser if the second obstruction complained of was by a different person."

(14) Later on on the next page, at page 728 of that report the judgment of the Division Bench of the Calcutta High Court proceeds to lay down:

"A decree-holder, however, is, ordinarily speaking, at liberty to apply for execution as often as may be necessary; provided such application is not out of time or for some other special reason bad in law, it is usually granted. In this particular case, the Court issued a second, if not a third, writ in favour of the decree-holder. It cannot be said that it had no jurisdiction to do so and if the decree-holder was given this fresh writ, there seems to be no good reason for depriving him of the remedy which the law allows in the case of resistance to that writ. There is nothing in the Code which confines the decree-holder to one writ under S. 318 (O. 21, R. 95), while the words of S. 328 (O. 21, R. 97) "such resistance or obstruction" clearly indicate that the month is to run from the time of the particular resistance or obstruction in respect of which the decree-holder is complaining."

(15) These observations in this judgment appear to me to be clear authority for the proposition that the decree-holder has the right to take out fresh writ for possession and every resistance or obstruction to such writ gives a fresh period of limitation from the time of that particular resistance or obstruction. The reasons given in the Calcutta decision in — 'Baranagore Jute Factory Co. Ltd. v. Raj Kumar Roy (G)', appear to me to be sound and are a complete answer against the view of the Bombay Full Bench. With great respect to the learned Judges responsible for the Bombay Full Bench decision, I am unable to accept that view and I find it does not notice the difference between a purchaser and a decree-holder in the matter of execution as discussed in this Calcutta decision. Then again to say as the Bombay Full Bench decision does, that there may be any number of writs for possession under O. 21, R. 35 and then to say that the remedy on these writs may be barred by limitation because subsequent resistance to such writs may be by the same person or in the same character as previous writs, is to me an illogical and inconsistent conclusion and such a conclusion unnecessarily cuts down the language of Art. 167 of the Limitation Act, by impliedly introducing such notions as "continuous" resistance or resistance "by same person or in the same character", and unjustifiably reduces the reliefs available on writs for possession applied for and obtained under O. 21, R. 35. I am therefore unable to follow and adopt the Bombay Full Bench view.

(16) The language of Art. 167 of the Limitation Act or of O. 21, R. 97 of the Code does not promote the view that in case the obstruction or resistance is by the same person or in the same character, then every time he makes such resistance to every writ of possession it is to be regarded as the original obstruction &, therefore, barred by limitation. Continuity of resistance or resistance by the same person or in the same character is a misleading notion in this context. The scheme under the Code on this point must be understood clearly. That scheme as I understand it is this. A writ for delivery of possession is issued under O. 21, R. 35; then when the writ is in the process of execution, resistance is offered; then a complaint is made under O. 21, R. 97 and finally this complaint is disposed of either under R. 98 or under Rule 99. From Order 21, Rule 35 to Order 21, Rule 98 or Rule 99 is one process disposing of and dealing with a particular resistance. The cycle may begin

again by another writ for delivery of possession under O. 21, R. 35, as the decree-holder may apply for as many writs thereunder as necessary until he gets satisfaction of his decree. The same process may be repeated in the case of repeated obstruction or resistance to the second writ under O. 21 R. 35. When the law allows subsequent writs under O. 21 R. 35 until satisfaction of the decree, the Court should not in my view cripple such right by saying that it might be defeated if resistance to subsequent writs may be related back to previous resistance by reason either of continuity or being by the same person or in the same character.

As I appreciate this Art. 167 of Limitation Act using the words "the resistance or obstruction", it appears to me that each resistance gives an independent terminus a quo for an application under O. 21 R. 97. The language of O. 21 R. 97 of the Code by using the words "such resistance or obstruction" reinforces that conclusion. If any number of writs of possession can issue under O. 21, R. 35 of the Code the conclusion is irresistible in my view that every resistance or obstruction to such writ will bring it within the meaning of the words "such resistance or obstruction" used in O. 21, R. 97 and it being remembered that complaint under O. 21, R. 97 is permissive and enabling and not obligatory. Therefore the decree-holder should be entitled to avail as fresh starting point for limitation every time the resister obstructs the Sheriff's writ for possession. Article 167 of the Limitation Act does no more than this, that each obstruction or resistance to be availed of as a ground of complaint under O. 21, R. 97 must not be allowed to be stale for more than 30 days from its date. If it is, then that particular obstruction or resistance can no longer be used but the decree-holder must take out another writ under O. 21, R. 35 and if there is again an obstruction, apply within 30 days from its date under O. 21, R. 97.

(17) One more word on the Bombay Full Bench decision. It noticed the old Madras decision — '13 Mad 504 (F)', but did not notice the later Madras decision in — 'Meyappa Chetty v. Meyappan Servai', AIR 1921 Mad 559 (J). There it was argued that an application for removal of a second obstruction more than 30 days after acquiescence in a previous obstruction was barred by Art. 167 of the Limitation Act. That argument was overruled. At p. 561 of that report Oldfield J. says:

> "it is material that the Code nowhere supports it explicitly and that O. 21, R. 97 is worded as merely permissive and as affording a summary procedure, which the obstructed person has an option to use or forgo."

Ramesam, J., the other member of the Bench in that decision observes at p. 562:

> "The only other question in this case is the question of limitation. As to this I have nothing to add to the reasons in my learned brother's judgment. It follows that we do not agree with the remark in — '5 Mad 113 (H), that the Court ought not to issue a second warrant for delivery of possession."

Reference may also be made to a recent Madras decision in — 'Narayanswami v. Verappa', AIR 1949 Mad 753 (K).

(18) In the case of — 'Ganapati Singh v. Ram Gopal', reported in AIR 1941 Nag 322 (L), Pollock J. comes to the conclusion that R. 97 merely gives the auction-purchaser the right to complain to the Court of the resistance offered to him. If he does so, he must do so within 30 days from the time of such resistance under Art. 167 of the Limitation Act. But the learned Judge holds that if he fails to do so, that does not take away his right to apply again under R. 95 for delivery of the property in which case he must apply within 3 years from the date when the sale becomes absolute under Art. 181. The learned Judge relied on and approved of the decision in — '13 Cal WN 724 (G)'.

(19) For these reasons, I hold that an application under O. 21, R. 97, Civil P. C. is not barred under Art. 167 of the Limitation Act if made within 30 days from the particular obstruction or resistance complained of in such application, and the fact that there was a previous objection or resistance to a previous writ for possession by the same person or in the same capacity is immaterial.

(20) I am, therefore, of the opinion that this application is not barred by limitation.

(21) The main argument on the question of limitation on behalf of the respondents has been on the basis of the Bombay and Allahabad decisions that their present obstruction is in the same character and same capacity as on the previous occasion on 5-7-1950. Even if the Bombay and the Allahabad decisions above referred to are regarded as good law, then this point of limitation can be applied only on that basis of fact. Now, what are the facts in this case? In the Sheriff's report on the occasion of the first obstruction on 5-7-1950, five persons were named but they did not include the present respondents to this application. The present respondents to this application, as will appear from the present report of the Sheriff dated 10-8-1951, are Jonab Abdul Sakkur Mohammad and one Abdul Jalil. Some argument was made that in fact in the notice issued upon the previous application the present respondents were also cited. That, I am afraid, cannot be an answer because from a comparison of the two reports of the Sheriff — one made on the occasion of the previous resistance on 5-7-1950, and the other on 10-8-1951 — it is quite clear that the present respondents were not cited as the persons resisting the Sheriff's execution of the decree. I am, therefore, unable to accept their contention made in their affidavits that their present obstruction is in the same character as before. I do not find from the Sheriff's previous report that there was any case of obstruction or resistance by them on the previous occasion.

It is then argued that Ramdeo and Aktar who are said to be the immediate landlords of the present respondents obstructed the previous attempt of the Sheriff and as the present respondents claim title through the previous obstructers, they come within the principle of obstruction by the same person and in the same character by some kind of extension of the view adopted by the Bombay Full Bench. To me this argument appears to be devoid of any substance whatever. Obstruction by an alleged successor-in-interest or a person claiming through a previous obstructor cannot in common sense or law be regarded as obstruction by the same person and in the same character and certainly cannot be said to be the same obstruction as or continuous with the previous ob-

struction. On the facts also therefore, I hold that they being different persons for the first time opposing the execution of the decree and creating the obstruction or resistance as against them, the limitation runs from the date of their obstruction or resistance. Hence I hold that this present application as against the respondents is not barred by limitation even on the basis of the Bombay and Allahabad decisions.

(22) A reference now to the merits of the defence raised in this application is necessary. The affidavits of Abdul Sekkur and Mohammad Osman state that they are not claiming through the defendant judgment-debtor at all but claim to be tenant of one Akhtar Khan whose immediate landlord is Gunendra Nath Sadhukhan. They plead in their affidavit.

"I and the said Mohammad Osman claiming the title and/or the right to occupy the premises through the said Gunendra Nath Sadhukhan and/or the said Akhtar Khan but not through the said defendant."

The affidavit of Abdul Jalil is that he also does not claim title through the defendant judgment-debtor at all but through one Ramdeo Burman whose immediate landlord again is the aforesaid Gunendra Nath Sadhukhan. Now both Akhtar Khan and Ramdeo Burman were the persons who are described as resisting the Sheriff's previous execution as will appear from the Sheriff's report of 5-7-1950. Now Gunendra Nath Sadhukhan who is said to be the immediate landlord of both Akhtar Khan and Ramdeo Burman is no other than the son of the judgment-debtor, and the affidavit in reply of Dwijendra Narayan Bhunia affirmed on 7-5-1952 and filed on behalf of the Official Trustee of Bengal makes it quite clear that this Gunendra Nath Sadhukhan had or has no right, title to the suit land or any portion thereof and he only looked after and managed the same on account of his father, the judgment-debtor, and the receipts alleged to have been granted by him are those for and on account of or on behalf of the judgment-debtor. On the Sheriff's previous report both Akhtar and Ramdeo figured as judgment-debtor's tenants. On the affidavits I am satisfied, specially when the respondents have not used any supporting affidavit or even letter from Gunendra Nath Sadhukhan in support of their claim and specially because the respondents' affidavit is careful enough only to say that Gunendra Nath Sadhukhan is the "immediate landlord" of their landlords, that the objection of the respondents is frivolous and that such resistance or obstruction was without any just cause within the meaning of R. 98. I have come to the conclusion that the present respondents are acting at the instigation of the judgment-debtor in this case.

This case illustrates in the most singular and striking manner the truth of the statement that the plaintiffs' troubles begin not before the decree but after the decree. Here is a judgment-debtor who for a period of 6 years has persistently avoided obedience to the decree of the Court. He violated his undertaking to the Court of Appeal when he took the stay of execution by undertaking to the Court that he would deliver vacant possession of the premises in suit in case the appeal was dismissed without recourse to execution proceedings. He avoided contempt proceeding against him by keeping out of the way by residing at mufassil. He violated again his undertaking to the Court of Appeal by starting new proceedings under the Calcutta Ticca Tenancy Act which again was dismissed. On the affidavits I am satisfied that it is the judgment-debtor again in these proceedings who has set up these respondents acting at his instigation to obstruct and resist the processes of this Court.

(23) I will, therefore, order the Sheriff to put the petitioner in vacant possession of the premises in suit by removing the respondents and if they continue such obstruction, by committing the respondents to civil prison. The respondents will pay the costs of this application. Certified for counsel.

A/R.G.D. Order accordingly.

A.I.R. 1953 CAL. 503 (Vol. 40, C.N. 188)

K. C. CHUNDER J.

Annada Prosad and others, Accused-Petitioners v. Manotosan Roy, Complainant Opposite Party.

Criminal Revn. No. 114 of 1952, D/- 10-7-1952.

Penal Code (1860), S. 499, Exception 4 — Reports of judicial proceedings — Necessity for contemporaneous publication — Minor errors in, effect of — Good faith — Necessity for.

A newspaper report of the proceedings in a Court of justice to fall under Exception 4 to S. 499 need not necessarily have been published contemporaneously. All that is required in law is that it should be substantially a true report. It need not be true absolutely, true word for word, and minor errors are immaterial. Good faith also is not a necessary ingredient in the exception. (Paras 5, 6)

Sudhangshu Sekhar Mukherjee and Kishore Mukherjee, for Petitioners; Debabrata Mukherjee, for Opposite Party.

ORDER: This is a Rule at the instance of three persons who had been accused under S. 500, Penal Code by the complainant opposite party one Manotosan Roy of having defamed him in an issue of the newspaper, called, the Loke Sevak, dated 20-12-1951.

(2) It is said that the opposite party was complained against by one Nirapada Mukherjee of criminal acts in connection with collection of the Bills of Nirapada through the People's Bank of Ghatal, of which Monotosan Roy was the Chairman. A short statement of the complaint as made and the action taken on the same appeared in the Loke Sevak. The Magistrate issued process against Manotosan Roy and others. As an item of news this was published in the newspaper.

(3) Manotosan Roy appears to have been very much ill-advised to rush to a Criminal Court on the ground of defamation instead of vindicating himself in the charge that was brought against him. Exception 4 to S. 500 is as follows:

"It is not defamation to publish substantially true report of the proceedings of a Court of justice or of the result of any such proceedings."

(4) The Explanation appended to the Exception will show that the phrase "Court of justice" has been given a very wide interpretation by the section itself. It is not necessary under this section that the report should even be contemporaneous and there is a reason for it, namely, that Law Books, reports of decisions etc., are not published on the same day, or often very

soon after the delivery of judgments or proceedings in Court. Therefore intentionally such publication has not been required to be made contemporaneous.

(5) The first argument of Mr. Debabrata Mukherjee on behalf of the opposite party was that this appeared in the newspaper a few days after the actual filing of the petition of complaint by Nirapada Mukherjee in Court. Apart from the question whether a delayed publication of a mofussil proceeding would be usual, it is enough to say that it is not necessary in law that the proceeding is to be published contemporaneously. The notable trial series has been and is being published long after those notable trials actually took place. All that is required in law is that the publication should be a substantially true report. It need not be true absolutely word per word but taking the whole thing it must be a substantially true account. Something was said about congress and Election and this was irrelevant as good faith has not been made an ingredient in the excepion.

(6) In the present case, the actual defect in the report that Mr. Debabrata Mukherjee could point out to show it was not substantially correct was that the embezzled sum which is mentioned in the petition of complaint as Rs. 21,841 has been stated in round figures in the newspaper report to be about Rs. 22,000/-. This does not make the report not a substantially true one. Minor errors are immaterial. The complaint for defamation filed in the Magistrate's Court is a most preposterous proceeding that has been taken and the proceedings are, therefore, quashed.

(7) The Rule is made absolute.

(8) The accused are discharged from their bail bonds.

B/M.K.S. Rule made absolute.

A.I.R. 1953 CAL. 504 (Vol. 40, C.N. 189)

BOSE J.

Hemanta Kumar Bhattacharjee, Petitioner v. N. N. Sen Gupta and others, Respondents.

Matter No. 215 of 1951, D/- 13-3-1952.

(a) Posts and Telegraphs Manual, Vol. II, Regn. 17 — Scope — 'Investigation', meaning of.

The "investigation" in R. 17 embraces within its scope "any investigation" whether it is being conducted in a Court or by the police or by the officers of the department concerned. (Para 10)

(b) Posts and Telegraphs Manual, Vol. II, Regns. 17 and 21 — Suspension of employee — Pendency of enquiry into employee's conduct is condition precedent to keeping him under suspension. (Para 10)

(c) Posts and Telegraphs Manual, Vol. II, Regns. 17 and 21 — Order of suspension — Duration of its effectiveness.

Where an employee was arrested on charges under several sections of the Penal Code in connection with his having used cancelled postal stamps, and he was kept under suspension thereupon on the basis of R. 21 (e) (iii) alone and not on the other grounds specified in R. 21 and he was discharged by the Court of the charges for which he was arrested:

Held that the suspension order also became spent out from the moment of his discharge and that the authorities certainly had the power to place him under fresh suspension by issuing a fresh order but that they cannot continue the suspension under the order which had become spent out by the order of discharge. (Paras 11, 12)

K. K. Basu, for Petitioner; A. N. Ray, for Respondents.

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ directing the respondents to forbear from giving effect to an order of suspension dated 5-9-1950, and also for cancellation of the order.

(2) The petitioner was a Sub-postmaster at Mission Row Post Office, Calcutta. On 2-9-1950, the petitioner along with some other clerks were arrested by the police in connection with an offence of using of used-up postage stamps while on duty at the said Post Office. On the same date the petitioner was relieved of his duties under an order of the Superintendent of Post Offices, South Calcutta Division, who is respondent 1 in this application. By a letter dated 5-9-1950, the petitioner was placed under suspension with effect from the afternoon of 2-9-1950, as he was arrested on charges under Ss. 261, 262 and 420, I. P. C., S. 5 (2) of Act 2 of 1947, and for conspiracy under S. 120, I.P.C. This order of suspension as contained in this letter was served on the petitioner on 7-9-50.

(3) The petitioner was thereafter sent up for trial on these charges before the Chief Presidency Magistrate, Calcutta. On 5-9-1950, the petitioner was produced before the Magistrate with the police report, but he was released on bail, and the case was adjourned till 19-9-1950; but as no report was received from the investigating officer on that date the matter was again adjourned till 13-10-1950. On 13-10-1950, there being no prayer for remand, the petitioner was discharged by the Chief Presidency Magistrate. On the very next day, that is, October 14, 1950, the petitioner made an application for return of a sum of Rs. 1,700/- cash and his postal savings bank pass-book which had been seized by the police on the day he was arrested, and the Chief Presidency Magistrate upon considering this application and the investigating officer's report thereon ordered the return of the said cash and the bank pass-book, and also discharged the petitioner from the bond which he had executed with regard to his furniture. But although the petitioner was discharged on 13-10-1950, he was still kept under suspension by virtue of the order which was made on 5-9-1950.

(4) On or about 16-1-1951, the petitioner was, however, summoned by the Chief Presidency Magistrate on a complaint made by the police under Ss. 262, 409, 120B and other sections of the Indian Penal Code. This case was ultimately allotted to the Special Judge's Court by a notification of the West Bengal Government issued on 1-2-1951. Thereupon the petitioner moved this Court challenging the order of allotment as illegal, and it appears that this Court has issued a rule in that application and the said matter is still pending disposal.

(5) The petitioner challenges the order of suspension as illegal or at any rate as having ceased to be in force after 13-10-1950, when he was discharged by the Chief Presidency Magistrate.

(6) The only point which has been urged by learned counsel for the petitioner is that the order of suspension dated 5-9-1950, has ceased to be in force after October 13, and the continuance of the petitioner under suspension since that date is illegal.

(7) Regulation 17 of the General Regulations contained in Posts and Telegraphs Manual, Vol. II, is as follows:

"An employee whose conduct is undergoing investigation on a serious charge may be placed under suspension pending the result of enquiries into his alleged misconduct. It is very important that cases of this kind should be promptly disposed of."

Regulation 21 provides in Cl. (e) thereof:

"No one should be suspended unless (i) he wilfully and obstinately refuses to carry out an order, (ii) during the course of an enquiry his retention in his appointment would hamper or frustrate such enquiry, (iii) he is in police custody or undergoing imprisonment, (iv) he is charged with an offence of a nature which, if proved against him, would ordinarily result in his dismissal."

(8) There are certain notes appended to this Rule 21 and the relevant note, being Note 3, may be set out hereunder:

"A servant of Government against whom a criminal charge or a proceeding for arrest for debt is pending should also be placed under suspension by the issue of a specific order to this effect during periods when he is not actually detained in custody or imprisoned (as e.g. while released on bail), if the charge made or proceeding taken against him is connected with his position as a Government servant or is likely to embarrass him in the discharge of his duties as such or involves moral turpitude."

It has been contended by Mr. A. N. Roy, learned counsel appearing for the respondents, that as an investigation into the case of the petitioner was pending during the relevant period, the order of suspension which was made on 5-9-1950 has not spent its force and the petitioner has been kept validly under suspension by virtue of the order which was passed on 5th September. He relies on R. 17 in support of his contention.

(9) The only material in support of the fact that an investigation was proceeding during the material period is to be found in the affidavit of Sailendra Nath Banerjee, Superintendent of Post Offices, South Calcutta Division. In para. 4 of the affidavit it is stated

"that the petitioner was produced before the Chief Presidency Magistrate on 13-10-1950 and it was not prayed by the police authorities that he should be remanded. The learned Chief Presidency Magistrate thereupon discharged the petitioner from custody. The case against the petitioner, however, continued to be under police investigation."

This statement is, as appears from the verification clause, based upon information received from the records of the deponent's office, but no records have been produced before this Court to show that this investigation was, as a matter of fact being carried on during the period between 13-10-1950 and 16-1-1951 when the fresh proceedings were initiated against the petitioner before the Chief Presidency Magistrate on identical charges for which he was arrested and sent up for trial on or about 5-9-1950. Mr. Roy has placed before me a petition of the Superintendent of Police, one Mr. B. C. Dutt, which is affirmed on 21-11-1950 in which it is stated that an investigation is still proceeding. It does not appear, however, from that petition as to when such investigation was started. The only thing that is clear from that petition is that some investigation was being carried on at or about the time when that petition was affirmed and for some time prior to that date. Therefore it appears to me that there are not sufficient materials to justify me in holding that an investigation was being conducted during the whole of the period between 13-10-1950 and 16-1-1951 when fresh proceedings against the petitioner were started in the Court of the Chief Presidency Magistrate.

(10) It has been contended by Mr. K. K. Basu, learned counsel appearing for the petitioner that the investigation referred to in R. 17 has reference only to departmental investigation. There is nothing in the Rule, however, to limit it to the case of only disciplinary or departmental proceedings, and I do not think that I shall be justified in putting such a narrow construction as is contended for by Mr. Basu. It appears to me that the "investigation" in that Rule embraces within its scope "any investigation" whether it is being conducted in a Court or by the police or by the officers of the department concerned. It is clear, however, from the Rules which I have quoted above that it is only when an investigation is actually pending that the employee whose conduct is being investigated can be kept under suspension. The Regn. 17 specifically says that an employee may be placed under suspension only pending the result of the enquiries into his alleged misconduct. So it appears to me that the pendency of the enquiry is a condition precedent to the employee being kept under suspension.

(11) There is no doubt that in the present case the foundation of the order of suspension of the petitioner was the fact of his arrest under the charges under several sections of the Indian Penal Code; in other words, the order of suspension was made on the basis of R. 21 (e) (iii), and although in R. 21 there are several other grounds specified, upon which an employee can be suspended, the order of the 5th September makes it clear that no other ground was availed of for placing the petitioner under suspension.

(12) That being so, it is clear, upon the construction of the relevant Rules in question, that the order of suspension dated 5-9-1950 spent its force the moment the petitioner was discharged on 13-10-1950. It is open to the respondents to place the petitioner again under suspension by a fresh order made for the purpose if such a course is necessary, but in the absence of any fresh order, I am of the view that the continuance of the petitioner under suspension since 13-10-1950 is not warranted. It is clear that no fresh order has yet been passed and the order of suspension having become exhausted, the contention of the petitioner that the opposite parties have no right to keep him under suspension since 13-10-1950 must be accepted.

(13) In my view this petition should succeed in part and the Rule is made absolute to the extent that the respondents are directed to forbear from giving effect to the order of sus-

pension dated 5-9-1950 or keeping the petitioner under suspension by virtue of that order.

(14) I make no order as to costs.

B/M.K.S. Rule made absolute.

A.I.R. 1953 CAL. 506 (Vol. 40, C.N. 190)

P. N. MOOKERJEE J.

Corporation of Calcutta, Complainant, Petitioner v. S. B. Trading Co., Ltd., Accused, Opposite Party.

Criminal Revn. No. 1259 of 1951, D/- 28-11-1952.

Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 179, 180 (2), 492(1)(c) and Sch. IX — Prosecution under S. 492(1)(c).

It is the duty of the Corporation to determine the average quantity of offensive matter and rubbish removed daily from the market in question and without such determination the tax or the fee cannot be paid or the license issued or obtained and as under S. 180(2) such license is to be taken out not later than the 1st day of June if the first half-year is the period concerned, it is imperative that the determination must be made by the Corporation before that date or, at any rate, before the expiry of the relevant half-year. Where the Corporation neglects or fails to do its duty no prosecution under S. 492 (1) (c) is maintainable against a market-owner who fails to take out license. (Para 6)

Santosh Kumar Basu and Pashupati Ghosh, for Petitioner; Narendra Kumar Basu and Bankim Chandra Roy, for Opposite Party.

CASES CITED:

(A) ('41) AIR 1941 Cal 560: 43 Cri LJ 28
(B) ('36) AIR 1936 Cal 20
(C) ('49) AIR 1949 Cal 664: 54 Cal WN 160: 51 Cri LJ 1
(D) ('41) AIR 1941 Cal 550: 43 Cri LJ 33
(E) ('40) AIR 1940 Cal 531: ILR (1940) 1 Cal 585: 42 Cri LJ 100

ORDER: This Rule is directed against an order of the learned Municipal Magistrate, Calcutta, acquitting the accused opposite party S. B. Trading Co. Ltd., of a charge under S. 492, Calcutta Municipal Act, 1923, read with S. 179 (b) and Sch. 9 of the said Act. The offence alleged was the exercise of the calling of a market-owner without a license for the first half year of 1950-51 and the prosecution was launched on 29-12-1951.

(2) According to the prosecuting Municipal authorities the accused were liable under the Act to pay a scavenging tax of Rs. 2340/- for the said first half year of 1950-51 in respect of the place alleged by the prosecution to be a 'market' and popularly known as Raja Katra in the Burra Bazar area of this city and to take out on such payment a license under S. 179 (b) of the Act for the said period, and they having failed to make the payment, and for such payment several demands were said to have been made, and take out the license and having actually exercised the calling of a market-owner in respect of the above place without such a license on and after the 1st day of June, 1950, that is, "on or after the 1st day of June in the year" as contemplated in S. 492 (1) (c) of the Act, the year being the financial year (vide S. 3 (69) 1950-51) committed the offence under S. 492 (1) (c) of the Act and were liable to be punished under the said statutory provision.

(3) The defence 'inter alia' was that the place in question popularly known, as said above, as Raja Katra was not a market, at any rate, it had ceased to be a market and was not a market at the relevant time, — and as such its owners were not liable to pay the scavenging tax demanded, or, for the matter of that, any such tax at all, or to take out any license under S. 179 of the Act, and that, accordingly, the prosecution was unsustainable. A further defence taken was to the effect that there was no valid or proper determination of the daily average quantity of offensive matter or refuse removed from the alleged market, and in the absence of such determination no liability to pay the scavenging tax or take out the license under S. 179 (b) could arise and no prosecution could be maintained under S. 492(1)(c) of the Act. Several other defences appear on the record, but they are not of much substance, and as before me no reference was made to them on behalf of the parties they may safely be left aside.

(4) The learned Magistrate has acquitted the accused on two grounds, either of which, if sound in law, is sufficient to throw out the prosecution. The learned Magistrate has found that the disputed place Raja Katra is not a market under the municipal law, it being a mere collection of some fixed shops, hotels and residential quarters and is not a bazar too as there is no declaration to that effect as required by law. He has further found that there has been in this case no proper determination of the average quantity of refuse, or, to put it in statutory language, "offensive matter or rubbish" removed daily from the said place and no proper assessment of the scavenging tax by the Corporation without which no prosecution like the present is maintainable in law in the face of the decision of this Court reported in — 'Kumar Jitendra Mullick v. Corporation of Calcutta', AIR 1941 Cal 560 (A).

(5) The propriety of the above views of the learned Magistrate has been subjected to severe criticism by Mr. Santosh Kumar Basu, appearing for the City Corporation, and I am not prepared to say that the said criticism is without force or wholly unfounded or unjustified. In the view, however, which I am taking it is unnecessary to examine the merits of the rival contentions of the parties upon the above two points, nor is it necessary to decide the question of limitation raised in this Court on behalf of the opposite parties as a bar to the present prosecution under either of the two Cls. (a) and (b) of sub-s. (1) of S. 534 of the Act, cl. (b) being read with sub-s. (2) of the said section, and considered in the light of the decisions of this Court reported in — 'Corporation of Calcutta v. Ganesh Chandra Dhar', AIR 1936 Cal 20 (B), and — 'Nagendra Nath v. The King', AIR 1949 Cal 664 (C).

To both the learned Advocates, Mr. Santosh Kumar Basu for the Corporation and Mr. N. K. Basu for the opposite parties, I am indebted for very elaborate arguments and valuable assistance on all the above points, but as, in the special circumstances of this case to be presently indicated below, I do not feel inclined or justified to interfere with the order of acquittal passed by the trying Magistrate, I would reserve my views on the said questions for appropriate future occasions.

(6) The special circumstances to which I have referred above reflect adversely on the character of the municipal administration of this city, and they ought to engage the immediate and serious attention of the authorities concerned. Under the Act the exercise of the calling of a market owner after the first day of June in any year without the statutory license for the first half year of that year is punishable (vide Ss. 179 (b), 180(2) and 492(1)(c)) and this license is to be obtained upon payment of the scavenging tax or fee calculated at the rate mentioned in Sch. 9, Part 2, upon the quantity of offensive matter and rubbish removed daily, as determined by the Corporation (vide S. 179(b)).

Clearly, therefore, it is the duty of the Corporation to determine the average quantity of offensive matter and rubbish removed daily from the market in question and without such determination the tax or the fee cannot be paid or the license issued or obtained and as under S. 180(2) such license is to be taken out not later than the 1st day of June if, as in the present case, the first half year is the period concerned, it is imperative and, in any event, it is quite reasonable to think that the law contemplates that the determination must be made by the Corporation before that date or, at any rate, before the expiry of the relevant half year, viz., the 30th September at the latest, taking the year to mean the financial year (vide the definition clause, S. 3(69), as above stated).

The records, however, disclose that measurements of refuse continued from time to time up to about the end of June and the average was determined, and the tax or fee calculated, some time in August and though objection was taken forthwith by the party to the said determination and average the Corporation authorities did not care to take up the matter before November, and then they revised their own previous determination and assessment thus showing that these had not been correctly done, and, in these circumstances, when the prosecution authorities neglected or failed to do what was required of them under the statute and thereby made it impossible for the party to take out the license in time or even before the end of the half year concerned and thus in a way contributed to a large extent to their alleged failure to comply with the law and save themselves from the mischief of the penal section, it would be unjust, unfair and improper to interfere with the order of acquittal passed by the trial Court, even assuming that the learned Magistrate was wrong in holding that the place Raja Katra was not a market under the Act and that the Corporation's manner or method of determination of the statutory average had not been proper or according to law, and assuming further that the opposite party's plea in this Court raising the time bar under S. 534 of the Act is not sound.

I would not, therefore, interfere with the order complained against in this Rule, not merely because it is an order of acquittal, such orders being, in my opinion, clearly revisable by this Court in appropriate cases in the exercise of its revisional jurisdiction vide — 'N. N. Bose v. Manager, Kedar Nath Jute Manufacturing Co. Ltd.', AIR 1941 Cal 550 (D), but because in the special circumstances of this case, as set out above, the revisional powers of this Court should not be exercised to the prejudice of the accused. This relieves me from the necessity of examining the scope and effect of the decision reported in — 'Corporation of Calcutta v. Bengal Dooars Rly. Co. Ltd.', AIR 1940 Cal 531 (E), cited by the opposite party, as, even apart from that, the order of acquittal should not, in my opinion, for the reason, already stated, be interfered with in the present case.

(7) This Rule, therefore, fails and is discharged, but this will not in any way affect the Corporation's right, if any, to recover the scavenging tax or license fee from the opposite party in other appropriate legal proceedings.

B/V.R.B. Rule discharged.

A.I.R. 1953 CAL. 507 (Vol. 40, C.N. 191)

K. C. CHUNDER J.

Taherbhoy Feedaally, Accused-Petitioner v. I. Ibraham, Complainant-Opposite Party.

Criminal Revn. Case No. 933 of 1952, D/-11-2-1953.

Criminal P. C. (1898), S. 195 — Complaint in respect of offence under S. 188, Penal Code.

A Magistrate cannot decide to make a complaint in respect of an offence under S. 188, Penal Code, unless he first decides whether there has been a disobedience of his order under S. 144, Criminal P. C. It is only after someone disobeys an order lawfully pronounced and duly served on him that any question of an offence under S. 188, Penal Code, can arise. (Para 1)

Anno: Cr. P. C., S. 195 N. 6 Pts. 13 to 15.

Moni Mukherji and Promode K. Mukherji, for Petitioner.

ORDER: This Rule was issued at the instance of a landlord against whom the Chief Presidency Magistrate decided to make a complaint u/s. 188, Penal Code, for disobeying an order under S. 144, Criminal P. C. The defence of the petitioner before him in the proceeding under S. 144, Criminal P. C. was that the petitioner himself did not violate any order of the Magistrate. The Chief Presidency Magistrate passed a very curious order. He said that the question whether the petitioner's plea that he did nothing whatever to disobey the order might be decided in the trial of the complaint which he had decided to make. He cannot decide to make any complaint till he actually finds that any order of his has been disobeyed by the person. It is only after someone disobeys an order lawfully pronounced and duly served on him that any question of an offence under S. 188, Penal Code, can arise. The order of the learned Chief Presidency Magistrate, to say the least, was most unwise. Before deciding himself whether his order has been violated, he should not, like an ordinary litigant, rush to another Court to have it decided whether his order has been violated or not. He has taken a point in his explanation as to whether a revision lies. As regards the complaint made by him subsequently, it may be challenged in an appeal under S. 195, Criminal P. C. to his superior officer. Instead of taking any such risk before the executive the petitioner, before the Magistrate made the complaint, moved this Court against his order deciding not to hear and decide the petitioner's objection that he had not violated the order.

(2) I cannot congratulate the learned Chief Presidency Magistrate on the order passed. His order was "not to dismantle a wall." According

to him, as his order shows, if a rack is fixed to the wall it is dismantling the wall. He does not see, even if his knowledge of English did not show it, that one cannot fix racks to a wall which is dismantled. Dismantling means taking down and unless the wall is standing up nothing can be fixed to it.

(3) Under the circumstances, the order of the learned Chief Presidency Magistrate is set aside. I am afraid the learned Chief Presidency Magistrate is not correct as regards the forum of appeal against an order directing a complaint to be made under S. 195, Criminal P. C. for an offence under S. 188, Penal Code. The forum of appeal, if he reads Ss. 476 and 195 together, will be his superior executive officer. This Court cannot object to an aggrieved person coming to question the justice and the propriety of an order intended to be passed by the learned Chief Presidency Magistrate.

(4) The Rule is made absolute and the order of the learned Chief Presidency Magistrate is set aside.

B/K.S. Rule made absolute.

A.I.R. 1953 CAL. 508 (Vol. 40, C.N. 192)

GUHA AND RENUPADA MOOKERJEE JJ.

Narayan Chandra Ghose, Petitioner v. Ananda Bisni and others, Opposite Party.

References Nos. 7 to 11 of 1951, D/- 12-12-52.

Sugar (Temporary Excise Duty) Act (1947), S. 3 — Validity — (Constitution of India, Arts. 13 (1) and 19).

Section 3 is valid as it cannot be held that it affects substantive rights retrospectively. Moreover, Art. 13 (1) of the Constitution has no retrospective effect with the result that even if S. 3 be held to be inconsistent with any fundamental right under Art. 19 it will exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution. (Paras 4 and 6)

Hemendra Kumar Das, for the State; Tarak Nath Ray (in No. 9 of 1951) and Saroj Bagchi (in No. 10 of 1951), for Plaintiff.

CASE CITED:
(A) ('51) AIR 1951 Cal 85: 55 Cal WN 433

GUHA J.: These are five cases of Reference under amended Section 113, Civil P. C., by a Small Cause Court Judge of Garhbeta arising out of five Small Cause Court suits filed in his court. The point referred by the learned Judge for decision by this Court is identical in all the cases and the plaintiff is also the same in all the suits. The facts of the cases are also similar. The relevant facts have been stated in the Letter of Reference made by the Judge and as between the different cases there is some variation only with regard to amounts, no useful purpose will be served by setting forth at length the facts of the different cases in detail. Briefly, the plaintiff who is a wholesale dealer sold sugar to retail dealers from his stock as on 23-10-46. Owing to certain reasons he could not realise excise duty on such sales from the defendant's retail dealers. He was, however, compelled to pay excise duty himself. He has accordingly brought the suits for the recovery from the retail dealers of the amount of excise duty realised from him by Government.

(2) The learned Judge is of opinion that S. 3, Central Act 9 of 1947 is invalid because of the following reasons:

1. Provision has been made therein for recovery of excise duty with retrospective effect.
2. Such retrospective provision has been made in favour of a limited class viz., wholesale dealers without any corresponding provision for retail dealers, and
3. There was no compelling public necessity for such provision.

(3) In support of such conclusion the learned Judge has purported to rely on the principles laid down by a Bench of this Court in the case of — 'Subodh Gopal v. Behari Lal', AIR 1951 Cal 85 (A), when dealing with the validity or otherwise of certain provisions in the Bengal Sales (West Bengal Amendment) Act, 1950.

(4) In order to appreciate the reasoning of the learned Judge it is necessary to refer to certain provisions of the Sugar (Temporary Excise Duty) Ordinance 1946 (Central Ordinance No. 25 of 1946) which was published in the Gazette of India on 23-10-1946 and which became operative all over British India from that date (vide Section 1). Section 3 of the Ordinance provided that

> "a duty of excise shall be levied and shall be payable to the Central Government on all sugar produced in any factory in British India before the commencement of this Ordinance and owned or possessed at the commencement of this Ordinance by the owner of the factory or by the wholesale dealer at the rate of Rs. 4/4 per standard maund."

Section 5 lays down the mode of assessing the payment of duty and S. 6 deals with the mode of recovery of duty. The above Ordinance was followed by Central Act 9 of 1947 which became operative from 11-3-1947. The preamble of the Act explains its purpose and it runs thus:

> "Whereas the duty of excise on sugar levied by the Sugar (Temporary Excise Duty) Ordinance, 1946, cannot be fully recovered before the expiry of the said Ordinance; And whereas it is expedient to make provision for the completion of the said duty, and for a certain incidental matter."

By Section 1 (1) of the Act it was made applicable to the whole of British India. By Section 2 the provisions for recovering excise duty on sugar as laid down in the Ordinance were continued. Then comes Section 3 which deals with the effect of levy of duty on certain sales. It provides 'inter alia' that in certain circumstances as specified in the Section the seller of sugar provided that he has paid the excise duty or that there was included in the price which he himself has paid for the sugar the amount as aforesaid, be entitled to be paid such amount by the buyer and to sue for and recover such amount. This provision, therefore, governs to some extent the liability & incidence as between the buyer & the seller in regard to the excise duty on sugar. It is to be noted that the Section opens with the words

> "without prejudice to the provisions of Section 64(A) of the Indian Sale of Goods Act, 1940".

Section 64(A) was inserted in the Indian Sale of Goods Act in 1940. It provides inter alia that if any excise duty is imposed after the

making of the contract for the sale of the goods and such duty is paid, the seller may add to the contract price so much as will be equivalent to the amount paid in respect of such duty and he shall be entitled to be paid and to sue for and recover such addition. The opening words, referred to above, of S. 3, Act 9 of 1947 show that the provision of law as contained in S. 64(A) of the Sale of Goods Act has not been cut down or modified. What Section 3 has done is to make explicit in regard to excise duty on sugar what was implicit in S. 64(A). It is apparent that it was put in by way of abundant caution. It does not take away the right which the retail dealer might have under the general law for passing on the incidence of the excise duty to the person to whom he in turn sells.

It cannot be said, therefore, that S. 3 of Act 9 of 1947 benefits only a limited class viz., the wholesale dealers and as such it comes within the mischief of the Constitution. On a proper construction of the relevant statutes, therefore, it cannot be held that the impugned provision viz., S. 3 of Act IX of 1947 affects substantive rights retrospectively and that as such it is open to question on the grounds set forth by the learned Munsif. The question of retrospective operation in the true sense of the term does not really arise in the present case and accordingly the reasons assigned by the learned Munsif stemming as they do from that assumption are hardly applicable to the question of the validity or otherwise of the Section.

Section 3 which is after all an incidental provision in a fiscal statute cannot, therefore, be held to be invalid looked at from that standpoint. Moreover Ordinance 25 of 1947 and Act 9 of 1947 came into operation long before the Constitution of India came into force. It is now well settled that Art. 13 (1) of the Constitution can have no retrospective effect but is wholly prospective in its operation, with the result that even if the impugned Section be held to be inconsistent with any fundamental right under Article 19 of the Constitution it will exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution. From this standpoint as well, Section 3 will stand.

(5) The reasoning of the learned Judge in support of his view that S. 3 is invalid was assailed before us by the learned Government Pleader who appeared for the State as also by the learned Advocates who appeared on behalf of the plaintiff in some of the References on other grounds as well which we do not consider it necessary to examine in detail. What we have stated above in support of our conclusion about the validity of the impugned Section is sufficient to dispose of the Reference.

(6) Our answer to the Reference is that S. 3 of Act 9 of 1947 is valid.

(7) This order will govern all the connected References. It appears from the letter no. 487 dated 21-8-51 of the learned Judge that in S. C. C. Suit No. 36 of 1951 in regard to which reference no. 7 has been made, the plaintiff has filed a petition of full satisfaction. That Reference has, therefore, become infructuous. The other suits in which the same question about the validity or otherwise of S. 3 of Act 9 of 1947 has arisen are still pending and the learned Judge will now proceed to dispose of them according to law in the light of our answer to the point mooted by him.

(8) The References are disposed of accordingly.

(9) There will be no order as to costs.

(10) MUKHERJEE J. :I agree.

A/V.B.B. References answered.

A.I.R. 1953 CAL. 509 (Vol. 40, C.N. 193)

CHAKRAVARTTI C. J. AND SINHA J.

Mandal Ghat Zemindary Syndicate Ltd., Petitioner v. Gour Mohan Mullick and others, Opposite Party.

Application for leave to appeal to the Supreme Court No. 14 of 1952, D/- 10-12-1952 from judgment and decree of the Division Bench of this Court in A. F. O. D. No. 225 of 1948.

Constitution of India, Art. 133 (1) — "Amount or value of subject matter in appeal" — (Civil P. C. (1908), S. 110).

The expression "amount or value of the subject-matter in dispute" in Art. 133 (1) does not mean the amount or value of the subject-matter of all disputes between the parties. The true scope of the expression is indicated by the words "on appeal" which follow, and therefore the true test is, what is really in stake in the appeal itself.

Where the plaintiff is asking for an immediate payment of such amount as may be found due to him on an account being taken and under the decree sought to be appealed from such amount is Rs. 31,443-15-6 and the defendant's case is that he is not liable to render accounts at all and therefore he is not liable to make any cash payment to the plaintiff, the subject-matter of the dispute in the proposed appeal is the whole sum of Rs. 31,443-15-6 and that being so, cl. (a) of Art. 133 (1) of the Constitution is satisfied. (Para 12)

Anno: C.P.C., S. 110 N. 8.

H. N. Sanyal with Purusottam Chatterjee, for Appellant; Dr. N. C. Sen Gupta with Chandra Nath Mukherjee, for Respondents.

CHAKRAVARTTI, C. J.: This is an application for leave to appeal to the Supreme Court from a judgment and decree passed by a Division Bench of this Court in a First Appeal. The judgment is one of reversal. It follows that if the petitioner can make out that the two matters mentioned in cl. (a) of Art. 133 (1) of the Constitution are of the requisite value, it will make out a claim to leave to appeal as of right. There is no difficulty about the amount or value of the subject-matter of the dispute in the Court of first instance, but the value of the subject-matter still in dispute on appeal requires a little close examination. The learned counsel for the petitioner conceded that if the case failed by the valuation test, he could not contend that it was otherwise a fit case for appeal.

(2) The facts briefly stated are as follows. Touzi No. 4 of the Howrah Collectorate, known

as Perganah Mandalghat, is owned by a number of co-sharers who may conveniently be classed under four heads, namely, the Mullicks Sree Sree Lakshmi Narayan Jew, represented by Manohar Lal Seal Shebait, N. N. Law and the Satkhira Zamindars. These cosharers had all separate accounts standing in their names. It appears that default having been committed in the payment of revenue, the estate was advertised for sale to be held on 25-9-1940, and about that point of time, the co-sharers other than the Satkhira Zamindars, conferred between themselves and agreed to come to an arrangement by which the imminent sale as well as such revenue sales in future might be averted. The terms of the arrangement appear to have been agreed to between the parties on 23-9-1940, and on the next day, namely, the 24th a formal deed of agreement was executed. By that deed it was provided that a private limited company would be formed for the purpose of taking over the shares of the executants in the zamindary, that after the formation of such a company, the executants would grant a lease of their shares to the company for a period of ninetynine years on receipt of a certain consideration and this was the most important term of all—

"all rents and decrees due to the parties hereto in respect of the Zemindary on the date of execution of the lease aforesaid will be duly assigned to the company at such agreed price as may be fixed by the Board and to be paid by the allotment of fully paid up shares."

In pursuance of that agreement a limited company, which is the petitioner company before us, was formed and the memorandum of association, as also the articles, was signed on 19-11-1940. The certificate of incorporation was obtained on the next day. On 23rd December following, the lease stipulated for in the agreement of September 24 was executed.

The next thing which happened was that on 27-12-1940, three powers of attorney were executed in favour of the petitioner company by which the company was authorised to collect from the tenants the arrears of rent due to the several co-sharers up to the date of the execution of the lease. One of those powers of attorney was executed by the Mullick cosharers. The preamble to the powers of attorney, which were all in the same language, recited that prior to the formation of the company and the execution of the lease it had been agreed that the co-sharers would assign all the arrears of rents and other dues in respect of the zamindary to the company

"for the total consideration of Rs. 20,000/- to be paid by the allotment of 200 fully paid up shares of Rs. 100/- each in the Company, to be issued to each of us and our said cosharers in proportion to the amount of arrears of rents and other dues actually realised in respect of his share in the Zemindary under his separate account."

The preamble proceeded to state that as it would take some time to ascertain the amount and other particulars of the arrears of rent and other dues and to execute and register a formal deed of assignment, it had been agreed in the common interest of all that until the execution of the formal deed of assignment, an irrevocable power of attorney should be granted to the company to collect and realise on behalf of the co-sharers all arrears of rent and other dues accrued up to 23-12-1940, that is to say, up to the date of the execution of the lease. It will be noticed that while the agreement executed on 24-9-1940, left the consideration to be paid by the company for the assignment of the arrears unspecified the power of attorney recited that the consideration had been fixed at Rs. 20,000/- to be paid in the shape of two hundred shares of the face value of Rs. 100/- each.

(3) It appears that no deed of assignment was ever executed and one of the Mullick cosharers, namely, Gour Mohan Mullick, became dissatisfied with the arrangements which had been made and in fact began repudiating them. Eventually, he brought a suit in the Court of the First Subordinate Judge at Howrah on 10-9-1946, for a declaration that the agreement of 24-9-1940, in so far as it differed from the draft agreement executed on the previous day, the memorandum and the articles of association of the private limited company which had been formed, the certificate of incorporation, the lease granted on 23-12-1940, and the power of attorney, dated 27-12-1940, were all void 'ab initio' and not binding upon him. He prayed further for recovery of possession of his share as also for damages for the use and occupation of his share by the company for accounts to be taken of the dues for arrears of rent and, alternatively, for a decree for his share of the rent for a period of five years from 23-12-1940.

(4) Besides the remaining co-sharers, the private limited company namely, The Mandalghat Zemindary Syndicate Ltd., was made a defendant in the suit. The company's defence was that the documents in respect of which a declaration of invalidity had been prayed for were all good and valid documents, that the plaintiff was not entitled to any accounts, nor entitled to any damages or any decree for his share of the rent for the period of five years.

(5) Of the issues framed in the suit, those numbered 9, 10 and 11 are material. They were as follows:

9. Is the plaintiff entitled to a decree for accounts?

10. Is the plaintiff entitled to a decree for damages? if so, to what extent?

11. To what relief, if any, is the plaintiff entitled?

(6) The trial Judge held against the plaintiff in regard to his principal prayer and came to the conclusion that the several documents which the plaintiff had impugned as void 'ab initio' were all good and valid documents. Having come to that conclusion, he proceeded to consider the further prayers made by the plaintiff and held that the plaintiff could not obviously recover possession of his share in the zemindary. As regards the claim for his share of the rent for the period of five years, the learned Judge held that no demand for the same had been made and consequently no cause of action had arisen. With regard to the claim on account of Malikana, by which was meant not the rent due from the tenants, but the rent due under the lease, the learned Judge held that the amounts were still lying with the company and the plaintiff would be entitled to take the money any time he liked. He pronounced an adjustment of a certain amount against the dues of the plaintiff to have been in order, but recorded no specific finding with regard to the prayer for accounts.

(7) Thereafter an appeal was taken to this Court and in that appeal the findings of the trial Court in respect of the documents were not challenged. Only three points are said to have been urged, namely, that the shebait of the deity co-sharer was not competent to execute the agreement and therefore the incorporation of the company was invalid in law; (2) that the company was liable to render accounts of all realisations made; and (3) that, in any event, even if the incorporation of the company was held valid, the plaintiff was entitled to his share of the Malikana from the date of the execution of the lease up to the date of the suit.

(8) The learned Judges of this Court held that they had no jurisdiction to consider the first ground taken by the appellants. With regard to the third ground, they held that the plaintiff was clearly entitled to the arrears of Malikana, but he was bound by the adjustment made by the company in respect of a sum which the plaintiff owed to N. N. Law. With regard to the claim for accounts, the learned Judges held that no assignment had yet been made by any of the parties for the arrear rents in favour of the company, and, therefore, whoever might have been responsible for that state of things, the position which they found in the case was that the company had realised rents under the powers of attorney, in other words, not in its capacity as an assignee of the rents but in the capacity of an agent under the powers of attorney. The learned Judges held that it consequently followed that as the facts were at the time, the company must be held liable to render accounts of the realisations which it had made under the powers of attorney to the grantors of the power on whose behalf it had made the realisation. The actual order made by the learned Judges with respect to the accounts is as follows:

"The Company is further liable to render accounts in respect of the arrears of rent which had accrued due before the execution of the lease which the Company was authorised to collect under the Power of Attorney. The plaintiff will be entitled to his share of the arrears of rent as were so realised by the Company under the Power, less the proportionate share of costs of collection etc."

(9) The learned Judges, as I have already stated, also made a decree for the plaintiff's share of the Malikana, less the amount adjusted, but that part of the decree is not proposed to be challenged in the intended appeal.

(10) The intended appeal is solely directed against the decree made by the learned Judges in respect of the plaintiff's prayer for accounts. It will be noticed that the decree declares the plaintiff to be entitled to his share of the arrears of rent as realised by the company less the costs of collection, which means that the amount found due to the plaintiff on accounts being taken will have forthwith to be paid out to the plaintiff. That being so, when the petition for leave to appeal was first moved before us and a question as regards the valuation was raised, we considered it proper to direct the intending appellant to satisfy us by proper affidavits as to what the amount was which had been collected on behalf of the plaintiff as arrears of rent. An affidavit was, in the first instance, filed, annexed to which there was a chart showing the collections, but as that chart was not vouched for by the Chartered Accountants who had prepared it, we directed a further affidavit to be filed. Such an affidavit was subsequently filed and there is a statement annexed to the affidavit of the collections made which is properly certified by Messrs. Ray & Ray, Chartered Accountants. Dr. Sen Gupta on behalf of the plaintiff respondent agreed to accept the figures given in this chart as the true figures of the collections made, although he qualified his admission by saying that he was making it only for the limited purpose of the present petition for leave to appeal.

(11) According to the chart attached to the appellant's affidavit, the total amount of the gross collections up to 30th Chaitra, 1357 B. S., is Rs. 3,36,023-13-0. The actual collection expenses are Rs. 92,626-15-9 and the net collections left after deducting the actual expenses amount to Rs. 2,43,396-13-3. In the plaintiff's share the gross collections are Rs. 43,410-3-0, the actual expenses Rs. 11,966-3-6 and the net collections Rs. 31,443-15-6. No further collections, it is stated, are expected. It follows that in terms of money the company will have to pay to the plaintiff a sum of Rs. 31,443-15-6 under this Court's decree.

(11a) The above being the practical implication of the decree it was contended by Mr. Sanyal who appeared on behalf of the intending appellant that the value of the subject-matter in dispute on appeal was clearly the sum of Rs. 31,443-15-6. His argument was that the plaintiff's prayer was one for accounts and for payment to him of such amount as might be found due to him. The company's case was that the plaintiff was not entitled to have any accounts in the suit at all and therefore when, in that state of the pleadings, the decree in effect directed the company to pay a sum of Rs. 31,443-15-6 no part of which, according to the company, it was liable to pay under any decree made in the present suit, the dispute obviously comprised and covered the whole of the amount and consequently the value of the subject-matter in dispute was the whole sum of Rs. 31,443-15-6.

On behalf of the plaintiff respondent, it was contended by Dr. Sen Gupta that it was not the company's case that it was entitled to retain the arrears of rent collected without paying anything to the co-sharers; but its case was that for the arrears of rent assigned to it, it would have to pay Rs. 20,000/- in the shape of two hundred shares of the company of the face value of Rs. 100/- each. According to the terms of agreement of 24-9-1940, and the recitals in the preamble to the powers of attorney to which I have already referred, the consideration for the arrears of rent would be paid by the allotment of fully paid up shares in proportion to the amount of arrears of rent or other dues actually realised in respect of the shares of each co-sharer. It appears from the chart prepared by the Chartered Accountants that on the basis of collections made in the plaintiff's share, the number of shares in the company to which he would be entitled is 25.84.

Dr. Sen Gupta's contention was that the sum of Rs. 20,000/- contemplated by the parties was only the face value of the shares, but if the shares were actually allotted to the co-sharers, the property which they would thereby get would not merely be the face value of the shares but their intrinsic value. It was said that the shares, after they had been allotted

to the co-sharers of the Zamindary, would entitle such co-sharers to receive dividend on them for a period of at least nintynine years and in view of the vastness of the Zamindary, the intrinsic value of the shares would be far in excess of their face value and indeed the value would be so great that if in the plaintiff's case, it was set off against the amount of the collections which had been made on his behalf, the result would be a minus figure. Dr. Sen Gupta's contention accordingly was that on the company's own case and on the case which, according to the grounds taken in the memorandum of appeal the company intended to urge before the Supreme Court, the value of the subject-matter in dispute in the intended appeal would be the difference between the sum of Rs. 31,443-15-6 and the intrinsic value of the 25.84 shares to which the plaintiff was entitled, if the former was at all larger than the latter.

Mr. Sanyal's reply to Dr. Sen Gupta was that what the parties contemplated was the face value and nothing more and so far as matters stood at present, it was only the face value of the shares which had to be regarded. In his submission, however, no question of working out the difference between the true value of the shares, whether face value or intrinsic value, and the amount of the net collections payable to the plaintiff under the decree arose, because in so far as the present suit was concerned the question of the allotment of the shares was altogether foreign to it, inasmuch as no deed of assignment had yet been executed and the Court had not found that the plaintiff was entitled to any shares or that the company was bound to allot him any. Mr. Sanyal's argument, therefore, was that the true test was what was in dispute in the appeal itself? and if that test was applied, the subject-matter in dispute was clearly the whole sum of Rs. 31,443-15-6.

(12) We have considered this matter with care and it appears to us that the contention of Mr. Sanyal is correct. If the decree of the High Court had dealt with the whole of the contractual relations between the parties and pronounced on the right of the plaintiff to obtain the shares and the liability of the company to allot them, some question of setting off the value of the shares against the amount of the net collections in the hands of the company might be relevant. As I see the position, it is that so far as the present suit is concerned, the plaintiff is asking for an immediate payment of such amount as may be found due to him on an account being taken and under the decree sought to be appealed from such amount is Rs. 31,443-15-6. Again, so far as the present case is concerned, the defendant company's case is that it is not liable to render accounts at all and therefore its case is that it is not liable to make any cash payment to the plaintiff. That being so, the rival cases are a claim for a certain amount of money and a denial of any liability to make any payment in pursuance of any directions that can be given in the present suit. I do not think that the expression "amount or value of the subject-matter in dispute" means the amount or value of the subject-matter of all disputes between the parties. The true scope of the expression is indicated by the words "on appeal" which follow, and therefore it seems to me that the true test is, what is really in stake in the appeal itself?

Another good test of a practical nature would be one suggested by Mr. Sanyal and that is, when the plaintiff seeks to execute the present decree against the company, would the company be entitled to put him off by saying that he must wait for the shares to be allotted to him or to set off the value of the shares which the plaintiff would be entitled to under the terms of agreement? It is perfectly clear that so far as the present litigation is concerned, the company could not possibly plead in bar of the execution of the Court's decree against it, any option to pay by shares. That being so, it seems to me that the value of the subject-matter in dispute being the value of such subject-matter as is in dispute in the intended appeal itself and that dispute in the present case being whether the plaintiff will get Rs. 31,443-15-6 or nothing at all — the company denying its liability altogether — the subject-matter in dispute must be taken to be the entire amount of the net collections.

The question of payment by shares does not arise and is in no way involved, because the shares were only to be given as the consideration for an assignment of the arrears, — as their price, so to say — but no assignment has taken place and therefore there is nothing yet to pay for by shares and what the plaintiff, on his part, is claiming and has got by the decree, is not the price of the arrears in his share, but the arrears themselves as his own money. If that claim is upheld, as it has been by the decree, the question of assignment is altogether eliminated, because the plaintiff cannot be under an obligation to assign the arrears and at the same time be entitled to recover them forthwith and the company also cannot enforce the agreement to assign in the present suit, nor claim to pay by shares, since no assignment, which only would bring in the question of payment by shares, has taken place. If the decree had been that the company must hold the collections, or deposit them in Court to be held, pending decision of the rights of the parties as to the agreement for an assignment and subject to adjustment on such decision, some question might arise of setting off the value of the shares against the amount of the collections in determining the value of the subject-matter of the dispute in the appeal. But the decree, by directing payment of the collections as the plaintiff's own money, collected by the company as his agent, gives the go-by to assignment altogether and, as I have already pointed out, no question of payment by shares can arise, unless an assignment is made which has not been done. The whole dispute in the proposed appeal, therefore, is and must be whether or not the company is liable to account and pay up the amount due.

It is true that in the grounds taken it is stated that the plaintiff should have been held to be entitled only to an allotment of a proportionate number of shares upon assignment of the arrears, but that only means that on that finding the present suit for accounts should have been dismissed and not that a decree for the allotment of a proportionate number of shares should have been made. In my opinion the subject-matter of the dispute in the proposed appeal is the whole sum of Rs. 31,443-15-6, and that being so, cl. (a) of Art. 133(1) of the Constitution is satisfied

(13) In the result, the application succeeds and we hold that the intending appellant is entitled to the leave asked for. Let a certificate issue under Art. 133(1)(a) of the Constitution. We assess the hearing-fee at three gold mohurs, but costs will abide the result of the appeal.

(14) The 'ad-interim' order for stay stands automatically vacated.

(15) SINHA, J. : I agree.

B/R.G.D. Leave granted.

A.I.R. 1953 CALCUTTA 513 (Vol. 40, C. N. 194)

R. P. MOOKERJEE AND GUHA JJ.

Nani Lal De and others, Petitioners v. Tirthalal De and others, Opposite Party.

Civil Rule No. 663 of 1950, D/- 6-9-1951.

(a) Civil P. C. (1908), S. 115 — Laches in making application.

There is no period of limitation specified for applications for revision though the usual practice has been to insist on such applns. being filed within 90 days from the date of the order complained of. Applications can however be accepted beyond such period if the Court is satisfied about the reasons for such delay. (Para 5)

Anno: Civil P. C., S. 115 N. 17.

(b) Contract Act (1872), S. 43 — Joint tort-feasors.

In India when one of the joint judgment-debtors pays off the decretal debt, he has a right to contribution from his co-judgment-debtors, to what extent and in what proportion, may depend upon the circumstances of each case. (1799) 8 Term Rep 186, Not applied. Case law referred. (Para 21)

Anno: Contract Act, S. 43 N. 7.

Manindra Nath Ghose and Hementa Krishna Mitter, for Petitioners; Hiralal Chakravarty and Sambhunath Banerjee, for Opposite Party.

CASES CITED:

(A) (1799) 101 ER 1337: 8 Term Rep 186
(B) (1894) 71 LT 163: (1894) AC 318
(C) (1908) 25 TLR 34: 99 LT 840
(D) (1827) 29 RR 503: 4 Bing 66
(E) (1936) 2 All ER 1165
(F) (1937) 53 TLR 1024: (1937) 3 All ER 907
(G) (1867) Beng LR Sup Vol 647: 7 WR 384 (FB)
(H) (1900) 5 Cal WN 393
(I) ('01) 6 Cal WN 88
(J) ('14) AIR 1914 Cal 863: 18 Cal WN 622
(K) ('28) AIR 1928 Cal 180: 55 Cal 666
(L) ('16) AIR 1916 All 160(2): 38 All 237
(M) ('32) AIR 1932 Cal 600: 59 Cal 859
(N) ('42) AIR 1942 Nag 52: ILR (1942) Nag 1
(O) ('02) 12 Mad LJ 13: 25 Mad 599

R. P. MOOKERJEE J.: This Rule was obtained on behalf of the plaintiffs and arises out of a suit brought by them for contribution. Both the Courts below have dismissed the plaintiffs' claim.

(2) For a proper appreciation of the points in issue in the present matter the facts may be shortly stated. One Chandra Nath Bhattacharjya held a jama Rs. 33/- under the predecessor of the plaintiffs and defendant 1, who were members of the same family. In 1875 Chandra Nath sold the holding to one Badal Giri. This transfer was recognised by the landlords and is supported by the entry in the records of rights as finally published. In course of execution of a rent decree obtained by the Dey landlords against the heirs of Chandra Nath, without impleading the heirs of Badal Giri, the property was purchased by defendant 2 Satya Charan Ghose. Satya Charan was resisted by the heirs of Badal Giri from taking possession of the holding. Defendant 2 thereupon brought a suit, with alternative prayers either to be put in possession on the property after declaration of his title or for a direction on the decree-holders Deys to refund the purchase price by way of damages on the ground, that the latter, although cognizant of the fact that the heirs of Chandra Nath had no saleable interest in the tenancy in suit, had put up the holding to sale purporting the same to belong to the latter. The alternative claim for compensation as put forward by the present defendant 2 was decreed —the original decree-holders Deys were asked to pay back the proportionate share of the purchase money taken by them. He put this decree in execution and attached an ejmali estate of the Deys Touzi No. 148/1 of the Hooghly Collectorate. The attached property was advertised for sale. The present plaintiffs who were part proprietors deposited the entire decretal amount on 9-6-1941 and thus saved the joint property from sale. It is now contended on behalf of the plaintiffs that defendant 1 was liable for a third share of the amount due under the decree obtained by defendant 2. Hence the present suit, for contribution with interest from defendant 1.

(3) The learned Munsiff came to the conclusion that the members of the Dey family viz., the plaintiffs and defendant 1 should be considered to be joint tort feasors as being cognisant of the wrongful act they were committing by putting the property to sale though it was not the property of the judgment-debtors. There could be no contribution as between joint tort feasors. The learned District Judge affirmed this decision.

(4) Originally a second appeal (S. A. No. 459 of 1946 (Cal)) was filed in this Court on behalf of the plaintiffs. The appeal was admitted after a preliminary hearing and was ultimately transferred to a Division Bench for final hearing. It was ultimately held on 25-5-1950 that no Second appeal lay to this Court as the same was barred under S. 102, C. P. C. The value of the appeal was only Rs. 143/-. An application for revision was thereafter filed and the present Rule was obtained on 12-6-1950.

(5) On behalf of the opposite party, it was faintly suggested that the application on which the present rule has been issued was barred by limitation. In the first place, there is no period of limitation specified for application for revision though the usual practice has been to insist on such applications being filed within 90 days from the date of the order complained of. There had however been occasions when applications had been accepted beyond such period if the Court were satisfied about the reasons for such delay. Further, if the period covered by the pendency of the second appeal in this Court and the time taken for obtaining certified copies of the judgments and decrees be excluded the application as filed is within time.

(6) On behalf of the plaintiff petitioner, it has been contended (1) that the defence based upon the judgment debtors being joint tort feasors was not raised in issue in the trial Court and this point ought not to have been allowed to be taken at the stage of the argument (2) that the

rule in —'Merry Weather v. Nixan', (1799) 8 Term Rep 186 (A) is not applicable to the conditions prevailing in India, and (3) that, even if that rule be applicable in India, on the facts of the present case, it ought to have been held that this is not a case of joint tort feasors.

(7) The argument founded on the ground that the parties were joint tort feasors cannot be brought under any one of the issues as raised. The parties did not therefore adduce all relevant evidence as to what part was played by the parties when the decree for rent was obtained by the landlords against the heirs of Chandranath. In the absence of such relevant and material evidence, it is not always possible to finally decide the question raised during argument. We may, however, proceed to consider whether the rule in Merry Weather's case can in any view be attracted in the present case.

(8) As we have come to the conclusion as indicated below that it is not — we are not required to consider whether the question of fact about the complicity of the parties as alleged tort feasors requires further examination.

(9) Under S. 43 of the Contract Act when two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise, and

> "each of the two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise unless a contrary intention appears from the contract."

(10) (1799) 8 Term Rep 186 (A) has been taken to be an authority for the proposition that no contribution can be claimed between joint tort feasors. It is often overlooked that this was not a case of joint tort feasors in the sense that all the parties were jointly guilty of one tort. There were, as a matter of fact, two separate torts. This rule in Merry Weather's case enunciated in very general terms was subsequently held by Lord Herschell in —'Palmer v. Wick', (1894) AC 318, at p. 324 (B) as not being "founded on any principles of justice or equity or even on public policy which justify its extension to the jurisprudence of other countries." After indicating the difference between the English & the Scotch Law, the House of Lords refused to extend this rule to Scotland (See also — 'Smith v. Clinton', (1908) 99 LT 840 (C)).

(11) The mere fact, however, that two or more persons have concurred or assisted in or contributed to an act which is responsible for inflicting damages, is not of itself sufficient to make such persons jointly liable unless certain other conditions are also fulfilled.

(12) In —'Adamson v. Jarvis', (1827) 4 Bing 66 (D), Best C. J. had pointed out so early as 1827 and that within 30 years of the rule having been laid down in Merry Weather's case that there was a tendency even in England to limit the broad principle laid down in the latter case. It is worthy of note that this rule has now been, for all practical purposes, abolished in England by Law Reform (Married Women and Tort Feasor's) Act 1935 (25 & 26 Geo. V C. 30 Sec. 6). If any damage is suffered by any person consequential upon a tort committed on or after 1-11-1935 any tort feasor liable in respect of that damage may recover contribution from any other tort feasor who is or would, if sued, have been liable in respect of the same damage whether as joint tort feasor or otherwise (See —'Burnham v. Boyer', (1936) 2 All ER 1165 (E) —'Kubach v. Hollands', (1937) 3 All ER 907 (F).

(13) The rule in Merry Weather's case (A) was considered by this Court in —'Sreepatty Roy v. Loharam Roy', 7 WR 384 (FB) (G). In this case, the plaintiff was one of several persons including the defendants who had wrongfully constructed a bund and caught fish within the limits of a Jalkar which belonged to a third party. That third party in a subsequent suit obtained a decree against the plaintiff and defendants jointly but the decree was executed against the plaintiff alone. The plaintiff sued the defendants for contribution. It is significant that with reference to the general question the following observation was made by the Full Bench.

> "All that we can see is that the plaintiff was not necessarily precluded from recovering contributions merely because the damages for which the decree was given was caused by a wrong, in the legal sense of the term, done to the plaintiff .....".

(14) In — 'Harisaran v. Jatindra Mohan', 5 Cal WN 393 (H) it was held that if the alleged joint wrong doers had acted under a bona fide claim of right and has reason to suppose that they had a right to do what they had done there is a right of contribution 'inter se'.

(15) In — 'Mohesh Chandra v. Boydyanath', 6 Cal WN 88 (I) it was the plaintiffs who were in possession of lands standing in the names of their father and deceased brother, part of which was sold by the deceased brother's widow to the defendants who got a decree for possession against the plaintiffs. The latter kept the former out of possession. In such circumstances, the plaintiffs' possession should not be considered as that of tort feasors and they are therefore entitled to recover from the defendants by way of contribution the rent paid by the plaintiffs for the portion of the land purchased by the defendants.

(16) In 'Bishnu Charan v. Bepin Chandra', AIR 1914 Cal 863 (J) Jenkins C. J. kept the question open whether the strict law of 'Merry Weather v. Nixan', was applicable in India. It was further pointed out that in a suit for contribution a plea that the plaintiffs were only wrongdoers in the sense that they alone were in possession of the land in respect of which mesne profits were awarded is of such a special nature & requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue.

(17) In another Bench decision — 'Kamala Prosad v. Chandra Nath', AIR 1928 Cal 180 (K) it was doubted whether the rule in Merry Weather's case at all applied to India. See also —'Nihal Singh v. Collector of Buland Sahar', AIR 1916 All 160 (2) (L).

(18) Similar doubt about the applicability of the rule enunciated in 'Merry Weather's case' (A) to India was repeated in —'Sashi Kantha v. Promode Chandra', AIR 1932 Cal 600 (617) (M).

(19) The same view was expressed by Nagpur Court in — 'Kushal Rao v. Bapu Rao Ganapat Rao', AIR 1942 Nag 52 (N).

(20) Reference may also be made to the views expressed by the Madras Court in — 'Siva Panda v. Jujusti Panda', 25 Mad 599 (O).

(21) In our view, the Rule in Merry Weather's case (A) expressed as a general proposition should not be extended to India. In India when one of the joint judgment-debtors pays off the decretal-debt, he has a right to contribution from his co-judgment-debtor to what extent and in what proportion may depend upon the circum-

stances of each case. When a defence of this nature is raised it is pertinent to enquire why, by punishing a wicked person by giving effect to the defence, relief is to be given to the defendant who is the other wicked person, specially if it should appear that the defendant himself was the mainspring or the ringleader in the perpetration of the tortuous act, or similar other facts are brought out.

(22) In the absence of any issue in the present case and the point having been raised during argument in the trial at a late stage there are no sufficient materials in the record from which one may differentiate between the plaintiff from the defendants as to the part played by them at the various stages of the activities imputed to them on the allegation that they were joint tort feasors.

(23) In this view, it must be held that the Courts below were in error in dismissing the plaintiff's claim for contribution. This Rule is accordingly made absolute. The judgments and decrees passed by the Courts below are set aside and the suit decreed.

(24) In the circumstances of this case, there will be no order for costs in this Court. The plaintiff will be entitled to the costs of the Courts below.

(25) GUHA J.: I agree.

B/H.G.P. Rule made absolute.

A.I.R. 1953 CALCUTTA 515 (Vol. 40, C. N. 195)

K. C. CHUNDER J.

Nilkantha Bhattacharjee, Petitioner v. Jitendra Nath Das, Opposite Party.

Civil Rule No. 2846 of 1951, D/- 23-7-1952.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 — Fixation of standard rent.

Clause (g) of S. 9 (1) being a residuary clause, applies only when other clauses of S. 9 (1) do not apply — Premises let out on 1-12-1941 — Landlord's evidence as to actual rent of premises on 1-12-1941 not satisfactory — Court should proceed to determine notional rent on 1-12-1941 in accordance with S. 9 (2) — S. 9 (1) (g) can have no application to such a case — Scheme of S. 9 and principles for determining standard rent fully discussed.

(Paras 2, 3)

Ranjit K. Banerji, for Petitioner; Bhuban Mohan Saha, for Opposite Party.

ORDER: This Rule was issued at the instance of a tenant against the order of the Subordinate Judge, 5th Additional Court, 24-Parganas, in connection with an application by a landlord for fixation of standard rent filed before the Additional Rent Controller of Calcutta.

(2) The facts are very simple. The landlord alleged that the premises were let out on 1-12-1941. That has not been contested. The landlord gave evidence as to what according to him was supposed to be the rent actually paid at the time. Both the Rent Controller and the Subordinate Judge disbelieved that evidence. The two courts then proceeded on the basis of S. 9 (1) (g). It is extremely regrettable that although we have very learned decisions on the Rent Control Act, no one has taken the trouble to point out to the lower Courts in simple language what they are practically to do in connection with fixation of rent. Section 9 of the Rent Act deals with fixation of standard rent. It has two clauses, clause (1) which says in which cases standard rent is to be fixed. Clause (1) has got seven sub-clauses. The first sub-clause deals with the very simple case — where Schedule A is to apply. Therefore in a case where it is a question of whether Schedule A will or will not apply, if it is found that it will apply then sub-cl. (a) has got to be applied. Sub-cl. (b) deals with cases where there has been increase of municipal taxes during the currency of the tenancy requiring therefore an alteration of the rent by assigning the increased taxes amongst the tenants. Sub-clause (c) deals with the case of additions, alterations, and improvements entitling the landlord in certain cases to enhanced rent. Sub-clause (d) deals with the case of furnishing a house during a tenancy. Cases under sub-cls. (a) to (d) are not very common in our Court but if the general nature of these sub-clauses as pointed out, is remembered it will be easy for the Courts to find out the particular sub-clause necessary should any such case, arise.

Then we come to the three important sub-clauses (e), (f) and (g). Sub-clause (f) can only apply if the premises were wholly or substantially constructed after 31-12-1949. In other words, for very new premises a special provision has been made and in such cases this sub-clause alone must be used. I have found cases where Courts have proceeded to apply sub-cl. (f) although the evidence has been that the premises had been constructed prior to 1949 having been in existence perhaps in 1943 or 1944. This is entirely wrong. Leaving aside houses constructed after the 31st December, 1949, that is, absolutely new houses, almost all rent fixation cases, except those I have already mentioned as falling within sub-cls. (a) to (d), will fall either under sub-cl. (e) or sub-cl. (g). The distinction is this: if the premises were wholly or partially let out on 1-12-1941 then the Court must proceed on the basis of sub-cl. (e) except where as mentioned in that sub-clause the premises were let rent free or at a nominal rent or for some consideration other than money rent or in addition to money rent.

It has been repeatedly pointed out by this Court that nominal rent does not mean merely a low rent and the Courts must bear this in mind. Therefore, if it is found that the premises in whole or in part were actually let out in 1941 then evidence must be given to show what was the actual rent at that time. If for any reason, as it has been found in the present case by the Courts below, evidence is not such as can be believed by them or is not obtainable then "notional rent" will have to be found what would the approximate rent for the premises on 1-12-1941, in accordance with cl. (2) of the section. Clause (2) of the Section applies where the case falls under S. 9 (1) (e) and the rent paid on the 1-12-1941 has to be determined. Where, because the evidence is not obtainable or because the evidence of actual rent paid is not satisfactory, such actual rent paid on the 1st December, 1941 cannot be found then the "notional rent" on the 1st December, 1941 will have to be found in accordance with clause (2) from standard rent of like premises in December, 1941.

In a case in which the house is shown to have been let out on the 1st December 1941

no question of sub-cl. (g) can ever arise. It will be a case of either taking evidence of the actual rent or taking evidence and determining the 'notional rent' on 1-12-1941 in case the actual rent is not proved to the satisfaction of the Court or is not obtainable. It is when all these sub-clauses fail then and then only S. 9 (1) (g) can apply. It is the residuary sub-clause but before the residuary sub-clause can be applied the Courts must see that other sub-clauses do not apply. As regards onus of proof in a rent fixation case there is already a reported decision of this Court.

(3) In the present case, it is the distinct finding of the Courts below that the premises were let out on 1-12-1941. If the landlord's evidence to show what the actual rent was was such as would not carry conviction then the Courts should have proceeded to determine the "notional rent" on 1-12-1941 in terms of Cl. (2), instead of proceeding in this case under S. 9 (1) (g).

(4) The result, therefore, is that the Courts have proceeded entirely on a wrong principle and the decisions must be set aside and the matter remanded to the learned Additional Rent Controller for fixation of standard rent in terms of S. 9 (1) (e) read with S. 9 (2) as pointed out in this judgment. Each party will pay his own costs in this Rule.

B/K.S. Case remanded.

A.I.R. 1953 CALCUTTA 516 (Vol. 40, C. N. 196)

CHAKRAVARTTI C. J. AND S. R. DAS GUPTA J.

Chillu Kahar, Appellant v. Burn & Co. Ltd., Howrah, Respondents.

A.F.O.O. No. 110 of 1951, D/- 21-8-1952.

(a) Workmens' Compensation Act (1923), Ss. 3, 10 — Succession of accidents.

Section 10 in no way makes it impossible to hold a succession of accidents to be an accident within the meaning of S. 3. (Para 14)

Anno: W. C. Act, S. 3 N. 2.

† (b) Workmens' Compensation Act (1923), S. 3 — Series of tiny accidents.

Although an accident must be a particular occurrence which happens at a particular time, if it is to be an accident at all, it is not necessary that the workman should be able to locate it in order to succeed in his claim.

A series of tiny accidents, each producing some unidentifiable result and operating cumulatively to produce the final condition of injury, constitute together an accident within the meaning of S. 3. (1946) 1 All ER 429, (1921) 126 LT 49, Rel. on. Case law discussed. (Paras 14, 15)

Thus, where in the course of the performance of his duties, the eyes of a workman were exposed to the glare of the furnace and on each occasion they were struck by ultra violet rays which they absorbed, impairing and affecting his vision in slight imperceptible degrees, till at last the gradually worsening condition reached a stage of a serious defect of vision:

Held that the workman suffered a personal injury, namely, the affection of his eyes, caused to him by an accident. (Para 19)

Anno: W. C. Act, S. 3 N. 2.

(c) Precedents — Decisions of House of Lords and Court of appeal.

The Courts in India are not bound by the decisions of either the House of Lords or the Court of Appeal and if the reasoning of the earlier decisions of the Court of Appeal appeared to be the better reasoning, there is nothing to prevent them from following those decisions rather than the later decision of that Court or the decisions of the House of Lords. (Para 13)

Anno: C.P.C., Pre. N. 15.

(d) Workmens' Compensation Act (1923), Ss. 1, 3 — Stretched construction — (Interpretation of Statutes).

With the progress of the times, the conception of the circumstances in which the workman is entitled to compensation has widened and become more and more liberal. Even if, therefore, the view taken by the highest courts in recent times, on facts which are more or less similar to the facts one has to deal with, be a view which only a stretched construction of the Act can bear, it will not be wrong to follow it so long as it is not something violently opposed to fundamental principles. (Para 16)

Anno: W. C. Act, S. 1 N. 2; S. 3 N. 2.

(e) Workmens' Compensation Act (1923), S. 19—Findings of fact—Duty of Commissioner.

The Commissioner who is charged with the duty of finding facts should not merely lift propositions from the statute itself and put them either in the affirmative or in the negative as his findings. Where he does not even attempt to give his finding on necessary facts, the High Court can go behind his judgment to the evidence in the case. (Para 17)

Phanindra Kumar Sanyal with Jitendra Mohan Sen Gupta, for Appellant; Nalini Kanta Mukherjee, for Respondent.

CASES CITED:

(A) (1946) 174 LT 233: (1946) 1 All ER 429
(B) (1921) 90 LJKB 1340: 126 LT 49
(C) (1905) 74 LJKB 610: (1905) 2 KB 232
(D) (1887) 57 LJQB 24: 12 AC 518
(E) (1903) 72 LJKB 787: 1903 AC 443
(F) (1926) 92 LJKB 676: (1926) 1 KB 497: 18 BWCC 535
(G) (1919) 88 LJPC 85: (1919) AC 765
(H) (1909) 2 BWCC 20
(I) (1912) 5 BWCC 305
(J) (1915) WC & I Rep. 11: 31 TLR 156

CHAKRAVARTTI, C. J.: This appeal raises an important question under the Workmen's Compensation Act on which, I confess, I have not found it easy to come to a satisfactory conclusion.

(2) The appellant, Chillu Kahar, was a workman under the respondents, Messrs. Burn and Company Limited, but in what exact capacity he was employed is not clear. The respondents alleged that he was a hammerman, but the appellant denied that allegation, although subsequently he appears to have admitted it. His positive case, however, is that his duty was to "join iron into the furnace and to take it out on opening the door of the furnace'.' The respondents' case that he was a hammerman and worked at some distance from the furnace probably means that his duty was to beat heated pieces of iron and steel into shape. It may well have been that the appellant was a hammerman, but he was himself required to throw into the fire and draw out the pieces of iron and steel which he was required to beat up. Unfortunately, there is no clear find-

ing on the matter and the learned Commissioner does not seem to have realised the necessity of arriving at a clear finding.

(3) Be that as it may, the appellant's case is that the duties of his job were such that his eyes were exposed to the glare of the furnace and during the twenty years that he had served the respondents, that exposure had slowly impaired his eyesight till a crisis came on 9-3-1950, when there was a sudden flash which completely blinded him in both of his eyes. It was on the footing of such continuous exposure to high light and the particularly intense flash on 9-3-1950, with the effect of completely blinding him, that the appellant based his claim for compensation.

(4) The defence of the respondents was, as I have already stated, that the appellant had been a mere hammerman. Their further case was that the defect of his eyesight was due merely to old age. Besides stating these two facts the written statement contained no other averment. It ended up with the submission that the case of the appellant was a purely speculative one and was liable to be dismissed.

(5) The record of the case on which we have to decide the appeal is in an extremely unsatisfactory condition. Evidence was not led on material points or if led, not properly recorded. Such record as the learned Commissioner made is extremely scrappy in character and deals only with superficial matters. Nevertheless, the parties agreed that we might give our decision on the findings of the learned Commissioner, as they were.

(6) The findings of the learned Commissioner are, (a) that the appellant had lost 50 per cent of his eye-sight, (b) that such partial loss of eyesight had not been caused by old age, but was the result of continuous exposure to the high light of the furnace in the course of the appellant's employment under the respondents and (c) that nothing extraordinary had happened on 9-3-1950, which in any way aggravated the malady.

(7) Having come to the findings which I have summarised above the learned Commissioner proceeded to consider whether the facts found by him entitled the workman to claim that he had suffered an accident which had resulted in an injury. The answer, the learned Commissioner thought, must be in the negative. He pointed out that it was not sufficient for the appellant to establish that he had lost his vision in the course of his employment under the respondents, but he was required also to prove that the loss had been caused by an accident. As regards accident, the learned Commissioner proceeded to observe that it must be an accident which took place on a particular day and consequently as he had found that the allegation of a particularly intense flash on 9-3-1950, had not been proved, the appellant could make no claim on the basis of an accident, although his eyes might gradually have reached their present condition on account of the continuous action of the glare of the furnace upon the retina. It appears that the decision of the Court of Appeal in England in the case of — 'Fitzsimons v. Ford Motor Co. Ltd.', (1946) 1 All E R 429 (A), was cited before the learned Commissioner, but he held that the principles of that case did not apply. Accordingly, the learned Commissioner dismissed the appellant's application.

(8) In support of the appeal, it was contended by Mr. Sanyal that the learned Commissioner was wrong in holding that the appellant was bound to fail unless he could prove a definite accident which had taken place on a particular day and which had resulted in the injury of which he complained. According to Mr. Sanyal, not merely a single accident but a succession of accidents also were accidents contemplated by the Act and if an injury, physical or physiological, was caused by a continuing series of successive accidents, each small in character but resulting in their cumulative effect in the injury of which the workman complained, there would be an accident to furnish a proper foundation for the claim. That principle, Mr. Sanyal continued, had been laid down by the English Court of Appeal in the very decision cited before the learned Commissioner, but its effect had not been correctly appreciated. In addition to that decision Mr. Sanyal also referred us to the decision of the House of Lords in the case of — 'Burrell & Sons Ltd. v. Selvage', (1921) 126 L. T. 49 (B), on which the decision of the Court of Appeal was wholly based.

(9) On behalf of the respondents, our attention was drawn to a number of cases which had no bearing on the point involved in the present case. Those citations may, therefore, be left out of account. But what was contended on the merits of the case was that an accident, in order to be a proper foundation for a claim under the Workmen's Compensation Act, had to be a precise and definite occurrence which had taken place on a particular and identifiable day, so that in respect of it a notice could be given under S. 10. A succession of tiny but unidentifiable accidents could never, therefore, be an accident within the meaning of the Act, since none of them in itself caused the injury as required by S. 3 of the Act since with respect to none of them, taken individually, a notice under S. 10 could possibly be given. It was accordingly argued that cases of gradual affection of the general health or an organ of the body by the action of a series of successive accidents were outside the contemplation of the Workmen's Compensation Act.

(10) The question is one which as I have already said, is not easy to decide and the decisions found in the books do not certainly render the task easier. Ordinarily, one should think that an accident connotes something abnormal or out of the way. I concede that an accident must be an accident from the point of view of the workman and if it is an occurrence which was accidental in the sense of being unexpected or undesigned. so far as he was concerned, the necessary elements of an accident would be present. But, on the other hand, one cannot forget that the duties of several kinds of employment involve in their very nature certain incidents which the workman going for such employment accepts as the normal risks of his job. One should therefore, think that if in the course of the employment nothing happens to the workman except the incidents which are inherent in the duties of the job, he would not be entitled to compensation on the basis of an accident, for the simple reason that the normal incidents of the duties of the job must have been taken into account in adjusting the wages and could not be compensated for again. From the commonsense point of view, therefore, it would seem that an accident could be said to occur only when something other than the normal incidents of a job came to happen and that resulted in an injury.

(11) But the cases have travelled far away from the plain man's point of view and refinements of various degrees of subtlety have been introduced from time to time. It is interesting to notice that some of these refinements appeared so baffling to the English Court of Appeal on one particular occasion that the learned Lord Justices

considered it expedient to leave the definition of "accident" alone and to proceed to decide the case before them on the simple ground that there having been no particular or identifiable occurrence on any particular day with respect to which a notice could be given, there was no accident within the meaning of the Act. I am referring to the decision in — 'Steel v. Cammell, Laird & Co., Ltd.', (1905) 2 K. B. 232 (C), decided by Collins M. R., Mathew and Cozens-Hardy, L. JJ. Collins M. R. referred to the definition or rather the exposition of "accident", as given by Lord Halsbury in the case of — 'Hamilton, Fraser & Co. v. Pandorf Co.', (1887) 12 A. C. 518 (D), where it had been stated that an idea of something fortuitous and unexpected was involved in the word. In a later case, decided by the House of Lords in — 'Fenton v. Thorley & Co.', (1903) A. C. 443 (E), Lord Macnaghten expressed his regret that the word "fortuitous" should have been applied to the term "injury by accident" in the Workmen's Compensation Act and his Lordship thought that the element of haphazard should be excluded from the concept of accident. Faced with the definition given by Lord Halsbury and the criticism of that definition made by Lord Macnaghten, Collins M. R. observed that if he was to conceive of an accident from which the element of haphazard was to be eliminated, he was required to perform a feat beyond his powers and therefore he would decide the case as man in the street. This conflict of opinion as to what the concept of accident really comprises has grown with the passing of time and is no longer limited to whether an element of haphazard is or is not involved. Of the many points on which the decisions in the books speak in two voices, the one before us is not the simplest.

(12) The facts in the case of — '(1946) 1 All E. R. 429 (A)', on which Mr. Sanyal relied were that the workman concerned was employed as a rotary fettler and his work consisted in holding, tightly gripped in the left hand, a hand machine, which was electrically operated and vibrated 2,800 revolutions a minute, whilst with his right hand he pressed it against the material to be cut, using the weight of his body to increase the pressure. The performance of the duties of a rotary fettler produced in the workman the condition known as "Raynaud's disease" and the medical evidence was that each vibration caused by the rapidly rotating instrument was a tiny blow to the appellant's hand and arm, transmitted to the nerves causing small damage to their tissues, and ultimately cutting off the flow of blood needed to keep the hand in a healthy condition. On those facts, the Court of Appeal held that the principles laid down by the House of Lords in the case of — '(1921) 126 L. T. 49 (B)', applied. The facts in 'Burrell's case (B)', were that a young girl, employed as a finisher of shell-adapters substained in the cross of her work abrasions on her hands from day to day and those ultimately resulted in blood-poisoning, leading to arthritis. The House of Lords held that the injury had been caused by accident and the accident was no less accidental because it occurred on a series of occasions instead of one. In their Lordships' view, even if a disease or injury was not due to one specific or definite accident but to a series of accidents, each one of which was specific and ascertainable though its actual influence and the resulting illness could not be precisely fixed, the disease or injury would be one caused by an accident and the workman would be entitled to the benefit of the statute. The Court of Appeal thought that in the case before them also there had been a series of accidents, although the precise effect of each could not be ascertained and as those accidents in their cumulative effect had caused the ruination of the workman's nerves, there was an accident within the meaning of the Act as explained by the House of Lords. The Court brushed aside somewhat abruptly three of its own earlier decisions on the ground that they were inconsistent with the decision in Burrell's case.

(13) Mr. Sanyal contended that he was entitled to invoke the principles laid down by the House of Lords and applied by the English Court of Appeal in aid of the workman in the present case. On behalf of the respondents, our attention was drawn to the case of — 'Williams v. Guest, Keen & Nettlefolds, Ltd.', (1926) 1 K. B. 497 (F), one of the cases decided by the English Court of Appeal which that Court in 'Fitzsimons's case (A)', declined to follow. It is unfortunate that the Court of Appeal should not have paid greater attention to its own earlier decisions, at least to the case of — 'Williams v. Guest, Keen & Nettlefolds', (F), because in that case the Court had attempted to distinguish the decision of the House of Lords in — '(1921) 126 L. T. 49 (B)'. Technically, we are not bound by the decisions of either the House of Lords or the Court of Appeal and if the reasoning of the earlier decisions of the Court of Appeal appeared to us to be the better reasoning, there would be nothing to prevent us from following those decisions rather than the later decision of that Court or the decisions of the House of Lords. Still, however, if the facts of the present case bring it fairly and squarely within the framework of the facts of either the later case before the English Court of Appeal or the case decided by the House of Lords, we should certainly be slow not to follow those decisions of high authority.

(14) Before proceeding further, I may dispose of a special point taken on behalf of the respondents. It will be remembered that their learned Advocate contended that since S. 10 required a notice of the accident to be given, an accident within the meaning of the Act could only be an occurrence of a precise and identifiable nature which took place on a particular day. That argument is not unfamiliar in cases under the Workmen's Compensation Act and I have already pointed out that the Court of Appeal in England gave effect to it, almost in despair, in the case of — '(1905) 2 K. B. 232 (C)'. But as pointed out by Atkin L. J., as he then was, in — '(1926) 18 B. W. C. C. 535 at p. 546 (F)', that argument was disposed of by another decision of the House of Lords in — 'Innes or Grant v. Kynoch', (1919) A. C. 765 (G). That was a case where a workman contracted blood-poisoning from a kind of germ which was frequently to be found in bone dust that he had to handle in the course of his employment and system by some crack in the skin. Dealing with that state of the facts, Lord Birkenhead observed that although an accident must be a particular occurrence which happened at a particular time, if it was to be an accident at all, it was not necessary that the workman should be able to locate it in order to succeed in his claim. That, if I may say so with respect, seems to me to be good reason and a good answer to the argument drawn from the necessity of notice and accordingly I would hold that S. 10 in no way makes it impossible to hold a succession of accidents to be an accident within the meaning of S. 3.

(15) Reverting now to the principal question in the case, I would repeat once again that it is extremely difficult to say positively, on the merits,

whether the facts of a case of the present nature do or do not disclose an accident. It is true that a series of tiny accidents, each producing some unidentifiable result and operating cumulatively to produce the final condition of injury, have been held to constitute together an accident within the meaning of the corresponding English Act. At the same time, there are numerous cases in the books, almost of equal authority, which have taken the view that no accident can properly be said to be involved in such facts. To take but three cases nearest in their facts to the present case, paralysis caused by riding a carrier tricycle over the space of many years which imposed a strain on the nerves of the leg, has been held not to be the result of an accident within the meaning of an accident — 'Walker v. Hockney Brothers', (1909) 2 B. W. C. C. 20 (H) eczema caused gradually by exposure to fumes or splashes of chemicals has also been held to be not due to an accident as contemplated by the Act — 'Evans v. Dodd', (1912) 5 B. W. C. C. 305 (I); and, lastly, dermatitis caused in a barber's assistant who had to handle shampooing materials has also been held to be not due to an accident — 'Petschett v. Preis', (1915) 31 T. L. R. 156 (J). I should think that it could well be said in the first of the cases to which I have referred that the nerves of the workman's leg suffered a series of tiny accidents, just as in the case dealt with by the Court of Appeal in — '(1946) 1 All. E. R. 429 (A). So also could, I imagine, a succession of tiny accidents be made out in the other two cases. It is therefore hardly possible to say that the principle which found with the Court of Appeal in the case relied on by Mr. Sanyal has been uniformly followed, or that any particularly impressive reason can be given in support of the conclusion adopted.

(16) Reading the reports in the books, it is impossible to avoid the feeling that a desire to assist a workman in distress, who has undoubtedly suffered from causes arising out of his employment, has often led to a stretching of the language of the statute. Even in the cases where the decision was in favour of the workman, the observations of the learned Judges make it perfectly clear that they felt the pressure of reason on the other side and perhaps decided in favour of the workman in pursuance of what they conceived to be the policy of the Act. Mr. Sanyal pointed out, and in my opinion rightly, that with the progress of the times, the conception of the circumstances in which the workman is entitled to compensation has widened and become more and more liberal. Even if, therefore, the view taken by the highest courts in recent times, on facts which are more or less similar to the facts one has to deal with, be a view which only a stretched construction of the Act can bear, it will not be wrong to follow it so long as it is not something violently opposed to fundamental principles.

(17) That takes me to what the actual facts in the present case are. Unfortunately, the learned Commissioner considered it sufficient to express his finding in terms of the Act and say that the workman lost his vision in the course of his employment under the respondents. It is much to be regretted that the court, charged with the duty of finding facts, should not find them as they ought to be found, but should merely lift propositions from the statute itself and put them either in the affirmative or in the negative as its findings. It was necessary in the present case for the learned Commissioner to find affirmatively what actually the duties of the workman were and in what manner the causes arising out of his duties had impaired his eyesight. He has not even attempted the task, but merely said that the affection of the appellant's eyes was not due to old age, but was due to causes traceable to the performance of his duties. In those circumstances, we have to go behind the judgment of the learned Commissioner to the evidence in the case and the best evidence is that of the appellant's doctor who is a qualified eye specialist. In fact, this evidence does not appear to have been seriously challenged. According to the doctor, the appellant is suffering from retrobulber optic neuritis. His opinion is

> "this condition can devolve if a man works in strong artificial light for a long time. There is absorption of ultra violet rays if a man works in a strong artificial light. This process goes on increasing gradually leading to destruction of tissue fibres".

And further:

> "In this case trauma is from strong rays of the artificial light".

(18) The substance of the medical evidence therefore is that in the course of the performance of his duties, the eyes of the appellant were exposed to the glare of the furnace and on each occasion they were exposed they were struck by ultra violet rays which they absorbed. The case therefore can be said to be akin to the case before the House of Lords, where the girl suffered tiny cuts on successive days in the course of cleaning the shell and each time she suffered a cut, she imbibed some poison, or to the case before the Court of Appeal where, each time the machine vibrated, some damage was caused to the nervous system of the workman. The case may even be said to be akin to those cases where the workman imbibed or assimilated some foreign matter into his system in tiny measures through a long course of days, but all in the course of his employment. Applying the principles applied in the type of cases to which I have referred, it can I think be said in the present case that throughout the period of the workman's service, whether it was twenty years as he contended, or mere seven years as the respondents alleged, there were successive assaults of high light on his eyes and in the case of each assault, his eyes absorbed some ultra violet rays which impaired and affected his vision in slight imperceptible degrees, till at last the gradually worsening condition reached a stage of a serious defect of vision. The accident in this case would therefore be the sum total of the assaults on the retina of the workman's eyes on the daily occasions when the high light struck them and the injury would be the final condition of his eyes, although it was reached by slow degrees. It would also perhaps be an accident in the popular sense, because when one gazes upon fire or on strong light, one does not expect that any affection of his eyes would be caused, and probably in the majority of cases such affection would not be caused. When it is in fact caused in an individual, it is caused accidentally and is thus the result of an accident.

(19) In my view, the weight of authorities, particularly of recent date, is in favour of the view which I have indicated, and I prefer to adopt it in favour of the contrary view contended for by the respondents on the strength of certain older decisions. I accordingly hold that the appellant suffered a personal injury, namely, the affection of his eyes, caused to him by an accident, namely, the successive assaults on his eyes by the high light of the furnace and the aborption on each occasion of ultra violet rays, causing in their

cumulative effect, the injury. The third element, namely, arising out of and in the course of employment, presents no difficulty, since the learned Commissioner has found that the exposure to the high light was caused by the appellant working under the respondents. The result of the above finding is that this appeal must be allowed.

(20) There remains then the further consideration as to what the amount of compensation would be. The workman originally claimed only a sum of Rs. 17-8-0 per month, but later on substituted for that claim a claim of a consolidated amount of Rs. 1,470/-. It is admitted by the learned Advocate for the respondents that if the appellant's claim is allowed, he cannot dispute the figure of the compensation money, since it is in accordance with the schedule.

(21) In the result, therefore, this appeal is allowed, the judgment and the order of the Commissioner are set aside and the appellant's application for compensation succeeds. The appellant will be entitled to recover from the respondents a sum of Rs. 1,470/ as compensation.

(22) In view, however, of the extreme difficulty of the point involved, we would make no order for costs either before the Commissioner or in this appeal.

(23) S. R. DAS GUPTA J.: I agree.

B/D.R.R. Appeal allowed.

A.I.R. 1953 CALCUTTA 520 (Vol. 40, C. N. 197)

BOSE J.

Dr. Satish Chandra Bhattacharjee and another, Petitioners v. R. N. Bose and others, Opposite Party.

Civil Rule No. 1143 of 1952, D/- 4-7-1952.

(a) Municipalities — Bengal Municipal Act (15 of 1932), S. 56 (2) — Revision of electoral roll — (Bengal Municipal Election Rules, Rr. 1 (6), 16 (2)).

The old Registering Authority is competent to revise electoral roll under R. 16, Bengal Municipal Election Rules. (Para 5)

(b) Constitution of India, Art. 226 — "Directions, orders or writs".

The prayers of a petition under Art. 226 should be as specific and definite as they can be, but the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for. AIR 1951 SC 41, Foll. (Para 6)

(c) Municipalities — Bengal Municipal Election Rules, R. 16 (2) — Non-compliance — (Bengal Municipal Act (15 of 1932), S. 26).

Before an election under S. 26 and other sections specified in R. 16 is held, revision of electoral roll is necessary. Omission to revise the electoral roll makes the holding of such election contrary to law. (Paras 8, 9)

Nani Coomar Chakravarty, for Petitioners; Sankar Banerjee, Standing Counsel, and Mihir Kumar Sarkar, (for No. 1); Diptakana Bose, (for No. 2); Santosh Kumar Bose and Arun Prokash Chatterjee (for Nos. 3 to 6), for Opposite Party.

CASE CITED:

(A) ('51) AIR 1951 SC 41: ILR (1951) Hyd 461 (SC)

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ directing respondents 1 and 2 to forbear from giving effect to certain orders dated 1st April, 10th April and 16th April 1952 and to act and proceed according to law in the matter of holding certain municipal elections.

(2) The case of the petitioners is that on 16-12-1951 the electoral rolls for the fourth General Elections of the 5 wards of the Garden Reach Municipality were finally published by respondent 2 who is the Chairman of the said Municipality. As the petitioners did not pay up the rates and taxes of the Municipality and were in arrears in respect thereof, their names did not find place in the said finally published electoral rolls. The fourth General Election was filed on 16-3-1952. The last date for filing nomination papers of Wards Nos. 1 and 4 was fixed on 9-2-1952. The scrutiny was held on 18-2-1952 and the nomination papers of 11 candidates in respect of Ward No. 1 which had four seats were found valid and in respect of Ward No. 4 which had seven seats the nomination papers of 14 candidates were declared valid, and respondent 2 published a list of the candidates under R. 17 (5), Bengal Municipal Election Rules. One Aswini Kumar Paul preferred appeals before the Magistrate at Alipore, under R. 20 (1) and the learned Magistrate ordered that the names of all the candidates excepting three in respect of Ward No. 1 and excepting six in respect of ward No. 4 should be expunged.

The result was that the 9 candidates whose nominations were upheld as valid by the Magistrate were declared to have been duly elected under R. 22 (3), Bengal Municipal Election Rules. But the names of these elected candidates have not been published in the Calcutta Gazette by the Government as contemplated in R. 44 of the Rules. The newly elected body of Commissioners have not started functioning nor have they elected any Chairman and vice-Chairman as provided by S. 45, Bengal Municipal Act. On 1-4-1952, respondent 1 purporting to act in pursuance of R. 2 (1) (b) fixed 31-5-1952 as the date for holding election of one commissioner in each of the Wards Nos. 1 and 4 of the said municipality. Respondent 2 published the said order of respondent 1 on 10-4-1952 for the information of the rate-payers. On 16-4-1952, respondent 2 fixed 26-4-1952 as the last date for submitting nomination papers for holding the said election of one Commissioner in each of the said wards Nos. 1 and 4. Prior to that the petitioners on 15-4-1952 wrote a letter to respondent 2 to the effect that although at the time of preparation of the last electoral roll they were defaulters for payment of taxes, they had since then paid all arrears of taxes and had, therefore, become entitled to be enrolled as voters and to stand as candidates for election as commissioners in respect of the said wards Nos. 1 and 4.

It was further pointed out in this letter that before holding a fresh election under S. 26, Bengal Municipal Act the electoral roll should be revised as contemplated in R. 16, Bengal Municipal Election Rules and unless this was done no fresh election could be held under S. 26 of the Act. On 22-4-1952 respondent 2 intimated to the petitioners that as he had been ordered by respondent 1 to hold the election on 31-5-1952 he could not take any action on the representation made by the petitioners by their said letter dated 15-4-1952. The petitioners thereupon applied to this Court on 23-4-1952 and obtained the Rule nisi.

(3) On 19-5-1952 four of the elected commissioners applied to this Court to be added as respondents to this application for the purpose of contesting this application, and an order was made on that date adding them as parties respondents.

(4) Mr. Nani Coomar Chakravarty, the learned Advocate for the petitioner, has challenged the validity of the orders and notifications dated 1st April, 10th April and 16th April, 1952. The main ground urged by him is that without revising the electoral roll as contemplated by R. 16 (2), Bengal Municipal Election Rules, respondents 1 and 2 had no jurisdiction to make the said orders or publish the said notifications. It is submitted by Mr. Chakravarty that the names of the elected commissioners should have been published as required by S. 50, Bengal Municipal Election Act and R. 44 Bengal Municipal Election Rules and after that these newly elected commissioners should have started functioning and after electing a Chairman and a Vice-chairman the Commissioners should have appointed a committee to function as "Registering Authority" and this Registering Authority should have revised the electoral roll before holding election in respect of Wards Nos. 1 and 4 or fixing the date for submission of the nomination papers. It is argued that it is only the newly elected Commissioners who have the power to revise the electoral roll and without such revision no date for election can be fixed or any election can be held under S. 26 of the Act.

(5) Mr. Santosh Kumar Basu the learned Advocate for respondents 3 to 6 has, however, contended that as under S. 56 (2) of the B. M. Act the old commissioners and the old Chairman and Vice-chairman continue to be in office until the date of the first meeting of the newly formed body of commissioners at which a quorum is present the "Registering Authority" as defined in R. 1 (5) and as constituted by the old Chairman (respondent 2) and 2 commissioners under S. 21 of the Act read with R. 2 (3) of the Rules had been functioning at all material times and are still functioning as such and therefore this old Registering Authority was competent to revise the electoral roll under R. 16, and so the contention of the petitioners that no electoral roll can be prepared except by "Registering Authority" constituted by the newly elected body of commissioners is fallacious. It appears to me that the contention of Mr. Basu is correct. The effect of S. 56 (2) of the Act is to preserve the continuity of the office and functions of the members of the old 'Registering Authority' and in my view this "Registering Authority" was competent to revise the electoral roll at all material times.

The petitioners did ask for revision of the electoral roll by their letter of 15-4-1952 but the Chairman had definitely stated in his reply that he could not take any action on the representation of the petitioners. The order fixing the election was made on the 1st April, and it was made known to the public on the 10th of April. Immediately thereafter the petitioners protested in their letter of 15th April. Their representation was turned down on the 22nd and on the very next day they moved this Court for reliefs. The last date for submitting nomination papers was the 26th and so the only course open to them was to apply to this Court. It has been contended by Mr. Santosh Coomar Basu that there are no facts stated in the petition showing that the petitioners have the qualifications as required by S. 23 of the B. M. Act which entitled the petitioners to have their names included in the electoral roll as voters in respect of any wards in the municipality. It is submitted that the petitioners should have stated affirmatively that they possess each of the requisite qualifications for being a voter in the municipality. But all that is stated in the petition is that the petitioners have paid off the arrears of rates and taxes and as such they are entitled to vote at an election of commissioner of the said municipality. It is, therefore, further submitted that the petitioners have not disclosed in the petition sufficient interest to maintain this application.

I am unable to accede to these contentions of Mr. Basu. The net effect of paras. 3 and 4 of the petition is that the only disqualification that disabled the petitioners from being included in the electoral roll as voters was that they had defaulted in payment of the rates and taxes of the municipality. But that disability has been got over by the petitioners by paying off the arrears and they are now fully qualified to be enrolled as voters and to stand as candidates for election as commissioners of the municipality. There is no affidavit either by respondent 1 or respondent 2 disputing the statements in para. 4 of the petition or suggesting that the petitioners do not possess all the requisite qualifications. Respondents 3 to 6 have filed a counter-affidavit but the only statement that is made therein with reference to para. 4 of the petition is that the said respondents are not aware of the truth of what is stated in para. 4 of the petition. In my view the petitioners have disclosed sufficient interest to maintain this application.

(6) It was next submitted by Mr. Basu as also by Mr. Shankar Banerjee who appears for respondent 1 that as the petitioners have not specifically asked for revision of the electoral roll and inclusion of their names in the revised roll they cannot ask for the other reliefs which they have claimed in the several prayers of the petition. It may be pointed out that the main grievance that is agitated in the petition is the failure or neglect to revise the electoral roll and to prepare a fresh electoral roll for the purpose of holding fresh election of the commissioners. That is the burden of the entire application. In the prayers of the petition the petitioners have asked for cancellation of the orders and notifications dated the 1st April, 10th April and 16th April and they have also asked for "issue of orders and/or directions on the respondents to act and proceed according to law in the matter of holding election". This general prayer is wide enough to embrace within its scope the prayer for revision of the electoral roll and inclusion of the names of the petitioners as voters in such roll. It is true that some of the cases of this Court have held that the prayers of the petition must be specific but it has also been pointed out by Mukherjee J. of the Supreme Court that absence of proper prayers in the petition moved under Art. 32 of the Constitution does not take away the discretion of the Court to grant suitable reliefs in appropriate cases.

It was observed by Mukherjee J. in the said case of — 'Charanjit Lal v. Union of India', AIR 1951 SC 41 at p. 53 (A), as follows:

"Anyway, Art. 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular

cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for."

These observations made by Mukherjee J. are equally applicable to the application under Art. 226 of the Constitution. It is no doubt desirable that the prayers of a petition should be as specific and definite as they can be, but the Court is not powerless to afford necessary reliefs in proper cases.

(7) It has been further contended by Mr. Santosh Kumar Basu that as the two commissioners who constitute the "Registering Authority" along with respondent 2 are not parties to this application, no direction for revision of the electoral roll can be given by this Court in their absence. I do not think that there is much substance in this contention. The petitioners have complained of only the acts of respondents 1 and 2. The order fixing the date of election was by respondent 1. The notification dated 10th April which published the order of respondent 1 fixing the date of election, was issued under the signature of respondent 2 as chairman of the Municipality. The notification fixing the last date for submitting nomination papers for holding the fresh election was also issued under the signature of respondent 2. Consequently the issue of appropriate writ and directions against respondents 1 and 2 will give effective reliefs to the petitioners. Therefore the non-joinder of the two commissioners is not fatal to the maintainability of the application. If this point had been taken in the affidavits, this alleged defect could have been got over by serving notice of the Rule on the two commissioners.

(8) It is true that the order dated 1-4-1952 which was made by respondent 1 fixing 31-5-1952 as the date for holding the election of commissioners in respect of wards 1 and 4 of the municipality was a good and valid order at the time it was made. But it is clear that omission to revise the electoral roll as required by R. 16 (2) of the B. M. E. Rules made the holding of such election contrary to law and as such the petitioners are entitled to seek the interference of this Court by directing respondents 1 and 2 to forbear from giving effect to the impugned orders and notifications issued by them for the purpose of holding fresh elections.

(9) It was contended both by Mr. Basu and Mr. Banerjee that the election fixed on 31-5-1952 is merely a continuity of the General Election which was fixed to be held by 16-3-1952 and as such the finally published electoral roll of 16-12-1951 will hold good and is available for this fresh election and no revision of electoral roll is necessary. This contention appears to me to be without substance, inasmuch as the order of the Additional District Magistrate of 1-4-1952 makes it quite clear that the fresh election that is to be held, is one under S. 26 of the B. M. Act. Further Rule 16 provides in definite and unambiguous terms that before an election under S. 26 and other sections specified therein is held, revision of electoral roll is necessary and shall be made.

(10) It is to be noted that the date for holding the election has passed and therefore the entire proceedings for holding the contemplated election have become infructuous. It is therefore not necessary now to issue any writ directing the respondents to forbear from giving effect to the orders and notifications dated 1st April, 10th April and 16th April, 1952.

(11) In my view this petition should succeed and the Rule is made absolute to the extent that respondents 1 and 2 are directed to act and proceed according to law in the matter of holding election of a commissioner in respect of each of the Wards Nos. 1 and 4 of the Garden Reach Municipality. I make no order as to costs.

A/D.H. Application allowed.

A.I.R. 1953 CALCUTTA 522 (Vol. 40, C. N. 198)

MITTER AND SEN JJ.

Raj Bahadur, Petitioner v. Legal Remembrancer to the Government of West Bengal and others, Opposite Party.

Criminal Misc. Case No. 14 of 1953, D/- 17-2-1953.

(a) Constitution of India, Art. 226 — Application in case where minor is incarcerated.

Where a girl incarcerated is a minor, the only person competent to move the High Court in habeas corpus under Art. 226 is one who is entitled either to the custody of the child or to represent her legally. Where, however, such a person is shown to be incapable of making the application, or where no such person exists, the question of the right of a friend to make such an application may properly arise. But, in that case, it must be shown by an affidavit, firstly, that no one who is legally entitled to the custody of the child or to represent her exists, or that such a person, if any, is unable, for reasons to be set out in the affidavit, to make such an application and, secondly, that the applicant himself is interested in the welfare of the child. (Para 3)

(b) Constitution of India, Article 22 — "Arrest" does not include removal — (Bengal Suppression of Immoral Traffic Act (6 of 1933), S. 13).

The word "arrest" in Art. 22 has a much restricted meaning and does not include the removal of a minor girl from a brothel or from premises which are used as a brothel under S. 13 of the Bengal Suppression of Immoral Traffic Act, 1933. AIR 1953 SC 10, Rel. on. (Para 6)

(c) Bengal Suppression of Immoral Traffic Act (6 of 1933), Ss. 13, 14, 15 and 17 — Validity of — (Constitution of India, Art. 21).

The words "procedure established by law" in Art. 21, Constitution of India, refer to any enactment which is not repugnant to the Constitution. Hence, Bengal Act 6 of 1933 is attracted by Art. 21, provided, there is nothing in the Bengal Act which is repugnant to the Constitution. The scheme of the Bengal Act is to provide for salvage of such children as are being exploited or are likely to be exploited for immoral purposes. Article 23 of the Constitution provides for prohibition of traffic, 'inter alia', in human beings, which would include traffic in women and children for immoral or other purposes. There is thus nothing in the Bengal Act which can be said to infringe either Art. 21 or Art. 22 of the Constitution. AIR 1950 SC 27, Foll. (Para 7)

(d) Bengal Suppression of Immoral Traffic Act (6 of 1933), S. 17 (2) — "Her case", meaning of.

The use of the words "her case" in S. 17 (2) suggest that the paramount consideration for the Court is her welfare and her future custody and that the girl's 'case' in that sense has to be disposed of in accordance with the provisions of the Act. (Para 8)

Jitendra Nath Ghose, for Petitioner; J. M. Banerjee, for Opposite Party.

CASES CITED:

(A) ('53) AIR 1953 SC 10: 1952 SCA 791: 1953 Cri LJ 130 (SC)

(B) ('50) AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383 (SC)

MITTER J.: This is an application under Art. 226 of the Constitution for a Writ in the nature of Habeas Corpus, directing the production of one Panna Bai, now in the custody of the Lady Superintendent of the Government Rescue Home.

(2) The petitioner claims to be known to the said Panna Bai. His case is that as by reason of her incarceration, the girl is unable to move this Court, he is entitled to ask for appropriate orders for her release.

(3) The first point which falls to be determined is whether or not the petitioner is competent to make this application. There can be no doubt that the girl concerned is a minor. As to her age, the evidence of Dr. Kabir Hossain appears to be conclusive. The girl being a minor, it seems to us that ordinarily the only person competent to move the Court in habeas corpus is one who is entitled either to the custody of the child or to represent her legally. Where, however, such a person is shown to be incapable of making the application, or where no such person exists, the question of the right of a friend to make such an application may properly arise. But, in that case, it must be shown by an affidavit, firstly, that no one who is legally entitled to the custody of the child or to represent her exists, or that such a person, if any, is unable, for reasons to be set out in the affidavit, to make such an application and, secondly, that the applicant himself is interested in the welfare of the child. The present applicant, in our view, does not appear to be interested in the welfare of the child, which is the paramount consideration here. Indeed, the applicant's interests appear to be in conflict with the well-being of the child who was recovered from a brothel and subsequently detained at the Rescue Home under the provisions of the Bengal Suppression of Immoral Traffic Act, 1933. We would hold, therefore, that the applicant is incompetent to present this application. At the same time, we have decided to dispose of this petition on its merits as well.

(4) Mr. Ghose on behalf of the applicant has argued that Ss. 13, 14, 15 and 17 of the Bengal Suppression of Immoral Traffic Act, 1933 (Bengal Act 6 of 1933) offend against Arts. 21 and 22 of the Constitution and that, therefore the detention of the girl is illegal. In order to appreciate the contention put forward by Mr. Ghose, it is necessary to set out the facts leading to this application.

(5) In October last year, the girl Panna Bai was recovered by an Inspecotr of Police from premises No. 43/1, Bowbazar Street, Calcutta, where she carried on the profession of a dancer. The house concerned was a brothel. In consequence of the recovery of the girl, the police sent up a woman named Tara Bai and one Md. Siddique for trial under Ss. 8 and 10 of the Bengal Suppression of Immoral Traffic Act, 1933, on the allegation that offences punishable under the said sections had been committed by them in respect of the said child. It was in connection with that prosecution that the present applicant was summoned as a prosecution witness. The girl Panna Bai was also a witness in the said case. Acting under S. 13 of the Bengal Act, the Inspector of Police, who was responsible for the recovery of the girl, removed her from the said address in Bowbazar Street and produced her before a learned Magistrate who, on 27-1-1953, made the following order:

"The girl Panna Bai is examined. She says she wants to go back to Bowbazar house. Considering the evidence of Dr. K. Hossain, I am of the opinion that the age of the girl is between 16½ and 17 years, nearer 17 years on 30-10-52, the date of examination.

Having regard to S. 14 (2) of B. S. I. T. Act, 1933, I direct that Panna Bai be detained at the Rescue Home for 9 months more."

The girl has been at the Rescue Home since.

(6) Mr. Ghose's contention is that the girl's detention is neither punitive nor preventive, and is, therefore, illegal. He argues that Ss. 13, 14, 15 and 17 of the Bengal Act violate the provisions of Arts. 21 and 22 of the Constitution. The answer to this argument is that Art. 22 does not appear to us to be applicable to the facts of this case. Mr. Ghose argues that the removal of the girl under S. 13 of the Bengal Act amounts to her arrest, and that, therefore, the person concerned should be entitled to the protection afforded by Cls. (1) and (2) of Art. 22 of the Constitution. Section 13 is as follows:

"The Commissioner of Police, Superintendent of Police, or a police officer not below the rank of a Sub-Inspector specially authorised in writing in this behalf by the Commissioner of Police or Superintendent of Police, may enter any premises if he has reason to believe—

(a) that an offence punishable under S. 4 has been committed or is being committed in respect of the premises; or

(b) that a female in respect of whom an offence punishable under S. 8, 9, 10, 11 or 12 has been committed is to be found therein;

and may remove any girl who appears to him to be under the age of eighteen years, if he is satisfied—

(a) that an offence punishable under S. 4 has been or is being committed in respect of the premises; or

(b) that an offence punishable under S. 8, 9, 10, 11 or 12 has been committed in respect of the girl."

As the section is concerned with the removal of a minor girl from a brothel or from premises which are used as a brothel and does not in terms authorise the 'arrest' of any such girl, Mr. Ghose points out that the word "arrest" as used in Art. 22 is wide enough to include any kind of restraint. In our view, the word "arrest" in Art. 22 has a much restricter meaning and does not include the removal of a minor girl under S. 13 of the

Bengal Act. A similar controversy arose in the case of — 'State of Punjab v. Ajaib Singh', AIR 1953 SC 10 (A). The question there was whether the taking into custody of an abducted person by a police officer and the delivery of such person by him into the custody of the Officer in charge of the nearest camp under S. 4 of the Abducted Persons (Recovery and Restoration) Act 65 of 1949 could be regarded as arrest and detention under Art. 22 (1) and (2) of the Constitution. Section 4 of that Act provided that if any police officer, not below the rank of an Assistant Sub-Inspector, or any other police officer specially authorised by the State Government in that behalf, had reason to believe that an abducted person resided or was to be found in any place, he might, after recording the reasons for his belief, without warrant, enter and take into custody any person found therein who, in his opinion, was a abducted person, and deliver or cause such person to be delivered to the custody of the Officer in charge of the nearest camp with the least possible delay. Their Lordships of the Supreme Court held that the physical restraint put upon an abducted person in the process of recovering and taking that person into custody under S. 4 of the impugned Act could not be regarded as arrest and detention within the meaning of Art. 22 (1) and (2). In view of the various definitions of the word "arrest" in well-known Law Dictionaries, Das J., in construing Art. 22 of the Constitution, observed as follows:

> "We are in agreement with learned counsel to this extent only that if the language of the Article is plain and unambiguous and admits of only one meaning, then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If, however, two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory."

It is not necessary to go further into this matter, for, the law laid down in that case is conclusive on the point.

(7) Mr. Ghose next argues that the girl's removal from the brothel and her subsequent detention at the Rescue Home were in breach of the provision of Art. 21 of the Constitution. As to this, we need only say that the matter is concluded by the majority decision of the Supreme Court in — 'Gopalan A. K. v. State of Madras', AIR 1950 SC 27 (B). In our view, the words "procedure established by law" refer to any enactment which is not repugnant to the Constitution. That being the position, Bengal Act 6 of 1933 would be attracted by Art. 21, provided, of course, there is nothing in the Bengal Act which is repugnant to the Constitution. Art. 23 of the Constitution provides for prohibition of traffic, 'inter alia', in human beings, which would include traffic in women and children for immoral or other purposes. The provisions of Art. 35, which require that Parliament shall have, and the Legislature of a State shall not have, power to make laws for prescribing punishment for those acts which are declared to be offences under Part III of the Constitution, are subject to clause (b) of Art. 35. It is, therefore, nobody's case that Bengal Act 6 of 1933 is not validly in operation. If the provisions of Art. 22 (1) and (2) have no application to the facts of this case, then the question of the alleged non-disclosure of the grounds of the girl's removal or any failure to produce her before the nearest Magistrate within a period of 24 hours cannot arise. The scheme of the Bengal Act is to provide for salvage of such children as are being exploited or are likely to be exploited for immoral purposes. While the Constitution prohibits discrimination, it provides for protection of women and children who may be said to suffer from a certain amount of disability either by reason of their sex or age. In our view, nothing has been shown in the Bengal Act which can be said to infringe either Art. 21 or Art. 22 of the Constitution, and we would, therefore, hold that the removal and the subsequent detention of the girl under the provisions of the said Act were and are legal.

(8) Mr. Ghose argues that the words "her case" appearing in S. 17 (2) of the Bengal Act suggest that the girl concerned was either an accused in the proceedings or that she was to be detained until she had deposed in the case. In our view, there is no substance in this contention. The use of the words "her case" would suggest that the paramount consideration for the Court was her welfare and her future custody and that the girl's 'case' in that sense had to be disposed of in accordance with the provisions of the Act. Sections 14, 15, 16 and 17 of the Act provide for the girl being placed in suitable custody until she attains the age of 18 years, and we cannot see how these provisions offend against the provisions of the Constitution.

(9) In our view, no case has been made out for any of the reliefs asked for. In the result, this application fails and is dismissed.

(10) Mr. Ghose on behalf of the petitioner asks for a certificate under Art. 132 of the Constitution. The points involved are concluded by the two decisions of the Supreme Court already referred to in our judgment. Mr. Ghose's prayer is accordingly rejected.

(11) SEN J.: I agree.

A/V.S.B. Application dismissed.

A.I.R. 1953 CALCUTTA 524 (Vol. 40, C. N. 199)

K. C. DAS GUPTA
AND P. N. MOOKERJEE JJ.

Sm. Radharani Das, Defendant-Petitioner v. Sisir Kumar and others, Opposite Party.

Civil Rule No. 1465 of 1951, D/- 10-9-1952.

(a) Civil P. C. (1908), Ss. 2 (2), 96 — Right of appeal — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 6).

Decision rejecting an application under S. 6, West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950) is appealable. AIR 1948 PC 12, Foll. Case law discussed. (Paras 7, 8)

Anno: C.P.C., S. 2(2) N. 3, S. 96 N. 2.

(b) Constitution of India, Arts. 141, 372 — Decision of Judicial Committee.

A decision of the Judicial Committee is binding upon the High Court until the Supreme Court rules otherwise. (Para 6)

Hemendra Chandra Sen and Nitya Ranjan Biswas, for Petitioner; Bankim Chandra Banerjee and Umaprosad Mukherjee, for Opposite Party.

CASES CITED:
(A) (1877) 47 LJQB 10: 3 QBD 1
(B) ('12) 40 Cal 21: 39 Ind App 197 (PC)
(C) ('48) AIR 1948 PC 12: 74 Ind App 264: 52 Cal WN 275 (PC)
(D) ('48) ILR (1948) 2 Cal 494
(E) ('49) ILR (1949) 1 Cal 487
(F) ('50) First Misc. Appeal No. 19 of 1948, D/- 27-4-1950 (Cal)

P. N. MOOKERJEE J: This Rule is directed against an order of the learned Munsif, First Additional Court, Alipore, rejecting the petitioner tenant's application for rescission of an ejectment decree obtained against her by the landlords opposite parties. The application was made under S. 6, West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act, 1950 (West Bengal Act 62 of 1950) which runs as follows:

"Where at any time between the commencement of the said Act (West Bengal Premises Rent Control (Temporary Provisions) Act, 1950-West Bengal Act 17 of 1950) and of 'this Act' (West Bengal Act 62 of 1950) an order or decree for the recovery of possession of any premises has been made or passed by any Court but possession of such premises has not been recovered in execution of such order or decree and the Court is of opinion that the order or decree would not have been made or passed if 'this Act' had been in force when the order or decree was made or passed, the Court may, on application by the tenant within sixty days of the commencement of 'this Act' rescind or vary the order or decree on such terms and conditions as it deems necessary for the purpose of giving effect to the provisions of S. 18 of 'the said Act' as amended by 'this Act'."

(2) The application was rejected by the learned Munsif on 26-5-1951 and the propriety of this decision is the subject-matter of the present Rule which is opposed by the landlords.

(3) At the hearing of this Rule, a preliminary objection was taken to its maintainability and Mr. Banerjee, appearing for the landlords, contended that from the learned Munsif's decision an appeal lay under the law and, accordingly, the present application for revision was incompetent.

(4) The question thus arises whether the learned Munsif's decision rejecting the petitioner's application under S. 6, Rent Control (Amendment) Act (West Bengal Act 62 of 1950) is in law appealable. That question is of considerable difficulty and importance and in answering the same we have preferred to follow the line of least resistance. We are free to confess that we have reached our conclusion not without some hesitation but we have at least this satisfaction that that conclusion has the support of the highest judicial authority. It is well settled that appeal is a creature of statute: vide — 'Sandback Charity Trustees v. North Straffordshire Rly. Co.', (1877) 3 QBD 1 (A) and — 'Rangoon Botatoung Co. Ltd. v. The Collector, Rangoon', 39 Ind App 197 (PC) (B) and it is not disputed that there is no specific provision in the Rent Control Act (West Bengal Act 17 of 1950) or in the Amending Act (West Bengal Act 62 of 1950) referred to above, authorising an appeal from a decision under S. 6 of the Amending Act 62 of 1950 or S. 18 of the Original Act (Act 17 of 1950) whether in its amended form to which the Amending Act in its S. 6 specifically refers or as it stood before the amendment.

It is also equally well settled that when a legal right is in dispute and the ordinary Courts of the country are seised of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal: vide — 'Adaikappa Chettiar v. Chandrasekhara Thevar', AIR 1948 PC 12 (C). There can be little doubt that in an application under S. 6 of the Amending Act 62 of 1950, or S. 18 of the original Act (Act 17 of 1950) whether before or after the amendment, a legal right is in dispute and that the ordinary civil Court of the country is in seisin of the same, that is, of such dispute. If, therefore, the decision of such an application falls within the provision or provisions which authorise appeals from decisions of civil Courts, its appealability would be beyond question. The Code of Civil Procedure contains the general law of appeals in relation to civil Court decisions. Under it decisions or adjudications of civil Courts are divided into two classes, viz. decrees and orders. Decrees are as a rule appealable excepting decrees passed on consent. Orders are appealable only when they fall within S. 104 or O. 43, R. 1 of the Code. Admittedly the impugned decision with which we are here concerned cannot be brought within any of these latter provisions namely, S. 104 and O. 43, R. 1 of the Code. The relevant enquiry therefore is whether it satisfies the tests or requirements of a decree under the Code of Civil Procedure.

(5) Prior to the decision of the Judicial Committee in — 'AIR 1948 PC 12 (C), there was a large, almost overwhelming, preponderance of judicial opinion in this country, the underlying principle whereof would have answered this question in the negative. That opinion was apparently based on the view that an application to re-open, rescind, vary, amend or modify the decree could not appropriately be said to involve the determination of a matter in controversy in the suit, and although the application might have to be made in the suit itself, a question concerning the decree, — already passed in the suit, could hardly be properly called a matter in controversy in the suit. This view, however, was not accepted by the Judicial Committee in the case, above cited, where their Lordships further held that mere rejection or dismissal of such an application might in the circumstances of a particular case amount to a formal expression of adjudication within the meaning of the definition of a decree as contained in the Code and their Lordships thus authoritatively laid down that such rejection or dismissal would be a decree under the Code and open to appeal as such.

(6) True, in the judgment of their Lordships there is no reference to S. 33 of the Code of Civil Procedure, but merely from such non-reference it can scarcely be concluded that that section escaped their Lordships' attention and that otherwise their decision would have been different. It is to be remembered in this connection that under the Code both 'decrees' and 'orders' are 'formal expressions of adjudication' and that the judgment is merely 'the statement given by the Judge of the grounds of a decree or order'. A document, therefore, embodying the reasons or grounds of adjudication and also its formal expression may well be a 'decree' or an 'order' under the Code and it will be the one or the other according as it contains the re-

maining requisites or elements under the respective definitions. In the case of 'orders' such composite documents are often found and as both decrees and orders are formal expressions of adjudications and differ only in their constituents the 'order' being the residuary that is, "the formal expression of any decision of a civil Court which is not a 'decree' such a composite document when it contains the other essential elements or requisite of a decree may well be a decree under the Code.

Section 33 of the Code does not necessarily rule out such a composite document and such documents are clearly contemplated by Rr. 187 and 188 of our Civil Rules and Orders and the decision of the Judicial Committee above cited, may thus have been given in spite of the said S. 33 and with the fullest notice or cognisance thereof and it is not necessarily inconsistent with the same. It is also to be remembered that a decision of the Judicial Committee is binding upon this Court until the Supreme Court rules otherwise (vide Art. 225 of the Constitution and Art. 141) and it is not disputed before us that there has been uptill now no contrary pronouncement by the Supreme Court affecting the above decision of the Judicial Committee or the relevant dictum contained therein. In such circumstances, we must proceed upon the view of law as expounded in the said decision and the controversy in the present case must be determined on that footing. It may be added here that even before the decision in — 'AIR 1948 PC 12 (C), this Court laid down and applied a similar principle in a case under the Calcutta Rent Control Ordinance of 1946: vide — 'Gouri Dutt v. Kasiram', ILR (1948) 2 Cal 494 (D).

(7) In the above view of the matter and examining the materials before us in the light of the Judicial Committee's pronouncement already cited it must be held that the learned Munsif's decision dated 26-5-1951 contained an adjudication which so far as that Court was concerned "conclusively determined the rights of the parties with regard to a matter of controversy in the suit". It was also a "formal expression" of that adjudication. It was thus a decree under the Code of Civil Procedure and was as such appealable. This view is clearly supported by two recent decisions of this Court, both under the Bengal Money Lenders' Act, one reported in the case of — 'Satish Chandra v. Riyasat Hossain', ILR (1949) 1 Cal 487 (E) and the other to be found in the case of — 'Jadunath Roy v. Sm. Ashalata Devi', First Misc. Appeal No. 19 of 1948 decided by Sen and Chunder JJ. on 27-4-1950 (Cal) (F) not yet reported, where the above decision of the Judicial Committee was noticed, cited, considered and followed.

(8) We hold, therefore, that under the law an appeal lay from the decision of the learned Munsif now challenged before us and as such the present application in Revision is not competent or maintainable. The preliminary objection is, accordingly, upheld and this Rule is discharged on that ground.

(9) In the above view of the matter it is not necessary for us to express any opinion on the other questions involved in this Rule.

(10) The parties will bear their own costs in this Court.

(11) DAS GUPTA J.: I agree.

A/D.H. Rule discharged.

A.I.R. 1953 CALCUTTA 526 (Vol. 40, C. N. 200)

SARKAR J.

Kanhaiyalal Jhanwar, Plaintiff v. Pandit Shirali and Co. and others, Defendants.

Civil Suit No. 2834 of 1949, D/- 29-2-1952.

(a) Contract Act (1872), S. 172 — Pledge of shares — Share script deposited with pledgee, by way of pledge — Deposit also of blank transfer in respect thereof, signed by pledgor and a witness — It is a good pledge — Pledgee can fill in the blanks in transfer — (Companies Act (1913), S. 34 Sch. I Table A, Reg. 18).

(Para 4)

Anno: Contract Act, S. 172 N. 1; Companies Act, S. 34 N. 2.

(b) Contract Act (1872), S. 172 — Pledge of shares — Transfer of title is not necessary — Simple delivery of possession of script is enough — (Companies Act (1913), S. 34).

(Para 4)

Anno: Contract Act, S. 172 N. 1; Companies Act, S. 34 N. 2.

(c) Companies Act (1913), Ss. 21 (1), 34 — Articles giving lien to company over shares for debts due from member — Director pledging his shares with third person — Subsequent agreement with company whereby such member incurring debt due to company — Company held had lien over shares — Lien held had priority over pledge, agreement being entered by company without knowledge of previous pledge — Knowledge of director held not knowledge of company — (Contract Act (1872), S. 172).

A company had under the Articles a lien on the shares held by a member in respect of debts, liabilities or engagements with the company. A member had under an agreement guaranteed due payment to the company of all the debts due by a third person to the company. This member had pledged his shares with another, before he had entered into the agreement referred to above, with the company. The question arose whether the lien of the company had priority over the pledge.

Held (1) that the company had according to the Articles lien on the shares held by the pledgor in respect of the debt due from him under the agreement. (Para 9)

(2) that the debt in respect of which the lien was claimed having been incurred without notice of the previous pledge, had priority over the pledge. (Para 11)

(3) that the fact that the pledgor was himself a director was immaterial because knowledge of a director is not imputable to the company unless the knowledge is acquired in his capacity of a director and the agreement with the pledgor was entered into by other directors on behalf of the company. (Para 13)

(4) that by the agreement with the pledgor, the company could not be said to have waived its contractual lien. There would have been waiver, if there had been actual pledge of shares with the company, for pledge is a higher security than the equitable charge and the acceptance of it implies an intention to give up the lower security. (Para 16)

Anno: Contract Act, S. 172 N. 1; Companies Act, S. 34, N. 3, 4; S. 21 (1) N. 1, 2.

D. C. Sethia, for Plaintiff; G. Mitter, for added Defendant 3.

CASES CITED:
(A) ('42) AIR 1942 Cal 461: ILR (1942) 1 Cal 122
(B) ('49) ILR (1949) 1 Cal 199
(C) (1886) 56 LJ Ch 364: (1886) 12 AC 29
(D) ('33) AIR 1933 All 607: 55 All 810
(E) (1905) 74 LJ Ch 531: (1905) 2 Ch 147
(F) ('48) AIR 1948 Pat 443: 27 Pat 108

JUDGMENT: In this suit there are three defendants but only one of them, namely, defendant 3, appeared to contest the claim. The other two defendants filed their written statements but did not appear at the hearing. The substantial contest is whether the plaintiff or defendant 3 is entitled to a prior charge over certain shares belonging to defendant 2.

(2) The plaintiff alleges that on 1-8-1946, defendant 1, Pandit Shirali & Co., executed a promissory note for Rs. 37,500/- payable to him on demand and defendant 2, Hemmad, guaranteed the due payment of the promissory note and as security for the guarantee, in or about November 1947, pledged to the plaintiff certain shares held by him in the Orient Movietone Corporation Ltd., which is defendant 3 in this suit. The plaintiff claims the amount of the promissory note against the debtor and the guarantor and also the enforcement of the pledge by the guarantor. He has proved the promissory note and the guarantee and is, therefore, entitled to the money decree claimed against Pandit Shirali & Co. and Hemmad.

(3) The difficulty arises with regard to the other part of the plaintiff's claim, namely, his enforcement of the pledge. This claim is opposed by defendant 3, the Orient Movietone Corporation Ltd. I will call this defendant, the defendant company. It says that it has a prior charge over the shares. This question of priority was the principal point argued in this case.

(4) The defendant company also denied that the plaintiff had any pledge. As I have said, the plaintiff proved the pledge and produced the share scripts and transfers. These transfers are, however, completely blank except for the signatures of Hemmad and of a witness who attested Hemmad's signatures thereon. It does not seem to me that this condition of the transfers makes the pledge invalid and I did not understand learned counsel for the defendant company to contend seriously that it was so. It is well settled that the person to whom share scripts and transfers in blank as to the name of the transferee and the date of the transfer are given, has the authority of the transferor to fill up these blanks. See — 'In the matter of Bengal Silk Mills Co. Ltd.', AIR 1942 Cal 461 (A).

This authority is presumed from the fact that the transferor did intend, by what he had done, to transfer the shares to the transferee or to such person as the transferee wanted, and as the transfer would not be complete in law unless these blanks were filled up, the transferee must be deemed to have been authorised by the transferor to fill up the blanks. If such is the principle, then the transferee must be deemed to have been authorised to fill up all blanks necessary to make the transfer effective in law. Further, to my mind, even if the transfers were held invalid that would not affect the question. The deposit of the share scrips themselves would be sufficient to create a pledge thereon. The transfers, if in order, would have transferred the title in the shares to the plaintiff, but a transfer of title is not necessary to create a pledge, simple delivery of possession being enough. It must, therefore, be held that the plaintiff became a pledgee of the shares in or about November, 1947.

(5) The defendant company then says that, even if the shares had been pledged to the plaintiff in November 1947, it held a prior charge thereon. Its case is that, under an agreement between it and Pandit Shirali & Co., it had advanced large sums of moneys to the latter in connection with the exploitation of certain cinematographic films. It is stated that in February 1949 a sum of Rs. 61,095-13-9 was due to the defendant company from Pandit Shirali & Co. under this agreement. It is further stated that, upon the defendant company pressing for payment of this sum, Hemmad interceded and guaranteed repayment of the moneys.

According to the defendant company, upon such guarantee and upon Hemmad pledging with the defendant company the shares mentioned above, it gave Pandit Shirali & Co. a year's time to pay. These facts, excepting the actual pledge, were established in evidence. It will be remembered that the share scrips were lying with the plaintiff and had not admittedly been delivered to the defendant company. The verbal evidence and the minutes of the director's meeting of the defendant company show that there was only an agreement by Hemmad to pledge the shares but no actual pledge. Such agreement, to my mind, is of no avail. It does not result in an actual pledge as the scrips were not delivered in terms of the agreement. There is no evidence of any agreement creating a charge on the shares without a pledge. The result is that the defendant company cannot establish that in February, 1949, it acquired any right to the shares which would have been binding on the plaintiff. It is also clear that, even if it had acquired any rights then, such rights, must on the facts proved, have been of a kind which would have ranked in priority after the pledge in the plaintiff's favour because the plaintiff's rights accrued earlier and no equity has been established entitling the defendant company to supersede the plaintiff.

(6) The defendant company then contends that it has, in any event, a lien on the shares under Art. 39 of its articles of association. That article is in these terms:

"The Company shall have a first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others) and upon the proceeds of sale thereof for his debts; liabilities, and engagements, solely or jointly with any other person to or with the Company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not and no equitable interest in any share shall be created except upon the footing and condition that Cl. 16 hereof is to have full effect. And such lien shall extend to all dividends from time to time declared in respect of such shares. Unless otherwise agreed the registration of a transfer of shares shall operate as a waiver of the Company's lien, if any, on such shares."

(7) On behalf of the plaintiff it is said that, the debts, engagements and liabilities men-

tioned in Article 39 were those arising out of the company relationship and did not include those arising out of an independent transaction e.g. the guarantee in the present case. The binding force of an article arises from S. 21 (1), Companies Act. That section states:

"The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."

In — 'Hanutmal Boid v. Khusiram Benarsilal', ILR (1949) 1 Cal 199 (B), Das J. had to consider how far an article of a company, providing in very wide terms for reference to arbitration of disputes between the members inter se, constituted an arbitration agreement between them on which an application for stay under the Arbitration Act could be based. He there held:

"The contractual force given to the articles by S. 21 (1) is, by judicial decisions, limited to matters arising out of the company relationship of the members as members. The statutory result does not extend beyond that and does not convert the articles into a contract or covenant in reference to rights entirely outside the company relationship and does not affect or regulate the rights arising out of a commercial contract with which other members have no concern."

I am asked to apply this decision and hold that the statute does not give a contractual force to Art. 39 so as to include within it the debt due to the defendant company from Hemmad on the guarantee, on the ground that that is a commercial transaction outside the company relationship.

(8) The judicial decisions on which Das J. based his view are decisions of English Courts on the corresponding section of the English Companies Act which is in the same terms as the section in the Indian statute. The extent of the contractual force given to the articles by the statute has always been and still is a question which cannot be regarded as fully settled. This is recognised in those judicial decisions themselves. One of the authorities, which Das J. called to his aid, is a passage in Halsbury's Laws of England (1932 Edition), Vol. V, Art. 256 at p. 142. That passage, as the case before Das J., is concerned with the binding force of the articles as a contract between the members inter se. I am concerned with the binding force of the articles as between a member and the company. This position is considered in Art. 255 at p. 140 of the volume in Halsbury's Laws of England already referred. It is there stated:

"The articles constitute a contract between the company and a member in respect of his rights and liabilities as a share-holder, and the company may sue a member and a member may sue a company to enforce and restrain breaches of the regulations contained in the articles dealing with such matters."

(9) It would not be wrong to presume from the reasoning employed by Das J. that he would have expressed his agreement with this statement of the law, if he had to consider a case between the company and a member. The question is, what are "rights and liabilities as a share holder?" Can it be said that the debt of Hemmad on the guarantee is as a shareholder? I think, it can. In — 'Bradford Banking Co. Ltd. v. Briggs Son & Co. Ltd.', (1886) 12 AC 29 (C), a similar decision was arrived at. That is one of the cases on which the statement of law read from Halsbury is based. One Easby held some shares in Briggs Son & Co. Ltd. The articles of Briggs Son and Co. Ltd., contained a provision, being Art. 103, similar to Art. 39 in the defendant company's articles before me. Briggs Son & Co. Ltd., carried on business as coal proprietor while Easby was a coal merchant. Easby purchased coal from Briggs Son & Co. Ltd., and became indebted to it for the price of coal purchased. It was held by the House of Lords that Briggs Son & Co. Ltd., had a lien on Easby's shares of the amount due to it from Easby. Lord Blackburn in his speech put the position in these words at pp. 33-34:

"John Faint Easby, a coal merchant, became a proprietor of a number of shares in the respondent company, and obtained certificates for them. This property in the shares was, by virtue of the 16th section of the Act already quoted, I think, bound to the company as much as if he had (at the time he became holder of these shares) executed a covenant to the company in the same terms as Article 103, but I do not think it was bound any further.

John Faint Easby filed a petition for liquidation on the 31st of December 1883, being then indebted to the company. He had been a customer of the respondent company, and owed them a considerable sum at that date. He still continued the registered holder of the shares, and, if there had been no more in the case, it is not now at least disputed that the respondent company would have had a first lien on the shares."

It is impossible to find any distinction between the debt that Easby owed to Briggs Son & Co. Ltd., and the debt that, in the case before me, Hemmad owes to the defendant company. I, therefore, come to the conclusion that the defendant company has, by virtue of Art. 39, a lien on Hemmad's shares for the debt due to it from him on the guarantee.

(10) I have already said that the shares were pledged to the plaintiff in or about November 1947 and Hemmad's guarantee to the defendant company was in February 1949. The question then arises, who has the priority, the defendant company under its lien or the plaintiff under its pledge? On this point — 'Bradford Banking Co. Ltd. v. Briggs Son & Co. Ltd.', (C) is again an authority. There Easby had pledged the shares with the Bradford Banking Co. Ltd. as security for the balance due and to become due on his current account with the banking company. The Banking company had given notice of the pledge to Briggs Son and Co. Ltd., who replied that Easby was indebted to them and under their articles, they had a first and paramount lien on the shares. A question arose as to who had the priority and it was held that Briggs Son & Co. Ltd. had priority in respect of the money that had become due to it before the Bradford Banking Co. Ltd. had given notice of the pledge but not in respect of the moneys that became due to it subsequent to the notice. It was held that the service of the notice decided the question of

priority. Lord Blackburn put the matter thus at p. 36:

"The first mortgagee is entitled to act on the supposition that the pledgor who was the owner of the whole property when he executed the first mortgage continued so, and that there has been no such second mortgage or pledge until he has notice of something to shew him that there has been such a second mortgage, but as soon as he is aware that the property on which he is entitled to rely has ceased so far to belong to the debtor, he cannot make a new advance in priority to that of which he has notice. As Lord Campbell says, 'the hardship upon the bankers from this view of the subject at once vanishes, when we consider that the security of the first mortgage is not impaired without notice of a second.'"

(11) The position then, applying the same principle here, is that, the security created by the lien in favour of the defendant company is not impaired till it had notice of another security created on the same shares. Now, the security created by the lien, it has to be remembered, is in respect of moneys due in present or to become due in future. This is what Art. 39 provides. In the present case it does not appear that any notice was given by the plaintiff to the defendant company of the pledge in his favour. It follows that the lien in favour of the defendant company was never impaired and covered all moneys due by Hemmad under the guarantee whether they became so due before or after the pledge to the plaintiff.

(12) It was then said that notice of the pledge had been given to one of the directors of the defendant company. No such notice was, however, pleaded and no issue was raised as to whether any such notice had been given. And naturally, no evidence was led on the question. It is, therefore, not open to the plaintiff to rely on any notice. Furthermore, I do not think that the defendant company had in fact any notice of the pledge to the plaintiff. It is said that Hemmad himself was a director of the defendant company and as he knew of the pledge, having himself made it, the defendant company must also be deemed to have known of it, for a director is an agent of the company and notice to an agent is notice to the principal. It is said that it was so held in — 'In the matter of Union Sugar Mills Co. Ltd.', AIR 1933 All 607 (D).

In that case it appeared that one Debi Dutt was a director of the company and held under its articles "all powers exercisable by the directors" in the management of the company's affairs. The company had under its articles a lien on the shares held by Debi Dutt. But Debi Dutt pledged the shares with another person to secure advances received by him from that person. The question arose, whether the lien or the pledge had the priority. It was held, following — 'Rainford v. James Keith & Blackwan & Co. Ltd.', (1905) 2 Ch 147 (E), that notice to the directors even in their personal capacity was notice to the company. It was also held that as the director was the agent of the company notice to him was notice to the company and the only exception was where the agent was acting in fraud of the principal. With regard to the last proposition, I think, it states the law too broadly.

The correct proposition may be gathered from Bowstead on Agency (10th Edn.) Art. 110, p. 222 and it is that, knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf is not imputed to the principal. In pledging the shares to the plaintiff, Hemmad was not obviously acting as the director of the defendant company and his knowledge of the pledge was, therefore, not the knowledge of the defendant company. Now coming to — 'Rainford v. James etc. Co. Ltd.', (E) on which also the Allahabad case is based, it appears that the rules of a company provided that no transfer of shares would be effected without the production of the scrips. Notwithstanding this, however, the directors allowed a transfer of certain shares to be registered without the scrips being produced, relying on a statement of the transferor that the shares were lying with a friend but not as security. Under the terms of the arrangement relating to the registration of the transfer, the price of the shares was paid by the transferee, not to the transferor but to the company in reduction of the transferor's liability to it. The arrangement had in reality been made for the benefit of the company. The shares had, however, been actually pledged by the transferor to another person, who thereafter produced the scrips and the transfer deed signed by the pledgor and asked the company to register a transfer in his favour. The company refused. The pledgee then brought an action claiming relief for the wrongful registration of the transfer by the company and was held entitled to recover the price of the shares from the company. It was said that the transferor's statement that the shares were lying with another person put the company on enquiry about the right of that person in the shares and the company was affected with notice that that person might have a charge on the shares. Furthermore, it appeared that the directors of the company, who were in charge of making the arrangement allowing the registration of the transfer in favour of the first transferee and the appropriation of the price paid by him towards the company's dues from the transferor, had in fact notice of the pledge. As the notice was received by the directors while acting as directors, that is to say, in the course of their employment under the company, the company, it was held, must be deemed to have notice of the pledge. The matter was put in this way by Stirling L. J. at p. 161 :

"Where the company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party, and is affected with such notice if it is brought home to the agents who managed the transaction on its behalf."

On these grounds the company was made to refund the price of the shares appropriated by it, to the pledgee. This case, therefore, turned on the fact that those who made the bargain on behalf of the company, had notice of the plaintiff's rights. When, in making the bargain, they acted as agents of the company and had notice of the plaintiff's rights, the notice must, of course, be imputed to the company.

(13) The facts in the present case are different. The agreement of guarantee by Hemmad was made on behalf of the company by its directors other than Hemmad. Such directors had no knowledge of the pledge by Hemmad and Hemmad's knowledge of the pledge cannot be imputed to the defendant company, for such

knowledge was not received by Hemmad as agent of the company. In making the pledge he was in fact acting for himself and not the company. The Allahabad case may be justified by reason of the special provision in the articles of the company there concerned, making Debi Dutt, in substance, the sole director of the company. In the case before me there is no such provision. I am unable, therefore, to agree that — 'In the matter of Union Indian Sugar Mills Co. Ltd.', (D) covers the present case.

(14) It was then said that the defendant company had waived its lien because it entered into the agreement for pledge with Hemmad in February 1949. 'Rajib Nath v. Chota Nagpur Banking Association Ltd.', AIR 1948 Pat 443 (F) was cited as an authority for this contention. There, the defendant bank had an article substantially the same as Art. 39 before me. The bank brought a suit against one of its shareholders for a debt due to it and obtained a money decree and in execution thereof the shares of the debtor were put to sale expressly stating that they would be sold free of incumbrance and itself purchased the same. The bank then realised that such a purchase would be bad, as it would result in reduction of its share capital without an order in that behalf from the Court under S. 55(1), Companies Act. It thereupon allowed the shares to stand in the debtor's name and subsequently purported to sell them in the exercise of its lien under the articles, to some of its directors. The debtor's heirs having sued to set aside the sale, the suit was allowed. One of the grounds of the decision was that the bank's conduct in the previous suit, amounted to a waiver of the lien upon which it could not afterwards rely. The learned Judges based their decision on a passage in Halsbury's Laws of England (Hailsham Edition) Art. 738 p. 584 and two cases cited in support of that passage. The passage states that a lien is waived or destroyed where a party claims to retain goods on grounds different from those on which he rests his claim for lien and makes no mention of the lien. This statement of the law is clearly meant to apply to possessory liens and not to a non-possessory lien created by contract giving rise to an equitable charge, as was the case before the learned Judges of the Patna High Court and as is the case before me. I am unable, therefore, to hold that that case decides the question in the case in hand.

(15) There is no doubt, however, that a contractual lien may also be waived. The question is, was there such a waiver in the present case. The law as to waiver of a contractual right may now be set out from Halsbury's Laws of England (Hailsham Edn.), Vol. VII, Article 285 p. 204:

"A contract may be discharged, either wholly or in part, before there has been any breach of it, by a waiver of the right to insist upon its performance. Waiver is based on fresh contract or estoppel. Where, for instance, one party consents at the request of the other to extend the time for performance or to accept performance in a different mode from that contracted for..... if the new arrangement is in fact carried out, the obligation of the other party under the contract is discharged to the extent to which the promisee has waived his rights."

(16) It is true that if a person having a contractual lien creating an equitable charge in his favour accepts a pledge of the goods over which he has the lien, the lien disappears by waiver, for the pledge is a higher security than the equitable charge and the acceptance of it implies an intention to give up the lower security. As is stated in the passage just read from Halsbury, in order to have this effect the pledge must have been created, or to put it in the language of that passage, "the new arrangement must in fact be carried out." Now, in the present case there was only an agreement to pledge which had never been carried out. The pledge had never in fact been made in terms of the agreement to make it. It cannot be said that a mere agreement to take a pledge amounts to a waiver of the existing lien. There is in such a case no executed contract giving up the lien nor any conduct creating an estoppel against the exercise of the rights under the lien. In the Patna case there may have been waiver because an order for sale had actually been made expressly providing that the sale would be without any incumbrance. I am, therefore, unable to hold that, in the case in hand, the defendant company had waived its lien.

(17) There will, in the result, be a decree for Rs. 43,000/- with interest on judgment and costs against defendants 1 and 2. Such costs are certified for two counsel.

(18) There will be a declaration that the plaintiff is a pledgee of the shares mentioned in the plaint but such pledge will rank in priority after the lien thereon in favour of defendant 3. The plaintiff will pay the costs of this suit of defendant 3.

(19) There will be an order that the shares may be sold by the Official Receiver of this Court and out of the sale proceeds defendant 3 will be paid the sum of Rs. 42,435/0/11. After payment of this sum to defendant 3 if there is any balance left that will be paid to the plaintiff in protanto satisfaction of the decree made in his favour against defendants 1 and 2.

B/R.G.D. Order accordingly.

***A.I.R. 1953 CAL. 530 (Vol. 40, C. N. 201)**

SPECIAL BENCH

R. P. MOOKERJEE,

K. C. CHUNDER AND LAHIRI JJ.

Mrs. Rosetta Evelyn Attaullah, Petitioner v. Justin Attaullah and another, Respondents.

Divorce Suit No. 24 of 1950, D/- 10-9-1952.

(a) Indian Independence Act (1947), Ss. 1, 7 and 19 — "British India" ceased to exist — (Constitution of India, Art. 1).

On and from 15th August 1947 "British India" has ceased to exist. The territories which had previously been known as British India were divided under the then sovereign authority of the British Parliament into two new sovereign Dominions viz. India and Pakistan. (Paras 12, 18)

† * Constitution of India, Art. 5 — Acquisition of domicil after "British India" ceased to exist.

It is not correct to say that although British India has ceased to exist a person who had originally a domicil of British India will continue to have the same. As a result of the provisions contained in the Indian Independence Act a person who had originally the domicil of British India,

unless he had subsequently acquired the domicil of some other country outside the ambit of the territories which were originally British India, would automatically acquire the domicil either of India or of Pakistan. (Para 19)

Even if it were possible for a British Indian subject to retain (after 15th August 1947) the British India nationality, a person who was not one habitually resident within that portion of British India which became the Indian Dominion and was subsequently declared to be the Indian Republic, cannot, even on the principles applied to cession of territories acquire after the 15th August 1947 the nationality of the Dominion of India or the Republic of India that is Bharat. (Para 28)

(c) Constitution of India, Art. 5 — Nationality how acquired.

Two of the different modes of acquisition of nationality is by subjugation after conquest or by cession of territory. The inhabitants of the subjugated and the ceded territory acquire ipso facto by such subjugation or cession the nationality of the State which acquires the territory. (Para 22)

(d) Constitution of India, Art. 5 — Nationality of resident of ceded territory.

A person habitually resident in a ceded territory acquires 'ipso facto' the nationality of the State to which the territory has been transferred, and loses the nationality of the ceding State. (Para 26)

†* (e) Constitution of India, Art. 5 — Domicil and nationality of individual — (Succession Act (1925), S. 9).

Domicil refers to the civil status of an individual, while nationality refers to his political status. Thus, domicil and nationality are two quite different conceptions. A man may change his domicil without divesting himself of his nationality. Similarly there may be a change of nationality without a change of domicil. (1869) LR 1 Sc & Div 441; (1932) Probate 9 and (1932) 147 LT 382, Foll. (Para 30)

But where the State known as British India disappears, from after a particular date, from the map of the world, it is impossible for a person to retain either the nationality or the domicil of British India. In the case of a complete merger or cession of a State it is not open to a person, who was a citizen of that State, which is now non-existent, or was domiciled therein, to continue to arrogate, even after its disappearance, either a citizenship or a domicil with reference to that quondum State. (Para 31)

Anno: Suc. Act, S. 9 N. 1.

†* (f) Constitution of India, Art. 5 — Acquisition of new domicil — (Succession Act (1925), S. 10) — (Domicil — Acquisition of).

It is open to a person to acquire a domicil of choice, by the combination of residence ('factum') and intention of permanent or indefinite residence ('animus manendi'), but not otherwise. To constitute residence it need not be long. So far as the intention is concerned, it must amount to a purpose or choice, it must be an intention to reside permanently or for an indefinite period and it must be an intention of abandoning, that is ceasing to reside permanently in the country of the former domicil. (Paras 32, 33, 34)

The expression of intention or animus of a person intending to acquire domicil in India cannot be regarded as being the final intention to reside in India permanently and adopt the Indian domicil unconditionally and without any reservation, when the intention is contingent on the fulfilment of a condition that is not fulfilled. (Paras 38, 41)

Anno: Suc. Act, S. 10 N. 1.

(g) Divorce Act (1869), S. 2 — Husband's domicil alone is to be considered.

In determining the domicil of the parties in a proceeding for dissolution of marriage it is the domicil of the husband alone which is to be considered inasmuch as a wife takes the domicil of her husband upon her marriage. In the submission by the parties to the jurisdiction of a Court their former domicils are relevant. The Court has to rigidly apply the test of domicil as on the date when the application for the dissolution of a marriage is filed. It is not open to the Court to import considerations of personal difficulties or problems which may arise on applying the statutory provisions. (Para 35)

Anno: Div. Act, S. 2 N. 4.

(h) Evidence Act (1872), S. 18 — Admission — A document purporting to contain an admission of a party to a suit has to be taken in its entirety. (Para 39)

Anno: Ev. Act, S. 18 N. 9.

(i) Divorce Act (1869), S. 2 — Change in domicil.

A change in domicil by the husband subsequent to the date when the application for dissolution of marriage is presented by the wife will not validate the proceedings started in India for the dissolution of marriage. (Para 41)

Anno: Div. Act, S. 2 N. 4.

Nripendra Nath Dutta Roy, for Petitioner; Surita and Barun Kumar Roy Chowdhury, for Respondents.

CASES CITED:

(A) (1869) LR 1 Sc & Div 441
(B) (1932) 101 LJP 4: (1932) Probate 9
(C) (1932) 147 LT 382
(D) (1868) LR 1 Sc & Div 307
(E) (1861) 158 ER 303: 30 LJ Ex 284
(F) (1871) 41 LJ Ch 74: (1871) LR 12 Eq 617
(G) (1930) 99 LJ PC 134: (1930) AC 588
(H) (1865) 46 ER 1057: 4 De G J & Sm. 616
(I) (1922) 91 LJ Ch 181: (1922) 1 Ch 232
(J) (1922) 91 LJ Ch 791: (1922) 2 Ch 580
(K) (1904) 73 LJKB 613: (1904) AC 287

R. P. MOOKERJEE J.: The petitioner wife filed an application under section 10, Divorce Act, for dissolution of her marriage with the respondent. Neither the respondent nor the co-respondent appeared before the lower Court. The decree nisi was passed ex parte by the Additional District Judge, Alipore. When the proceedings came up before this Court for confirmation appearance was entered on behalf of the husband respondent. On his behalf it was contended that the Alipore Court had no jurisdiction to entertain the application.

(2) In the petition for dissolution of marriage it was stated that the parties were domiciled in India at the time of their marriage in 1948. Evi-

dence was led to this effect on behalf of the petitioner and the learned Judge came to a finding that it was so. Under S. 2, Divorce Act, it is necessary that there should be a definite finding that the parties were domiciled in India at the time when the petition for dissolution was presented. During the ex parte hearing no evidence was adduced in support of such a case and no finding was recorded by the Judge. The attention of this Court having been drawn to this matter by the respondent the following issue was sent down for decision by the trial Court:

"Were the parties domiciled in India at the time when the petition was presented".

(3) After this issue had been sent down evidence was led by the parties and on a consideration of such evidence the Additional District Judge has recorded the finding that at the time when the application for dissolution of marriage was presented on 2-5-1950, the parties were domiciled in the dominion of Pakistan and not in the Republic of India.

(4) At the final hearing before us it had been strenuously argued on behalf of the petitioner wife that since 15-8-1947 the domicil of the parties was the Indian domicil. In the alternative it is contended that even if the domicil of the respondent husband had not since 15-8-1947 been the Indian domicil he had adopted thereafter the domicil of India and both the parties had acquired the domicil of India before the date of the presentation of the application by the wife for dissolution of marriage.

(5) For a proper appreciation of the questions raised before us it is necessary to refer to the facts as elicited from the evidence adduced by the parties.

(6) Both the parties admittedly professed the Christian faith. The petitioner and both her parents were residents of Calcutta or near about from long before 15-8-1947 and continued thereafter. The place where the petitioner's parents stayed have since 15-8-1947 been included in the Indian Dominion. The petitioner was of Indian domicil from after 15-8-1947. Whether after her marriage the same domicil continued would depend on the question whether her husband was of Indian domicil.

(7) The respondent husband was born in 1912 at Mardan, in area which then within the North-West Frontier Province was situate within the then British India. Since 15-8-1947 this area has been within the Dominion of Pakistan. The respondent's father lived at Peshawar and died there in 1940. The respondent was baptized at Mardan and was educated at different places in the North-West Frontier Province. In 1933 he entered Government service at Peshawar in the office of the local Secretariat. In 1946 his services were lent by the British Indian Government to the British Embassy at Kabul within Afganisthan. He has ever since been working at Kabul and has also been residing there. It also appears that since 1946 the respondent husband had not resided for any length of time in the North-West Frontier Province or in any other part of Pakistan.

(8) The respondent had never even visited any other part of British India before 1948. He came to what has become Western-Bengal for the first time in December 1948. He came from Kabul to marry the petitioner. The respondent's brother had from before been staying at Konnagar in the District of Hooghly in West Bengal, and it was he who had arranged for this marriage. The petitioner and the respondent were married at St. John's Church, Calcutta, on 15-12-1948. Within a week thereafter the respondent husband left for Kabul with his newly married wife.

(9) The petitioner wife returned to West Bengal alone in April 1949. The respondent came from Kabul on 7-7-1949, and stayed with his wife in the house of the father of the latter in West Bengal and both left for Kabul on 27th July following. Within two months thereafter the petitioner wife again returned in September 1949 to her father's place after having obtained a temporary permit from the authorities for staying in India temporarily on the ground that her brother was seriously ill. The petitioner-wife has ever since stayed in India after obtaining extensions of the temporary permit.

(10) On or about 6-4-1950 the respondent husband came to West Bengal and stayed for some time either with his father-in-law or his brother until he returned to Kabul the next month. He has since then been staying at Kabul except for the temporary period when he had come to Calcutta to depose in the present proceedings after the order of remand by this Court.

(11) It was first contended on behalf of the petitioner wife that before 15-8-1947 the respondent was domiciled in British India as it then was. As he had left the North-West Frontier Province for Kabul before 15-8-1947, and he had ever since been employed in the British Embassy at Kabul without returning to the North-West Frontier Province the respondent continued to have the domicil of British India even after the Dominion of India and Pakistan had been brought into existence under the Indian Independence Act.

(12) The patent fallacy in this line of argument is that it is overlooked that on and from 15-8-1947 "British India" had ceased to exist.

(13) Under S. 1 (1), Indian Independence Act, 1947 (10 & 11 Geo. VI c. 30)

"(1) As from the 15th day of August Nineteen hundred and fortyseven, two independent Dominions shall be set up in India, to be known respectively as "India" and "Pakistan".

(2) The said dominions are hereafter in this Act referred to as the "new Dominions" and the said 15th day of August is hereafter in this Act referred to as the appointed day".

(14) Section 2, Indian Independence Act, further made it clear that:

"the territories of India shall be the territories under the sovereignty of His Majesty's which, immediately before the appointed date, were included in British India except the territories which under sub-section (2) of this Section are to be the territories of Pakistan".

(15) Sub-section (2) of S. 2, Indian Independence Act, further provided subject to the provisions of sub-sections (3) and (4) of this section, which are not relevant for the purpose of the question now before us, that:

"The territories of Pakistan shall be—

(a) The territories which, on the appointed day are included in the Province of East Bengal and West Punjab as constituted under the two following sections:

(b) The territories which, at the date of the passing of this Act, are included in the Province of Sind and the Chief Commissioners Province of British Baluchistan; and

(c) If, whether before or after the passing of this Act but before the appointed day, the Governor-General declares that majority of the valid votes cast in the referendum which, at the date of the passing of this Act, is being or has reasonably been held in that behalf under his authority in North Western Frontier Province are in favour of represen-

tatives of that Province taking part in the Constituent Assembly of Pakistan the territories which, at the date of the passing of this Act are included in that Province".

(16) The Referendum taken in the North-West Frontier Province resulted in favour of its joining Pakistan.

(17) Under the provisions of the Indian Independence Act, 1947, all rights, authority and jurisdiction exercisable by the King of England over the territories constituting British India under S. 2, read with Section 311 (1), Government of India Act, 1935 (25 and 26 Geo. V. c. 42) came to an end. This will become abundantly clear if we refer to the provisions of Section 19 (1) Indian Independence Act, read with sub-section (4) of that section. Under the latter sub-section the term "India" when we refer to a state of affairs existing before the appointed day or which would have been existing but for the passing of this Act has the meaning assigned to it by S. 311, Government of India Act, 1935. This is further clarified when in Section 7, Indian Independence Act, the consequences of the setting up of the two new Dominions are set out. The British Parliament in England will have no responsibility as from the appointed date so far as the Government of any of the territories which immediately before that day were included in British India. The Parliament of the United Kingdom also gave the assent to the omission from the Royal style and title of the King of England the words "Emperor of India".

(18) The territories which had previously been known as British India were divided under the then sovereign authority of the British Parliament into two new sovereign Dominions viz: India and Pakistan. We are not concerned here as to the legal status under the provisions contained in the Indian Independence Act, so far as the States under the Indian rulers are concerned.

(19) It is contended that although British India has ceased to exist, a person who had originally a domicil of British India will continue to have the same. This is not possible. As a result of the provisions contained in the Indian Independence Act a person who had originally the domicil of British India, unless he had subsequently acquired the domicil of some other country outside the ambit of the territories which were originally British India, he would automatically acquire the domicil either of India or of Pakistan.

(20) The limited question for our decision is whether on 2-5-1950, the parties were domiciled in the Republic of India. If they were so domiciled the conditions imposed under Section 2, Divorce Act, (as adapted by the Adaptation Orders of 1948 and 1950) would be satisfied If on the other hand we reach the conclusion that the parties were not domiciled in the Republic of India on the date when the application for dissolution of marriage was filed it will not be necessary to enter into a discussion far less to find specifically, of what domicil the parties were on the relevant date.

(21) On behalf of the petitioner it was contended that the territorial sovereignty will not affect the question of domicil in the present case. As observed by Oppenheim in "International Law" — Volume 1 — Peace 6th Edition, at page 408, that the importance of "State territory" lies in the fact that it is the space within which the State exercises its supreme authority. It must however "be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State." The State community may consist of different nations.

(22) Nations lay down in their respective municipal law as to how nationality can be acquired as also for determining the grounds on which individuals obtain their nationality. Two of the different modes of acquisition of nationality are by subjugation after conquest or by cession of territory. The inhabitants of the subjugated and the ceded territory acquire ipso facto by such subjugation or cession the nationality of the State which acquires the territory.

(23) The circumstances under which Britain withdrew from India though of a unique character are not altogether without precedent. From the territory which was under the sovereignty of the British King and Parliament viz. British India, the latter withdrew such sovereign authority and after division of the territory into two different parts ceded such territory to two new independent States which were brought into existence under a Parliamentary Statute viz. the Indian Independence Act. Oppenheim in S. 219 at page 503 observes —

"As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become 'ipso facto' by the cession subjects of the acquiring State."

(24) If the old State does not disappear altogether it is possible to mitigate the hardship of the inhabitants being handed over to a new sovereign State against their will by a stipulation in the treaty of cession, if any, which binds the acquiring State, to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration.

(25) Reference is made in Vol. 38 of the American Journal of International Law (1944) pages 363-374 to options which were allowed in treaties concluded by Germany between 1939 and 1942 about the evacuation of German minorities from Soviet Russia, Italy and some other countries. It has been pointed out by Oppenheim in section 219 (a) page 504-505 that —

"failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring State."

(26) In some cases therefore an option is stipulated in favour of the inhabitants of the ceded territory and thus avert the charge that inhabitants are handed over to a new sovereign against their will. The terms of option may vary from case to case but the general principle applied has been that a person habitually resident in a ceded territory acquires 'ipso facto' the nationality of the State to which the territory has been transferred, and lose the nationality of the ceding State. (page 506 — Oppenheim.)

(27) From the principles referred to above it will be significant that a person habitually resident within a particular ceded territory acquires 'ipso facto' as a result of the cession the nationality of the State to which the territory is transferred.

(28) On an examination of the provisions contained in the Indian Independence Act it has already been pointed out that British India had ceased to exist after two new independent States having sovereign authority over particular portions of the original territory which constituted British India had been brought into existence.

In this case therefore there was no possibility of a British Indian subject retaining his nationality after 15-8-1947. Even if it were possible for a British Indian subject to retain (after 15-8-1947) the British Indian nationality the respondent husband was not one habitually resident within that proportion of British India which became the Indian Dominion and was subsequently declared to be the Indian Republic. He cannot, therefore, even on the principles applied to cession of territories acquire after 15-8-1947 the nationality of the Dominion of India or the Republic of India that is Bharat.

(29) Whether the respondent husband was a person habitually resident of the North-West Frontier Province i.e. within Pakistan from after 15-8-1947 and also whether he had acquired 'ipso facto' the Pakistan nationality does not require consideration by us as we have already indicated; we do not express any opinion on this point.

(30) No doubt domicil and nationality are two quite different conceptions as had been pointed out by Lord Westbury in — 'Udny v. Udny', (1869) LR 1 Sc and Div 441 at p. 457 (A) —

"The law of England, and of almost all civilised countries ascribes to each individual at his birth two distinct legal states or conditions: one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. This political status may depend on different laws in different countries, whereas the civil status is governed universally by one single principle, namely that of domicil, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend."

A man may change his domicil without divesting himself of his nationality — 'Boldrini v. Boldrini', (1932) Probate 9 (B). Similarly there may be a change of nationality without a change of domicil.

"A change of domicil is not a condition of naturalisation and naturalisation does not necessarily involve a change of domicil. (—'Wahl v. Att.-Gen.', (1932) 147 LT 382) (C)."

(31) But in the present case where the State known as British India disappears, from after a particular date, from the map of the world, it is impossible for a person to retain either the nationality or the domicil of British India. In the case of a complete merger or cession of a State it is not open to a person, who was a citizen of that State, which is now non-existent, or was domiciled therein, to continue to arrogate, even after its disappearance, either a citizenship or a domicil with reference to that quondum State.

(32) On the conclusion reached by us that the respondent's husband had not 'ipso facto' acquired either the nationality or the domicil of the Indian Dominion after 15-8-1947, it remains to be considered whether the respondent had adopted the domicil of India subsequently and before the date of the presentation of the application for dissolution of marriage. The law as to the acquisition of a new domicil is now well settled. It is open to a person to "acquire a domicil of choice, by the combination of residence ('factum') and intention of permanent or indefinite residence ('animus manendi'), but not otherwise" (Dicey's Conflict of Laws, 6th Edition, page 89).

(33) So far as the factum of residence is concerned to constitute residence it need not be long in point of time.

"If the intention of permanently residing in a place exists, a residence in pursuance to that intention, however short, will establish a domicil" — 'Bell v. Kennedy', (1868) LR 1 Sc. & Div 307 at p. 319 (D).

(34) In determining the nature of domicil of choice therefore the 'animus' or the character of the necessary intention requires careful scrutiny. Dicey refers to the four following essential conditions for determining the character of necessary intention—

(1) The intention must amount to a purpose or choice. There is some divergence of judicial opinion as to how far this intention or choice must be definite or conscious. According to some it is not necessary in order to establish a domicile, that a person should have absolutely made up his mind which of the two countries is the place where he intends to make his permanent home —'Attorney General v. Pottinger', (1861) 30 LJ Ex. 284 at p. 292 (E). The other view is that somewhat more distinct intention must be proved specifically:

"it must be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question of change of domicil had arisen in a form requiring a deliberate or solemn determination." — 'Douglas v. Douglas', (1871) LR 12 Eq 617 (F). See also — 'Ramsay v. Liverpool Royal Infirmary', (1930) AC 588 (G). This latter view seems to have been stressed in the more recent cases.

(2) The intention must be an intention to reside permanently or for an indefinite period. If a person goes to a foreign country with the intention to finish a piece of business or even with the intention of staying there until he has made a fortune he still retains his domicil of origin and is not proved to have adopted the domicil of choice — 'Jopp v. Wood', (1865) 4 De GJ & Sm. 616 (H). The intention to reside temporarily may afterwards be shown to have become unlimited. As soon as there is such a change of purpose or 'animus' the fact of domicil will be taken to have been established, but not until then '(1869) LR 1 Sc & Div 441 at p. 458 (A)'.

(3) The intention must be an intention of abandoning i.e. of ceasing to reside permanently in the country of the former domicil. Difficulty arises when the intention to leave the country of former domicil is dependent on some purpose which may subsequently be frustrated. The intention to abandon must be a real one and not a make-believe one. Reference may be made to the observations of the Court of Appeal in — 'Fasbender v. Attorney General', (1922) 1 Ch 232 (I); — 'Fasbender v. Att. Gen.', (1922) 2 Ch 850 (J).

(4) It is not necessary that the intention of the person should be an intention to change allegiance. This view has, however, been shaken by the more recent decision in —'Winans v. Attorney General', (1904) AC 287 at pp. 299-300 (K).

(35) It is to be borne in mind that in determining the domicil of the parties in a proceeding for dissolution of marriage it is the domicil of the husband alone which is to be considered inasmuch as a wife takes the domicil of her husband upon her marriage. It has been repeatedly pointed

out that in the submission by the parties to the jurisdiction of a Court their former domicils are relevant. In view of the clear provisions of S. 2, Divorce Act no other consideration can influence the decision. The difficulties in which one or other party finds himself or herself are not relevant for the decision. The problem of the deserted wife after the husband has acquired a new domicil and the tendency of earlier decisions in English Courts to remedy the peculiar position by relaxing the general principles has no relevancy in the face of the clear statutory provisions in the Indian Divorce Act. As in the more recent cases in England the Courts have been rigorously applying the test of domicil even in hard cases special statutory provisions have been made in England as Matrimonial Clauses Act of 1937 and 1944. In India, however, the Court has to rigidly apply the test of domicil as on the date when the application for the dissolution of a marriage is filed. It is not open to the Courts to import considerations of personal difficulties or problems which may arise on applying the statutory provisions. That is a matter of policy which is the province of other competent authorities.

(36) We shall now proceed to examine the evidence as adduced by the parties to prove the 'animus' of residence as indicated by the husband.

(37) It appears that the husband respondent had on 14-4-1948 applied through the British Embassy at Kabul to the Government of India in the Ministry of External Affairs and Commonwealth Relations regarding "adoption of Indian domicil and the possibility of his employment under the Government of India". It is with reference to that application that the Deputy Secretary in the Ministry of External Affairs, New Delhi, intimated on 27-5-1948 the Secretary, British Embassy at Kabul (Ex. 2 (b) and Ex. A) to the following effect:

> "Mr. J. Ataullah is free to come to India and settle down here if he so desires. His citizenship of the Dominion of India will, however, be determined according to the provisions of the Draft Constitution of India, recently published which are yet to be adopted by the Constituent Assembly of India with or without any modifications. As regards employment under the Government of India, there is none which could be offered to him and he will have to revert to the Government of the North West Frontier Province after the expiry of his deputation to the British Embassy, Kabul."

The respondent husband in course of his deposition in the present proceedings states with reference to his application dated 14-4-1948 referred to above and the reply from the Ministry of External Affairs (Ex. 2(b) and Ex. A):

> "Originally I had the intention of settling in India permanently, but I changed my mind as the Government of India could not promise any job under them. I finally changed my mind on 16-6-1948 when I received that letter" (Ex. A).

He states at another place that

> "Permission had been granted to me by the Government of India by their letter dated 27-5-1948 to reside in India permanently. But I never resided in India permanently."

We have not before us any copy of the application made by Attaullah on 14-4-1948 but it is quite clear that his intention to reside permanently in India was dependent on his obtaining a job in India. The condition was not satisfied and he frankly admits his earlier intention was abandoned on receipt of the letter Ex. A.

(38) The evidence as furnished by Ex. A is not under the circumstances sufficient to prove the adoption of a domicil of choice by Attaullah. The intention to reside permanently in India and also to leave permanently the then domicil, whatever it might have been, were contingent on his obtaining a job in India. This was frustrated. The original intention to abandon the then domicil cannot be deemed to be a real one but a conditional one.

(39) On behalf of the petitioner's wife it was contended that the intention expressed in April 1948 continued in November 1950 and reliance is placed on Ex. 2 a letter written by Attaullah to his father-in-law on 18-11-1950. If this letter is to be treated as an admission by the respondent husband it has to be taken in its entirety. It is to be noticed that the wife petitioner has been residing in India on the strength of a temporary Permit from September 1949. The husband respondent came to Bengal on or about 6-4-1950 and the husband and wife lived together for a few days till 11-4-1950 when they again fell out. The husband left for Kabul a few days later. The application for dissolution of marriage was filed on 2-5-1950, and a decree nisi was passed ex parte on 28-9-1950. The husband respondent came to Bengal between October and November 1950. The case for the husband is that during that visit certain terms for the settlement of the differences between them were accepted. The letter (Ex. 2) which was written by the husband is the outcome of such terms of settlement.

(40) In his letter dated 17-11-1950 addressed to the Secretary Embassy of India in Kabul (with a copy sent to the Assistant Secretary to the Government of West Bengal, Home (Political) Department Calcutta (Ex. 2(a)) he had no doubt declared that he intended

> "....To go to India and settling down there eventual permission for which has already been given by the Government of India vide Memorandum No. D. 3309-EI/48 dated 27-5-1948 from the Deputy Secretary to the Government of India in the Ministry of External Affairs and Commonwealth Relations to the Secretary, British Embassy, Kabul I shall be grateful if it please be recommended to the Government of India to allow my wife to stay in India permanently with her parents who are Indian nationals being bona fide residents of Calcutta. My wife has been born and brought up in Calcutta.
>
> My wife will not be a burden to the Govt., of India in any way as she will stay with her parents and I will support her.
>
> I shall be highly obliged if an earlier action is taken on this application as Government of India have extended the period and validity of the temporary permit of my wife up to 31-12-1950."

If this declaration of intention be taken as valid and a bona fide one as of abandoning the idea or desire to reside permanently in the country of the then domicil and to reside permanently in India he would as from 17-11-1950 be deemed to have adopted a domicil of choice — the Indian domicil.

(41) As pointed out already this expression of intention on 17-11-1950 was long after the date of the application by the wife for dissolution of marriage. A change in domicil subsequent to the date when the application for dissolution was presented will not validate the proceedings as the provisions contained in S. 2, Divorce Act, are clear and specific. Taking into account this difficulty in the way of the petitioner wife it was attempted to be argued that the intention to adopt the Indian domicil was expressed on 14-4-1948 and this

intention was continued till 17-11-1950 as evidenced by Ex. A and Ex. 2(a). As I have pointed out already that the expression of intention or animus as disclosed in the correspondence in 1948 cannot be regarded as having expressed the final intention to reside in India permanently and adopt the Indian domicil unconditionally and without any reservation.

(42) Further Ex. 2(a) has to be read along with Ex. 2 viz., the letter which Attaullah wrote to his father-in-law on 1-11-1950 enclosing what is now marked as Ex. 2(a). An attempt was being made at that stage to settle the differences between the husband and the wife by taking such steps as would make it possible for the wife to stay with her parents by expressing a make believe intention of coming over to India by the husband. Exhibits 2 and 2(a), therefore, cannot be regarded as expressing a real and bona fide intention by the husband to reside permanently in India or of ceasing to reside permanently in the country of his the then domicil. The tests indicated by Dicey in the 2nd and 3rd conditions referred to above are not satisfied.

(43) The evidence as adduced in this case, therefore, leads to the irresistible conclusion that the husband had not acquired ipso facto the Indian domicil on 15-8-1947 and had not thereafter adopted the domicil of India as the domicil of his choice before the wife petitioner presented her petition for dissolution of marriage on 2-5-1950. The condition laid down in S. 2, Divorce Act, not having been satisfied the application for dissolution must be dismissed as not maintainable in the Court of the District Judge, 24-Parganas. The decree nisi passed by the Additional District Judge, Second Court Alipore on 28-9-1950 is accordingly set aside.

(44) As had been noticed in the order passed by this Court on 30-8-1951 the husband respondent raised for the first time in this Court an objection based upon S. 2, Divorce Act, questioning the jurisdiction of the Court to entertain the application. The question of costs was to be determined at the final hearing. In view of the fact that the objection had not been raised at the initial stage the proper order in the circumstances of this case will, therefore, be to direct each party will bear the respective costs of both the Courts.

(45) CHUNDER, J.: I agree.

(46) LAHIRI, J.: I agree.

A/V.S.B. Decree nisi set aside.

A.I.R. 1953 CAL. 536 (Vol. 40, C. N. 202)

P. B. MUKHARJEE J.

Sm. Charusila Dassi, Plaintiff v. Madan Theatres Ltd. and others, Defendants.

Suit No. 3788 of 1949, D/- 5-9-1951.

Transfer of Property Act (1882), S. 114 A — Breach of covenant to keep free seats in cinema house — (West Bengal Amusement Tax (Amendment) Act (11 of 1949), Ss. 3, 4).

A covenant in a lease of cinema house, provided that the lessee shall during the period of lease keep one box at the disposal of the lessor. It was also provided that the lessee shall pay both the owner's and occupier's shares of rates and taxes and other outgoings and impositions payable 'in respect thereof' during the term of the lease —Held that no price for the seats mentioned in the covenant was to be paid by the lessor — Person admitted on free ticket was liable to pay entertainment tax. But the covenant required the lessee to discharge for and on behalf of the lessor such liability — The lessee did infringe its liability under the covenant to provide free seats to the lessor when it attempted to realise the tax from the lessor — Seats on demised premises being part of the demised premises taxes in respect thereof could legitimately come under the covenant contained in the other clause — There being the breach of the covenant and the lessor having given the necessary notice of forfeiture, forfeiture must follow as a matter of legal consequence. As one of the clauses of the lessee's covenant in the lease provided clearly that the breach of any condition mentioned in the lease will entitle the lessor to re-enter, and the breach in this case was capable of remedy and the lessor failed to remedy, therefore, under S. 114A, T. P. Act, the Court had no power to grant any relief against forfeiture. Case law ref.

(Paras 15, 21, 30, 31, 37, 40, 43)

Anno: T. P. Act, S. 114A N. 1.

Atul Chandra Gupta and K. K. Basu, for Plaintiff; S. M. Bose, for Defendants.

CASES CITED:

(A) (1867) 36 LJCP 103: LR 2 CP 326
(B) (1897) 66 LJQB 287: (1897) 1 QB 525
(C) (1897) 66 LJ Ch 350: (1897) 1 Ch 633
(D) (1914) 83 LJKB 941: (1914) 2 KB 361
(E) (1910) 79 LJKB 138: (1910) 1 KB 247
(F) (1886) 55 LJQB 587: 17 QBD 212
(G) (1882) 52 LJQB 190: 9 QBD 632
(H) (1918) 87 LJKB 984: (1918) 2 KB 236
(I) ('38) AIR 1938 PC 243: 65 Ind App 354: 42 Cal WN 1098 (PC)
(J) ('36) AIR 1936 Cal 459: 40 Cal WN 1118
(K) (1888) 58 LJ Ch 299: 13 AC 613
(L) (1902) 71 LJKB 499: (1902) 1 KB 700
(M) ('35) AIR 1935 Bom 41: 59 Bom 194
(N) ('19) AIR 1919 Mad 1106: 41 Mad 629

JUDGMENT: The plaintiff in this suit claims possession of the two cinema houses, named Sree Cinema and Uttara Cinema, formerly known as Cornwallis theatre and Crown Cinema respectively at No. 138/1 and 138/2 Cornwallis Street, Calcutta, on the ground of forfeiture. The defendant company is alleged to have committed breach of the covenant in the lease between the plaintiff and the defendant company dated 19-8-1933, which provides that the lessee shall keep a box, not less than four seats in each of the said cinema houses at the disposal of the lessor for the use of herself or other person or persons authorised by her or on her behalf & if the lessor so desires in writing the defendant company shall instead of four seats in the box permit 6 persons in the stall and 8 persons in the gallery or pit to view the performance held in the aforesaid two demised premises. The allegation is that the defendant company has committed breach of this covenant. That is the cause of action.

(2) The main dispute in this suit may be stated briefly at the outset.

(3) By a Statute of the West Bengal Government an Entertainment Tax has been imposed on all free or complimentary passes or tickets. This Statute is the West Bengal Amusement Tax (Amendment) Act, 1949, being West Bengal Act 11 of 1949. The defendant company contends that such Entertainment Tax has to be paid by the plaintiff and the defendant company and its Receivers who are the two other defendants in this suit demanded payment of this tax from the plain-

tiff. On the other hand the plaintiff contends that she is not liable to pay the tax for the seats mentioned in the covenant, in the Indenture of Lease. She claims protection from this liability under the covenants in the lease.

(4) It is admitted by the defendant company and the two Receiver defendants that the admittance of the Cinema was refused to the plaintiff and/or her nominees on this ground. The plaintiff gave notice of forfeiture and gave the defendants time to remedy such alleged breach. As the defendants did not yield on the point, the plaintiff has sued for possession.

(5) The main question in this suit is one of law and of considerable importance. Such question is whether the lessor or the lessee is to pay this Entertainment Tax in respect of seats mentioned in the covenant. It depends on the construction of the covenants in the lease and on the construction of the West Bengal Amusement Tax Act.

(6) The following issues were raised by counsel for the defendant and accepted by the plaintiff:

1. What was the agreement with regard to keeping a box and/or seats at the disposal of the plaintiff by the defendant company under lease dated 19-8-1933?
2. Have the defendants committed breach of covenant by refusing admittance to the cinema performance as provided for in the said lease except on receiving from the plaintiff the amount of taxes levied by the West Bengal Amusement Tax (Amendment) Act, 1949, being West Bengal Act 11 of 1949?
3. In case the defendant company has committed breach of covenant is it entitled to any relief against forfeiture?
4. To what relief, if any, is the plaintiff entitled?

Another issue was raised whether the notice given by the plaintiff forefeiting the lease was valid. But the learned Advocate-General appearing for the defendant company abandoned that issue.

(7) There are two admitted Briefs of documents marked 'A' and 'B' in these proceedings. Counsel on either side have called no evidence as the issues are all issues of law.

(8) Issue No. I. The covenant in the lease of 19-8-1933, which is relevant for this issue is contained in cl. 7 of the lessee's covenants and runs as follows:

"The company shall at all times during the period of the lease keep one box containing not less than 4 seats in each of the said Cornwallis Theatre and Crown Cinema at the disposal of the lessor for the use of herself or of person or persons authorised by her or on her behalf in writing and if the lessor so desires in writing the company shall instead of four seats in the box permit 6 persons in the stall and 8 persons in the gallery or in the pit to view the performances which will be held in the aforesaid two demised premises."

(9) On this covenant a contention has been raised that this does not provide for free seats in the box or in the stall or in the gallery or in the pit. The substance of that contention is that the word "free" has not been used in the covenant. The words "keep one box" are said only to mean that the box is reserved but payment of the price of tickets has to be made for getting into the seats. As long therefore as the stated accommodation is kept at the disposal of the lessor or for her use the covenant is said to be satisfied.

(10) To my mind this is an untenable contention both on the grounds of pleading and correspondence in this suit as well as on the ground of construction of the covenant.

(11) I will take first the pleadings and the correspondence in this suit. In paragraph 5 of the written statement filed on behalf of the defendant company the admission is made in the following terms:

"The obligation of the lessee under the said indenture of lease dated the 19th August, 1933, is to issue free passes to the lessor or other person or persons authorised by her or on her behalf in writing to the lessee."

(12) On that pleading, it is not open in my opinion to the defendant company now to contend that there was no obligation to provide the seats mentioned in the covenant 'free'. In paragraph 2 of the written statement by the defendant Receivers the admission is made in the following terms:

"These defendants have taken the view that they will not charge the plaintiff or her nominees any price on behalf of the said lessee but the Amusement Tax payable to the West Bengal Government must be paid either by the plaintiff or her nominees."

(13) This admission is made further clear in paragraph 3 of their written statement where in fact it is said that the seats are free except as to Amusement Tax payable on them. There is further admission in the said paragraph 3 of their written statement that the defendants had "at all material times allowed free and complimentary passes or tickets in terms of the lease."

(14) Upon such admission in the pleadings I do not think that the argument is open to the defendant Receivers now that the seats mentioned in the covenant are to be paid for by the plaintiff.

(15) The correspondence is also to the same effect as the pleadings. In the letter of Muralidhar Chatterjee, Director of the Exhibitor Syndicate Ltd., acting for the defendant company addressed to the plaintiff dated 29th March 1949, it is admitted

"Under the terms of the lease agreement with you, you have been allowed one box of complimentary passes and 6 D. C. The passes or the complimentary tickets were so long free from payment of any Amusement Tax."

Then again in the letter of 14-6-1949, from the defendant company's solicitor to the plaintiff's solicitor it is said with reference to that letter of 29-3-1949,

"our client duly sent intimation to your client about the imposition of the Amusement Tax by the Government on free pass and requesting your client to advise the person or persons who will come on the complimentary pass or tickets issued by your client to pay the amount of entertainment tax payable."

Again in the defendant company's solicitor's letter to the plaintiff's solicitor dated 21-6-1949 it is said:

"As already stated the lessee's obligation was to keep the seats reserved free from payment of any charges which they have done."

On the correspondence in this suit, and the entire conduct of the defendant company appearing from the said correspondence, the admission is clear that these seats mentioned in the covenant were free in the sense that no price was charged or paid in respect thereof. On this ground also, I hold that this contention is no longer open to the defendants that the seats mentioned in the covenant had to be paid for by the plaintiff.

(16) I do not wish to rest my decision on this issue merely on admission on pleadings and correspondence or even on the conduct of parties. On the construction also of this particular

covenant in the lease I have come to the same conclusion. My reasons for so construing the covenant may be stated briefly.

(17) The words in the covenant are not merely to "keep one box". There are qualifying words such as "at the disposal of the lessor for the use of herself or of other person or persons authorised by her", "permit" and "to view the performances which will be held in the aforesaid two demised premises." The combined effect of the words "disposal", "permit" and "to view the performances" to my mind is that the seats mentioned in the covenant are at the disposal of the plaintiff or her nominees to view the cinema performances and no price for the seats so used is to be charged or paid. This covenant does not in my view mean an ordinary case of a mere reservation which is open to other spectators, namely, reservation on payment or purchase of a ticket.

(18) On a consideration of the whole lease and the context in which this particular covenant appears it seems to me that this is a part of the consideration for granting of the lease by the plaintiff to the defendant company. It would be a meaningless consideration if the prices of such seats are to be paid by the plaintiff. In fact, the very next covenant appearing in Cl. 8 of the lessee's covenant the consideration of the lessee's quiet enjoyment is the performance by the lessee of the "covenant hereinbefore mentioned."

(19) The historic context behind this particular covenant leads to the same construction. The origin of the lease of these two cinema houses dates back to the year 1919. By lease dated 29-10-1919, it was provided:

> "The lessee shall during the terms of this demise allow to the lessor a free complimentary pass for four seats in the first class stall or a private box for the performance at the theatre or cinema in the demised premises".

This clearly provides for free seats. Then there are two leases between the same parties on 14-11-1924. There it is provided:

> "The company shall during the term of this demise allow to the lessor a free complimentary pass for 4 seats in the first class stalls or a private box for the performance at the theatre or cinema in the demised premises."

That again clearly states that the seats are to be free. Then came the lease of 19-8-1933, and I have already set out in extenso the covenant appearing in that lease. I am not unmindful of the fact that one lease is not to be interpreted by reference to another lease. But here the historic context of these other previous leases has an importance and relevance which arise by reason of the fact that in this lease of 1933 there is a specific stipulation in cl. 9 of the lessee's covenant which runs in these terms:

> "Provided always and it is hereby agreed and declared that the terms, conditions and covenants as contained in the said two leases dated 14th day of November 1924 will be existing and binding on the parties."

(20) Therefore, the lease of 1933 does attract such terms and conditions of the lease of 1924 as are not inconsistent with the lease of 1933. The construction that the seats mentioned in cl. (7) of the lease of 1933 are not to be paid for by the plaintiff can also be arrived at by attracting the above provision of the 1924 lease, subject of course to what is expressly stated in cl. (7) of the lease of 1933. Mere variation of the language between the lease of 1933 as compared to the language in the lease of 1924, in the sense that the word "free" is dropped in the 1933 lease, cannot lead to the conclusion that by the 1933 lease it was intended to make the seats mentioned in cl. (7) thereof not free, because of the fact that the terms and conditions of the 1924 lease are expressly said to be subsisting by the clear provisions of the 1933 lease. This conclusion is not, in my view, affected by the fact that the lease of 1924 has expired. By stipulating in the 1933 lease that the terms and covenants of the 1924 lease are to subsist, they have, in my view, been extended for the period mentioned in the 1933 lease. There can be no doubt that if there is a conflict or repugnancy between the 1924 lease and the 1933 lease, the latter lease of 1933 must prevail. But I see neither conflict nor repugnance when I make the construction that cl. (7) of the lessee's covenants in the 1933 lease must mean free seats. In fact, such construction alone reconciles cls. (7) and (9) of the lessee's covenants in the very lease of 1933.

(21) I therefore hold, both on the pleadings as well as on the construction of cl. (7) of the lessee's covenants in the lease of 1933, that the seats mentioned therein are free seats for the plaintiff and the plaintiff need not pay the price for the same.

(22) Issue No. 2. This is the main and the most important issue in the suit. Indeed the whole controversy is who should pay the Entertainment Tax, the lessor or the lessee; or to put it more accurately and narrowly, can the defendant company realise the Entertainment Tax levied by the Government on free and complimentary tickets used by the plaintiff and/or her nominees?

(23) A survey of the Bengal Amusement Tax Act with its amendments is essential to understand the nature of the problem raised.

(24) Amusement tax was introduced into Bengal in the year 1922 for the declared object of making an addition to the public revenues of Bengal. That was the Bengal Amusement Tax Act, 1922, being Bengal Act 5 of 1922. By Section 3 of that statute an entertainment tax is provided for on all payments for admission to any entertainment, which included any performance, amusement, exhibition, game or sport. Being a tax on "all payments for admission to any entertainment", no such amusement tax could be realised where admission to the entertainment was not by payment, but free. One of the main alterations introduced by the Amendment Act 1949 is to impose a tax even where no payment is made for admission to the entertainment. In sub-section (3) (b) of S. 3 of the Act as amended it is now provided:

> "Entertainment taxes shall be charged, levied and paid on all free or complimentary passes or tickets, by whatever name called, issued by the proprietor of a cinematograph exhibition in respect of admissions without payment to a seat or other accommodation therein and every person who is so admitted on a free or complimentary pass or ticket in a cinematograph exhibition shall be liable to pay the same amount of entertainment tax as would be payable by him had he been admitted to such seat or other accommodation on payment".

(25) Upon this the learned Advocate General has argued with considerable force that the statute makes every person who is admitted on a free ticket liable to pay the entertainment tax. I have given my most anxious consideration to this argument of the learned Advocate General, and the clear words of the statute, in my opinion, show that the Advocate General's contention must be accepted. There is no doubt in my mind that

the words of sub-section (3) (b) of Section 3 of the Amended Act are such that the person who is admitted on free ticket is liable to pay the entertainment tax.

(26) But this conclusion does not lead to the solution of the problem. Liability of the person admitted on a free ticket does not, in my view, under the scheme of the Act as amended, prevent the proprietor of the cinema from discharging that liability. Under S. 4 as amended, it is provided that no person liable to pay the entertainment tax shall be admitted to any entertainment except with a ticket stamped with the stamp issued by the Government for the purpose of revenue denoting that the entertainment tax has been paid, or, in special cases, with the approval of the Government, through a barrier which, or by means of a mechanical contrivance which automatically registers the number of persons admitted. Nevertheless, the provision is also made that this procedure for admittance will not apply in the case when the proprietor of the entertainment has made arrangements approved by the Government for furnishing returns of the payments for admission and in the case of cinematograph exhibitions also returns of admission to seats or other accommodation without payment and further has given security up to an amount and in a manner approved by the Government for the payment of the entertainment tax. On a proper construction of the amended Section 4 of the Act it is clear to me that if the proprietor of the entertainment has made the requisite arrangement for furnishing returns both for paid and unpaid seats and has given the necessary security, the person liable to pay the entertainment tax may be admitted without payment of the tax as mentioned in sub-clauses (a) and (b) of S. 4 of the amended Act.

The proprietor, therefore, has the option. Then again, by S. 5 of the Amended Act the proprietor of the entertainment is liable on a conviction to pay a fine not exceeding Rs. 5,00/- plus the tax if he allows a person liable to pay tax to be admitted without complying with the provisions of Sections 4 and 5 of the Act as noticed above. That on a proper construction means that a person liable to pay entertainment tax can be admitted to a place of entertainment without payment of the tax if the proprietor has made the necessary arrangements for returns and security as contemplated in S. 4, and if he does that he cannot suffer any conviction or penalty. The proprietor of the entertainment, therefore, has it in his power to avoid penalty and conviction as well as to admit a person liable to pay tax without actually realising such tax from the person so admitted, as long as he gives the necessary returns of admissions to seats and furnishes the necessary security to the Government.

(27) That view is further supported by a reference to some other sections of the Act. Section 6 lays down that the provisions of Sections 4 and 5 shall not apply to any entertainment in respect of which a consolidated payment is made under sub-section (4) of S. 3. Now, Section 3 (4) of the Act provides that the Government may, on the application of a proprietor of any entertainment, in respect of which the entertainment tax is payable under the sub-section, allow the proprietor on such conditions as they may prescribe to pay the amount of tax due by means of a consolidated payment of 20 per cent of the gross sum received by the proprietor on account of payments for admissions to the entertainment and on account of tax. Now, when the proprietor makes a consolidated payment under sub-section (4) of S. 3, the proprietor avoids the operation of both Sections 4 and 5 of the Act. It is noteworthy that neither S. 6 nor S. 3 (4) of the Act has been amended by the Amendment Act of 1949. The result is that by paying the consolidated amount on the gross sum received on account of payments for admission to the entertainment and on account of the tax the proprietor will be within law to admit persons on free or complimentary passes or tickets without realising the amusement tax from the holders of such tickets at the time of their admittance.

(28) A person cannot be required to commit a crime or an offence in order to perform a contract into which he has entered with another person. Requirement under the law to perform a contract is ordinarily commensurate with the ability to perform it. To this Court there are no degrees of higher or lower efficacy or higher or lower order of sacredness as between a contract and a statute. The Court will hold both contract and Statute equally good and sacred obligations to be discharged and apply such remedies as the law provides in the case of breach of either. The Court does not make a competitive preference between a breach of a statute and a breach of contract. The Statute however may make the contract illegal in which event no court can require its performance. The law will not presume that the demands of a Statute and the demands of a contract are mutually intolerant and will not treat them as such unless they are manifestly so. Whenever possible the law will attempt to reconcile them and in doing so the court will have to be satisfied, before the Statute is allowed to override the contract, that the Statute is such, that to contract out of it is not permissible or against public policy.

I am satisfied on the analysis I have made that the present Statute under my consideration is not such a Statute. Had I been convinced on a reading of the different sections of the Act as amended that the proprietor of an entertainment by admitting a person liable to pay the entertainment tax without realising the tax from him was open to statutory penalty or an offence, I would have held that inasmuch as the Act makes the person admitted liable, the tax is to be paid by him when demanded by the proprietor, because to admit him without payment of the tax would mean conviction for the proprietor. But I am convinced that that is not the position here. Under the scheme of the statute the liability of the person admitted does not mean that the proprietor cannot discharge that liability for him.

(29) The whole question therefore resolves into the problem that although the liability to pay the Entertainment Tax is on the person admitted without payment and although a free ticket is charged with the payment of the Amusement Tax, does the lease or its covenant emancipate the lessor or her nominees from the demand of the defendant company to obtain the tax, from the plaintiff. That a person is admitted without payment and that free tickets are charged with the payment of the tax are clear to my mind beyond dispute both under sub-section 3 (b) of Section 3 of the Amended Act as well as under S. 7 (1) of the Amendment. But the point here for determination is, does the covenant protect the lessor from this liability and enable the lessor to shift this Statutory liability to the lessee under the covenant.

(30) Reverting to cl. 7 of the lessee's covenants in the lease and applying the considerations I have just discussed, I reach the conclusion that this covenant requires the lessee to discharge for

and on behalf of the lessee such liability for tax on free and complimentary tickets or passes.

(31) Entertainment tax cannot in my view be realised on these seats by the lessee from the lessor. That will not keep the lessee's covenant to provide free seats to the lessor. Such free seat is part of the very consideration of the lease just in the same way as rent. In my view, therefore, the lessee does infringe its liability under the covenant to provide free seats to the lessor if it attempts to realise the tax from the plaintiff. This does not mean that such free seats or the holders of such free passes or complimentary tickets are not under the statute liable to pay taxes. They are expressly made so liable under the Act but by virtue of the covenant, the lessee, in my view, has to discharge such liability for the lessor and that the lessee, as the proprietor of the cinema can do under the Act without incurring any penalty or committing any offence thereunder as I have indicated by my analysis of the various provisions of the Statute. That is how in this case the demands of the Statute and the demands of the contract can best be reconciled.

(32) The next consideration which appears to me to be relevant in this context is the well-settled principle that the law will always imply in such context on the part of the lessee to do all things necessary to perform the covenant. That he can so perform in this case without obtaining payment of the entertainment tax from the lessor or her nominees under the statute is clear. I find nothing in the statute which prevents the defendant company as lessee to discharge this liability for entertainment tax which has been levied by the statute on all free or complimentary passes or tickets and which says that every person who is so admitted on free or complimentary passes or tickets shall be liable to pay the amount of the entertainment. It is in my judgment open to two persons by a private contract to agree that one will discharge the tax liability of the other. Such a contract is neither illegal nor against public policy. This is therefore a statute from which the parties can contract out and this is exactly, in my view, the effect of the covenant. The covenant shifts the incidence of the tax. The protection contained in the covenant, therefore, in my view prevails and protects the lessor from the tax being realised by the lessee.

(33) It is necessary at this stage to dispose of another argument which has been advanced on the basis of the construction of cl. 2 of the lessee's covenant in the lease of 1933. By that clause, it is provided:

> "That the company during the continuance of the term hereby granted shall pay the monthly rent as hereinbefore reserved on the days in the manner and to the extent hereinbefore mentioned and shall also pay both the Owner's and Occupier's shares of rates and taxes and other outgoings and impositions payable in respect thereof during the said term".

(34) On behalf of the plaintiff, it has been contended that apart from Clause 7 of the lessee's covenant which I have just noticed and discussed this particular clause also protects the lessor from the tax. Learned Advocate General submits that on proper construction of this particular clause, it means that the rates and taxes or outgoings and impositions that the lessee agreed to pay under this clause are only such as are "in respect thereof" appearing in the covenant. He emphasizes the words "in respect thereof". The argument proceeds that the provision for free seats is not part of the demised premises & therefore the entertainment tax on the free seats does not come within this covenant so as to protect the lessor. It is said that the taxes or impositions contemplated by this covenant are proprietory taxes and do not include entertainment tax which is levied on the person admitted without payment and which therefore must be regarded as a personal tax. There is a good deal of force in that argument. That the words "in respect thereof" are very material in construing such covenant there can be no doubt. I have examined various decisions and authorities on this point and if I do not refer to them that is because I do not consider that they settle the point that I have to decide. While on the question of construction of a particular covenant I am not convinced that decisions and authorities in other cases are at all a safe guide, this general conclusion can at any rate be made from the authorities that the words "in respect thereof" do circumscribe the scope and effect of a covenant. In Vol. 20 of Halsbury's Laws of England at p. 194 the law is stated briefly as follows:

> "In all the above cases however whether the 'covenant' is in the restricted form — 'rates taxes and assessments' — or whether it is extended by the use of one or more of the words 'duties', 'outgoings', 'impositions', 'burden', or 'charges' if it defines these as existing 'in respect of the demised premises' this is enough to determine the scope of the covenant and it is immaterial whether the words 'or on the landlord or tenant in respect thereof' are also inserted".

I accept that to be the correct statement of law on that point.

(35) Various authorities which I have examined and to which reference was made in the course of arguments are: — 'Tidswell v. Whitworth', (1867) L R 2 C P 326 at p. 336 (A); — 'Brett v. Rogers', (1897) 1 Q. B. 525 (B); — 'In re Floyd', 1897 1 Ch 633 (C); East wood v. Me Nab', (1914) 2 K. B. 361 (D); — 'Wooler v. North Eastern Breweries', (1910) 1 K. B. 247 (E); — 'Aldridge v. Ferne', (1886) 17 Q B D 212 (F); — 'Allum v. Dickinson', (1882) 9 Q B D 632 (G); — 'Henman v. Berliner', (1918) 2 K B 236 (H). But there is no terminological similarity between the language of the covenant that I have to construe and the language of the covenants construed in these authorities.

(36) The learned Advocate General also relied on the decision of the Privy Council in — 'Bengal Coal Co. Ltd. v. Sri Sri Janardan Kishorelal Singh', AIR 1938 PC 243 (I) deciding the appeal from this High Court whose judgment is reported in — 'Bengal Coal Co. Ltd. v. Sri Sri Janardan Kishore Lal Singh', AIR 1936 Cal. 459 (J). The language of the covenant in that case used the words in a mining lease "charged, assessed or imposed upon the said mine or any part thereof". I must say at once that the words I have to construe are not similar. It was held by the Privy Council in that case that on the construction of the covenant the case being a levy on the immovable property was a demand which was within the covenant but income tax was outside such covenant. Sir George Rankin in delivering the judgment of the Privy Council at p. 245 of AIR 1938 P C 243 (I) observed:

> "Income tax is in a very different position, as intending purchaser or mortgagees of the lessor's interest would appreciate. It is not a tax imposed upon the mines in any sense relevant to the lessee's covenant in a Mining Lease. Indeed express words referring to pub-

lic demands imposed upon the proprietors in respect of the mine would not have brought income tax within the covenant".

As the words "imposed upon" are not in the present covenant before me this case cannot be said to decide the construction of the particular covenant in this suit. The Privy Council referred to the cases of — 'Payne v. Esdaile', (1888) 13 A. C. 613 (K), (1882) 9 Q B D 632 (G) and — 'Foulger v. Arding', (1902) 1 K. B. 700 (L).

(37) These principles must all be understood with reference to the particular covenants considered in each case. I have set out the covenant in the present lease before me relating to the payment of taxes. I will assume, as I consider it to be correct, that the taxes mentioned in such covenants are only those which are "in respect of the demised premises". The real question in this case appears to me whether the provision of free seats can at all be said to be a part of the demised premises. Now for this purpose clause 7 of the lessee's covenants in this regard uses rather significant words and they are "to view the performance which will be held in the aforesaid two demised premises". That seems to me that the lessor should be given free access to the seats in these two demised premises during performance. In such a contract I do not see anything unreasonable in the construction that these seats in the demised premises are part of the demised premises themselves and if any tax is imposed in respect of these seats or persons using these seats why such taxes should not be said to be in respect of the demised premises. It is not any seat that is contemplated in Cl. 7 of the lessee's covenant but seats on those demised premises. If the proprietor of the cinema house or the lessee defendant company had agreed by a covenant to provide seats to the lessor in other cinema but not in this demised premises that surely would not come within the meaning of "in respect of the demised premises". Such seats being part of the demised premises taxes in respect thereof can in my view legitimately come within the meaning of the covenants contained in clause 2 of the lessee's covenant.

(38) It is essential to remember also in this context that the purpose of the lease as appears from the lease itself is provided in cl. 6 of the lessee's covenant which is in these terms:

"The company shall be at liberty to use the demised premises for bioscope and cinema shows, party entertainment, theatre, clubs and all other purposes of like nature".

Obviously, the purpose of the lease was to make it a house for entertainment. Obviously again and expressly indeed the lessor was intended to be given by the lease free access to such entertainments on those demised premises. If therefore such entertainment being the express purpose of the demise attracts a tax, it is difficult to see how it goes outside the covenant. If the lessee did not use these demised premises for this particular purpose of cinematographic exhibition, then such user would not have attracted the tax. It is in a double sense that the entertainment tax in this case can be said to be "in respect of" the demised premises, first because the very purpose of the demise being entertainment produces the tax and secondly because the seats themselves being on the demised premises are an integral and inseparable part of the demised premises. It is one of those cases where I think it is not possible to make a clear-cut division between a personal tax and a proprietory tax. It is one of those cases where I consider the personal element of the tax, is so inextricably connected with the proprietary element of it, that such a tax can very reasonably be said to come within the meaning of Cl. 2 of the covenant. On the other question there can of course be no doubt that entertainment tax will be within the meaning of the words "taxes", "outgoings" or "imposition" used in that covenant.

(39) I therefore hold that even on the construction of cl. 2 of the lessee's covenant, the liability to pay the entertainment tax should be discharged by the lessee under this covenant although the statute imposes such liability on the free seats and the persons using them.

(40) As it is admitted that the defendants have refused admittance to the lessor or her nominees except on receiving from the plaintiff the amount of taxes levied by the West Bengal Amusement Tax Act as amended, the answer to issue No. 2 must, in my opinion, be in the negative and I hold that the defendant has committed breach of the covenant.

(41) Issue No. 3. There being the breach of the covenant and as the plaintiff gave the necessary notice of forfeiture, forfeiture must follow as a matter of legal consequence.

(42) The only question now is whether any relief can be given by me against such forfeiture. Court's power to grant relief against forfeiture is much wider when such forfeiture is caused by non-payment of rent. There S. 114, T. P. Act endows the court with the power to relieve forfeiture at the hearing of the suit for ejectment. But where forfeiture is caused by the breach of an express condition providing for re-entry the only relief is that provided by section 114 A, T. P. Act. The substance of that relief is the opportunity to remedy that breach within a reasonable time after the service of the notice under that section. Once that stage is passed with the expiry of the reasonable time without remedy of the breach, the court in my judgment is powerless to grant any relief against forfeiture. The Legislature in my view, by introducing this particular relief under S. 114A, T. P. Act, by the Amending Act, 20 of 1929 intended a conscious and deliberate departure from the Scheme laid down for relieving forfeiture for non-payment of rent u/s. 114, T. P. Act, and withheld from the court any power to grant relief against forfeiture caused by breach of express condition providing for re-entry, where the lessee had failed to remedy the breach within a reasonable time after notice to remedy. That intention of the Legislature will be defeated if the court assumes and exercises any further power of relief purporting to act under equity or inherent jurisdiction. I am not unmindful of the obiter dicta of the Bombay and Madras High Courts in —'Rachtoppa v. Konher', AIR 1935 Bom 41 (M) and — 'Komalukutti v. Muhamad', AIR 1919 Mad 1106 (N), where relief was said to be possible when forfeiture is incurred by disclaimer. But they are of no assistance here because this is not a case of forfeiture by disclaimer but is a case clearly within the four corners of S. 114A, T. P. Act. Where that is so there can in my judgment be no scope whatever of this court applying equity jurisdiction or inherent jurisdiction in the teeth of the Statute.

(43) In the present case, the forfeiture is incurred for breach of an express condition. Clause 8 of the lessee's covenant in the lease of 1933 provides clearly that the breach of any condition mentioned in the lease will entitle the lessor to re-enter. The admitted Brief of Correspondence shows that notice in writing was given by the plaintiff under S. 114A, T. P. Act, specifying the

particular breach complained of, and asking for remedy of the breach. The correspondence shows that the letter of 1-9-1949 is such a notice. That reasonable time was given by the plaintiff to the defendants is also seen from the letter dated 8-6-1949. The defendants did not remedy the breach and chose to obtain and act on counsel's opinion. On that it is argued that the defendants and specially the Receiver defendants could not remedy such a breach as it was a question of law and they had to wait till the decision of the court. This I am afraid is no argument in defence under S. 114A, T. P. Act. One who takes a defence in law just as one who takes a defence on fact must always do so at his peril. The words in S. 114A, T. P. Act and in Sub-paragraph (o) thereof are "capable of remedy" and the lessee "fails to remedy". The breach in this case was capable of remedy and the lessee failed to remedy. Legal opinion can be no answer and can give no protection. The defendants have taken the risk of acting on the legal opinion without remedy of the breach. They therefore have also taken the risk of the consequence. In such a case, therefore, under S. 114A, T. P. Act, the Court has no power when the conditions mentioned in that section are satisfied to grant any relief against forfeiture. This issue therefore must be answered in the negative.

(44) Issue No. 4.: Relief follows as a matter of course on the basis of my findings on the foregoing issues.

(45) For reasons stated above, the plaintiff is entitled to judgment in this case. There will therefore be judgment for the plaintiff for possession of the said demised premises and for costs. No claim for damages has been pressed before me. I certify the suit to be a fit and proper one for the employment of two counsel. Costs of the Receivers should come out of the estate in their hands and such costs will be as between attorney and client.

B/D.H. Suit decreed.

A.I.R. 1953 CALCUTTA 542 (Vol. 40, C. N. 203)

LAHIRI AND GUHA JJ.

Ahmed Hossain, Petitioner v. Aswini Kumar and others, Opposite-Party.

Civil Rule No. 245 of 1953, D/- 10-3-1953.

(a) Municipalities — Bengal Municipalities Election Rules, 1932, R. 17 — "Scrutiny of nomination", meaning of.

The phrase 'scrutiny of nominations' occurring in sub-rule 4(b) has the same meaning as the phrase 'scrutiny of nomination papers' referred to in sub-rules 3 and 4(a). Case law referred. (Para 7)

(b) Municipalities — Bengal Municipal Act (15 of 1932) as amended by Act 28 of 1951, S. 22 — Bengal Municipalities Election Rules, 1932, R. 17 — Powers of Chairman and Magistrate.

So far as elections under the Bengal Municipal Act, 1932 are concerned, the powers of the Chairman, regarding determination of the eligibility of a candidate under S. 22, while holding the scrutiny, are not higher than the corresponding powers of the mayor and while acting under Rule 17 he cannot decide a question of qualification. He can determine any 'formal' objection arising on the face of the nomination paper. (1888) 13 A. C. 241 and other case law considered. (Para 11)

(c) Municipalities — Bengal Municipalities Election Rules, 1932, R. 20 — Powers of District Magistrate as appellate authority.

The Magistrate's powers under R. 20 are wider than those of the Chairman under R. 17. In the context in which it appears in R. 20, the word 'appeal' does not have the same technical meaning and connotation that attach to that word ordinarily. The District Magistrate's powers are not co-extensive with those of the Chairman and the former has, while the latter has not, the power of scrutinising the eligibility of a candidate under S. 22. Provided that the formalities laid down in R. 17, sub-rr. (1) and (2) have been observed, the District Magistrate has the power to insert in the list of candidates the name of a candidate who has been wrongly omitted from such list. He has also similar powers of omission of the name of a candidate who is not eligible for election by reason of S. 22, even though it had been accepted by the Chairman. Case law referred. (Paras 13, 15)

(d) Municipalities — Bengal Municipal Act (15 of 1932), S. 22(1)

If a person is disqualified on the date of nomination, he cannot shake off his pre-existing disqualification by acquiring a new right between the date of nomination and the date of scrutiny. Where, therefore, on the material date (the last date for submission of nomination) a person was in arrears for more than three months in payment of the tax which he was liable to pay, he comes within the mischief of Cl. (g) of amended S. 22 (1) and it matters little that the name of the Press of which he was the proprietor and not his name was recorded in the books of the Municipality as the assessee, and that his name was in the electoral roll by reason of his educational qualifications. Case law referred. (Paras 16, 17)

(e) Municipalities — Bengal Municipal Act (15 of 1932), S. 38(d).

Where there was no poll there being only three candidates passed by the Magistrate under R. 20 for three seats, neither the spirit nor the letter of the law requires that two inoffensive candidates should be penalised by way of setting aside the whole election for the fault of a third candidate who was wanting in the necessary qualifications. Under S. 38(d) of the present Act, it is open to the High Court to set aside the election of the delinquent candidate only without interfering with the result of the election in so far as the other successful candidates are concerned. AIR 1931 Cal 36, Distinguished and Explained. (Para 19)

Noni Coomar Chakravartty, for Petitioner; Anil Kumar Sinha and Somendra Ch. Basu, for Nos. 1 and 2 for Opposite-Party.

CASES CITED:

(A) (1888) 57 LJ QB 313: 13 AC 241
(B) (1904) 73 LJKB 47: (1904) 1 KB 74
(C) (1899) 68 LJQB 599: (1899) 1 QB 852
(D) ('43) AIR 1943 Cal 574: 47 Cal WN 676: 44 Cri LJ 601
(E) ('07) 31 Bom 604
(F) (31) AIR 1931 Cal 36: 34 Cal WN 741
(G) ('52) AIR 1952 SC 64: 1952 SCR 218
(H) ('31) AIR 1931 Cal 288: 34 Cal WN 972
(I) (1899) 68 LJ QB 599: (1899) 1 QB 852
(J) ('53) AIR 1953 Cal 184: 89 Cal LJ 211
(K) ('44) AIR 1944 Cal 395: 48 Cal WN 655

GUHA, J.: This is an application under Art. 227 of the Constitution of India and S. 115, Civil P. C. by Sheikh Ahmed Hossain who was a candidate for election to the Garden Reach Municipality at its fourth general election. In order to appreciate the various points urged before us, it is necessary to set forth in some detail the relevant facts.

(2) Three seats were allotted for Ward No. 3 of the Garden Reach Municipality and the present petitioner was one of the candidates. His name was finally published in the final Electoral Roll of Male Voters of the same Ward. The date of final publication of the Electoral Roll was 16-12-1951. 9-2-1952 was fixed by the Chairman of the Municipality as the last date for submission of nomination papers and the Chairman held scrutiny of the nomination papers on 18-2-1952, and found the nomination papers of the present petitioner along with those of eleven other candidates to be valid as complying with all the requirements of R. 17(2), Bengal Municipal Election Rules 1932 (hereinafter described as Rules of 1932).

(3) Opposite Party No. 1 Aswini Kumar Paul who was another candidate preferred an appeal before the Magistrate at Alipore under R. 20 of the said Rules against the present petitioner and others contending 'inter alia' that the petitioner was not eligible for election as a commissioner under the provisions of law as laid down in S. 22, Bengal Municipal Act, 1932, as amended by S. 5, West Bengal Act 28 of 1951. (The amended Act will be described hereafter as the Act of 1932).

(4) By an order, dated 29-2-1952, the Magistrate held that the present petitioner along with eight other candidates were disqualified under S. 22 (1) (g) of the Act of 1932 for being elected as commissioners and directed under R. 20 the omission of the petitioner's name as well as the names of eight other candidates from the list of registered candidates for Ward No. 3. As a result of the Magistrate's order, only three nomination papers, namely, those of opposite parties Nos. 1, 2 and 3, were found to be valid for the three seats of Ward No. 3 and in the circumstances those three opposite parties were declared as duly elected as commissioners under R. 22 of the 1932 Rules.

(5) Thereupon the present petitioner filed an election petition under S. 36 of the Act of 1932 before the District Judge of Alipore praying for setting aside the entire election contending 'inter alia' that the petitioner did not suffer from any disqualification; that the rejection of his nomination paper was illegal and improper; that the result of the election owing to such improper rejection materially affected the result of election of Ward No. 3; that opposite party No. 2 was a defaulter in payment of rates and taxes for more than three months and as such disqualified under S. 22 (g) and that the election of the entire Ward No. 3 should be set aside. The case was transferred to Mr. A. N. Lahiri, Subordinate Judge, Alipore and ultimately it was dismissed by him. The findings of the learned Subordinate Judge may be summarised as follows: .

"Under R. 17 of the 1932 Rules the Chairman has the power to go into the question of the eligibility of a candidate under S. 22 of the 1932 Act and the District Magistrate's powers under Rule 20 being co-extensive with those of the Chairman, the Magistrate also has similar powers as the Chairman to decide the question of eligibility under S. 22. The material date in this connection is the last date (9-2-1952) for the submission of nomination papers and not the date of scrutiny (18-2-52) as contended for on behalf of the plaintiff petitioner. The Magistrate was right in rejecting the nomination of the plaintiff as he was in arrears on the nomination date. Opposite Party No. 2 Md. Taher Ali Molla was not disqualified under S. 22 (1) (g) though he had paid the taxes only two days before the date of scrutiny, as he was not personally in arrears in respect of the license fee. The other successful candidates namely opposite parties Nos. 1 and 3 are not disqualified at all under S. 22. (This finding is not challenged before us). In the circumstances the result of the election in Ward No. 3 was not materially affected within the meaning of S. 38 of the Act of 1932."

(6) The first point that has been urged by Mr. Chakravartty on behalf of the petitioner is that the learned Judge is wrong in holding that the Chairman or the Magistrate has jurisdiction to go into the question of the petitioner's disqualification and reject his nomination paper on that ground. In the opinion of the learned Judge the Chairman cannot act properly as the Returning Officer under R. 17 of the 1932 Rules unless he can reject nomination papers on the ground of ineligibility under S. 22 of the 1932 Act. His opinion further is that the powers of the Magistrate as appellate authority under R. 20 of the 1932 Rules are co-extensive with those of the Chairman as Returning Officer with the result that the Magistrate can also go into the question of disqualification under S. 22 and reject the nomination of a candidate on that ground, as has been done in the present case. Mr. Chakravartty's contention is that the learned Judge is right in holding that the powers of a Magistrate under R. 20 are co-extensive with those of a Chairman under R. 17, but he strongly contests the other proposition of the learned Judge. The main reasons put forward by Mr. Chakravartty in support of his contention that neither the Chairman under R. 17, nor the Magistrate under R. 20, can go into the question of disqualification of a candidate under S. 22 are briefly as follows:

(i) Rule 17, sub-rr. (3) and (4) (a) speak of the scrutiny of the 'nomination paper' of a candidate as distinguished from the scrutiny of the nomination of a candidate, thereby implying that all that the Chairman has got to satisfy himself about at the stage of the scrutiny is to see whether the nomination 'paper' is 'in form', i.e. whether it satisfied the requirements of sub-rules (1) and (2) of the same rule and if he goes beyond those limits, i.e. if he arrogates to himself the power to go into the question of disqualification under S. 22, his action is without jurisdiction and as such void. The powers of the Magistrate under R. 20 are also, according to Mr. Chakravartty, no larger than those of the Chairman under R. 17.

(ii) The above view is in harmony not only with English decisions on electoral law but it also receives support from the contrasting provisions made in various Indian Statutes regarding parliamentary and Municipal elections.

(iii) The eligibility of a candidate on account of a disqualification under S. 22 of the 1932 Act can be challenged only by S. 25A (inserted in 1936) or by an election petition under S. 36 and by reason of these specific provisions the

question of disqualification under S. 22 cannot be canvassed under any other provision, or agitated before any other tribunal (e.g. Chairman or Magistrate).

(7) On behalf of opposite parties 1 and 2, Mr. Sinha contends briefly that both the Chairman under R. 17 and the Magistrate under R. 20 are competent to decide the eligibility of a candidate under S. 22 and that in any case the powers of the Magistrate under R. 20 are not co-extensive with but are wider than those of the Chairman under R. 17. His contention further is that in any case the Magistrate has, in view of the provisions of R. 20, got the necessary power of deciding the eligibility of a candidate under S. 22 and if it be held to be correct that his powers as appellate authority are co-extensive with those of the Chairman, as contended for by Mr. Chakravartty, the Chairman must also be deemed to have the power to go into the question of disqualification under S. 22 when holding the scrutiny under R. 17 (4) (a).

Mr. Sinha has drawn our attention specifically to the phrase "the scrutiny of 'nominations'" which occur in sub-rule 4(b) of R. 17 and has contended therefrom that this phrase shows that the Chairman (or for the matter of that, his appellate authority, the Magistrate) is competent to go into the question of eligibility under S. 22. As regards this particular contention of Mr. Sinha, it may be pointed out at this stage that sub-rule 4(b) was introduced for the first time in January, 1952, whereas the other provisions in R. 17 were there from before and it will not, therefore, be proper to construe the main provisions in R. 17 regarding the 'scrutiny' of 'nomination paper' in the light of the stray phrase— 'scrutiny of nominations'. On the contrary, it will be in consonance with the principles of construction of statutes if we hold that the phrase— 'scrutiny of nominations' — occurring in sub-rule 4(b) has the same meaning as the phrase 'scrutiny of nomination papers' referred to in sub-rules 3 and 4(a).

(8) It remains now to examine the rival contentions in greater detail. The question is by no means free from difficulty. Similar problems have arisen in England and I may examine first how they have been solved there.

(9) Rule 17 (4) (a) of 1932 Rules lays down that the Chairman shall scrutinise all nomination papers and shall register as candidates all those whose nomination papers are found to be valid. This is similar to R. 9 of Sch. 3 to the Municipal Corporation Act, 1882 (45 and 46 Vict. c. 50) which runs as follows:

"The mayor shall attend at the town hall..... for delivery of nomination papers and shall decide on the validity of every objection made in writing to a nomination paper."

(10) In — 'Pritchand v. Bangor Corporation', (1888) 13 A C 241 (A), which was decided by the House of Lords, it was held that the returning officer or mayor was to satisfy himself only of the validity of the nomination 'paper' and not of the validity of the 'nomination' as distinguished from the nomination paper, e.g. he could not go into the question of the qualification of the candidate for election. In that case Lord Watson observed (at page 252 of the report):

"I do not think that the legislature has empowered him (i.e. the Mayor as returning officer) to deal with or intended that he should deal with every kind of objection which might be raised to a nomination paper. Schedule 3 to the Act of 1882 which contains the rules rather points to his disposing of formal objections arising upon the face of the nomination paper, and making inquiry as to whether the nominators have their names on the burgess roll and whether the paper is in statutory shape."

The observations of Lord Herschell in this important case may also be quoted—

"Now those provisions i. e. the provisions of Sch. 3 to the Act appear to me to indicate that it could not have been intended that the mayor should entertain such a question as the qualification of a candidate, because it is impossible to suppose that the legislature provided that a question of that sort should, on, it may be, very imperfect information and without legal assistance, be finally and conclusively decided by the mayor." (In this connection the case of — 'Hobbs v. Morey', (1904) 1 KB 74 (B) may also be seen).

The rigour of the decision in the — 'Bangor case' (A) was, however, toned town to some extent by the subsequent decision in the case of — 'Harford v. Linskey', (1899) 1 QB 852 (C) where the following observations were made by Wright J. in delivering the judgment of the Court— "We do not understand it to be laid down in the — 'Bangor Case' (A) that a nomination paper cannot ever be rejected except for informality in the form or presentation of it. If the nomination paper is, on the face of it, a mere abuse of the right of nomination or an obvious unreality as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected." In England statutory effect has now been given to the decision in the 'Bangor case' (A) (See in this connection (i) the Law relating to Local Elections in England and Wales, Edn. 3, by Dowson and Wightwick at page 49, (ii) Rogers on Elections, Vol. III, Edn 21, at page 75, and (iii) Parker's Election Agent & Returning Officer, Edn. 5, at p. 140).

(11) In our opinion, so far as elections under the Bengal Municipal Act, 1932 are concerned, the powers of the Chairman, regarding determination of the eligibility of a candidate under S. 22, while holding the scrutiny are no higher than the corresponding powers of the mayor as laid down in the 'Bangor Case' (A). In other words, the Chairman acting under R. 17 cannot decide a question of qualification. He can determine any 'formal' objection arising on the face of the nomination paper. On this view the learned Subordinate Judge was not right in holding that the 'Chairman' while holding the scrutiny could go into the question of disqualification under S. 22 of the 1932 Act.

(12) The above view receives indirect support on analysis of the corresponding provisions made in various other Indian Statutes regarding election to some of which Mr. Chakravartty drew our attention. Reference may in this connection be made 'inter alia' to the provisions contained in R. 6 of Bengal Legislative Assembly Electoral (Conduct of Elections) Rules, 1936, and the relevant certificate of scrutiny, S. 36, Representation of the People (Amendment) Act, 1950 (Central Act 73 of 1950), R. 13 of the Rules for the conduct of Elections framed under the Calcutta Municipal Act, 1923 and the relevant certificate of Scrutiny, R. 14, Calcutta Corporation (Conduct of Election of Councillors) Rules, 1952, framed under the Calcutta

Municipal Act, 1951, R. 4(2) of Part II—Conduct of Elections—of Bengal Act 3 of 1885 (Bengal Local Self-Government Act of 1885) and R. 9 of the Election Rules under the Bengal Village Self-Government Act, 1919. The provisions referred to above indicate that the respective Returning Officers have been given specific power to refuse any nomination on the ground 'inter alia' that the candidate is ineligible for election for want of necessary qualification and where such power has been specifically given the Returning Officer concerned is clearly entitled to reject the nomination of a candidate on the ground that he has not the necessary qualification for election. It is noticeable, however, that neither under R. 17 of the Election Rules under the Bengal Municipal Act, 1932, nor under the corresponding rule—being Rule 15—under the previous Act, i.e. Bengal Municipal Act, 1884 was any power specifically given to the Returning Officer viz. the Chairman to reject the nomination of a candidate on the ground that he has not the requisite qualifications. This marked difference in the power of the Returning Officer under the Bengal Municipal Act, 1885 or 1932 as contrasted with the powers specifically conferred on Returning Officers under other Statutes relating to election would seem to indicate that the difference was intentional: in other words, whatever might be the reason the legislature did not intend that the Chairman as Returning Officer under R. 17 of the 1932 Rules (or under Rule 15 of 1885 Rules) should enjoy the power of scrutinising the nomination paper of a candidate with a view to see whether he had the necessary qualifications for election.

(13) The next point for consideration is whether the Magistrate who by virtue of R. 20 of the 1932 Rules is the appellate authority from the Chairman's decision also suffers from the same limitation as the Chairman. As has been mentioned before, Mr. Chakravartty relies strongly upon the view of the learned Subordinate Judge that the Magistrate's powers are co-extensive with those of the Chairman. Mr. Chakravartty contends that as the Magistrate is only an appellate authority his powers cannot be larger than those of the Chairman. This point again is not quite free from doubt or difficulty. On a careful consideration of the language of R. 20, we have reached, however, to the conclusion that the Magistrate's powers under R. 20 are wider than those of the Chairman under R. 17. Rule 20 says 'inter alia' that if any person who has filed a nomination paper disputes the right of any other candidate to be on such list, he may appeal to the Magistrate and the Magistrate shall make such order as to the omission or insertion of the name as 'appears to him to be just'. This rule is couched in very wide terms. The language of the rule is enough to show that what the Magistrate is called upon to do is not a mere mechanical act (cf. — 'Bibhuti Bhusan v. Dwarika Nath', AIR 1943 Cal 574 (D). In the various statutes to which reference has been made before there is no corresponding provision. If the rule be read in its widest amplitude, it is clear that if it appears to him to be just, the Magistrate can reject the nomination of a candidate on the ground that he is disqualified under S. 22 of the Act (of 1932). We do not see any compelling reason why a narrow construction should be put upon the rule and the Magistrate's powers be restricted to those of the Chairman under Rule 17. It is true that R. 20 of the 1932 Act uses the word 'appeal' instead of the word 'apply' as in R. 15 of the 1885 Act. That does not, in our opinion, make much difference and undue importance should not, in our view, be attached to the word 'appeal'. In the context in which it appears in R. 20, the word 'appeal' does not, in our opinion, have the same technical meaning and connotation that attach to that word ordinarily. If the legislature had intended that the Magistrate's powers should be co-extensive with those of the Chairman one would expect R. 20 to be couched in an entirely different way.

In support of his argument that R. 20 should be construed narrowly, Mr. Chakravorty has pointed out that the Magistrate has been given a very short period to dispose of objections urged before him. This is no doubt true and an election has to be got through within a comparatively short time. At the same time it has to be borne in mind that all that R. 20 requires of the Magistrate is that he should dispose of all the disputes as he thinks just within the prescribed time limit. His decision is no doubt final (Sub-r. 3 of R. 20), but the aggrieved candidate can question it later on after the election is over (S. 36 of the 1932 Act). Mr. Chakravorty has also laid stress on the well recognised principle that when a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of, and contended on the basis of that principle that S. 25A and S. 36 of the Act of 1932 having specifically laid down that the question of eligibility of a candidate under S. 22 is liable to be challenged under the procedure mentioned in those sections, the same cannot be gone into by a different tribunal as well viz. by the Magistrate under R. 20. In this connection Mr. Chakravorty has drawn our attention to the following observations of Sir Lawrence Jenkins in the case of — 'Bhai Sankar v. Municipal Corporation of Bombay', 31 Bom 604 (E)—

> "But where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive."

The contention is not without some force but there is nothing in R. 20 debarring the Magistrate to go into the question of eligibility. Rule 20 deals with 'pre-election' challenge to the eligibility of a candidate, while Ss. 25A and 36 deal with post-election challenge to eligibility. Read in that light there is nothing contradictory in R. 20 on the one hand, and Ss. 25A and 36 on the other: the one is complementary to the other. Looking at the matter from a different standpoint there is nothing wrong if we construe R. 20 as conferring power on an impartial and competent public functionary like the District Magistrate to see that the process of election is not reduced to a mockery by allowing, say, a lunatic, a person under 21, an undischarged insolvent or a municipal officer, to cause harassment, expense and trouble to all concerned including not only the candidates but also the electorate. A narrow construction of R. 20 will reduce the District Magistrate to the position of a helpless on-looker of what may be no better than a farce. A pre-poll brake on the pranks of an over enthusiastic but misguided candidate is by no means undesirable

on principle. There is no compelling reason why R. 20 should be construed in that narrow way. We hold, therefore, that the District Magistrate's powers are not co-extensive with those of the Chairman and that the former has, while the latter has not, the power of scrutinising the eligibility of a candidate under S. 22. Provided that the formalities laid down in R. 17, sub-rr. (1) and (2) have been observed, the District Magistrate has, in our opinion, the power to insert in the list of candidates the name of a candidate who has been wrongly omitted from such list. He has also similar powers of omission of the name of a candidate who is not eligible for election by reason of Section 22.

(14) In this connection Mr. Chakravorty drew our attention to the observations of Costello J. in the case of — 'Rathis Chandra v. Amulya Charan', AIR 1931 Cal 36 (F), but we find nothing there which can be said to be against our view as set forth above. On the contrary the observations in question seem to lend support to our view of the matter.

(15) Overruling, therefore, the contention of Mr. Chakravorty we hold that it was within the competence of the Magistrate to reject the nomination paper of the present petitioner, even though it had been accepted by the Chairman.

(16) Mr. Chakravorty has next contended that even assuming that the Magistrate was competent to go into the question of disqualification of a candidate he (i.e. the Magistrate) was wrong in holding that the petitioner was in arrears at the material time for more than three months in payment of municipal taxes as required under the amended S. 22, Bengal Municipal Act, 1932. It has been found that the petitioner was in arrears for more than three months on 9-2-1952 which was the last date for submission of nomination papers. He paid up the arrears, however, on February 16, 1952 so that on 18-2-1952 when scrutiny was held by the Chairman he was no longer in arrears. Mr. Chakravorty contends that the relevant date is the date of scrutiny and not the date of nomination, as wrongly held by the learned Subordinate Judge. We cannot agree. Section 22 of the 1932 Act lays down the test of eligibility for election: Sub-section (1) uses the phrase—"shall not be eligible for election". Election is a continuous process consisting of several stages and embracing many steps of which nomination is one, as pointed out in the case of — 'N. P. Pannuswami v. Returning Officer, Namakkal', AIR 1952 SC 64 (G). "Nomination is the foundation of a candidate's right to go to the polls: it is an integral part of the election". If a person is disqualified on the date of nomination, he cannot shake off his pre-existing disqualification by acquiring a new right between the date of nomination and the date of scrutiny. If any authority for this proposition is necessary, it is to be found in the case of — 'Satyendra Kumar v. Chairman of Municipal Commissioners, Dacca', AIR 1931 Cal 288 (H) where this point was conceded apparently on the basis of — 'Harford v. Lynskey', (1899) 1 Q B 852 (I). In the latter case it was held definitely that the date of the nomination and not the date of the actual polling was the material date and we have no doubt that this is so in the case of elections held under the Bengal Municipal Act as well. We hold, therefore, that the petitioner's nomination paper was rightly rejected by the Magistrate acting under R. 20. Had we come to the conclusion that the petitioner's nomination paper had been improperly rejected, we would have no hesitation in holding that the result of the election had been materially affected thereby and in setting aside the entire election in Ward 3 on that ground. Reference may in this connection be made to the case of — 'Ram Chandra v. Sachindra Kumar', AIR 1953 Cal 184 (J) where it was pointed out that when a person's nomination paper is rejected the effect is that the voters are precluded from exercising their right to return the person at the election. The case of — 'S. M. Solaiman v. Noor Mahommad', AIR 1944 Cal 395 at p. 399 (K) may also be referred to: in that case also the same principle was stressed.

(17) Mr. Chakravorty next contends that in any event opposite party No. 2 Md. Taher Ali Molla's nomination paper should also have been rejected by the Magistrate as he was in arrears on the nomination date. It has been found that Md. Taher Ali Molla is owner of the Garden Reach Printing Press which is situated within the Garden Reach Municipality. It has also been found that the license fee in respect of that Press was in arrear for more than three months on the last date for submission of nomination paper i.e. on 9-2-1952 and as in the case of the petitioner, the arrears were paid up on 16-2-1952 i.e. two days before the scrutiny. 'Prima facie', therefore, Mahammad Taher Ali Molla also suffers from the same disability as the petitioner. The learned Subordinate Judge has held, however, that it cannot be said that he was personally in arrears in respect of the license fees though he was the owner of the Press which was shown as the assessee in the books of the Municipality. Mr. Chakravorty has assailed vigorously the correctness of this finding of the learned Judge and, in our opinion, Mr. Chakravorty is right. Section 182 of the 1932 Act lays down that every person who exercises in the municipality either by himself or by an agent or representative any of the professions, trades or callings specified in Sch. 4 shall take out a half yearly license and pay a certain tax. Section 182 clearly applies to Mahammad Taher Ali Molla by virtue of his ownership of the Press. It has been found that on the material date i.e. 9-2-1952 (the last date for submission of nomination) he was in arrears for more than three months in payment of the tax which he was liable to pay. He was thus clearly within the mischief of Cl. (g) of amended S. 22 (1) and it matters little that the name of the Press of which he was the proprietor and not his name was recorded in the books of the Municipality as the assessee. Mr. Sinha pointed out to us on behalf of Taher Ali Molla that his name was in the electoral roll by reason of his educational qualifications. That may be so but so far as the point now in issue is concerned that does not make any material difference. He may be qualified as a voter but that is not enough. In order to be eligible for election he must not also be in arrears for more than three months in payment of any tax and we have seen that on the material date he was in such arrears. Dissenting, therefore, from the finding of the learned Subordinate Judge we hold that there was improper acceptance of his nomination by the Magistrate.

(18) The next point that falls for decision is whether the result of the election has been materially affected by the improper acceptance

of his nomination, so that it has to be set aside under S. 38 of the 1932 Act. That the election has to be set aside in so far as Md. Taher Ali Molla is concerned is clear enough, but the really important point is whether the entire election in that three-member constituency should be set aside on the ground of his disqualification alone. It is not the case of the petitioner now that opposite party No. 1 Aswini Kumar Pal, and opposite party No. 3, Vejoy Bahadur Singh, who were declared elected unopposed with Md. Taher Ali Molla on the rejection by the Magistrate of the nomination of other candidates suffered from any disqualification.

(19) Relying on the case of — 'AIR 1931 Cal 36' (F) Mr. Chakravartty contended that there was no option in the present case but to set aside the election of Aswini Pal and Vejoy Bahadur Singh as well even though they did not suffer from any disqualification under S. 22. There are observations no doubt in the judgment of Suhrawardy, J. in the above case which go in favour of Mr. Chakravartty's contention. As summarised in the head-note, that case lays down the proposition that when the election of one or two or more candidates jointly elected from a constituency is set aside, the whole election from that constituency must be set aside. That case was decided, however, in 1930 under the old Bengal Municipal Act of 1884 whereas the present Bengal Municipal Act of 1932 came into force on 1-12-1932. In the old Act (1884) there was no provision corresponding to S. 38 and the allied sections of the present Act, nor was there any provision corresponding to S. 25A of the present Act. The above provisions of the present Act seems to have brought about a radical alteration in the position and it is doubtful if the observations of Suhrawardy J. can be held to apply to a case governed by the present Act, especially to a case like the present one where no poll was held and three candidates were returned unopposed in a three-member constituency, unlike — 'Rathis Munshi's case' (F) where a poll was held in a two-member constituency for which four candidates went to the poll. As there was no necessity for a poll in the present case, the question of fairness to the constituency and the other candidates, if the election of Md. Taher Ali Molla alone is set aside, hardly arises. Nor in the present case are we pressed by any speculation as to how votes would have been divided among the respective candidates in case the Magistrate had rejected Mr. Taher Ali Molla's nomination as he should have done, as in that case there would have been only two validly nominated candidates for three seats. The considerations that weighed with the learned Judges in — 'Rathis Munshi's case' (F) are thus absent in the present case and on the facts of the present case where, as pointed out before, there was no poll there being only three candidates passed by the Magistrate under R. 20 for three seats, neither the spirit nor the letter of the law requires that two inoffensive candidates should be penalised for the fault of a third candidate who was wanting in the necessary qualifications. As we read S. 38 (d) of the present Act, it is open to us to set aside the election of the delinquent candidate only without interfering with the result of the election in so far as the other successful candidates are concerned.

(20) In the result, therefore, the election of opposite party No. 2 Md. Taher Ali Molla alone is set aside and the Rule is made absolute to that extent only.

(21) In view of the circumstances, the parties are directed to bear their own share of the costs throughout.

(22) LAHIRI J.: I agree.

B/H.G.P. Order accordingly.

A.I.R. 1953 CALCUTTA 547 (Vol. 40, C. N. 204)

A. N. SEN AND K. C. CHUNDER JJ.

Chandubhai Fulabhai Patel and others, Plaintiffs-Petitioners v. River Steam Navigation Co., Ltd., Defendants, Opposite Party.

Civil Rules Nos. 571 to 576 of 1950, D/-7-2-1951.

Carriers Act (1865), S. 8 — Liability under — (Contract Act, 1872, S. 188).

Agent contracting on behalf of known principal can restrict his personal liability for acts of principal or his servants and agents — Stipulation by Steam Company with respect to consignment of goods, to act as principal so far as their own system was concerned but so far as transport over the railway system was concerned, as agents for known principals — Further stipulation that they would not be liable for loss to goods while in transit over Railway system, due to acts of the principal or the agents or servants of the principal, as they would be for loss on their own system — Stipulation contained in clause 11 of forwarding note — Stipulation held valid and did not offend against S. 8. (Para 4)

Anno: Contract Act, S. 188, N. 1; Carriers Act, S. 8, N. 1.

Hiralal Chakravarty and Radha Kanta Bhattacharjee, for Petitioners; A. C. Chatterjee and Khetra Mohan Chatterjee, for Opposite Party.

CHUNDER J.: These six Rules were issued at the instance of plaintiffs in six applications filed in the Court of Small Causes, Calcutta, under S. 38, Presidency Small Causes Courts Act, against R. S. N. Company in five cases and the I. G. N. and R. S. N. Companies in the sixth.

(2) The facts in issue and the point in dispute are alike. The plaintiffs in all the six cases sent consignments of goods through the steamer company to East Bengal, now Eastern Pakistan. In each of the cases there was a forwarding note which was the basis of the contract and Clause II is as follows:

"The company undertake to carry goods over their own transport system only. Where goods are accepted by the company for carrying beyond their own transport system, and where goods are either wholly or partly carried by the other carrying administrations, in the matter of carrying beyond the company's own transport system, the company act merely as agents for such other carrying administration. The contract of carriage shall be deemed to have been entered into between the consignor (and the consignee) on the one hand and the one or other of the various carrying administrations, including the company on the other hand that may at any material time be in control or possession of the goods for carriage to destination and/or delivery to the consignee, and that any liability for loss, damage, destruction, partial or total deterioration, detention and delivery of the goods shall solely rest on the respective

carrying administrations in whose charge the goods may have been placed at the time such loss, damage etc. are found to have arisen. In case of goods accepted by the company for carrying beyond their own system of transport, the consignor (and consignee) shall be deemed to have agreed that the company has accepted such goods on the footing that the consignor (and the consignee) has entered into a series of contracts with the different carrying administrations, and that the company will not be liable for any loss, damage etc. which may happen when the transit over the company's system of transport is over, and when the goods are not directly under their control."

(3) This can leave no room for doubt that the steamer people were contracting as principals so far as transport over their own system was concerned but as agents for known principals, that is, the railway companies, so far as transport over the railway system was concerned. The clause also leaves no room for doubt that so far as transport over the steamer company's system was concerned they fully undertook to be liable for any loss, damage etc., by themselves or agents or servants, but as far as loss or damage etc. caused when in transit over the railway system was concerned they as agents were not to be liable for loss caused by their principal or the agents or servants of the principal. The liability for the loss will be that of the railway company as principal.

(4) The main contention it appears before the courts was that this offended against S. 8, Carriers Act. Section 8 of the Carriers Act reads as follows:

"Notwithstanding anything hereinbefore contained every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from criminal act of the carrier or any of his agents or servants."

That section lays down two things. First, that the principal is always to be liable for any loss or damage etc., caused by the principal himself or the agents of the principal or the servants. Secondly, any contract to the contrary will be void. In the present case, in cl. II, care has particularly been taken to retain in each case whether the transport system is that of the steamer company or of the railway administration that the liability of the principal for acts by himself or his agents or servants remains intact. There is nothing in S. 8 or in any part of the law of contract or of law of carriers by which an agent contracting on behalf of known principal is prevented from restricting his own personal liability for the acts of the principal or the agents or servants of the principal. Therefore the Full Bench of the Calcutta Court of Small Causes rightly decided that clause II did not offend against Section 8 of the Carriers Act. The decisions cited before it do not cover the point now raised at all. They were cases dealing with principal absolving himself from liability for the acts of agents or servants, which is not the case now before us.

(5) Under the circumstances all the six Rules are discharged with costs.

(6) SEN J.: I agree.

B/R.G.D. Rules discharged.

A.I.R. 1953 CALCUTTA 548 (Vol. 40, C. N. 205)

SINHA J.

Atulya Kumar De and others, Petitioners v. The Director of Procurement and Supply and others, Opposite Parties.

Civil Rule No. 3259 of 1952, D/-3-3-1953.

(a) Essential Supplies (Temporary Powers) Act (1946) — Validity — (Constitution of India Art. 245).

The Act does not permit delegation of legislative powers. Case law Foll. (Para 10)

(b) Essential Supplies (Temporary Powers) Act (1946) S. 3 (1), (2) — Scope.

Power under the Act is derived from S. 3, sub-s. (1), and the provisions of sub-s. (2) are merely illustrative. Although the State cannot promulgate an order to acquire stock not already held under S. 3(2) (f), it can be done under the general powers conferred by sub-s. (1) of S. 3. AIR 1951 S. C. 201 Foll. (Paras 14, 17)

(c) Essential Supplies (Temporary Powers) Act (1946) S. 3 (2) (c), (d), (f) (h) (i) and (J) — Validity — (Constitution of India Arts. 19, 31).

Even if Cls. (c) (d) (f) (h) (i) and (j) of sub-s. (2) offend against the fundamental rights conferred by Art. 19(1)(f) and (g) or Art. 31(2) of the Constitution the Government would have ample powers under sub-s. (1) of S. 3, to promulgate an order. (Para 17)

(d) Constitution of India Arts. 19, 31 — Scope.

A Legislative enactment empowering Government to acquire property of a citizen compulsorily for a public purpose, attracts Art. 31 and not Art. 19. Where it is a composite piece of legislation the Court has to distinguish that part of it which deals with acquisition from the rest. Case law discussed. (Para 28)

(e) Essential Supplies (Temporary Powers) Act (1946) S. 3(1) — Validity — (Constitution of India, Art. 19(1)(f) (g) (5); (6).

The restrictions imposed by the general powers conferred by S. 3(1) upon the fundamental rights conferred by Art. 19(1)(f) or (g) of the Constitution are reasonable restrictions which are in the public interest. Case law discussed. (Para 35)

(f) Essential Supplies (Temporary Powers) Act (1946) S. 3(2)(c), (d) (h), (i) (j) are valid — (Constitution of India Art. 19). (Paras 35, 36)

(g) Constitution of India Art. 19(1)(f),(g), (5)(6) — (West Bengal Food grains (Intensive Procurement) Order (1952).

The provisions of the West Bengal Foodgrains (Intensive Procurement) Order are reasonable and in the public interest. AIR 1952 Pat 220 (S.B.) Rel. on. (Para 37)

(h) Constitution of India Art. 31(2) — Compensation.

Compensation in Art. 31 (2) means a just compensation, that is to say, a just equivalent in value. AIR 1951 Cal 111, AIR 1951 All 674; (1893) 148 U. S. 312 Rel. on. (Para 39)

(i) Constitution of India Art. 226 — New point.

In the case of high prerogative writs, new matters cannot be allowed to be introduced at the hearing. (Para 40)

(j) Constitution of India Art. 31(2) — Fixing of compensation.

The 'law' in a given case must be an Act read with the order promulgated under it. It cannot be said that the Essential Supplies (Temporary Powers) Act (1946) read with West Bengal Foodgrains (Intensive Procurement) Order (1952) does not fix compensation. (Para 40)

(k) Essential Supplies (Temporary Powers) Act (1946) S. 2 — Foodstuff.

Paddy is 'foodstuff', within the meaning of that expression as used in the Act and the notification issued under it. (Para 42)

(l) Essential Supplies (Temporary Powers) Act (1946) S. 3(1), (2) (j) — Delivery of goods at destination.

The producer can be ordered to deliver goods at a prescribed destination, as provided for in para 3(5) of the West Bengal Foodgrains (Intensive Procurement) Order (1952). (Para 43)

(m) Essential Supplies (Temporary Powers) Act (1946) S. 3(1), (2) (e), (j) — Notice in Form 'A'.

Notice in form 'A' would be valid under S. 3(1) and S. 3(2) (e) and (J). (Para 44)

(n) West Bengal Foodgrains (Intensive Procurement) Order (1952) — Validity — (Constitution of India, Art. 14).

The classification of 'producers' who owned 10 acres or more, affected by the Order is a reasonable classification, bearing a just relation to the object sought to be attained. Nothing in the Essential Supplies (Temporary Powers) Act (1946) read with the order, offends against the fundamental right of equal protection guaranteed by Art. 14 of the Constitution. (Paras 47, 48)

(o) Constitution of India, Art. 226 — Scope.

The High Court will not interfere when there exists other adequate legal remedies, or it will not impose its will upon the exercise of executive discretion. But that course of conduct is dependent upon expediency and not want of jurisdiction. The existence of an alternative remedy is not absolute bar, and the abuse of a power even though discretionary can always be controlled. (Para 49)

Apurbadhan Mukherjee and Tarak Nath Roy, for Petitioners; S. M. Bose, Advocate General Hemendra Kumar Das, Smriti Kumar Rai Choudhuri and M. N. Sen, for Opposite Parties.

CASES CITED:

(A) ('51) AIR 1951 S. C. 484: 1952 SCR 127: 1952 Cri. LJ 69 (S. C.)
(B) ('51) AIR 1951 S. C. 332 :1951 SCR 747 (SC)
(C) ('53) AIR 1953 Cal 492: 56 Cal WN 789
(D) ('52) AIR 1952 Pat 220: 1952 Cri. LJ 710 (SB)
(E) ('51) AIR 1951 SC 201: 1951 SCR 303 (S. C.)
(F) ('45) AIR 1945 P.C. 156: 72 Ind App 241 (PC)
(G) ('50) AIR 1950 S.C. 27: 1950 SCR 38 : 51 Cri. LJ 1383 (SC)
(H) ('51) AIR 1951 SC 41: 1950 SCR 869 (SC)
(I) ('52) AIR 1952 Cal 65: 87 Cal LJ 140
(J) ('51) AIR 1951 Cal 111: 55 Cal WN 778
(K) ('51) AIR 1951 Cal 97: 55 Cal WN 463
(L) ('52) AIR 1952 Cal 870:
(M) ('52) AIR 1952 Cal 679: 89 Cal LJ 301
(N) ('51) AIR 1951 All 674: 1951 All LJ 365 (F.B.)
(O) ('51) AIR 1951 Bom 86: ILR (1951) Bom 473
(P) ('52) AIR 1952 Mad 756: ILR (1952) Mad 982
(Q) ('50) AIR 1950 SC 211: 1950 SCR 519: 52 Cri LJ 550
(R) ('51) AIR 1951 SC 118: 1950 SCR 759
(S) ('52) AIR 1952 SC 196: 1952 SCR 597: 1952 Cri LJ 966
(T) (1942) 110 LJ KB 724: 1942 AC 206
(U) (1935) 79 Law Ed 1070: 294 SC 580
(V) (1893) 37 Law Ed. 463: 148 US 312
(W) (1905) 74 LJ Ch. 629: 1905 AC 426
(X) ('45) AIR 1945 Nag 8: ILR (1945) Nag 6
(Y) ('52) AIR 1952 SC 335: 1952 SCR 877: 1952 Cri LJ 1406
(Z) (1894) 63 LJ MC 41: (1894) 1 QB 304
(Z1) (1918) 118 LT 447: 87 LJ KB 893
(Z2) ('51) AIR 1951 SC 318: 52 Cri LJ 1361

ORDER: This is a Rule issued upon the opposite parties to show cause why the West Bengal Food Grains (Intensive Procurement) Order 1952, and the notices complained of in the petition issued on the petitioners in pursuance thereof, should not be declared null and void and as such set aside, or why appropriate writs should not issue prohibiting them from taking any further steps in pursuance of the said order and the notices issued thereunder or why such other or further order or orders should not be made as to this Court may seem fit and proper.

(2) The petitioners are eighteen in number and are all owners of lands situate in villages within Police Stations Sadardighi and Nawapara in the District of Murshidabad. They state that they cultivate paddy in these lands with the help of the hired labour. They further state that the yield from these lands is their only source of income, out of which they have to maintain themselves and their dependents.

(3) At the time that this application was originally made, the petitioners had been served with notices under "A" introduced by para 3(3) (a), West Bengal Food Grains (Intensive Procurement) Order 1952, promulgated by the Government of West Bengal, by virtue of powers conferred by sub-s. (1) of S. 3 Essential Supplies (Temporary Powers) Act 1946 (24 of 1946), read with Notification of the Government of India in the Department of Food, No. PY-603 (2)/1, dated 21-10-1946, calling upon them to make a declaration in Form 'B', and directing them in the meanwhile not to deal with or dispose of any portion of stock owned or possessed by them except what was required for family consumption at the prescribed scale, until further orders.

The petitioners have made such declarations, but followed it up by applying to this Court for an order directing the opposite parties not to take any further steps to implement the notices in form "A", and for other reliefs. Since then notices in form 'C', have been served upon sixteen of the petitioners calling upon them to deliver their available surplus (as mentioned in the notices) to the officer named therein on or before a date specified. I shall presently deal with these notices in detail. The further implementation of these

notices in Form 'C' have been restrained, pending the hearing of this rule.

(4) Before I proceed further, it would be necessary to refer more fully to the Essential Supplies (Temporary Powers) Act, 1946, Act 24 of 1945 (hereinafter referred to as 'the Act') and the West Bengal Foodgrains (Intensive Procurement) Order 1952 (hereinafter referred to as 'the order'). The Act which is a Central Act came into operation on 19-11-1946. It replaced an ordinance, known as the Essential Supplies (Temporary Powers) Ordinance 1946 (18 of 1946). The Act in its preamble recites that it had become necessary for the continuance during a limited period of powers to control the production, supply and distribution of foodstuffs and certain other commodities, and the Indian Legislature had been empowered by S. 2 of the India (Central Government and Legislature) Act 1946, to make laws with respect to the aforesaid matters. The original Act was to come to an end on 31-3-1947, but it has been extended from time to time, the final extension being up to 26-1-1955. Under S. 2 of the Act, the expression "Essential Commodity" has been defined and includes "Foodstuffs".

Section 3(1) is in the following terms:

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein."

The relevant provisions of S. 3(2) are as follows:

"without prejudice to the generality of the powers conferred by sub-s. (1), an order made thereunder may provide—

(c) for controlling the prices at which any essential commodity may be brought or sold;

(d) for regulating by licenses, permits or otherwise the storage, transpost, distribution, disposal, acquisition, use or consumption of any essential commodity;

(f) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order;

(h) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters;

(i) for requiring persons engaged in the production, supply or distribution of, or trade or commerce in, any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto as may be specified in the order;

(j) for any incidental and supplementary matters, including in particular the entering and search of premises etc. etc. .... the grant of or issue of licenses, permits or other documents and the charging of fees therefor."

Section 4 of the Act provides that the Central Government may by notified order direct that the power to make orders under S. 3 shall in relation to such matters and subject to such conditions as may be specified in the direction, be exercisable also by such officer or authority subordinate to the Central Government or by such Provincial Government or such officer or authority subordinate to a Provincial Government, as may be specified in the direction.

(5) Even before the Act came into operation, and under Section 4 of the relative ordinance, the Central Government issued a notification, being No. PY 603 (2)/1, dated 21-10-1946, (hereinafter referred to as 'the notification') directing that the powers conferred upon it by sub-s. (1) to Section 3 of the said ordinance to provide for the matters specified in sub-s. (2) thereof, shall in relation to foodstuffs be exercisable also by any Provincial Government subject to certain conditions. The order was promulgated by the Governor of West Bengal on 22-10-1952, and the Preamble is as follows:

"In exercise of the power conferred by sub-s. (1) of S. 3, Essential Supplies (Temporary Powers) Act, 1946 (24 of 1946 and in particular by cls. (c) (d) (f) (h) (i) and (j) of sub-s. (2) of that Section, read with the notification of the Government of India in the Department of Food No. PY-603 (2)/1 dated the 21st October, 1946, the Governor with the concurrence of the Central Government is pleased to make the following order ....."

(6) In para. 2 of the order, "Foodgrain" has been defined to mean rice in the husk (paddy) or rice husked; "Producer" has been defined to mean a person who cultivates any land or lands, the area whereof is not less than ten acres as proprietor, trustee, sebait, tenure-holder, tenant, subtenant, temporary lessee or occupier, or in any other capacity, either by himself or with the aid of others or receives a portion or share of the foodgrains grown on such lands.

(7) Under para. 3 of the order, every producer shall if so ordered by the Director sell and deliver to the Director or any person appointed by him, such quantity of foodgrains as may be determined by the Director to be the 'available surplus'. The Director is to determine the available surplus by taking into account on the one hand, the yield of foodgrains estimated by him as grown or received by the producer and on the other hand making allowances for such part thereof as may be required by the producer for his family consumption, for seeds, for feeding agricultural labourers and for payment of rent-in-kind or repayment of loan-in-kind. All these allowances are in accordance with the scales prescribed by Government from time to time.

(8) The scheme of the order is roughly as follows. The Director in the first instance issues a notice upon the producer in form "A" (individual) or in Form A (1) (General), calling upon him to make a declaration in Form 'B', of paddy lands held or cultivated by him or share or produce received by him. By that notice, the producer is directed not to deal with or dispose of any portion of stock owned or possessed by him except what is required for his family consumption at the prescribed scale, until further orders. The Form No. 'B', requires the producer to declare the particulars of the total quantity of land held by him and the area under 'Aus or Aman'. He has also to give particulars of the rent-in-kind to be received or paid by him or loan-in-kind to be received or repaid, as also the number of members in his family including servants taking meals in the house. It will be noted that the producer is not required to state his actual produce, which is wholly determined by estimation. The Director determines the available surplus after considering such declarations or after such enquiry as he thinks fit to make, and then causes notice to be served in Form 'C', calling upon the producer to deliver the available surplus to an officer named in the notice within a specified date.

The paddy or rice has to be sewn in bags supplied by the State and delivered at the place mentioned; the transport to be supplied by the pro-

ducer. The price is paid in cash upon delivery at the rate prescribed (Notification No. 10365 F. D.). These rates have been prescribed district wise. So far as Paddy is concerned, Aus and Boro have been everywhere fixed at Rs. 7/8/- per maund and Aman other than fine at Rs. 8/8/- per maund except West Dinajpur where the price fixed is Rs. 8/2/- per maund. Fine Aman has been fixed at Rs. 10/- to 11/ per maund according to quality. The price includes the cost of delivery at the prescribed destination. The price prescribed as above is for stocks of fair average quality. If quality is less than average, deduction is made at prescribed rates (Notification No. 10366 F. D.). If the amount demanded in the notice is not delivered within the date fixed then the Director or an officer authorised by him may seize the same and then the producer will get the value of the foodgrains seized, less the cost of transport at rates specified. (Notification No. 10367 F. D.). The order further contains provision for inspection, search and enquiry etc. as ancilliary steps to procurement (Section 9).

(9) The order contains the following provisions for review, revision and appeal:

Paragraph 3 (2) proviso — Any determination of the available surplus made by an officer exercising the powers of a Director may be reviewed, revised or altered at any stage by any other higher officer exercising the like powers of the Director whenever he considers it expedient to do so.

Paragraph 5 (1)— Any producer aggrieved by an order served on him under cl. (b) of sub-para. (3) of para 3 may within seven days of the service of the order appeal against the order in the prescribed manner to an officer empowered by the State Government in this behalf. I am informed that this officer is usually the District Magistrate. While the above picture portrays the normal working of the order, it must be observed that it is entirely optional upon the Director to serve notices in form "A" and ask for a declaration in form 'B'. The Director may rely on any other form of enquiry that he thinks fit and ignore a declaration even if such a declaration has been filed. He may also direct the producer to sell a specified quantity of foodgrains even before the determination of the available surplus. The provision as to review or revision is entirely at the discretion of the officers. Again, while it is true that failure to comply with the directive results in a seizure of the actual stock it does not preclude any punishment to which the producer may be otherwise liable.

(10) I shall now proceed to deal with the objections put forward to the validity of the Act and the order. Mr. Mukherjee appearing on behalf of the petitioners has advanced several points and Mr. Das, appearing in Civil Revision Cases 54 and 55 of 1953, has advanced one point of considerable importance. I have heard these cases together and proceed to deal with all the points of law raised before me. Before I come to the actual points raised, I must mention that this is not the first time that the Act has been impugned as being unconstitutional. The most familiar ground of attack has been that it permits delegation of legislative powers. This ground of attack has, however, been finally repelled by the highest court of our land, See — 'Joylal Agarwalla v. The State', AIR 1951 S. C. 484 (A). and In re — 'Constitution of India and Delhi Laws Act (1912) etc.' A. I. R. 1951 S. C. 332 (B). Also see — 'Mulchand Khatar v. The State', AIR 1953 Cal 492 (C). — 'Mohammad Anzar Husnain v. State of Behar', AIR 1952 Pat. 220 (D)

(11) Mr. Mukherjee has not advanced this ground. He does not assail the Act as a whole but argues that clauses (c) (d) (f) (h) (i) and (j) of sub-s. (2) of S. 3 of the Act offend against the fundamental rights guaranteed to his clients under Art. 19 (1) (f) and (g) and Art. 31 (2) of the Constitution. At the commencement of his argument, he conceded that S. 3 (1) of the Act was a valid provision of law. This concession, as will presently be seen, puts him in a very disadvantageous position. My decision, however, is not based upon this concession, but upon what I consider the law to be. He says that his clients have the fundamental right to carry on their occupation as cultivators in any manner they wish and to hold the produce of their lands in any manner they desire and to dispose it wherever and howsoever they please. It is argued that the impugned provisions of the Act offend against these fundamental rights. It is not very clear how the fundamental rights conferred by cl. (g) of Art. 19 (1) are infringed, except perhaps in the sense that such action on behalf of the State restricts the free exercise of the occupation trade or business of a producer in foodgrains and might render it impossible to carry it on altogether.

Next comes the question of compensation. It is argued that under Art. 31 (2) of the Constitution, no property can be taken over without compensation. It is said that the word "compensation" means adequate or reasonable compensation, that is to say, a just equivalent in value. But under the Act, a citizen may be ordered to sell his goods "at such prices" as he may be directed by the acquiring authority. It is argued that it is quite true that the Act lays down the payment of some compensation, but since it depends upon the sweet-will and pleasure of the acquiring authority, the price offered may not be a just equivalent. Neither can it be said that the Act has fixed the compensation or laid down any principle for its fixation, excepting the arbitrary whims of the acquiring authority. It is stated that an Act which in its exercise might or might not remain confined within the limits of Constitutional validity is wholly void. It is of course emphatically stated that the prices which have been fixed under the Act and the order are not just equivalents but unduly low, wholly arbitrary and utterly uneconomic.

(12) It will be appropriate at this place to mention the point made by Mr. Das. According to him, the provisions of the order whereby the Government demands an estimated yield and not an actual yield, is not authorised by cl. (f) of sub-s. (2) of S. 3 of the Act, which speaks of "Requiring any person 'holding stock' of an essential commodity to sell, etc. etc." If clause (f) of sub-s. (2) of S. 3 of the Act was the source from which the Government derived its power to promulgate the order, I must hold at once that the point made by Mr. Das is quite sound. Here the essential commodity concerned is paddy and if the power to make an order was given only in respect of a person "Holding stock" of paddy, it would be absurd to hold that a person who has a crop of rice growing in the field is the "Holder" of a stock of paddy. It is admitted that notices in Form "A" are given when the crop is still in the field, and at least in the case of Mr. Das's clients they had not yet harvested it when notice was served.

(13) But the common infirmity in both these arguments lies in thinking that Government has derived its power or authority, under any of the clauses of sub-s. (2) of S. 3 of the Act. The power to promulgate an order of this description is derived from sub-s. (1) of S. 3 of the Act. That

power is general in its terms, and authorises 'inter alia' the promulgation of any order providing for regulating or prohibiting the production, supply and distribution of, and trade and commerce in, any essential commodity, in so far as it appears necessary & expedient to do so for maintaining or increasing supplies or for securing their equitable distribution and availability at fair prices. Sub-section (2) of S. 3, commences with the words "without prejudice to the generality of the powers conferred by sub-s. (1) .....etc". This shows that sub-s. (2) confers no fresh powers but provides illustrations of the general powers conferred by sub-s. (1), without exhausting the hearings under which such powers can be exercised. This has been held by the Supreme Court in — 'Santosh Kumar v. The State', AIR 1951 S C 201 (E) following the Privy Council decision in — 'Emperor v. Shibnath Banerjee', AIR 1945 P C 156 (F).

(14) Section 2 (1), Defence of India Act, 1939, as amended by S. 2, Defence of India (Amendment) Act, 1940, empowered the Central Government to make rules for securing the defence of British India, the public safety, the maintenance of public order, etc. Sub-sec. (2) of S. 2 enacted that without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for several matters specified therein. Lord Thankerton delivering the judgment of the Board held that the rule-making power was conferred by sub-s. (1) and the function of sub-s. (2) was merely an illustrative one and did not control the general powers conferred by sub-s. (1). The Supreme Court held on an analogy that power under the Essential Supplies Act was derived from S. 3, sub-s. (1), and the provisions of sub-s. (2) were merely illustrative.

(15) In the present case, the only difficulty is presented by the actual wording of Notification PY 603 (2)/1, which is as follows:

".....The Central Government is pleased to direct that the powers conferred on it by sub-s. (1) of S. 3 of the said Ordinance to provide for the matters specified in sub-s. (2) thereof shall in relation to foodstuffs be exercisable by any Provincial Government".

(16) This is undoubtedly very incompetent drafting. But I think that the meaning is reasonably clear. The 'Matters Specified' in sub-s. (2), being "without prejudice" to the generality of the powers conferred by sub-s. (1) must be held to include such powers. Thus it cannot be said that the general powers have not been conferred upon the State, but only those specified in clauses (a) to (j) of sub-s. (2). The only limitation is with regard to the kind of essential commodity concerned. The State has been given powers limited to 'foodstuffs' only.

(17) It follows that although the State could not promulgate an order to acquire stock not already held under cl. (f) of sub-s. (2) of S. 3 of the Act, there is no impediment in doing so under the general powers conferred by sub-s. (1) of S. 3. This is also an answer to the objection of Mr. Mukherjee that clauses (c) (d) (f) (h) (i) and (j) of sub-s. (2), offend against the fundamental rights conferred by Art. 19 (1) (f) and (g) or Art. 31 (2). Even if they do, the Government would have ample powers under sub-s. (1) of S. 3, to promulgate the order.

(18) Coming now to the order, Mr. Mukherjee has not argued that it is by itself unconstitutional because it invades his client's fundamental rights. He argues that the order is not within the four corners of the powers conferred by the Act read with the notification. In particular he argues as follows:—

(1). The power can be only exercised in relation to 'Foodstuffs' and paddy is not a foodstuff. He points out that the description of paddy as "rice in the husk" is a colourable attempt to avoid this difficulty.

(2) That there is no power conferred by the Act to order the producer to deliver the goods at a prescribed destination, as provided for in para 3(5) of the order.

(3) That the prohibition contained in the notice in Form A, whereby the producer is directed not to deal with or dispose of any portion of stock owned or possessed by him etc., is not authorised by any power conferred either by the Act or the order.

(19) But although Mr. Mukherjee did not specifically take that point before me, in course of argument he inevitably took the stand that several of the provisions in the order e.g. sub-paras 1, 2(a), 3(b), (4), (5) of paras 3, 6 and 7 of the order were unreasonable restrictions on his fundamental rights, and the prices prescribed thereunder were not reasonable compensation. Thus, I have not only to consider whether the order comes within the four corners of the powers conferred by the Act read with the notification but also whether it offends the fundamental rights conferred by Art. 19(1)(f) and (g) or Art. 31(2).

(20) Before I deal with the question as to whether the Act or the Order offends against the fundamental rights of the petitioners under Art. 19(1)(f) or (g), I must dispose of a preliminary point taken by the learned Advocate General. He argues that where Government acquires property belonging to the citizen for a public purpose, Art. 19 does not apply at all. According to him, the right of the Government to acquire property for a public purpose arises under Art 31 and it is that article alone which is applicable. If Art. 19 is excluded, no question can arise of "Reasonable restrictions", the question is entirely one of the compensation to be paid.

(21) In — 'A. K. Gopalan v. The State of Madras', AIR 1950 SC 27 (G), Das J. said as follows:

"But suppose a person loses his property by reason of its having been compulsorily acquired under Art. 31 he loses his right to hold that property and cannot complain that his fundamental right under sub-cl. (f) of cl. (1) of Art. 19 has been infringed. It follows that rights enumerated in Art. 19(1) subsist while the citizen has the legal capacity to exercise them. If his capacity to exercise them is gone ..... by reason of a lawful compulsory acquisition with respect to the right in sub-cl. (f), he ceases to have those rights while his incapacity lasts."

(22) In — 'Charanjit Lal v. The Union of India', AIR 1951 SC 41 (H), the same learned Judge said;

"The fundamental rights said to have been infringed are the right to acquire, hold and dispose of property guaranteed to every citizen by Art. 19(1)(f) and the right to property secured by Art. 31. In 'Gopalan's case (G) (Ibid) I pointed out that the right to property guaranteed by Art. 19(1)(f) would likewise continue until the owner was, under Art. 31, deprived of such property by authority of law".

(23) Coming to our Court, we have the Division Bench decision, — 'Sudhindra Nath Datta v

Sailendra Nath Mitra', AIR 1952 Cal 65 (I). In that case Harries C. J. said as follows:—

"In my opinion it is quite clear that Art. 19(1)(f) of the Constitution has no application to cases where a State, authority or person has compulsorily acquired property or obtained possession of property. The relevant provisions are to be found in Art. 31."

(24) In a later case, however, — 'West Bengal Settlement Kanungoi Co-operative Society Ltd. v. Mrs. Bella Bannerjee', AIR 1951 Cal 111 at p. 116 (J) Harries C. J. threw some doubt upon the above proposition by saying:

"A statute empowering a State compulsorily to acquire property can be said to impose a restriction on the right to hold property. A person who acquires property has a right to hold it until he desires to part with it. A statute empowering a State compulsorily to acquire property does affect the right to hold property. It renders that property liable to be acquired compulsorily and against the wishes of the person who holds it. It is in the true sense a restriction on the right to hold property as it renders the property liable to compulsory acquisition at the instance of Government or some authority. If that be so, then a statute dealing with compulsory acquisition would have to comply with cl. (5) of Art. 19 and if it imposed on the citizen a restriction that was more than necessary in the interest of the general public then such a law would be void".

(25) This case came up before the same bench on review, and Harries C. J. said

"Much however might be said in support of the view that Art. 19 (1)(f) has no application but the matter is by no means a simple one and the point can, I have said, be decided on other grounds".

(26) Bose J., in several cases has held that Art. 19(5) of the Constitution is not attracted where the legislative enactment is aimed at the compulsory acquisition of property by the Government for public purposes —'Md. Safi v. State of West Bengal, AIR 1951 Cal 97 (K), — 'Naba Kumar v. West Bengal State', AIR 1952 Cal 870 (L), —'Aswini Kumar v. State of West Bengal', AIR 1952 Cal 679 (M). The matter has also been considered by other High Courts. In —'Suryapal Singh v. U. P. Government', AIR 1951 All 674 at p. 690 (N), a Full Bench of the Allahabad High Court has held as follows:

"In our view the acquisition of property is not the subject of Art. 19(1)(f) but of Art. 31. This view is reinforced by the consideration that as the Constitution contains specific provisions in Art. 31 relating to the acquisition of property it is unlikely that it was intended that the matter should also be within the ambit of Art. 19(1)(f)".

(27) In —'Dwarkadas v. Sholapur S. and W. Co. Ltd.', AIR 1951 Bom 86 (O), the learned Judges observe:

"The rigt to acquire, hold and dispose of property guaranteed to the citizen under Art. 19 (1)(f) would only be operative in the case of those whose property has not been taken away under Art. 31. That must be so logically, because if a man has been deprived of property under Art. 31(1) or 31(2) no question of acquiring, holding and disposing of that property could possibly arise under Art. 19. This right can only be made justiciable provided the legislature has not validly taken action under Art. 31 and it is only then that the question may arise whether any restrictions placed upon that right under sub-cl. (5) of Art. 19 are reasonable restrictions or not".

(28) This view has been followed in — 'Thambiran Padayachi v. State of Madras', AIR 1952 Mad. 756 at p. 758 (P). Had the matter been one of first impressions I would have held that a legislative enactment granting the power of acquiring property compulsorily, necessarily affects the fundamental right of a citizen to hold and dispose of property as he likes. If, however, it is to be done for a public purpose, it is a reasonable restriction under Art. 19(5). In other words, it would then satisfy the provisions of Art. 19(5), and not make it inapplicable. I am, however, bound by authority and must hold that a legislative enactment empowering Government to acquire property of a citizen compulsorily for a public purpose, attracts Art. 31 and not Art. 19. In such a case, what has to be considered is the question of compensation. It is irrelevant to consider whether it imposes reasonable restrictions on the fundamental rights conferred by Art. 19 (1)(f) or (g). But this would be true only in a case where the legislative enactment is one for acquisition simpliciter. Where it is a composite piece of legislation like the present Act which we are considering, we have to distinguish that part of it which deals with acquisition from the rest.

In S. 3(1), power is given for regulating or prohibiting the production, supply and distribution of essential commodities. Such a power may be exercised in a variety of ways including that of acquisition. In an enactment meant for acquisition, we may again have a pre-acquisition stage and a post-acquisition stage. During the pre-acquisition stage, powers of regulation, control or prohibition may be exercised, even before the goods have been acquired, so that Art. 19 will be attracted. The order is undoubtedly a measure, primarily intended for the acquisition of foodgrain by the Government of West Bengal. But even here, we have a pre-acquisition stage. Even before the producer is called upon to sell his rice or paddy to the State, in fact at a time when he has not even harvested the crop; he is called upon to make declarations regarding his land and is prohibited from dealing with or disposing it of to any one else.

Then we find that in pursuance of powers granted by S. 3(1) read with cl. (c) of sub-s. (2), the Government has imposed a control over the price of foodgrains which producers may charge in respect of procurement made under the order. Then again, the producer served with a notice is compelled to harvest the paddy grown by him, thrash it in time and store it properly and take reasonable precaution to prevent damage and theft. Finally, we find notice served in form 'C', when the acquisition starts. After this, Art. 19 ceases to operate, and the question is whether Art. 31(2) has been complied with.

(29) Therefore the matter stands thus. Section 3(1) of the Act confers wide powers on the Central Government to promulgate orders for the purposes of regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein, if it appears to it necessay or expedient for maintaining or increasing their supply or for securing their equitable distribution and availability at fair prices. Subsection (2) of that section specifies several illustrations of such powers and the mode in which they may be exercised.

(30) Under sub-s. (b) of S. 4 of the Act, these powers may by notification be made exercisable by any Provincial Government. The State of West Bengal has been authorised to exercise such

powers so far as foodstuffs is concerned (with certain exceptions not relevant to be stated). One of the ways in which the power to regulate or prohibit the production and distribution of foodstuffs, can be exercised, is to acquire the foodstuff from producers in surplus areas and to distribute the same in areas where they are most needed. But such power can be exercised in a variety of ways other than compulsory acquisition, for example by controlling prices, by prohibiting sales except in a certain specified manner, and so on and so forth. In so far as such powers are exercised for purposes of compulsory acquisition for a public purpose, the only thing to see is whether Art. 31(2) of the Constitution has been infringed. In other cases, it will have to be considered as to whether the provisions of Art. 19(1)(f) or (g) have been infringed. In the first case, it will be necessary to consider the question of reasonableness of compensation, in the latter case, the reasonableness of the restrictions imposed. The order is stated to have been promulgated in exercise of the power conferred by sub-s. (1) of S. 3 of the Act and in particular by cls. (c) (d) (f) (h) (i) and (j) of sub-s. (2) of that Section.

Mr. Mukherjee has not challenged the power under S. 3(1) of the Act but under sub-s.(2) of that Section. Since the power is in reality derived from S. 3(1) of the Act, this would suffice to put him out of Court. But I am not going to decide this case upon this basis. I would have to examine whether powers conferred by S. 3(1), excepting the power to acquire compulsorily for a public purpose, offends against Art. 19(1)(f)& (g). Also I have to consider whether cls. (c), (d), (h), (i) of sub-s. (2) offend against Art. 19 (1)(f) & (g). Thirdly I have to consider whether the powers in S. 3(1) in so far as they may provide for compulsory acquisition for a public purpose offend against Art. 31(2). Similarly in case of cl. (f) of sub-s. (2) of S. 3, the question to be considered is as to whether it offends against Art. 31 (2).

(31) As regards cl. (j) of sub-s. (2) of S. 3, the applicability of Art. 19 or 31 will depend upon the question whether it is related to an order for compulsory acquisition or not.

(32) Lastly, I have to consider whether the provisions of the Order (e. g. sub paras. 1, 2 (a), 3 (b) (4) and (5) of para. 3, para. 6 and para. 7) offend against Art. 19 (1) (f) & (g) where they relate to a stage prior to acquisition or against Article 31 (2), where they relate to a stage after acquisition. If any of these provisions transgress Article 19 (f) & (g), the question to be considered is whether they are saved by Art. 19 (5). The learned Advocate General does not wish to take recourse to Art. 31 (5).

(33) Let me now consider the powers granted by S. 3 (1) of the Act, mentioned above, in so far as they do not relate to compulsory acquisition for a public purpose. The power to regulate or prohibit production or supply and distribution, and trade and commerce in essential commodities may be exercised in a myriad ways. Some may be mere steps to ultimate compulsory acquisition, others having no connection therewith. Thus, control of prices may be made without acquisition, or as in the instant case, prelude to acquisition, and in aid thereof. Such powers, however, cannot exist in vaccuo. In so far as the State regulates or prohibits production or supply and distribution or trade and commerce in essential commodities, it must constantly cross the border line and restrict the citizen's right to acquire, hold or dispose of such property or the free practice of his occupation, trade, business or profession. The question, therefore, is as to whether such restrictions are reasonable and in the interest of the general public, and thus saved by Art. 19 (5) or (6). Before examining whether the particular restrictions complained of are reasonable or not, let us see what constitutes in law a "Reasonable Restriction" under sub-ss. (5) and (6) of Art. 19. The phrase 'Reasonable restrictions' has now been considered in at least three Supreme Court decisions: — Dr. Khare v. State of Delhi', AIR 1950 S C 211 (Q). — 'Chintaman Rao v. State of Madhya Pradesh', AIR 1951 S C 118 (R) and — 'State of Madras v. V. G. Rao', AIR 1952 S C 196 (S).

The law laid down, both from the objective and the subjective point of view may be summarised as follows:

(1) The phrase 'reasonable restriction' connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public (Per Mahajan J. in — 'AIR 1951 S. C. at p. 119)

(2) The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness. (Per Mahajan J. in — 'AIR 1951 S. C. at p. 119)

(3) Clause (5) of Art. 19 must be given its full meaning. The question is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable, or not. The question whether the provisions of the Act provide reasonable safeguards against an abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the Clause. (Per Kania C. J. in — 'AIR 1950 S. C. at pp. 213-214)

(4) The law providing reasonable restriction on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise to the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. (Per Kania C. J. in — 'AIR 1950 S C at p. 214).

(5) The Court should consider not only factors such as duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised (Per Patanjali Sastri C. J. — 'AIR 1952 S C at p. 200)

(6) The restriction of a power to the duration of a period of emergency was a sufficient safeguard (Per Lord Wright quoting Lord Dunedin, in — 'Liversidge v. Sir John Anderson', (1942) A. C. 206 at p. 214 (T)).

(7) The test of reasonableness wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to be infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict (per Patanjali Sastri C. J. in — 'AIR 1952 S. C. at p. 200).

(8) The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive. It is subject to supervision of the Court, which watches and guards the rights guaranteed by the Constitution and has the power to set aside an Act of the legislature, if it is in viola-

tion of the freedom guaranteed by the Constitution. (Per Mahajan J. in — 'AIR 1951 S. C. at p. 120)

(9) In evaluating the elusive factors which go to decide whether a restriction imposed by law is reasonable or not, a Judge has to form his own conception of what is reasonable in all circumstances of a given case. In doing so, it is inevitable that the social philosophy and the scale of values of the Judge participating in the decision should play an important part and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable. (Per Patanjali Sastri C. J. in — 'AIR 1952 S. C. at p. 200).

(10) It is, however, improper to start with an assumption that the Provincial Government will not perform its duty and may abuse the provisions of an Act. An abuse of the power given by a law sometimes occurs but the validity of the law cannot be contested because of such an apprehension. (Per Kania C. J. in — 'AIR 1950 S. C. at p. 214).

(11) It is not to be assumed that the powers conferred upon the executive by Statute will be abused. Per Lord Wright quoting Lord Atkinson in — '(1942) A. C. 206 at p. 263 (T).

(12) If the language employed in a legislative enactment be wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the fundamental right of the citizen then so long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void. (Per Mahajan J. in — AIR 1951 S C at p. 120)

(13) It is a salutary principle of Judicial decision long emphasised and followed by the Court that the burden of establishing unconstitutionality of a Statute rests on him who assails it. (Per Stone J. in — 'Metropolitan Casualty Insurance Co v. Brownell', (1935) 294 U. S. 580 (U)).

(34) Let me now apply the tests adumbrated above to the general powers conferred by S. 3 (1) of the Act. It is not denied by Mr. Mukherjee and indeed the fact is so notorious that the Courts must take judicial notice thereof, that there exists an overall shortage of foodstuffs not only in India but in the whole world. In particular, it is a notorious fact that there is an acute shortage of rice in the rice-eating areas of India, particularly West Bengal. Whether the origin of such shortage is to be attributed to the aftermath of a devastating World War, or to the unchecked growth of the population, or to the political dismemberment of the country, or to a fortuitous combination of all such factors, it is unprofitable to consider. The stark reality confronts us that there is not enough food to go round and parts of the country are constantly verging on conditions of acute shortage and even famine. Under such emergent circumstances, would it be unreasonable for the legislature to vest the Government with wide powers of regulating or prohibiting the production, supply or distribution of essential commodities in so far as it appears to it to be necessary or expedient for maintaining or increasing such supplies or for securing their equitable distribution and availability at fair prices? I think not.

The object of good Government is constantly to adjust the conflicting claims of its different components. Neither the administration of the State nor the administration of the law itself can flourish in a State of unstable equilibrium. If one part of the country is faced with a famine or even acute shortage of food stuffs, it is not unreasonable to expect the Government to acquire food compulsorily from surplus areas at a reasonable price and transport it to the deficit areas. Indeed such would be its plain duty. It is true that the conferment of the fundamental rights upon a citizen by the Constitution is a landmark in our history. But the most fundamental fact of all is that the State must survive. To talk of the fundamental right to hoard as one pleases, to profiteer as one pleases, to be the Lord of one's Manor and Fief, all this sounds edifying under certain given circumstances of peace and plenty but it is a mockery when a man's brother sits out in the pavement naked and unfed.

(35) Even the liberty of the subject — that right which English jurisprudence guards so uncompromisingly in times of peace, is no longer inviolable and sacrosanct during periods of emergency. "The suggested rule as to construing penal statutes" said Lord Wright in — 'Liversidge's case (T)', (ibid),

> "in favour of the liberty of the subject had no reference to a case dealing with an executive measure by way of preventing a public danger .....'However precious' said Lord Atkinson 'the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national blunder or enslavement' ....."

The Statute in question and the powers sought to be conferred thereby are not permanent but temporary. The continuation of the evil sought to be remedied is the measure of the justification for its existence at any given point of time. It is not long ago that we emerged out of a devastating world war and immediately thereafter came the turn in our national fortunes, when we emerged into a state of political emancipation. So far as the State of West Bengal is concerned, it became free but truncated, most of the food producing areas going to Eastern Pakistan. While the sources of food-supply have thus diminished, the State has suddenly been faced with an unprecedented influx of refugees from over the border. Thus, there is less food but more mouths to feed, less production and more consumption.

It follows naturally that in such an emergency, an infant State must of necessity be clothed with plenary powers in order to regulate the production and distribution of foodstuffs with an eye to maintain or increase the supply. To expect that the State will not take from any one and yet give to all, that it should procure at the highest price and distribute at the lowest, that it should nurse, clothe and feed the multitude, without the least executive interference or without the least encroachment upon any of the fundamental right guaranteed by the Constitution is to my mind a counsel of perfection not likely to be attained. In England, even in peace time the widest possible powers were conferred upon the Board of trade by the Foodstuffs (Prevention of Exploitation) Act 1931, 21 and 22 Geo, 5, to control any shortage or unreasonable increase in the price of any article of food or drink of general consumption. The result is that I do not find anything arbitrary in such restrictions; anything excessive, beyond what is required in the interests of the general public. In my opinion, there is nothing in the restrictions imposed by S. 3 (1) of the Act which fails to pass

the tests laid down above. I, therefore, hold that the restrictions imposed by the general powers conferred by S. 3 (1) of the Act upon the fundamental rights conferred by Art. 19 (f) or (g), are reasonable restrictions which are in the public interest.

I am of the same opinion as Shearer J. was, in — 'AIR 1952 Pat. 220 (D)', in respect of the Bihar Levy Order, which I quote below:

"To sum up, India is a predominently agricultural country, and yet at the moment cannot produce enough food for its rapidly increasing population. In such a situation, in order to prevent famine occurring in particular local areas, it is necessary that the State should control the distrioution of grain and in order to enable it to do this it must have control of large stocks of grain itself. The only way in which it can do this is to require producers to deliver a part of their stocks to the State or agents of the State. As I have already said the quantity of grain which any producer is required to deliver is not so high that it does not leave him with sufficient for his own consumption and for seed, and indeed, in some cases with a certain surplus which he is at liberty to sell. That being so, the restriction imposed on producers is a reasonable restriction, and is imposed in the interests of the general public".

I now come to the specific clauses in sub-s. (2) of S. 3. Clause (c) gives power to control the price. Even Mr. Mukherjee has not argued that such a power is unreasonable. What he says, however, is this. He says that he can understand a general control of all essential commodities. In that event, his clients would know that if they received less for one commodity they could buy others for less. He says that it is unreasonable to ration only industrial areas and then forcibly take away the food from the areas where they are grown, to feed those who themselves grow nothing.

This, he says, is to compel the producer to be charitable but at his own expense. In my opinion, there is no foundation for this argument. The industrial area does not naturally grow food; but it produces many things without which the cultivator cannot exist. He must have his ploughshare to plough, kerosene oil to light his evening lamp, cloth to wear, medicines in time of illness, & so on and so forth. How then can it be unreasonable to compel him to part with his surplus to feed the industrial area? As regards the area within which price is to be controlled, that is a matter which must be left to the discretion of the Government. The remedy must be proportionate to the evil that is sought to be remedied. If no general control is necessary, government would rather be exceeding its powers if it insisted on general control.

(36) No argument was advanced before me on cls. (d), (h), (i) or (j). I cannot see how without these powers would it be possible for any State to regulate or prohibit the production, supply or distribution of essential commodities.

(37) I now come to the order; it is said that several provisions of the order relating to a stage when the goods have not yet been acquired, offend against the fundamental rights conferred by Art. 19(1)(f) and (g) and the restrictions imposed are not reasonable restrictions, such as are in the public interest. The first ground of attack is the method employed in estimating the produce by not calling for a declaration as to the actual produce of the land. It is argued that an executive officer sitting in his arm-chair hundreds of miles away lays down by estimation, what a man's yield should be, purely on an imaginary basis. The producer is merely asked to state as to what area is under rice. He has no opportunity of saying whether part of that area has reason to be less productive than the rest. His land may suddenly be flooded, or left arid far want of water, his crop may be destroyed by pests or die for want of manure. He may be unable to deliver whatever amount the executive officer thinks that his land should yield.

This argument sounds plausible but is without substance. If the return called for the disclosure of the actual yield of a cultivator's land, then the determination of it could only be made upon a survey and inspection of that land. If it was intended to inspect all lands, producer-wise, in order to determine the available surplus in a given case the staff and administrative machinery required to investigate the case of about four million cultivators would be so stupendous and costly that the very object of the order would be frustrated. On the other hand, let us consider the result of a determination by estimation. What actually happens is that the Government prepares some kind of a record union-wise and then calculates the available surplus on the footing of the average expected yield in the locality. The worst that can happen is that the actual yield of a person may be below the average and so the actual surplus may be less. He can always move the authorities for review or revision and ultimately go to the district magistrate in appeal. If he convinces the authorities that he has not the goods which he has been asked to deliver, the demand has necessarily to be modified. This must be so because the producer cannot deliver more than he has and the next step to be taken by Government is to seize the goods and they cannot seize more than what exists.

It is true that a non-compliance also exposes the producer to penalties other than seizure. But it must be realised that to establish the fact that an offence has been committed it would be for the Government to prove that the producer had the goods and yet did not comply with the directive. I must refer here to a case that was decided by a Divisional Bench of the Patna High Court. 'AIR 1952 Pat 220 (D)', which is very much on all fours with the present case. The Court was there considering the validity of the Essential Supplies Act and an order promulgated by the Bihar Government under it, viz., 'the Bihar Agriculturist Levy Order (1950)', which is very much upon the lines of the order I am investigating here, only some of the terms are even more stringent.

Referring to an argument made on similar lines, Shearer J. stated as follows:

"Finally the scale of levy is based on the assumption that in Bihar the average gross produce of paddy from one acre of land is 12 mds. or 8 mds. according as the land is or is not canal irrigated and that in Chotanagpur and the Santhal Parganas the average gross produce is 12.8 or 4 maunds of paddy according as the land is first second or third class land respectively ..... Throughout Bihar and Chotanagpur except in the Khasmahal villages, the State has no officials capable of appraising crops, and to have recruited a staff for this purpose would, I imagine, have been quite impracticable. Moreover appraising standing crops is a very difficult task and serious errors are likely to be made one way or the other. Even if it had been possible to do this, and it would, in my opinion, have been quite impossible, more hardship would have been likely to have been

caused than is likely to be caused by the procedure, adopted, namely by assessing the demand in each case on the assumption that the average outturn will be a certain quantity of paddy per acre, the notional figure taken being well on the low side ..... Finally it must be remembered that the order contains provisions enabling any large producer on whom a demand is made, to apply for a revision of the assessment and if the assessment is not revised to his satisfaction to appeal against it."

The next grievance of Mr. Mukherjee is that in calculating the available surplus, that scale fixed for consumption of the producer and his dependents is wholly inadequate. He argues that rice is the staple food of the villager and he has not the variety of fancy foodstuffs that a city dweller has. I find, however, that 12 mds. is allowed per head, irrespective of the fact whether the consumer is an adult or a child. This is about double the amount allowed to an adult in the Calcutta industrial area, under the rationing regulations. I find nothing unreasonable in this. As regards the other provisions of the order, regarding the power of inspection, seizure, etc., or the power to prohibit disposal pending acquisition, these are all ancillary to the main object of procurement and I do not find them unreasonable or not in the public interest.

(38) I now come to the all important question of compensation. This obligation of the Government arises under Art. 31(2) of the Constitution, which provides that where government acquires property for a public purpose under any law authorising the taking of such possession or such acquisition, the law must provide for payment of compensation and either fix the amount of compensation or specify the principles on which and the manner in which the compensation is to be determined and given. Mr. Mukherjee argues that 'compensation' means a reasonable compensation. The learned Advocate General submits that I cannot import the word "Reasonable" into Art. 31 as it would be adding to the Constitution. In — 'AIR 1961 Cal 111 at p. 115 (J)', Harris C. J. held as follows:

"It seems to me that the word 'reasonable' or 'just' qualifying the word compensation is really unnecessary because compensation to be compensation must be a compensation reasonable or just equivalent ....In my view nothing can be compensation which is unjust or unreasonable because if it is not a proper equivalent then it is not compensation and anything which is unjust or unreasonable can never be regarded as an equivalent".

This view is supported by a Full Bench decision of the Allahabad High Court—" 'AIR 1961 All 674 at p. 685 (N)'. In — 'Monongahela Navigation Co. v. United States', (1893) 148 U.S. 312 (V), Brewer J. delivering the opinion of the Court said with regard to the 14th Amendment:

"The noun 'compensation' standing by itself carries the idea of an equivalent .....so that if the adjective 'just' had been omitted and the provision was simply that the property should not be taken without compensation, the natural import of the language would be that the compensation should be equivalent of the property".

(39) I agree with the views expressed above and hold that, 'compensation' in Art. 31(2) means a just compensation, that is to say, a just equivalent in value. It is then argued that the Act or the Order does not fix a compensation or specify the principles for fixing it. It gives arbitrary power to the government to fix such compensation as it likes. In this connection, the provisions of cl. (f) of sub-s. (1) of S. 3 of the Act and sub-para 3 of para 3 of the order, are strongly attacked. It is argued that the prices are such as might be arbitrarily fixed by Government. Such powers might be abused and the compensation might be fixed so low as not to amount to a just equivalent. Mr. Mukherjee argues that it would not be an answer to say that in the instant case, a compensation has been fixed which is just, because if a legislative enactment be wide enough to cover restrictions both within and without the limits of constitutionally permissive legislative action affecting the fundamental rights of the citizen, then so long as the possibility of its being applied for a purpose not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void. He relies on the Supreme Court decision of — 'AIR 1951 S. C. 111 at p. 120 (R)'.

The above dicta in 'Chintaman Rao's case, (L)', must, however, not be read wholly divorced from the context. In that case, the impugned legislation empowered the Deputy Commissioner to fix the agricultural season in respect of notified villages and to totally prohibit the manufacture of Bidis therein during that period. The object of the Act was to ensure that during the agricultural season, there would not be a dearth of labour. The legislation was held to be arbitrary inasmuch as it totally prohibited all persons from engaging in the trade whether they constituted the class or not who carried out agricultural labour. It was held that the law in so far as it affected agricultural labour was also invalid because the language employed was wide enough to cover all persons whether agricultural labour or not. This principle, however, cannot apply to the facts of the present case.

The constitutionality of a law cannot be judged because a power given under it might be abused in its exercise — 'AIR 1950 S. C. 111 at p. 113 (Q)', — '(1942) A. C. 206 at p. 263 (T)'. (See principles of reasonable restriction ennunciated above). Also see — 'AIR 1951 Pat 220 (D)'. If an executive official abuses the power given under a legislative enactment, or acts without good faith, it would not be an exercise of the power at all, and the Court is not powerless to control him. — 'Westminster Corporation v. L.& N. W. Ry.', (1905) A. C. 426 at p. 430 (W). — 'Vimlabai v. Emperor', AIR 1945 Nag 8. at p. 23 (X). That however does not make the law unconstitutional or valid. But it is I think an appropriate moment to give a warning that this Court will always stand uncompromisingly between the law and its abuse. Wide powers call for a wide degree of a circumspection on the part of those who are called upon to wield them. As soon as the remedy exceeds to evil, this Court will find a means of calling a halt to its exercise.

(40) I next proceed to deal with the argument that the Act by itself does not fix the compensation or lay down the principles upon which it should be fixed. Article 31(2) speaks of the 'law'. Now, a statute like the present Act is only an enabling statute which confers powers upon the Government to do certain things by promulgating orders. All the ancillary and procedural provisions are to be found in the orders when promulgated. The 'law' in a given case must, therefore, be the Act read with the order. In other words, the Act provides the power to promulgate the order and when the order is promulgated in exercise of the powers conferred by the Act, it has the force of law. Since the Act is merely an enabling statute, it cannot stand by itself for any practical

purposes and the Act and the order must be treated as supplementary to each other and the entirety considered as the 'Law' which under Art. 31(2) must provide the compensation or fix the principles for assessing it. So read I do not think that the law in this particular case does not fix the compensation. The matter may be looked at from another angle. Under S. 3(1) of the Act, the Government is given wide general powers which would include the power to compulsorily acquire the paddy. Also under sub-s. (2)(c) of S. 3 of the Act, it has the power to control the price at which an essential commodity may be bought.

In exercise of the power given under S. 3(1) read with cl. (c) of sub-s. (2), the Government has controlled the price payable in respect of the paddy bought by Government. (See Notification No. 10365 F. D., dated 22-10-1952). If a power to control prices is given under an Act, the controlled price must necessarily be read into the Act and is a sufficient fixation of compensation under Art. 31 (2). It will be observed that the actual fixation of price has not been done under cl. (f) of sub-s. (2) of S. 3 of the Act, but cl. (c). I next come to the question as to whether the actual compensation fixed is unreasonably low, so as not to amount to a just equivalent in value. The price to be paid has been fixed districtwise (save and except the Siliguri Sub Division of Darjeeling district) and there seems to be a flat rate for Aus and Boro at Rs. 7/8/- per maund, Aman other than fine at Rs. 8/2/-in West Dinajpur & at Rs. 8/8/- in other places. Fine Aman at Rs. 10 to 11 according to quality. If these are not reasonable prices, so much so that they do not amount to compensation at all as mentioned in Art. 31(2), the onus was upon the petitioners to establish this. (See principles laid down above). They should have given the cost of production in their locality,cost of production in their own lands and enumerated all the other factors that go to determine the fair price of any commodity, e.g., prevailing wages, fertility of the soil, special economic factors if any in operation, transport charges, availibity of transport, etc.

But the petitioners have chosen to give no particulars whatever. At the hearing, Mr. Mukherjee wished to rely on certain reports published in the Calcutta Gazette under the heading "Weekly weather & Crop Report of West Bengal". These appear to be published by Government in accordance with the provisions of S. 39, Bengal Tenancy Act, and give the market price of coarse rice in the various sub-divisions of the State. The learned Advocate General rightly objected to such use being made of a document at the hearing without any prior notice being given thereof. In the case of high prerogative writs, it is a well accepted procedure that new matters cannot be allowed to be introduced at the hearing. But quite apart from this technical objection, I do not see that matters are at all advanced by being apprised of the market price prevailing in a particular subdivision. Local market price is a thing that might depend upon various incalculable factors. The market may be in the hands of racketeers: There might be a sudden influx of goods: There might be trade competition, & so on and so forth. In any event, compensation under Art. 31(2) is not necessarily the market price. The result is that I have no materials before me to hold that the prices fixed are not just or reasonable compensation.

It is argued that the inclusion of transport charges in the price makes the compensation illusory. One near the place of delivery gets more than one situated at a distance. The price does include the transport charges but there is nothing to show that after deducting such charges the prices fixed are unreasonably low. I am not told what the distance would be to the several places of destination mentioned in the notices in Form 'C', so far as the petitioners are concerned. In villages, stocks are sold in local Hats which cannot be equidistant from the house of all villagers. But the price does not vary because of the variation in the distance. The villagers usually bring their produce in their own bullock-carts or upon their own heads to the local market. Cost of transport would enter into the price if long distances have to be covered, but there is no material before me to show that such distances have to be covered in the case of any of the petitioners.

(41) The next thing I have to consider is whether the order is outside the four corners of the Act.

(42) The first point taken is that the power conferred by the Act (read with the notification) upon the State of West Bengal is only in relation to foodstuffs and that paddy is not foodstuff. It is stated that the description of paddy as "Rice in the husk" is a colourable attempt to avoid this difficulty. In — 'The State of Bombay v. Virkumar Gulabchand Sha', AIR 1952 S. C. 335 (Y), it was held that turmeric is "foodstuff" within the meaning of the "spices (Forward Contract Prohibition) Order 1944" read with S. 2(a) of the Act. It was held that the term "Foodstuff" is ambiguous and may have a wide meaning or a narrow one. Whether the term is used in a particular Statute in its wider or narrower sense cannot be answered in the abstract but must be answered with due regard to the background and context. Thus in — 'James v. Jones', (1894) 1 Q. B. 304 (Z), baking powder was held to be an article of food while in — 'Hinde v. Allmond', (1918) 87 L.J.K.B. 893 (Z1), it was held that tea was not. Now the Act has been passed to control the production and distribution of essential commodities. What can be looked upon more of an essential commodity than both rice and paddy? In West Bengal, the two things most essential for the sustenance of human life are rice and paddy. Mr. Mukherjee admits that rice is an essential commodity & a food stuff, but he says that paddy is not because nobody can eat paddy. But that is a very narrow view to take. Paddy is only a stage in the production of rice and the one cannot be food without the other being food as well. Nobody eats the husk in paddy; but nobody eats the skin of mango or the shell of a egg and yet they are unquestionably articles of food. In my opinion, paddy is 'foodstuff', within the meaning of that expression as used in the Act and the notification.

(43) It is next stated that there is no power conferred by the Act to order the producer to deliver goods at a prescribed destination, as provided for in para 3(5) of the order. This would come within the general powers in S. 3(1). It may also come under para (j) of sub-s. (2), inasmuch as delivery would be an incidental matter to sale and distribution.

(44) Lastly it is said that the prohibition contained in the notice in Form "A" whereby the producer is directed not to deal with or dispose of any portion of stock owned or possessed by etc., is not authorised by any power conferred either by the Act or the Order. But this would certainly be included in the general power under S. 3(1) as also covered by cl. (e) of sub-s. (2). Such a prohibition would also be an incidental or

supplementary matter under cl. (j), because it would be futile to ask for a return with a view to purchase, if the commodity itself could instantly be sold to another.

(45) Lastly I come to a point which was taken by Mr. Mukherjee but which he did not develop at all. According to him, the Order is aimed at victimising only a limited class of producers, namely those who owned 10 acres or more. This he says is discrimination which offends against Art. 14 of the Constitution. Now, the object of procurement from the comparatively larger producers of foodgrains is self-evident. If a surplus is to be acquired, a larger producer is more likely to have a surplus than a smaller one. I think a more rational basis of legislation cannot be imagined. In the Income-tax Act, the lower income groups are more generously treated than the higher-income groups. The higher the income, the greater the imposition. Can it be said that citizens are thereby denied the equal protection of the laws? The law as to equal protection has thus been summed up by Professor Wills, referring to the 14th amendment of the American Constitution:

"The guaranty of equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred & the liabilities imposed ..... The inhibition of the amendment ..... was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation ..... Mathematical nicety and perfect equality are not required .....".

(46) In —'State of Bombay v. F. N. Balsara', AIR 1951 SC 318 at p. 326 (Z2), the Supreme Court has summarized the law as follows:

1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

2. The presumption may be rebutted in certain cases by showing that on the face of the Statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class and yet the law hits only a particular individual or class.

3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

4. The principle does not take away from the state the power of classifying persons for legitimate purposes.

5. Every classification is in some degrees likely to produce some inequality and mere production of inequality is not enough.

6. If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of legal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis. (See also — 'Charanjitlal v. Union of India', (H) (ibid).

(47) Applying the above principles, we find that the classification of 'producers', affected by the legislation in question, is a reasonable classification, bearing a just relation to the object sought to be attained. If surplus foodgrain has to be procured, the class which is most likely to have a surplus is the large grower. As between members of that class there is no distinction made. Thus it cannot be said that any person or class of persons has to be singled out for hostile legislation, without a rational basis for a discriminatory treatment and without any rational object to be achieved. "The question is not" says Ramaswaim J. in — 'Mohd. Anzar Hussin v. State of Bihar', (D) (ibid)

"whether the Court considers the classification reasonable to its satisfaction or whether in its opinion the Government could have devised a more equitable scheme. The question must be posed on the other hand — Is the Statute so clearly arbitrary that legislators acting reasonably could not have believed it to be necessary in the public interest. To put it in other words, the question is whether there was any rational basis for legislative action. Applying this test, it is obvious that the Bihar Agriculturists Levy Order considered as a whole and notwithstanding certain anomalies does not violate the guarantee under Art. 14 of the Constitution".

(48) I hold, therefore, that nothing in the Act read with the order offends against the fundamental right of equal protection guaranteed by Art. 14 of the Constitution.

(49) Finally I come to an argument advanced by the learned Advocate General about the scope of Art. 226. He says that when the accredited representatives of the people have thought a legislative enactment to be necessary, the Courts must not think otherwise. Secondly he says that the executive officers concerned acted in an administrative capacity and exercised their discretion within the four corners of the Statute and a Writ did not lay under Art. 226. As regards the first contention I have already referred to the duty of a Judge in this respect as laid down in the felicitous language of Patanjali Sastri C. J. in — 'The State of Madras v. V.G. Rao', (S) ibid. But while giving due weight to the views of the elected legislature, the Court cannot forget that in this respect, the legislature is always subject to the Constitution. The Courts must always stand as an unfailing bulwark against any breach of the Constitution. I for one am not in favour of belittling the powers of this Court under Art. 226. It is true that this Court will not interfere when there exists other adequate legal remedies, or that it will not impose its will upon the exercise of executive discretion. But that course of conduct is dependent upon expediency and not want of jurisdiction. The existence of an alternative remedy is no absolute bar, and the abuse of a power even though discretionary can always be controlled. In my view, there exists no kind of injustice which in the last resort cannot be set right under the powers conferred by Art. 226. If we do not realise this and set about clipping our own wings in a hurry we shall soon arrive at a stage

when clear injustice will be done, but we shall find ourselves unable to soar to the heights. The oft-repeated argument that an excessive use of such powers would result in Judges having very soon to run the administration of the country, is an argument of desperation. The judiciary in the United States have assumed wide powers under the fiction of the "due process" of law, but the administration of that great country has not fallen into their laps.

(50) It is, however, unnecessary on the facts of this case to deal with this argument any further. As I am not satisfied that anything unconstitutional has been done or attempted to be done, nor any act of injustice wrought, that calls for interference, this application must fail and be dismissed. The rule is accordingly discharged and the interim order vacated. I make no order as to costs.

A/D.H. Application dismissed.

A.I.R. 1953 CALCUTTA 560 (Vol. 40, C. N. 206)

P. N. MOOKERJEE J.

Sm. Prafulla Nalini Ghose and another, Accused-Petitioners v. The State and another, Opposite Party.

Criminal Revn. No. 95 of 1952, D/- 13-5-1952.

Criminal P. C. (1898), S. 439 — Trial Court's appraisement of evidence — Usually High Court will not interfere in revision — Trial Court not paying proper or sufficient attention to broad principles — Conviction ought not be allowed to stand although matter comes before High Court in revision and not in appeal because of non-appealable sentence.

(Para 5)

Anno: Cr.P.C., S. 439 N. 25, 26, 46.

Prafulla Kumar Roy and Hemesh Chandra Sen, for Petitioners; N. K. Basu, S. C. Talukdar, R. Chowdhury and N. R. Biswas, for Opposite Party.

CASE CITED:

(A) ('51) 52 Cri LJ 173: 55 Cal WN 1 (PC)

ORDER: This Rule is directed against an order passed by a learned Magistrate, 1st class, Sealdah, on 27-10-1951, convicting the two petitioners under Ss. 453 and 341, I. P. C., and sentencing each to a fine of Rs. 30/- in default to S. I. for 15 days under S. 453, I. P. C., and directing also restoration of possession under S. 522, Criminal P. C. there being, however, no separate sentence passed under S. 341, I. P. C.

(2) A motion for reference of the case to this Court was eventually rejected by the learned Addl. Sessions Judge on 21-1-1952 and thereafter on 28-1-1952 the present Rule was obtained by the two accused.

(3) The case had a chequered career. In the petition of complaint which was filed on 17-11-1949, process was prayed for under Ss. 448/341/506/426/427, I. P. C., and such process was sought not only against the two petitioners who are husband and wife but also against their three sons and two daughters and two other persons, Priya Ranjan Das Gupta and Madan Gopal Mitter. The learned Police Magistrate issued process only against the two petitioners and Priya Ranjan Das Gupta and Madan Gopal Mitter. Later on, on 6-5-1950, the case against the two last named persons was ordered to be "filed for the present" and the case against the two petitioners was transferred to Sri S. D. Banerjee, Hony. Magistrate, for disposal. Before this learned Hony. Magistrate the case proceeded for over nine months when the term of this learned Magistrate having expired the case was withdrawn, by an order of the learned Additional District Magistrate, passed on 12-2-1951, to the latter's file and transferred to Sri B. B. Mazumdar, Magistrate, 1st Class, Sealdah, for disposal. Thereafter, on the prayer of the accused the case was tried de novo and evidence was taken from 21-3-1951 till 1-10-1951. Arguments were concluded on 3-10-1951 and the learned Magistrate delivered judgment on 27-10-1951, convicting and sentencing the petitioners and directing restoration of possession as aforesaid.

(4) In my opinion, the petitioner's conviction cannot stand. I am not impressed by the argument of the learned Advocate for the petitioners that, even if the prosecution evidence be fully believed, this was at best a case of civil trespass and no conviction could be made for any criminal offence as the petitioners' dominant intent was not "to insult, intimidate or annoy". The case of — 'Sinnaswamy Salvanayagam v. The King', 55 Cal WN 1 (PC) (A), cited by the petitioners' learned Advocate in support of this argument, would be of no help to the petitioners if the prosecution story be accepted as correct. I am bound, therefore, to reject this argument, advanced in support of the Rule.

(5) On the facts, however, I have not been able to persuade myself that the prosecution case has been proved beyond reasonable doubt. It is true that the learned Magistrate has apparently believed the prosecution evidence and accepted the prosecution case. It is true also that this Court, sitting in revision, should not ordinarily interfere with the trial Court's appreciation and appraisement of evidence. But, even then, when certain broad and inalienable features are overlooked or do not appear to have received any or proper or sufficient consideration and conviction is made on conclusions reached without paying attention — or, at any rate proper or sufficient attention — to such features or irreconcilable with the same, such conviction ought not to be allowed to stand, although the matter comes up to this Court not in appeal but in revision only because, to the accused's misfortune, a non-appealable sentence is passed by the learned trying Magistrate. That is what has happened in the present case and I feel, therefore, bound in the interest of fairness and justice, to set aside the petitioner's conviction and sentence and all consequential orders, passed by the learned trying Magistrate.

(6-8) (His Lordship went through the evidence and concluded:)

(9) In the above state of things I am unable to accept — and I do not also feel bound to accept — the finding of the learned trying Magistrate that the prosecution case has been sufficiently proved to justify a conviction of the petitioners under Ss. 453 and 341, I. P. C. I, therefore, make this Rule absolute, set aside the orders of conviction and the sentences, passed upon the petitioners, as also the order for restoration, passed under S. 522, Criminal P. C., and direct that the petitioners be acquitted. The fines, if already paid, are ordered to be refunded.

C/R.G.D. Rule made absolute.

A.I.R. 1953 CALCUTTA 561 (Vol. 40, C. N. 297)

K. C. CHUNDER J.

Mohari Lall and another, Accused Appellants v. The Corporation of Calcutta, Complainant Respondent.

Criminal Appeal No. 148 of 1952, D/- 7-1-53.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 3(55), 425(2) — Report of Analyst — (Criminal P. C. (1898), S. 510).

An Analyst appointed by the Calcutta Corporation is a Public Analyst. His report is evidence without calling him to Court. (Para 2)

Anno: Cr. P. C., S. 510 N. 1, 3.

(b) Municipalities — Calcutta Municipal Act (3 of 1923), S. 406 — "Seller."

Not only the person who is the actual proprietor or holder of the licence but any one selling on his behalf comes within the mischief of the section as the seller. (Para 3)

(c) Constitution of India, Art. 20(1) — Greater penalty.

Prosecution under Calcutta Municipal Act of 1923 — Greater penalty under new Calcutta Municipal Act is not justified. (Para 6)

Amiya Chatterji, for Appellants; Sambhu N. Banerji, for the State; Sunil K. Basu, for Corporation of Calcutta.

CASES CITED:

(A) ('12) 13 Cri LJ 205: 16 Cal WN 455
(B) ('49) 53 Cal WN 503
(C) ('28) AIR 1928 Cal 320: 32 Cal WN 842: 30 Cri LJ 256
(D) ('33) AIR 1933 Cal 598: 34 Cri LJ 836

JUDGMENT: This is an appeal against a conviction and sentence on the two accused persons under S. 406, Calcutta Municipal Act, (Bengal Act 3 of 1923) read with S. 488. Mohari Lall is the proprietor of the shop and Sower Lall was acting as the actual salesman. The shop is situated at 24/1, Sir Hariram Goenka Street, Calcutta. A Food Inspector of the Calcutta Corporation visited the shop. His evidence is that he found actually adulterated turmeric was being sold to customers. He purchased a sample of the same. What is more, he found turmeric was being ground with calcium carbonate in a machine near where the accused salesman was actually selling the article. He observed all the necessary requisites for the taking of such a sample and for sending the same to the Public Analyst of the Calcutta Corporation. The certificate of the Public Analyst is that even on physical examination small solid particles of calcium carbonate were visible to naked eye and chemical examination disclosed also calcium carbonate and he was of opinion that the sample of turmeric was adulterated with calcium carbonate. The Food Inspector Dr. H. C. Saha is himself a medical man & his evidence is that as a doctor he would boldly say that such turmeric mixed with calcium carbonate was harmful and injurious to health and it might produce stones & give rise to serious diseases, etc. Both the accused pleaded not guilty. The accused Moharilall in his statement under S. 342, Criminal P. C. said that the turmeric was not to be sold by him but as it had got mixed up, it was going to be thrown away by him. The statement of Sower Lall was that he was a servant. No evidence was given on behalf of the defence.

(2) These facts, as I have stated, were accepted by the learned Magistrate on the evidence on record. They have not been challenged by Mr. Chatterji as incorrect. His contention first is that the Public Analyst's certificate is inadmissible in evidence and he has referred me to S. 510, Criminal P. C. This argument was obviously based upon a mistake as it had overlooked S. 425 (2), Calcutta Municipal Act, read with S. 3 (55) of the same Act. These two sections of the Calcutta Municipal Act would show that an Analyst appointed by the Calcutta Corporation is a Public Analyst and that a Public Analyst's report is evidence without calling the Analyst to Court. This has therefore nothing to do with S. 510, Criminal P. C.

(3) The next argument of Mr. Chatterji was that I should take seller to mean the person in whose name the licence has actually been granted. That contention cannot be supported in the context of the section itself. It shows by the words 'by any other person on his behalf' that not only the person who is the actual proprietor or holder of the licence but anyone selling on his behalf comes within the mischief of the section as the seller.

(4) Mr. Chatterji next contended that 'mens rea' is necessary and it must be proved that the salesman who was merely a servant knew that he was selling adulterated goods. He has referred me to two decisions reported in — 'Shew Karan v. The Corporation of Calcutta', 16 Cal WN 455 (A) and — 'Bikhuram v. The King', 53 Cal WN 503 (B). It is unnecessary for me to say anything regarding the question of absolute liability or 'mens rea' in the present case. As far as the decision reported in — '16 Cal WN 455' (A), is concerned, the law has been changed since then but apart from that even if 'mens rea' is necessary, a question which I leave undecided, the evidence clearly shows such 'mens rea' or knowledge as the evidence is that the physical examination itself would show particles of calcium carbonate mixed with turmeric which was being sold and also that the turmeric was being ground with calcium carbonate in a machine near where the seller was carrying on his work. If in these circumstances knowledge is inferred it cannot be said that the inference will be wrong. As far as knowledge of the proprietor is concerned, his own statement showed that he knew that the articles were adulterated and his defence was that he did not want to sell the articles known to be adulterated but that he wanted to throw the same away, of which pious intention there is no further evidence. The evidence of actual sale of such adulterated article is on record.

(5) Mr. Chatterji's next contention was that the compulsory sale to an officer of the Corporation like this was not a sale contemplated under S. 406 of the Act. He has referred me to the decision reported in — 'Akhoy Kumar v. Corporation of Calcutta', AIR 1928 Cal 320 (C). The soundness of that decision was questioned by a Division Bench in — 'Davis Hewlet & Co. v. Emperor', AIR 1933 Cal 598 (D) and was not followed but it is unnecessary for me to enter into the correctness or otherwise of either decision because in the present case the evidence of the Food Inspector is that in his presence there was sale to others of the adulterated article and no reason has been given why the evidence of the Food Inspector on this point should be disbelieved, so that

apart from the compulsory sale to the Food Inspector there is evidence of other sales as well. Under the circumstances the legal question does not arise.

(6) Finally, Mr. Chatterji has contended about the sentences. He is right in pointing out that the sentence of fine of Rs. 1000/- imposed by the learned Magistrate under the new Calcutta Municipal Act is not justified. He has drawn my attention rightly to Art. 20, Cl. (1) of the Constitution of India in accordance with which the sentence must be a sentence in accordance with the Municipal Act of 1923 under which the prosecution took place. The sentence therefore passed on Mohari Lall cannot be sustained and as the Magistrate is rightly of opinion that in view of the big business of Mohari Lall the highest sentence under the section should be passed, I impose a sentence of fine of Rs. 500/- in his case.

(7) Mr. Chatterji next contended that the salesman Sower Lall is after all only a servant. He stands to gain nothing & a sentence of a fine of Rs. 300/- is a stiff sentence in his case. At the same time, it must be pointed out that but for such salesman it would not be possible for such adulterated articles to be so readily sold because the proprietors themselves hardly ever act as distributors of these articles. Under the circumstances, I find no reason to interfere with the sentence passed in his case.

The result, therefore, is that except for the modification of the sentence in the case of Mohari Lall the appeal is otherwise dismissed. The excess fine, if realised, is to be refunded to Mohari Lall.

A/D.H. Appeal dismissed.

A.I.R. 1953 CALCUTTA 562 (Vol. 40, C. N. 208)

P. B. MUKHARJI J.

Ganendra Kumar, Applicant v. Narayan Chandra and others, Respondents.

Application in connection with O. S. Suit (Liquidated Claim) No. 835 of 1950, D/- 11-7-1952.

(a) Debt Laws — Bengal Money Lenders Act (10 of 1940), S. 34(1)(a)(ii) and Form 15 — Notice — (Limitation Act (1908), Art. 181) — Decision in Suit No. 2077 of 1939, Dissented from.

Under O. 34, Civil P. C. the mortgagee decree-holder's right to apply for the final decree is governed by Art. 181, Limitation Act. In so far as form 15 makes a special limitation of time within which to apply for final decree such special limitation is ultra vires the Bengal Money Lenders Act and therefore void and ineffective. Case law discussed. (Paras 11, 13)

Anno: Lim. Act, Art. 181 N. 4.

(b) Debt Laws — Bengal Money Lenders Act (10 of 1940), S. 34(1)(a)(ii) and Form 15 — Specification of amount of interest.

Rate of interest fixed by decree — Notice asking for "subsequent interest" in terms of preliminary decree without specifying exact amount is valid. (Para 15)

Gouri Mitter, for Applicant; A. K. Sarkar, for Respondents.

CASES CITED:

(A) ('43) AIR 1943 Cal 257: ILR (1943) 2 Cal 227

(B) ('50) AIR 1950 Cal 217: 54 Cal WN 110

(C) ('44) AIR 1944 Cal 414: 47 Cal WN 637

(D) ('45) Suit No. 2077 of 1939, D/- 14-3-1945 (Cal)

(E) ('70) 4 Beng LR 101: 13 WR 44 (FB)

ORDER: This is an application for final decree in a Mortgage Suit under S. 34(1)(a)(ii), Bengal Money Lenders Act.

(2) The facts are simple.

(3) On 22-2-1951, the usual preliminary mortgage decree was passed in this suit declaring the applicant as the first mortgagee under the two Indentures of Mortgage dated 22-12-1941 and 22-12-1945 and the amounts due to the applicant for principal and interest up to the date of that decree were Rs. 58,450/- and Rs. 71,438-14-3 respectively on the two mortgages. The decree provided that the amounts due to the applicant for principal and interest and also costs awarded thereunder should be paid in four equal annual instalments. It provided that in default of payment the applicant would be at liberty to apply for a final decree for sale. Default having taken place, the mortgagee now applies for the final decree, after having given notice to the mortgagors.

(4) The only point on behalf of the respondents mortgagors is a short point about the notice mentioned u/s 34(1)(a)(ii), Bengal Money-lenders Act.

(5) Mr. Sarkar appearing on behalf of the respondents argues that the application is not maintainable because the time specified in the notice given under that Section expired before this application was moved in Court. The notice under the Bengal Money-lenders Act appearing as Annexure to the notice of motion and as exhibit referred to in the affidavit of Parswanath Saha affirmed on 21-5-1952, is dated 17-5-1952. That notice specified that an application would be made by the plaintiff 'within 15 days' to the Court for final decree under sub-r. 1 of R. 4 of O. 34, Civil P. C. The notice of motion was taken out on 22-5-1952 notifying that an application would be made on 2-6-1952. Although the date for which the notice of motion was returnable was within the time specified in the notice under the Statute the application was not noted as made on that date. On 2-6-1952 when the application appeared on the motion list it was by consent of the parties adjourned for affidavits till 13-6-1952. Mr. Sarkar's contention is that such an application must be made within the time specified in the notice given under the Bengal Money-lenders Act and as it was not actually made within that time this Court cannot make an order for final decree. In aid of his argument he has relied on the well known decision of this Court in — 'Sreechand Daga v. Sohanlal Daga', AIR 1943 Cal 257 (A) and — 'Debendra Nath v. Satya Bala Dasi', AIR 1950 Cal 217 (B).

Further reliance has been placed on the decision of S. R. Das J. in — 'Rangalal Mandal v. Narendra Nath Ghosh', AIR 1944 Cal 414 (C). In that decision S. R. Das J. holds that u/s 34(1)(a)(ii), Bengal Money-lenders Act, the giving of a notice in the form prescribed by the Rules made under the said Act is a condition precedent for the plaintiff's right to apply for a final decree and the provision relating thereto should be strictly complied with. In that case this statutory notice was given not by all the plaintiffs but by only one

amongst them and the notice also suffered from the defect that the amount specified there for which default was alleged was not correct. It was held that such a notice was bad and the plaintiff was not entitled upon such notice to apply for a final decree. This case, however, is not an authority for the point which I am now asked to decide here on the question that if the notice specifies that application will be made within 15 days then unless the application is made to the Court within such 15 days the decree-holders will lose their right to apply for the final decree on the strength of such notice.

(6) The case, however, which helps Mr. Sarkar on the point, is an unreported decision of Gentle J. in Suit No. 2077 of 1939 — 'Sm. Sovana Sundari Pal v. Satyendra Nath Chatterjee (D) and delivered on 14-3-1945. There Gentle J. upon the same point observed :

"The prescribed notice is found in Form 15 of the Rules under the Act. In the notice to be given by the mortgagee decree-holder notification is given that an application will be made by him to the Court within a number of days which can be filled in by the person giving the notice for a final decree in the suit."

The learned Judge then proceeds to refer to the two decisions that I have just mentioned and then holds :

"The Bengal Money-lenders Act in S. 34 makes it imperative for a notice to be given of an intention to apply for final decree for sale and the notice must be in accordance with the prescribed form and the prescribed form requires the mortgagee to state when the application will be made that is to say the period during which the mortgagor is to expect that the mortgagee will apply to the Court. I have come to the conclusion that the application must be made within that period specified in the notice, and if it is not made within that period the notice has spent itself and when the notice is spent then until and unless a fresh notice is given the application cannot be made. I uphold the preliminary objection and dismiss the application."

(7) Left to myself I would have been content to follow this decision of Gentle J. But there are certain considerations which require more careful scrutiny and Mr. Gouri Mitter appearing for the applicant has very ably advanced some arguments which I do not find considered by Gentle J. in his judgment. I accept the principle that the provision regarding notice under the Bengal Money lenders Act must be strictly followed. But even then does it follow that if the application is not actually moved in Court but a notice of motion is taken out returnable within the time specified in that notice, then that should be read as a bar of limitation as though it was provided in the Limitation Act? Be it observed that in the case before Gentle J. the notice of motion was made returnable after the time specified in the statutory notice. Here in the case before me the returnable date of the notice of motion was within the time specified in the statutory notice.

(8) The language used in S. 34(1)(a)(ii) of the Act is important in this connection. That language is

"That in default of payment of any such instalment the plaintiff shall, after giving to the defendant such notice as may be prescribed, be entitled to apply for a final decree."

The prescribed notice is in Form 15 under the Rules made under the Act which uses the language "An application will be made by me to the Court within ..... days." The point is that u/s 34(1)(a)(ii) the plaintiff's right to apply for a final decree does not arise until after a notice is given. All that the statute does is to make it a condition precedent that such a notice should be given and the plaintiff can apply "after giving to the defendant such notice as may be prescribed." If therefore the notice itself specifies the time within which the application has to be made then it puts additional fetter on the right to apply for a final decree by stipulating that such right must be exercised within the period of the notice.

The form of the notice therefore intimating the time within which the application is to be made goes beyond the prohibition contained in the statute itself in S. 34(1)(a)(ii). Then the question does arise whether such specification of the time in the Statutory Notice requiring that the application must be made within that time goes beyond the statute and therefore ultra vires. In fact Form 16 made under S. 34(2) of the Act which section also does not put a time limit, sets out the notice for execution of the decree but provides no time limit as in notice under S. 34(1)(a)(ii). In other words if the statute has not put in a limitation of time within which to apply for the final decree but says only that such right shall arise "after" giving to the defendant such notice as may be prescribed then can the notice itself curtail the right to apply by saying that it must be exercised within a particular time and not beyond that? Neither the judgment of Gentle J. nor the two decisions which I have referred to considered this point. In my opinion this is a point of substance and requires to be carefully examined.

(9) Section 34(1)(a)(ii), Bengal Money-lenders Act, makes it a condition precedent that the plaintiff decree-holder before exercising his right to apply for a final decree shall give the prescribed notice. Two conditions therefore must be satisfied under this clause before his right to apply for the final decree accrues. First there must be a default in the payment of the instalment. Secondly the decree-holder must give the prescribed notice. So far as the statute is concerned there are all the limitations imposed thereunder. The statute says that 'after' giving the notice the mortgagee decree-holder shall be entitled to apply for the final decree and does not prescribe the time within which to apply once the notice is given, which therefore remains governed by Art. 181, Limitation Act, providing a period of 3 years from the time when the right to apply accrues. The Bengal Money-lenders Act and specially S. 34(1)(a)(ii) thereof do not say that when the notice is once given the plaintiff's right to apply will further be limited by the time specified in the notice in derogation of Art. 181, Limitation Act.

This statute could have done so having regard to the opening words "Notwithstanding any law for the time being in force" at the beginning of S. 34(1) of the Act, but in fact had not done it. If the notice has put a limit to the time within which the plaintiff must apply, then in so far as it does so, it proceeds beyond the statute. Form 15 which prescribes the notice is certainly a statutory notice. But

the point remains that this form framed under the Rules made under the Act has chosen to give a period of time within which the application is to be made to the Court. In this case the notice reads "an application will be made by me to the Court within 15 days." The statutory form prescribed does not itself stipulate the particular number of days within which the application is to be made. The form itself leaves blank the period of time and which blank space is only filled by the person giving the notice.

(10) On an anxious consideration I have come to this conclusion that this specification of time in the form cannot fetter the right to apply when S. 34(1)(a)(ii) does not itself put the time fetter. It should be observed that the rule making power under the Bengal Money-lenders Act is contained in S. 44. That section makes it clear that the rules must be "for carrying out the purposes of the Act." I do not consider that under S. 44(2)(n) of the Act under which the form is prescribed the time limit within which the application is intended to be made can be read and construed as a special limitation of the right to apply for final decree. That will not be carrying out the purposes of the Act but will be creating a new law beyond the Act.

(11) The general procedure for enforcing a mortgage is still contained in O. 34, Civil P. C. and I read the Bengal Money-lenders Act only to provide such specific inroads upon the general law as are expressly or by the most necessary implication contained in the Bengal Money-lenders Act. When therefore I find that under O. 34, Civil P. C. the mortgagee decree-holder's right to apply for the final decree is governed by Art. 181, Limitation Act, I am unwilling to take away such statutory right unless the Special Statute of the Bengal Money-lenders Act expressly or by necessary implication takes it away. As I read and interpret S. 34(1)(a)(ii), Bengal Money-lenders Act, I find that while express reference is made prescribing the mortgagee decree-holder's right to apply for a final decree it does not proceed to provide a special limitation of time in derogation of the Limitation Act within which the right must be exercised. It is true that prescribed notice has to be given. It is also true that the prescribed notice in this case provides a time limit. But neither of these two facts can override the Statute itself which does not put that limitation. Nor does the fact of a specified time in the notice in my opinion can be said to override the Limitation Act.

To exalt the time limit put privately by the notifying party in the blank space provided in the prescribed statutory notice, into a period of limitation is to my mind engage in legislation. To do so to the extent of importing all the technicality of a notice of motion read with Limitation Act as in AIR 1943 Cal 257 (A) that a notice of motion made returnable on a particular date does not amount to making of the application in Court within the meaning of the Limitation Act is to create a technicality where it does not exist. I find no justification that this strictness with which the Limitation Act has always to be applied, should be imported in construing the effect of the period of time which the notifying party puts in by his own hand in the blank space of the prescribed notice under Form 15 read with S. 34 (1)(a)(ii) of the Act and R. 23(1) made thereunder. There is no authority for such a proposition and in the absence of one it appears to me it is an unjustified extension of the principle laid down in — 'Srichand Daga's case', (A) applied to a statute like the Limitation Act. This however is only an independent reason. If that principle is intended to be applied in all its strictness in construing the notice under Form 15 of the Bengal Money-lenders Act then I would hold that in so far as that form makes a special limitation of time within which to apply for final decree, such special limitation is ultra vires the Bengal Money-lenders Act and, therefore, void and ineffective.

(12) I, therefore, do not interpret the time mentioned in the Statutory notice under S. 34 (1)(a)(ii), Bengal Money-lenders Act, as a limitation within which the application has to be made. This construction does not create any hardship for the borrower for whose relief the Statute was enacted; Court's power to grant extension of time even then under O. 34 R. 4(2), Civil P. C., is preserved expressly by the first proviso to S. 34(1)(a), Bengal Money-lenders Act. This construction, therefore, that I am putting is in harmony with the spirit and language alike of the Money-lenders Act.

(13) There is yet another reason why the time mentioned in the statutory notice should not be read as prescribing a period of limitation. The prescribed statutory notice does not itself lay down the period of time within which the application is to be made. As I have said the party notifying in each case by his own hand puts whatever time he chooses to fix. If this were intended to be a limitation as hard as one under the Limitation Act then the result will be that there will be varying periods of limitation for applying for a final decree according to the whims of the mortgagee decree-holders and according to such times as their 'fancies dictate.' Some may put in the statutory notice 7 days, others a fortnight, or one year or twelve years. Is it going to be said that if 12 years' time is given in the notice that will keep alive the right to apply for final decree which normally would have been barred by 3 years under Art. 181, Limitation Act. This will lead to most absurd and ridiculous results. This will lead to most unequal laws for the same classes of people. I therefore hold that filling up the blank space providing the time within which the application is to be made remains a private act of the party giving the notice and by no such private act agreement or consent can the period of limitation as imposed by the Limitation Act be reduced or enlarged or altered. If any authority is needed for such a well known proposition reference may be made to the Full Bench decision of — 'Krishna Kamal v. Haru Sirdar', 13 WR 44 (FB) (E) and S. 28, Contract Act.

(14) For these reasons I respectfully dissent from that decision of Gentle J. and I hold that the plaintiff applicant is entitled to the final decree that he has asked.

(15) Mr. Sarkar also raised the point that in the statutory notice in this case, the notice after specifying the amount of the first instalment up to date asks for "subsequent interest" in terms of the preliminary decree without stating the exact amount of interest

due. In my opinion the notice on this point is sufficiently in compliance with the Act and the preliminary decree and cannot be impugned on the ground that the exact figure is not stated. The rate of interest is fixed and it is a matter of calculation and the decree makes it abundantly clear by saying "subsequent interest payable under R. 11 of O. 34 of Sch. 1, Civil P. C." It is properly said "subsequent interest" as it grows from day to day and does not remain stationary.

(16) There will, therefore, be an order in terms of the notice of motion.

B/D.H. Order accordingly.

A.I.R. 1953 CALCUTTA 565 (Vol. 40, C. N. 209)

CHAKRAVARTTI C. J. AND SINHA J.

Nishikanta Das, Petitioner v. Jnanendra Nath Mondal and others, Opposite Party.

Civil Rule No. 110 of 1952, D/- 18-12-1952.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 26F — Effect of reconveyance of property on right of pre-emption.

Where a co-sharer tenant sells his entire interest to a third person, a right of pre-emption arises in favour of another co-sharer tenant. Such right is not affected by the fact that the transferee has reconveyed the land to the vendor co-sharer in pursuance of an oral agreement to reconvey not embodied in the deed of sale. (Paras 5, 6)

Binodbihari Haldar, for Petitioner; Amiya Kumar Mookerji and Haridas Chatterji, for Opposite Party.

CASE CITED:
(A) ('49) 53 Cal WN 678

CHAKRAVARTTI C. J.: This Rule is directed against an appellate order, dated 22-9-1951, upholding an order made by a learned Munsif in a proceeding under S. 26F, Bengal Tenancy Act.

(2) The material facts are as follows. On 19-7-1949, the petitioner sold .49 decimals of land to one Bhudeb, but the kobala was made out in the names of the sons of the transferee. This kobala was registered on the same day. On May 15, 1950 the property was resold by the transferee to the petitioner. On 22-5-1950, opposite party No. 1 made an application for pre-emption under S. 26F, Bengal Tenancy Act.

(3) The objection taken on behalf of the petitioner appears to have been that although the transaction between him and Bhudeb had been given the form of a sale, it was really a mortgage; but the appearance of a sale had been given because Bhudeb was not a registered money lender and consequently he could not represent himself as a lender of money on interest. It was further contended that, in any event, since possession of the property had never been parted with and the title had been reconveyed, no application for pre-emption could lie after such reconveyance had taken place. The trial court overruled these objections, relying mainly on a decision of myself in —'Tarapada Karati v. Sudhamoy Dolui', 53 Cal WN 678 (A).

(4) An appeal was taken from the order of the trial court and the appellate Judge seems to have thought that the application under S. 26F was liable to be dismissed, but he was powerless to give effect to his view because he was bound by the decision of this Court on which the trial court had relied. The learned Judge took upon himself the responsibility of giving a number of reasons why he thought the application ought to have failed. In the first instance, he deals with what he considers to be an equitable right of the petitioner as against the transferee to have the property reconveyed to him. The basis of that right, according to the learned Judge, was that possession had never been parted with. It is not very clear to me what the learned Judge was thinking about. If he was thinking about S. 53(A) of the Transfer of Property Act at all, he might have referred usefully to the terms of that section and if he did so, he would have discovered that that section required an agreement in writing. In the present case, admittedly, the term for a reconveyance of the property, if any such term had ever been agreed to at all, was not incorporated in the original deed of sale. It is, therefore not clear how the possession of the petitioner could have been made the basis of any equitable right, apart from the question that no equity could relieve against a statute.

(5) The learned Judge has not held that the transaction should be treated as a mortgage by conditional sale and he could not have held so, because no provision for reconveyance was incorporated in the deed of sale itself. But he speaks of the Trusts Act, though he concedes that if the application for pre-emption had been made before the reconveyance, the petitioner could not have resisted it. According to him, however, the position has been altered by reason of the reconveyance and at the present stage, according to him, serious questions will arise as between the petitioner and opposite party No. 1, because on the one hand the petitioner might rely upon his equitable right to possession against the transferee and seek to assert the same right against opposite party No. 1, who might be treated, according to the learned Judge, as standing in the transferee's shoes. I do not see why anybody should complicate a simple matter by introducing confusions of that kind. The clear position is that after the petitioner had made the sale on July 19, 1949, he had no interest in land left in him. Even assuming that there was a verbal agreement for resale, which the learned Judge thinks there was, such an agreement or even a written agreement could not confer any interest in land. The position, therefore, was that the entire right, title and interest in the property had passed to Bhudeb in the names of his sons and the moment such transfer of interest took place, the right of the co-sharers to apply for pre-emption arose. It is well settled that all subsequent transfers by the transferee of an occupancy holding are subject to the rights of the pre-emptor under S. 26F, Bengal Tenancy Act. It is, therefore, not clear how the learned Judge could have thought that any question as between the petitioner and his transferee arising out of the agreement for reconveyance or the reconveyance itself, could affect in any way the right arising to opposite party No. 1 under S. 26F.

(6) In my opinion, the case is a clear one and falls to be governed by the decision to which I have already referred. There is really no answer to the application under S. 26F and the trial Court rightly dismissed it and the appellate Court rightly upheld the order.

(7) For the reasons given above, this Rule is discharged. We make no order as to costs.

(8) SINHA J. I agree.

B/K.S. Rule discharged.

A.I.R. 1953 CALCUTTA 566 (Vol. 40, C. N. 210)

BOSE J.

Puran Chand Burman and another, Plaintiffs v. Md. Latiff and another, Defendants.

Suit No. 3036 of 1950, D/- 11/1/1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 2 (ii), as amended by Act 62 of 1950 — Amendment of definition of "tenant" — Retrospective operation — Has no application to proceedings pending when Act 17 of 1950 was enacted — Suit properly instituted in original side — Jurisdiction of High Court is not taken away by Amending Act 62 of 1950 — (Houses and Rents — West Bengal Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 2).

The effect of the amendment of Cl. (ii) of S. 2 by Act 62 of 1950 is to make a person whose interest in the premises has determined ipso facto by three consecutive defaults of payment of rent, a tenant within the meaning of the West Bengal Act 17 of 1950, and it is also the intention of the framers of the Act that this change of status will have retrospective operation from the date when Act 17 of 1950 had come into force. (Para 6)

But there is nothing in the language of S. 2 either expressly or by necessary implication to suggest that the definition which is made retrospective in operation was intended to apply to proceedings pending when Act 17 of 1950 was enacted, or to take away the jurisdiction of the High Court in respect of such proceedings (proceedings for ejectment of person whose tenancy has been ipso facto determined) which were properly instituted in its original jurisdiction. (Para 8)

(b) Interpretation of Statutes — Retrospective operation — Statute is not to be construed to have retrospective operation so as to affect pending proceedings unless its language plainly provides for it — (Civil P. C. (1908), Pre.). **(Para 9)**

Anno: C.P.C., Pre. N. 3.

(c) Interpretation of Statutes—Construction just in other statutes, language of which and the circumstances under which they were passed, are different is not safe guide. **(Para 11)**

R. C. Deb and S. C. Deb, for Plaintiffs.

CASES CITED:

(A) (1916) 85 LJKB 1010: (1916) 2 KB 249
(B) (1917) 86 LJKB 66: (1917) 1 KB 259
(C) (1861) 10 CB (NS) 179: 142 ER 419

JUDGMENT: This is an undefended suit for arrears of rent and for recovery of possession of premises No. 78, 78/1 and 78-2 Bentink Street, Calcutta, situate within the ordinary original jurisdiction of this Court.

(2) The ground on which possession is asked for is that the defendants' interest in the premises stood ipso facto determined on the expiry of the month of October 1949 under the provisions of the West Bengal Rent Control (Temporary Provisions) Act, 1948.

(3) It is stated in the plaint that since the month of August 1949 the defendants failed to pay any rent in respect of the premises, and that there is a sum of Rs. 728-7-0 due for arrears of rent up to October 1949. The plaintiff claims mesne profits from October 1949 on the ground that as the defendants' tenancy stood ipso facto determined by reason of three consecutive defaults in payment of the rent for the months of August, September and October, the defendants became trespassers, and, therefore, they have no right to retain possession.

(4) The present suit was filed on 25-7-1950. At this date the West Bengal Premises Rent Control (Temporary Provisions) Act, (Act 17 of 1950), which came into force on 30-3-1950, was in operation, and as the defendants could not be described as "tenants" on that date, S. 16 of the said Act did not apply to the suit in question, and, therefore, although the rent in respect of the premises was Rs. 242-13-0 per month, the suit was properly instituted on the Original Side of this Court, being a suit by a landlord against persons who were to be regarded as mere trespassers in respect of the premises in question.

(5) The West Bengal State Legislature, however, passed an Amending Act, known as the West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act, 1950, (Act 62 of 1950), which came into force on 30-11-1950. In S. 2 of the Amending Act it is provided as follows:

"In S. 2, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, (hereinafter referred to as the said Act) for cl. 11 the following clause shall be substituted and shall be deemed always to have been substituted, namely: (11) "Tenant means any person by whom rent is, or but for a special contract would be, payable for any premises, and includes (i) any person who is liable to be sued by the landlord for rent; and (ii) any person whose interest in the premises has been ipso facto determined under sub-s. 3 of S. 12, West Bengal Premises Rent Control (Temporary Provisions) Act, 1948."

(6) It is clear from this provision that the effect of the amendment is to make a person, whose interest in the premises has determined ipso facto by three consecutive defaults of payment of rent, a tenant within the meaning of the West Bengal Act 17 of 1950, and it is also the intention of the framers of the Act that this change of status will have retrospective operation from the date when Act 17 of 1950 had come into force. There can be no doubt upon the plain language of the Section that the definition of "tenant" as given in the amending section was intended to have retrospective effect from the very date of the commencement of Act 17 of 1950.

(7) The question, however, which further arises for determination is whether this amending S. 2 was intended to affect pending proceedings. It is clear that when the present suit was filed on the footing that the defendants were trespassers, it was a properly instituted suit and was maintainable in the Original Jurisdiction of this Court. The question is whether this jurisdiction of the High Court has been taken away by this amending S. 2.

(8) It may be pointed out that S. 5 of the Amending Act is as follows:

"In all applications made under sub-s. 1 of S. 18 of the said Act which are pending at the commencement of this Act, and in all suits referred to in sub-s. 5 of the said section which are pending at such commencement, the said Act as amended by this Act

shall apply and shall be deemed always to have applied."

It is clear from this section that in so far as the framers of the Amending Act intended the Amending Act to affect pending proceedings, it has made express provision to that effect, and in respect of granting reliefs as contemplated under S. 18 of Act 17 of 1950, this Amending Act is expressly made applicable to pending proceedings by the terms of S. 5 itself. There is, however, nothing in the Amending Act which, either expressly or by implication, affects the jurisdiction of this Court to deal with a pending suit of the kind which is before me now for disposal.

(9) It is a well-settled principle of construction of Statutes that very clear language should be used to make the retrospective effect applicable to proceedings commenced before the passing of the statute. If the legislation purports to affect rights of action, then it would only apply to actions commenced before the passing of the Act, if any intention to that effect can be gathered from the language of the Act itself. I do not find anything in the language of S. 2 either expressly or by necessary implication to suggest that the definition which is made retrospective in operation was intended to apply to pending proceedings, or to take away the jurisdiction of the High Court in respect of such proceedings.

(10) Learned counsel appearing for the plaintiff drew my attention to a decision reported in — 'Rex v. Southampton Income Tax Commrs, Ex parte Singer', (1916) 2 K. B., 249, at p. 258 (A), bottom to p. 259, where the principles of interpretation as to retrospective operation of statutes affecting pending proceedings have been discussed. The principles therein laid down are well-settled and it is not necessary to repeat them here. It has been pointed out that this decision was reversed in appeal on another point, but so far as this point of construction is concerned the Court of Appeal had affirmed the decision of the lower Court. The decision of the Court of Appeal is reported in — 'Rex v. Southampton Income Tax Commrs., Ex parte Singer', (1917) 1 K. B. 259 (B). In the case of — '(1916) 2 K. B. 249 (A), the facts were that one Washington Singer of Norman Court, Tytherley, Hampshire, was assessed to income tax by the Additional Commissioners for the district of Romsey in respect of profits from foreign securities. Singer applied for Writ of Prohibition on inter alia the ground that under S. 108, Income-tax Act, 1842, the only Commissioners having jurisdiction to assess him in respect of such profits were the Commissioners for Bristol, that being the nearest of the four places mentioned in the Section to the place where the applicant resided, namely, Norman Court, Romsey in Hampshire. It was contended on behalf of the applicant that the assessment was without jurisdiction. The order nisi on the application was made on 26-10-1915 returnable on 4-11-1915. During the pendency of the proceeding the Finance Act 1915 (5 & 6 Geo. 5. Ch. 89) was passed on 23-12-1915 by S. 32 whereof it was provided that a person might be charged to income-tax in respect of foreign possessions by Commissioners acting for any parish or place in which that person ordinarily resided and if such person had been charged before the commencement of this Act the charge would not be deemed invalid by reason of that person not having been charged by the right commissioners. It was held that this amendment validated the assessment of the petitioner Singer although it was not done by the right commissioners, and as the intention of the Statute was clear enough for validating all charges prior to the Act whether the charges were the subject matter of pending proceedings or not, the mere fact that the assessment of the applicant was the subject of pending proceedings did not take it out of the operation of the amending Statute.

(11) Learned counsel also drew my attention to the decision in — 'Midland Rly. Co. v. Pye', (1861) 142 E. R. 419, at pp. 424-425 (C), where a married woman, whose husband had deserted her, obtained a protection order from a Magistrate under S. 21, Divorce Act (20 and 21, Vic. Chap. 85), after the commencement of an action by her in her own name to recover damages against a carrier for the loss of goods entrusted to him by her for carriage, and it was held that although the protection order was retrospective in operation by virtue of S. 21, Divorce Act, it did not make a suit competent which a married woman had no right to file as feme sole at the date when the suit was filed. This, as it appears, was a converse case, but it is submitted that the principle laid down in this case will apply to the case before me. It is not always a safe guide to rely upon construction put upon a particular statute, the language of which is different and the circumstances and considerations attending the passing of the statute are different, and so I do not propose to make this decision in — '(1861) 142 E. R. 419 (C)', as the basis of the conclusions at which I have arrived in this case. I am satisfied from the language of the Amending Act 62 of 1950 that it was not intended to affect pending proceedings, and therefore this Court has jurisdiction to entertain the present suit.

(12) The plaintiff has called evidence and has proved his claim in the suit. There will, therefore, be a decree in favour of the plaintiff for Rs. 728-7-0 for arrears of rent, and decree for possession and mesne profits at the rate of Rs. 242-13-0 per month from November 1949 till possession is delivered, with interest on decree at 6 per cent and costs as of an undefended suit.

(13) The Official Receiver who has been appointed receiver in this suit is discharged and he is directed to deposit the surplus amount lying in his hand, after deducting his costs, charges and expenses, to the credit of this suit.

B/R.G.D. Order accordingly.

A.I.R. 1953 CALCUTTA 567 (Vol. 40, C. N. 211)

HARRIES C. J AND S. R. DAS GUPTA J.

Yunus Shaikh, Accused-Petitioner **v.** The State, Opposite Party.

Criminal Revn. No. 1018 of 1951, D/- 6-3-52.

Criminal P. C. (1898), S. 437 — 'Improperly discharged'.

An order of commitment can be passed under S. 437 only when the accused has been improperly discharged. Where out of the two possible charges under S. 366 and S. 498, Penal Code, the Magistrate frames a charge under S. 498, the Sessions Judge

cannot order commitment for offence under S. 366, Penal Code. AIR 1918 Cal 943(2) and Cr. R. No. 273 of 1937, D/- 29-4-37, Rel. on. (Para 6)

Anno: Cr. P. C., S. 437 N. 5, 9.

S. S. Mukherjee with Kishore Mokerjee, for Petitioner; J. M. Banerjee, for the State.

CASES CITED:

(A) ('37) Criminal Revn. No. 273 of 1937, D/- 29-4-1937 (Cal)

(B) ('18) AIR 1918 Cal 943(2): 22 Cal WN 117: 18 Cri LJ 834

HARRIES C. J.: This is a petition for revision of an order of a learned Sessions Judge directing a Magistrate to commit the opposite party to the Court of Session for trial upon a charge under S. 366, Penal Code.

(2) The charge against the petitioner was that he had gone off with the wife of one Fakir Mohammed and apparently had lived with her for some time.

(3) A complaint was made and the matter was investigated by a Magistrate. Two possible charges could have been framed, one under S. 366, Penal Code and one under S. 498, Penal Code. After hearing the evidence the learned Magistrate framed a charge under S. 498 that is of enticing away a married woman with intent that she may have illicit intercourse with another person.

(4) The Sessions Judge was moved in revision and he appears to have thought that the proper charge here was under S. 366, Penal Code and he directed a commitment upon that charge. The learned Judge assumes that what the husband said that the girl was seventeen is true. It must be remembered that the learned Magistrate had the advantage of not only hearing the girl but seeing her and forming his own impression about her age.

(5) Mr. Sudhangshu Mukherjee has contended that the learned Sessions Judge had no power whatsoever to make this order under S. 437, Criminal P. C. The learned Sessions Judge can make an order directing the accused to be committed to Sessions only in a case where an accused person has been improperly discharged by the inferior Court. The petitioner was not improperly discharged. He has been charged with a serious offence and he is now awaiting the conclusion of the trial. Therefore this case does not fall within the four corners of S. 437, Criminal P. C. That was the view of a Bench of this Court consisting of Derbyshire C. J. and Henderson J. in the case of — 'Haripada Biswas v. Emperor', Criminal Revn. No. 273 of 1937 (A). There is also an earlier Bench decision of this Court in — 'Abdul Hakim v. Buzruk Ali', AIR 1918 Cal 943 (2) (B), where it has been pointed out that the accused must be improperly discharged before a learned Sessions Judge can exercise his powers under S. 437.

(6) It seems clear that the learned Sessions Judge had no power to make the order which he did and that being so the order must be set aside. The Rule is accordingly made absolute.

(7) S. R. DAS GUPTA J.: I agree.

B/K.S. Rule made absolute.

A.I.R. 1953 CALCUTTA 568 (Vol. 40, C. N. 212)

BOSE, J.

Panchkori Ghosh, Petitioner v. State of West Bengal and others, Opposite Party.

Civil Rule No. 745 of 1952, D/- 19-12-1952.

West Bengal Land Development and Planning Act (21 of 1948), S. 6 — Validity of declaration — West Bengal Land Development and Planning Rules (1948), R. 5(2).

A declaration made under S. 6, without complying with requirements of R. 5(2) in respect of giving opportunity to the person concerned to make representation against the development scheme is invalid. (Paras 8, 9)

R. 5(2) has given a very valuable right to make representation against not only the details of the scheme but against acquisition of land at all. AIR 1951 Cal 111, Rel. on. (Para 8)

(Scheme of S. 5 and R. 5 with regard to preparation of development Scheme discussed.) (Para 8)

Binayak Nath Bannerjee, for Petitioner, Hemendra Kumar Das and D. Basu, for Opposite Party.

CASE CITED:

(A) ('51) AIR 1951 Cal 111: 55 Cal WN 778

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ for cancellation of a declaration made under S. 6, West Bengal Land Development and Planning Act, and for direction upon the respondents to forbear from proceeding further with the acquisition or from taking possession on the strength of the said declaration.

(2) The petitioner is the owner of about 2.42 acres of land in Mouza Kodalia in Police Station Khardah in the District of 24 Parganas. By a notification dated 8-9-1951 published in the Calcutta Gazette on 11-10-1951, and purported to be issued under S. 4, West Bengal Land Development Act, 1948, it was notified that the petitioner's said lands along with other lands were likely to be needed for the settlement of immigrants. The total area which was notified as likely to be so needed was 284.32 acres. On coming to know of the said notification, the petitioner approached the respondent No. 3 who is the Collector of 24 Parganas, for relief. But it is alleged that no relief was granted to the petitioner. On or about 6-3-1952 a declaration dated 27-2-1952 made under S. 6, West Bengal Land Development and Planning Act, was published in the Calcutta Gazette, and it was thereby notified that 174.22 acres of land were needed for a public purpose, namely the settlement of immigrants who had migrated to West Bengal on account of circumstances beyond their control. The petitioner has challenged the validity of the declaration under S. 6 of the Act on the ground that no opportunity was given to the petitioner to make representations against the development scheme as contemplated by R. 5(2), West Bengal Land Development & Planning Rules, 1948.

(3) In the counter-affidavit which has been affirmed by Mr. S. N. Das Gupta, the Special Land Acquisition Officer, it is stated that a scheme known as "Kodalia-Masunda-Agarpur Scheme" in bare outline was proposed and sponsored by the Refugee Rehabilitation Department of the Government. This skeleton scheme comprising an area of about 284.32 acres of land was placed before the Land Planning Committee. A copy of this proposal for development scheme has been placed before me at the hearing, and the for-

warding letter accompanying the scheme which appears in print in the body of the prescribed form (Rural "D" Type Scheme) runs as follows:

To

The Secretary, Land Planning Committee,
Government of West Bengal.

Sir,

I have the honour to submit herewith 'a proposal for undertaking a development scheme' in accordance with the West Bengal Land Development and Planning Rules 1948 in respect of the area shown in the annexed schedule and plan. The particulars of the 'proposed scheme' are furnished below. Government may be requested to issue notification under S. 4 of the Land Development and Planning Act and 'direct the prescribed authority to get a development scheme prepared under Rule 5' of the West Bengal Land Development and Planning Rules 1948 or make a declaration under S. 6 read with S. 7, Land Development and Planning Act 1948.

(4)) It is clear from the aforesaid letter that what was submitted was a proposal for undertaking a development scheme and it was not the development scheme as is contemplated by West Bengal Act, 21 of 1948 and the rules made thereunder. The copy of the letter written by the Deputy Refugee Rehabilitation Commissioner to the Secretary, Land Planning Committee, dated 27-8-1951 also indicates that what was submitted to the Land Planning Committee at the time, was a proposal for a scheme for favour of sanctioning a notification under S. 4 of the Act.

(5) It appears further from the said counter-affidavit that tentative scheme was considered by the Land Planning Committee on 31-8-1951, and the Committee decided that a notification under S. 4 of the Act should issue for giving effect to the said proposal for acquisition and the Refugee Rehabilitation Department should submit a detailed scheme and a layout plan. The Government approved the said decision of the Land Planning Committee and a notification under S. 4 of the Act was accordingly drafted and made ready on 8-9-1951. On 21-9-1951 a letter was written by the Assistant Secretary to the Government of West Bengal to the Collector, 24 Parganas the relevant portion whereof was as follows

".....He is requested to cause a local enquiry and submit a report on objections filed if any, under Rule 5(2) of Land Development and Planning Rules ('On receipt of the detailed scheme from the Refugee Rehabilitation Committee who is being requested to prepare the same and submit a copy thereof to him)."

(6) On 11-10-1951 the notification under section 4 was published in the Calcutta Gazette. On 31-10-1951 an order was passed for causing the substance of the notification under S. 4 to be published in conspicuous places in the locality. On 6-11-1951 the substance of the notification under S. 4 was notified and at the bottom of such Notice a statement to the effect "objection invited by 21-11-51" was inserted. The petitioner filed two objections for release of his plots from acquisition and it appears that certain plots were recommended for exclusion as a result thereof. In the counter-affidavit it is further stated that the deponent held the local enquiry as contemplated by Rule 5(2) and submitted his report to the Collector. A copy of the report has been placed before the Court by the respondents at the hearing and it appears from a note at the bottom of such report that the Collector approved the report on or about the 10-2-1952. This report recommended exclusion of 110.10 acres out of the total area of 284.32 which was the subject-matter of the notification under S. 4. This report was sent to the Refugee Rehabilitation Department & thereafter the Refugee Rehabilitation Department forwarded the Collector's report under R. 5(2), along with a detailed development scheme prepared by the said department and the layout plan to the Government for consideration. These were ultimately placed before the Land Planning Committee which approved the Collector's report and the detailed scheme with the layout plan at a meeting held on 22-2-1952, and the Committee recommended to the Government publication of the declaration under S. 6 of the Act.

(7) It is thus clear from the facts stated above, that the petitioner did not have any opportunity to make representations against the development scheme as contemplated by Rule 5 (2). The statement in paragraph 11 of the counter affidavit that detailed scheme was shown to the petitioner and others, is obviously not correct and is inconsistent with the case made in paragraph 8 of the counter-affidavit. I am inclined to accept the case of the petitioner that only a copy of a plan was shown to the petitioner. But assuming that any opportunity was given to make objections, such opportunity was given only in respect of the tentative scheme if at all and not the Development scheme as contemplated by the Act and the Rules.

(8) The scheme of S. 5 and Rule 5 with regard to preparation of the Development scheme, appears to be that the Provincial Government, in the first instance, directs the prescribed authority or a company or local authority to prepare a Development scheme, in accordance with the Rules, and in respect of a notified area. When the prescribed authority is so directed, it has to prepare and submit the scheme in accordance with the provisions of sub-rules 2 and 3 of R. 5. This is enjoined by sub-rule 1(a) of R. 5. When a company or local authority is so directed, then such company or local authority has to prepare the scheme in accordance with sub-rules 2 and 3 of Rule 5 and submit it to the Government through Land Planning Committee. Sub-Rule 3 of Rule 5 specifies the matters which should find place in a Development scheme. The details which a scheme should contain are enumerated in cls. (a) to (e) of sub-r. 3 of R. 5. Section 5(1) of the Act and cls. (d) and (e) of sub-rule 3 of R. 5 very clearly indicate that Development scheme has to be prepared after a notified area has come into existence and in relation to such notified area. Sub-Rule 2 of Rule 5 requires that before actually submitting a Development scheme prepared in exercise of the power given in Sub-rule 1, of R. 5 the Land Planning Committee will cause a local enquiry to be held in respect of the scheme by the Collector of the District or any duly authorised officer of the Collector, and persons interested, should be given an opportunity of making representations against the scheme. The purpose of this inquiry seems to be to invite the views of persons who will be affected by the scheme and to consider their objections pointing out the defects or infirmities in the scheme. It may also be that as a result of the enquiry some lands will have to be excluded from the scheme or some lands which were not within the scheme have to be brought within the purview of the scheme. It is after such local enquiry is held and the scheme assumes a final shape that the Development scheme is submitted to the Provincial Government along with the scheme as originally proposed, the report of the local enquiry together with the representations and objections against the scheme and the recommendations of the Land Planning Committee,

and after these documents are placed before the Government the Government sanctions the Development scheme with or without any modification. As has been pointed out by Harries C. J. in — 'West Bengal Settlement Kanungoe Co-operative Credit Society Ltd. v. Mrs. Bella', Rule 5(2) has given a very valuable right to make representation against not only the details of the scheme but also against acquisition of the land at all. The learned Chief Justice observed:

"It appears to me, however, that if owners are given the right to make a representation against a scheme, they could in the first place say that no scheme was necessary at all and therefore, no land should be acquired or in the alternative, if a scheme was necessary the scheme proposed went beyond what was necessary or that more land was acquired than the scheme required. 'AIR 1951 Cal 111 at p. 119 (A)' 1st column."

It appears from the documents and materials that have been placed before this Court that in the present case the Development scheme as contemplated by the Act and the Rules, was not prepared till about 19-2-1952. The objections that were invited by the Notice containing the substance of the notification under S. 4 of the Act, was not a notice giving opportunity to persons interested, to make representations against the Development scheme. Such notice by its terms did not refer to any scheme.

(9) As in my view the requirements of Rule 5(2) have not been complied with in this case, the declaration No. 3280 L. Dev. dated 27-2-1952 and published in the Calcutta Gazette on 6-3-1952 must be held to be an invalid declaration.

(10) In the result this petition succeeds and the Rule is made absolute to the extent that the declaration No. 3280 issued under S. 6 of the Act is cancelled and the opposite parties are directed to forbear from giving effect to such declaration. The opposite parties will however be at liberty to comply with the requirements of Rule 5(2) of the Land Development and Planning Rules and issue a fresh declaration under S. 6 of Act 21 of 1948.

(11) The petitioner is entitled to the costs of the present proceedings, hearing fee being assessed at three gold mohurs.

B/K.S. Rule made absolute.

A.I.R. 1953 CALCUTTA 570 (Vol. 40, C. N. 213)

CHAKRAVARTTI C. J.

AND SINHA J.

Indra Kumar Karnani, Petitioner v. M/s. Sundardas Thackersey & Bros. Opposite-Party.

Civil Rule No. 1472 of 1952, D/- 7-1-1953.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Sch. A, Para. 3(b) — 'Has elapsed or elapses'.

The words 'has elapsed' refer to the date of the passing of the Act. The word 'elapses' refers to the date when the Act came into force and does not provide for cases where the period of three years might elapse during the pendency of the proceedings. (Para 9)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Sch. A, Paras. 2(b), Proviso and 3(b) — Scope.

Where no rent was fixed on an earlier occasion, nor was any increased rent paid the only rent to which regard must be paid is the rent payable on the 1st day of December 1941. The subject matter of the proviso to para. (2) (b) has been compressed in the case of para. (3)(b), into the words "or where such period is not relevant". (Para 11)

(c) Interpretation of Statutes — Redundancy — (Civil P. C., (1908), Pre.)

An Act ought not to be so construed as to convict the Legislature of having used a redundant expression. (Para 8)

Anno: C. P. C., Pre. N. 7.

Bejoy Bhose, for Petitioner; Sushil Kumar Biswas with C. Tondon, for Opposite Party.

CHAKRAVARTTI C. J.: This Rule raises an interesting question of first impression under the Rent Control Act of 1950.

(2) The facts are simple. The opposite party is the tenant in respect of Godown No. 9B, situated at 13C, Lower Chitpore Road and was the tenant in respect of the same premises in December 1941 as well. In 1941, the rent was Rs. 330/- per month, as has been found by the authorities below. It has also been found that with effect from December, 1948, the rent was increased to Rs. 508-3-0 per month. On 30-8-1950, the opposite party made an application for standardization of the rent and the Rent Controller fixed the standard rent at Rs. 363/- per month. He arrived at that figure by adding ten per cent. to the contractual rent of Rs. 330/- which was being paid in December, 1941. He declined to add anything more, although a rent of Rs. 508-3-0 per month was being paid since December, 1948, for the reason that three years had not elapsed from the date on which the increased rent had been first paid. It would appear that the Rent Controller was computing the three years by reference to the date on which he was making his order. The landlord preferred an appeal against the order of the Rent Controller and the only point urged in the appeal was that the rent had not been correctly fixed in accordance with law. That contention meant that a further percentage should have been added because of the payment of an increased rent from December, 1948. The learned Judge repelled that contention and the ground given by him was that the increased rent had been paid from December, 1948 and "from that date three years had not elapsed when the Act of 1950 came into force on 31-3-1950". The appellate Judge, therefore, took the date on which the Act had come into operation as the date by reference to which the period of three years was to be computed. The landlord thereafter moved this Court and obtained the present Rule.

(3) It was contended by Mr. Bhose, who appears on behalf of the landlord petitioner, that the learned Judge had overlooked the second alternative in Para. (3) (b) of Sch. A, Rent Control Act. The words there are "when the said period of three years relevant to the case has elapsed or elapses". Mr. Bhose contended that some meaning had to be given to the word "elapses" and the true meaning of that word, according to him, was that it was intended to cover a case where the period of three years, although it had not expired at the date of the application, might yet expire during the course of the proceedings. By the course of the proceedings Mr. Bhose meant the whole course up to the date of the final disposal by the last Court.

(4) On behalf of the opposite party it was submitted by Mr. Biswas that the word "elapses" had been used for the purpose of giving the landlord a right to make an application as soon as a period of three years had elapsed. He pointed out that the application in the present case was an application by the tenant and that neither at the date of the application, nor on the date on which the

Rent Controller had made his order, had the period of three years elapsed. It was, therefore, according to Mr. Biswas, unnecessary to consider the meaning of the word "elapses" in view of the facts of the present case. That word would have to be considered and the landlord might call it in aid of any application which he might make for a further increase of the rent after the period of three years had expired.

(5) In my view, in substance, the contention put forward by Mr. Biswas is not in any way different from that put forward by Mr. Bhose. The schedule does not say that the increased rent will be allowable on the expiry of three years from the relevant date, only if the landlord makes an application. An application may well be made by the tenant and if the word "elapses" really means that the expiry of the period of three years on some date after the making of the tenant's application has to be taken into account, there seems to be no reason why it should not be taken into account when the period expires during the pendency of a proceeding initiated by the tenant. Both Mr. Bhose and Mr. Biswas really construed the word "elapses in the same way, inasmuch as they seemed to agree that the landlord would be entitled to the additional percentage as soon as a period of three years elapsed from the date when the rent might have been fixed on an earlier occasion or from the date when an increased rent was first paid within the limits of time mentioned in Para. (1) (b) of the schedule. If that construction be correct, the landlord was entitled to an increase at the hands of the appellate Judge in the present case, since by the time the appeal came to be heard, three years had elapsed from the date when the increased rent was first paid.

(6) In my opinion, the construction suggested by the learned Advocates is not the true construction of the word "elapses". If the only intention of the Legislature was to provide for cases where the relevant period of three years might not have elapsed at the date of the application, but might elapse sometime after that date but before the order fixing the standard rent was made, whether the Rent Controller or by the appellate Court or by the High Court in revision, the words "has elapsed" would, in my view, be sufficient to cover even that case. Neither the Rent Controller nor the appellate Judge nor the High Court could make an order, unless at the date of the making of the order the three years had elapsed and if they had elapsed, that fact would be sufficiently described by the words "has elapsed". The necessity of providing for cases where the period of three years might elapse during the pendency of the proceedings is, therefore, no explanation of the use of the word "elapses". The real intention of the Legislature must be sought elsewhere.

(7) On general considerations too, it appears to me that construction proposed by the learned Advocates cannot be the true construction. What the schedule in effect provides is that if the rent of the premises concerned was fixed on an earlier occasion, either under the Bengal Rent Control Order of 1942 or the Calcutta House Rent Control Order of 1943 or the Calcutta Rent Ordinance of 1946, the landlord will get an additional percentage, if three years from the date on which the rent was so fixed has elapsed or elapses. The other case provided for in the schedule is that if any increased rent was paid between 1-12-1941, and the date on which the Act of 1950 came into operation, then also the landlord would be entitled to an additional percentage, if three years from the date when the increased rent was first paid has elapsed or elapses. The Calcutta Ordinance, to take the last of the three enactments mentioned in Para. (1) (a) of the Schedule, continued to be in force up to 30-9-1948. It follows that the rent for a particular premises might be fixed under the Ordinance of 1946 up to the date I have mentioned. Again, the limits of time which the increased rent might have been paid in order to earn recognition under the schedule are 1-12-1941 and 31-3-1950, when the present Rent Act came into force. It follows that the last date on which an increased rent, such as is contemplated by Para. (1) (b) of the Schedule, might have been paid in order to entitle the landlord to an additional percentage, would be the 30th of March 1950, if not the 31st as well.

If the construction favoured by the learned Advocates be the true construction, the Legislature was saying in 1950 that no matter what the economic conditions in the country might turn out to be and although prices and rents might otherwise show a downward tendency, still, up to the 30th of September, 1951, in one case and the 30th or the 31st of March, 1953, in the other, the landlord would continue to be entitled to an additional percentage, if the rent was fixed on an earlier occasion or if any increased rent was paid, provided three years had elapsed. I cannot imagine the Legislature, which was passing an Act for the purpose of stabilising the rent and mainly in order to give relief to the tenants, thus securing to the landlords an additional future advantage, regardless of what the general economic conditions in the country might thereafter be. In my view, if some other and more reasonable explanation can be found for the use of the word "elapses", the construction put forward by the learned Advocates ought not to be accepted.

(8) The intention of the Legislature in using the additional word "elapses" does not, it is true, lie on the surface, but it appears to me that if one examines the provisions of the Act a little closely, the intention can be ascertained with reasonable certainty. The enquiry is why after using the words "has elapsed" in the present perfect tense, the Legislature considered it necessary to use a further word "elapses" in the present tense. As is well known, an Act ought not to be so construed as to convict the Legislature of having used a redundant expression and therefore some necessity and reasonable explanation for the use of the word "elapses" must, if possible, be found. It appears to me that such necessity or explanation can be discovered, if one examines the provisions of S. 1 (2) of the Act and Paras. (1) (a) and 1 (b) of the Schedule.

(9) The Act was passed somewhen in February or March, 1950, but S. 1 (2) provided that it was to come into force on such date as the State Government might, by notification, appoint. It is thus clear that although the Legislature was passing the Act, it did not know when the Act would be brought into operation. In Schedule A it was prescribing a period of three years from the date on which the rent of any premises might have been fixed under the Bengal House Rent Control Order of 1942 or the Calcutta House Rent Control Order, 1943, or the Calcutta Rent Ordinance, 1946, and also from the date on which an increased rent might have been paid for the first time between 1-12-1941, and the coming into operation of the Act. In February or March, 1950, when the Act was being passed, three years must have already elapsed from any order fixing the rent of any premises under either the Bengal House Rent Control Order or the Calcutta House Rent Control Order. In the case of the Calcutta Rent Ordinance, 1946, however, the position was different, inasmuch as that Ordinance continued to be in force up to 30-9-1948. At the date of

the passing of the Act, therefore, the position, so far as fixation of rent under the Calcutta Rent Ordinance was concerned, was that a period of three years might have elapsed in certain cases, but in other cases it might not have yet elapsed. But the Act of 1950 was not coming into operation immediately but was, as I have pointed out, to come into operation on such future date as the State Government might fix.

It seems to me that the Legislature, placed in that position and intending to give the landlords the benefit of the additional percentage if the three years from the date of the earlier fixation of rent had already passed or would pass by the date the Act would come into operation, had to provide the two alternatives, "has elapsed" or "elapses". In other words, it was providing for cases where the period of three years had already elapsed at the date of the passing of the Act when the Legislature was speaking and also for cases where it might elapse by the date when the Act might come into force. It was to meet the latter case that the addition of the word "elapses" became necessary. Similarly, as regards the payment of increased rent, since the limits of time between which such payment might first be made were 1-12-1941, and the date of the coming into operation of the Act, the period of three years may have already elapsed in certain cases, but in certain other cases it might not yet have elapsed, but might elapse by the date the Act came into force. Again, the Legislature intending to give the landlord the benefit of the additional percentage on the basis of the payment of an increased rent only if three years had elapsed by the date the Act would come into force, but not knowing when the Act might be brought into operation, had to provide for both the case where the three years had already elapsed and the case where the three years not yet elapsed, but might still elapse by the date the Act was brought into force. Here again, in order to provide for the second case, it was necessary to add the word "elapses". The above, in my view, is the true construction of the Act and although the learned appellate Judge gave no reasons in support of the view he took, the date he adopted for judging whether the relevant period of three years had or had not expired was the correct date.

(10) The Act came into force on 31-3-1950. The increased rent of Rs. 508-3-0 was first paid for the month of December 1948. Clearly, three years from the date of the first payment had not elapsed by the date the Act was brought into operation. It follows that on the construction which I have put upon the words "has elapsed or elapses", the landlord was not entitled to the benefit of Para. (3) (b) of the Schedule.

(11) This disposes of the present case, but I might refer to one other point which was raised in the course of the argument. Paragraph (2) of the Schedule deals with premises used for residential purposes, while Para. (3) deals with premises used mainly for purposes other than residential. A provision for an additional percentage on the basis of the expiry of three years is made in both cases, though separately. The two contingencies in which an additional percentage is allowable are, as I have pointed out, if the rent was fixed on an earlier occasion under one or other of the enactments mentioned in Para. (1) (a) and if an increased rent was paid within the limits of time mentioned in Para. (1) (b), provided, however, three years have elapsed from the date of the fixation of the rent or the date when the increased rent was first paid. In a case where no rent was fixed on an earlier occasion, nor was an increased rent paid, the only rent to which regard must be paid under the schedule is the rent paid in December, 1941. The provision with regard to residential premises is contained in Para. (2) (b) and that with regard to non-residential premises is contained in Para. (3) (b).

Mr. Bhose submitted that there was a very noticeable difference between the two provisions, inasmuch as the words "or where such period is not relevant" which are to be found in Para. (3) (b), did not occur in Para. (2) (b). In my opinion, the difference is only apparent, but not real. From what I have so far stated, it must be clear that where no rent was fixed on an earlier occasion, nor was any increased rent paid, the period of three years is not relevant. That is the kind of case which is contemplated by the words "or where such period is not relevant" which are to be found in Para. (3) (b), and it must also be clear that, in such a case, the only rent to which regard must be paid is the rent payable on the 1st day of December, 1941. Such a case in regard to residential premises is provided for in the proviso to Para. (2) (b), which deals with a case where "the basic rent is the rent payable on the 1st day of December, 1941". That rent must at once be taken as the basic rent only in cases where no rent was fixed on an earlier occasion and where no increased rent was paid within the limits of time mentioned in Para. (1) (b). It follows that the subject-matter of the proviso to Para. (2) (b) has been compressed in the case of Para. (3) (b) into the words "or where such period is not relevant."

(12) For the reasons already given, this Rule is discharged; but in view of the difficulty of the point, we order that each party will bear its own costs throughout.

(13) SINHA J.: In this application we have to deal with the standardisation of rent of a non-residential premises at the instance of the tenant. The original rent was Rs. 330/- per month and this has been increased to Rs. 508-3-0 per month in December 1948. The application was disposed of by the Rent Controller in December 1950. An appeal against the order was disposed of in March 1952. The determination of the standard rent has to be done with reference to Sch. 'A'. First the basic rent has to be fixed and then the standard rent would have to be calculated under the provisions of Cl. 3 of Sch. 'A' which deals with non-residential premises. There, the words used are 'has elapsed' or 'elapses'. The question is as to what is the point of time that they refer to. Is it the date of the passing of the Act or the date when the Act came into operation or when the tenant made the application or when the original order was made, or some other date? From the dates set out above, it is quite obvious that the increased amount of 15 per cent. would not be allowed unless the date refers to some point of time after the Rent Controller had determined the standard rent. It has been argued by the learned advocate for the applicant that inasmuch as there was this application for revision pending, it will be quite sufficient if the date had elapsed at any point of time up to the time that we are called upon to decide the matter. It is of course not disputed that now the three years have elapsed. This argument is certainly attractive but it does not explain the distinction made between the words 'elapsed' and 'elapses'.

The Legislature must have had some intention in using the two expressions instead of one. I think that in an emergency legislation of this description which is promulgated in order to provide a rent which is consistent with the economic condition prevailing in the country, the wiser course is to accept the date of the passing of the

Act and/or the date when it came into operation as the dates intended, if nothing else is said. Without any suggestion in the Act itself, one should not take it as providing for a rate of rent prospectively. It is quite obvious that if the point of time is not the passing of the Act or when it came into operation, then it is possible to have these words referring to a period nearly three years hence, when the economic condition of the country may be such that the increase paid to the landlord would not be consistent with justice. I, therefore, agree that the word 'has elapsed' refers to the date of the passing of the Act and 'elapses' refers to the date when it came into operation. The Act was passed in February 1950 and came into operation on 31-3-1950. Upon that construction, there would arise no absurdities. For example, if the date to be considered is the date of the order of the Rent Controller then if the Rent Controller had fixed a particular standard rent and it was quite correctly done, even then the party may file an appeal simply hoping that the three years will elapse during the interval that he may be proceeding with an otherwise frivolous appeal. Also, as has been pointed out, the Act may be dealing with the rent in years to come without any reference to the prevailing economic condition of the country at the time. The appellate Court here has correctly computed the standard rent, having taken it as being the date when the Act came into operation.

(14) I agree with the order passed by my Lord.

B/D.H. Rule discharged.

A.I.R. 1953 CALCUTTA 573 (Vol. 40, C. N. 214)

MITTER AND SEN JJ.

Khudiram Ghosh and others, Accused-Petitioners v. The State.

Criminal Misc. Case No. 12 of 1953, D/- 10-3-1953.

Criminal P.C. (1898), Ss. 192, 529 — Transfer under S. 192 by Magistrate not taking cognizance, bona fide but not erroneous — Subsequent proceedings by transferee Magistrate are without jurisdiction.

A First Class Magistrate dealing with general file, cannot transfer a case of which cognizance is taken by another Magistrate, who is absent on the date of hearing, to his own file under S. 192. Jurisdiction to transfer is founded upon the transferring Magistrate's taking cognizance of the case.

But under S. 529 want of jurisdiction to transfer a case under S. 192, by reason of the transferring Magistrate not having taken cognizance of the case, would not render invalid the subsequent proceedings before the transferee Magistrate, provided it is shown that the transfer concerned was made erroneously and in good faith. (Para 3)

But where the transfer is bona fide but not erroneous in that the Magistrate was aware of the requirements of S. 192, both the transfer and the subsequent proceedings are without jurisdiction and not curable under S. 529. (Para 4)

Anno: Criminal P. C., S. 192 N. 2, 9; S. 529 N. 5.

S. S. Mukherjee and Kishore Mukherjee, for Petitioners; Bireswar Chatterjee, for the State.

CASES CITED:

(A) ('53) AIR 1953 Cal 109: 56 Cal WN 193: 1953 Cri LJ 344

(B) ('38) AIR 1938 Cal 195: 42 Cal WN 246: 39 Cri LJ 417

MITTER J.: This is a petition for setting aside an order of transfer of a case, purporting to be under S. 192, Criminal P. C.

(2) The case concerned was transferred under the following circumstances: On 7-11-1952, Mr. P. C. Bala, Magistrate, 1st class, Bankura, took cognizance of the case and adjourned it to the 13th. Mr. Bala not being available on the last mentioned date, another 1st class Magistrate, Mr. Moitra, dealt with the General File and transferred the case to his own file, although he had not taken cognizance of the case. Therefore, the actual trial commenced and proceeded before Mr. Moitra. It is this order of Mr. Moitra transferring the case to his own file that is sought to be set aside by this application.

(3) Section 192 is in these terms:

"192. (1) Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly."

It is clear from the terms of the section that the jurisdiction of any of the Magistrates mentioned in it to transfer a case to some other Magistrate is founded upon the former having taken cognizance of the case. It is common case that Mr. Moitra, not having taken cognizance of the case, had no power under the section to transfer it to his own file. The question, therefore, is whether the transfer and the subsequent proceedings before him were nevertheless valid by reason of the provisions of S. 529 of the Code. The material part of S. 529 is as follows:

"If any Magistrate not empowered by law to do any of the following things, namely:

....

(f) to transfer a case under S. 192;

....

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

It would seem, therefore, that want of jurisdiction to transfer a case under S. 192, by reason of the transferring Magistrate not having taken cognizance of the case, would not render invalid the subsequent proceedings before the transferee Magistrate, provided it is shown that the transfer concerned was made erroneously and in good faith.

(4) There has been a fair amount of case-law on the subject. A recent decision of a Division Bench in — 'Sm. Tulsibala Rakshit v. N. N. Ghosal', AIR 1953 Cal 109 (A) was cited to us. We should have thought, however, that the words of S. 529 were sufficiently clear as to the circumstances under which any defect of the nature concerned could be remedied. It is conceded on behalf of the State that there is a general impression amongst the Magistracy

that the transfer of a case by a Magistrate, of which he has not taken cognizance, while dealing with the General File of the Sub-Divisional Officer, who is on some other duty, is curable by S. 529, even though the transferring Magistrate is conscious of the requirements of S. 192. It is urged that a strict adherence to the provisions laid down in S. 192 would render the day-to-day work of the Sub-Divisional Officer almost impossible when he should happen to be away on other work. The argument in short is that the disregard of the provisions of S. 192 is the result of a pressing necessity and that what is done is done honestly and in good faith. We have not the least doubt that such a transfer is usually done in good faith. The question, however, is, is it done erroneously? The answer to this, one way or the other, involves, on the one hand, gross ignorance, and, on the other, a conscious disregard of the provisions of S. 192.

In the case before us, the learned Magistrate has submitted an explanation in which occurs the following statement :

"The cognizance of the case was taken by Sree P. C. Bala, Magistrate, 1st Class, Bankura on 7-11-52 and on next date viz 13-11-52 Sree Bala was deputed to do other work by District Magistrate and I was deputed by District Magistrate to take up General File and Police papers. I transferred the case to my file on that day in good faith as S. D. O. was absent, and hence the error, if any, is curable under S. 529, Cr. P. C."

We accept the learned Magistrate's explanation that what was done was done in good faith. It is significant, however, that he thinks that the error, if any, is curable under S. 529. This explanation would suggest that the learned Magistrate was aware of the provisions of S. 192. That is why, in our view, he has not stated that the transfer was done erroneously. We agree that the procedure required under S. 192 would make it difficult for the proper disposal of the General File when the Sub-Divisional Officer should be absent on other important work. Having regard to the practical difficulty which a strict compliance with the provisions of S. 192 involves, some provision to avoid the difficulty appears to us to be necessary by way of an amendment of either S. 192 or S. 529, Cr. P. C.

Our attention was drawn to the case of — 'Ramkrishna Sinha v. Emperor', AIR 1938 Cal 195 (B) as justifying the procedure adopted in the case before us. We do not, however, discern in that case any proposition contrary to what we say. In our view, the defect of jurisdiction complained of here can be cured under S. 529, if the conditions mentioned in the section are fulfilled. In our view, the transfer concerned not having been done erroneously, although it may be said to have been done in good faith, both the transfer and the subsequent proceedings were without jurisdiction.

(5) Mr. Mukherjee on behalf of the petitioners intimates that his clients do not desire a 'de novo' trial. We do not see how an undertaking by Counsel can preclude the petitioners from asserting their rights under the law. The petitioners' anxiety appears to have been to avoid their trial before the particular Magistrate. Their application for transfer under S. 528, Cr. P. C. was dismissed by the learned District Magistrate. In this application Mr. Mukherjee has not referred to any fact or circumstance which can be said to raise a ground for transfer. Mr. Mukherjee's grievance is that the 'de facto' complainant in the case and a doctor witness were not produced on the date the defence wanted them to attend for cross-examination. The learned Magistrate's order of 26-12-1952, however, negatives the allegation. What happened was this: on that date the petitioners asked for an adjournment on the ground that their lawyer was not available to cross-examine the prosecution witnesses. That being so, it was of no consequence to them that the witnesses asked for were not present on that date. In our view, the order of 26-12-1952, was wholly justified.

(6) In view, however, of our decision that the transfer concerned was without jurisdiction and not curable under S. 529, the transfer not having been done erroneously, we set aside the order of the learned Magistrate, dated 13-11-1952, transferring the case to his own file, and we direct that Mr. Bala, who had taken cognizance of the case, should either try the case or transfer it to any learned Magistrate of, his own choice.

(7) Subject as aforesaid, the Rule is made absolute.

(8) SEN J. : I agree.

B/R.G.D. Order accordingly.

A.I.R. 1953 CALCUTTA 574 (Vol. 40, C. N. 215)

G. N. DAS AND
DEBABRATA MOOKERJEE, JJ.

Rebati Ranjan Chakravarty and others, Petitioners v. Umaprasanna Mukherjee and others, Respondents.

Civil Revn. No. 3151 of 1952, D/- 27-3-1953.

(a) Civil P. C., (1908), O. 40, R. 1 — Receiver's possession.

A receiver has to take possession and assume charge of the estate in respect of which he is appointed Receiver and he cannot be deemed to be in possession merely because he furnishes security. (Para 3)

Anno: C. P. C., O. 41, R. 1, N. 22.

†(b) Civil P. C., (1908), O. 40, Rr. 1 and O. 43, R. 1(s) — Order fixing Receiver's salary — Appeal. AIR 1942 Nag 64, Dissented from.

Where the Court by an order fixes the salary of the receiver under O. 40, R. 2, the order is not appealable under O. 43, R. 1(s). AIR 1915 Cal 74 Foll., AIR 1942 Nag 64, Dissented from. (Para 9)

Anno: C. P. C., O. 40, R. 1, N. 51, Pt. 26.

(c) Civil P. C., (1908), O. 40, Rr. 1 and 2 — Remuneration of receiver.

Order 40, R. 2 leaves a discretion for the Court either to pay the receiver a percentage on the collections or a fixed remuneration for his services. (Para 14)

Anno: C. P. C., 40, R. 1, N. 35, O. 40, R. 2, N. 1.

†(d) Civil P. C. (1908), O. 40, R. 2, — Power to vary receiver's salary.

There is power in Court to vary the salary of the receiver once fixed by the Court and the power can be exercised to reduce his salary in a case where he is sitting idle. (Para 16)

Anno: C. P. C., O. 40, R. 2, N. 1.

(e) Civil P. C., (1908), O. 40, Rr. 1 and 2 — Right to salary till discharge.

There is no legal right in the receiver to earn his salary even though, to his knowledge, his possession and management of the estate are taken away from him. (Para 17)

Anno: C. P. C., O. 40, R. 1, N. 35; O. 40, R. 2, N. 1.

(f) Civil P. C., (1908), O. 40, Rr. 1 and 2 — Question whether receiver's salary should be reduced — Law of master and servant cannot be invoked in determination of question — (Master and servant). (Para 18)

Anno: C. P. C., O. 40, R. 1, N. 35; O. 40, R. 2, N. 1.

(g) Civil P. C., (1908), O. 40, Rr. 1 and 2 — Remuneration of receiver.

The receiver's remuneration should ordinarily come out of the estate in regard to which he was appointed receiver. AIR 1923 Cal 516, Foll. (Para 20)

Anno: C. P. C., O. 40, R. 1, N. 35, Pt. 5.

(h) Civil P. C., (1908), S. 115 and O. 40, R. 1 — Personal liability of receiver to pay costs of revision.

Where it is the clear duty of a receiver to obtain a clear direction from the court when he finds that his services are no longer required but he fails in his duty, he should be personally made liable for costs of revision which goes against him. (Paras 22 and 23)

Anno: C. P. C., O. 41, R. 1, N. 35.

Dr. Sen Gupta with Jatis Chandra Guha, for Petitioners; Sitaram Banerjee with Hari Prasanna Mukherjee, for Oppo-Parties; Purshottam Chatterjee with Rabindra N. Chakravartty, for Receiver.

CASES CITED:

(A) ('15) AIR 1915 Cal 74: 22 Ind Cas 352
(B) ('11) 12 Ind Cas 780: 14 Cal LJ 445
(C) ('42) AIR 1942 Nag 64: ILR (1942) Nag 671
(D) ('52) AIR 1952 Cal 52: 55 Cal WN 135
(E) (1840) 9 LJ (NS) Ch. 287: 2 Beav 488
(F) 68 Miss 54 (SC)
(G) ('23) AIR 1923 Cal 516: 76 Ind Cas 583
(H) 8 Fed 60
(I) (1808) 33 ER 758: 15 Ves 273
(J) 32 Mont 143

G. N. DAS, J. : This is a petition in revision on behalf of defendants nos. 1 and 2 and is directed against an order of Mr. P. M. Lahiri, learned Subordinate Judge, Birbhum, dated the 8-12-1952, directing the payment to the Receiver, who is opposite party No. 1 in this Rule, his salary at the rate of Rs. 500/- per month from 20-1-1951 prospectively till his discharge.

(2) The petitioner, opposite parties Nos. 2, 3, and 4 were co-trustees of two trust estates known as Brajabala Trust Estate and Ram Ranjan Trust Estate.

(3) As was to be expected, the trustees had their differences with the result that on 13-11-1950, two Title Suits Nos. 110 of 1950 and 111 of 1950 were instituted in the Court of the Subordinate Judge, Birbhum, by the plaintiff opposite party No. 2 against the petitioners as defendants nos. 1 and 2 and opposite parties Nos. 3 and 4 defendants Nos. 3 and 4. In these suits, the plaintiffs prayed for removal of the trustees and appointment of new trustees for the framing of a scheme of management, for the appointment of a Receiver, for the issue of injunction, for acounts and for other incidental reliefs. On the same day, an application was made by the plaintiff for the appointment of a Receiver. On 18-1-1951, Mr. Nishakar Choudhury, learned Subordinate Judge of Birbhum made an order appointing the opposite party No. 1, Uma Prasanna Mukherjee, B. L., Honorary Magistrate, Suri, as Receiver

"for managing the Brajabbala Trust Estate and Ram Ranjan Trust Estate during the pendency of the suits Nos. 110 and 111 of 1950."

The Receiver was directed to furnish security of Rs. 40,000/- within 25-1-1951. The learned Subordinate Judge further directed that

"the Receiver will get Rs. 500/- per month as fixed remuneration with effect from the date on which the security is accepted by the Court and on acceptance of the security, the possession of the trust property will be vested in him."

The last sentence of the order which is just quoted is somewhat unhappy. It is contrary to the general rule that the Receiver has to take possession and assume charge of the estate in respect of which he is appointed Receiver and that he cannot be deemed to be in possession merely because he furnishes security. On 20-1-1951, the Receiver furnished requisite security which was accepted and a Writ was issued to him on the terms mentioned in the Writ. On 22-1-1951, a petition was filed before the learned Subordinate Judge for stay of proceedings. The learned Subordinate Judge directed the matter to be put up on 25-1-1951. The Receiver was directed to report by the said date if he had exercised any act of possession. On 22-1-1951, the petitioners filed an appeal in this Court against the order of the learned Subordinate Judge appointing the opposite party No. 1 as Receiver. This was registered as First Miscellaneous Appeal No. 36 of 1951.

On 22-1-1951, the Receiver went to Hetampur to take possession but he failed to get possession either of the 'Sherista' of the Trust Estates or of the papers relating thereto. On 24-1-1951 the Receiver made a report to the Court for direction as regards the papers of the trust estates. On the same date, a telegram was received from the petitioners' learned Advocate in this Court, informing the petitioners' Pleader in the Court below that this Court had admitted the appeal filed by the petitioners and that this Court had granted 'ad interim' stay of further proceedings. On receipt of the telegram, the learned Subordinate Judge made a further order on the same date directing that the matter be put up on 25-1-1951.

The order which was made by this Court was an 'ad interim' order staying possession of the Receiver if he had not already taken possession. This Court also called for a report from the learned Subordinate Judge. On 27-1-1951, the Receiver appeared before the learned Subordinate Judge through his Pleader, Mr. R. P. Mukherjee. On 29-1-1951, the Receiver filed a statement of the realisations made by him. The statement is dated 25-1-1951. The statement shows that upto 24-1-1951, the Receiver had realised a sum of Rs. 20/8/- in respect of the Brajabala Trust Estate and a sum of Rs. 65/11/- in respect of Ram Ranjan Trust Estate, aggregating a sum of Rs. 86/3/-. The statement also shows that before 25-1-1951, the Receiver had realised a further sum of Rs. 1,030-/14/-. The total sum which was realised by the Receiver upto 25-1-1951 aggregated to a sum of Rs. 1117/1/-.

It does not appear, not has it been suggested that the Receiver has realised any other sum in respect of the trust estates. The learned Subordinate Judge then proceeded to make an enquiry on the question as to how far the Receiver has been able to taken possession. After enquiry into this matter, by Order No. 48, dated 10-2-1951, Mr. Malli Nath Mukherjee, the learned Subordinate

Judge of Birbhum, reported that the Receiver was not allowed possession by the principal defendants who are in possession, that on 22-1-1951, the Receiver had realised a sum of Rs. 20/8/- and that on 24-1-1951, he had realised a further sum of Rs. 65/11/-. The learned Subordinate Judge further stated that this was all the realisation the Receiver had made before the order for stay was received.

In the result, the learned Subordinate Judge was of the opinion that the Receiver had taken possession only of a part of the estate and that he had not taken possession of any of the properties in the 'Khas' possession of the trustees. This report was sent by the learned Subordinate Judge on 16-2-1951. It appears that on 7-7-1951, the Receiver who had filed his accounts of the trust estates made an application before the learned Subordinate Judge for direction in the matter of the passing of accounts, and as regards the salary which he was entitled to. By an order dated 26-7-1951, the learned Subordinate Judge was of the opinion that the Receiver was entitled to a sum of Rs. 693/8/- on account of his salary and costs upto 28-2-1951.

The learned Subordinate Judge also directed that in regard to the salary for the months of March to June, 1951, the plaintiff must deposit a sum of Rs. 2,000/-. There was no clear direction as to whether the Receiver was entitled to the salary for these months. Against this order of the learned Subordinate Judge dated 26-7-1951, the petitioners moved this Court in revision. It appears from the affidavit in support of this petition that the petitioners did not press the petition then filed against the order of the learned Subordinate Judge dated 26-7-1951 and that it was accordingly dismissed. There is no counter-affidavit on this point.

(4) Thereafter certain proceedings for contempt were initiated against the petitioners-defendants nos. 1 and 2. This matter came up to this Court giving rise to Criminal Misc. Case No. 250 of 1951. This Criminal Misc. case was disposed of by a Bench of this Court on 27-11-1951. The Bench observed:

> "The proceedings for contempt were misconceived and that the Receiver was in possession merely of a small part of the estate and that the rest of the estate was in the possession of the petitioners."

(5) As I have already said, a Rule was issued by this Court, being Civil Rule No. 225(M) of 1951, calling upon the respondents, that is, the plaintiffs opposite parties and the other co-trustees to show cause why the Receiver should not be restrained from taking possession and that an 'ad interim' stay was granted. This Rule came up for hearing on 14-12-1951. This Court directed that pending the hearing of the Misc. Appeal, the Receiver would not possess any part of the trust estate. On 5-1-1952, by an order No. 118, the learned Subordinate Judge Suri, Birbhum, passed the Receiver's accounts upto December, 1951. The learned Subordinate Judge also permitted the Receiver to appoint a learned Advocate to appear in the Misc. Appeal on his behalf. The order of the learned Subordinate Judge is signed by Mr. R. P. Mukherjee, the Pleader, acting on behalf of the Receiver.

On 30-5-1952, a joint petition of compromise was filed in Misc. Appeal No. 36 of 1951. In paragraph 2 thereof, as appears from the petition in revision, the parties agreed that a token salary should be paid to the Receiver and the Receiver should be discharged. On 2-6-1952, the Misc. Appeal was disposed of in terms of the joint petition of compromise. This Court granted leave to the guardian of the minor parties to enter into compromise and directed that the Misc. Appeal and the suit should be disposed of in terms of the petition of compromise. As the joint petition was filed in the Misc. Appeal arising out of an order for appointment of Receiver, this Court further directed that the petition of compromise should be sent down to the Court below "with a direction to pass a decree in terms of the petition of compromise." As regards the prayer for discharge and remuneration of the Receiver, this Court observed:

"We do not think it proper to pass any order." The records were received back in the Court of the learned Subordinate Judge, Birbhum on 14-7-1952. In the meantime, on 1-7-1952, the Receiver filed a report praying for directions on certain matters. In this report, the Receiver asked the Court for direction as regards his discharge subject to certain payments and a report to this Court. The order which was passed by the learned Subordinate Judge on the same date does not show that the Receiver really pressed for a discharge although the order shows that he was heard at length. Certain other directions were obtained from the Court. It appears from the order sheet that though learned Advocates of this Court had gone to Suri to have the suit disposed of in terms of the petition of compromise, the learned Subordinate Judge did not find time to comply with their request to dispose of the suit in accordance with the terms of compromise.

The learned Subordinate Judge, however, took up the question of the Receiver's salary and by an order dated 8-12-1952, directed that the Receiver would be entitled to his salary from 20-1-1951 till his discharge. By this order, the learned Subordinate Judge did not allow the Receiver the pay of a clerk which was alleged to have been kept by him. The propriety of this order has been challenged in this revision petition by the petitioners. The petition purports to be one under S. 115, Civil P. C., and under Art. 227, Constitution of India.

(6) Mr. Purushottam Chatterjee, learned Advocate who has appeared on behalf of the opposite party No. 1, the Receiver appointed in the suit, has raised a preliminary objection that the petition is incompetent because an appeal lay to this Court against an order of the learned Subordinate Judge dated 8-12-1952. His contention is that the order of the learned Subordinate Judge comes within Or. 40 R. 1(d), Civil P. C., and against an order made under that rule, an appeal lies under Or. 43, R. 1(s), Civil P. C. The order which was passed on this case was an order made in pursuance of a report by the Receiver praying for certain directions, one of the directions being the fixation of his salary. The Court fixed the salary of the Receiver under the provisions of Or. 40, R. 2. If the order is one under that rule, then under Or. 43, R. 1(s), no appeal lies.

A similar question came up for decision by this Court in the case of — 'Thomas Cunliff Tweedie v. Pokea Khatun', AIR 1915 Cal 74 (A). In that case the facts were that Mr. Tweedie had been appointed a Manager of Hatooria Estate at a remuneration of 12½ per cent. on the collections of the estate. After Mr. Tweedie had assumed charge and began to collect rents and profits of the estate, his possession was interfered with by a common Manager who made large collections. The result was that Mr. Tweedie failed to make proper collections. Thereafter Mr. Tweedie moved the Court for direction for payment to him of 12½ per cent. of the realisations made by the Common

Manager. This matter was considered by the learned Subordinate Judge.

The learned Subordinate Judge was of the opinion that Mr. Tweedie would be entitled to 12½ per cent on his own collection and in addition 6 per cent on the collection made by the Common Manager. Being aggrieved by this order, Mr. Tweedie, the Receiver, moved this Court in revision. On behalf of the opposite party, an objection was taken that the order made by the learned Subordinate Judge was an appealable order because the order came within Or. 40, R. 1(d). The Bench consisting of Sir Herbert Carnduff and Richardson JJ. was of the opinion that the order did not come within Or. 40, R. 1(d) but came within Or. 40, R. 2 and in that view held that no appeal lies against this order of the learned Subordinate Judge. This case therefore, supports the view that no appeal lies in this case against the order of the learned Subordinate Judge dated 8-12-1952.

(7) I may add that in the case of —'Mohini Mohan v. Baroda Kanta', 14 Cal LJ 445 (B), a Bench of this Court held that no appeal lies against the order giving direction to the Receiver in the matter of passing his accounts.

(8)On behalf of the opposite party, reliance was placed on the decision in —'Budhulal Jagannath v. Hirdagarh Collieries, Ltd.', AIR 1942 Nag 64 (C). In that case, a Bench of the Nagpur High Court was of the opinion that an order re-fixing the remuneration of the Receiver was an appealable order. The view taken by the Bench was that if the original order for appointment contained a direction as regards the salary, that original order was appealable as being one made under Or. 40, R. 1. In that appeal, the amount of salary of the Receiver could have been called in question. The Bench was of the opinion that there was no reason why a similar view would not be taken of the supplementary order made varying the salary.

In my opinion, the reason for the decision is not sound. The original order of appointment is clearly appealable under Or. 40, R. 1. In that appeal the whole of the order is liable to review by the Court of Appeal. A similar view cannot be taken where the only question before the Court is one under Or. 40, R. 2 fixing the remuneration of the Receiver. Or. 43, R. 1(s) distinctly limits the appeal to an order made under Or. 40, R. 1 or under Or. 40, R. 4. An order made under Or. 40, R. 2 has not, however, been made appealable.

(9) Our attention was also drawn to the case of — 'Ali Ismail Doodha v. Momin Bibi', AIR 1952 Cal 52 (D). That case, in my opinion, does not support the opposite party No. 1. That was a case where the question was whether the order was appealable under cl. 15, Letters Patent. In dealing with that question, Harries C. J. was inclined to accept the submission made by Mr. S. C. Mitter, learned Counsel appearing in that case, that if the order comes under Or. 40, R. 2, no appeal lies from that order and an order fixing the remuneration of the Receiver was not 'per se' appealable under Or. 43, R. 1(s). In my opinion, the order which was passed in this case was not an appeable order and as such the preliminary objection raised on behalf of the opposite party no. 1 cannot be entertained.

(10) As regards the powers of this Court to interfere with the order complained of, I do not feel any hesitation in coming to an affirmative conclusion. This case discloses a misconception on the part of the Judge as regards the power of the Court to vary an order made by the Court fixing the salary of the Receiver. The learned Subordinate Judge seems to be of the opinion that the Court has no jurisdiction once the salary is fixed under Or. 41, R. 2 to vary the salary so fixed. In any event, the facts of this case pre-eminently call for this Court's interference under Art. 227 of the Constitution.

(11) The question then is whether on the facts of this case the order of the learned Subordinate Judge is justified or not.

(12) The learned Subordinate Judge has given the following reasons in support of his conclusion. He has stated; (i) that this Court refused to discharge the Receiver (ii) that the Receiver took possession of a part of the estate and figured as a party in a certain case and had his accounts checked and passed, (iii) that his salary was fixed and cannot be reduced for no fault of the Receiver (iv) that such salary must be paid till his discharge and (v) that a contrary order would be unfair to the Receiver. I shall deal with these reasonings after I have stated my views as regards the powers of the Court to vary the remuneration of the Receiver, once it is fixed by the Court.

(13) In order to decide this question, namely, the power of the Court to vary the order made by it fixing the remuneration of the Receiver, one has to bear in mind the reasons why the Receiver earns his salary. The practice, has been ordinarily to give the Receiver a percentage on the collections made by him. In the case of — 'Day v. Croft', (1840) 2 Beav 488 (E), Lord Langdale, Master of the Rolls made a detailed enquiry and came to the opinion that the ordinary rule in England was to pay the Receiver a percentage on the collections made by him. The idea obviously is that the Receiver earns his salary out of the collections which he makes and it is proportionate to those collections.

In America, the position is somewhat different. In America the rule is based on the principle of compensation. In the case of — 'Lichenstein v. Dial', (68 Miss 54 (SC) (F)), it was held that instead of compensation at a certain percentage upon receipts, the Receiver is paid compensation according to the circumstance of each case after consideration of the responsibility assumed and the skill and labour employed by the Receiver the controlling circumstance being the fair value of the time and labour required in the performance of his duties as measured by the ordinary business standards, and the degree of activity, integrity and dispatch with which the work has been performed.

(14) In this country, we are governed by the provisions of Or. 40, R. 2 Civil P. C., which states that the Court may by general or special order fix the amount to be paid as remuneration for the services of the Receiver. In other words, the Receiver earns his remuneration because of the performance of the services to the estate in respect of which he is appointed a Receiver. Or. 40, R. 2, leaves a discretion for the Court either to pay the Receiver a percentage on the collections or a fixed remuneration for his services. That such fixed remuneration may be paid to the Receiver was decided by this Court in the case of — 'Sripat Singh v. Ram Sarya Prasad', AIR 1923 Cal 516 (G). It was observed that though generally the Receiver is paid on the commission basis, he may be allowed a fixed salary for his services.

(15) The question is whether the salary once fixed can be reduced by the Court under certain contingencies. That the Court had such a power to vary the remuneration fixed by the Court has been decided in the affirmative in American Courts. In — 'Farmer Loan and Trust Co. v. Central Railroad', 8 Fed 60 (H) it was held that although

the Receiver's compensation may have been fixed by a salary, yet if his duty proves more arduous and onerous than originally expected either by the Receiver or by the Court, it is proper to grant him an allowance in addition to salary. In — 'Potts v. Leighton', (1808) 15 Ves 273 at p. 276 (I), the Court varied the salary in favour of the Receiver when it was discovered that his work was more onerous. In the case of — 'AIR 1915 Cal 74 (A)', to which I have already referred, the Subordinate Judge had varied the order made by him fixing the remuneration of the Receiver. This Court seemed to be inclined to agree with the view of the learned Subordinate Judge.

(16) There is, therefore, power in the Court to vary the salary once fixed by the Court. The question is whether the Court could exercise its powers to the detriment of the Receiver. In my opinion, there is no reason why, if the Receiver can earn a higher salary in case his duty proves more onerous, the Court will have no power to reduce his salary in a case where the Receiver is sitting idle, as in this case. A somewhat similar case came up for adjudication in the case of — 'Kickey v. Parol S. & C. Co.', 32 Mont. 143 (J) where it was observed that a Receiver should not be allowed compensation for work performed by him either after the reversal of the order of appointment and the filing of the mandate in the lower court, and it was the duty of the Receiver in such a case to immediately present his final accounts and ask for his discharge.

The case cited referred to a case of reversal of the order appointing the Receiver. In such a case, the Court was of the view that it was the duty of the Receiver to pass his final accounts and to get his discharge. In a case like the present, where the Receiver's hands are restrained by an order of this Court directing that the Receiver shall not take possession, the same principles should, in my opinion, apply. In this case, as I have said, the Receiver merely realised rents to the tune of Rs. 86/3/- upto 24-1-1951, when, according to him, he had knowledge of the order for stay.

It is to be noted that the subsequent realisations made by him should not have been realised. At any rate, he has not made any realisation since 25-1-1951. By an order made by the learned Subordinate Judge, the Receiver was paid Rs. 693/8/- being his total dues on account of salary and costs upto the end of February 1951. Since then the only work he has done is to figure as a defendant in certain suits and to file his accounts and get the same checked and passed. Before us, no complaint has been made that the Receiver has sustained any other pecuniary disadvantage.

(17) Mr. Chatterjee learned Advocate appearing on behalf of the Receiver has pressed his case upon what he called his legal right to his salary till his discharge. In my opinion, there is no such right in the Receiver to earn his salary even though, to his knowledge, his possession and management of the estate are taken away from him. In my opinion, there is no reason why he should be allowed to go on earning his salary till his discharge is made. In my opinion, having regard to the facts of this case, it is sufficient to allow the Receiver a reasonable sum.

(18) I may add that the law of master and servant cannot be invoked in the determination of the question, as was suggested by Mr. Chatterjee. Dr. Sen Gupta replied by contending that even so, there has been a frustration of the contract of service.

(19) Dr. Sen Gupta on behalf of the petitioner has submitted that his clients are not disagreeable to the payment of a sum of Rs. 2,000/- as the total sum payable to the Receiver on account of his remuneration and costs. In our opinion, this is a fair estimate of the amount to which the Receiver is entitled on the facts of this case. In my opinion, the reasons given by the learned Subordinate Judge do not support his conclusion. The learned Subordinate Judge was not right when he observed that the High Court had refused to discharge the Receiver. This Court merely stated that it was not proper to pass any order at that stage. The view of the learned Subordinate Judge was that the salary was fixed, and that as the Receiver could not act for no fault of his, it was fair that he should be entitled to his salary till his discharge.

In my opinion, the proper course for the Receiver was to have taken proper directions from the Court whose officer he was, instead of filing accounts from time to time, claiming salary at the rate of Rs. 500/- per month together with his incidental costs and the pay of a clerk who had no duty to perform. The reasons given by the learned Subordinate Judge are, in my opinion, entirely without any foundation. I am, therefore, of the opinion that we should set aside the order made by the learned Subordinate Judge and direct that the Receiver be paid a sum of Rs. 2,000/- for his salary plus incidental expenses. We desire to make it clear that the Receiver will not earn any further salary.

(20) Mr. Banerjee learned Advocate appearing on behalf of the plaintiff opposite party has submitted that the learned Subordinate Judge was wrong in directing the plaintiff to pay Rs. 2000/- towards the expenses of the Receiver. In our opinion, the Receiver's remuneration should ordinarily come out of the estate in regard to which he was appointed Receiver. This was the view taken by this Court in — 'AIR 1923 Cal. 516 (G). In any event, on the facts of this case, there is no reason why the plaintiff should bear the burden of paying the salary of the Receiver. The remuneration of the Receiver which we have assessed at Rs. 2,000/- and the incident costs should come out of the estate.

(21) Before we conclude we desire to point out that this Court by its order dated 2-6-1952 sent down the records to the Court below with a direction to pass a decree in terms of the joint petition of compromise. This Court gave leave to the parties to enter into the compromise of the suit and of the appeal pending before it. The records of this case reached the learned Subordinate Judge on 14-7-1952. It appears from the records that learned Advocates of this Court had been to Suri in order to have the compromise recorded but the learned Subordinate Judge could not find any time to pass what seems to us to be a formal order disposing of the suit in accordance with the direction made by this Court on 2-6-1952. In our opinion, the inaction of the learned Subordinate Judge has resulted in serious loss to the parties and the suit has remained undisposed of in spite of the specific directions by this Court made as far back on 2-6-1951.

To pass an order disposing of the suit in terms of the joint petition of compromise ought not to have taken the learned Subordinate Judge any length of time. We regret that the delay in this matter has resulted in serious prejudice to the parties. We direct the learned Subordinate Judge to comply with the directions of this Court made on 2-6-1951, and in case he is unable to act up to the direction of this Court, he is requested to submit to this Court a report why he is unable to comply with the order made by this Court as far back on 2-6-1952.

(22) It remains for us to consider the question of costs in this revision case. In the case of —

'14 Cal L. J. 445 (B)', this Court made an order disallowing the Receiver his costs incurred in the Court below and made him personally liable for the costs of proceedings in this Court. In this case, the Receiver has taken up the position that the powers of the Court are not sufficient to disentitle him to any part of the salary which was fixed as his remuneration for the management of the estate. He has failed to get proper direction from the Court when he found that he was sitting idle. On the other hand, he submitted accounts from time to time claiming salary at the rate of Rs. 500/- per month although all the active work that he did extended for about three days. In our opinion, it was his clear duty to obtain a clear direction from the Court when he found that his services were no longer required.

(23) In these circumstances, we are of opinion that this Rule must be made absolute on the terms indicated above and that the petitioners will be entitled to costs of this Rule which we assess at 5 gms. to be paid by the Receiver personally.

(24) Let the records be remitted to the Court below as early as possible.

(25) DEBABRATA MOOKERJEE, J.: I agree.

A/V.R.B. Rule made absolute.

A. I. R. 1953 CAL 579 (Vol. 40, C. N. 216)

BOSE J.

Phanibhusan Mondal, Petitioner v. B. L. Ghose and others, Opposite-Party.

Civil Rule No. 1371 of 1952, D/- 22-12-1952.

Houses and Rents — West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947), S. 3(1) — Omission to specify public purpose.

An order of requisition which does not specify the public purpose for which the house is sought to be requisitioned is not valid it having failed to comply with the requirements of S. 3(1). The foundation of the power of the State to requisition premises is the existence of a purpose of the State or any other public purpose. The validity of the order must appear on the face of the order. AIR 1951 Bom 404, Applied. (Para 4)

Jyotirindra Nath Das for Petitioner; Jagneswar Majumdar with Pramatha Kumar Chakravarty, for Opposite Party.

CASES CITED:

(A) ('53) AIR 1953 Cal 223: 89 Cal LJ 268
(B) ('51) AIR 1951 Bom 404: 53 Bom LR 669

ORDER: This is an application under Art. 226 of the Constitution for an appropriate Writ for cancellation of an order of requisition dated 4-3-1952 made under the provisions of the West Bengal Premises Requisition and Control (Temporary Provisions) Act (W. B. Act 5 of 1947) and also for cancellation of a notification directing the petitioner to vacate the premises requisitioned and also for direction upon the opposite parties to forbear from giving effect to the said order of requisition and the said notification.

(2) The petitioner is a resident of Garh Kamalpur in P. S. Mahisadal in the district of Midnapore. The case of the petitioner is that he became a tenant in respect of the whole of the first floor and one room on the ground floor in a two-storied building at Garh Kamalpore of which respondent 6 is the owner under a lease dated 16-2-1952 which was for a period of 5 years and at a rent of Rs. 50/- per month. There are other tenants in respect of other rooms on the ground floor of the said premises. By a notice dated 2-4-1952 the petitioner was called upon by the Collector of Midnapore, who is respondent 1, to vacate the portion of the building in his occupation on or before 16-4-1952. On receipt of the said notice the petitioner moved the Collector for withdrawal of the said notice but with no effect. Thereafter he approached the Commissioner of the Burdwan Division but he got no redress from him in spite of reminders sent to the Commissioner to take action in the matter. It is alleged that the petitioner has no place to live in other than the rooms in the said building and it is further alleged that he has a sweet-meat shop and tea-stall in the ground floor room in his occupation. It appears that the order of requisition under S. 3(1) of the West Bengal Act 5 of 1947 is dated 4-3-1952 but it was published in the Calcutta Gazette on 10-4-1952. The petitioner has set out certain facts in paras. 11 to 23 of the petition to show that the order of requisition was made mala fide. These facts have been disputed in the counter-affidavit which has been filed on behalf of the opposite parties. As this question cannot be satisfactorily determined in this application under Art. 226 of the Constitution, I do not propose to express any opinion on the point.

(3) It has, however, been contended by the learned Advocate appearing for the petitioner that the order of requisition, a copy of which has been set out in annexure 'D' to the petition does not specify the public purpose for which the requisition is sought to be made and as such the order does not comply with the requirements of S. 3(1) of the West Bengal Act 5 of 1947 and is therefore bad. I have already held in the case of — 'Abdul Hamid v. State of West Bengal', AIR 1953 Cal 223 (A), that the question as to whether a requisition is made for a particular public purpose is a justiciable issue and the Court can investigate into the question whether the purpose is in fact a public purpose. It is also clear from the language of S. 3(1) of the Act that the condition precedent to the exercise of the power under S. 3(1) is the existence of a public purpose.

(4) As has been pointed out by the Chief Justice of the Bombay High Court in the case of — 'State of Bombay v. Mohan Lal Kapur', AIR 1951 Bom 404 (B):

"the foundation of the power of the State to requisition premises is the existence of a purpose of the State or any other public purpose. The validity of the order must appear on the face of the order. The subject who is served with the order should be in a position to know that the order has been validly made. If the order merely states that the property is being requisitioned for the purposes of the State or any other public purpose, it would be impossible for the subject to determine whether in fact the specific purpose for which the order of requisition was passed was a purpose of the State or any other public purpose."

The order which is the subject matter of this proceeding does not also specify the public purpose for which the house is sought to be requisitioned. As there is no material difference between the language of S. 3(1) of the West Bengal Act 5 of 1947 and that of the Bombay

Requisition Act which was the subject matter of consideration in the Bombay Case cited above, the reasons set out in the Bombay judgment are equally applicable to the order of requisition in question.

(5) In my view this petition should succeed and the Rule is made absolute to the extent that the opposite parties are directed to forbear from giving effect to order of requisition made under S. 3(1) of the Act and the notification dated 2-4-1952 directing the petitioner to make over possession of the portion of the premises of which he is in occupation.

(6) The petitioner is entitled to the cost of the present proceeding. Hearing fee is assessed at two gold mohurs.

B/G.M.J. Petition allowed.

A. I. R. 1953 CAL 580 (Vol. 40, C. N. 217)

K. C. DAS GUPTA AND LAHIRI, JJ.

Sachindra Nath Defendant-Petitioner v. Lilabati Das Plaintiff,Opposite-Party.

Civil Revn. Case No. 1920 of 1951, D/- 9-5-1952.

(Chandernagore (Adaptation of Laws) Order, 1950), S. 7 — Notifications No. 133 E. U. R. D/, 1-5-1950 and 25-11-1950 — Effect — (French Civil P. C., Art. 158).

French Court at Chandernagore ceased to exist from 2-5-1950 — Courts of Sub-Judge and District Judge constituted by Government of India under Bengal, Agra and Assam Civil Courts Act, 1887 — Decree passed by French Court on 12-4-1950 — Opposition for setting aside decree filed on 30-8-1950 in the Court of Sub-Judge — On Dismissal, District Judge in appeal, remanding case as falling under Art. 158 of French Civil P. C. — On revision held that neither Sub-Judge nor District Judge had any jurisdiction to try the case. AIR 1952 Cal 588 (S. B.), Applied. (Paras 2, 3, 4)

Hari Prasanna Mukherjee, and Satya Prosad Banerjee, for Petitioner; Apurba Charan Mukherjee and Samarendra Nath Banerjee, for Opposite Party.

CASE CITED:

(A) ('52) AIR 1952 Cal 588 (Cri Revn. Case No. 1200 of 1951): 1952 Cri LJ 1308 (SB)

LAHIRI J.: On 12-4-1950, the French Court at Chandernagore passed a decree in favour of the petitioner Sachindra Nath Das against the opposite party Lilaboti Dass. This decree was notified to the opposite party presumably under Art. 158, French Civil P. C., on 3-8-1950 and the opposite party filed her opposition to the decree on 30-8-1950, in the Court of the Subordinate Judge, Chandernagore which succeeded the French Court. This opposition was registered as Suit No. 38 of 1950 of the Court of the Subordinate Judge, Chandernagore. As the result of the trial, the learned Subordinate Judge came to the conclusion that there was no reason for setting aside the decree and dismissed the suit. Against that decree Lilaboti Das filed an appeal to the District Judge of Chandernagore. The learned District Judge has held that O. 9, R. 13, Indian Civil P. C., does not apply to the case which should be governed by Art. 158, French Civil P. C. He has accordingly allowed the appeal and remanded the suit to the trial Court for decision under Art. 158, French Civil P. C. Against that decision, Sachindra Nath Das in whose favour the decree was passed has obtained this Rule and it has been contended in support of the Rule that the Indian Courts established at Chandernagore have as yet no jurisdiction to administer the French Law.

(2) It appears that in exercise of powers conferred by S. 4, Foreign Jurisdiction Act, (Act 47 of 1947) the Central Government promulgated on 1-5-1950 an order called the Chandernagore (Adaptation of laws) Order, 1950 which came into operation on 2-5-1950. Section 7 of this Order provides 'inter alia' that all laws in force in Chandernagore immediately before the commencement of this order which correspond to the enactments specified in the schedule will cease to have effect save as respects things done or omitted to be done before the commencement of this Order. The schedule specifies the Bengal, Agra and Assam Civil Courts Act of 1887 and Civil P. C., of 1908. By Notification No. 133 E. U. R. dated 1-5-1950 the Central Government in exercise of powers conferred by S. 4, Bengal, Agra and Assam Civil Courts Act, appointed the District Judge, Hooghly ex-officio to be the District Judge, Chandernagore and Sree K. M. Roy to be the Munsif with jurisdiction extending to the whole of Chandernagore. By another Notification dated 21-10-1950 published in the Chandernagore Gazette dated 25-11-1950 the Central Government in exercise of powers conferred by Ss. 4, 6 and 13 of the Bengal, Agra and Assam Civil Courts Act 1887 appointed Sree K. M. Roy as Subordinate Judge, Chandernagore. It is clear, therefore, that as a result of the promulgation of the Chandernagore Adaptation of laws) Order and the notifications made thereunder the French Court at Chandernagore ceased to exist with effect from 2-5-1950 and was substituted by the Court of the Subordinate Judge and District Judge appointed by the Central Government of India.

(3) The decree in the present case was passed on 12-4-1950 at a time when the Chandernagore (Adaptation of laws) Order had not come into operation. The procedure for setting aside the decree will therefore be governed by the French law under the saving clause of S. 7 of the aforesaid order. The opposition was filed by the opposite party on 30-8-1950 in the Court of the Subordinate Judge appointed by the Government of India under the Chandernagore (Adaptation of laws) Order. The question, therefore, is whether the Indian Courts appointed by the Government of India under the Chandernagore (Adaptation of laws) Order had jurisdiction to try the case under the French law. In the case of — 'Sankar Mouli Dutta v. The State', AIR 1952 Cal 588 (A), a Special Bench of this Court held that Criminal Courts constituted and empowered under the Criminal Procedure Code have no jurisdiction to try an offence under Art. 437(1), French Penal Code. In that case, an offence was alleged to have been committed before the commencement of the Chandernagore (Adaptation of Laws) Order and was therefore triable under the French Penal Code. But the enquiry resulting in an order of commitment to the Court of Sessions was made by a Magistrate empowered under the Criminal Procedure Code and the Sessions trial was proceeding before a Sessions Judge empowered under the Criminal Procedure Code. The Special Bench held that neither the Committing Magistrate had jurisdiction to make the order of commitment nor

the Sessions Judge jurisdiction to try the offence under the French law.

(4) The facts of the Special Bench case cannot be distinguished from the facts of the case before us. Applying the principle of that case we hold that neither the Court of the Subordinate Judge nor the Court of the District Judge which was constituted under the Bengal, Agra and Assam Civil Courts Act has at present any jurisdiction to try the case under Art. 158, French Civil P. C. We accordingly make this Rule absolute and set aside the orders made by the District Judge as well as by the Subordinate Judge.

(5) We are informed by the learned Advocate for the opposite party that under the draft treaty between the Government of India and the French Government the opposite party will have a right to proceed with the suit in an Indian Court. If that be so, it will be open to her to take proper steps if and when that treaty comes into operation. Under the present law no action can be taken by the opposite party. The orders of the Courts below are accordingly set aside, but there will be no order as to costs of this Rule.

(6) DAS GUPTA J.: I agree.

B/H.G.P. Rule made absolute.

A. I. R. 1953 CAL 581 (Vol. 40, C. N. 218)

BOSE J.

Bibhuti Bhusan Ghosh, Petitioner v. Damodar Valley Corporation and others, Opposite Party.

Civil Revn. Case No. 1549 of 1951, D/- 7-3-1952.

(a) Constitution of India, Arts. 226, 311(2) — Damodar Valley Corporation Act (1948), Ss. 7, 60(2)(b) — Dismissal of servant of Corporation — Issue of writ of certiorari.

In order that a writ of certiorari may issue for quashing the departmental proceedings and the order of dismissal which follows as a result of such proceedings, it must be shown that an obligation or duty has been imposed by Statute upon the employer to act judicially or quasi-judicially in relation to such inquiry. (Para 4)

There is nothing in the Damodar Valley Corporation Act which makes it incumbent upon the Corporation to make regulations imposing a duty on the Corporation to hold a judicial or quasi-judicial enquiry into the charges of misconduct of its officers. There is therefore no duty either express or implied in the Corporation to act judicially or quasi-judicially in matters of dismissal of its employees and hence a writ of certiorari cannot issue. (Para 8)

Further, the different provisions of the Damodar Valley Corporation Act, 1948, indicate that the Corporation has a separate and independent existence and is a different entity from the Union or State Governments. Its servant cannot, therefore, be treated as an officer holding a civil post under the Union and/or the State Government and as such there is no duty upon the Corporation to act judicially imposed by Art. 311(2) of the Constitution. (Para 4)

(b) Constitution of India, Art. 226 — Issue of writ of mandamus.

Before a writ of mandamus can issue it must be shown that there is a distinct demand of that which the party seeking the mandamus desires to enforce and that such demand was met by a refusal. This is not merely a technical point but a point of substance. AIR 1952 Cal 601, Rel. on. (Para 9)

Where there is no specific pleading or any evidence to show that any such demand was made and the demand was refused, no relief can be granted to the petitioner by the issue of a writ of mandamus. (Para 10)

(c) Constitution of India, Art. 226 — Existence of other effective remedy.

The remedy by way of an application under Art. 226 of the Constitution is not a proper substitute for a remedy by way of a suit, especially where facts are in dispute and in order to get at the truth it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct. AIR 1952 Cal 601, Rel. on. (Para 11)

(d) Tort — Master and servant — Dismissal for misconduct — Nature of enquiry.

Where the Agreement of Service provides that the servant may be dismissed summarily for misconduct without any notice being given to him beforehand and also suggests that some investigation may be made but the nature of the investigation is not indicated, it may be an investigation by the employer to inform its own mind and may not be a judicial enquiry. (1948) AC 87 and AIR 1950 SC 222, Ref. (Para 7)

Nirmal Chandra Sen, Rabindra Narayan Chakravarty and Rash Behary Goswami, for Petitioner; S. M. Bose, Advocate-General; D. K. Sen and Satyendra Nath Sen, for Opposite Party.

CASES CITED:

(A) (1947) 2 All ER 289: (1948) AC 87
(B) ('50) AIR 1950 SC 222: 1950 SCR 621
(C) ('52) AIR 1952 Cal 601: 56 Cal WN 232
(D) ('52) AIR 1952 Cal 610: 56 Cal WN 264

ORDER: This is an application under Art. 226 of the Constitution for the issue of a writ of certiorari and a writ of mandamus or any other appropriate writ for quashing of an order of dismissal passed against the petitioner in certain departmental proceedings taken against the petitioner for misconduct in the discharge of his duties as an Engineer employed under the Damodar Valley Corporation and for prohibiting the opposite parties from giving effect to the said order of dismissal.

(2) The petitioner who is a Bachelor of Science in Engineering of the University of Glasgow, was appointed as an Assistant Civil Engineer by the respondent Corporation for a term of three years commencing from 22-8-1950 under an Agreement of Service entered into on 9-12-1950 on terms and conditions contained in the said Agreement. It is a term of the said Agreement that the service of the petitioner might be terminated by the Corporation without previous notice if the Corporation was satisfied that the employee was unfit and was likely to continue as such for a considerable period by reason of ill-health, or if the Corpora-

tion or its officers having proper authority, found the petitioner to be guilty of insubordination, intemperance or other misconduct or breach or nonperformance of any of the provisions of the agreement. It is a further term of the said agreement that in respect of any matter for which no provision has been made in the agreement the provisions of the relevant rules or regulations of the Corporation would apply. In course of his employment as such Assistant Engineer the petitioner on or about 6-1-1951 was entrusted with the work of laying galvanised iron pipe lines for over a distance of about 5,000 running feet from the Barakar river to the Kumardhubi Power House & he was directed to complete the work within ten days from date. As the work was an urgent one the petitioner had to engage sufficient number of labourers who were paid from the Muster Roll at the usual rates of wages allowed by the respondent Corporation. It appears, however, that the petitioner succeeded in completing the work by 14-1-1951.

(3) Some time thereafter the respondent had reason to suspect that the petitioner had not engaged all the labourers whose names had been entered in the Muster Roll and false entries were made in the Muster Roll with a view to misappropriate some money out of the amount that might be received from the Corporation on account of wages paid to the labourers engaged in such work and on or about 21-2-1951 the Executive Engineer who is respondent 4 threatened to report against the petitioner for the alleged misconduct to the Authorities concerned. On 7-3-1951 the petitioner showed cause against the allegations and charges made by the Executive Engineer in his said letter of 21-2-1951. On 21-3-1951 respondent 4 purporting to act under the order of the Corporation suspended the petitioner from service and served upon him a charge-sheet containing four heads of charges as set out in the petition and the petitioner was called upon to show cause why he should not be dismissed from service or why a lesser punishment should not be inflicted upon him on the said charges. On 28-3-1951, the petitioner by a letter of that date denied the charges levelled against him and showed cause against the said charges. As the Authorities did not accept the explanation offered by the petitioner, a departmental inquiry was directed by the Superintending Engineer who is respondent 3. Certain correspondence thereafter passed between the petitioner and the Authorities concerned in relation to the said enquiry and in course of such correspondence certain Questionnaire was submitted to the petitioner which is in Annexure 'H' of the petition. This Questionnaire indicates that it was contemplated that the petitioner would be entitled to put in a written statement of his defence and an oral enquiry would be held by the Authorities in respect of the charges and the petitioner would be allowed to attend such enquiry, engage the services of a lawyer and would be afforded an opportunity of examining and cross-examining the witnesses tendered at such enquiry.

(4) It may be pointed out at this stage that no regulations have yet been framed by the Damodar Valley Corporation in respect of disciplinary or departmental proceedings likely to be taken against its officers, although the framing of regulations is contemplated under S. 7 read with S. 60, Damodar Valley Corporation Act, 1948 (Act 14 of 1948). The affidavit of Mr. Murty the Superintending Engineer of the Damodar Valley Corporation indicates in para. 32 thereof that in respect of departmental enquiry the respondent Corporation is following Government rules pending introduction of its own rules. In order that a writ of certiorari may issue for quashing the departmental proceedings and the order of dismissal which followed as a result of such proceedings it must be shown that an obligation or duty has been imposed by Statute upon the respondent Corporation to act judicially or quasi-judicially in relation to such inquiry. It was contended by Mr. Nirmal Chandra Sen the learned Advocate for the petitioner that as the petitioner must be treated as an officer holding a civil post under the Union and/or the State Government there is such a duty to act judicially imposed by Art. 311(2) of the Constitution of India and in the event of this Court holding that the petitioner is not an officer of the Union or State Government there is a duty to act judicially or quasi-judicially under the conditions of service as embodied in the service agreement and also under the procedure contemplated by the Questionnaire. It appears to me that the petitioner cannot be regarded as an officer holding a civil post under the Union or State Government. The agreement of service by which he was employed as an Assistant Engineer shows that the appointment was made by and under an order of the respondent Corporation. The different provisions of the Damodar Valley Corporation Act 1948 indicate that the Corporation has a separate and independent existence and is a different entity from the Union or State Government. This Corporation has properties vested in it under the Act, it has its own fund and its functions and duties are defined in the Act. Section 49 of the Act shows that if there is any dispute between the Corporation and the Participating Governments regarding any matter covered by the Act the same has to be referred to an Arbitrator for decision and the decision of the Arbitrator shall be final and binding on the parties. It may be that this Corporation has been set up by the Government for the purpose of discharging certain functions of the Union or the State Governments, but there can be no doubt that it has a separate existence and cannot be considered as a part of the Union or State Government. Just as the Corporation of Calcutta discharges certain duties and functions which are to be performed by the State Government so also certain functions and duties of the Union and the State Governments have been allocated to the Damodar Valley Corporation, but the Corporation performs these duties and functions as a separate entity.

(5) The Agreement of Service of the petitioner is not in the form in which Government contracts are entered into and does not comply with the requirements of S. 175, Government of India Act, 1935 or Art. 299 of the Constitution. This shows that the petitioner is not an employee of the Government. I am unable to hold that the petitioner is an officer holding a civil post under the State or the Union Government.

(6) There can be no doubt however that the Respondent Corporation is a statutory and public body entrusted with the discharge of public duties. But the question is whether in holding a departmental enquiry into the conduct of one of its officers it is under any duty to act judicially or quasi-judicially. The Damodar Valley Corporation Act has not expressly imposed any such duty. It is only in the case of dismissal of members of the Corporation that an obligation of such a nature has been cast upon the Central Government by S. 51 of the Act. The Act however contemplates making of regulations under S. 60 of the Act but no regulation has been framed as yet although about 4 years have elapsed since the commencement of the Act. It is clear from the terms and conditions of Service of the petitioner that it was contemplated by the petitioner and the Corporation at the time the Agreement of Service was entered into, that regulations framed would govern matters which were not provided for in the Contract of Service. But

there is nothing in the Act which makes it incumbent upon the Corporation to make regulations imposing a duty on the Corporation to hold a judicial or quasi-judicial enquiry into the charges of misconduct of its officers. The Regulation if framed might have provided for an enquiry of a very summary nature or might not have provided for any enquiry at all or might have provided for an enquiry merely for informing the minds of the Authorities of the Corporation concerned. It is true that the Corporation is at the present moment following the procedure analogous to that provided by the Government rules but there is no obligation on it created by Statute to do so. It may refuse to do so at any time.

(7) Clause 4 of the Agreement of Service shows that the petitioner can be dismissed summarily for misconduct without any notice being given to him beforehand. Clause (6) no doubt suggests that some investigation may be made but the nature of the investigation is not indicated. It may be an investigation by the Corporation to inform its own mind and it may not be a judicial enquiry. (See —'Franklin v. Minister of Town and Country Planning', (1948) A C 87 at pp. 96, 102 (A) and — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 S C 222 at pp. 241, 255 (B).

(8) I am unable to hold that there is any duty either express or implied in the Corporation to act judicially or quasi-judicially in matters of dismissal of its employees. It appears to me therefore that a Writ of Certiorari cannot issue.

(9) Now so far as the prayer for issue of a Writ of mandamus is concerned it appears that the present application was not preceded by a specific demand of justice and refusal. It has been held by the Court of Appeal in the case of — 'Union of India v. Elbridge Watson', AIR 1952 Cal 601 (C) that before a writ of mandamus can issue it must be shown that there is a distinct demand of that which the party seeking the mandamus desires to enforce and that such demand was met by a refusal. It has been pointed out in that case that this is not merely a technical point but a point of substance.

(10) In the present case there is no specific pleading or any evidence to show that any such demand was made and the demand was refused. So no relief can be granted to the petitioner by the issue of a writ of mandamus in this case.

(11) Assuming a writ of certiorari could issue in this case and the respondent Corporation was under a duty to act judicially or quasi-judicially in the matter of disciplinary or departmental proceedings against its officers, I would not be inclined to grant a writ in the present case inasmuch as there is a good deal of controversy as to what actually took place at the departmental proceedings held in respect of the charges against the petitioner. It is the case of the petitioner that he was not afforded an opportunity to take the assistance of his lawyer nor to cross-examine witnesses and tender his own witnesses for examination. This is however disputed by the respondents. A good deal of evidence has to be taken before any satisfactory conclusion can be arrived at on the points. As observed by .G N. Das J. in the case of — 'D. Parraju v. General Manager, B. N. Rly.', AIR 1952 Cal 610 (D) the remedy by way of an application under Art. 226 of the Constitution is not a proper substitute for a remedy by way of a suit, especially where facts are in dispute and in order to get at the truth it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct.

(12) So in any event this is not a case where the Court will in the exercise of its discretion under Art. 226 of the Constitution grant a writ of certiorari or mandamus when there is a more convenient and effective remedy open to the petitioner by way of a suit.

(13) A point was raised by Mr. Sen that the Authority that passed the order of dismissal of the petitioner is not the appointing authority but it is the Director of Personnel of the Corporation who has made the order. This fact has been denied in the counter-affidavits and at the hearing the learned Advocate-General has produced the order of dismissal and it appears that the order was approved or sanctioned by all the members who compose the Corporation. The approval was given on 12-6-1951 and the order was communicated to the petitioner by the Director of Personnel on 16-6-1951. So there is no force in this contention of Mr. Sen.

(14) In my view this petition fails and the Rule is accordingly discharged. I make no order as to costs.

A/D.R.R. Rule discharged.

A. I. R. 1953 CAL 583 (Vol. 40, C. N. 219)

CHAKRAVARTTI C. J. AND SINHA J.

Tarapada Ghose, Petitioner v. Sailendra Nath and others, Opposite Party.

Civil Revn. No. 1610 of 1952, D/- 25-11-1952.

(a) Court-fees Act, (1870), S. 7(iv)(c) — Distributive Valuation.

Where the suit is governed by S. 7(iv)(c), no question of distributive valuation of several reliefs can arise. AIR 1930 Cal 686, Rel. on. (Para 4)

Anno: Court-fees Act, S. 7(iv)(c), N. 23.

(b) Court-fees Act (1870), Ss. 17, 7(iv)(c) (f), Sch. 2, Art. 17(vi) — Suit for different reliefs.

Suit for construction of a will, declaration of title to certain movable and immovable properties, partition of the said properties, accounts and appointment of Receiver, pending final determination of suit — Held that the suit came in part under S. 7(iv)(c), in part under the provision dealing specifically with partition suits and in part under S. 7(iv)(f), so far as the prayer for accounts was concerned. (Para 5)

Anno: Court-fees Act, S. 17, N. 4.

Rabindra Nath Bhattacharjee, for Petitioner; Nanda Gopal Banerjee and Sunil Kumar Mitra, for Opposite Party.

CASES CITED:

(A) ('23) AIR 1923 Cal 329: 27 Cal WN 457
(B) ('30) AIR 1930 Cal 686: 54 Cal 281

CHAKRAVARTTI C. J.: There seems to have been misconception in this case on the part of all parties. The plaintiffs brought a suit in which they prayed for a large variety of reliefs, the chief of which are construction of a will, declaration of their title to certain movable and immovable properties, partition of the said properties, accounts and appointment of a receiver, pending the final determination of the suit. The above is only a broad summary of the large multitude of reliefs which have been crowded into the prayer portion of the plaint, but they give a fairly accurate idea of the lines along which the plaintiffs desired the Court to relieve them. The suit was valued for the purpose of jurisdiction at Rs. 55173-3-9 but for the purposes of court-fees the plaintiffs adopted a method which one thought was no longer surviving. They took the reliefs on construction of the will, declaration, accounts

and the appointment of a receiver separately, valued each relief at Rs. 500/- and paid a sum of Rs. 187-8-0 upon the total amount of Rs. 2000/- which, according to them, was the total value of the four reliefs. In addition they also paid the fixed court-fee of Rs. 15/- for the relief of partition. We are informed that certain further small amounts were subsequently paid — one such amount having been for the relief of the removal of the receiver which is said to have been subsequently added.

(2) It was objected on behalf of defendant 3 that the method according to which the court-fee had been computed was not correct and that the plaintiffs were not entitled to pay a lump sum as court-fees on the total of the four amounts at which they had separately valued the four reliefs. It does not seem to have been contended that the value of Rs. 500/- put on each relief was inadequate, but what appears to have been contended was that each of the reliefs prayed for was a distinct relief, asked for on the basis of a distinct cause of action, within the meaning of S. 17, Court-fees Act, and accordingly the court-fee was to be calculated distributively. The learned Judge below has overruled that contention. He has held, as appears to have been admitted before him, that the suit was governed by S. 7, cl. (iv) (c), Court-fees Act and that court-fee had been rightly paid in a single sum on the total amount of the values of the several reliefs claimed. It was against that decision that defendant 3 obtained the present Rule.

(3) The Rule was issued only on a limited ground, and that ground is that court-fees should have been paid separately on the several items and not on the total amount of Rs. 2000/-. It was at one stage conceded by the learned Advocate for the petitioner that the learned Judge was right in holding that the suit was governed by S. 7, cl. (iv) (c), Court-fees Act and what he tried to suggest on the basis of that concession was that the sum of Rs. 2000/- was not an adequate valuation of the principal and the consequential reliefs claimed and that, therefore, there ought to have been an enquiry under S. 8 (C), Court-fees Act. Later on, however, the learned Advocate reverted to the ground upon which the Rule had been issued and contended that court-fee could not be paid on the total of the values of the several reliefs as had been done. Reliance was placed on S. 17.

(4) It is impossible to see how, once it is admitted that the suit is governed by S. 7 (iv)(c), Court-fees Act, any question of any distributive valuation of the several reliefs can arise. It is true that, at one time, that method of valuation was quite common & an instance is to be found in the case of —'Rupchand Ghosh v. Sm. Kshirodamoyi Dasi', AIR 1923 Cal 329 (A) to which the learned Judge has referred. But the incorrectness of so valuing a suit falling under S. 7 (iv)(c), Court-fees Act was pointed out by Sir George Rankin in — 'In re Kalipada Mukherji', AIR 1930 Cal 686 (B). The learned Chief Justice observed that he had noticed decisions which seemed to mean that so much was to be put down for declaration and so much for each consequential relief prayed for, but that his Lordship observed, was a plain perversion of the Act. He also pointed out that if a case came under S. 7 (iv)(c) it was clearly outside the provisions of S. 17 which dealt with cumulative fees and that the only question in a case under S. 7 (iv)(c) was that the true valuation would be of the entire relief claimed. This view is clearly in accord with the plain language of S. 7 (iv)(c) of the Act which lays down that in suits to obtain a declaratory decree or order, where consequential relief is prayed for, court-fee is to be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. Obviously, what the section contemplates is a single or a composite relief made up of the declaration and whatever ancillary aids may be prayed for and not so many separate reliefs which have to be valued separately. The further reliefs, being consequential, are not distinct or separate reliefs and, therefore an unitary and not a distributive method of computing the court-fee is clearly indicated. It appears to me that once it is conceded, as appears to have been conceded before the learned Judge, that S. 7 (iv)(c) governs the suit, the question of separate or a consolidated valuation was immediately at an end.

(5) The question, however remains: is the whole suit governed by S. 7 (iv)(c), Court-fees Act at all? I am of opinion that the answer must be in the negative. It is true that the main prayer is one for partition for which a specific fee has been prescribed in the Court-fees Act. It is also true that so far as the declarations prayed for are concerned, certain of the other reliefs prayed for may be combined with them so as to make up a prayer for a declaration or declarations and consequential reliefs. So much of the suit will certainly come under S. 7 (iv)(c), but so far at least this Court is concerned, a suit for partition and accounts have not been treated as a suit governed by S. 7 (iv) (c) and the prayer for accounts has not been treated as a prayer for a relief consequential to declaration of title and partition. It has always been treated as a separate item or count among the reliefs and if that be so, the present suit seems to come in part under S. 7 (iv)(c), in part under the provision dealing specifically with partition suits and in part under S. 7 (iv) (f) so far as the prayer for accounts is concerned. Of these three suits or rather three parts of the suit, the partition part presents no difficulty inasmuch as there is the fixed court-fee prescribed for it. So far as the accounts portion is concerned, the usual practice is to put a tentative valuation upon the relief with an offer to pay further court-fees, if, upon the accounts being taken, a sum larger than the amount at which the prayer is tentatively valued is ultimately found due to the plaintiff.

In the present case, such a tentative valuation has been put and the figure is Rs. 500/-. There remains only that part of the suit which comes under S. 7 (iv)(c) and so far as that part is concerned the plaintiff is entitled to put his own valuation, subject, however, to revision by the Court under the new provision of S. 8C. The latter section cannot be brought under requisition to any useful purpose, unless there be some objective standard, but in the present case we can see none. The right claimed by the plaintiffs does not seem to have been denied and the grievance is limited to the postponement of their right to possession of the properties which they claim. This disadvantage is clearly not payable of being valued in money and consequently it is not practicable to revise the valuation at which the plaintiffs may themselves value it.

It has to be borne in mind, however, that the plaintiffs have not valued the suit on the basis which I have pointed out to be the correct basis and before the suit proceeds further, they will have to put a valuation in the correct manner. The learned Judge has proceeded on the basis that the sum-total of the separate values of the several reliefs is the sum to be treated as the value of the suit for the purposes of S. 7 (iv)(c), but in that he is clearly wrong for reasons I have

already stated. On being questioned by us, the learned Advocate for the plaintiffs stated that he was prepared to put the same valuation of Rs. 2000/- on that part of the suit which fell under S. 7 (iv)(c) and to that valuation the learned Advocate for the petitioner did not object. That being so, the position which ultimately emerges is that the plaintiffs are liable to pay ad valorem court-fees on the valuation put by them or going to be put on that part of the suit which comes under S. 7 (iv)(c); in addition they are liable to pay tentatively ad valorem court-fees on the amount at which they have tentatively valued the prayer for accounts; & lastly they have to pay the fixed court-fees for the relief of partition. The three amounts so payable by them make up a sum of Rs. 258-12-0 which, in my view, is the true revenue liability of the plaintiffs on the plaint, truly construed.

(6) We are unable to obtain accurate information as to the exact amount which the plaintiffs have paid, but it is clear that what they have paid is less than Rs. 258-12-0. They will therefore be liable to pay the difference between Rs. 258-12-0 and the sum which they have already paid. They will also have to amend their plaint, for which we give them leave, so as to put a valuation of Rs. 2000/- on that part of the suit which is governed by S. 7 (iv)(c), Court-fees Act.

(7) In the result the rule is made absolute, the order passed by the learned Judge is set aside and we direct that the plaintiffs do pay on the plaint a sum of Rs. 258-12-0 as court-fees and that they make a further payment of an amount equivalent to the difference between the said sum of Rs. 258-12-0 and such sum as they have already paid. They are also directed to amend the plaint in the way indicated by me which must be done within three weeks of the arrival of the record in the Court below.

(8) In view of the fact that this is a revenue matter, we do not make any order as to costs.

(9) Let the counter-affidavit filed by opposite party 4 be kept on the record.

(10) SINHA J.: I agree.

B/D.H. Rule made absolute.

A. I. R. 1953 CAL 585 (Vol. 40, C. N. 220)

LAHIRI AND GUHA JJ.

Mrs. A. Cacacie, Defendant-Appellant v. S. Safdar Ali, Plaintiff-Respondent.

A. F. A. D. No. 809 of 1952, D/- 1-4-1953.

(a) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act 17 of 1950 as amended by Act (62 of 1950), Ss. 2 (11) and 12(1)).

Where the tenant has determined the lease by a notice to quit and the landlord has accepted the offer, and did not consent either expressly or impliedly to the continuance of the tenancy, it is not open to the tenant to claim the tenancy any more.

The benefit of the phrase "notwithstanding anything to the contrary in any other Act or law" and the phrase "including a tenant whose lease has expired" occurring in S. 12(1) of the 1950 Act are of no assistance to her as she is not a tenant as defined in the amended S. 2(11). She is a trespasser pure and simple and the landlord is entitled to evict her as such. AIR 1951 Cal 215, held no longer good law; (1944) 1 All ER 246, Disting. (Para 7)

(b) Transfer of Property Act (1882), S. 106 — Notice, sufficiency of.

Where the tenant occupied a flat known as Suite Nos. 3 and 3-A, but in her notice, she mentioned Suite No. 3 only. But the receipt, and the correspondence between the parties made it quite clear that both the parties understood that the tenant was vacating the entire premises which she was occupying,

Held that there might be slight misdescription in the notice, but that could not mislead either party. The notice was sufficient and legal. (Para 11)

Anno: T. P. Act, S. 106 N. 19.

P. C. Mullick and Bhabanath Datta, for Appellant; Amaresh Chandra Roy, for Respondent.

CASES CITED:

(A) ('28) AIR 1928 PC 227: 55 Ind App 344 (PC)
(B) ('51) AIR 1951 Cal 215: 54 Cal WN 735
(C) (1944) 113 LJ KB 196: (1944) 1 All ER 246

GUHA J.: This appeal by the tenant defendant arises out of a suit for ejectment and recovery of mesne profits instituted by the plaintiff-respondent. The facts are briefly as follows:

(2) The defendant was a tenant under the plaintiff in respect of one flat on the ground floor of premises No. 11, Lower Range, Park Circus, Calcutta, the flat being known as Suite No. 3 and 3A. On August 15, 1950, the defendant sent a notice, Ex. 2, to the landlord to quit which was to expire on 31-8-1950. The notice was in these terms:

"Dear Mr. Ali,

As I am vacating your premises, suite 3, No. 11 Lower Range, on the 31st instant, please accept 15 days' notice.

Thanking you,
etc."

(3) On the next day, that is, 16-8-1950, the plaintiff landlord communicated his acceptance of the notice.

(4) On 29-8-1950, the defendant sent a letter, Ex. A, of withdrawal of the notice (Ex. 2). This, however, was not accepted by the landlord and was returned to the defendant who sent it again under registered post. The registered cover again was refused by the plaintiff. The defendant did not keep her promise to vacate the premises on 31-8-1950, and continued in possession. She had paid rent upto August 1950 and the present suit was filed by the landlord on 22-9-1950.

(5) The defence inter alia was that though the defendant had sent the notice, Ex. 2, dated 15-8-1950, that notice was waived before the expiry of the period stated in the notice itself and in these circumstances the tenancy in question had not been determined and she was not liable to be evicted.

(6) The defence was overruled by both the Courts below and the suit was decreed in favour of the landlord. It has been held by the lower appellate Court that after the tenant had surrendered the premises by her notice dated 15-8-1950, she was occupying the premises as a trespasser and not as a tenant and as such the landlord was automatically entitled to get khas possession of the disputed premises as a proprietor.

(7) On behalf of the defendant appellant Mr. Mullick contends that even if the tenancy be held to have expired by reason of the notice given by the tenant, the tenancy is protected under S. 12 (1) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, (herein after described briefly as the 1950 Act). In this con-

nection Mr. Mullick has drawn our attention to the phrase "including a tenant whose lease has expired" which occurs in that sub-section. In support of his contention he has relied upon the decisions in the cases of — 'Karnani Industrial Bank Ltd. v. Satya Niranjan', AIR 1928 P C 227 (A) and — Sm. Nandarani Dassi v. Satya Narain Harit', AIR 1951 Cal 215 (B). He has contended that the defendant even after the expiry of her tenancy must be deemed to be a tenant who is entitled to the protection of S. 12 of the 1950 Act. It is to be noted, however, that since the decision in the case of — 'Sm. Nandarani Dassi v. Satya Narain Harit', (B) the 1950 Act has been amended by West Bengal Act 62 of 1950. By S. 2 of the amending Act the definition of the word 'tenant' as occurring in S. 2(11) of the 1950 Act was amended with retrospective effect. As the definition stands now, the defendant in the present case does not come within the category of any of the persons who can be said to be a tenant within the terms of the definition. She is not a person who is liable to be sued by the landlord for rent, in the ordinary sense of the word; nor is she a person whose interest in the premises has been ipso facto determined under S. 12(3) of the Rent Control Act of 1948; nor is she, after her offer to give up her tenancy and the acceptance of that offer by the landlord, a person by whom rent, in the ordinary sense of the word, is payable for the premises. She is no doubt "a person continuing in possession after the termination of a tenancy in her favour" who, according to the relevant definition under S. 2(11) of the 1948 Act, would be a tenant: she is, however, no longer so by reason of the different phraseology used in the present definition of the term. The tenant has determined the lease by a notice to quit Ex. 2, sent on 15-8-1950, and the landlord has accepted her offer, (Vide Ex. 1) and did not consent either expressly or impliedly to her continuance of the tenancy as found by both the Courts below. It is, therefore, not open to the tenant defendant to claim the tenancy any more. The continuity of the tenancy has been broken irrevocably by her own action. No subsequent unilateral action by her can repair the breach. Her conduct in persuading the landlord to accept the surrender of the tenancy leads to the reasonable inference that at the material time she was in no need of protection against eviction. She changed her mind subsequently no doubt, but then it was too late. Her case is, therefore, quite different from that of other tenants who are sought to be evicted against their own wishes. She can get no relief, therefore, under S. 12 of the 1950 Act which was enacted obviously for the protection of other class of tenants from eviction. It follows from this that the benefit of the phrase "notwithstanding anything to the contrary in any other Act or law" in S. 12(1) of the 1950 Act which was relied upon by Mr. Mullick to nullify the effect of the notice, Ex. 2, given by his client is not available to her. The phrase "including a tenant whose lease has expired" occurring in S. 12(1) of the 1950 Act is of no assistance to her as she is not a tenant as defined in the amended S. 2(11). After the expiry of the period of the notice (Ex. 2) that is, since 1-9-1950, she is a trespasser pure and simple and the landlord is entitled to evict her as such, as he has sought to do by the present suit. In our opinion, there is nothing in the 1950 Act as amended which stands in his way.

(8) Mr. Mullick also drew our attention to the decision in the case of — 'Brown v. Draper', (1944) 1 All E R 246 (C), and relied upon certain passages in that decision in support of his contention that the tenant appellant in the present case was entitled to protection under S. 12 of the 1950 Act. Among other passages, Mr. Mullick relied particularly upon the following passage:

"A tenant remaining in possession cannot lawfully contract not to avail himself of the protection which the Acts give him if and when the landlord takes proceedings against him to recover possession. If he wishes to place himself outside the protection of the Acts without putting the landlord to the necessity of taking proceedings his proper course is to deliver up possession. Unless and until he does so, he is under the shelter of the Acts, whether or not he so desires. No contract, and a fortiori no mere statement of his wishes or intentions can deprive him of the statutory protection."

(9) On the strength of the principle laid down in the above passage, Mr. Mullick has contended that even though in the instant case the tenant had sent a notice to the landlord communicating her desire to vacate the premises with effect from 31-8-1950, as she had continued in possession after that date, she was entitled to the protection of the 1950 Act. As regards this English case, it will suffice to say for our present purpose that that case was decided on the basis of the provisions of certain English statutes which differ in material particulars from the corresponding West Bengal Statutes. For one thing, in our statute there is no provision, as pointed out by Mr. Roy, on behalf of the respondents, corresponding to the provision in clause (c) of the First Schedule to the Rent and Mortgage Interests Restrictions Amendment Act, 1933. In view of that provision in the English statute, it was possible for the Court to hold in the case of — 'Brown v. Draper', (C) that the possibility of a tenant changing his mind where he himself has brought the contractual tenancy to an end by a notice in being entitled nevertheless to claim protection is envisaged by Schedule I Para. (c) to the Act of 1933. Then again so far as the definition of the term "tenant" is concerned, it would appear that there is wide divergence between the definition of that term in the relevant English statute in Cl. (g) of sub-s. (1) of S. 12 of Increase of Rent and Mortgage Interests Restrictions Act, 1920, and the definition as contained in S. 2(11) of West Bengal Premises Rent Control (Temporary Provisions) Amendment Act, 1950, (West Bengal Act 62 of 1950). As observed before, the present appellant is not, in our view, a tenant within the meaning of S. 2(11) of the Amended Act.

(10) Thirdly, it may be observed that in the present case the tenant determined her tenancy by a notice, Ext. 2, whereas in the case of Brown v. Draper', (C) there was no such notice given by the tenant. In view of all the circumstances, it does not appear to us that it will be proper to decide the present case on an application of the principle laid down in the case of — 'Brown v. Draper', (C).

(11) There is another minor point which may be dealt with briefly. The appellant occupied a flat known as Suite Nos. 3 and 3-A, but in her notice Ex. 2, she mentioned Suite No. 3 only. The question is whether the notice was bad on that ground. As pointed out by the trial Court, however, the receipt, Ex. 1, and the correspondence between the parties read along with Ex. 2 itself make it quite clear that both the parties understood that the defendant was vacating the entire premises which she was occupying. There might be slight misdescription in the notice, Ex. 2, but that could not possibly mislead either party. The notice was, therefore, sufficient and legal.

(12) We hold accordingly that the suit has been rightly decreed by the Courts below. The appeal is dismissed accordingly.

(13) In the circumstances, the parties are left to share their own costs of the appeal.

(14) The appellant is allowed three months' time from date to vacate the premises.

(15) LAHIRI, J.: I agree.

B/H.G.P. Appeal dismissed.

A. I. R. 1953 CAL 587 (Vol. 40, C. N. 221)

BOSE J.

Pankaj Kumar Ghosh and another, Appellants v. Commr., Burdwan Division and another, Opposite Party.

Civil Rule No. 2303 of 1952, D/- 9-12-1952.

Motor Vehicles Act (1939), S. 64 — Notice of appeal.

It is true that S. 64 does not expressly provide for any notice being given to any person other than the appellant and the Transport Authority, but the moment it is intended to affect the right of any third person by any order made in the appeal, a duty arises according to the principles of natural justice to give notice to the persons affected. (Para 5)

Anno: Motor Vehicles Act, S. 64, N. 1.

Kalyan Kumar Bose and Purnendu Sekhar Bose, for Appellants; Hemendra Kumar Das and D. Basu, for Opposite Party.

CASES CITED:

(A) ('52) Civil Revn. No. 1188 of 1952, D/- 4-8-1952 (Cal)

(B) ('52) AIR 1952 Madh-B 128: (Civil Misc. Appln. No. 24 of 1951)

ORDER: This is an application under Art. 226 of the Constitution for an appropriate writ directing the opposite parties to rescind or withdraw an order dated 31-7-1952 passed by the Commissioner, Burdwan Division, and given effect to by the Regional Transport Authority, Burdwan, cancelling the route permit granted in favour of the petitioners for plying a bus in the Burdwan Barakar route.

(2) The petitioners along with several other persons applied for route permits for plying buses on the Burdwan-Barakar route before the Regional Transport Authority, Burdwan, being the respondent No. 2. On 9-5-1952, the respondent No. 2 passed orders granting a route permit to the petitioners and the said order was communicated to the petitioners on or about 14-5-1952. By the said order, the petitioners were called upon to produce the bus before the Secretary, Regional Transport Authority, Burdwan, for inspection by 16-6-1952. Acting upon the said order, the petitioners purchased one stage carriage at a cost of about Rs. 26,550/- and put the same on the said route. By a letter dated the 6/7th August 1952, the petitioners were intimated that the Commissioner, Burdwan Division, had set aside the order of the Regional Transport Authority granting a permit for one stage carriage to the petitioners after hearing an appeal preferred by one Sailesh Nath Sanyal, who had been unsuccessful in getting a permit in respect of the same route from the Regional Transport Authority, Burdwan.

By this letter the petitioners were directed to stop plying the bus on the above route with immediate effect. The petitioners were not made parties to the appeal preferred by the said Sailesh Nath Sanyal, nor were they given notice of the hearing of that appeal at any stage thereof and the order of cancellation of the permit granted to the petitioners was made by the Commissioners without hearing the petitioners and in their absence. The petitioners have challenged the validity of the orders dated 31-7-1952 and 6/7-8-1952 on various grounds set out in paragraph 7 of the petition.

(3) Mr. K. K. Basu, the learned counsel for the petitioner, has argued with reference to S. 64 of the Motor Vehicles Act, 1939, that the provisions of that section indicated clearly that the jurisdiction of the Commissioner in deciding an appeal is confined only to the determination of the question whether the refusal to grant a permit to the appellant was justified or not, but the Commissioner has no power to order cancellation of permits granted in favour of other persons who are not parties to the appeal and without hearing such persons and in their absence.

(4) Mr. Hemendra Kumar Das, the senior Government Advocate, has on the other hand contended that there is no limit to the power of the Commissioner in the matter of deciding appeals preferred by candidates who have failed to obtain permits from the Regional or Provincial Transport Authorities and he can pass any order that he thinks fit.

(5) It appears to me that the contention of Mr. Basu is consonant to reason, and to the principles of natural justice. The Commissioner, while deciding an appeal under S. 64 of the Act, is acting judicially or quasi-judicially and consequently he is bound to observe the principles of natural justice and it will be a flagrant violation of the principles of natural justice to affect the right of a person by an order made in his absence and without giving him an opportunity to put forward his case before he is prejudicially affected by such order. It is true that section 64 does not expressly provide for any notice being given to any person other than the appellant and the Transport Authority but the moment it is intended to affect the right of any third person by any order made in the appeal, a duty arises according to the principles of natural justice to give notice to the persons affected.

(6) For the reasons set out above, and also for the reasons given in my judgment — 'Sitanath Mukherjee v. Regional Transport Authority, Hooghly', Civil Revn. No. 1188 of 1952, D/- 4-8-1952 (Cal) (A), this petition should succeed. It may be pointed out that since the judgment delivered by me in Civil Revn. No. 1188 of 1952 (A), a similar view has been expressed by the Madhya Bharat High Court, by Kaul C. J. and Mehta J. in the case of — 'K. N. Bhatia Ghisalal v. Regional Transport Authority', AIR 1952 Madh-B 128 at pp. 129, 130 (B) in Civil Misc. Appln. No. 24 of 1951, paragraphs 14 to 18.

(7) The Rule is accordingly made absolute to the extent that the order dated 31-7-1952 and the order dated 6/7-8-1952 only in so far as they affect the cancellation of the petitioners' permit are cancelled and the respondents are directed to forbear from giving effect to those orders in so far as they affect the petitioners. The petitioners are entitled to costs of the present proceedings. Hearing fee is assessed at two gold mohurs.

B/V.R.B. Rule made absolute.

A. I. R. 1953 CAL 588 (Vol. 40, C. N. 222)

G. N. DAS J.

Hakir Mahamed and others, Plaintiffs-Appellants v. Abdul Majid and others, Respondents.

A. F. A. D. No. 469 of 1946, D/- 18-11-1949.

(a) Civil P. C. (1908), O. 22, R. 4 — Suit against trespassers — Death of one of defendants.

In regard to a co-trespasser who had participated in the trespass if one of the trespassers dies and his heirs are not brought on record, the whole suit abates. AIR 1928 Cal 138, Rel. on. (Para 2)

The plea that the whole suit has abated by the death of one of the co-trespassers can be raised by the defendant for the first time in the appeal from the decree passed against him. The Appellate Court can go into the matter, as in the absence of co-trespasser who had participated in the trespass no effective decree could be passed in the suit. (Para 2)

Anno: C. P. C., O. 22, R. 4, N. 23, 25.

(b) Civil P. C. (1908), O. 23, R. 1 — Withdrawal of suit.

Suit for declaration and injunction against trespassers — Death of one trespasser — Suit decreed against remaining trespasser and held to have abated against the deceased defendant — Plea that whole suit abated raised by defendant in Appeal —Plaintiff praying for permission to withdraw suit — Held prayer was not belated as suit could not proceed in absence of heirs of deceased trespasser — Decree set aside and permission to bring a fresh suit granted. (Para 3)

Anno: C. P. C., O. 23, R. 1 N. 10, 11.

Panchanan Chowdhury, for Appellants; Apurba Charan Mukherjee and Ganganarayan Chandra, for Respondents.

CASES CITED:

(A) ('34) AIR 1934 All 716: 150 Ind Cas 148
(B) ('28) AIR 1928 Cal 138: 46 Cal LJ 433

JUDGMENT: This appeal is by the plaintiffs. The plaintiffs are the owners of a plot of land recorded in C. S. Dag No. 885. On the west of plaintiffs' properties lies C. S. Dag No. 770 which the plaintiffs claim as the village pathway. Beyond that lies C. S. Dag No. 854 which belongs to the defendants. The plaintiffs' case was that the defendants including defendant No. 5 Amina Bibi by a concerted act threw earth on the west portion of the said pathway and was preparing to put a mud wall on that portion. The plaintiffs accordingly brought a suit for declaration that the disputed strip Schedule Ka of the plaint was a part of the village pathway and for a mandatory injunction directing the defendants to remove the earth which they have thrown and for a permanent injunction restraining the defendants from raising any wall on the disputed land. In the course of the suit, defendant No. 5 Amina died and an application for bringing her heirs on record was dismissed and the trial court directed that the suit shall abate so far as the heirs of Amina are concerned. This order was made on 18-4-1944. No steps were taken by the plaintiffs to have the order vacated and the suit proceeded and in the result the plaintiffs' suit succeeded. On appeal by the defendants, the lower appellate court has held that the entire suit has abated because of non-substitution of the heirs of Amina Bibi. In the lower appellate court the plaintiffs were respondents and made an application for withdrawal of the suit and for liberty to bring a fresh suit on the same cause of action. It was otherwise barred and the lower appellate court refused to accede to this prayer. In the result the plaintiffs' suit was dismissed. The plaintiffs have preferred this appeal.

(2) Mr. Chowdhury, appearing for the appellants, has contended that the lower appellate court was wrong in allowing the defendants to raise for the first time in the appellate court a plea that the whole suit abated. In my opinion the court was entitled to go into the matter, as in the absence of co-trespasser who had participated in the obstruction caused in the disputed pathway no effective decree could be passed in the suit. Mr. Chowdhury referred to a decision in the case of — 'Shibban v. Allaha Mehar', AIR 1934 All 716 (A). So far as this Court is concerned, it was held in the case of — 'Arunadoya Chakravarty v. Mahomed Ali', AIR 1928 Cal 138 (B) that in regard to a co-trespasser who had participated in the trespass if one of the trespassers dies and his heirs are not brought on record the whole suit abates. I cannot, therefore, accede to the first contention raised by Mr. Chowdhury that the abatement should be limited to the heirs of Amina Bibi.

(3) Mr. Chowdhury next contended that the plaintiffs may be allowed leave to withdraw this suit. The lower appellate court overruled this prayer on the ground that it was made at a later stage. Mr. Chandra, appearing for the respondents, reiterated the same objection. In my opinion, this is not a correct view to take. The trial court had limited the abatement of the suit so far as it concerned the heirs of Amina. The question whether the whole suit abated or not was not raised by the contesting defendants in the trial court. If the matter had been raised in the trial court the plaintiffs would have taken proper steps at the time and the costs incurred by the plaintiffs who succeeded in the trial court would not have been thrown away. In these circumstances, it cannot be said that the prayer was a belated one. As the suit cannot proceed in the absence of the heirs of Amina I think the proper order to pass is to set aside the judgments and decrees of the courts below and to direct that the plaintiffs-appellants will be at liberty to bring a fresh suit on the same cause of action if not otherwise barred.

(4) The result, therefore, is that the judgments and decrees of the Court below are set aside and the appellants are allowed to withdraw the suit with liberty to bring a fresh suit as directed above. The parties will bear their own costs in this court.

B/D.R.R. Order accordingly.

***A.I.R. 1953 CAL 589 (Vol. 40, C. N. 223)**

P. B. MUKHARJI J.

P. K. Ghosh, Applicant v. Mrs. K. Dutt, Respondent.

Suit No. 1490 of 1952, D/- 2-12-1952.

***(a) Letters Patent (Cal), Cl. 13 — Power to transfer suit is affected by S. 16 of Rent Control Act — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 16).**

Reading the words "notwithstanding anything contained in any other law" and "no other Courts shall be competent to entertain or try such suit" occurring in S. 16, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, the proper conclusion to arrive at is that all jurisdictions of the High Court in entertaining or trying a suit are affected in all cases of a suit by a landlord against a tenant in which recovery of possession of any premises to which the said Rent Control Act applies "is claimed" except suits involving a substantial question of law as to the interpretation of the Constitution of India when under Art. 228 of the Constitution the High Court has the jurisdiction to transfer such suits from a subordinate Court. Thus, S. 16, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, has destroyed the jurisdiction of the High Court under Cl. 13 of the Letters Patent to entertain or try suits of the nature and description mentioned in that section of the Act. (Paras 8, 10)

Anno: L. P. (Cal), Cl. 13 N. 5.

(b) Letters Patent (Cal), Cl. 13 — Transfer of suit for purpose of justice — (Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (1950), S. 16).

It is not the jurisdiction of the Small Causes Court that the Chief Judge exercises under Sch. B of S. 16 of the Rent Control Act, but he exercises the jurisdiction of the Court of a District Judge. As such that Court being quite competent to deal with any question arising out of the fact of tenancy or relating to the construction of the provisions contained in any Act, it will not be for the purposes of justice to transfer a suit for ejectment governed by the Rent Control Act to the High Court, even if Cl. 13 of the Letters Patent can be construed to be legally applicable to such suits. (Paras 13, 15)

Anno: L. P. (Cal), Cl. 13 N. 1.

R. C. Deb, for Applicant; Amiya Bose, for Respondent.

JUDGMENT: This is an application for transfer under Cl. 13 of the High Court Letters Patent, of Suit No. 1490 of 1952, now pending before the Chief Judge, Court of Small Causes, Calcutta. A copy of the plaint in that suit is annexed to the petition. In that suit, the respondent Mrs. K. Dutt as plaintiff claims a decree for eviction of the applicant as defendant in that suit. The pleading in that plaint is that the applicant was in occupation of the entire first floor flat of premises No. 4, Moira Street, Calcutta, as a monthly tenant under the respondent on an arrangement for payment of a monthly rent of Rs. 500/- payable on the expiry of each English calendar month. The suit in the Small Causes Court was instituted sometime in June, 1952.

(2) The grounds of merit on which such transfer is asked are set out in para. 16 of the petition. Briefly stated, these grounds are that in the suit in the Small Causes Court difficult questions of law and/or facts will have to be decided, specially questions relating to the factum and validity of an alleged marriage of the respondent with one Rangulal Dutt, since deceased and questions of construction of the Special Marriage Act and the Succession Act. It is stated that the applicant was originally a tenant under the said Rangulal Dutt at a rent of Rs. 500/- but later on, he became a tenant of a garage in addition at an extra monthly rent of Rs. 30/-. The respondent Mrs. K. Dutt filed the Small Cause Court suit against the applicant in her capacity as a widow of the said Rangulal Dutt, deceased. The applicant's case is that he has challenged the validity of respondent's marriage with the said Rangulal Dutt and her status as his widow to claim the eviction of the applicant. In fact, the applicant says in para 13 of his affidavit that Rangulal Dutt was married to one Bijoli Sinha, daughter of the late Lord Sinha under the Special Marriage Act, 1872, and had two daughters of such marriage by the names of Brinda and Anjali who it is alleged, are married to Englishmen and are residents abroad. It is said by the applicant that the widow Bijoli Dutt (nee Sinha) and her two daughters as aforesaid are alive and the succession to the estate of Rangulal Dutt, deceased, has devolved upon his widow Bijoli Dutt and her said two daughters and not upon the applicant. The respondent's answer on the point is that the said Rangulal Dutt died leaving a will dated 5-12-1948 and under that will, the testator after payment of certain legacies bequeathed the whole of the residuary estate including the said premises No. 4, Moira Street, Calcutta, to the respondent. The respondent says that on 3-6-1949, she obtained letters of administration in respect of the estate of the said deceased with a copy of the will annexed from this Court and in her application for such letters of administration, the widow Mrs. Bijoli Dutt and her two daughters Brinda and Anjali gave their consent. On that ground, Mrs. K. Dutt, the present respondent, now claims to be the only owner of the said premises as the sole residuary legatee under such will. It is alleged that the administration of the estate has been completed and all debts and legacies have been duly paid.

(3) The other grounds of merit relate first, as to whether the tenancy was in respect of the said premises only or whether it included the garage. The point of this allegation is that if it is one tenancy including the garage the total rent will be over Rs. 500/- per month so that in that event this Court will be competent to try the case. Secondly, there is the consideration of question of reasonable requirements under the West Bengal Premises Rent Control Act. I should state incidentally that the grounds of eviction pleaded in the Small Causes Court suit appear in paragraph 5 of that plaint which says that the plaintiff reasonably requires the portion in occupation of the defendant, for herself and one Mr. Myer whom the respondent is about to marry or has married and for their respective families. It is, therefore, said by the applicant that construction inter alia of Section 16 and S. 12 (h), West Bengal Premises Rent Control Act, 1950, as amended, is one of the difficult questions of law to be tried in that suit. The other grounds are about the convenience of the case being disposed of by the High Court instead of by the Small Causes Court.

(4) Both on the grounds of fact and of law, great difficulties are on the way of the applicant.

(5) The legal point is whether such a suit can any longer be transferred under Clause 13 of the Letters Patent of this High Court. Section 16 of the West Bengal Premises Rent Control Act, 1950, provides:

"Notwithstanding anything contained in any other law a suit by a landlord against a tenant in which recovery of possession of any premises to which this Act applies is claimed shall lie to the courts, as set out in Schedule B, and no other court shall be competent to entertain or try such suit".

Schedule B of that Act provides inter alia:

"(1) Where the premises are situate on land, wholly within the Ordinary Original Civil Jurisdiction of the Calcutta High Court:

(i) When the rent payable for one month for the premises exceeds Rs. 500/-

The Calcutta High Court.

(ii) In all other cases — The Chief Judge of the Calcutta Court of Small Causes, who shall entertain and try the suit as a Court of District Judge under the Bengal Agra and Assam Civil Courts Act, 1887;"

The other parts of Schedule B of the Rent Control Act are not relevant for the present purpose.

(6) Reading these provisions of S. 16 of the Rent Control Act and the Schedule B thereof, it appears to me that the Calcutta High Court is not competent to entertain or try a suit for the recovery of possession of any premises the rent of which does not exceed Rs. 500/- per month. This deprivation of the jurisdiction of the Calcutta High Court has a legal history whose details need not detain us. It is enough to say that in its wisdom the legislature has now stated that such suits are to be tried not by the Calcutta High Court, but by the Chief Judge of the Small Causes Court acting as a Court of the District Judge.

(7) Clause 13 of the Letters Patent gave to this High Court.

"Power to remove, and to try and determine, as a Court of extraordinary original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court".

The question, therefore, now is whether this power of the Calcutta High Court to remove, and to try and determine such suits in this High Court's extraordinary Original Jurisdiction has been curtailed by S. 16, West Bengal Premises Rent Control Act, 1950. That powers under the Letters Patent can be curtailed by legislation cannot be doubted. Clause 44 of the Letters Patent is clear on the point. The Rent Control Act, 1950, has received the assent of the President of the Indian Union. The language in S. 16 of the Rent Control Act which uses the famous words "Notwithstanding anything contained in any other law" covers the law as contained in Clause 13 of the Letters Patent of the High Court.

(8) The argument was advanced on behalf of the applicant that the High Court under Cl. 13 of the Letters Patent tries suits which it has ordinarily no jurisdiction to try and that this S. 16 of the Rent Control Act, 1950, only refers to and should be understood only in relation to the original Civil jurisdiction of the High Court, and therefore it is contended that S. 16 of the Act does not affect the extraordinary original civil jurisdiction given under Cl. 13 of the Letters Patent. The section itself does not say whether it is the original jurisdiction or the extraordinary original jurisdiction which was intended to be affected. The section is unqualified on this point. When, therefore, the section is silent on the point it can only be read in its amplitude and the proper conclusion to arrive at will be that all jurisdictions of this Court in entertaining or trying a suit are affected in all cases of a suit by a landlord against a tenant in which recovery of possession of any premises to which this Act applies "is claimed" except suits involving a substantial question of law as to the interpretation of the Constitution of India when under Art. 228 of the Constitution this High Court has the jurisdiction to transfer such suits from a subordinate Court.

(9) It is then argued that the words: "Shall lie to the Courts" indicate that it is the original jurisdiction where suits are instituted, which is in the contemplation of the section. But the latter part of S. 16 of the Act uses much wider language when it says: "And no other Court shall be competent to entertain or try such suit". The bar operates not merely on the entertainment of such suit but also it prohibits trying of such suits by the High Court. "Such suit" in that part of the section means: "A suit by a landlord against a tenant in which recovery of possession of any premises to which this Act applies is claimed", and not merely suits which could be instituted originally in this High Court. The words: "Ordinary Original Civil Jurisdiction of the Calcutta High Court" appear in Sch. B of the Rent Control Act of 1950. But the use of such words is only to denote or fix the situs of the land. It is quite clear that premises No. 4, Moira Street, Calcutta, is within such situs and within the ordinary original Civil jurisdiction of the Calcutta High Court. In that view of the matter, I am unable to read and construe S. 16, West Bengal Premises Rent Control Act, 1950, as affecting only the original jurisdiction of the High Court in the sense that such suits cannot be instituted in this High Court. By reason of the clear words: "and no other Courts shall be competent to entertain or try such suit", the intention of the legislature is clear that this High Court shall not entertain or try such suits. Now suits are transferred under Cl. 13 of the Letters Patent only with a view to enable this High Court to try such suits. There will be no point, therefore, in transferring a suit under Cl. 13 of the Letters Patent when the Act has deprived this High Court of any power to try such a suit. To give the High Court such power by construing S. 16 of the Rent Act as affecting only the ordinary original civil jurisdiction & not the extraordinary original jurisdiction will be clearly to defeat the language of the section by a process of back-door construction, which I do not propose to adopt. In fact, if the construction was to be limited only to suits that could be instituted in this Court, then it would have been enough for this section to have stopped after the words: "shall lie to the Courts as set out in Schedule B". The further words: "and no other Court shall be competent to entertain or try such suit" would then, in that event, be completely redundant.

(10) For these reasons, I hold that on this point of law, S. 16, West Bengal Premises Rent Control Act, 1950, has destroyed the jurisdiction of this Court under Cl. 13 of the Letters Patent to entertain or try suits of the nature and description mentioned in that Section of the Act.

(11) On the question of merits, I am not persuaded enough to say that "for the purpose of justice", even if Cl. 13 of the Letters Patent of the High Court were applicable, this is a proper and fit case which should be transferred to this Court.

(12) Mr. Deb, appearing for the applicant has urged the grounds of merits which appear in para. 16 of his client's petition and which I have already stated. The main contention of Mr. Deb is that the Small Causes Court is not a proper Court to try these difficult questions of law and of facts.

(13) Now, although under Sch. B of S. 16, Rent Control Act, 1950, the Court of jurisdiction is described to be the Court of the Chief Judge of the Calcutta Court of Small Causes, he in entertaining and exercising this jurisdiction, does not act as Small Causes Court at all. Schedule B makes it clear that the Chief Judge in this case, "shall entertain and try the suit as a Court of the District Judge". As a Court of the District Judge, it is a Court of record and where all the sections of the Code of Civil Procedure will apply. It will, therefore, be not entertained and tried as a Small Cause in the Small Causes Court. It is not the jurisdiction of the Small Causes Court that the Chief Judge exercises under Sch. B of S. 16, Rent Control Act, but he exercises the jurisdiction of the Court of a District Judge.

(14) I do not think that the Court of a District Judge can be said to be a Court where the fact of tenancy or the question of construction of the Special Marriage Act and the Succession Act cannot be properly and duly determined. In fact a District Judge's Court normally does exercise jurisdiction both under the Special Marriage Act as well as under the Succession Act. On the question of the construction of S. 12(h), Rent Control Act, 1950, I am satisfied that the District Judge's Court is quite a competent and a proper Court to decide such question and I see no room for fear of failure or miscarriage of justice in such Court.

(15) I am not impressed by the grounds made by the applicant that the parties and their witnesses live in Calcutta within the original civil jurisdiction of this Court and therefore, it will be convenient for them to attend this Court. It is a very laboured attempt to make a case of convenience. The distances between this Court and the Small Causes Court and their respective original jurisdictions are enough to show that such a ground has really no substance. I am satisfied on the facts also and having regard to the nature of the suit that it will not be for the purpose of justice to transfer such a suit to this Court, even if Cl. 13 of the Letters Patent could be construed to be legally applicable to these suits.

(16) For these reasons, I dismiss this application. The costs of this application will abide by the result of the Small Causes Court suit. If the applicant wins there, he gets the costs of this application. If he fails, he pays the costs of this application. The costs of this application will be taxed according to the scale permissible on the original side of the High Court.

A/V.S.B.

Application dismissed.

A. I. R. 1953 CAL 591 (Vol. 40, C. N. 224)

BOSE J.

Haji Sattar and another, Petitioners v. Joint Chief Controller of Imports and Exports and another, Respondents.

Matter No. 123 of 1952, D/- 3-3-1953.

(a) Constitution of India, Art. 226 — Foundation for jurisdiction under — Existence of right — (Import and Export Control Act (1947), S. 3).

Foundation for jurisdiction under Art. 226, is the existence of a right in petitioner — Granting of import licence depending on discretion of authority and not as of right — Refusal to grant licence — Petition under Art. 226 for writ is not maintainable. AIR 1952 SC 12; Appeal No. 101 of 1952, D/- 19-12-1952 (Cal); AIR 1952 SC 192, Rel. on. (Paras 4, 5)

(b) Import and Export Control Act (1947), S. 3 — Statutory Notification referred to in Appendix H(i) and Appendix H(ii) — Notification No. 2 ITC/478 of Ministry of Commerce, D/- 6-3-1948, setting out conditions and circumstances under which import licence may be refused — Notification does not provide for refusal of licence on the ground that the applicant has been declared an evacuee — Such a refusal is bad and in excess of jurisdiction — The matter however, being in the discretion of the authority, the Court refused to grant relief under Art. 226 of the Constitution — (Constitution of India, Art. 226). Case law Ref. (Para 6)

(c) Import and Export Control Act (1947), S. 3 — In granting or refusing to grant licence authority does not act judicially.

In the matter of granting or refusing import licences the Authority discharged only administrative functions. There is nothing in the Statutes governing the matter which indicates that there is a duty cast upon the authority, either expressly or impliedly, to act judicially or quasi-judicially. In refusing or cancelling a licence, it is taking merely executive action to deny or withdraw a privilege because it believes that the applicants are unfit to hold or retain a licence. (1931) AC 275, Relied on. (Paras 8, 10)

Santosh Kumar Basu, for Petitioners; G. P. Kar, for Respondents.

CASES CITED:

(A) ('52) AIR 1952 SC 192: 1952 SCR 583: 1952 SCA 287
(B) ('52) Appeal No. 101 of 1952, D/- 19-12-1952 (Cal)
(C) ('52) AIR 1952 SC 12: 1952 SCR 28
(D) ('52) AIR 1952 Cal 206: 55 Cal WN 253
(E) (1910) 79 LJ KB 595: (1910)-2 KB 165
(F) (1891) 60 LJ MC 73: (1891) AC 173
(G) (1898) 67 LJ QB 632: (1898) 1 QB 802
(H) (1890) 59 LJ QB 244: 24 QBD 371
(I) (1924) 93 LJ Ch 209: (1924) 1 Ch 483
(J) ('52) AIR 1952 SC 179: 1952 SCA 299
(K) ('52) AIR 1952 SC 319: 1952 SCA 501
(L) ('53) AIR 1953 Mad 279: 1952-2 Mad LJ 894
(M) ('51) AIR 1951 Mad 876(1): 1951-1 Mad LJ 704
(N) ('50) 54 Cal WN 883 (PC)
(O) (1931) 100 LJ PC 55: (1931) AC 275
(P) (1924) 93 LJ KB 390: (1924) 1 KB 171

ORDER: This is an application under Art. 226 of the Constitution and S. 45, Specific Relief Act, for a writ in the nature of certiorari for quashing certain orders made by the respondents refusing to grant import licences for cloves and betel-nuts and also for a writ in the nature of mandamus directing the respondents to deal with and consider certain applications of the petitioner's firm for import licences for cloves and betel-nuts, on merits and in accordance with law.

(2) The petitioner No. 1 Haji Sattar has been carrying on the business inter alia of importers and wholesale dealers for the last 17 years under

the name and style of Haji Sattar Haji Pir Mohammed. The principal place of business of the said firm is at 23, Amratola Lane Calcutta. The petitioner No. 1 is the owner of the said premises and while in Calcutta he resides at the said premises. The said firm has branches at Bombay, Madras, Kanpur, Agra, Delhi, Bhatinda, Vizianagaram, Cochin, Calicut, Jamnagar, Penang & Singapore. The petitioner No. 1 lives at various places and manages the business of the firm through managers or agents. Until recently, one Essa Haji Daud was the Manager of the petitioner No. 1 but on or about 18-8-1950 the petitioner No. 2, Adam Kara has been appointed as the agent of the petitioner No. 1 for managing the said business in the State of West Bengal. It is alleged that the petitioner No. 2 is also a working partner of the said firm Haji Sattar Haji Pir Mohammed and is remunerated by a share of profits thereof.

The case of the petitioner No. 1 is that he was born of Indian parents in the State of Saurashtra and owns extensive immoveable properties at various places in India. He is a member of the Indian Chamber of Commerce, Muslim Chamber of Commerce, Indian Produce Association and other associations at Calcutta and is recorded as a voter in the municipal and Parliamentary Electoral Rolls for the constituency comprising the said premises No. 23, Amratola Lane, Calcutta. The firm of the petitioners is assessed to Income-tax under Indian Income-tax Act and also to Sales Tax under the West Bengal Sales Tax Act. The petitioner No. 1 pays rates and taxes to the Corporation of Calcutta with respect to his property at 23, Amratola Lane and also holds trading licence granted by the said Corporation of Calcutta.

From the year 1933 to 1946, the petitioner No. 1 imported various goods including foodstuffs, spices, mineral oils, yarns, salt, sugar etc., and the value of such imports was about Rs. 50 lakhs per every accounting year. Since 15-8-1947, the petitioner's firm as an Established Importer on various goods applied for and regularly obtained in the usual course import licences or quotas for various goods for import through the port of Calcutta, till the half-yearly period January-June 1951. There were two applications made for import licences for the period January-June 1951—one for importing cloves from Zanzibar to Calcutta and the other for importing betel-nuts from Penang and Singapore to Calcutta. The said applications were made on 4-1-1951 and 6-2-1951 respectively. In response to these applications an import licence dated 1-2-1951 for cloves and an import licence dated 9-3-1951 for betel-nuts were granted by the respondents in favour of the said firm of the petitioners. Subsequently, upon request of the petitioners, the respondents duly validated both the above licences for double the value of the goods specified therein and extended the validity of the licences by six months.

On or about 9-6-1951 the Deputy Custodian (Judicial) of Evacuee Property at Lucknow declared the petitioner No. 1 as an evacuee under the Administration of Evacuee Property Act 1950 (31 of 1950) and the said firm of the petitioner was declared as evacuee property. As a result thereof the petitioners have ceased to carry on any business in Saurashtra, Kanpur, Madras, Travancore-Cochin and Uttar Pradesh. On 21-9-1951 the firm of the petitioners applied for supplementary import licences for the period July-December 1951 for importing cloves from Zanzibar and for importing betel-nuts from Penang and Singapore. The respondents, however, by their letters dated 3-10-1951 and 26-10-1951 refused to grant the said supplementary licences on the ground that the petitioner No. 1 had been declared an evacuee and his said firm had been declared evacuee property under the said Administration of Evacuee Property Act. The petitioners thereafter applied for reconsideration of the matter but this was not done. On 30-4-1952 the said firm again applied for import licence for betel-nuts for the period January-June 1952 but by a letter dated 13-6-1952 the respondents rejected the application on the ground that the firm had been declared defunct under the Evacuee Property Act. On 14-7-1952 the firm again applied for import licence for betel-nuts for the period July-December 1952 but the said application was not considered by the respondents.

It is stated that before rejecting the petitioner's application for import licence an opportunity should have been granted to the petitioners to make representations and to be heard in respect of the matter and the orders refusing the licence are bad as they are based on extraneous and irrelevant considerations and in violation of the principles of natural justice. It is further stated that it is incumbent upon the respondents to consider the pending applications on merits and in accordance with the rules and regulations governing the matter and to grant the licences asked for by the petitioners.

(3) Mr. Santosh Kumar Basu, the learned Advocate for the petitioners has contended that the petitioners' firm as an Established Importer has a right to get the import licences applied for, and as the conditions precedent for getting the licences have been satisfied, the respondents had no justifiable reasons for refusing the licences. Mr. Basu has referred to the Gazette of India (Extraordinary) Publication of the Public Notice No. 101 dated 15-12-1950, and argues with reference to Paragraph 4(a) of S. 1 and Para. 23 of S. II thereof (Page 631) that established importers are entitled to be allotted quotas of licences based on their past imports. It is also submitted by Mr. Basu that the applicant for the licences having duly complied with the procedure for obtaining such licences and having presented the applications which are complete in all respects, there is no scope for the respondents to refuse to grant the licenses asked for. Mr. Basu points out that the only grounds on which licences can be refused are in cases which fall within Paras. 8 and 9 (Page 633) or when there is non-compliance with the requirements of Paras. 11, 12, 13, 14, 15, 16, 17, 35 and other paragraphs of the Public Notice.

(4) Mr. G. P. Kar who appears on behalf of the respondents has contended on the other hand that the petitioners have no legal right to get a licence as a matter of course, but the matter of granting and refusing licences rests entirely in the discretion of the licensing authorities and unless it can be established that the discretion has been exercised in bad faith, the petitioners have no right to maintain this application or to invoke the jurisdiction of this Court under Art. 226 of the Constitution. Mr. Kar has placed reliance on the case of — 'Veerappa Pillai v. Raman & Raman Ltd.', AIR 1952 SC 192 (A) and a decision of a Bench of this Court in — 'Director of Consumer Goods v. Roy Brothers', Appeal No. 101 of 1952 D/- 19-12-1952 (B).

In the case of — 'Director of Consumer Goods v. Roy Brothers', (B) Lahiri and Guha Roy JJ. held that the firm of Roy Brothers who carried on the business of manufacture of an adhesive substance known as P. B. Clay and required a certain quantity of cement for such business could not claim a permit for a monthly quota of cement as a matter of right, and, in that view, of the matter came to the conclusion that no application under Art. 226 was maintainable at the instance of the firm of Roy Brothers who moved this Court for the issue of a Writ in the nature of Mandamus. The learned Judges relied on the case of — 'State of Orissa v.

Madan Gopal Rungta', AIR 1952 S C 12 (C) in which it has been held that the existence of a right is the foundation of the exercise of the jurisdiction of the Court under Art. 226 of the Constitution. The learned Judges also relied on — 'Veerappa Pillai's case (A)' which lays down that

"the issue or refusal of permits under the Motor Vehicles Act is solely within the discretion of the Transport Authorities and it is not a matter of right. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions."

Now Ss. 42, 48 and 60 of the M. V. Act correspond substantially to the Notifications dated 1-7-1943 and dated 6-3-1948 printed in Appendices "A" and "H" (i) and (ii) of the Red Book. The reasonings of Lahiri J. should therefore apply to the case before me, though no doubt there are slight differences between the facts in that case and the case before me.

(5) In view of the aforesaid decisions, I have no other alternative but to hold that the petitioners in the case before me have no legal right which can form the foundation of an application under Art. 226 of the Constitution and hence this application must fail on this ground alone.

(6) Mr. Santosh Kumar Basu also contended that the orders of the respondents refusing the licences asked for, being based on extraneous or irrelevant considerations this Court has power to interfere with and cancel such orders and to direct the respondents to deal with the applications of the petitioners for licences according to law. Mr. Basu has argued that if the procedure prescribed for granting licences is not complied with or there is any breach of any condition of licence or an applicant for licence is guilty of any acts or conduct in relation to the licences or in relation to the carrying on of the import business, which make him unfit to be the holder of a licence, or in other words is guilty of acts and conduct as are envisaged in paragraph 3 of Chapter VIII (page 51) of the Handbook of Rules and Procedure relating to import Trade Control published by the Ministry of Commerce and Industry, Government of India in 1952 (Small Red Book), then refusal or cancellation of licence on any such ground may be held to be justified. But as the respondents have not refused licence on any such ground but on the ground that the firm of the petitioners is an evacuee property and that it is a defunct firm, the respondents have taken into consideration extraneous and irrelevant matters and have thus exceeded their jurisdiction and have not acted within the four corners of the Statute by which their rights, powers and duties are defined.

It appears to me that this contention of Mr. Basu is not without substance. Some of the Rules and procedure as appearing in the Handbooks published from time to time by the Government of India have statutory force but some are merely departmental instructions issued by the Ministry concerned with the regulation and control of Import trade. It is clear that some of the rules and procedure have been brought into existence in exercise of the power contained in S. 3 of the Imports and Exports (Control) Act, 1947. Section 3 confers power on Central Government to make Orders containing provisions for prohibiting, restricting or otherwise controlling the various matters or things mentioned in sub-ss. (a), (b) & (c) of that Section. The various Appendices in the Small Red Book of 1952 printed at pages 56-112, 113-139, 140-141- 158-160 and being Appendices A, B, C & H refer to the Statutory notifications issued under the Defence of India Rules and under Section 3 of Act 17 of 1947 and S. 4A of Act 18 of 1949. The Public Notices issued from time to time and published in the official gazette do not however appear to have any statutory force but they are merely departmental instructions issued for the guidance of the licensing authorities and the public and as indicating the policy and scheme of the Government relating to Import Trade Control. The notifications referred to in Appendix H(i) and Appendix H(ii) of the Small Red Book which have undoubtedly statutory force show that the powers and rights of the licensing authorities with regard to the matters of granting, refusing and cancelling of licences, are defined in these notifications. The Notification No. 2 ITC/48 of the Ministry of Commerce dated 6-3-1948 (Appendix H (i) pages 158-159 Small Red Book) sets out the circumstances and conditions under which a licence may be refused. It does not appear that the notification provides for refusal of a licence on the ground that an applicant for licence has been declared an Evacuee.

The sole ground on which the applications of the petitioners have been refused, appears to be that the branch firms of the petitioners at Kanpur and other places outside West Bengal have been declared to be Evacuee property and as such the firm which carries on business in West Bengal must also be deemed to be an Evacuee property and as having become defunct. This is a ground of refusal which is not contemplated by the Notification No. 2 I.T.C./48 dated 6-3-1948. If an applicant can be refused licence because he is an evacuee, an Englishman or any foreigner who is not a citizen of India can be refused license because of their foreign nationality. But such a thing was never contemplated by the relevant statutes or Notifications. In my view therefore the refusal must be held to be bad. See — 'Basanti Rice Mill v. C. S. Maitra', AIR 1952 Cal 206 (D).

It has been held that

"if the tribunal has exercised discretion bona fide not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally the Courts cannot interfere; they are not a Court of appeal from the tribunal but they have power to prevent the international usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law & also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion etc....over such tribunals."

Per L. J. Farwell, in — 'Rex v. Board of Education', (1910) 2 K. B. 165 at p. 179 (E). See also — 'Sharpe v. Wakefield', (1891) A C 173 at pp. 179, 184 (F); — 'Reg v. Cotham', (1898) 1 Q B 802 at p. 807 (G); — 'Reg v. St. Pancras Vestry', (1890) 24 Q B D 371 at p. 375 (H) and — 'Sadler v. Sheffield Corporation', (1924) 1 Ch 483 at pp. 504-505 (I). Mr. Kar referred to three decisions of the Supreme Court reported in — 'AIR 1952 SC 192 (A)'; — 'Parry & Co. Ltd. v. Commercial Employees Association Madras', AIR 1952 SC 179 (J) and — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi', AIR 1952 SC 319 (K) and contended that the case before me is one in which there has been at the most a wrong view of law taken by the respondents with regard to the construction of the scope and implications of the Administration of Evacuee Property Act, but it is not a case of excess or want of jurisdiction and consequently the principles enunciated by the Supreme Court in the three cases apply to this case and this Court therefore cannot convert itself into a court of appeal and substitute its own discretion in place of the discretion exercised by the respondents even if such discretion has been wrongly exercised by the respondents.

It appears to me however that the present case is, a case of excess of jurisdiction, but as I am bound to hold in view of the decision of this

Court in — 'Appeal No. 101 of 1952 in O. S. Matter No. 208 of 1951 (Cal) (B)' that the petitioners have no legal right, I am unable to give any relief to the petitioners in this case. It may be noted however that the Madras High Court in the case of — 'C. S. S. Motor Service v. State of Madras', AIR 1953 Mad 279 at p. 295,296 (L) has pointed out that the case of — 'Veerappa Pillai (A)' upon which reliance is placed by this Court in — 'Roy Brother's case (B)' was a pre-constitution case and the observations made by the Supreme Court must be limited to cases under M. V. Act arising before the Constitution.

(7) Mr. Santosh Kumar Basu placed reliance on — 'Hooson Kasam Dada (India) Ltd. v. Custodian of Evacuee Property, Madras', AIR 1951 Mad 876 (1) (M) to show that the opinion formed by the respondents that the Calcutta firm of the petitioners is an Evacuee property, is wrong, and consequently the ground or reason put forward for refusing the licences is not a valid or substantial one. It is not necessary, however, for the purpose of this case to decide the question whether the opinion of the respondents is erroneous or not. Even assuming it to be the correct view of the scope of the Administration of Evacuee Property Act, the act of the respondents in rejecting the applications for licences on such ground must be held to be one which is outside the four corners of the Notification No. 2 I.T.C./48 dated 6-3-1948 which governs the matter of refusal of licences.

(8) It was contended by Mr. Basu that the rules and procedure governing the grant of licences show that in exercising the powers and functions of granting or refusing licences the respondents act judicially or quasi-judicially and as the orders of refusal have been passed without giving an opportunity to the petitioners to put forward their case, there has been violation of the principles of natural justice and so the orders of refusal are bad. Reference is made to various provisions in the Red Book to show that the application for license is treated as a claim, evidence has to be produced in support of the claim, the licensing authorities have to consider such evidences, they have to decide whether affidavits can be accepted in any particular case, they have to decide whether there has been contravention of any rule or regulation in any particular case, and these are said to be matters which indicate that a judicial approach is necessary.

It appears to me that in the matter of granting or refusing licences the respondents discharge only administrative functions. There is nothing in the Statutes governing the matter which indicate that there is a duty cast upon the respondents either expressly or impliedly, to act judicially or quasi-judicially. In refusing or cancelling a licence the respondents are taking merely executive action to deny or withdraw a privilege because they believe that the applicants are unfit to hold or retain a licence. See —Nakkuda Ali v. M. F. De. S. Jayaratne', 54 Cal W N 883 at 889-890 (PC) (N).

(9) In the case of — 'Shell Co. of Australia v. Federal Commissioner of Taxation', (1931) A C 275 (O) referred to by Mr. Kar, Viscount Dunedin in attempting to determine the question "what is exercise of judicial power" observed as follows:

> "The authorities are clear to show that there are many tribunals with many of the trappings of a Court which nevertheless, are not courts in the strict sense of exercising judicial power." (page 296).

Later on at page 297 the Judicial Committee enumerated some negative propositions to show that even exercise of certain specific powers which are ordinarily exercised by a Court does not by itself constitute an exercise of judicial power. The propositions set out are as follows:

> "(1) A tribunal is not necessarily a Court in this strict sense because it gives a final decision (2) Nor because it hears witnesses on oath (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affects the rights of subjects (5) Nor because there is an appeal to a Court (6) Nor because it is a body to which a matter is referred by another body. See — 'Rex v. Electricity Commissioners', (1924) 1 K. B. 171 (P)."

These observations were made in deciding the question whether a Board of Review set up under the Commonwealth Income Tax legislation was a court exercising judicial powers in the strict sense. Although a quasi-judicial body is not bound to act in accordance with strict rules of judicial procedure but can act on principles of administrative policy or convenience, there must be an express or implied duty imposed by Statute to act judicially or quasi-judicially. There is, as I have pointed out, no such statutory obligation upon the respondents. The provisions relating to production of evidence etc. referred to by Mr. Basu in the Red Book have no statutory force but they are merely departmental instructions, issued in order to enable the licensing authorities to satisfy themselves as to the fitness of the applicants to get the licenses asked for.

(10) It is not necessary to say anything more on this point except that there was no duty cast upon the respondents to give any hearing to the petitioners before refusing the applications for licence and so there has been no violation of the principles of natural justice in the present case.

(11) Mr. Kar has submitted that the petitioner No. 2 has no right or authority to maintain this application under Art. 226 of the Constitution either for self or on behalf of the petitioner No. 1. There is dispute as to the status of the petitioner No. 2 in the firm Haji Sattar Pir Mohammed. The petitioner No. 2 claims to be a working partner. The decision of this question depends on the real intention and conduct of the two petitioners in relation to the firm and without further materials and evidence the question cannot be satisfactorily determined in this application. The petitioner No. 2 has also placed reliance on a Power of Attorney executed by the petitioner No. 1 in his favour. Mr. Kar has submitted that the Power of Attorney is not wide enough to cover an application under Art. 226 of the Constitution. As it is not necessary for the disposal of this case to decide this question as to the maintainability of this application I express no opinion on this point.

(12) In the result this petition fails. The Rule is discharged. I make no order as to costs.

B/R.G.D. Petition dismissed.

A. I. R. 1953 CAL 594 (Vol. 40, C. N. 225)

CHUNDER J.

Panchu Gopal Ghose, Complainant-Petitioner v. Jogen Naskar, Accused-Opposite Party.

Criminal Revn. Case No. 134 of 1953, D/- 5-5-1953.

Criminal P. C. (1898), S. 250(1) — "Call upon him to show cause."

Section 250(1) clearly lays down that the Magistrate is to call upon the complainant forthwith and not that the complainant cannot have time to show cause and must show cause forthwith. The complainant may ask for time and the

question of granting time must be decided on its merits and if time is necessary time is to be granted. (Para 1)

Anno: Cr. P. C., S. 250 N. 10.

C. C. Gangully and Amaresh Ch. Roy, for Petitioner; Rabindra Nath Mitra, for Opposite Party.

ORDER: The facts in this case as far as necessary for our present purpose can be summarised within a very short compass. The petitioner brought a criminal case against the opposite party. The learned Magistrate held that the case was frivolous and vexatious. He does not exactly say false. He called upon the petitioner to show cause why he should not be ordered to pay compensation under S. 250, Criminal P. C. The complainant it appears was absent and he filed an application wanting time on two grounds, namely, that as the judgment was a long one covering several pages he must have a copy to find out on what ground his case has been held to be frivolous and vexatious and what material there was in the judgment to give rise to an inference, not explicitly drawn, that the case was false. The second reason was that as he was ill he could not do all this immediately.

The learned Magistrate has nowhere said that either of the two reasons was not acceptable or was not a good reason. All that the learned Magistrate says is that it was incumbent upon the complainant to show cause forthwith. Such is not the law. Section 250 clearly lays down that the Magistrate is to call upon the complainant forthwith and not that the complainant cannot have time to show cause and must show cause forthwith. The Magistrate has not given time to the complainant to show cause and held that he must do so forthwith and as this had not been done he passed judgment. When he has forthwith called upon the complainant the complainant may ask for time and the question of granting time must be decided on its merits and if time is necessary time is to be granted. The learned Magistrate rejected the prayer for time on an erroneous view of the law.

(2) The order must therefore be set aside. This matter will go back to the trial Court and the petitioner will show cause within a month of notification to him of arrival of the records in that Court and then the Court will decide on the cause shown according to law. The matter will be heard by a Magistrate different from the Magistrate against whose order the present petition has been filed as he has already expressed his opinion in the matter.

(3) The Rule is thus disposed of.

B/G.M.J. Case remanded.

A. I. R. 1953 CAL 595 (Vol. 40, C. N. 226)

CHAKRAVARTTI C. J. AND SINHA J.

Birendra Nath Ray Sarkar and another Petitioners v. Union of India and another, Opposite Party.

Civil Rule No. 2940 of 1951, D/-12-1-1953.

West Bengal Land (Requisition and Acquisition) Act (2 of 1948), S. 8(2) — Time for making a reference — (Land Acquisition Act (1894) S. 18(2).).

Only so much of Land Acquisition Act, 1894 as bears upon application for reference, the making of a reference and the consideration of it can be held to be incorporated by Sub-s. (2) by the Bengal Act even on the assumption that the legislature intended by its language, to cover not only a reference as made but also the making of it — Application for reference by person not before the Collector and not represented when award was made — Sub-s. (2)(a) of S. 18, Land Acquisition Act does not regulate period of time for making application — First alternative of sub-s. (2)(b) of that section also does not apply because under the Bengal Act no question of notice by Collector after making award arises as the Act does not require such a notice — Case is governed by the second alternative in sub-s. (2)(b) as the award under the Bengal Act is made, as in cases under Land Acquisition Act, by the Collector. (Paras 5, 6)

Rajendra Bhusan Bakshi with Satya Priya Ghose, for Petitioners; Hemendra Kumar Das and Smriti Kumar Ray Choudhury, (for No. 2) Bhabesh Narayan Bose and S. K. Guha, (for No. 1) for Opposite Party.

CHAKRAVARTTI C. J.: This Rule raises an interesting question under S. 8 (2) of the West Bengal Land (Requisition and Acquisition) Act, 1948 regarding limitation for applications for a reference to this Court that may be made under the Act.

(2) The facts are simple and are as follows. It appears that on 6-10-1949, a notification, numbered 8214/L. A., (P. W.) dated 23-9-1949, was published under S. 4 of the Act to the effect that the Provincial Government had decided to acquire a particular area of land belonging to the petitioners. The area concerned, we are informed, is 108.07 acres of which 82.52 acres are in the occupation of tenants, while the rest, namely 25.55 acres are in the khas possession of the petitioners. On the publication of that Notification, the petitioners lodged a claim, presumably under S. 5 (2) of Act, and asked for an award at the rate of Rs. 200/- per cottah. So far as the tenanted lands are concerned, they asked for a total amount of Rs. 9,86,000/- of which according to them, Rs. 6,16,250/- would have to be their own allotment, while Rs. 3,69,750/- would go to the tenants as their share of the compensation. With regard to the khas lands the claim was for an amount of Rs. 3,02,000/- which there would be nobody to share, inasmuch as they were lands in khas possession. After the above claim had been lodged, the Land Acquisition Collector made an award on 5-2-1951, by which he awarded on account of all the lands acquired a total amount of only Rs. 17,379/-. The order of the Collector mentions three other sums as component parts of the said sum of Rs. 17,379/- but what those sums individually stand for, could not be explained to us by either of the parties.

(3) A notice of the award was served on the petitioners on 6-2-1951, presumably, under some rule or practice, but it was not till 30-7-1951, that they made an application for a reference to the Court under S. 8 (1) (a) of the Act. That application was thrown out by the Collector on 21-8-1951 on the ground that it was barred by limitation. The Collector referred to S. 8 (2) of the Act under which the provisions of the Land Acquisition Act apply mutatis mutandis in respect of any reference made to the Court under sub-s. (1). The Collector took the view that since the petitioners had not made their application within six weeks from the date on which the notice of the award had been served upon them, their

application was time barred, although it was within six months from the date of the award. The present Rule is directed against that order.

(4) On behalf of the petitioners it was contended by Mr. Bakshi that, in fact, there was no period of limitation at all for applications for a reference to the Court to be made under the Act. He pointed out that all that sub-s. (2) of S. 8 provided was that the provisions of the Land Acquisition Act would apply mutatis mutandis in respect of any reference made to the Court under sub-s. (1). The language being 'any reference made to the Court', it was contended that what this section incorporated by reference were only those provisions of the Land Acquisition Act which related to the merits of the questions regarding which a reference might have been made, but the process of making the reference itself, in other words, the making of the reference, was not covered by the language of the sub-section. I am bound to say that if one takes the language of S. 8 (2) literally, the conclusion contended for by Mr. Bakshi must follow. It may, however, be that what one finds here is only one of the examples of unprecise draftsmanship with which we have now become familiar and it may have to be considered in a proper case whether by the language used in S. 8 (2) the Legislature had not really intended to cover not merely a reference as made, but also the making of the reference itself. In view, however, of the special facts of the present case, it is not necessary to decide the points and we may proceed on the footing that even the making of a reference is covered by the sub-section.

(5) The language of the sub-section has already been quoted. Even assuming that it bears the extended meaning to which I have referred, only so much of the Land Acquisition Act can be held to have been imported under that language as bears upon the application for a reference, the making of a reference and the consideration of a reference. The language of the sub-section cannot entitle one to go back further along the Land Acquisition Act and import any other section which has no bearing upon or connection with a reference to the Court. Mr. Das, who appears on behalf of the State, pointed out that the sub-section made the relevant provisions of the Land Acquisition Act applicable 'mutatis mutandis'. So it does, but the question is not whether the relevant provisions of the Act apply 'mutatis mutandis' or 'so far as they may be applicable'. But the question is what provisions of the Land Acquisition Act are at all imported and what provisions apply, though it may be mutatis mutandis. The provision relating to the making of a reference is to be found in S. 18 of the Land Acquisition Act and the time for making an application is dealt with in Cls. (a) and (b) of sub-s. (2) of the section. Those clauses read as follows:

> "Provided that every such application shall be made, (a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award (b) in other cases, within six weeks of the receipt of the notice from the Collector under S. 12, sub-s. (2) or within six months from the date of the Collector's award, whichever period shall first expire."

(6) It is not disputed that the petitioners who applied for a reference to the Court, were not before the Collector when he made his award, nor were they represented. Clause (a) of sub-s. 18 (2) is, therefore out of the way. Proceeding next to cl. (b) one finds that it contains two alternatives, six weeks from the receipt of the notice under S. 12 (2) that is to say, that section of the Land Acquisition Act and six months from the date of the Collector's award. The second alternative presents no difficulty. As under the Land Acquisition Act, so under the West Bengal Land (Requisition and Acquisition) Act, 1948, it is the Collector who makes the award and, therefore, there is a Collector's award from which time may be computed. But so far as the first alternative is concerned, in order that it may apply, there must be a notice from the Collector under S. 12 (2) of the Land Acquisition Act. The West Bengal Land (Requisition and Acquisition) Act, 1948, does not provide for any notice to be given in respect of awards made under that Act under S. 12 of the Land Acquisition Act, nor is there, and there could not be, any provision in the Land Acquisition Act itself for issuing any notice of an award given in respect of acquisitions made under the subsequent and the special Act. It therefore follows that although under S. 8 (2) the provisions of the Land Acquisition Act may apply 'mutatis mutandis' in respect of applications for references or the making of references or the consideration of references under the special Act, the first alternative in S. 18 (2) (b) of the Land Acquisition Act cannot possibly be fitted into the scheme of the Statute. In order that limitation may be computed against the applicant for a reference under the first alternative contained in S. 18 (2) (b), it is necessary that there should be a notice under S. 12 (2) of the Land Acquisition Act. But that section is not attracted by S. 8 (2) of the special Act, because it deals only with giving notice of an award and has nothing to do with a reference, nor does the reference to S. 12 (2) in S. 18 (2) (b) make the former section itself applicable. Since in the case of awards made under the special Act there can be no question of any notice under S. 12 (2) of the Land Acquisition Act and in fact no notice under that Act is served, it is clear that the first alternative contained in S. 18 (2) (b) does not and cannot apply to applications for a reference under the West Bengal Land (Requisition and Acquisition) Act. So far as the first alternative contained in section 18 (2) (b) is concerned, the provision implied in section 8 (2) of the special Act that it will apply to references made thereunder 'mutatis mutandis' is therefore meaningless. The only provision which applies in such a case is the second alternative under S. 18 (2) (b) and that alternative, it will be recalled, is six months from the date of the award.

(7) It is not disputed that the petitioner's application in the present case was within six months from the date of the award. It follows that their application was within time and the Land Acquisition Collector was in error in throwing it out as time barred.

(8) In the result, the Rule is made absolute, the order passed by the Land Acquisition Collector is set aside and he is directed to entertain the application filed by the petitioners and to dispose of it in accordance with law. The petitioners are entitled to their costs of this Rule — the hearing fee being assessed at three gold mohurs.

(9) Let the affidavit in reply filed in Court to-day be kept on the record.

(10) SINHA J.: I agree.

B/M.K.S. Rule made absolute.

A.I.R. 1953 CAL 597 (Vol. 40, C. N. 227)

R. P. MOOKERJEE AND RENUPADA MOOKERJEE JJ.

Bhutnath Das and others, Appellants v. Satish Chandra Guin and others, Respondents.

A. F. O. D. No. 179 of 1950 (Probate), D/- 4-8-1952.

Succession Act (1925), S. 62 — Non-production of will — Presumption.

Obiter: On the mere non-production or disappearance of a will after the death of the testator, no inflexible presumption can arise that the will had been revoked by the testator. Each case has to be considered on the merits and circumstances of that particular case. (Para 13)

Anno: Succession Act, S. 62 N. 1.

Panchanan Chaudhuri and Nirmal Chandra Chaudhuri, for Appellants; Rabindra Nath Bhattacharjee and Benoyendra Deb Rai Mahasai, for Respondents.

CASES CITED:

(A) ('15) AIR 1915 PC 111: 19 Cal WN 929 (PC)

(B) ('52) A F O D No 269 of 1949, D/- 21-1-1952 (Cal)

R. P. MOOKERJEE J.: One Sasibala Dasi died in a hospital in Calcutta on 21-11-1943. It is admitted fact that she had executed a will on 22-1-1930, and had the same registered two days later. Sasibala at the time of her death left a brother Bonowarilal and the petitioners Satish Chandra and others who are her sisters' sons; the petitioner Santosh Bala was another sister of hers.

(2) A little over three years after the death of Sasibala an application for the issue of letters of administration was filed by Satish Chandra and others before the court of the Munsif at Katwa. The proceedings were transferred to the court of the District Judge. The petitioners came to court with the story that the original will which was with Sasibala was not found after her death. A certified copy obtained from the registration office was filed along with the petition. Sasibala's brother Bonwari died in February-March, 1945, leaving five sons viz., Bhutnath, Ramanath, Dinonath, Saktipada and Muktipada.

(3) The petition which had been filed originally was a defective one, as in the body of that petition, there was no averment that the will had been properly executed and attested. This was remedied by a subsequent petition for amendment filed on 5-7-1950, just before the decision by the learned District Judge.

(4) Two sets of objections were filed, — one by the three sons of Bonwari and the other by the youngest minor son. The defence taken was that the will had not been properly executed and attested, and secondly, the will having been admittedly with Sasibala and not having been found at the time of her death, or after her death, it should be presumed that the alleged will had been revoked by Sasibala. It was further alleged in the petition of objection that the properties in question did not belong to Sasibala, but were owned by her brother Bonwari. We are not concerned, however, in the present proceedings with the question of title which had been raised. We are concerned only with the question whether Sasibala had left a will, and whether the certified copy of the will produced is the one which was the last will and testament left by her.

(5) During the trial, however, both the parties shifted their grounds to a certain extent, and at least on one material point. The propounders attempted to adduce direct evidence for proving that the original will had been shown to other persons by Bonwari after the death of Sasi. On the other hand, the objectors adduced evidence to prove that Sasibala had shortly before her death destroyed the original will by burning it.

(6) The learned District Judge disbelieved the evidence adduced by both the parties on the two points above mentioned, either about the production of the will after the death of Sasi Bala, or of its destruction before her death. The learned Judge proceeded to consider whether under such circumstances, the inability of the propounders to produce the original will would raise a presumption that the will had been revoked by the testatrix or not. The learned Judge came to the conclusion that the will had not been revoked, and accordingly letters of administration were issued in favour of the petitioners.

(7) The present appeal is on behalf of the objectors. It is contended that the learned Judge was wrong in disbelieving the evidence as adduced by the objectors about the actual destruction of the original will by Sasibala. Secondly, and in the alternative, it is contended that even if the evidence so adduced be disbelieved, the learned Judge was not correct in stating the legal principles or the circumstances under which a will not being proved to have been in existence after the death of the testatrix could be regarded as not having been revoked by her.

(8) Sasibala came from a very poor family, and the entire property left by her consisted of about three bighas and five cottas of culturable land in her village. It is an admitted case that she used to serve as a maidservant in Calcutta. She had no issue of her own, and the only near relations were her brother, sister and sister's sons. As stated already, the will in question was executed and registered in January 1930. The learned Judge had found on the evidence that due execution and attestation had been proved. This has not been questioned before us and we shall proceed on the footing that there had been a valid will by Sasibala executed in January 1930. If that will had not been revoked by her, the order passed by the learned Judge granting letters of administration must stand.

(9) For the purpose of proving that the will had been revoked by Sasibala, the objectors examined Jitendra Nath Bakshi, zemindar of Mouzah Bijnagra, a village about two miles away from the village of Khajurdihi, the village in which Sasibala used to live.

(His Lordship considered the evidence of the witness and proceeded:)

(10-12) Once we accept Jitendra as an witness of truth, there is no escape from the conclusion that the will which had been executed by Sasibala was revoked by her by destroying the same. The petitioners, therefore, are not entitled to get letters of administration with a copy of the will annexed.

(13) Under these circumstances, it is not necessary for us to discuss the question of law which had been raised before the lower court, or canvassed before us as to whether the non-production of the original will after the death of the testator should always raise the pre-

sumption that the will had been revoked by the testator. We may state at once, however, that there is no inflexible presumption which arises on the mere non-production of the will, or of the disappearance of a will after the death of the testator. The question has now been settled so far as the Indian courts are concerned by the decision of the Judicial Committee in — 'Padman v. Hanwanta', AIR 1915 PC 111 (A). Each case has to be considered on the merits and circumstances of the particular case. I have had occasion to consider this question in — 'Guru Prosad v. Lakshmi Priya Devi', A. F. O. D. No. 269 of 1949, D/- 21-1-1952 (Cal) (B), to which I was a party.

(14) This appeal is accordingly allowed. The order passed by the learned District Judge is set aside and the application for letters of administration dismissed. In consideration of the smallness of the property, the parties will bear their respective costs personally both in this court as also in the lower court.

(15) RENUPADA MUKHEREE J.: I agree.

C/V.R.B. Appeal allowed.

A. I. R. 1953 CAL 598 (Vol. 40, C. N. 228)

G. N. DAS AND DEBABRATA MOOKERJEE JJ.

S. N. Talapatra, Petitioner v. Bengal Bonded Ware House Association, Opposite Party.

Civil Revn. Case No. 1403 of 1951, D/- 23-3-1953.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 13(2) — Civil P. C. (1908), O. 21, R. 100 — Decree against tenant — Dispossession of sub-tenant — Application of restoration — Maintainability — (Civil P. C. (1908), S. 144, O. 21, R. 100).

A, a landlord obtained a decree for ejectment against his tenant B on the ground of default in payment of rent after service of notice to quit. In execution of the decree A was resisted by C, a sub-tenant from B, in taking possession which was recovered from C with police help. C applied under O. 21, R. 100 and S. 144, Civil P. C. and S. 13(2) of the Rent Control Act, 1950 for restoration of possession.

Held that (1) in order that the landlord may recover possession from the sub-tenant he must show that he has a right to treat the sub-tenancy at an end and to recover possession from the sub-tenant on the footing that the sub-tenancy no longer exists. AIR 1922 Bom 449(2) and AIR 1945 Cal 283, Distinguished.

(2) In view of the provisions of S. 13(2) of the Rent Control Act, 1950, as the ejectment decree against B did not proceed on the ground mentioned in S. 12(1)(h) of the Rent Control Act, 1950, C who was a sub-tenant under the tenant of the first degree, would be deemed to be a tenant under the landlord A.

(3) A therefore, had no right, in spite of the decree obtained by him against his own tenant B, to treat the petitioner C as trespasser.

(4) The decree obtained by landlord A against the tenant B was not directed against the petitioner C nor was it enforceable against him; as such C could not be regarded as judgment-debtor vis-a-vis the decree-holder A and was accordingly entitled to an order for restoration of possession under O. 21, R. 100, Civil P. C. (Para 5)

Anno: Civil P. C., O. 21 R. 100 N. 2.

N. N. Dutta Roy, for Petitioner; M. N. Ghosh and Anil Kumar Sett, for Opposite Party.

CASES CITED:

(A) ('22) AIR 1922 Bom 449(2): 46 Bom 887
(B) ('45) AIR 1945 Cal 283: 49 Cal WN 133

G. N. DAS J.: This Rule was obtained against an order of Mr. S. K. Roy learned Judge of the Presidency Court of Small Causes, Sixth Bench, rejecting an application filed by the petitioner purporting to be under O. 21, R. 100, S. 144, Civil P. C. and S. 13(2), Rent Control Act, 1950. The admitted facts are that the opposite party 2 was a tenant under the opposite party 1. The petitioner is a sub-tenant under opposite party 2 in respect of a portion of the premises held as tenant by the opposite party 2 under opposite party 1.

(2) On 10-1-1951 the opposite party 1 obtained a decree in ejectment against opposite party 2 on the ground of default in payment of rent after service of a notice to quit. In execution of that decree the opposite party 1 wanted to eject the petitioner from the disputed property but was resisted by the petitioner in taking possession. On the next date the opposite party 1 dispossessed the petitioner with police help. Thereafter the present application was filed by the petitioner for restoration of possession under O. 21, R. 100, S. 144, Civil P. C. and S. 13(2), Rent Control Act, 1950, before the learned Judge of the sixth Bench. An objection was raised by the opposite party 1 that the application was not maintainable. The learned Judge without deciding the merits of the application was of the opinion that the application as laid was not maintainable and dismissed the same. It is against this order that the petitioner has moved this Court in revision.

(3) Mr. Dutta Roy, learned Advocate who has appeared in support of the petition, has submitted that the application which was filed by the petitioner in the Court below was really an application under O. 21, R. 100, Civil P.C. Mr. Dutta Roy has contended that he was not the judgment-debtor and was not in possession on account of the judgment-debtor and as such he was entitled to be restored to possession under the provisions of O. 21, R. 100.

(4) Mr. Ghosh, learned Advocate for the opposite party 1, has first submitted that this Court should not interfere in revision as the petitioner has other remedies. In this case the learned Judge of the Court of Small Causes dismissed the application on the preliminary ground. The question is whether on the face of the application the petitioner has a right to apply for restoration of possession. It seems to me that in the facts of this case there is no reason why we should not exercise our powers in revision and give the petitioner the remedy to which he is entitled under the statute. The learned Judge, in my opinion, has clearly misconceived the scope of the application under O. 21, R. 100, Civil P. C. and the effect of S. 13(2), Rent Control Act, 1950.

(5) Mr. Ghosh has further contended that in effect the decree obtained by opposite party 1 against opposite party 2 was executable as

against the petitioner and as such the petitioner has no right to apply under O. 21, R. 100. He has referred us to a decision of the Bombay High Court in the case of — 'Jairam Jadowji v. Nowroji Jamshedji', AIR 1922 Bom 449(2) (A), as also to the case of — 'Sailendra Nath v. Bijan Lal', AIR 1945 Cal 283 (B). These cases are clearly distinguishable. In these cases the decree for ejectment against the tenant was executable as against the sub-tenant, the decree having proceeded on a ground which determined the sub-tenancy as well.

In order that the landlord can recover possession from the sub-tenant he must show that he has a right to treat the sub-tenancy at an end and to recover possession from the sub-tenant on the footing that the sub-tenancy no longer exists. In view of the provisions of S. 13(2), Rent Control Act, 1950, as the ejectment decree did not proceed on the ground mentioned in S. 12(1)(h), Rent Control Act, 1950, the petitioner, who was a sub-tenant under the tenant of the first decree, would be deemed to be a tenant under the landlord, that is, opposite party 1, on the same terms. We are not concerned with the question as to the terms of the tenancy. Under S. 13, sub-s. (2), Rent Control Act, 1950, the petitioner must be deemed to be a direct tenant under opposite party 1. In other words, the opposite party 1 had no right in spite of the decree obtained by him against his own tenant i.e. the opposite party 2, to treat the petitioner, that is the sub-tenant as trespasser. The decree for possession obtained by the opposite party 1 was, therefore, not executable against the petitioner. It may be noted that the word 'judgment-debtor' is defined in S. 2(10), Civil P. C. to mean any person against whom a decree has been passed or an order capable of execution has been made. In this case the decree obtained by the opposite party 1 against the opposite party 2 was not directed against the petitioner nor it was enforceable against the petitioner; as such the petitioner cannot be regarded as judgment-debtor vis-a-vis the opposite party 1. The petitioner is accordingly entitled to an order for restoration of possession under O. 21, R. 100, Civil P. C.

(6) The question then is whether we should direct this matter to be remitted to the Court below or make an order in this Court. In the Court below the only objection raised to the application under O. 21, R. 100 was that the application was not maintainable. It was not suggested that the tenancy created under S. 13(2), Rent Control Act, 1950, had come to an end on any account whatsoever. It was not disputed in the Court below that the petitioner was a sub-tenant under the opposite party 2 and that the opposite party 2 was a direct tenant of the first degree under the opposite party 1. In these circumstances it is not necessary to remit this case to the Court below, as no other fact need be investigated for the purpose of making an order in terms of the application under O. 21, R. 100.

(7) The result, therefore, is that this Rule must be made absolute. The order of the learned Judge is set aside and the petitioner will be restored to possession, such possession as he had on 22-2-1951 on which date he was turned out of possession. The petitioner is entitled to his costs of this application hearing fee being assessed at two gold mohurs.

(8) The records of this case must be sent down as early as possible.

(9) DEBABRATA MOOKERJEE J.: I agree.

B/D.R.R. Rule made absolute.

A. I. R. 1953 CAL 599 (Vol. 40, C. N. 229)

CHUNDER J.

Pulin Krishna Dutt and another, Accused-Petitioners v. Satyaranjan Bhattacharjee, Complainant-Opposite Party.

Criminal Revn. No. 1198 of 1952, D/- 26-2-1953.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 40 — Prosecution under for taking pugree or selami in 1948 — (Houses and Rents — Calcutta Rent Ordinance (5 of 1946), S. 9) — (Constitution of India, Art. 20).

By virtue of Art. 20, Constitution of India, a person cannot be prosecuted under S. 40 for an act of taking pugree or selami committed in 1948 as the Calcutta Rent Ordinance, 1946, which was in force when the act was committed did not make the act an offence for which a person could be prosecuted but only provided for imposition of penalty. (Para 3)

Quaere: Whether proceedings for enforcing penalty under the Calcutta Rent Ordinance (1946) can now be taken. (Para 2)

Hemanta Krishna Mitra with Anil Kumar Sen, for Petitioners; Nani Coomar Chakravarty, for Opposite Party.

ORDER: This Rule was issued at the instance of landlords who are being prosecuted before a Presidency Magistrate of Calcutta under S. 40, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950.

(2) It raises a point of law which has not yet received decision from any Court to my knowledge. Briefly, the facts are that in July 1948 a tenancy was created by the petitioner in favour of one Satyaranjan Bhattacharjee at the time when the Rent Control Ordinance of 1946 was in force. It is alleged now that the accused-petitioners at that time took a premium or pugree or selami of about Rs. 200/-. It is for act of theirs in 1948 that they are now sought to be prosecuted under the present law. The provision of 1946 Ordinance briefly, and in plain language, was that if any one took a selami like that, he incurred a penalty which might be imposed by the Rent Controller. There was no provision for prosecution for any offence committed by him. Under the present Act of 1950, under S. 40 an offence has been created and prosecution provided for in the Court of a Magistrate. Taking advantage of this new legislation in 1950, an application was filed on 23-7-52 by the tenant for action under S. 40 and the Magistrate began proceedings against the landlord-petitioners. Under S. 8, Bengal General Clauses Act if there was a liability to a penalty, that only was perhaps saved. There is no allegation of any one suing the petitioners before under that Rent Control Ordinance for enforcing the penalty under that Ordinance so that any question of pending proceedings could arise. I do not express any opinion whatsoever as to whether there is any Court in which proceedings under that Ordinance can now be taken at all.

(3) Under Art. 20 of the Constitution of India it is clearly provided that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, so that, since the passing of the Constitution of India if the act charged was not an offence at the time when it was committed, there can be no conviction therefor whatever the subsequent legislation may have done. As I have pointed out this act was not an offence for which any person could be convicted at the time when the act is said to have been committed, namely, July 1948. Therefore the proceedings that had been taken against the two petitioners violate their constitutional rights and therefore such proceedings must be quashed.

(4) The proceedings are accordingly quashed and this Rule is made absolute.

B/G.M.J. Rule made absolute.

A. I. R. 1953 CAL 600 (Vol. 40, C. N. 230)

LAHIRI AND GUHA JJ.

Maulvi Miah (Maulavi and Co.), Defendant-Petitioner v. Sashanko Mohan Guha, Plaintiff-Opposite Party.

Civil Rule No. 2302 of 1952, D/- 3-2-1953.

(a) Houses and Rents — West Bengal Premises Rent Control Act (17 of 1950), S. 14 (4) — Default in making deposit of rent — Effect.

Where a tenant makes default in making the deposit of rent as required by an order passed under S. 14(4), the defence against ejectment would be struck out although in the order such a consequence is not specifically mentioned. The striking out of the defence against ejectment is a necessary and inevitable consequence of default without leaving any scope for discretion on the part of the Court.

(Para 4)

(b) Houses and Rents — West Bengal Premises Rent Control Act (17 of 1950), S. 14(4) — Legality of order under S. 14(4).

A tenant can question the jurisdiction or authority of the court to pass an order under S. 14(4) even after he has deposited rent including arrears in compliance with that order. Civil Revn. No. 1270 of 1952, D/- 9-1-1953 (Cal), Distinguished.

(Para 5)

(c) Houses and Rents — West Bengal Premises Rent Control Act (17 of 1950), S. 14(4) — Type of suits contemplated by S. 14(4).

The type of suits contemplated by sub-s. (4) of S. 14 is the same as contemplated by sub-s. (1) of S. 14 which is clearly limited to suits in which the only ground which disentitles the defendant from the protection of the Act is that he has defaulted in the payment of rent for two months. Hence, where a suit for ejectment is based not only on the ground of default but also on the ground of bona fide requirement for the plaintiff's own use and occupation, an order under S. 14(4) cannot be passed. AIR 1952 Cal 879 (FB), foll.

(Paras 6 and 7)

Bhabesh Chandra Mitter, for Petitioner; Prafulla Kumar Roy, Dwijendra Narayan Ghose and Arunendra Nath Basu, for Opposite Party.

CASES CITED:

(A) ('52) AIR 1952 Cal 879: 57 Cal WN 1 (FB)

(B) ('53) Civil Revn. No. 1270 of 1952, D/- 9-1-1953 (Cal)

(C) ('53) Civil Revn. No. 2226 of 1952, D/- 14-1-1953 (Cal)

(D) ('53) Civil Revn. No. 1436 of 1952, D/- 15-1-1953 (Cal)

GUHA J.: This application under S. 115, C. P. C. by a tenant defendant is directed against an order dated 26-7-52 under S. 14(4), West Bengal Premises Rent Control Act, 1950, in an ejectment suit brought against him by the plaintiff opposite party. In that suit the plaintiff made an application for directing the defendant "to deposit all arrears and current dues month by month as provided in S. 14(4) of the Act." This petition was disposed of by the lower Court after contest by the following order passed on 12-3-52:

"Parties are ready. Heard both sides' lawyers regarding petition under S. 14(4) of the Act. Parties have filed a statement of account. It appears from it that Rs. 88/- is in arrears up to February 1952. Hence ordered that the defendant be directed to deposit Rs. 88/- within 15 days from the date. He is further directed to deposit rent at the rate of Rs. 16-8 per month from month to month to be deposited within 15 days of the month following for which the rent is due. Put up on 31-3-52 for orders."

(2) It is to be noted that the order does not mention what is to happen in case of non-compliance with it. The defendant deposited the arrears of rent of Rs. 88/- in time and also the rents for the months from March 1952 to May 1952, but there was some delay in making the deposit for the month of March 1952 with the result that upon the prayer of the plaintiff the Court passed an order under S. 14(4) on 26-7-52 striking out the defence as against the claim for ejectment after rejecting the defence prayer for condoning the delay.

(3) It is against this order dated 26-7-52 that the present petition is directed.

(4) The first point that has been urged on behalf of the petitioner is that, as pointed out before, there being no penal clause about striking out the defence in case of default in the order dated 12-3-52 the learned Munsif was not justified in striking out the defence regarding ejectment and as a corollary to this argument, it was contended that in the circumstances of this case the Court could and should, have condoned the delay in the deposit of the rent for March in view of S. 148, C. P. C. In this connection our attention was invited to certain observations in the judgment of Chakravartti C. J. in the recent Full Bench decision in the case of — 'T. S. R. Sarma v. Nagendra Bala', AIR 1952 Cal 879 at p. 880 (A). In that Full Bench case, the point now under consideration did not directly fall for decision and not much assistance can be derived from that case in regard to this point. The contention of Mr. Mitter for the petitioner seems to lay inadequate stress on the fact that the plaintiff in his petition dated 12-3-52 had prayed for deposit of rent 'as provided in S. 14(4) of the Act' — a prayer that carried with it the implication that in certain contingencies the defence regarding ejectment was to be struck

out. Though in the order of the Court dated 12-3-52 it is not specifically mentioned that the defence against ejectment was to be struck out in case of default, we are of opinion that such was the necessary consequence of the order. The Court was granting the prayer of the plaintiff in toto without any qualification or reservation as regards the penalty. The penalty in case of default was laid down clearly in the section viz. S. 14(4): it would follow as a necessary and inevitable consequence without leaving any scope for discretion on the part of the Court. Striking out of the defence against ejectment was a mandatory provision of the statute; default would be automatically followed by it, even though the Court had not reproduced in its order the words of the statute and, in view of the imperative words of the statute the Court could not, even if it so desired, show any indulgence to the tenant defendant either by condoning delay in payment or in any other way. The first contention of Mr. Mitter must accordingly fail.

(5) It has next been contended by Mr. Mitter that the present case did not attract the operation of S. 14(4) at all. The validity of his argument will be examined presently. Before that question is gone into, it is necessary to dispose of one argument of Mr. Ray on behalf of the plaintiff opposite party. Mr. Ray has argued that after the defendant had deposited rent including arrears in compliance with the Court's order dated 12-3-52 it is not open to Mr. Mitter to contend, as he has done, that the Court acted illegally in passing that order. In support of his contention Mr. Ray has relied upon a passage in the judgment of Chakravartti C. J. (sitting with Sinha J.) in the unreported case of — 'D. R. Gellatly v. J. R. W. Gannon', Civ. Revn. No. 1270 of 1952, D/- 9-1-1953 (Cal) (B). We do not think that it will be proper to lay undue stress on that passage torn from its context. The facts of that case are very different from those of the present one and in the passage referred to above, his Lordship was referring incidentally to the conduct of the defendant petitioner in that case in not moving this Court earlier against the order under S. 14(4) passed against him by the trial Court. The systematic course of conduct of the defendant in that case especially the proceedings for standardisation of rent initiated by him showed unmistakably that he was a tenant and it was, therefore, held that it was not open to him to turn round and avoid the result of his default he had admittedly committed by setting up the plea that S. 14(4) did not apply to his case at all.

In the present case all that can be charged against the defendant is that he had not come up promptly to this Court against the order dated 12-3-52 but waited till 26-7-52 when his defence against ejectment was finally struck out after he had made some payments in pursuance of the previous order. We are not prepared to hold that in circumstances such as these it is not open to the defendant petitioner to challenge at this stage the jurisdiction or authority of the Court to pass an order under S. 14(4).

(6) This brings us to the question whether Mr. Mitter is right in his contention that the order under S. 14(4) passed on 12-3-52 was not a legal order at all on the ground that this case did not come within the mischief of that provision. The plaint shows that the suit for ejectment was based not only on the ground of default but also on the ground of bona fide requirement for the plaintiff's own use and occupation. In these circumstances relying upon the observations of his Lordship the Chief Justice who delivered the majority judgment in that F. B. Case, Mr. Mitter has contended that as in this case it cannot be said that the landlord could not get a decree for possession but for cl. (i) of the proviso to sub-s. (1) of S. 12, the Court had no authority to pass an order under S. 14(4). Mr. Mitter has also drawn our attention to the case of —'Bhabani Charan Chaudhury v. Nagendra Bala Debi', Civ. Revn. No. 2226 of 1952, D/- 14-1-1953 (Cal) (C), where Chunder J. following the F. B. Case referred to above, has, on facts which seem to be similar to those of the present case, decided that S. 14(4) did not apply. After the F. B. decision the question would seem to admit of no debate so far as this Court is concerned.

On behalf of the plaintiff Mr. Ray has drawn our attention, however, to the case of —'Janab Ujir Ali v. Sasanka Mohan Guha', Civ. Revn. No. 1436 of 1952, D/- 15-1-1953 (Cal) (D), by Chakravartti C. J. and Sinha J. in support of his contention that even when one of the grounds taken in the ejectment suit is the ground of default as contemplated by S. 12(1)(i) of the Act, the suit is within the ambit of S. 14(1) and therefore within the ambit of S. 14(4). Apart from authority, Mr. Ray has advanced an ingenious argument that it is only by construing the Statute in the above sense that justice can be done to both the landlord and the tenant. With all due respect to the observations of His Lordship the Chief Justice in the above unreported case — which, it may be mentioned incidentally, was decided without hearing the learned advocate for the tenant defendant and in which, we understand, a rehearing petition is pending — we are bound to follow the F. B. decision which has laid down in the unequivocal words of His Lordship the Chief Justice that sub-s. (1) of S. 14 is clearly limited to suits in which the 'only' ground which disentitles the defendant from the protection of the Act is that he has defaulted in the payment of rent for two months.

(7) It has been further laid down there that suits in which the protection of the Act may be unavailable to the tenant on any of the other grounds mentioned in cls. (a) to (h) of S. 12(1) or on any of those grounds in addition to the ground of default are not within the ambit of S. 14(1). It has also been laid down in that case that the type of the suit contemplated by sub-s. (4) of S. 14 is the same as contemplated by sub-s. (1) of S. 14, Rent Control Act, 1950. If we may say so with respect, the above propositions are supported by weighty reasons and in any case it is not open to us to reagitate the matter. If this causes hardship or injustice to any party, the remedy lies elsewhere. The above view seems to be in consonance with the plain language of the Statute. We are bound, therefore, to uphold the contention of Mr. Mitter to the effect that the striking out of the defence regarding ejectment on the strength of the order dated 12-3-52 cannot be supported. The rule is made absolute, accordingly, the order of the lower Court dated 26-7-52 striking out the defence as against the claim for ejectment is set aside and the case

is directed to be disposed of according to law in the light of the observations made above.

(8) In view of all the circumstances, there will be no order as regards the costs of this rule. Let the records be sent down as early as possible.

(9) LAHIRI J.: I agree.

B/G.M.J. Rule made absolute.

A. I. R. 1953 **CAL 602 (Vol. 40, C. N. 231)**

J. P. MITTER AND SEN, JJ.

Radha Nath Dhara and others, Accused-Petitioners v. The State.

Criminal Revn. No. 997 of 1952, D/-22-4-1953.

(a) Criminal P. C. (1898), S. 297 — Misdirection — (Evidence Act (1872), S. 1).

Judge, in summing up, warning jury that they should bear in mind that once a witness was found to be deliberately telling an untruth they should as a matter of judicial prudence view the rest of the evidence with suspicion, and adding that if a witness could not be believed on one point the jury might accept so much of his evidence as tallied with other reliable evidence and circumstances and probabilities of the case. — Direction held correct. (Para 6)

Anno: Cr. P. C., S. 297, N. 6, 9, 11; Evidence Act, S. 1, N. 9, 12.

(b) Criminal P. C. (1898), S. 162 — Statement in search list not placed before jury being inadmissible — Search list admitted merely to show that the article was seized — Fact that statement was not pasted held did not prejudice accused. (Para 7)

Anno: Cr. P. C. S. 162, N. 19.

(c) Criminal P. C. (1898), S. 162 — Statement to police.

Conduct of complainant merely pointing out place of occurrence to Investigating Officer does not constitute statement before Investigating Officer — Evidence of such conduct is not inadmissible — But if evidence is led that a witness when pointing out a plot of land to the Investigating Officer, told him that the occurrence had taken place on that land or made any other similar statement, that statement would be inadmissible. (Para 8)

Anno: Cr. P. C. S. 162, N. 3a.

(d) Criminal P. C. (1898), S. 286 — Prosecution need not tender every witness examined in committing court.

There is no law which compels the Public Prosecutor to tender at the sessions trial every witness examined in the committing Court. If the Public Prosecutor is of the opinion that the evidence of a particular witness is false or unnecessary he may withhold such evidence and need not even tender the witness for cross-examination. (Para 10)

Anno: Cr. P. C. S. 286 N. 6

(e) Criminal P. C. (1898), S. 297 — Explaining the law — (Evidence Act (1872), S. 144 illus (g).

Sessions Judge in explaining illus (g) to S. 114 stating to jury that the jury was entitled to presume that the evidence if produced might have contradicted the prosecution case — This was held not an error in explaining in law but merely a case of faulty expression — Judge should have said that the jury might or might not presume that evidence would be unfavourable to the prosecution — Though the judge should have used the correct expression in explaining the law to the jury there was really no misdirection. (Para 11)

Anno: Cr. P. C., S. 297, N. 9, 11; Evid. Act, S. 114 N. 11.

(f) Criminal P. C. (1898), S. 537 — Irregularity.

Public Prosecutor filing petition for prosecution of one of their witnesses for perjury before the end of trial — Judge hearing submission of Public Prosecutor in connection with petition before jury, although he passed order that application be put up after disposal of sessions case — Although Public Prosecutor ought not to have been permitted to move petition before end of sessions trial, the procedure followed, held did not prejudice accused, when the accused against whom the witness had testified was unanimously found not guilty by the jury. (Para 12)

Anno: Cr. P. C., S. 537, N. 6.

(g) Criminal P. C. (1898), S. 288 — Procedure.

If the prosecution wants to use previous testimony to the contrary as substantive evidence it must confront the witness with those parts of it which are to be used for the purpose of contradicting him and then only can the evidence be brought in as substantive evidence under S. 288. Where the prosecution did confront the witnesses with those parts of their lower Court depositions which were to be used for the purpose of contradicting the witnesses, but the only irregularity was that the application for putting in the depositions of the witnesses was not made then and there but it was made on the following day:

Held that the irregularity did not amount to illegality. (Para 13)

Anno: Cr. P. C., S. 288, N. 2, 9.

(h) Criminal P. C. (1898), Ss. 297 and 154 — Misdirection.

Held on facts that the Judge did not use First Information Report as substantive evidence but referred to it as corroborative evidence of immense value — No misdirection. (Para 14)

Anno: Cr. P. C., S. 297, N. 6, 11; S. 154 N. 10.

(i) Criminal P. C. (1898), S. 297 — Explaining law of defence of property — (Penal Code (1860), Ss. 97, 99).

Judge in explaining the law relating to private defence of property referred to S. 97 I.P.C., to the restrictions referred to under S. 99, I. P. C., and he made a note that he had read out these sections and explained them. He did not put down in so many words what exactly he had told the jury in connection with the case. He ought to have put down clearly that if the jury found that the complainant's party had committed criminal trespass into the land of the accused, the accused would have a right of private defence against such criminal trespass. Similarly,

all the limitations to the right of private defence as applicable to the particular case should have also been put down concisely as explained by him, and not disposed of by reference to sections only. In this particular case, however, no serious notice of the failure of the Judge to put down in words the specific explanation that he gave to the jury in relation to the right of private defence held should be taken. (Para 15)

Anno: Cr. P. C., S. 297, N. 9, 10; Penal Code S. 97 N. 1; S. 99 N. 7.

(j) Constitution of India, Art. 14 — Criminal P. C. (1898), S. 269.

The notification under S. 269 for trial by jury being in respect of classes of offence there is no contravention of Art. 14. AIR 1953 Cal 394; AIR 1953 All 123, Relied on. (Para 16)

Anno: Cr. P. C., S. 269, N. 2.

S. S. Mukherjee, with Sukumar Mitra, for Petitioners; J. M. Banarjee, for the State.

CASES CITED:

(A) ('39) AIR 1939 Cal 176: 40 Cri LJ 240
(B) ('43) AIR 1943 Cal 644: 48 Cal WN 356: 45 Cri LJ 258
(C) ('87) 14 Cal 245
(D) ('30) AIR 1930 Cal 134: 34 Cal WN 170: 31 Cri LJ 918
(E) ('45) AIR 1945 PC 42: 46 Cri LJ 394 (PC)
(F) ('51) AIR 1951 SC 441: 52 Cri LJ 1491 (SC)
(G) ('53) AIR 1953 Cal 394: 57 Cal WN 350: 1953 Cri LJ 899
(H) ('53). AIR 1953 All 123: 1953 Cri LJ 356

SEN J.: This revisional application arises from an order of Sri. M. N. Mukherjee, Assistant Sessions Judge, Burdwan, convicting the petitioners, Radha Nath Dhara, Naran Dhara alias Ram Narayan Dhara, Madhusudan Dhara, Siddheswar Mondal & Purna Chandra Das under S. 147, I. P. C. and sentencing each of them to suffer rigorous imprisonment for one year.

(2) The prosecution case briefly was that on the 26-8-1951 at about 6-30 A. M. the complainant Rasomay Mondal, his brothers Kartick Mondal & Madan Mondal & an agricultural labourer Radhu Bauri were transplanting paddy in their land comprising C. S. plot 1062 of Mouza Soknar Beel. According to the complainant he and his brothers had been in continuous possession of the land in question from the time of their father. At about 7 or 7-30 A. M. the five petitioners along with Khoka Pande 'alias' Abanidhar Pande armed with a gun and 7 or 8 Hindusthani 'lathials' came up there. The petitioners challenged Rasomoy Mondal and his brothers and asked them to leave the land. There was an altercation & thereafter the petitioners asked Khoka Pande 'alias' Abanidhar Pande to fire at the complainant and his brothers saying that otherwise they could not be made to leave the land. Thereupon Khoka Pande fired 4 times as the result of which some men of the complainant's party including Kartick Mondal and Madan Mondal were hit with pellets and fell down injured. Radhu Bauri was also hit with pellets and crawled into the Patiban which was close to the disputed land. One Bholanath Misra came up on hearing the row and he was also shot at by Khoka Pandey and was also injured with gun shot wounds. Thereafter other people of the neighbourhood came up and then the petitioners and other men of the accused party ran away.

The complainant Rasomoy Mondal went to Kanksa P. S. at 2 P. M. on the same day and lodged the first information report at the thana. After investigation charge-sheet was submitted against five petitioners and Khoka Pande 'alias' Abanidhar Pande. After the preliminary enquiry these accused were placed on trial before the learned Assistant Sessions Judge and a jury of five. There was a charge under S. 307, I. P. C. for attempt to murder against Khoka Pande 'alias' Abanidhar Pande, a charge under Ss. 307/114, I. P. C. against the 5 petitioners and a charge under S. 148, I. P. C. for rioting being armed with deadly weapons against all the 6 accused.

(3) The accused all pleaded not guilty. One of the accused Ram Narayan Dhara took the plea of 'alibi' saying that he was a teacher and that on 26-8-1951 in the morning the Education Minister had come to Raniganj and that as a school teacher he had attended the function at Ranigunj and was not present at the place of occurrence. Khoka Pande 'alias' Abandhar Pande stated that though he had a shot gun he had deposited the gun on 24-8-1951 two days before the occurrence with a repairer and that he had been falsely implicated out of enmity. The accused Purna Chandra Das stated that he had taken settlement of C. S. plot no. 1062 of Mouza Soknar Beel from the landlord who had auction purchased the jote at a rent sale and that from Pous 1357 B. S. corresponding to December 1950, that is, about 7 months before the occurrence, he was in possession of the land through his labourer Ananda Bhuinya, and that on the day of occurrence Ananda Bhuinya was transplanting paddy on the land and then the complainant's party came up and tried to take forcible possession of the land in question after driving out Ananda Bhuiya. The other accused merely pleaded not guilty and did not take any definite defence.

(4) The jury returned a unanimous verdict of not guilty in respect of Khoka Pande 'alias' Abanidhar Pande in respect of all the charges against him. They found the petitioners not guilty of the charge under Ss. 307/114, I. P. C. but found them all guilty by a majority of 3 to 2 in respect of the charge under S. 147, I. P. C. for rioting. The learned Judge accepted the verdict and sentenced the 5 petitioners as already described.

(5) There was an appeal to the Sessions Judge of Burdwan but the appeal was dismissed.

(6) In this revisional application the first point urged by Mr. S. S. Mukherjee appearing for the petitioners is that the Judge should have warned the jury that if they found that the case was false as to Khoka Pande they should take the evidence as to the other accused with great caution and that as no such warning was given there was a misdirection. It appears however that the learned Judge did give warning in this connection to the jury. He stated that the jury should bear in mind that once a witness was found to be deliberately telling an untruth they should as a matter of judicial prudence view the rest of the evidence with suspicion. He however added that if a witness could not be believed on one point the jury might accept so much of his evidence as tallied with other reliable evidence and circumstances and probabilities of the case. This direction, in our opinion, was quite correct and gave sufficient warning to the jury.

Again, in dealing with the case of Khoka 'alias' Abanidhar Pande the learned Judge referred to the receipt for the gun purporting to have been granted by the repairer. There was a question whether the receipt had been granted on 24-8-1951 or on 29-8-1951, the defence case being that

the receipt had been granted on 24-8-1951 but that the Investigating Officer or some body on behalf of the prosecution had tampered with the receipt and changed the digit 4 into 9 converting 24 into 29. The learned Judge discussed this question and referred to the repairer's register showing the corresponding entry and asked the jury to make up their minds on the point whether or not there was any interpolation in the receipt. In this connection the learned Judge told the jury that if they found that the real date was 24-8-1951, it would follow that there had been interpolation by some body on behalf of the prosecution, and that would rudely shake the prosecution case in its entirety. We consider therefore that sufficient warning was given to the jury as to the mode of procedure if the evidence was found to be false in some respect and we do not consider that there was any misdirection in this respect.

(7) The next point urged by Mr. S. S. Mukherjee is that there was admission of evidence in contravention of S. 162, Cr. P. C. Thus the search list Ex. (1) in respect of a blood-stained vest which was seized from the person of one of the injured men contains a statement that the vest in question was seized as it was stained as a result of injuries received at the time of the occurrence. There is no doubt that this statement contained in the search list Ex. (1) was inadmissible, but the search-list was admitted merely to show that the vest had been seized and it does not appear that at any portion of the charge the learned Judge referred to the contents of the search list. It is true that the inadmissible portion was not pasted out, but the inadmissible statement was not placed before the jury and there was therefore no prejudice.

(8) In this connection, it is also urged that the learned Judge told the jury repeatedly that the complainant Rasomoy Mondal had pointed out the C. S. plot No. 1062 and the place of occurrence to the Investigating Officer and it is urged by Mr. Mukherjee that this also amounted to a statement made before the Investigating Officer and was inadmissible. It is however not possible to hold that the conduct of the complainant in merely pointing out a plot of land to the Investigating Officer constitutes a statement before the Investigating Officer and that evidence of such conduct is inadmissible under S. 162, Cr. P. C. But if evidence is led that a witness when pointing out of a plot of land to the Investigating Officer, told him that the occurrence had taken place on that land or made any other similar statement, that statement would be inadmissible.

In this connection Mr. Mukherjee has referred to certain rulings. Some of them however do not support his contention. In the case of — 'Lala Lalung v. Emperor', AIR 1939 Cal 176 (A), it was held that S. 162 should be read upon its plain terms and a statement made by a witness to a police officer was not evidence at this trial; but where a witness deposed to the fact that he identified the two accused before the police officer in the village such evidence would be admissible. It was held that merely pointing out the accused in the village would be admissible and that the fact that the accused was arrested on his evidence could be proved at the trial and this would not contravene S. 162, Cr. P. C. It is true that in a subsequent case — 'Sk. Khabiruddin v. Emperor', AIR 1943 Cal 644 (B), this ruling was not fully approved, but there the facts were different, viz., there was a regular test identificatoin of stolen property held at the thana by a police officer and it was held that identification of the stolen property by the complainant involved a statement that the property was his property and therefore this amounted to a statement before the police and could not be admitted. This case is not an authority for the proposition that merely pointing out an accused or pointing out a plot of land to the police officer constitutes a statement before the police and we must hold that the evidence of such pointing out is admissible.

(9) It is urged that the learned Judge went further than merely admitting the statement that the complainant had pointed out a plot of land to the Investigating Officer and that he admitted a statement that the complainant had pointed out the land as the place of occurrence and as C. S. Plot 1062 to the police officer and that therein a statement before the police was involved and was wrongly admitted. I have already pointed out that such a statement would be hit by S. 162, Cr. P. C. If however the evidence given is that the complainant pointed out a plot of land to the police officer and then the complainant gives evidence in Court that the plot pointed out by him to the police officer was the plot on which the occurrence had taken place, there could be no objection and the result would be the same. Although the learned Judge was not careful enough to admit the statement in the form which would be unobjectionable and to a slight extent contravened S. 162, Cr. P. C., in this connection we do not think that there was any prejudice to the accused, because even according to the case of some of the accused headed by Purna Chandra Das there was occurrence over the particular plot, viz., C. S. plot No. 1062 of Mouza Soknar Beel and therefore there was no dispute as to the place where the occurrence had actually taken place. No prejudice could therefore occur even if the statement was wrongly admitted that that particular plot had been pointed out to the Investigating Officer as the land of occurrence.

(10) The third point urged by Mr. S. S. Mukherjee is that two witnesses examined in the committing Court and present in Court were not tendered for cross-examination and that this prejudiced the accused. There is however no law which compels the Public Prosecutor to tender at the sessions trial every witness examined in the committing Court. If the Public Prosecutor is of the opinion that the evidence of a particular witness is false or unnecessary he might withhold such evidence and need not even tender the witness for cross-examination. This was held in the case of — 'Empress of India v. Kaliprosonno Doss', 14 Cal 245 (C). It was held in that case as follows:

> "In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate".

Mr. Mukherjee has referred to a later ruling, — 'Nayan Mondal v. Emperor', AIR 1930 Cal 134 (D). In that case Lort-Williams J. observed that although it was not necessary for the prosecutor to call witness whose name was on the back of the indictment or in India whose deposition has been taken in the committing Court it had become usual to do so so that the defence might cross-examine them. Now though Lort-Williams J. made the observation that it had become customary to tender witnesses at the Sessions Court for cross-examination, Lort-Williams J. pointed out that the law was that the prosecutor was not bound to call such witnesses and the only thing he was bound to do was to have every such person in Court so that ne might be called for the defence if the prisoner so chose.

As authority for this statement of law, the learned Judge referred to Archbold's Criminal Pleadings, 22nd Edition, and some decided English cases and pointed out that the law was the same in India. This case cited by Mr. Mukherjee does not therefore go to show that there was any illegality in not tendering for cross-examination two of the witnesses who had been examined in the committing Court. Mr. Banarjee appearing for the State has pointed out that in a subsequent case the Privy Council has also held that it is not necessary that the public prosecutor should tender for cross-examination any witness whom he considers to be unreliable even though such witness was examined in the committing Court. This view was taken in the case — 'Adel Muhammed El. Dabbah v. Attorney-General of Palestine', AIR 1945 P. C. 42 (E). This was not an appeal from India and the Indian Law was not being considered, but it would appear that the principle involved is the same, in India as well as in England as pointed out by Lort Williams J. in the case reported in 'AIR 1930 Cal 134 (D)', cited above. Therefore we find that there was no illegality in the public prosecutor's refusing to tender the two witnesses for cross-examination though they had been examined in the committing Court. Admittedly, they were present in Court, but the defence did not call them as witnesses.

(11) Next, Mr. S. S. Mukherjee has alleged that the learned Judge did not correctly explain to the jury the illus. (g) of S. 114, Evidence Act that the Court may draw a presumption that the evidence which could be and was not produced would, if produced, be unfavourable to the person who withheld it. The learned Judge referred to the presumption which the jury might draw from withholding of two witnesses who had been examined in the committing Court but not tendered for cross-examination and from the non-examination of certain witnesses named in the charge sheet and the first information report. He also read and explained S. 114(g), Evidence Act. He however observed that under the law the jury was entitled to presume that if the witnesses had been examined they might have contradicted the prosecution case. Objection is taken to the words "might have"; it is urged that the learned Judge should have told the jury that if they thought fit they might presume that the evidence withheld would have been unfavourable to the prosecution. It appears to me however that this was not really an error in explaining the law but merely a case of faulty expression. The learned Judge should have said that the jury might or might not presume that the evidence would be unfavourable to the prosecution. Instead of that he stated that the jury was entitled to presume that the jury was entitled to presume that the evidence might have contradicted the prosecution case. In further explaining the law with reference to the facts of the case, the learned Judge put the law correctly. Thus he stated that from the circumstances the jury would have to decide whether they would draw any adverse presumption. Thus, though we think that the learned Judge should have used the correct expression in explaining the law to the jury, there was really no misdirection. It is to be remembered that the charge was delivered in Bengali and not in English and a reading of the portion of the charge as a whole conveys the impression that the learned Judge had the correct idea of the law but sometimes he fumbled with the words in expressing his ideas in English.

(12) It has next been urged that before the end of the trial the Public Prosecutor filed a petition for the prosecution of one witness P. W. 23 for perjury and that before the jury the learned Judge heard the submission of the Public Prosecutor in connection with that application, although he passed the order that the application be put up after the disposal of the sessions case, and that such discussion in the presence of the jury had prejudiced the accused. Now it is quite true that the Public Prosecutor ought not to have been permitted to move the petition before the end of the trial. In this particular case, however, we are satisfied that no prejudice was caused to any of the petitioners. P. W. 23's evidence concerned only Khoka Pande 'alias' Abanidhar Pande. This P. W. 23 Chandi Charan Hazra had stated in the committing Court that on 25-8-1951, that is, a day before the occurrence, he was a conductor of the bus by which the accused Khoka Pandey along with 5 or 6 other men armed with lathis travelled from Ondal and got down at Rajbundh and further stated that the accused Khoka Pandey had a shot gun in his hand. In the Sessions Court this witness stated that Khoka did travel by his bus along with 5 or 6 other men on a particular day but that he did not remember the date and did not remember whether Khoka had any weapon in his hand. He was then cross-examined with reference to his statement in the committing Court and his deposition in the committing Court was also put in on behalf of the prosecution under S. 288, Cr. P. C. and it was in this connection that the application for prosecution for perjury was made against Chandi Charan Hazra. As pointed out, this witness's evidence was concerned only with Khoka's presence at the place of occurrence and the jury returned a unanimous verdict of not guilty in respect of Khoka alias Abanidhar Pandey. This witness's evidence did not at all touch the other accused, viz., the present petitioners, and the moving of the application for prosecution for perjury by the Public Prosecutor in the presence of the jury, though it is to be condemned, did not therefore at all prejudice the present petitioners.

(13) The next point urged was that in putting in the depositions of two witnesses recorded in the committing Court under S. 288, Cr. P. C. the learned Judge did not comply with the provisions of law and therefore it must be held that the evidence was put in improperly and that this had prejudiced the petitioners. Of the two witnesses whose recorded depositions had been put in one was P. W. 23 whose deposition has already been referred to. He was fully cross-examined by the prosecution with reference to his differing statements in the committing Court. The other witness P. W. 8 was similarly questioned with reference to his differing statement in the committing Court. It appears that in the committing Court P. W. 8 stated that he had seen the accused going away, having arrived at the place of occurrence on hearing the row. In the sessions Court however he stated that he did not see any of the accused going away; and he was cross-examined on this point by the prosecution with reference to his lower Court deposition.

In the case of — 'Tara Singh v. The State', A. I. R. 1951, S. C. 441, (F) it was held that if the prosecution wanted to use previous testimony to the contrary as substantive evidence it must confront the witness with those parts of it which are to be used for the purpose of contradicting him and then only could the evidence be brought in as substantive evidence under Section 288, Cr. P. C. In this case the prosecution did confront

the two witnesses with those parts of their lower Court depositions which were to be used for the purpose of contradicting the witnesses. The only irregularity was that the application for putting in the depositions of the two witnesses was not made then and there but that it was made on the following day. We do not think that this irregularity would amount to an illegality.

(14) It has next been urged that the learned Judge used the first information report as substantive evidence and in this connection Mr. Mukherjee has referred to the last part of the charge where the learned Judge was dealing with the case against each of the accused. The learned Judge in this connection pointed out that each accused had been mentioned in the first information report as well as by a number of eye-witnesses. It appears, however, that in the beginning of the charge the learned Judge did explain to the jury that the first information report was not substantive evidence but it was the first recorded version of the occurrence and therefore of immense importance for the purpose of corroboration and contradiction. The summary of the case against each accused at the end of the charge must be read in that context. The learned Judge might have done better by first referring to the identifying witnesses who had deposed in Court and then stating that the identification by the complainant was corroborated by the fact that the name was also mentioned in the first information report. But in this portion of the charge the learned Judge recorded the case against each accused in the form of a memorandum and not in extenso and it must be held that with reference to the earlier portion of the charge the learned Judge was referring to the first information report as corroborative evidence of immense value as mentioned by him. We do not therefore find that there was any misdirection.

(15) The next point urged is that the law relating to the right of private defence was not properly explained and that the learned Judge only referred to the sections of law but did not put down in so many words what was the law as actually explained by him. It is quite true that the learned Judge in explaining the law relating to private defence of property referred to Section 97 to the restrictions referred to under Section 99, I. P. C. and he made a note that he had read out these sections and explained them. He did not put down in so many words what exactly he had told the jury in connection with this case. He ought to have put down clearly that if the jury found that the complainant's party had committed criminal trespass into the land of the accused Purna Chandra Das, the accused would have a right of private defence against such criminal trespass. Similarly, all the limitations to the right of private defence as applicable to the particular case should have also been put down concisely as explained by him, and not disposed of by reference to sections only. In this particular case, however, we do not think that we should take serious notice of the failure of the learned Judge to put down in words the specific explanation that he gave to the jury in relation to the right of private defence. The right of private defence taken by the accused depended on the statement of the accused Purna Chandra Das that the landlord had settled c. s. plot 1062 of Mouza Suknar Beel with him in Pous 1357 B. S. corresponding to December 1950 and that from that time he had been in possession of the same through his labourer Ananda Bhuinya; but no oral or documentary evidence of such settlement by the landlord or such possession on behalf of the accused by the labourer Ananda Bhuinya was given. The thing was no doubt suggested to the prosecution witnesses but it was denied by them. One item of documentary evidence on behalf of the accused was produced in this connection, viz., a sale certificate showing that the jote comprising c. s. plot no. 1062 had been sold at a rent execution sale and purchased by the landlord. That was more than 14 years before the present occurrence. There was nothing to show whether the landlord after such auction sale had actually taken possession of the land. It is to be noted that the accused did not plead that 14 years ago after the rent sale the landlord had settled the plot with them. They stated that they had taken settlement of the land only 7 or 8 months before the occurrence. The complainant and his brothers and other witnesses all stated that in spite of the rent sale the complainant's father and uncle and after them the complainant and his brothers had been continuously in possession of the plot of land. This evidence of possession was referred to by the learned Judge. In the circumstances, there was no evidence at all in support of the defence that the plot of land belonged to the accused and that the accused had the right of private defence against any criminal trespass committed on the land by the complainant's party.

(16) Lastly, it has been urged that the jury trial constitutes a contravention of Article 14 of the Constitution because under Section 269, Cr. P. C. the normal procedure for trial by the Sessions Court is with the aid of assessors and it is only when Government makes a notification under S. 269, Cr. P. C. that there may be a trial by a jury, but as S. 269 does not contain the basis of the classification of offences or cases for trial by a jury, a notification that certain specified offences shall be tried by jury is in contravention of Art. 14 of the Constitution. This point was raised in — 'Badri Prasad Missir v. The State', AIR 1953 Cal. 394 (G), and it was held that the notification being in respect of classes of offence there is no contravention of Article 14. The same view was taken also by a Division Bench of the Allahabad High Court in the case — 'Dal Chand v. The State', A. I. R. 1953, All 123 (H). We must therefore hold that the jury trial does not contravene Art. 14 of the Constitution.

(17) This application therefore fails and the Rule is discharged.

(18) The petitioners must now surrender to their bail and serve out the remainder of their sentences.

(19) MITTER J.: I agree.

A/R.G.D. Rule discharged.

A. I. R. 1953 CAL 606 (Vol. 40, C. N. 232)

P. B. MUKHARJI, J.

In the Goods of Kumar Brojendra Narayan Singh Deo deceased, Petitioner.

D/- 26-6-1952.

(a) High Court Rules and Orders — Calcutta High Court Original Side Rules, Ch. 35, R. 19 — Nomination of Gazetted officer outside jurisdiction of High Court.

The nomination under Rule 19 of Ch. 35 by the Registrar has to be of a person who is amenable to the jurisdiction of the Calcutta High Court. A gazetted officer at Delhi not being such a person cannot and should not be nominated by the Registrar under Chap. 35, Rule 19. **(Para 8)**

(b) High Court Rules and Orders — Calcutta High Court Original Side Rules, Ch. 35, R. 15 — Execution of personal bond of applicant by his authorised attorney — (Succession Act (1925), S. 291) — (Powers of Attorney Act (1882), S. 2)

Where a Court grants to an applicant Letters of Administration only on the condition of his executing a personal bond it means administrator's own bond signed by him personally and individually. In such a case, an agent's or attorney's bond, however, duly empowered such agent or attorney may be, cannot be a substitute for the administrator's 'personal' bond. The word 'personal' in such cases cannot be extended to cover authorised act of the agent which is deemed to be as good an act as that of the principal himself under the law of agency or the Powers of Attorney Act. (Paras 26 and 29)

Anno: Succession Act S. 291, N. 1; Powers of Attorney Act S. 2, N. 1, 3.

H. K. Mitra, Solicitor, for Petitioner.

CASES CITED:

(A) (1877) 46 LJP 57: 2 PD 274
(B) (1862) 164 ER 1489: 4 SW & T (Sup) 189
(C) ('28) AIR 1928 PC 38: 55 Ind App 81 (PC)

ORDER: This matter has been set down before me for judicial determination under a special direction from the learned Chief Justice on 14-5-1952.

(2) It has been a long standing point which has caused the offices of this Court constant headache for over half a century. On every occasion the point avoided Judicial determination by special departmental directions obtained from Judges confined to individual cases without setting the law and practice on the point.

(3) The point is that if an Order is made by the Court for grant of Letters of Administration to a person on his executing a personal bond without surety, can he obtain such Letters of Administration if he has that bond executed not personally but by an agent to whom he grants a power of attorney to do the same.

(4) Before proceeding to discuss and decide the point I consider it proper to set out briefly the facts of the case.

(5) Rajendra Narayan Singh Deo Maharaja of Patna and the certificated guardian of the person and property of Pushpamitra Singh Deo the only son of Kumar Brojendra Narayan Singh Deo deceased applied to this Court and obtained as such certificated guardian Letters of Administration of the estate of the deceased. The order granting the Letters of Administration was made on 3-4-1952 in these terms:

"It is ordered that subject to the applicant furnishing security by a personal Bond in the above goods Letters of Administration of the property and credits of the abovenamed deceased be granted and issued to the said applicant."

(6) Then on 7-5-1952 Solicitor Hirendra Kumar Mitter for the grantee wrote a letter to the Registrar, Original Side of the High Court, from which I quote the relevant extracts:

"My client the petitioner is a Member of Parliament and he is now at Delhi to attend Sessions which will commence shortly and he cannot come down to Calcutta till July next. The estate of the deceased will suffer loss if the Letters of Administration are not issued forthwith. In the circumstances and in accordance with Chapter 35 Rule 19 of the Rules I request you to nominate a gazetted officer at Delhi before whom my client will execute the Bond at Delhi and the Bond may be attested by such officer. If you feel any difficulty in nominating a gazetted officer at Delhi for that purpose and with a view to save costs my client suggests that the settled Bond may be executed by my client's constituted attorney duly authorised for the purpose by a Power of Attorney properly executed and registered by my client. In this connection I beg to refer to you to the notes at page 356 of Mr. Ormond's Rules 4th Edition, in the Goods of Andrew Yule deceased."

The letter raises two problems for decision, one about nominating a person at Delhi and the other about the feasibility of carrying out that order of Court through a constituted attorney. The Registrar felt great difficulty in acceding to the request contained in that letter and referred the matter to the learned Chief Justice. The application now comes up before me for judicial determination on an assignment from the Chief Justice.

(7) Order 19 of Chapter 35 of the Original Side Rules of this Court provides:

"The execution of Administration Bonds by persons other than a Guarantee Society shall be attested by the Registrar or Master or where executed outside the Court House by the Registrar or the Master or such gazetted officer as may be nominated by the Registrar for that purpose."

(8) On a reading of this Rule, I cannot conceive of the Registrar of the Original Side of this State High Court nominating a gazetted officer at Delhi outside the jurisdiction of the State High Court and requiring him to accept such nomination and order him to carry out the obligation imposed thereunder. I do not think that such an officer is amenable to the jurisdiction of this Court or its Registrar. In case of refusal by such a nominated officer this Court will be powerless to enforce such nomination. On a construction of that Rule, I am of the opinion that such nomination under this Rule by the Registrar has to be of a person who is amenable to the jurisdiction of this High Court. A gazetted officer at Delhi not being such a person cannot and should not be nominated by the Registrar under Chap. 35, Rule 19.

(9) But the more important point raised in this application relates to the nature of the personal bond of the administrator and whether an agent's bond can be regarded as such a personal bond.

(10) The Attorney's reference to Ormond's Rules of the Original Side of the High Court 4th Edition at page 356 is inaccurate, the correct reference being page 556 of the said Edition of the Rules. "In the Goods of Andrew Yule deceased" is a case quoted at the foot note on that page of the Rules. There it is said that the Bond in that case was signed for the administrator who was absent from Calcutta by his attorney duly authorised under a General Power of Attorney which had been registered. It is stated there that it was held by Chaudhuri J. that this was a sufficient execution of the Bond. This foot note also proceeds to suggest that although that case was of an additional Bond, Chaudhuri J. expressed the view that such procedure might also be adopted in the case of an original Bond and reference is made to a passage at p. 307 of Tristram & Coote's Probate Practice. It is this particular foot note which appears to have caused most of the trouble in the present case.

(11) I had the Old Records Department searched for the purpose of finding out the papers of 'In the Goods of Andrew Yule deceased'. From the records of that case it appears that on 1-5-1918 Mr. Hechle the then Registrar of the Original Side of this Court put up a long departmental note

before Chaudhuri J. The basis of that note was the case 'in the Goods of Ross' (1877)-2 P D 274 (A) and a passage in the 15th Edition of Tristram & Coote's Probate Practice.

(12) On the basis of these two authorities Mr. Hechle suggested in his departmental note to the learned Judge that a constituted attorney could sign the personal Bond. Upon that Chaudhuri J. gave the following departmental direction:

"I think the Bond as signed by the administrator's attorney can be accepted 'in this case'. I think it may also be done in the case of an original Bond."

(13) It is clear however from this that there was no judicial determination of the point and this departmental direction of Chaudhuri J. was given without any arguments being heard at the Bar, a privilege which I had in the present case. Then the case put up before Chaudhuri J. was of an additional Bond and not the case of an original Bond and the observation of the learned Judge about an original Bond was obiter. It is also clear from Chaudhuri J.'s direction, that the learned Judge did not give any general direction but only directed acceptance of the attorney's bond in that particular case.

(14) I proceed now to examine the authorities placed before me.

(15) In the case of — '(1877) 2 P D 274' (A) a person having taken out administration to the goods of the deceased went abroad and subsequently under an order of the Court of Chancery a considerable sum became payable to the estate of the deceased and to his brother and sister who were also deceased. Then what happened in that case was the order could not be passed and entered until the additional duties in regard to these estates had been paid. But then the administrator was at that time in Japan. The Court allowed another person to file the affidavit as to the increase of property and to execute the Bond to cover the increased duty (in the place of the administrator) with two sureties on the distinct understanding that as soon as possible the administrator should execute a similar Bond. Sir James Hannen, President of the Probate Division delivering judgment observed at p. 275:

"The question is, can the Court allow such Bond to be given by some other person than the one primarily liable to give such Bond, that is by the Administrator? It does not seem to me that in this respect my power is in any way limited by the Statute, and from the case cited 'In the Goods of Stewart Sutherland', (1862) 4 SW & T (Sup) 189 (B) it is clear that there are cases in which the Judges of this Court have allowed some one, other than the original administrator, to execute the Bond under the circumstances, for instance, that it is impossible for the administrator to do so, or where there is a pressing necessity that it should be done by some one else. Here the latter is the ground of the application. There is a necessity that the additional duty should be paid at once. The applicant is undoubtedly a proper person to do what is necessary and I will allow him to do so, but it must be understood that the administrator himself must execute a similar Bond as soon as possible."

(16) Now the limits of this decision should be strictly observed. First the condition must be such that it indicates the existence of a situation almost verging on impossibility for the original administrator to sign a personal Bond. Secondly it is only as a very temporary expedient that such a Bond is accepted by the Court it being always understood that even in such cases where it is done the administrator is directed to execute a similar Bond as soon as possible. None of these conditions is satisfied in the present case. Attendance in the sessions in Parliament at Delhi is not considered by me to be one of such conditions and even then it was possible for him to come on any Saturday to Calcutta to execute the Bond. Secondly there was no offer by him that when he does come he will personally execute the Bond but in the meantime his agent may be allowed to tide over the present inconvenience. So much for the authority. In the Goods of Ross (A).

(17) In the latest edition of the Tristram and Coote's Probate Practice which is the 18th Edition published in 1940 the point is stated at page 271 as follows:

"In certain circumstances another person will be permitted to make and execute the Bond."

(18) In support of the above proposition the learned Editors rely on the same case 'In the Goods of Ross (A)' and the case of Stewart Sutherland (B) referred to by Sir James Hannen. It is also said at that page under the heading "Administrator absent":

"A person acting under a Power of Attorney from the absent administrator is allowed to execute the necessary documents."

(19) No authority is cited for this second proposition. The above authorities are intended to apply not as a principle of law but as a measure of temporary expedient. The Court's practice, if such there be, to adopt such temporary expedient cannot in my view be elevated to a principle of law.

(20) In all these cases and the statements of the law on the point there was already an administrator duly appointed and functioning but who was not present to sign additional bond or additional affidavit. That singular fact fundamentally distinguishes the present case before me. Here there is no administrator yet because the condition stated in the Order of the Court appointing has not been yet satisfied. These authorities therefore do not help the contention of the applicant.

(21) Our law on the subject must be analysed at this stage. Rule 15, Chapter 35, Original Side Rules, provides that every person to whom a grant of Letters of Administration, other than a grant under S. 212 (now renumbered as S. 241) of the Indian Succession Act is committed shall give a Bond in the name of the Chief Justice with one or more sufficient sureties to be approved by the Registrar. The forms of the Bonds are set out in Forms Nos. 6 and 7 and shall unless otherwise ordered by the Court or a Judge be given in the amount of the full value of the property for which the grant is made. Almost to the same effect is provision contained in S. 291 of the Indian Succession Act.

(22) Now in this case the order of the Court dispensed with the surety and that presumably because of the status of the applicant and that is why the Court ordered that his personal Bond would be enough. I cannot conceive how a personal bond of the applicant under express order of the Court can now be substituted by a Bond executed by his constituted attorney as a sufficient satisfaction of the Court's express order. It is not so much a case of risk as the quality of the Bond. No one disputes that in case of non-performance of the conditions, a Bond executed by a constituted attorney is as good a Bond from such point of view as a Bond by the principal himself. But does that mean a "personal" bond within the meaning of the order of the Court, I will pursue the matter further in this way. Should necessity arise, the Court will have to sue or cause to be sued upon the Bond so executed. It may transpire that there is some defect in the Power of Attorney

and it may be that the principal might contest that the constituted attorney did not have exactly the same power in executing such Bond as he purported to have. It may be that these points may not ultimately succeed. But why should a risk even of such litigation or why should such risk at all be taken when this Court has ordered a personal Bond?

(23) A reference at this stage to Mortimer's Probate Practice may be useful. In the marginal note at p. 455 of the Second Edition of that great work, it is said "Bond to be executed by the applicant in person, except in very special circumstances." Even there it is said that the administrator should as soon as possible execute a similar Bond. That is supported again by the old authority of — 'In the Goods of Ross' (A). To the same effect is another passage in that book at p. 492.

(24) The case to which Sir James Hannen referred in his judgment which I have quoted above may also be noticed in some detail here. That case is — '(1862) 4 SW & T (Sup) 189' (B). That was a case of a married woman and it decides the question that where a married woman is entitled to administration and her husband refuses to join in the Administration Bond or to assist his wife in obtaining the administration the Court will grant the administration to her allowing a third person to execute the Bond for her. This case is no authority for the proposition that the Court's Order for a personal Bond can be discharged by an attorney's or agent's Bond.

(25) In that case deceased Stewart Sutherland made a will at Sea bequeathing his property after the death of his wife divided equally amongst his children. Probate of this Will was granted to his widow who died later on and Sarah Bessel, the wife of George Bessel, was the only surviving child of the testator and was entitled to a certain sum of money which had been transferred to the Court of Chancery. Sarah was living within the same house as her husband but maintained herself by her own industry. Her solicitor applied to her husband to join her in the administration Bond which the husband declined. It was then that the Court allowed her administration permitting a third person to execute the Bond for her. These were days when there were many legal incapacities for married women in England and this particular case shows that the law then prevailing in England was that a married woman could not be granted administration without her husband signing the Bond for her. Indeed as pointed out in Mortimer's Probate Practice, 2nd Edn. at p. 272 on the authorities cited there that before the Married Women's Property Act, 1882 in England the general rule was that a married woman could not take out administration without her husband's consent. Sutherland's case (B) is only an authority for the proposition that in such a case where the husband refused, the Court granted administration to the married woman allowing somebody else, a third person, to execute the Bond for her. That law however has been changed in England since the Married Women's Property Act, 1882.

(26) From an analysis of the law as stated in the text books and deducible from the cases, I find no warrant for the proposition that where Court grants to an applicant Letters of Administration only on the condition of his executing a personal Bond, such grant can be made if the applicant instead of giving his personal Bond offers a Bond to be executed by his duly constituted attorney. In the case of Ross (A) as well as in the propositions stated by Tristram & Coote and in Mortimer the reference is to the cases of an administrator already appointed and presumably already having signed a Bond and for some reason he is either absent or otherwise not in a present position to execute further or additional bonds or affidavits. It is in such cases only that the Court adopts the temporary expedient of allowing an agent to sign such additional Bond or further affidavits with the obligation that the administrator himself when he returns or is in a position "will sign the Bond as soon as possible." But where as in this case before me the Court itself by its very order of grant makes it clear that the grant is not to issue until the applicant signs and executes a personal Bond the case to my mind is entirely different. His appointment as an administrator has not yet taken place because the condition for the issue of the grant to him has not yet been satisfied. If he wants now to produce somebody else's Bond that means that he will have to go behind the order for grant already made. But this application before me is not for varying the terms of the order of grant. In my opinion therefore the principles governing execution of an original bond are entirely different from the principles governing execution of additional bonds or further affidavits for the simple reason that in the latter case there is a primary bond or affidavit of the administrator on the faith of which the Court can act to tide over an emergency by allowing a third person to execute for the administrator with the added obligation that the administrator will sign a similar bond as soon as possible.

(27) Before I conclude a short reference to the Power of Attorneys Act is necessary to deal with an argument advanced before me. The argument is that under S. 2 of that Act the donee of a power of attorney can execute or do any affidavit instrument or thing in and with his own name and signature and his own seal and every such affidavit instrument and thing so executed and done shall be as effectual in law as if it had been executed or done by the donee of the power of attorney in the name and with the signature and seal of the donor. That an agent under such a power of attorney can execute a Bond which has the same effect in law as if executed by the donor himself is an indisputable proposition. The Privy Council dealing with a case whether a document executed by an agent under a power of attorney can be acknowledged for registration under the Indian Registration Act by another agent acting under a power of attorney given for that purpose held that it could be done and Viscount Sumner in — 'Puran Chand v. Manmatha Nath', AIR 1928 PC 38 at p. 39 (C) observes:

"A document is executed when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required and another person duly authorised may by writing the name of the party executing, bring about his valid execution and put him under the obligation involved. Hence the words 'person executing' in the Act (S. 35 of the Registration Act) cannot be read merely as 'person signing.'"

But that observation related to the scheme of the Indian Registration Act and the construction thereunder. This will be clear from the observations of the learned Lord at p. 39 where His Lordship says:

"Their Lordships have failed to find in the scheme of the Act (Indian Registration Act) anything repugnant to this construction. Any other would involve risk of confusion and might even defeat the statutory procedure by multiplying the persons who have to be traced and induced to attend either by themselves or by some representative."

(28) Now to my mind the provisions of the Powers of Attorneys Act or the observations of the Privy Council relating to the Indian Registration Act are not an answer to the points involved in the present case before me. I am of the opinion that when the Court makes an order for the grant of Letters of Administration on the condition that the applicant will execute a personal Bond and for that purpose security is dispensed with, the uppermost consideration in the Court's mind is the personal character of the applicant and his executing the Bond in such personal capacity and the fictions of law by which agents are empowered to do the work of the principal as completely as the principal himself while may be good enough for many legal purposes are not good for administration under such order of Court in such terms which enjoin execution of a personal Bond by the administrator. The word 'personal' does not occur at all in the Power of Attorneys Act or in the Indian Registration Act. I attribute to it the meaning which it ordinarily should have unrelieved by any statutory modification or by the doctrine of agency.

(29) When the Court orders that before the Letters of Administration are issued to the applicant, he has to execute a 'personal' bond, it means administrator's own bond signed by him personally and individually. In such a case an agent's or attorney's bond, however duly empowered such agent or attorney may be, cannot be a substitute for the administrator's 'personal' bond. In my judgment the word 'personal' in such cases cannot be extended to cover authorised act of the agent which is deemed to be as good an act as that of the principal himself under the law of agency or the Power of Attorneys' Act. The Court in such cases want the original and not the derivative executant.

(30) Such a view and such orders of Court directing personal bond by the administrator are in my opinion in consonance with the law of administration of the estate of the deceased. In the first instance, administration is essentially and usually a personal responsibility of the administrator and the law does not favour vicarious discharge of such responsibility by other agencies of the administrator, as a method of ordinary practice. The Administrator cannot normally be allowed to delegate his responsibility and even in limited cases where the law allows him to do that, the Court looks to the Administrator and not to his delegate to answer for the administration. Secondly, the legal origin of taking a bond exemplifies still more this view. An Administrator is the person to whom the representation of the deceased is committed by the Court for default or in the absence of an executor. His office resembles that of an executor but because he has not been selected by the deceased, he is in general obliged to give a bond with sureties for the due performance of his office. Therefore the Court's order for personal bond must be strictly followed and observed.

(31) Such a view can cause no inconvenience in practice. If the applicant does find any difficulty in attending for the purpose of executing a personal Bond under such an Order of Court he can always apply for varying the terms of that Order on those grounds, in which case the Court might accept a Bond through an attorney with or without sureties. But then it will no longer be an order upon the applicant to execute a personal Bond.

(32) I therefore hold in this application on the two points of the attorneys' submissions which I have quoted above at the beginning of this judgment that (1) the Registrar cannot nominate a gazetted officer at Delhi before whom the applicant can execute the Bond at Delhi under Chapter 35 Rule 19 of the Original Side Rules as I construe it and (2) that under the terms of the order of grant as it stands the Bond must be executed by the applicant himself personally and not by any constituted attorney authorised by him for that purpose.

B/G.M.J. Order accordingly.

A.I.R. 1953 CAL. 610 (Vol. 40, C. N. 233)

P. B. MUKHARJI, J.

Dhakuria Banking Corporation Ltd., Applicant v. Sm. Surabala Debi and others, Respondents.

Application D/-25-8-1952.

Companies Act (1913), S. 199 — Balance order on contributory — Enforcement — Appointment of receiver — Power to transfer case for execution — Exclusive jurisdiction of High Court — (Banking Companies Amendment Act (1950), Ss. 45H, 45A, 45B) — (Civil P. C. (1908), O. 40, R. 1 Ss. 42, 51 and 39(1) (b) and (c)).

In Company jurisprudence a balance order is a summary statutory proceeding for the purpose of enabling the liquidator to get payment from a contributory in lieu of proceeding by action. This, however, does not mean that the execution by appointment of a Receiver at once becomes the ordinary remedy in such cases. The ordinary method of execution by attachment and sale should even here be normally adopted and a Receiver will not be appointed in execution unless there are some grounds at least shown which will indicate that the ordinary methods of execution by attachment and sale are not the proper mode in the particular case. An enforcement order calling upon the contributory to pay is an order which is executable under S. 199, Companies Act, and S. 45H, Banking Companies Amendment Act, 1950, as a decree under the Civil Procedure Code by attachment and sale by the High Court. The High Court does not ordinarily appoint a Receiver to sell properties which are outside the jurisdiction of this Court. This Court certainly has the power and jurisdiction to adopt that course. But the question is one of propriety and whether it is proper to do so in a particular case. (Para 17)

Obiter: By making the "same manner" of enforcement as a decree available to orders under the Banking Companies Act, it should be thought that S. 45H meant such manner as delivery, sale, receiver, arrest and detention in prison and such other manner as the nature of relief may require and as are provided in S. 51 Civil P. C. for execution of decrees. But it does not recreate jurisdiction in the Court, may be a transferee Court for execution, for dealing with a matter in res-

pect of which statute has expressly and manifestly taken away jurisdiction under S. 45A and S. 45B Banking Companies Act. (Para 13)

High Court cannot make an order of transfer of an execution case relating to a Banking Company in liquidation to another Court. Such Court has no power to determine the same issue when it comes to that Court by transfer of execution from the High Court: (Para 14)

Ss. 45A and 45B of the Banking Companies Amendment Act override S. 42, Civil P. C. (Para 15)

Accordingly the High Court should exercise exclusive jurisdiction and the words of the statute cannot be controlled by consideration of higher costs of execution or absence of machinery of execution. (Para 15)

Anno: Companies Act, S. 199 N. 1; Civil P. C. O. 40, R. 1, N. 3; S. 39 N. 7, 8, 2; S. 42 N. 1, S. 51 N. 4, 6

R. Choudhuri, for Applicant; R. C. Kar, Attorney, for Respondents.

CASE CITED:—

(A) ('50) 54 Cal WN 975 (SB)

JUDGMENT: This is an application for the appointment of a Receiver to enforce what is known as Balance order on the contributions. The order was made on 4-12-1951 and provides:

"It is ordered that the said applicant be at liberty to enforce a call on the contributories of the said bank as set dut in the Schedule annexed to the affidavit of the said applicant and specified in the Schedule hereunder written for payment of the balance of the amounts due in respect of the shares of the said Bank except that such call be not enforced on the said Promotho Nath Sanyal."

The applicant in that case was the Official Liquidator of the Dhakuria Banking Corporation Ltd. (In Liquidation).

(2) In the tabular statement the applicant official Liquidator now before me asks for an order appointing a Receiver of the properties mentioned in Dhakuria and at Bolepur, Santiniketan, more particularly described in paras. 15 and 16 of the petition used in support of this summons. This order is asked as against Sm. Surabala Debi, Dwijendra Nath Chatterjee, Sm. Provarani Chatterjee, Satyendra Nath Chatterjee and Birendra Nath Chatterjee.

(3) The grounds alleged by the applicant to have this mode of execution by Receiver are expeditious sale, and avoidance of separate and independent proceedings in different courts which mean more expense to the banking company already in liquidation. These grounds are set out in paras. 19, 20 and 21 of the petition.

(4) On behalf of the respondents there is an affidavit by Satyendra Nath Chatterjee. The main points raised in that affidavit are first, that he has no knowledge of the order of 4-12-1951, and, secondly, that the sum is not payable by him. The defence raised is that the Dhakuria property No. 14, Station Road, is a debutter property dedicated to Deity Lakshmi Narayan and does not belong to Sm. Surabala Debi and other persons against whom a receiver is sought in tabular statement. Lastly, the defence is taken that the application is not maintainable & is misconceived.

(5) The defences about lack of knowledge of the order of 4-12-1951, and existence of an alleged debutter have not been pressed before me. The only point urged against this application is that the ordinary method of execution by attachment and sale should not be discarded in favour of the extraordinary method of execution by appointment of a receiver. The important argument advanced on behalf of the applicant is that under the Banking Companies Act the lower district Courts have no jurisdiction to deal with any question in execution in relation to a Banking Company in liquidation and therefore the most convenient course will be for this Court having exclusive jurisdiction to deal with the present execution through a receiver. It is contended by the respondents that this application should not be granted, first, on the ground that the Receiver is an extraordinary method of execution and the normal methods of execution should be followed and, secondly, that in this particular case the point on the Banking Companies Act is concluded by the decision of the Special Bench in — 'Bharati Central Bank Ltd., v. Rathindra Nath Sen', 54 Cal WN 975 (A).

(6) It is necessary to elaborate this last point. In that case Banerjée J. referred the matter to a Special Bench under Ch. V, R. 3, Original Side Rules, and himself sat in the Special Bench and delivered the judgment. The unfortunate part in that decision is that no one appeared for the respondent and there was only the petitioner present and the decision of the Special Bench of two learned Judges was necessarily given on ex parte arguments. But in that judgment delivered by Banerjee J. with which Harries C. J. agreed, it is said at p. 978:

"We are unable to read the sections of the Banking Companies Act in the manner Counsel suggests. It seems to us that S. 45H is an exception to Ss. 45A, 45B and S. 11 and makes special provisions for enforcement of the orders."

Thereafter Banerjee J. quoting an English case as to how to construe a statute, observes:

"Reading, therefore, Ss. 45A, 45B, 11 and 45H together it is clear to us that the Court which winds up the company and passes orders as referred to in S. 45H, Banking Companies Act, 1950, may execute the orders in the manner provided in the Civil Procedure Code. For example, if necessary, it may transfer the order to any Court for execution."

(7) Mr. R. Chowdhury who has very ably argued this case before me had to contend against this decision because of the following considerations.

(8) The allegations made in paras. 19, 20 and 21 of the petition he very fairly and readily conceded as not sufficient allegations for departing from the ordinary mode of execution by attachment and sale of immoveable properties and for adopting the extraordfnary remedy of execution by the appointment of a Receiver. For if in every case the properties being in the district it could be said that ordinary processes of attachment and sale should not be resorted to in the District Courts within whose jurisdiction these properties are situate on the ground of expense and delay, then as a matter of course ordinary processes of execution would be supplanted by the mere consideration of the situs of these properties. I do not conceive that to be the law.

(9) But the other argument that Mr. Chowdhury has advanced on this branch of the law requires

greater consideration. It is this. He says that under the Banking Companies (Amendment) Act, 1950, this Court is made the only Court with exclusive jurisdiction to deal with matters mentioned in Ss. 45A and 45B. The argument is that under these sections the only Court having jurisdiction is the High Court within the jurisdiction of which the registered office of the Banking Company is situate. This statute also divests all other Courts of their jurisdiction to entertain any matter relating to or arising out of the winding up of a Banking Company. The argument proceeds that if any order under the Banking Companies Act is transferred to a district Court, then the moment any objection relating to any matter arising in course of execution is taken in the transferee Court which is executing this order, the dispute or the objection will have to be referred back to this Court for determination as being the only Court of jurisdiction to decide the issue. Therefore Mr. Chowdhury argues that execution by appointment of a receiver by this Court will be the more appropriate and the more proper and convenient remedy and ordinary methods of execution by attachment and sale should not be followed.

(10) To that the answer is given by quoting the decision in the 'Bharati Central Bank, (A)' where the learned Judge delivering the judgment observed that S. 45H was to be read as "an exception to Ss. 45A and 45B, Banking Companies Act."

(11) It may be necessary later in an appropriate case and proceeding to reconsider the scope and ambit of this decision in Bharati Central Bank because some of the arguments made before me in this case do not appear to have been noticed in the judgment of that case. I propose, therefore, briefly to discuss such arguments if only to show their nature and importance.

(12) All that S. 45A, Banking Companies Act, says is:

> "All orders made in any civil proceeding by a Court exercising jurisdiction under part III or part IIIA may be enforced in the same manner in which the decree of such Court made in any suit pending therein may be enforced."

The language there used relates to enforcement in the same "manner". For the purpose of enforcing in the same "manner" as a decree, can this Court transfer an order for execution to a Court which has been expressly divested by statute of all jurisdiction, is the real question to which I do not find sufficient attention paid by the Special Bench.

(13) Mr. Choudhury has contended that this language means that ordinarily the orders under the Banking Companies Act would not have been enforced as decrees and all that this S. 45H does is to say that they will be enforceable in the same manner as such decrees and it does no more than what S. 199, Companies Act, does in enabling orders under the Companies Act to be enforced as decrees. By making the "same manner" of enforcement available to orders under the Banking Companies Act I should have though S. 45H meant such manner as delivery, sale, receiver, arrest and detention in prison and such other manner as the nature of relief may require and as are provided in S. 51, Civil P. C., for execution of decrees. But it does not, to my mind, recreate jurisdiction in the Court, may be a transferee Court for execution, for dealing with a matter in respect of which statute has expressly and manifestly taken away jurisdiction under Ss. 45A and 45B, Banking Companies Act.

(14) If it were otherwise, most illogical and inconsistent situations appear to arise. An execution case relating to a Banking Company in liquidation pending or originally arising in any Court other than the High Court will be beyond the jurisdiction of such Court to determine. But by the decision in 'Bharati Central Bank, (A)', the same Court will determine the same issue when it comes to that Court by transfer of execution from the High Court.

(15) S. 45H, as it says, relates to the "power of the Court to enforce" orders. The Court there is the High Court under S. 45A and no other Court, and S. 45H gives the High Court power to enforce orders under the Banking Companies Act by such manner as delivery, attachment, sale, receiver, arrest or otherwise as provided in S. 51, Civil P. C., whose marginal note "powers of Court to enforce" execution is the same as S. 45H. The group of Ss. 38-46, Civil P. C., which apparently persuaded the Special Bench in Bharati Central Bank case to come to that particular conclusion which it did, does not concern powers of enforcement but describes the "Courts by which decrees may be executed." S. 39 of the Code deals with Courts to which decrees may be transferred for execution and sub-s. (2) thereof at any rate implies that the subordinate Court to which the decree is transferred is itself a Court of competent jurisdiction although the same postulate for competent jurisdiction is not stated in S. 39(1) of the Code.

The powers of the transferee Court are clearly laid down in S. 42 of the Code which provides that a transferee Court "shall have the same powers in executing such decree as if it had been passed by itself." The words "powers in executing such decrees" in S. 42 of the Code cannot reasonably be said to include jurisdiction to execute where such jurisdiction has been expressly taken away by statute. That conclusion appears to be supported by the subsequent words that follow "as if it had been passed by itself". These words indicate that though the transferee Court itself did not pass the decree the law deems it as though it had passed it. How can it be deemed and how can this implication of law be still drawn where S. 45B provides expressly that "notwithstanding anything to the contrary in any other law for the time being in force" the High Court shall have the power to determine all questions in this respect and S. 45A expressly provides "notwithstanding anything to the contrary in any other law for the time being in force" no other Court shall have jurisdiction. Left to myself, I should have thought these provisions override S. 42, Civil P. C. Two grounds are stated towards the end of the judgment in Bharati Central Bank case, one of cost and the other of machinery for execution. It is debatable whether the prospect of higher costs of execution or absence of machinery of execution should be used as arguments to influence the construction of the express words of this statute.

The example given in the 'Bharati Central Bank case, (A)', of Allahabad High Court without having original jurisdiction, executing Company Orders by transferring them to district Courts for execution, is misleading because the Companies Act does not lay the embargo on other Courts as Ss. 45A and 45B, Banking Companies Act. If the Act is clear, costs and machinery of execution will have to be suitably devised by the Court invested with jurisdiction under the Act.

(16) Mr. Chowdhuri has contended before me that a Special Bench decision under Chapter 5 of the Original Side Rules is not an Appellate Bench but a bench of co-ordinate jurisdiction with the Original Side Court and that if I am convinced that the Special Bench decision is wrong I should dissent from it. It is not necessary for me to

adopt that course although I hope I have made sufficiently clear my own views on the matter. At the present moment, I need not further pursue this branch of the law as I propose to rest my decision in this case on the more general aspect of this application.

(17) To me it appears that enough ground has not been shown in the petition as to why any Receiver should be appointed in preference to the ordinary methods of execution by attachment and sale. Form 53 of the Company Rules under R. 152 provides that when the person is served with a copy of an enforcement call order from the Court then his failure or neglect to obey that order makes him liable to process of execution.

The exact language of that form is:

"If you the under-mentioned neglect to obey this order by the time mentioned therein you will be liable to process of execution for the purpose of compelling you to obey the same".

It follows the form of the "Balance Orders" in English Company Law.

In Company jurisprudence a balance order is a summary statutory proceeding for the purpose of enabling the liquidator to get payment from a contributory in lieu of proceeding by action. This, however, does not mean that the execution by appointment of a Receiver at once becomes the ordinary remedy in such cases. As I read the law on this point, the ordinary method of execution by attachment and sale should even here be normally adopted and a Receiver will not be appointed in execution unless there are some grounds at least shown which will indicate that the ordinary methods of execution by attachment and sale are not the proper mode in the particular case. The publicity with which a land is sold in the particular locality in which it is situate is the very basic justification of holding the sale at such a place. For a Receiver to sell district properties here in Calcutta may not be attended with the publicity and interest which a local sale will create notwithstanding advertisements. Besides there may be other interests affected by such sale and persons holding such other interests are more likely to know about the sale if it is held on the spot where the land or the property is situate.

These are cogent and moving considerations which are also expressly recognised in sub-cls (b) and (c) of Section 39 (1), Civil P. C. in case of transfers and apart from and independently of cases of transferred execution the principles of attachment and sale are basically local in their manifestations for obvious reasons of convenience and fairness alike. This Court does not ordinarily appoint a Receiver to sell properties which are outside the jurisdiction of this Court. This Court certainly has the power and jurisdiction to adopt that course. But the question is one of propriety and whether it is proper to do so in a particular case, I have no doubt in my mind that an enforcement order such as the one before me calling upon the contributory to pay is an order which is executable under Section 199, Companies Act, and S. 45H, Banking Companies Amendment Act, 1950, as a decree under the Civil Procedure Code by attachment and sale in this case by this Court. I am not satisfied that in this case the applicant has taken the matter out of the ordinary method of execution by attachment and sale and qualified himself to get a Receiver by way of execution.

(18) For these reasons I will make no order on this application. Having regard to the fact that the money remains unpaid there will be no order for costs also in favour of the respondents. The liquidator, however, will retain his own costs out of the estate. Certified for Counsel.

B/R.G.D. Order accordingly.

A.I.R. 1953 CAL. 613 (Vol. 40, C. N. 234)

BOSE J.

Bilash Chandra Mitra, Plaintiff v. Balmer Lawrie and Co., Ltd. Defendant.

Suit No. 2371 of 1949, D/-28-7-1952.

(a) Industrial Disputes Act (1947), Ss. 2(k), 2(s) — Dispute between dismissed employee and employer.

If the discharge itself originates or gives birth to the dispute then the dispute does not arise till the moment when discharge takes effect or till sometime later than the discharge and in such a case there cannot be an industrial dispute between the employer and the dismissed employee, provided there was no other dispute existing at the time. AIR 1949 F. C. 111 distinguished. (Para 9)

(b) Industrial Disputes Act (1947) S. 2(k) — Individual dispute cannot be an industrial dispute. 55 Cal WN 256, AIR 1951 Mad 616 and AIR 1951 Mad 141, Rel. on. (Para 9)

(c) Industrial Disputes Act (1947), Ss. 2(k), 2(s) — Employee forced to relire on pension — Dispute taken up by union.

When an employee retires or is forced to retire on pension he cannot be said to be still in employment. He ceases to be an employee or a workman but he receives the pension in consideration of his past services.

But the non-employment 'of any person' can amount to an industrial dispute between the employer and the workmen falling under the definition of that word in S. 2(s) when an Union takes up the cause of the worker. AIR 1949 F. C. 111 Rel. on. (Paras 15, 16)

(d) Industrial Disputes Act (1947), Ss. 15, 18 — Effect of re-instatement by award.

When an award declares that a workman is reinstated to his previous service and post with effect from the date on which the award would become effective and as consequence of reinstatement he would get arrears of pay and allowances, fixing a time-limit within which the amount has to be paid, nothing is left to be done by the employer company. There is an automatic reinstatement by virtue of the award which fixes the liability of the company to pay the arrears of salary and allowances. In other words a sort of decree for a sum to be calculated arithmetically is passed against the company and in favour of the worker. (Para 17)

(e) Industrial Disputes Act (1947), S. 15 — Waiver of rights under award — (Waiver).

Unless waiver is clearly established, or can be inferred from the facts proved, a workman's rights under an Award cannot be taken away by mere implication.

Thus mere acceptance of pension by a workman forced by the employer to retire does not amount to a waiver on his

part of his rights under an award passed in his favour, in the absence of clear evidence to the contrary.

Held further that filing a suit to enforce his rights or claims under the award was a clear indication that the workman had not given up his rights under it. (Para 18)

(f) Industrial Disputes Act (1947), S. 29 — Right to enforce award in Civil Court — (Civil P. C. (1908), S. 9) — (Special Tribunal).

The remedy provided by S. 29 by way of penalty does not deprive the individual rights of action in cases where the Award confers any personal right or benefit to particular employer or employees for the purpose of bringing about industrial peace among the whole body of employees who are espousing the cause of the particular employee or employees. (Para 23)

An award which re-instates a workman to his previous service and declares him to be entitled to the arrears of his pay and allowances, in effect, creates a debt in favour of the workman who can enforce it by a suit. The debt has accrued from the relationship of the master and servant. It is a civil liability and for enforcement of such liability recourse can be had to an action in a Civil Court under S. 9, Civil P. C., though, no doubt, the remedy of proceedings for enforcement of provisions of S. 29 of the Act is also available for punishing the person so liable. AIR 1950 Cal 577 and AIR 1950 S. C. 188, Relied on; (1947) 2 All E. R. 693, Distinguished. (Para 24)

Anno: C. P. C. S. 9 N. 53.

P. Sanyal for Plaintiff; Niren with P. P. Ginwalla, for Defendant.

CASES CITED:

(A) ('49) AIR 1949 FC 111: 1949 FCR 321
(B) ('51) AIR 1951 Mad 616: 1949-2 Mad LJ 789
(C) ('51) AIR 1951 Mad 141: ILR (1952) Mad 43
(D) ('51) 55 Cal WN 256
(E) ('48) ILR (1948) 2 Cal 209
(F) (1949) 1 All ER 544: (1949) AC 398
(G) ('50) AIR 1950 Cal 577: 54 Cal WN 222
(H) ('50) AIR 1950 SC 188: 1950 SCR 459
(I) (1948) 1 KB 424: (1947) 2 All ER 693

JUDGMENT: This is a suit for recovery of Rs. 4476-12-0 for arrears of salary, dearness allowance and certain bonus payable to plaintiff under an Award of a Tribunal constituted under the Industrial Disputes Act 1947.

(2) The case of the plaintiff as laid in the plaint is that he had been in the employment of the defendant company for 22 years. On 1-4-1947 he was unjustly pensioned off for Trade Union activities. Thereupon an industrial dispute arose between the defendant company and the plaintiff and other employees represented by the Balmer Lawrie & Company's Employees Union and the Government of West Bengal by an order No. 648-Lab. dated 10-10-1947 referred the said dispute to an Industrial Tribunal for adjudication. The Tribunal made an award directing that the plaintiff be reinstated in his employment and it further directed the defendant company to pay to the plaintiff the arrears of pay and allowances consequent to such reinstatement within months of the date on which the Award would be effective. By an order dated 22-1-1948 the Government declared the Award to be binding.

(3) It is alleged that by virtue of the said Award the plaintiff came to be reinstated to his service and post and shall be deemed to be reinstated from 1-6-1947 and became entitled to his arrears of pay and allowances from that date and as the plaintiff is still in and shall be deemed to be in the employment of the defendant company he is entitled to the sum of Rs. 4476/12/- for his pay and allowance from June 1947 after giving credit for the sums paid to the plaintiff as pension during the period. The particulars of the claim are set out in para. 5 of the plaint. As the defendant company failed and neglected to implement the Award and to pay the dues of the plaintiff this suit was filed on 6-7-1949.

(4) The defendant company filed a Written Statement on 17-8-1949. It is stated in this Written Statement that on 1-4-1947 the defendant duly terminated the employment of the plaintiff with two months pay in lieu of notice and a payment of Rs. 31/- per month as pension and certain reasons for the discharge of the plaintiff are set out therein. It is denied that the dispute which was referred by the Government was an Industrial dispute at all and it is submitted that the order of reference was invalid and consequently the Tribunal had no jurisdiction to make the Award. It is further denied that the Award entitled the plaintiff to claim reinstatement and pay and allowance as alleged. It is further stated that by accepting and enjoying the pension the plaintiff had waived his right to be reinstated and to receive the pay and allowances, and so the Suit should be dismissed.

(5) The following Issues were raised:

1. (a) Does the plaint disclose any cause of action?

(b) Is the suit maintainable?

2. Was there any industrial dispute within the meaning of the Industrial Disputes Act which was the subject matter of the Order of Reference?

3. Is the Order of Reference and/or the Award valid?

4. Is the plaintiff to be deemed to be reinstated or was the plaintiff reinstated as the result of the Award?

5. Is the plaintiff entitled to any arrears of pay and dearness allowance on the basis of being in employment with the company?

6. Has the plaintiff waived his rights to pay and dearness allowance, if any?

7. To what relief, if any, is the plaintiff entitled?

(6) A copy of the Award, an admitted brief of documents, and certain receipts for pension have been put in evidence by consent of parties. The plaintiff has also given evidence in the box. He states that he and few other employees formed the Balmer Lawrie and Company's Employees Union in July or August 1946 and he was the Vice-President of the Union. In or about October 1946 the employees submitted a charter of demands to the defendant company. After the Charter of demands was submitted he incurred the displeasure of the Accountant and on 31-3-1947 he was served with a letter intimating that he was pensioned off with effect from 1-4-1947. The company paid him salaries for April and May 1947 and since June 1947 he is and has been receiving his pension but he has not given up his right to be reinstated. The plaintiff states that it is because of his activities on behalf of the Union that he ceased to be in the good books of the Authorities and was ultimately pensioned off. He states that he had been discharging his duties smoothly for 22

years and there was no reason for his suddenly being found inefficient. Although the defendant company did not accept the Charter of the demands which was submitted originally but after the discharge of the plaintiff they accepted a revised charter of demands. The plaintiff admits that the only dispute referred to the tribunal was about the discharge and reinstatement of the plaintiff and one Shanti Mitra. The plaintiff further states that he did not write any letter himself stating that he kept his rights under the Award open, but the Union had written several letters asking for reinstatement and salary and allowances. He does not know whether the Union had written any letter stating definitely that plaintiff's rights under the Award had been kept open.

(7) Mr. Niren De, the learned counsel for the defendant company has contended that the dispute purported to be referred by the Order of Reference dated 10-10-1947 was not an industrial dispute within the meaning of the Industrial Disputes Act 1947. Mr. De argues that the alleged dispute was the dispute, if at all, between a single workman and the defendant company and as the plaintiff was a discharged employee and the origin of the dispute is the discharge itself there could not be an industrial dispute within the meaning of S. 2 (k) of the Act read with S. 2 (s) thereof. The said sections are as follows:

" Section 2 (k) — "Industrial dispute" means any dispute or difference between employers and employers or between employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person.

Section 2 (s) — "Workman" means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Crown."

(8) In the case of — 'Western India Automobile Association v. Industrial Tribunal, Bombay', AIR 1949 FC 111 (A), Mahajan J. made certain observations which lend some support to the proposition that a dispute between a dismissed employee and the employer relating to the dismissal itself is an industrial dispute. At page 114 the following observation appears with regard to the third illustration given:

"An employer may dismiss a man or decline to employ him. This matter raises a dispute as to non-employment."

Then again at page 116 the learned Judge made the following observations:

"Having regard to the general words in connection with the employment or non-employment in the definition of industrial dispute, it seems clear that if there arises non-employment by reason of the termination of employment by the employer, it will be within the jurisdiction of the Tribunal to determine whether the termination was justifiable."

But the facts of the case show that the dismissal took place during other disputes which were subsisting and which had been referred to the Tribunal and consequently the dismissed employees were "workmen" within the meaning of S. 2 (S) of the Act.

(9) It appears to me that there is considerable force in the argument of Mr. De that if the discharge itself originates or gives birth to the dispute then the dispute does not arise till the moment when discharge takes effect or till sometime later than the discharge and in such a case there cannot be an industrial dispute between the employer and the dismissed employee provided there was no other dispute existing at the time. I accept this argument of Mr. De as sound. With regard to the other contention of Mr. De that an individual dispute cannot be an industrial dispute. I think that it is equally sound. See — 'Kandan Textiles Ltd. v. Industrial Tribunal, Madras', AIR 1951 Mad 616 (B); — 'United Commercial Bank Ltd., Mathurai v. Commr. of Labour, Madras', AIR 1951 Mad 141 (C); and — 'J. Chowdhury v. M. C. Banerjee', 55 Cal WN 256 (D).

(10) The order of reference in the present case, however, shows that the Union had taken up or espoused the cause of the plaintiff and Santimoy Mitra in regard to the dispute as to their discharge, and the Union represented these two employees in their dispute. The relevant portion of the order of reference is that:

"Whereas an industrial dispute has arisen between Messrs. Balmer Lawrie & Co. Ltd. of 103 Netaji Subhas Road and Messrs. Bilash Chandra Mitra and Santimoy Mitra two of their employees as represented by the Balmer Lawrie & Company's Employees' Union.....etc....."

(11) Thus the case was not of a dispute between a single individual and the company but disputes of two employees represented by the Union, and taken up by the Union, had been referred to the Tribunal. The Statement filed before the Tribunal was by the Union. (See brief of documents).

(12) In the case of — 'Birla Brothers Ltd. v. Modak' an order of reference in which the wordings were "and their employees as represented by the Birla Brothers' Employees' Union" was held to be a valid order of reference and the dispute as to dismissal was held to be an industrial dispute. See — 'Birla Brothers Ltd. v. Modak', ILR (1948) 2 Cal 209 (E) per Harries C. J. and Clough J.

(13) In the case of — 'Western India Automobile Association', AIR 1949 FC 111 (A), the Federal Court observed at pages 120-121:

"It was contended that the reinstatement of the discharged workmen was not an industrial dispute because if the Union represented the discharged employees, they were not workmen within the definition of that word in the Industrial Disputes Act. This argument is unsound. We see no difficulty in the respondents (Union) taking up the cause of the discharged workmen and the dispute being still an industrial dispute between the employer and the workmen. The non-employment 'of any person' can amount to an industrial dispute between the employer and the workmen falling under the definition of that word in the Industrial Disputes Act."

(14) Mr. P. Sanyal, the learned Advocate for the plaintiffs contended that his client was not dismissed or discharged but was merely pensioned off and so the relationship of master and servant had not been terminated or wiped out at any time and so according to the learned advocate, the plaintiff remained a workman at all material times.

(15) The order pensioning off the plaintiff which was served on him on 1-4-1947 shows that the company did not dismiss the plaintiff but instead forced him to retire on a pension. The Union, however, treated it as a discharge (See Statement of Union filed before Tribunal). In my view when an employee retires or is forced to retire on a pension he cannot be said to be still in employment. He ceases to be an employee or a workman but he receives the pension in consideration

of his past services. (See Oxford Concise Dictionary, page 847).

(16) However, inasmuch as the Union had taken up the cause of the plaintiff it must be held that the dispute referred to the Tribunal was an Industrial dispute and the Order of Reference was consequently a valid order and the Award was also a valid Award and became binding on the parties upon the order dated 22-1-1948 being made, under S. 18, Industrial Disputes Act. The Award therefore, cannot be impeached by the defendant company.

(17) The next question relates to the scope and effect of the Award. It is contended by Mr. De that as the company did not at any time reinstate the plaintiff, the plaintiff cannot claim any salary or allowance. It appears to me that the contention of Mr. De cannot be accepted. The Award declares that the plaintiff is reinstated to his previous service and post with effect from the date on which the Award would become effective and as consequence of reinstatement the plaintiff would get arrears of pay and allowances. Further, a time limit was fixed within which the amount had to be paid. It is thus clear that nothing was left to be done by the defendant company. The plaintiff was restored to his service by the Award itself and he was declared entitled to arrears of pay and allowances. There was automatic reinstatement by virtue of the Award. The award fixed the liability of the company to pay the arrears of salary and allowances. In other words a sort of decree for a sum to be calculated arithmetically had been passed against the defendant and in favour of the plaintiff.

(18) The further point raised by Mr. De is that by accepting the pension since June 1947 the plaintiff had waived his rights or claim under the Award and so the plaintiff has no right to maintain the suit. The correspondence between the Union and the defendant company beginning from 4-2-1948 and ending with the letter of the defendant company dated 5-5-1949 shows that all the time the rights of the plaintiff and Santimoy under the Award were asserted but as the defendant company refused to implement the Award and declined to pay the salary and allowance the suit was filed on 6-7-1949. There is nothing to show that the plaintiff had given a go-by to the Award and accepted the pension in lieu of his claim under the Award. The defendant company has not been able to produce any letter of the plaintiff or the Union to show that the claim under the Award was given up at any time. No witness has been called by the defendant company to prove that the plaintiff had by anything that he said or did induced the defendant company to believe that the plaintiff had given up his claim under the Award. A suggestion was made in cross-examination in Questions 32 and 33 about waiver but the answers do not throw any light on the point. Unless waiver is clearly established or can be inferred from facts proved, the plaintiff's rights cannot be taken away by mere implication. It is further clear that the defendant company was not at any time misled into thinking that the plaintiff by accepting the pension had elected to forgo his rights under the Award. Even after the filing of the suit the defendant company has gone on paying the pension and the plaintiff has accepted it month by month. The filing of the suit was a definite indication that the rights under the Award had not been given up but this did not lead the company to stop the payment of pension. I hold that there was no waiver of the plaintiff's rights or claim under the Award and the suit is maintainable.

(19) It was further contended by Mr. De and Mr. Ginwalla on behalf of the defendant company, that inasmuch as the rights of the plaintiff under the Award of the Tribunal and the liability incurred by the defendant company under the Award are the creatures of Statute and the Statute also prescribes the remedy for their enforcement, the remedy provided by the Industrial Disputes Act alone can be availed of and the plaintiff cannot proceed by action to enforce the rights or the liability created by the Award. Mr. Ginwalla referred to Halsbury Vol. I page 11, para. 11 and also relied on the decision of the House of Lords in — 'Cutler v. Wandsworth Stadium Ltd.', (1949) A. C. 398 (F).

(20) Mr. Ginwalla has also drawn my attention to various sections of the Industrial Disputes Act, 1947, such as Ss. 15(2), 18(a) & (b), 22, 23, 29 and 34 and also to S. 20(1) of the new Act 48 of 1950 and argues that the object of the Act was to secure benefit to the public as a whole and to keep the wheels of industry going and so the only method provided for enforcing obedience to the provisions of the Act is the coercive machinery provided in S. 29 of the Act. A private individual has no right of enforcing the provisions of the Act but it is the Government alone who can do so by invoking in aid the provisions of S. 29 of the Act.

(21) It is further pointed out by Mr. Ginwalla that the Federal Court also has held in — 'AIR 1949 FC 111 (A)' that the remedy for enforcing obedience was under S. 29 of the Act. It is argued that if it was open to file a suit, the Federal Court would have said so. It may be pointed out, however, in answer to this contention that the question before the Federal Court was the question of reinstatement and as no suit lies for enforcing reinstatement, this aspect of the question whether an action lies for enforcing any right under an Award of an Industrial Tribunal did not engage the attention of the learned Judges of the Federal Court nor any such question was raised. So it was observed by the Federal Court that the remedy was under S. 29 of the Act.

(22) In — '(1949) A C 398 (F)' a bookmaker had instituted an action asking for declaration of his right to use a convenient space on the dog racing track in a Stadium occupied by a company known as Wandsworth Stadium Ltd., and for certain other declarations and also for injunction. The plaintiff had founded his claim on S. 11, Betting and Lotteries Act (24 and 25 Geo. 5 Ch. 58) and also claimed damages for breach of statutory duty. Section 11 itself provided that if any person contravened the provisions of the section he would be guilty of an offence. Lord Simonds quoted the general rule that

> "Where an Act creates an obligation and enforces the performance in a specified manner, the performance cannot be enforced in any other manner."

It was pointed out, however, that this general rule is subject to exceptions and the Court is to consider the scope and purpose of the Statute in question and in particular for whose benefit it is intended. Lord Simonds after an analysis of the provisions of the Betting Act concluded that the primary intention of the Act was to regulate the conduct of race tracks and in particular conduct of betting operations thereon and agreed with the principle of interpretation suggested by Somervell L. J. that where an Act regulates the way in which a place of amusement is to be managed the interests of the public who resort to it may be expected to be the primary consideration of the Legislature. As the Betting Act had the public benefit for its primary object, it was held that the statutory remedy by way of penalty was the only remedy

available and the general right of action was excluded.

(23) The Industrial Disputes Act has for its object "the investigation and settlement of industrial disputes" and bringing about industrial peace. "An industrial tribunal can create new rights and obligations between the employer and the employees which it considers essential for keeping industrial peace, though they may not be within the terms of any existing agreement."

The primary object is to maintain a harmonious relation between the employers and employees of industrial establishments. It is no doubt true that by this process the public is also benefited as the wheels of industry are kept going and production of goods in the country is not hampered, but the more immediate object is to remove discontentment from the minds of the employees and to bring a sense of security in the minds of the employers. To achieve this end provision for industrial Awards is made and there is provision which makes breach of the terms of an Award an offence, punishable by fine. But this remedy by way of penalty does not, in my view, deprive the individual right of action in cases where the Award confers any personal right or benefit to particular employee or employees for the purpose of bringing about industrial peace among the whole body of employees who are espousing the cause of the particular employee or employees.

(24) In the present case the plaintiff is not merely claiming the arrears of salary and allowance due up to the date of the Award but also salary and allowance which accrued due after the Award on the strength of the declaration as to reinstatement made by the Award. In other words the plaintiff's claim extends to or comprises further reliefs which flow from the Award. The Award has created a debt in favour of the plaintiff and I fail to see why payment of such debt cannot be enforced by suit. The debt has accrued from the relationship of the master and servant. It is a civil liability and for enforcement of such liability recourse can be had to an action in a civil Court (S. 9, Civil P. C.) though no doubt the remedy of proceedings for enforcement of the provisions of S. 29 of the Act is also available for punishing the person so liable. Banerjee J. of this Court and Mahajan J. of the Supreme Court have held that suits to enforce payment of monies or wages due under the Award of an Industrial Tribunal are maintainable at the instance of individuals in whose favour the Award is made. See — 'Judhisthir Chandra v. P. R. Mukherjee', AIR 1950 Cal 577 at p. 578 (G), and —'Bharat Bank Ltd., Delhi v. The Employees of the Bharat Bank Ltd., Delhi', AIR 1950 S C 188 (H) paragraph 37 at page 202, where Mahajan J. observes as follows:

"The Award given by an Industrial Tribunal in respect of either of bonus or higher wages, etc., is enforceable by its own force and by the coercive machinery of the Act and it is not merely a declaration of a character that furnishes a cause of action to the employee to bring a suit on its foot to recover the wages."

(25) Mr. De placed reliance on the case of—'R. v. National Arbitration Tribunal, Ex parte Horatio Crowther & Co. Ltd.', (1947) 2 All E R 693 (I) and submitted that this case has decided that an Industrial Tribunal has no doubt power to add to or alter the terms or conditions of the contract of service, but it has no power to restore or recreate a contract of employment which has been terminated, by directing reinstatement, and so there cannot be any question of automatic reinstatement or can any claim for salary on the basis of a subsisting contract of service arise in the case before me. But it has to be remembered that the Federal Court in 'AIR 1949 FC 111 (A)' has held that under the privisions of the Indian Industrial Disputes Act, 1947, the Tribunal has been vested with power even to make a new contract of employment. Mahajan, J. at pages 116-117 observed as follows:

"The strongest argument urged on behalf of the appellants was that to invest the Tribunal with jurisdiction to order re-employment amounts to giving it authority to make a contract between two persons when one of them is unwilling to enter into contract of employment at all..... This argument overlooks the fact that when a dispute arises about the employment of a person at the instance of a trade union or a trade union objects to the employment of a certain person the definition of Industrial Dispute would cover both those cases. In each of those cases although the employer may be unwilling to do so there will be jurisdiction in the Tribunal to direct the employment or non-employment of the person by the employer. This is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract with a particular person.....It can equally direct in the case of dismissal that an employer or employee shall have the relation of employment with the other party although one of them is unwilling to have such relation." (p. 117).

The learned Judge has explained the scope and effect of 'Horatio Crowther's case' at pages 117-119 of the report.

(26) If such is the wide power of the Tribunal—if the tribunal can create the relationship of employer and employee even if the employer is unwilling to do so, I fail to see why cl. 14 of the Award cannot be construed to have reinstated the plaintiff to his service by the force of the Award itself. Of course it is open to the defendant Company to terminate this relationship created by the Award by giving proper notice of termination, if sufficient or justifiable reasons exist for such termination. But that has not been done in this case so far.

(27) Mr. De also argued that in 'Horatio Crowther's case' (I) the Court construed the Award for reinstatement as implying a direction upon the employer to re-employ the dismissed workmen and not that such dismissed employees had been automatically reinstated, and the words "be reinstated" in the present award should also bear the same construction. The learned Judges who decided Crowther's case could never conceive that there could be such a thing as an automatic reinstatement under the English law because according to them the Industrial Tribunal had no power to recreate the relationship of master and servant which had been terminated at the instance of an employer or an employee. So according to them the reasonable and perhaps the only possible construction to be put upon the Award was that it directed the employer to recreate the relation of master and servant which had been terminated by the employer. In the case before me if cl. 14 of the Award had ended with the first sentence then it might have been possible to put the same construction as was put in Horatio Crowther's case. But here the Award proceeds to state further that:

"As a consequence to reinstatement they shall also be entitled to arrears of pay and allowance less any sum, if any, already paid. These may be paid by the company within three months of the date on which the Award becomes effective."

(28) These succeeding sentences distinguish the present case from Horatio Crowther's case. This

argument of Mr. De, therefore, cannot be accepted.

(29) In my view this suit should succeed. As there is no dispute as to the amount claimed there will be a decree in favour of the plaintiff for Rs. 4476-12-0 with interest on decree at 6 per cent. and costs on scale No. 2. Certified for two counsel.

B/D.R.R. Suit decreed.

A.I.R. 1953 CAL. 618 (Vol. 40, C. N. 235)

P. B. MUKHARJI J.

Bhudarmull Bazaz Applicant v. Uma Shankar Purushottamdas & Co., Opposite Party.

Award Case No. 134 of 1952, D/-26-8-1952.

(a) Contract Act (1872), S. 23 — Contract relating to jute goods — Settlement contract — Nature and validity — (West Bengal Jute Goods Act (5 of 1950), S. 2).

A settlement contract means that a contract which is made before delivery of jute is not extinguished by performance and delivery but is settled by the payment of dues. The settlement contract and the original contract "stand together" and it is not the intention of a settlement contract that the first contract should be treated as altogether discharged. AIR 1920 Cal 143, Rel. on. (Para 6)

It is, therefore, clear that if the original contract is on a forward basis so as to come within the mischief of the Jute Goods Act, then the settlement contract must also on that basis be within the operation of the Act, for the simple reason that in the settlement contract the agreement or consideration is to pay the difference with reference to a contract which itself was entered on the forward basis. (Para 6)

Anno: Contract Act, S. 23, N. 3, 32

(b) Arbitration Act (1940), S. 13 — Powers of arbitrators to determine validity of contract.

Primarily the arbitrator's jurisdiction depends always on the meaning and construction of the language of submission for an arbitration. Then again on a properly worded submission an arbitrator can be made a judge not only of facts but also of law. But when the question of submission itself is in issue in the sense that the controversy is whether the parties concerned at all entered into a valid agreement for arbitration, then that controversy cannot be decided by the arbitrators. That jurisdiction belongs to the Courts. But where the question is not one whether there was at all a submission to arbitration, but whether certain facts exist which make the contract or the submission void and unenforceable in law or statute, the arbitrator's jurisdiction is not thereby ipso facto ousted, if it is otherwise within the language and scope of the submission.

Thus where the validity of an arbitration clause depends on the validity of the contract containing it which, in its turn, depends on deciding whether certain facts existed so as to make the provisions of the West Bengal Jute Goods Act, 1950 applicable to the contract, the arbitrators are competent to decide that issue of fact. Consequently in an award allowing damages to a party the finding that the contract is valid and enforceable is implicit and that issue of fact cannot be agitated in a civil court again. (Para 14)

Anno: Arbt. Act S. 13 N. 1.

(c) West Bengal Jute Goods Act (5 of 1950), S. 2 — Validity of jute contracts — Burden of proof.

The West Bengal Jute Goods Act has not made all contracts void and unenforceable. Before a contract could be made void and unenforceable under the statute it must be shown that it is a contract within the meaning of S. 2 of the statute. That depends again on the proof of certain facts. It is for the party who alleges those facts to exist to prove them and take all necessary steps to produce such proof. (Para 13)

A. C. Bhabra, for Applicant; P. P. Ginwalla for Opposite Party.

CASES CITED:

(A) ('50) A F O O No 116 of 1950 (Cal)
(B) (1942) 111 LJ KB 241: 1942 AC 356
(C) ('51) AIR 1951 Cal 147: 87 Cal LJ 352
(D) ('20) AIR 1920 Cal 143: 46 Cal 534
(E) ('51) 88 Cal LJ 34

ORDER: This is an application by Bhudarmull Bazaz carrying on business under the name and style of Shivaramdas Bhudarmal under the Indian Arbitration Act for declaring the Award No. 139 of 1952 of the Bengal Chamber of Commerce dated 13-2-1952 as null and void, and for an order that there was no valid arbitration agreement in the contract dated 16-3-1951.

(2) The matter arises out of a transaction relating to sale and purchase of jute goods. On 16-3-51, there was a contract being contract No. 6 by which the petitioner agreed to sell and deliver to the respondent 15000 bags of B. Twills at Rs. 231-10-0 per 100 bags on the terms and conditions contained in a sold note of that date and number passed by the brokers to the petitioner. That contract No. 6 dated 16-3-1951, contained the following arbitration clause:

"All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of relating to this contract whether or not the obligation of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

(3) At that time when this contract was made there was the West Bengal Jute Goods Act, 1950 (West Bengal Act 5 of 1950) in operation. It is now contended by the petitioner that this contract is void under that statute. It is argued that under S. 3 of that Act the State Government may, from time to time, if it so thinks fit, by notification in the Official Gazette prohibit the making of contracts relating to jute goods and may, by like notification, withdraw such prohibition. It is also provided by sub-s. (2) of S. 3 of that Act that when the making of contracts relating to jute

goods is prohibited by notification, no person shall make any such contract or pay or receive any margin except, in the case of any such contract made prior to the date of the notification, to the extent to which the payment or receipt is allowable on the basis of the last closing rate in a notified market. The section goes on to provide that notwithstanding anything contained in any other law for the time being in force, every such contract made and every claim in respect of margin in contravention of the provisions shall be void and unenforceable. It is contended on behalf of the petitioner that this contract was entered into after this Act came into operation and after there was a notification under S. 3 of the statute. It is, however, not stated in the petition that there was a notification under S. 3, but learned counsel appearing for the applicant has stated before me that it was so. I will accept that to be a fact. It is not disputed by counsel for the respondent.

(4) The main basis of the applicant's argument challenging the arbitration agreement and the award may be stated briefly. It is contended that by reason of the provisions in the statute which I have just mentioned this contract has become void and unenforceable. Therefore as the arbitration clause forms a part of this contract, this arbitration agreement is also void and unenforceable. Reliance has been placed on the decision of Sarkar J. in — 'Bhimraj Sethia v. Jiwanmull Tapuria' from which there was an appeal, being A.F.O.O. No. 116 of 1950 (Cal) (A), but which appeal failed on a preliminary ground as being not a competent appeal. Reference has also been made to the observations of Viscount Simon L. C. in 'Hayman v. Darwins Ltd.', (1942) AC 356 at p. 360 (B). In answer Mr. Ginwalla, learned counsel for the respondent, has relied on the decision of the Court of Appeal of this Court in — 'State of Bombay v. Adamji Haji Dawood & Co.', AIR 1951 Cal 147 (C) and specially on observations appearing at page 148 of that report.

(5) On behalf of the respondents, learned counsel has made three submissions. First, according to him, the original contract may or may not be hit by the West Bengal Jute Goods Act, 1950 and the Court before it can set aside the award must be satisfied that this is a contract which in fact comes within the mischief of the Statute. Secondly, in any event, there was a settlement contract which could not possibly come within the Act as being not a contract on a forward basis, and thirdly, the basic question whether the parties are habitual dealers in jute or not being a question of fact could be decided by the arbitrators. and in fact and effect has been decided by the arbitrators in the circumstances of this case.

(6) The question whether a settlement contract in jute is a contract on a forward basis or not within the meaning of S. 2 and the definition provided by the West Bengal Jute Goods Act, 1950 may first be disposed of briefly. The settlement contract in this case is dated April 19, 1951, and this is what appears on the contract: "This is a settlement contract. Contract No. 6 dated 16-3-51. The present buyer will pay to the present seller a difference at Rs. 20/6 per cent. bags on due date."

A settlement contract means that a contract which was made before delivery of jute is not extinguished by performance and delivery but it is settled by the payment of dues. The nature of the settlement contract was considered in — 'Uttam Chand Saligram v. Jewa Mamooji', AIR 1920 Cal 143 (D). At p. 149 Rankin J. delivering judgment observes that when a settlement contract is made, reselling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together so that there can be a set off as regards delivery and a set off as regards price, for everything except the difference. It is, therefore, clear to my mind that if the original contract is hit by the Jute Goods Act, then the argument treating the settlement contract containing an arbitration clause as an independent contract immune from the operation of that Act cannot be sustained. If the original contract was on a forward basis so as to come within the mischief of the Jute Goods Act, then the settlement contract must also on that basis be within the operation of the Act, for the simple reason that in the Settlement Contract the agreement or consideration is to pay the difference with reference to a contract which itself was entered on the forward basis. I find myself in entire agreement with the view expressed by Rankin J., that the settlement contract and the original contract "stand together" and it is not the intention of a settlement contract that the first contract should be treated as altogether discharged.

(7) But the main difficulty in this case on the way of the applicant arises on more fundamental grounds on the provisions of the Statute. Before the West Bengal Jute Goods Act, 1950 can be applied to a contract in order to make it void and unenforceable, it must be shown that it is a contract which comes within the operation of that statute. This Act prohibits making of contracts relating to jute goods and makes such contracts void and unenforceable. The impact of the statute is upon "contract relating to jute goods". It is not, however, any and every contract relating to jute goods that is made void and unenforceable. The Act was designed to provide for the prevention of "certain dealings" in jute goods. By S. 2(1) of the Act it is provided that a contract relating to jute goods means a contract relating to the sale or purchase of jute goods made on a forward basis:— (a) providing for payment or receipt as the case may be, or margin in such manner and on such dates as may be specified in the contract, or (b) by or with any person not being a person who (i) habitually deals in sale or purchase of jute goods involving the actual delivery or possession thereof, or (ii) possession or has control over a godown and other means and equipment necessary for the storage and supply of jute goods.

(8) Taking that definition certain major considerations become obvious. One is that it must be a contract relating to the sale or purchase of jute goods. The second is that it must be made on a forward basis. These two considerations are fundamental. In addition to these the considerations mentioned in S. 2(1)(a) or 2(1)(b) must be satisfied. Now all these considerations under S. 2(1)(a) or 2(1)(b) of the Act are considerations of fact. The petitioner in this case alleges that neither the petitioner nor the respondent was a person habitually dealing in the sale or purchase of jute goods involving the actual delivery or possession. It is also alleged that neither the petitioner nor the respondent possessed or possess any godown or other means and equipment necessary for the storage and supply of jute goods. These are the grounds on which the petitioner contends the contract comes within the operation of the statute. These are both questions of fact. They are denied and disputed by the respondent.

(9) The question, therefore, is in this case confined within the limits of the controversy whether the contract is void or not on the basis of these disputed allegations of fact. In my opinion no contract can be said to be void under this statute unless it satisfies the requirements and considerations laid down in S. 2 of that Act and some of which considerations I have already set forth. In

this case, therefore, the point is whether the petitioner and the respondent are not habitual dealers or whether they do not possess or control godown and other means and equipment for storage and supply. Until therefore, that decision on fact is made, no one can say whether this particular contract comes within this statute so as to become void and unenforceable. But this itself being a dispute resting on facts can be referred to arbitration. I am not aware of any legal principle where a party claiming these facts and another party disputing them, can be prevented from submitting to arbitration that very fact. To my mind the problem here is first to determine these facts and then to determine if the contract is void on the basis of these facts. The first is a question of fact and the second a question of law. An arbitration clause can be so worded as to give the arbitrator jurisdiction to decide both such questions of fact and law. Whether the parties can do so in a particular case will depend primarily and fundamentally on the scope of the submission contained in the particular arbitration agreement and any other submission which has otherwise been made but which satisfies the requirements of the Indian Arbitration Act.

(10) Now in this case what are the facts? The fact is that as early as 8-9-1951, the petitioner's attorney Mr. B. M. Bagaria wrote to the Registrar of the Tribunal of Arbitration that the contract between the parties was illegal, void and inoperative. The petitioner pleads this letter in para. 14 of the petition before me. The letter definitely alleges that:

> "The Chamber has no jurisdiction in the matter. The contract referred to between the parties is illegal and void and inoperative and no such contract could be entered into in view of the provisions of the law. Consequently the arbitration cannot be proceeded with.
>
> If in spite of the above the Chamber want to proceed further in the matter, I shall thank you to please let me know. On hearing from you my clients will move the High Court at Calcutta."

Having said that, what the petitioner did was not what was stated in that letter. The petitioner did not move the High Court, but in fact by his letter of 7-12-1951, which is annexed to the affidavit-in-opposition of the respondent, asked for time to appear and to produce the necessary documents in the matter before the arbitrators. In fact the letter requested the arbitrators

> "to hold your meeting at any date after the 20-12-1951, as otherwise my clients will be seriously prejudiced and they will not be able to produce necessary documents in the matter. You will appreciate that my clients should not be shut out in this manner inasmuch as on account of an unavoidable reason the gentleman has not been able to come to Calcutta and do the needful at present, who is acquainted with the fact of the said case."

The matter thereafter proceeded before the arbitrators and in fact on this request the arbitration was adjourned. The award was subsequently made on 13-2-1952, directing the petitioner to pay Rs. 3056/4/-.

(11) As I read these letters of 8-9-1951 and 7-12-1951, as well as the submission, I have come to the conclusion that they together constitute a lawful submission even on the points of fact that are now being urged as a ground for invalidating the contract. Having taken the decision of the arbitrators after that submission and after asking for time from the arbitrators not only for witnesses to appear before the arbitrators but for the purpose of producing necessary documents, the one & only conclusion possible is that the petitioner could not prove the basic facts which alone would have brought this particular contract within the operation of the Statute and make the contract void.

(12) Two courses were open to the petitioner, and it was for him to elect which course to adopt. If his contention was that on the facts of habitual dealing or possession and control of godown the parties were within the meaning of the statute, then he could have come to this Court to stop and stay the arbitration proceedings alleging those grounds before this Court. The other course was that notwithstanding this difference, that is, the petitioner claiming those facts of habitual dealing or possession or control of godown to be true and the respondent disputing such facts, they were prepared to compose this conflict by referring or submitting these very disputed facts to the decision of the arbitrators. Having regard to the language of the scope of submission which includes all matters, questions, disputes and differences, I am of the opinion that this question of fact on which whether the contract was void or not was made to depend could also be a matter of submission before the arbitrators. The decision of the arbitrators having been obtained, it is in my view no longer open to the applicant to reagitate the same grounds of fact now before this Court in order to invalidate the arbitration clause. To permit such a course will be not only to allow a person to blow hot and cold but also to re-open a fact, on whose basis alone the contract could be avoided, and which fact was duly submitted to the arbitrators.

(12a) A reference was made by Mr. Bhabra to the decision of Bachawat J. in — 'Pannalal Sagoremull v. Fateh Chand Muralidhar, 88 Cal L J 34 (E). In that case the award was impeached on the ground that the arbitrators took evidence on the merits as also on the question whether the contract which was denied by the applicant had been entered into between the parties. The learned Judge there held that the contract was good and valid and had expressed the opinion that the arbitrator need not proceed upon the assumption that there was a valid and binding contract, but it was proper for him to enquire into the fact of the existence of the contract upon which his jurisdiction depended in order to satisfy himself that prima facie he had jurisdiction. The learned Judge also held that the parties could always come to the Court which alone could determine if there was, in fact, a contract which conferred jurisdiction upon the arbitrator.

(13) This case, however, has no application to the principle and facts that arise in the case before me. Here is a question not about the factual existence of a contract in the sense that an enquiry has to be made whether the parties at all entered in fact into a contract or into a submission. It is admitted here before me that the parties did enter into a contract but what is said is that the West Bengal Jute Goods Act, 1950, makes this contract void & unenforceable by reason of certain facts. But that statute has not made all contracts, as I have said, void and unenforceable. Before a contract could be made void and unenforceable under the statute it must be shown that it is a contract within the meaning of S. 2 of the statute. That depends again on the proof of certain facts. It is for the party who alleges those facts to exist to prove them and take all necessary steps to produce such proof. But it is equally open to the party not to press this difference on the question of facts because it may lead to a decision against him or to have the arbitrator's decision on such facts when this comes within the ambit of the arbitration clause.

(14) A controversy of this character is, in this branch of jurisprudence, very often overlaid with dubious theories of arbitrator's power to decide his own jurisdiction. But legal propositions when taken in abstraction are a snare to lure the Courts and jurists to tempting errors of legal conclusions and arbitrator's power to decide his own jurisdiction is such a proposition which has been well known in history of legal disputes to have successfully raised the siren call for false alarms and erroneous decisions. Primarily the arbitrator's jurisdiction depends always on the meaning and construction of the language of submission for arbitration. Then again on a properly worded submission an arbitrator can be made a judge not only of facts but also of law. But when the question of submission itself is in issue in the sense that the controversy is whether the parties concerned at all entered into a valid agreement for arbitration, then that controversy cannot be decided by the arbitrators. That jurisdiction belongs to the Courts. Because while arbitrator has only such jurisdiction as the parties by contract agree to give him the Courts have all the jurisdiction that has not been taken away and there is, therefore, all the difference on this point between an institution with enumerated powers such as the private forum of arbitration and an institution with residual powers such as the Courts. But where the question is not one whether there was at all a submission to arbitration, but whether certain facts exist which make the contract or the submission void and unenforceable in law or statute, the arbitrator's jurisdiction, is not thereby ipso facto ousted, if it is otherwise within the language and scope of the submission. In my view the present case is not one where the arbitrator is deciding his own jurisdiction in the sense I have just discussed. What he is deciding is a dispute of fact. That fact is, does the person habitually deal in sale or purchase of jute goods involving actual delivery or possession or does he possess or control a godown and other means and equipment necessary for storage and supply of jute goods. Reading the words of the submission in the arbitration clause with the relevant sections of the West Bengal Jute Goods Act 1950 which I have already discussed, I am of the opinion that the arbitrators were competent to decide that issue of fact. The Award that was finally made in this case, gave damages to the respondent. Implicit in such award is the finding that there was a contract, that such contract was valid and enforceable and that the party responsible for the breach of such contract is the applicant. In that view of the matter, it is not for this Court to agitate over again that issue of fact.

(15) For these reasons, I dismiss this application with costs.

B/D.R.R. Application dismissed.

A.I.R. 1953 CAL. 621 (Vol. 40, C. N. 236)

P. B. MUKHARJI J.

Re: Arbitration between Gulzarilal Kanoria and Co., Applicant v. Busi and Stephenson Ltd., Respondent.

Suit No. 82 of 1952, D/- 29-8-1952.

(a) Arbitration Act (1940), S. 14 — Separate submissions — Separate awards.

Disputes under same contract — Two separate submissions in respect of two separate items — Arbitrators can make two awards and need not combine them into one. (Para 3)

Anno: Arbi. Act, S. 14, N. 1.

(b) Arbitration Act (1940), Ss. 17, 30 and 2(a) — Question of law — Damages, basis of — Submission.

The question of basis of damages for breach of contract is a question of law and can be submitted to arbitration — Question submitted — Arbitrators must decide it — Award on the question is conclusive, unless the award is bad on the face of it — Court hearing application for setting aside award cannot constitute itself a Court of Appeal over the decision on a point of law. (Para 6)

Anno: Arbitration Act, S. 17 N. 2; S. 2(a) N. 9; S. 30 N. 2.

(c) Arbitration Act (1940), S. 30 — Duty of Court.

Application to set aside award — Court cannot make sifting investigation of proceedings before arbitrators, unless it is first shown that the award is bad on the face of it. (Para 7)

Anno: Arbitration Act, S. 30 N. 2.

(d) Arbitration Act (1940), S. 30 — Violations of certain legal principles.

Damages for breach of contract — What are damages in particular case will depend on facts and on the principles of law which will regulate the measure of damages — Arbitrators considering several facts and award not bad on face of it — Award cannot be set aside on the ground that 'prima facie' the damages violated a certain principle — (The award held could not be said to be on any considerations or principles that were illegal). 53 Cal WN 828, Explained. (Paras 8, 9)

Anno: Arbitration Act, S. 30 N. 7, 9.

D. C. Sethia, for Applicant; R. C. Deb, for Respondent.

CASES CITED:

(A) ('52) AIR 1952 Cal 440
(B) (1923) 92 LJ Ch 307: 1923 AC 395
(C) ('51) AIR 1951 Cal 230: 85 Cal LJ 176
(D) ('23) AIR 1923 PC 66: 50 Ind App 324 (PC)
(E) ('27) AIR 1927 PC 164: 54 Ind App 427 (PC)
(F) ('49) AIR 1949 PC 334: 54 Cal WN 74 (PC)
(G) (1911) 80 LJ PC 91: 1911 AC 301
(H) ('49) 53 Cal WN 828

JUDGMENT: This is an application to set aside the two awards of the Bengal Chamber of Commerce, each dated 21-12-1951. The dispute is between the seller who is the applicant and the buyer who is the respondent in the matter of a contract of sale of B twills.

(2) It is the seller's application to set aside the awards on various grounds. Fourteen different grounds have been urged in para. 23 of the petition. It is unnecessary for me to refer to all these grounds because Mr. D. C. Sethia, learned counsel appearing for the applicant, has abandoned the other grounds except grounds 4, 5, 7 and 11 in para. 23 of the petition. In other words, Mr. Sethia has argued that these two awards should be set aside on the ground first that the arbitrators had no power to make two awards in this

case and secondly, on the ground that their award gave damages on the basis of rates exceeding the official ceiling price at the relevant time. The third ground of attack is that the extension of due date had been pleaded by the respondent beyond 16-2-1951, and the award must have been on the basis of a later date and therefore illegal and void because no evidence had been taken on the question.

(3) Taking the first ground of objection that the arbitrators in this case could not make two awards, I find that the whole basis of the argument of Mr. Sethia is based on a misconception of fact. The point of his argument was that there was only one letter, dated 20-6-1951, which his clients have annexed to the petition & that is only with regard to 250 bales of B twill bags. From the file of the records of the arbitrators which has been sent to this Court, it appears that on the same date, i.e., 20-6-1951, the buyers wrote two letters of submission, one in respect of 250 bales, a copy of which has been annexed to the petition claiming £3037-10s. and the other in respect of 100 bales of B twills claiming £1005. That being so, although the disputes arose under the same contract, there being two separate submissions before the Tribunal of Arbitration, the arbitrators in my view were quite within the bounds of law to make two separate awards, each on the different submission, and not to combine them in one award simply because the contract was one. There is in the law nothing which makes this illegal on the part of the arbitrators. I, therefore, hold that this ground of objection that the arbitrators could not make two awards on two separate letters of submission under the same contract in respect of different bales of twill bags has no substance whatever and I overrule such objection.

(4) It is on the second ground on which the main argument has been concentrated by Mr. Sethia. He has relied on the Jute Goods Export Control Order, 1949, and the provisions contained therein. Briefly his argument may be formulated in this way. According to him under this Order there is a ceiling price fixed in relation to any quantity of manufactured jute goods and which means the price determined in accordance with the provisions of the Schedule annexed to that Order. No person under this Export Control Order can export manufactured jute goods of any quality specified in the Schedule except under and in accordance with the conditions of a licence issued by the Licensing Officer. It is provided further in that Export Control Order that no licence shall be granted by the Licensing Officer unless he is satisfied in respect of any manufactured jute goods to be exported, that the price at which they have been or are being sold by the applicant for the licence is not more than the ceiling price and the additional sum, if any, received or receivable by the licencee on account of brokerage or commission paid or to be paid to the shipping agent, or to the selling agent abroad, or howsoever otherwise, is not more than 5 per cent. of the ceiling price. The Schedule referred to in that Export Control Order fixes the sch. price of this particular type of twills which are the subject-matter of the contract in these proceedings at Rs. 155-12 as. per hundred bags. It is the contention of the applicant that the award of damages by the Tribunal of Arbitration, Bengal Chamber of Commerce has violated the ceiling price. In fact Mr. Sethia has relied on the decision in — 'Bijoy Singh v. Bilas Rai & Co.', AIR 1952 Cal 440 (A) for this purpose as well as on the question of the extension of time, and there being no evidence about such extension, the main point of his submission is that if the law prohibits a certain rate, it is not for the arbitrators to award that rate.

(5) Now there are a number of answers to that point.

(6) The first and the obvious answer is that the question whether such rate was permissible or not was a question of law and could be submitted to the arbitrators as laid down by the Privy Council in — 'Government of Kelanton v. Duff Development Co. Ltd.', (1923) A C 395 (B). As I understand the law on the point, if there is a due submission on a question of law before the arbitrators, it is not only proper for them to decide it, but it is also their duty to do so. In this case I find that among the submission made before the Arbitrators this was one of the very points. Indeed in the letter of 27-6-1951 of the buyers to the Arbitrators it is said that while official ceiling price was at the time Rs. 270/-, everyone in the trade knew that it was quite impossible to buy bags at that price at that time or subsequently, and in fact, since they bought, the price had continued to advance and at that time it was considerably higher. That being so, the Arbitrators' award on the point would be final and conclusive. He might have decided erroneously and he might have taken a view which, left to myself, I might not have taken, but that is a consideration which is not relevant for purposes of this enquiry. So long as the award is not bad on the face of it — and I do not find anything on the face of the award to suggest that — I cannot constitute myself a Court of Appeal over the Arbitrators' decision on a point of law.

(7) The second answer is that the award of the Arbitrators on the face of it does not show the basis on which the damage is given. It is quite true that some idea could be obtained from the proceedings before the Arbitrators. But in an application to set aside an award, this Court does not make a sifting investigation of the entire proceedings before the Arbitrators. Before that can be done, the award must be shown to be bad on the face of it. The award itself in this case does not show the grounds on the basis of which the damage was given. Here, again, Mr. Sethia has relied on the case of the Court of Appeal in — 'AIR 1952 Cal 440 (A)'. But then the point was entirely different in that case. There the Arbitrators in the award itself gave the ground about the availability of the market and goods on the contract date and came to a conclusion regarding the availability of markets on a particular date. This will be found at page 441 of the report. Entirely different considerations apply in the case of an award such as the one before me. No ground here is given on the face of the award and it is not possible to fathom the processes of reasoning by which the Arbitrators came to the conclusion in awarding a particular sum as damage.

In order to get rid of the rigour of the law on the subject, Mr. Sethia naturally referred to the fact that the contract and the claim made, have been referred to in the opening prefatory words of the award. He contended that because the contract and the claim were referred to they had become part of the award itself. I am entirely unable to assent to that argument. Here, again, there is too much of confusion of thought. The law is quite clear and all the pronouncements of the Judicial Committee of the Privy Council on this point will be found collected by me in my judgment at page 234 of AIR 1951 Cal 230 in the case of — 'Ebrahim Kochinwalla v. Northern Oil Industries Ltd', (C). In — 'Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd.', AIR 1923 PC 66 (D) as well as in — 'Saleh Mohamed Umer Dossal v. Nathoomal Kessamal', AIR 1927 PC 164 (PC) (E) and in — 'Durga Prosad v. Sew Kishen Das', AIR 1949 PC 334 (F) the law has been very clearly laid down, and this re-

ference to the contract or to the claim of the buyers does not make them part of the award itself.

(8) The third answer is that while it is true that a ceiling price is fixed under the Jute Goods (Export Control) Order 1949 for "B" Twills, it is quite a different thing to say that having made a contract under that Control Order damages could not be on a basis which was higher than the price fixed. What are the damages in a particular case will depend on the facts in the first instance and in the second instance on the principle of law which will regulate the measure of damages. Now suppose a contract is made under this Export Control Order. Having made that contract, the breach is committed by the seller and the buyer then suffers damages. How much that damage is will depend as an ordinary rule on the difference between the contract price and the market price at the date of the breach. The market price at the date of the breach may have to depend on considerations of such facts as— (1) either the controlled market under the Export Control Order was no longer controlled at the time of the breach, or (2) even with the control of the market it may be impossible to get those goods at such prices and yet the buyer may have to satisfy his own obligations by buying in any market where he can get it. If it is impossible to get it in the market or the place where the goods were bought, there is no rule of law which prevents the buyer from getting it anywhere else so long as he can show that that was a reasonable market in which he could fairly have bought it. The point of this illustration is to show that the fixing of the ceiling price under the Export Control Order need not necessarily as a matter of fact make damages beyond the ceiling price illegal. (3) In a contract of this nature such as the one before me, there is yet a third consideration. The ceiling price under the Export Control Order naturally operates within the boundaries of the Indian market. Normally it is quite true that damages are to be assessed at rates available at the Indian market because that is the place from which goods are to be supplied and the contract is F. O. B. But here, again, if the Indian market is not available, then as I have said the buyer can go to any foreign market where he can buy against the seller, so long as he does so at a reasonable price and satisfies the Court or the Tribunal that that was the best market in which he could have bought in the circumstances. Here the foreign market will not suffer under any consideration of a ceiling price under the Indian Export Control Order for jute goods. The learned editor of Mayne's 11th Edition on the Treatise on Damages observes at page 183—"Further it may be proper for him (buyer) to regard a distant market as an available market, subject to proper allowance for additional cost of carriage." The rule is one of "available market" and not of an impossible market and the overriding principle as laid down by the Privy Council in — 'Wertheim v. Chicoutiuir', (1911) A C 301 (G) is that damages should place the plaintiff in the same position as if the contract had been performed. The fact of the impossibility or non-availability of materials at ceiling prices in India was itself one of the submissions made in the letter of 27-6-1951 by the buyers to the Arbitrators where they said definitely and categorically that it was quite "impossible" to buy bags at the ceiling price.

(9) These are considerations of fact which were certainly matters before the Arbitrators and as the award is not bad on the face of it, it is not possible for this Court to set aside the award on the ground urged by Mr. Sethia that prima facie the damages violate the ceiling prices.

(10) This disposes of the main arguments made on behalf of the applicant.

(11) There is one short point referred to by Mr. Sethia in the course of his arguments challenging the award on the ground that apart from the fact of ceiling prices the principle on which the damages were awarded by the Arbitrators is the loss suffered by the buyer because of the buyers' breach with their buyers. According to Mr. Sethia, that was a special damage. I am inclined to agree with him that that is so. But then what is the basis of saying that the Arbitrators awarded damages on that principle? Here, again, the answer to this breach of Mr. Sethia's argument is three-fold:

(i) First, the Arbitrators' awards in this case do not show any basis on which the award has been made such as was expressly stated in the award in the case of AIR 1952 Cal 440 (A),

(ii) secondly, in the letter of submission of 20-6-1951 the only submission that the buyers made before the Arbitrators is this:

"We contend that as they have sold to us with quota secured, they are responsible for the difference in price between the contract price and the price at which we bought in these bags."

Therefore, the submission in this case was a claim for difference in price between the contract price and the price at which the buyers bought these bags. It may be a right submission; it may be a wrong submission. But then it does not entitle me to say that the Arbitrators in awarding the damages had proceeded on a wrong principle of law which is apparent on the face of the award. The award does not say on what principle they have decided. By no process of inference is it possible to extend the peculiarly technical legal doctrine of award being bad on the face of it, by these considerations. What Mr. Sethia tried to do was to show it by reference to the letter of the 31st October 1951 in which the buyers mentioned the fact of their contracts with their buyers. But that letter was only in answer to the arbitrators' order to furnish them with the original re-purchase contracts. Even there it would appear that while one of the companies like the Co-operative Wholesale Society Limited bought against the buyers at 338/4½ d. f. o. b. Calcutta, in the buyers' claim against the present applicants the figure was 335/- f. o. b. But then, as I have said, it is not for this Court to go into ali these controversies raised from time to time in different letters and submissions as long as I find that the awards on the face of them cannot be said to be bad on any considerations or principles that are illegal.

(12) Before I conclude, I would notice the decision of — 'Chhogmal Rawatmal v. Sankalchand G. Shah', 53 Cal WN 828 (H). In that case the Court of Appeal says that where the Arbitrators come to a finding on the extension of due dates under contract before them without taking evidence or award damages at a rate higher than that fixed by the law, they are guilty of legal misconduct and their award should be set aside. Mr. Sethia has relied on this principle which is accepted by Mr. Deb appearing for the respondents. The dispute is not with regard to these principles that the Arbitrators' award of damages at a rate higher than that fixed by law would be illegal. But the question is: what is damage, if any, fixed by any law in this case and, if so, do the awards in this case contain any indication whatever that the Arbitrators have followed such an illegal principle? I have no hesitation in holding that the Arbitrators have not done anything illegal in this case. The case

considered in — '53 Cal WN 828' (H) concerned entirely different set of facts from the one before me. On the extension of due dates, that apparently was in the main a hypothetical argument made on behalf of the applicant in order to come within the decision of — '53 Cal WN 828' (H). There is no evidence whatever on this point in this case to suggest that the Arbitrators have decided anything on the point without taking evidence, & on the facts I am satisfied that this is a point which cannot arise and this allegation has no substance.

(13) The application, therefore, fails and is dismissed with costs.

B/R.G.D. Application dismissed.

A.I.R. 1953 CAL. 624 (Vol. 40, C. N. 237)

K. C. CHUNDER J.

Bibhuti Bhusan and others, Appellants v. Shib Krishna and another, Respondents.

Civil Revn. Case No. 2472 of 1952, D/- 5-2-1953.

(a) Presidency Small Cause Courts Act (1882), S. 48 — Second appeal and not revision is the proper procedure against an appellate order of the Small Cause Court.

(Para 1)

Anno: Pres. Small Cause Courts Act, S. 48 N. 1.

(b) Limitation Act (1908), S. 5 — Mistake of Court.

Ejectment suit in Small Cause Court — Trial Court, not noticing change in Rent Control Act which required proper decree to be drawn, maintaining on record after judgment statement according to usual practice — Appeal against ejectment order — After judgment statement not filed with memorandum of appeal according to practice — Court insisting on decree being filed after the effect of change in law was pointed out by High Court — Held error on part of lawyer was bona fide and delay in filing appeal, which had to be treated as having been filed only when decree was filed, was unintentional which justified exercise of discretion under this section. (Para 2)

Anno: Lim. Act, S. 5 N. 22.

Arun Kumar Dutt, for Appellants; Ranendra Nath Ghose, Hara Prasad Paladhy and Asoke Kumar Chakrabartti, for Respondents.

CASE CITED:

(A) Civil Revn. Case No. 1749 of 1951 (Cal)

ORDER: This Rule was issued by my learned brother P. N. Mookerjee J. in connection with an ejectment appeal before the special Bench of the Calcutta Court of Small Causes. It appears from unreported decision produced before me in — 'N. K. Dey & Sons v. Eastern Stock & Agency Ltd.', Civil Revn. Case No. 1749 of 1951 (Cal) (A) that P. N. Mookerjee J. appears to be of the opinion that a revision was the proper procedure in the High Court against an appellate order of the Court of Small Causes. A Division Bench has held that a second appeal is the proper procedure. The matter is before a Full Bench. As I am a single Judge, I am bound by the Division Bench decision that the procedure will be that of a second appeal but as P. N. Mookerjee J. admitted it as a Civil Revision I direct that this be treated as a second appeal. So long as the matter of Second Appeal and Civil Revision is not set at rest by the Full Bench it will be better to treat such Revision Applications as Second appeals.

(2) The main question is the question of condoning the delay under S. 5, Limitation Act. It appears that the change introduced by the Rent Control Act in 1950 was not noticed by the Judge of the Court of the Small Causes till this Court pointed out that in such a case a proper decree in the form laid down in Civil Procedure Code for a decree is necessary to be drawn up by the trial Court and the appellate Court. It appears that till it was so pointed out by this Court the Calcutta Court of Small Causes had kept up its previous practice of merely having an after judgment statement on record. This may or may not have all the information required in a decree but certainly no one will call it a decree in the proper form as prescribed by the Code of Civil Procedure. The Judge of the Calcutta Small Causes Court did not know what had to be done and I do not see why the lawyers of that Court should be blamed for not knowing what more erudite persons, namely, the Judges, even did not know. It was not usual in appeals against ejectment orders from the Small Causes Court to file the after judgment statement. In the present case, as, I am told, in numerous other cases no such statement was filed. Then when the Judges realised that a decree had to be drawn up and filed they insisted upon the decree being filed. The parties were quite willing to comply with the same but technically the decree not having been filed with the memorandum of appeal the appeal had to be considered as filed on the day on which the copy of the decree was actually filed. That required an exercise of the discretionary power of the Judges under S. 5, Limitation Act. I cannot conceive of a worthier case where such discretion could be used when large number of persons would otherwise be penalised because neither the Bench nor the Bar had paid attention to changes in the law which, if I may say so without disrespect, is the order of the day now in this State at least. Every day, laws are changing and full effect of such changes are very often not realised till some Court points the same out. It was not even the Judges who discovered what had to be done. It was the High Court which pointed it out. In such a case bona fide error on the part of lawyers and unintentional delay on the part of appellants might properly have been condoned by the Court. A little exercise of common sense would have saved the Court from doing injustice to a large number of persons and flooding this Court with unnecessary revisional work.

(3) Under the circumstances, I set aside the order of the Special Bench, allow the application under S. 5, Limitation Act, extend the period of limitation to the date on which the appeal was properly filed by a copy of the decree being filed.

(4) The appeal will now go back to the Court of Small Causes for hearing on the merits by the Special Bench. Costs will abide the result. The appeal is thus disposed of.

B/M.K.S. Order accordingly.

AIR 1953 CALCUTTA 625 (Vol. 40, C. N. 238)

CHAKRAVARTTI C. J. AND SINHA J.

Sailabala Dasi, Petitioner, Appellant v. Sarat Chandra and others, Opposite Party.

Civil Rule No. 1428 of 1952, D/- 13-1-1953.

Tenancy Laws — Thika Tenancy (Amendment) Ordinance (1952), S. 5 — Scope.

Sub-s. (1) is a general rule of applicability to all cases pending at commencement of Ordinance while sub-s. (2) contains the exception to the rule. Consequently, where a case, though it satisfies the conditions of sub-s. (1), is covered by sub-s. (2) the appellate Court, hearing the appeal against the final decree, cannot apply the Act to the case and grant relief on the basis of the new definition of Thika tenant. The party concerned has to seek remedy as provided under sub-s. (2). (Paras 8, 9, 11)

Jitendra Nath Guha, for Petitioner; Nagendra Mohan Saha, for Opposite Party.

CHAKRAVARTTI C. J.: This Rule raises a point of first impression, and a somewhat challenging one, under the Calcutta Thika Tenancy (Amendment) Ordinance 1952.

(2) The Rule was obtained by the defendant in a suit for ejectment. That suit was decreed on 31-8-1948, and the decree of the trial Court was affirmed on appeal on 10-9-1949. On 28-2-1949 the Calcutta Thika Tenancy Act came into force Thereafter, the petitioner made an application under S. 28 of the new Act for reopening the decree and for consequential reliefs, but his application was dismissed on 28-5-1951, on the finding that he was not a thika tenant at all. An appeal from that order was dismissed on 24-3-1952, on the ground that no appeal lay. Thereafter, the defendant moved this Court against both the order of 28-5-1951, passed by the Munsiff and order of 24-3-1952, passed by the appellate court and obtained the present Rule. While the Rule was pending, the Thika Tenancy (Amendment) Ordinance was published and came into force on 21-10-1952.

(3) The only point urged in the Rule is that by virtue of the provisions contained in S. 5(1) of the Ordinance, the Act, as amended by the Ordinance, should now be applied to the case and this Court should either itself give relief to the petitioner on the basis of the new definition of 'thika' tenant or remit the case to the trial court for appropriate action. There can be no question that if S. 5(1) applies to the facts of this case, the prayer made by the petitioner must be conceded.

(4) It seems to me, however, that the present case does not come under sub-sec. (1) of S. 5, but comes under sub-sec. (2) of the section. In order to explain the contention of the petitioner and what I conceive to be the answer thereto, it is necessary to set out the relevant parts of S. 5 in extenso.

(5) The section is expressed in the following terms:

"5. Provisions as to certain cases — (1) Save as provided in sub-sec. (2), the provisions of the said Act as amended by this Ordinance, shall apply to all cases pending before a court or Controller on the date of the commencement of this Ordinance.

(2) If, at any time between the commencement of the said Act and of this Ordinance, a decree or order has been passed for the recovery of possession of any land and for other relief, if any, and delivery of possession has not been given, then on application made in this behalf by the person against whom the decree or order was passed, within three months of the commencement of this Ordinance, the Court which or the Controller who passed the decree or the order shall decide (after hearing the parties and after taking fresh evidence if necessary) whether the person is a thika tenant within the meaning of the said Act as amended by this Ordinance."

(6) It is not necessary to quote the rest of sub-sec. (2) which provides what the Court or the Rent Controller should do, according as it is held that the applicant is or is not a 'thika' tenant.

(7) Mr. Guha, appearing on behalf of the petitioner, contended that the case came clearly within the words of the first sub-section of S. 5. He pointed out that under Explanation (ii) appended to the section, the expression 'court' included a court exercising appellate or revisional jurisdiction. The requirements of S. 5 are that there should be a case before a court and that it should be pending on the date of the commencement of the Ordinance. The Ordinance came into force on 21-10-1952, but before that date, the present Rule had been issued on 19th May. It was accordingly contended that there was a case pending, that it was pending before a court as defined in the Ordinance and that it was also pending on the date on which the Ordinance had commenced to operate and that all the three conditions required being present, the case fell clearly within the ambit of the sub-section.

(8) It requires a somewhat close examination of the provisions of the two sub-sections of S. 5 to understand what situations the two sub-sections respectively provide for. The relevant portion of the two sub-sections has already been quoted. The opening words of sub-s. (1), it will be recalled, are "save as provided in sub-s. (2)". It is thus clear that sub-s. (1) is laying down a general rule which would apply to all cases pending at the commencement of the Ordinance and then it is providing for an exception which is specifically set out in sub-s. (2); in other words, from the field covered by the general words of sub-s. (1), the sub-section itself carves out a portion and assigns it to sub-section (2). The effect of the opening words, in my view, is that even if a case satisfies the three requirements of the first sub-section, that sub-section will still not apply if the case belongs to the class specified in sub-s. (2).

(9) It is therefore necessary to enquire next what are the cases contemplated by sub-s. (2). The cases are those where a decree or order for recovery of possession was passed between the two limits of time mentioned in the sub-section, namely, the commencement of the parent Act and the commencement of the Ordinance, and where delivery of possession has not yet been given. If therefore there be a case which was pending before a Court on the date of the commencement of the Ordinance but it was a case where a decree for recovery of possession had been passed between the two limits of time mentioned in sub-s. (2) but possession had not been delivered, then it would be sub-s. (2) which would apply and sub-s. (1) would be excluded. It is clear that but for the opening words of sub-s. (1), such a case would come within the ambit of that sub-section and the occasion for the use of the opening words was to except this type of cases from the general scope of the first sub-section, but for which there would be an overlapping between the two. As I have already indicated, the first sub-section contains a general provision contemplating all cases where a proceeding was pending before a Court, as defined in the expla-

nation, or a Controller on the date of the commencement of the Ordinance, but, inspite of the requirements of that sub-section being satisfied, it will still not apply if the case be one covered by sub-s. (2). In such a case the benefit of the Ordinance can be obtained only by an application before the Court which, or the Controller, who passed the decree.

(10) Proceeding now to the facts of the present case, it is true that the trial Court's decree was passed before the commencement of the Thika Tenancy Act, but the decree to be regarded is the final decree which, in the present case, was the decree of the appellate Court. That decree was passed on 10-9-1949 which was between the two limits of time mentioned in sub-s. (2) of S. 5 of the Ordinance. It is admitted that delivery of possession has not been given. That being so, the case falls clearly under sub-s. (2) and since it falls under that sub-section, it does not fall under sub-section (1) because of the opening words of the latter sub-section.

(11) It is therefore not possible for us to apply the amended Act in this proceeding, but the petitioner will be entitled to take such steps as he may be advised to take under sub-section (2) of S. 5, if there be any time left for it.

(12) For the reasons given above, this Rule must be discharged.

(13) There will be no order for costs.

(14) Let the records be sent down with the least possible delay.

(15) SINHA J.: I agree with the conclusions reached by my Lord. I would add that the words "save as provided etc." in S. 5, sub-s. (1) of the amendment appear to me to be very inappropriate. The wording as it stands indicates that both sub-ss. (1) and (2) of S. 5 deal with cases pending before the Court or Controller and that sub-s. (2) is an exception to the general rule laid down in sub-s. (1). Sub-section (2) however speaks about a decree or order having been passed within two specified points of time. But supposing the decree or order has been passed but not put into execution can it be strictly called a case "pending before a Court or Controller"? Then again, in sub-s. (1) it is said that "save as provided in sub-s. (2)" the provisions of the Act as amended by the Ordinance shall apply. This is as if no provisions of the Act applied in the case of sub-s. (2). A glance at sub-s. (2) will show that although the initial procedure has been provided there, subsequently when the decree is reopened, the ordinary law is applied, that is to say, the Act as amended by the Ordinance. Therefore, the wordings as they have been put into the section are misleading. But at the same time they cannot entirely be ignored and I think the only way of reconciling the two sub-sections and giving some effect to the words "save as provided etc." is to come to the conclusion that my Lord has reached, namely that the provisions of sub-s. (1) will not be applicable to the particular cases adumbrated in sub-s. (2), that is to say, where a decree or order has been passed within two specified points of time and recovery of possession has not yet been obtained. It is only in those special circumstances that it will not be open to the parties to proceed under sub-s. (1), but a party must in such a case take recourse to the special procedure laid down therein which obviously is a more summary one.

(16) I agree with the order made.

B/M.K.S. Rule discharged.

AIR 1953 CALCUTTA 626 (Vol. 40, C. N. 239)

J. P. MITTER AND SEN JJ.

Abanti Pramanik and others, Petitioners v. The State.

Criminal Revn. No. 676 of 1952, D/- 17-2-1953.

Criminal P. C. (1898), Ss. 211, 212 and 213 — Procedure laid down in sections should be followed in order in which sections appear.

(Para 3)

Anno: Cr. P. C., S. 211, N. 1, S. 212 N. 1, S. 213 N. 1.

S. S. Mukherjee, Kishore Mokerji and Subimal Som, for Petitioners; Sisir Kumar Basu, for Complainant; N. K. Basu, for the State.

CASE CITED:

(A) ('53) AIR 1953 Cal 10: 1953 Cri LJ 128

J. P. MITTER J.: This is a petition for setting aside an order of commitment made by Sri A. Bagchi, Magistrate, First Class, Contai.

(2) It appears that on evidence on behalf of the prosecution being concluded, the learned Magistrate framed a charge under Ss. 302/120B, Penal Code, and then, instead of complying with the provisions of Ss. 211 and 212, Criminal P. C., proceeded to make an order of commitment, as provided under the first part of S. 213, Criminal P. C. After the order of commitment, the learned Magistrate called upon the accused to submit a list of witnesses for the defence.

(3) The procedure adopted by the learned Magistrate was, in our view, in disregard of the provisions laid down in the Code. See — 'Sripati Duley v. State', AIR 1953 Cal 10 (A). Mr. N. K. Basu appearing for the State has drawn our attention to a form of charge in Sch. V to the Code of Criminal Procedure and has argued that the procedure followed by the learned Magistrate made no difference to the position of the accused in such an enquiry. In our view, there are good grounds why the procedure laid down in the Code should be followed in the order in which the relative provisions appear. True, under S. 210 the Magistrate has to frame a charge provided there are sufficient grounds for committing the accused. He is nevertheless required not merely to give an accused the opportunity of furnishing a list of witnesses, but himself to scrutinise the list and if so minded, to examine such of the witnesses for the defence as he may wish to examine, and then to come to a definite conclusion as to whether the accused is to be committed for trial. Sub-section (2) of S. 213 provides:

> "If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused."

This, in our view, is a salutary provision and should not be departed from.

(4) In the result, we must set aside the order of commitment made by the learned Magistrate and order that on this case being sent back to him, he will give a fresh opportunity to the accused to give a list of witnesses for the defence under S. 211, Criminal P. C. and that he will thereafter follow the procedure laid down in Ss. 212 and 213, Criminal P. C.

(5) The Rule is accordingly disposed of.

(6) SEN J.: I agree.

B/V.R.B. Order set aside.

AIR 1953 CALCUTTA 627 (Vol. 40, C. N. 240)

CHAKRAVARTTI C. J. AND S. R. DAS GUPTA, J.

Hem Bala Dassi, Appellant v. Sundar Shaw and others, Respondents.

A. F. O. O. No. 166 of 1951, D/-22-8-1952.

(a) Letters Patent (Cal) Cl. 15 — Civil Contempt and Criminal contempt — Appeal under Cl. 15 — Constitution of India, Art. 215. AIR 1936 Bom 314 Dissented from.

Words and acts obstructing administration of justice is criminal Contempt — Disobedience to orders or processes of Court causing private injury is civil contempt or "contempt in procedure" known to English Law — Order passed in case of Criminal Contempt is one passed in exercise of criminal jurisdiction within meaning of Cl. 15, Letters Patent — No appeal lies from such order — Order made in case of civil contempt falls outside the exception in Cl. 15 — Breach of undertaking involves misconduct — (Consequence of the breach indicated) — Court refusing to commit for civil contempt — Order affects merits of question between parties and is "judgment" — Appeal lies therefrom under Cl. 15. AIR 1936 Bom 314 Dissented from.

(Paras 10, 13)

(b) High Court Rules and Orders — High Court Rules (Cal) Original Side Rules, Chap-XX, R. 4 — Procedure — Notice of motion for contempt.

Notice of motion that application will be made for order for committal to prison for contempt for breach of undertaking — Alleged act of contempt not specified — Motion will not be dismissed if there is compliance with O. 20, R. 4 — It is, however, desirable to give particulars of the contempt — Procedure to be followed in such cases, indicated.

(Paras 21, 22, 26)

G. K. Mitter with A. N. Roy, for Appellant; H. N. Sanyal as amicus curiae for Respondents.

CASES CITED:

(A) ('32) AIR 1932 Bom 638: 141 Ind Cas 411
(B) ('48) AIR 1948 Cal 214: ILR (1948) 2 Cal 231
(C) ('98) 25 Cal 236
(D) ('36) AIR 1936 Bom 314: 60 Bom 894
(E) ('72) 17 WR 364: 8 Beng LR 433
(F) (1875) 10 Ch 450
(G) (1908) 52 SJ 317
(H) (1822) 1 Add 301
(I) (1890) 59 LJP 47: 15 PD 59
(J) (1897) 61 LJ Ch 267: 1897-1 Ch 545
(K) (1913) 82 LJP 74: 1913 AC 417
(L) (1877) 46 LJMC 4: 2 QBD 43
(M) (1881-82) 51 LJ Ch 471: 20 ChD 493
(N) ('46) ILR (1946) 2 Cal 499
(O) ('09) 2 Ind Cas 485: 33 Bom 630
(P) (1911) 105 LT 615: 1911-2 Ch 605
(Q) (1884) 32 WR 288: 25 ChD 64
(R) (1893) 41 WR 230: 1893-1 Ch 252
(S) (1887) 56 LJCh 690: 55 LT (NS) 147
(T) (1885) 33 WR 76: 26 ChD 644
(U) (1891) 61 LJCh 3: 1891-3 Ch 488
(V) (1903) 72 LJCh 655: 1903-2 Ch 312

CHAKRAVARTTI C. J.: This case has been the occasion for an interesting debate on two important questions of procedure relating to proceedings for contempt of Court. In view of the importance of the issues and the somewhat unsettled character of the practice of the Court, we invited Mr. H. N. Sanyal to appear as an 'amicus curiae'. Mr. Sanyal readily responded to our request and we are grateful to him for the assistance he rendered.

(2) The points I have referred to arise out of the following facts: The appellant Hem Bala Dassi is the owner of premises No. 5, Ratan Sarkar Garden Street, Calcutta, which she let out to one Lalit Mohan Saha and Lalit Mohan, in his turn, sub-let the premises to a number of sub-tenants. Among the sub-tenants were the respondents to this appeal, Sunder Shaw, Kaloo Shaw, Hira Shaw and Nand Lal Shaw. In 1948, the appellant brought a suit against Lalit Mohan Saha, which was Suit No. 2449 of that year, and in that suit she obtained a decree for ejectment. In due course she attempted to execute the decree in the manner provided for in O. 21, R. 35, Civil P. C., but was resisted by the respondents who ultimately brought a suit for a declaration that they were tenants under the decree-holder and were not liable to be ejected in execution of the decree obtained by her against Lalit Mohan. That suit was Suit No. 910 of 1949 and it was disposed of by P. B. Mukharji, J. on 6-6-1950. One of the plaintiffs, Nand Lall Shaw, had never appeared and so far as he was concerned, the suit was dismissed with costs. As regards the remaining three plaintiffs, Sundar Shaw, Kaloo Shaw and Hira Shaw, the suit was disposed of by consent on certain terms and one of the terms was that the said three plaintiffs gave an undertaking to the Court to vacate the rooms occupied by them within eight months from the date of the decree. The period of eight months expired on 6-2-1951. The appellant's case is that while Nand Lall Shaw vacated the premises, Sundar Shaw, Kaloo Shaw and Hira Shaw did not but, on the other hand, while retaining possession of the rooms occupied by them in violation of the undertaking given to the Court, they caused certain letters to be written by a solicitor in which it was falsely stated that they had vacated the old rooms and taken possession of certain new ones in pursuance of a fresh agreement with the appellant.

(3) On 23-5-1951, the appellant took out a notice of motion which stated that on 4th June an application would be moved before Sinha, J. for an order, 'inter alia' that "the plaintiffs 1, 2 and 3 Sundar Shaw, Kaloo Shaw and Hira Shaw be committed to the prison for contempt of the Hon'ble Court." That notice was served on Kaloo Shaw personally, but in the case of Sundar Shaw and Hira Shaw, it was served by affixation, as they were not found on the premises and as Kaloo Shaw refused to accept service on their behalf. When the motion appeared in the list of new motions on 4th June, an attorney appearing for the respondents informed the learned Judge that two of his clients had not been served, but he was not prepared to contend at once that, as against them, the application should be thrown out 'in limine' and only asked for an adjournment to consider his position. The learned Judge adjourned the motion to the 8th June. Thereafter, the appellant took out a fresh notice of motion, returnable on the 8th June, and served it personally on Sundar Shaw and Hira Shaw. That notice was the same as the previous notice, with only the date changed, and it contained a note to the effect that the learned Judge had directed copies of the application papers to be served on Sundar Shaw and Kaloo Shaw, though in fact no such direction had been given. No further application

was made in connection with the fresh notice of motion.

(4) Except the bare notice of motion, nothing else was served on the respondents. The notice merely stated that an order for committal to prison for contempt of this Court would be asked for and the grounds stated at the foot of the notice were:

> Petition of the defendant Sm. Hembala Dassi abovenamed and verified by an affidavit of Ashutosh Roy affirmed by him on 16-4-1951 and the records and proceedings in this suit and in the suit No. 2449 of 1948 (Sm. Hembala Dassi v. Lalit Mohan Saha).

No copy of the petition referred to in the notice was served on the respondents. Actually, however, an affidavit-in-opposition was filed by Sundar Shaw and Kaloo Shaw and therein they referred to information as to the contempt with which the respondents Sundar Shaw, Kaloo Shaw and Hira Shaw were charged. It referred to the consent decree of 6-6-1950 and alleged a breach of the undertaking on the part of those three respondents.

(5) At the trial of the application, no point was taken as to the confused manner in which the notice of motion had been taken out and served. The parties proceeded on the footing that there was but one application and the service of the notice of motion was in order. But it was contended that the notice itself was defective, inasmuch as it contained no statement of the contempt for which the three respondents were sought to be committed and that no proceedings founded on such a notice could be maintained. It is unnecessary to refer to another point taken on which the learned Judge held against the respondents, because it was not further canvassed before us.

(6) On the principal point urged on behalf of the respondents, the learned Judge held in their favour. He observed that proceedings for committal for contempt were quasi-criminal in their nature and therefore it was essential that the established procedure should be strictly followed, not only in substance but also in form. By established procedure, the learned Judge meant the procedure established in England and that procedure, he held, was applicable in this Court, because it had inherited the jurisdiction and powers of the Supreme Court which were the same as those of the Court of the King's Bench and the Court of Chancery, as they stood then. According to the learned Judge, the English practice required that the precise act constituting the alleged contempt should be set out in the notice of motion itself and it could not suffice merely to refer to the petition and leave it to the respondent to ascertain from the petition, as best as he could, what the charge against him was. The learned Judge observed that in England, this rule applied both to motions for attachment and motions for committal, but in India even the distinction between attachment and committal did not exist. In support of his view that the notice was defective and the motion bad, the learned Judge relied mainly on the decision of the Bombay High Court in — 'Jayantilal Hiralal & Co. v. Waman Narayan', AIR 1932 Bom 638 (A), but he also referred to statements of the law in Oswald and Halsbury.

(7) Against that decision the present appeal was preferred. The respondents in the appeal are Sunder Shaw, Kaloo Shaw, Hira Shaw and Nand Lall Shaw, but it is not clear how the fourth person came to be impleaded. He had given no undertaking in the suit, the notice of motion had not been served on him, no allegation had been made against him in the petition but on the other hand, it had been stated that he had duly vacated the premises. As against him, therefore, the appeal must be dismissed in any event. It must also be dismissed as against Sundar Shaw and Hira Shaw, for Mr. Mitter, who appeared for the appellant, informed us that he would not press the appeal against them, in view of the irregularity in the service of the notice of motion, so far as they were concerned.

(8) The only respondent left is Kaloo Shaw and on the merits of the appeal, the only point requiring consideration is whether the motion was bad, because no particulars of the contempt charged had been given in the notice which was the only paper served. It must, however, be considered first whether any appeal lies at all.

(9) The provision regarding appeal is contained in Cl. 15 of the Letters Patent which provides that, subject to certain exceptions, an appeal shall lie to the High Court "from the judgment" of one Judge of the Court. It was contended that an order refusing to commit for contempt or to entertain an application for such committal was not a 'judgment' within the meaning of Cl. 15 and accordingly no appeal lay.

(10) It is necessary to define first the precise scope of the question raised. One of the exceptions contained in Cl. 15 is that a sentence or order, passed or made "in the exercise of criminal jurisdiction" shall not be appealable. Contempt of Court consists either in words or acts obstructing the administration of justice, in which case it is criminal contempt or in disobedience to orders or processes of the Court so as to cause private injury, in which case it is civil contempt or, in the language of English law, "contempt in procedure". An order passed in a case where the contempt alleged is of the former kind is an order passed "in the exercise of criminal jurisdiction" and an appeal is barred under the express language of Cl. 15 — 'Shyam Sundar v. Jodhraj', AIR 1948 Cal 214 (B).

In England also, an appeal in such cases is now barred by S. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925, since the exception there contained, viz., a judgment of the High Court in a criminal cause or matter from which an appeal is provided for by the Criminal Appeal Act, 1907, does not cover an order for attachment or committal for criminal contempt, since no appeal is provided for in the Criminal Appeal Act against such a judgment. Whether the contempt in a particular case is civil or criminal contempt or partakes of the nature of both is often a question of great refinement, but this at least is well established that breach of an undertaking given to the Court to do or not to do a certain thing in the interest of a private party is mainly and substantially contempt in procedure or civil contempt. An order made in respect of such a breach is outside the exception contained in Cl. 15 and accordingly whether an appeal lies from such an order must depend upon whether it amounts or does not amount to a 'judgment'.

(11) So far as this Court is concerned, there is clear authority in a three-Judge decision in the case of — 'Mohendra Lall v. Anundo Coomar', 25 Cal 236 (C), that an appeal lies from an order made by a Judge on the Original Side, refusing an application to commit for contempt. But it was pointed out by Mr. Mitter himself that the view taken in that case had been dissented from by the Bombay High Court in the case of — 'Narendrabhai Sarabhai v. Chinubhai Manibhai', AIR 1936 Bom 314 (D). The Calcutta case was ful-

ly argued, both on general principles and as to the true construction of the word 'judgment' in Cl. 15, but unfortunately the judgment gives no reasons. Besides, the contempt alleged in that case was interference with the possession of a receiver by certain third parties and the trial Judge refused the application on the ground that the receiver's right to possession was not too clear, nor that the alleged contemnors had not a bona fide claim to a superior title. In those circumstances, the case appears to have been one of a criminal contempt and, further, the decision appears to have been based on the principle of the old English cases in which it was held that an appeal would lie, at least in cases where the order sought to be appealed from had not been made purely as a matter of discretion, but on the view taken by the Court on a question of right, such as whether an act amounting to contempt had at all been done. The decision therefore does not appear to me to dispose of the point raised in the present case, at any rate not clearly and satisfactorily. I may point out that the criminal nature of the contempt was no bar to an appeal under Cl. 15 of the Letters Patent, as it stood at the time, because before the amendment of 1919, the words of the exception were not "sentence or order passed or made in the exercise of criminal jurisdiction", but "sentence or order passed or made in any criminal trial".

(12) The Bombay Case is more in point. It was a case of a breach of an undertaking and the trial Judge held that no breach, such as would justify him in committing the respondent to prison, had been proved. An appeal was preferred from that order, but the appellate Court held that no appeal lay, inasmuch as the order sought to be appealed from was not a 'judgment' within the meaning of Cl. 15. Beaumont, C. J. and Rangnekar, J. who delivered separate but concurring judgments, both pointed out that the Bombay High Court had always acted upon the definition of 'judgment' given by Couch, C. J. of this Court, viz., " 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability" — 'Justices of the Peace of Calcutta v. Oriental Gas Co.', 8 Beng L. R. 433 (E).

In the view of the learned Judges, an order refusing to commit a person for a breach of an undertaking given to the Court could not be said to affect the merits of any question between the parties, but affected only the right of the Court to enforce its order and vindicate its authority. The question was one entirely between the Court and the person guilty of the breach and the Court might make any order it deemed fit to make, but the party in whose interest the undertaking violated had been given had no right to insist that the violation must be punished with committal to prison and therefore a refusal to commit did not affect any question between the parties. In that view, the learned Judges declined to follow the decision in — '25 Cal 236 (C)'.

(13) Mr. Sanyal submitted that the view taken by the Bombay High Court was not right and in my opinion his submission was well founded. In this Court at least, the definition of 'judgment' given by Sir Richard Couch has not always been taken as the last word and Judges have on occasions pointed out the necessity of enlargement or modification. But Mr. Sanyal submitted that for the purposes of the present case, he was prepared to accept the definition, as it was, and he would contend that an order refusing to commit a person for breach of an undertaking given to the Court was within the ambit of that definition.

In my opinion, Mr. Sanyal's contention is correct and must be accepted. An undertaking given to the Court is equivalent to an injunction. —'Neath Canal Co. v. Ynisarwad Resolven Coll. Co.', (1875) 10 Ch 450 (F); — 'Milburn v. Newton Colliery Ltd.', (1908) 52 SJ 317 (G). Long ago, Sir John Nicol said in the case of — Barlee v. Barlee', (1822) 1 Add 301 at p. 304 (H), that when contempt was incurred by a party's neglect or refusal to do some act which was in justice due to the other party in the cause, "the imprisonment which follows is at the prayer of the other party, a prayer which the Court cannot refuse to accede without a breach of its duty & a denial of justice." In other words, the party affected prejudicially by the act constituting contempt has a right to initiate proceedings and demand that the contemnor be committed to prison. That is so, because "the true nature of the remedy is in such cases a relief granted by way of execution to the applicant" (Edwards on Execution, p. 244), or as Cotton L. J. put it in — 'O'Shea v. O'Shea', (1890) 15 PD 59 (I),

> "where an injunction is granted against a defendant, and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt, that is really only a procedure to get something done in the action".

The same view was expressed by Lord Lindley in — 'Seaward v. Paterson', (1897) 1 Ch 545 at p. 555 (J) when he said that in the case of a motion to commit a man for breach of an injunction, he was "proceeded against for the purpose of enforcing the order for the benefit of the person who got it".

It will thus be seen that as between the parties, committal to prison in such cases is a form of execution which the party in whose interest the order was made or the undertaking given, has a right to ask for in order to the enforcement of the undertaking or order and which the Court cannot properly refuse. But I must add that that is not the whole position. In circumstances involving misconduct — and misconduct includes breach of an undertaking given to the Court — contempt in procedure bears a twofold character, implying as between the parties a right to exercise and a liability to submit to a form of execution and, as between the party in default and the State, a penal and disciplinary jurisdiction to be exercised by the Court in public interest: Halsbury, Hailsham Edition, Vol. VII, p. 24, on the authority of (1897) 1 Ch 545 at pp. 555-56 (J) and — 'Scott v. Scott', (1913) AC 417 at p. 440 (K). With great respect, in the Bombay case the learned Judges fell into the error of confining themselves to the second aspect, but overlooked the first. But the first aspect cannot be overlooked. If committal to prison for breach of an undertaking given to the Court is a form of execution which the party for whose benefit the undertaking was given is entitled to ask for, an order refusing to commit or to entertain an application for committal undoubtedly affects the merits of a question between the parties and is therefore a 'judgment' within the definition of Sir Richard Couch. If so, an appeal obviously lies under Cl. 15 of the Letters Patent.

(14) It may be interesting to note how the word 'judgment', occurring in the corresponding provision of English Law, has been interpreted. Section 27(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that subject as otherwise provided, the Court of Appeal shall have jurisdiction to hear and determine appeals from "any judgment or order of the High Court",

but S. 31(1)(a) provides that except as provided by the Act or by the Criminal Appeal Act, 1907, "no appeal shall lie from any judgment of the High Court in any criminal cause or matter". The word 'judgment', in that provision is treated in the cases as equivalent to 'decision': Halsbury, Vol. VII, 54, note (g). "It is used here in a broad sense and extends to all orders of the High Court": — 'Reg v. Fletcher', (1877) 2 QBD 43 (L). It is true that in the case of the word, as used in our Letters Patent, the definition of Couch, C. J. has added certain qualifications, but as shown above, those qualifications do not exclude the order appealed from in the present case.

(15) On behalf of the respondents, it was contended by Mr. Bose that the High Court was a Court of Record and therefore apart from whether the order of Sinha, J. was a judgment or not, no appeal lay from the order made by the learned Judge in a matter involving contempt of the Court. To that argument there are two answers. In spite of this Court and other High Courts of India being Courts of Record, the Privy Council has entertained appeals from their orders in contempt matters in several cases. Secondly, the appeal in the present case is to the High Court itself and not from the High Court. In a similar case, it has been held in England that when a Judge has refused to commit for contempt, an appeal lies from such refusal, although where the refusal was not based on a particular view of a disputed question but simply an exercise of judicial discretion, the Court of Appeal, while entertaining the appeal, will be slow to interfere with the order of the Court below. —'Jarmain v. Chatterton', (1881-82) 20 Ch D 493 (M).

(16) I may now turn to the main question in the case which is whether Sinha, J. was right in holding that the motion was bad, because the notice contained no statement of the contempt charged. The learned Judge referred to the decision in 'AIR (1932) Bom 638 (A)' with which he agreed and observed that so far as he was aware, that case had never been dissented from in this Court. Unfortunately the decision in — 'Prokash Chandra v. Manindra Nath', ILR (1946) 2 Cal 499 (N), where the Bombay decision had been expressly dissented from and a contrary view taken, was not cited before the learned Judge.

(17) The substance of the question is this: When a person is warned by a notice of motion that an application will be made before the Court for an order to commit him to prison for contempt, is he entitled, as of right, to be informed by the notice itself of the specific act of contempt charged against him and when the act charged is not mentioned in the notice, must the application fail for that reason alone?

The rules of the Original Side of this Court do not contain any special provision for notices of motion in cases of contempt. There is only a general provision contained in Rule 4 of Chapter XX which applies to all notices of motion and all that it provides is that the notice

> "shall state the time and place of application and the nature of the order asked for, with a note at foot specifying the grounds to be used in support of the application."

I confess I am a little intrigued by the language of the last portion of the provision I have quoted. If the word 'grounds' is to be taken in its natural sense of 'reasons', the word 'used', to say the least, does not go well with it and, on the other hand, if the meaning be the petition or affidavit intended to be used in support of the prayer, the use of the word 'grounds' to express that meaning is clearly inappropriate. But the meaning established by the practice of the Court is the latter and the insertion of a foot-note, mentioning the petition or affidavit proposed to be used, is regarded as sufficient compliance with the Rule. In those circumstances, a notice of motion in respect of an application for an order to commit for contempt, which mentions the petition to be used at the hearing but nothing more, cannot be said to be defective under the Rules of the Court, as they stand, unless it can be said that special considerations apply to cases of contempt.

(18) Sinha, J. did not refer to the Rules of this Court, but he seems to have thought that special considerations did apply to cases of committal for contempt, because they were quasi-criminal in nature and therefore it would not only be proper to import the wholesome principles of the English practice, but also legally correct to do so, because the jurisdiction to punish for contempt which this Court had was the same as that of the Court of the King's Bench and the High Court of Chancery, which it had inherited from the Supreme Court. The whole matter was dealt with by Das, J. in 'ILR (1946) 2 Cal 499 (N)' where the learned Judge pointed out that the requirement of the English practice that the particulars of the contempt charged must be furnished along with the notice of motion did not exist in 1773, the date of the Charter Act, but had been introduced by later statutory rules and that even since then, the requirement applied only to cases of attachment but not to cases of committal. His Lordship proceeded to observe that if there was no distinction in India between attachment and committal, as held in — 'Bai Moolbai v. Chunilal Pitambar', 33 Bom 630 (O), there was no reason why the English procedure relating to committal should not be followed in India rather than the procedure relating to attachment, particularly since the former was warranted by our own Rules.

(19) In stating what the English procedure was, Sinha, J. relied on a passage in Oswald on Contempt and a passage in Halsbury's Laws of England, Vol. VII, p. 40. The latter relates clearly to cases of attachment and is based expressly on O. 52, R. 4 of the Rules of Supreme Court which is limited to applications for that form of process. Cases of applications for committal are dealt with separately in a passage which follows. The passage in Oswald (Third Edition, pp. 207-8) does say that a notice of motion for attachment must state in general terms the grounds of the application and that the same rule applies to notices of motion to commit, but it was pointed out by the Court of Appeal in — 'Taylor, Plinston Brothers and Co., Ltd. v. Plinston', (1911) 2 Ch 605 (P) that text-book writers had been misled by the wrong head-note in the case of — 'Litchfield v. Jones', (1884) 25 Ch. D 64 (Q), as reported in the authorised reports. The Court held clearly that in the case of a notice of motion to commit, the provisions of O. 52, R. 4, requiring the notice to state in general terms the grounds of the application and a copy of any affidavit, intended to be used, to be served along with the notice, did not apply.

(20) It is not easy to ascertain all the details of the English practice from the reports in the books, for the practice seems to have differed widely before the Judicature Acts and to differ to a certain extent even now, according as the contempt was or is civil or criminal, or as the proceedings were or are for attachment or committal or as the proceedings were or are taken at common law in Chancery. Particularly is the distinc-

tion between attachment and committal not too apparent, seeing that whether a person is attached or not attached, he is consigned to prison in both cases all the same. On the distinction between the two forms of proceeding, the best statement is to be found in Mr. Registrar Lavie's note, set out in the report of the case of — 'In re Evans; Evans v. Norton', (1893) 1 Ch 252, at p. 259 (R). It appears that before the Judicature Act, the distinction, broadly speaking, was that a man was committed for doing what he had been ordered not to do and attached for not doing what he had been ordered to do in other words, committal was the remedy for doing an act prohibited by an order, whereas attachment was the remedy for neglecting some act ordered to be done. That distinction has to a large extent been abolished by O. 42, R. 7 of the Rules of the Supreme Court which makes both the remedies applicable to both kinds of transgression and indeed in many cases it was said, even without reference to the Rules, that for all practical purposes the distinction had disappeared: —'Callow v. Young', (1887) 56 LT (NS) 147 (S); —'Harvey v. Harvey', (1885) 26 Ch D 644 (T).

But there are other cases such as interference with a receiver, misconduct towards a ward or comment on a pending action, where there is no question of the breach of any order and in such cases, which are not covered by O. 42, R. 7, room for the distinction still remains. The generally accepted view, however, is that committal is the proper remedy in such cases. Other points of distinction between attachment and committal are that in the case of the former, the order is executed by the Sheriff who lodges the prisoner in county gaol and it is virtually a sentence for an uncertain term of imprisonment until the Court authorises the prisoner's discharge. In the case of the latter, the order is executed by the plaintiff or, in his absence, the usher, who lodges the prisoner in the Court's prison and the order either commits the prisoner for a fixed period or simply commits him to prison, leaving him to apply for his discharge.

(21) But the distinction with which we are concerned in the present case is the distinction in the form and manner in which the proceedings were formerly initiated in cases of attachment and committal and in that distinction will be found the reason for the special rule of English law that in cases of attachment, the notice of motion must state the grounds in general terms and that where an affidavit is intended to be used, a copy of the affidavit must also be served along with the notice. It appears that under the old practice, an order for attachment could be obtained on the Chancery Side without an order of the Court. One had merely to produce before the proper official in the Court's office the order concerned and evidence of default in complying with it and an attachment issued as a matter of course. '(1893) 1 Ch 252 (R)', '(1911) 2 Ch 605 (P). This practice appears to have been confined to the Chancery Side, for it is stated in Halsbury that, at common law, a writ of attachment was never issued without leave of the Court (Halsbury, Hailsham Edition, Vol. VII, p. 37 Note (o)). Now, however, the Judicature Act has amalgamated the several Divisions of the High Court and O. 44, R. 2 provides that "no writ of attachment shall be issued without leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is sought to be issued." The present procedure therefore is that an application for leave to issue a writ of attachment is to be made by motion to the Court, both in the Chancery and the King's Bench Divisions, which notice to the party affected. I am leaving aside the distinction that in the King's Bench Division, applications to enforce obedience to orders are made by summons to a Judge in chambers. The general provision regarding notices of motion is contained in O. 52, R. 3 of the Rules of the Supreme Court which merely says that except in certain specified cases, notice must be given to the party affected by a motion before the Court is moved. The prescribed form of the notice contains no reference to grounds and all that it requires is an intimation that on a specified day at a specified hour or so soon thereafter as counsel can be heard, a particular counsel will move the Court on behalf of a particular party for a particular order — See Form 18, Annual Practice, 1950, Vol. 2, Appendix B, Part II, p 2555.

Motions for committal are governed by R. 3 and notice in Form 18 is sufficient notice. But with regard to motions for attachment and certain other reliefs, there is a special provision in O. 52, R. 4 which lays down that every notice of motion must state in general terms the grounds of the application and where the motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served along with the notice. It has been explained that this rule was framed in order to supersede the old practice of obtaining a writ of attachment without leave of the Court and without notice to the alleged contemnor, which was leading to abuses, and that the statement of the grounds and the connected affidavit are only modern substitutes for the old praecipe which, formerly, was only taken to the office but is now required to be served on the party affected. — '(1911) 2 Ch. 605 (P); Mr. Registrar Lavie's memorandum in — '(1893) 1 Ch. 252 (R)',. The explanation seems to explain nothing, because if these formalities were never required to be observed in the case of applications for committal for the reason that such applications were dealt with by the Court, it is not easy to see why, now that provision has been made for bringing before the Court applications for attachment as well, a special procedure should be required to be followed in the case of such applications. Besides, in the King's Bench Division, where leave of the Court was required in cases of attachment even under the old practice, motions for attachment were made in the same way as motions for committal and with the same kind of notice. Why a different kind of notice should now have been brought necessary, it is not easy to see. It cannot even be said that whatever the reason, it is the policy of the new rules that the party against whom a writ of attachment is sought, should be apprised in advance of the particulars of the case against him, because personal service of the notice is not essential and where a party has not appeared, it is sufficient to file the notice with the proper officer, as provided for by Order 67, R.4; — '(1893) 1 Ch. 252 (R)'. Why then a fuller notice has been prescribed for motions for attachment, is not clear.

(22) In view of the above state of the English procedure, it appears to me that there is no good reason in that procedure to insist that in proceedings for committal in this Court, the special rule of English law as to the notice of motion in cases of attachment must be followed. Motions for committal can be made in England, both on the Chancery Side and the Civil Side of the King's Bench Division, on a bare notice that an application will be made on a certain date. Rule 4 of

Chapter XX of the Rules of the Original Side of this Court requires the notice to be fuller, because it provides that the grounds to be used in support of the application must be specified in the notice. It is true that according to the accepted sense of the word 'grounds' only the petition or affidavit is meant, but even so, the party sought to be proceeded against is given more information than in England. It is again true that where the liberty of a person is concerned, a writ should not issue without notice to him of what the case against him is, but what we are considering here is whether such information must be given by the notice of motion itself or whether it is sufficient to mention the petition or affidavit on the usual terms as to costs. I can see nothing in the rules of this Court or in the English practice to require me to hold that omission to specify the alleged act of contempt in the notice itself must entail a dismissal of the motion. In my opinion, however desirable it may be to give particulars of the contempt charged in the notice of motion itself, in law it is sufficient if the provisions of Chapter XX Rule 4 are complied with, both in motions for committal and motions for attachment, if ever a motion of the latter kind can be made in an Indian Court at all.

(23) I have already stated that Mr. Mitter did not desire to press the appeal as against Sundar Shaw and Hira Shaw on whom the first notice of motion was not personally served. I may, however, point out that in cases of civil contempt, it is not essential that notice must be personally served before the motion, even if it be a motion for committal, can be heard. Every endeavour must certainly be made to effect personal service, but where such endeavour fails, the Court may make an order for substituted service: — 'Mander v. Falcke', (1891) 3 Ch. 488 (U).

(24) I have now discussed all the points raised in the appeal. The parties, and Mr. Sanyal as well, submitted that the procedure to be followed on the Original Side of this Court in proceedings for contempt was in an unsettled state and we might take this opportunity for settling the procedure. It is clear to me that the framers of the Rules of the Original Side had not present to their minds the consideration that proceedings for contempt might require separate treatment. As the Rules stand now, proceedings can only be initiated by a notice of motion or perhaps by a Court application in urgent cases and the common procedure applicable to all other cases must be followed. A judicial prescription cannot override the Rules. I can therefore only indicate on general lines what the better procedure would be as respects certain essential matters, without being inconsistent with the Rules.

(25) Before I do so, I should like to point out that the question in issue in the case of — '(1911) 2 Ch. 605 (P), was not what the notice of motion should contain, but whether a copy of the affidavit on which the motion was founded ought to have been served along with the notice of motion. The form of the notice served in the case does not appear from the report, but since the contempt was of a civil nature and the motion was for committal, the notice was presumably a bare notice of the intended application in Form No. 18. It was still held that service of the affidavit was not obligatory. But although such is the strict law, it is stated in Halsbury that although Order 52, R. 4 does not apply to motions for committal in terms, in practice the procedure applicable to attachment is followed and therefore copies of the affidavits intended to be relied on should be served along with the notice of motion, as in cases of attachment (Halsbury, Hailsham Edition, Vol. VII, p. 46, Note (h) and — 'Carter v. Roberts', (1903) 2 Ch. 312 (V).

(26) Having regard to all that I have said before, I should consider the better procedure to be as follows:

(1). The application should be made by notice of motion;

(2). Although it is not obligatory under Chap. XX, Rule 4 of the Original Side Rules, the notice should preferably specify the act of contempt charged and a copy of the petition on which the notice is founded should also be served along with the notice;

(3). Every attempt must be made to serve the notice personally, but in suitable cases the Court, on being satisfied that personal service cannot be effected, may make an order for an alternative form of service authorised by the Code of Civil Procedure, read with Rule 26 of Chapter VIII of the Criminal Side Rules and by Rule 11 of that Chapter;

(4). The above rules would not apply to cases of purely criminal contempt where the application should be by a motion for an order 'nisi' or an order upon the respondent to appear and answer and which are dealt with by the summary process.

(27) Reverting now to the present case, for the reasons given above, this appeal is dismissed as against respondents 1, 3 and 4, Sundar Shaw, Hira Shaw and Nandlal Shaw. It is allowed as against respondent 2, Kaloo Shaw, the order of Sinha, J., is set aside and the case is remitted to the Court below for the motion to be heard and determined, as respects the said respondent, in accordance with law.

(28) There will be no order for costs as respects Nand Lal Shaw who has not appeared. Respondents Sundar Shaw and Hira Shaw will get their costs from the appellant. As respects Kaloo Shaw, the costs will be costs in the cause.

(29) S. R. DAS GUPTA J.: I agree.

B/R.G.D. Order accordingly.

AIR 1953 CALCUTTA 632 (Vol 40, C. N. 241)

LAHIRI AND GUHA JJ.

Darpa Hari Pakhira and others, Petitioners v. Samarendra Nath Sen and another, Opposite Party.

Civil Rule No. 2848 of 1952, D/-11-2-1953.

(a) West Bengal Bargadars Act (2 of 1950), Ss. 7 and 9(2) — Jurisdiction of Conciliation Board.

If the reliefs asked for come under any one or more of the clauses enumerated in S. 7 of the Act, the Bhag Chas Conciliation Board will have jurisdiction to decide a question, such as a question of title, not falling within that section, as ancillary or incidental to the reliefs asked for. The decision on such question will not, however, be final or conclusive and will not be binding between the parties and will not attract the operation of S. 9 (2) of the Act. AIR 1918 Cal 1037; 10 Ind Cas 117 (Cal); AIR 1919 Cal 205 and 37 Bom 675 (F.B.) Applied. (Para 6)

(b) West Bengal Bargadars Act (2 of 1950), — Rules under R. 6(2) — Objection as to non-compliance with R. 6(2).

Where the objection as to non-compliance with the provisions of R. 6(2) has not been raised before it must be deemed to have been waived and cannot be raised for the first time before High Court: AIR 1951 Cal 138, Distinguished (Para 9)

Panchanan Pal and Rebati Nath Sarkar, for Petitioners; Anil Kumar Das Gupta and Sailendra Nath Sen, for Opposite Party.

CASES CITED:

(A) ('18) AIR 1918 Cal 1037: 21 Cal WN 784
(B) ('12) 10 Ind Cas 117: 16 Cal WN 288
(C) ('19) AIR 1919 Cal 205: 23 Cal WN 647
(D) ('13) 20 Ind Cas 974: 37 Bom 675 (FB)
(E) (1888) 57 LJ QB 513: 21 QBD 313
(F) ('51) AIR 1951 SC 115: 1951 SCR (CWN Sup) 98
(G) ('51) AIR 1951 Cal 138: 56 Cal WN 23

ORDER: This is a Rule under Art. 227 of the Constitution of India obtained by the bargadars against an order of the appellate officer, Hooghly, affirming a decision of the Bhagchas Conciliation Board under S. 7, West Bengal Bargadars Act, 1950.

(2) The opposite parties initiated a proceeding under S. 7, Bargadars Act, for delivery of the produce and for termination of cultivation of the lands by the Bargadars. The case of the opposite parties was that the disputed land belonged to one Hakim Bux Haldar and that the opposite parties obtained title to this land under a deed of exchange executed by the said Hakim Bux Haldar. It was alleged that the petitioners were bargadars under the said Hakim Bux Haldar and they were liable to pay the barga produce to the opposite parties after the execution of the deed of exchange.

(3) This proceeding was contested by the petitioners bargadars on the ground that there was no relationship of owner & bargadar between them & the opposite parties and therefore S. 7, Bargadars Act did not apply. They also alleged that the opposite parties had acquired no title to the disputed land because the deed of exchange under which they claim to obtain title was void and inoperative. After the institution of the proceedings under S. 7, Bargadars Act, the petitioners instituted a title suit, namely, Title Suit No. 89 of 1952, in the Second Munsif's Court, Hooghly, for a declaration that no relationship of owner and bargadar exists between the opposite parties and the petitioners and as such the Bhag Chas Conciliation Board had no jurisdiction to entertain the application under the Bargadars Act.

(4) The Bhag Chas Conciliation Board overruled the defence and made an award in favour of the opposite parties. Against that award the petitioners filed an appeal before the Appellate Officer, Hooghly. The learned Appellate Officer dismissed that appeal by a judgment dated 25-8-1952. Against this judgment the petitioners have obtained the present Rule.

(5) Mr. Pal appearing in support of the Rule has raised the question that under S. 7, West Bengal Bargadars Act, the Bhag Chas Conciliation Board has no jurisdiction to decide a disputed question of title and as such the award made by the Board is liable to be set aside.

(6) Now S. 7, West Bengal Bargadars Act, 1950, enumerates four matters which can be decided by the Bhag Chas Conciliation Board. They are (a) the division or delivery of the produce; (b) the priority of the right to supply plough-cattle, etc.; (c) the termination of or the restoration to cultivation of such land by the bargadar and (d) the place of thrashing or the place of delivery of the owner's share of the produce. It is quite clear that the question of title does not come under any of the four items mentioned above. The preamble to the Act also makes it clear that only certain rights between the bargadar and the owner of land can be decided by the Bhag Chas Conciliation Board constituted under the Act. Therefore we have to consider the question whether the Bhag Chas Conciliation Board had jurisdiction to give its decision on the question of the existence of relationship of owner and bargadar as between the petitioner and the opposite parties.

In order to construe the provisions of this statute we think we are entitled to examine the relevant provisions of another statute, namely, the Provincial Small Cause Courts Act. By S. 15, Provincial Small Cause Courts Act a Court of Small Causes is debarred from taking cognizance of a suit specified in the Second Schedule of the Act as excepted from the cognizance of Small Cause Courts. Suits for accounts and suits for the recovery of interest in immovable property are excepted from the cognizance of the Provincial Small Cause Courts Act. In spite of these provisions it has been held in a number of decisions of this Court as well as of other High Courts that if the relief asked for is of a small cause nature, the suit is a small cause and triable by the Small Cause Court even though it incidentally raises the question of title to immovable property. Reference may in this connection be made to the decision of this Court in the case of — 'Kshetranath Banerjee v. Kali Dasi Dasi', AIR 1918 Cal 1037 (A), where it has been held that where the suit is for the payment of money it is triable by a Small Cause Court even though accounts may have to be taken. So also it has been held in the case of — 'Elahi Buksh Mandal v. Ram Narayan Ghosh', 16 Cal W N 288 (B), that in a suit for damages for trespass the question of title may incidentally be gone into. This decision was cited with approval in the case of — 'Saharali Mollah v. Bhola Mollah', AIR 1919 Cal 205 (C). Amongst the decisions of other High Courts reference may be made to the decision of the Full Bench of the Bombay High Court in the case of — 'Puttangowada v. Nil Kantha', 37 Bom 675 (D).

It seems to us that in order to determine the jurisdiction of the Bhag Chas Conciliation Board we have to look into the nature of the reliefs sought for by the applicants and that the nature of the defence does not determine the jurisdiction of the Board. If the reliefs asked for by the applicants come under any one or more of the clauses enumerated in S. 7 of the Act, the Bhag Chas Conciliation Board will have jurisdiction to decide the case even if the objectors in their objection raise questions which are not within the purview of that section. The decision of the Board on any of the matters not included in S. 7(1) of the Act will not certainly be final or conclusive and will not be binding between the parties, but we think that the Board will have jurisdiction to decide those questions incidentally for the purpose of adjudicating on the applicants' claim. It is ancillary or incidental relief asked for by the applicants. The decision of the Board on any of the matters which are not covered by the four clauses of S. 7(1) will not attract the operation of S. 9(2) of the Act, because the Board is not required to decide those questions under S. 7(1) and this decision may very well be challenged in a Civil Court as erroneous. If the Board be held to have no jurisdiction whatsoever to go into any question of title it is quite possible that the objectors to a proceeding under S. 7(1) may oust the jurisdiction of the Board by raising a question which does not come under the four clauses mentioned in sub-s. (1). For these reasons we are inclined to hold that the question of existence of the relationship

of owner and bargadar may be incidentally decided by the Board in order to give relief to the applicants in a proceeding under S. 7. There is no doubt that in the present case the reliefs sought for by the applicants come under cls. (a) and (c) of sub-s. (1) of S. 7 and the question of title arises only on the objection of the petitioners. We hold that the Bhag Chas Conciliation Board had jurisdiction to decide that question as ancillary to the reliefs asked for by the applicants, though the decision given by the Board is not final or conclusive.

(7) Reliance was placed upon the observations of Lord Esher in the case of — 'Queen v. Commissioners for Special Purposes of the Income-Tax', (1888) 21 Q B D 313 at p. 319 (E), which were quoted with approval by the Supreme Court in the case of — 'Rai Brijraj Krishna v. S. K. Shaw & Brothers', 1951 SCR (cwn sup) 98 at p. 104 (F), for the proposition that Board has no jurisdiction to decide the disputed question of title even incidentally for the purpose of adjudicating on the applicants' claim. The observations run as follows:

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that if a certain state of facts exists and is shown to such tribunal or body, before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."

(8) From the passage quoted above, it does not follow that a question not included in any one of the four clauses enumerated in sub-s. (1) of S. 7 may not be decided even incidentally. All that is said is that if the question is decided, its decision is liable to be challenged. We have already said that the decision given by the Bhag Chas Conciliation Board in the present proceedings will not be conclusive and binding between the parties and therefore the conclusion at which we have arrived is not contrary to the principles laid down above. The first point raised by Mr. Pal must accordingly fail.

(9) The second point raised in support of the Rule is that the application filed by the opposite parties under S. 7(1) of the Act was not verified in the manner provided for by R. 6(2) of the Rules framed under the Act. This Rule provides that every application under S. 7 shall be signed and verified in the manner provided in sub-rr. (2) and (3) of R. 15, O. 6, Civil P. C. and must contain the particulars enumerated in that Rule. Reliance was placed by Mr. Pal upon the decision in the case of — 'Narendra Nath Sashmal v. Binode Behari Dey', AIR 1951 Cal 138 (G) in support of the view that non-compliance with the provisions of the aforesaid Rule is a fatal defect and the application filed by the opposite parties is liable to be dismissed on this ground.

In the case before us, however, it appears that the petitioners did not raise this objection either before the Board or before the appellate officer, nor did they raise it in their petition of objection. The memorandum of appeal which was filed by the petitioners before the appellate officer was not also verified in the manner provided for by R. 11, the provisions of which are very similar to the provisions of R. 6(2). In these circumstances, we are of the opinion that the petitioners waived the objection on this point, & they cannot be allowed to raise it for the first time in this Court. In the case in — 'AIR 1951 Cal 138 (G)', relied upon by Mr. Pal, the objection as to the non-compliance with the provisions of R. 6(2) was pressed before the Board as well as the appellate officer, but that objection was overruled. This is a circumstance which, in our opinion, differentiates that case from the facts of the present case. We are, therefore, unable to give effect to the second point raised by Mr. Pal.

(10) The third point raised by Mr. Pal relates to the order as to termination of cultivation of the disputed land by the petitioners. Mr. Pal contends that in order to get an order for the termination of cultivation the opposite parties must prove that the owner desires to cultivate the land by himself, or by members of his family, or by servants or labourers. It is not quite correct to say that the owner can ask for termination of cultivation only upon this ground. Section 5 of the Act enumerates four grounds upon which the owner is entitled to ask for termination of cultivation by the bargadar. From the petition of objection filed by the bargadars before the Bhag Chas Conciliation Board it does not appear that they objected to the termination of cultivation for non-compliance with the provisions of the different clauses of S. 5 of the Act. As the point raised before us involves a consideration of questions of facts and as this point was not raised by the petitioners either before the Bhag Chas Conciliation Board or in their petition of objection, we are afraid we cannot allow the petitioners to raise that point for the first time in this Court.

(11) As all the points raised by the petitioners before us fail, this Rule must be discharged, but in the circumstances of this case we do not make any order as to costs of this Rule.

B/G.M.J. Rule discharged.

AIR 1953 CALCUTTA 634 (Vol. 40, C. N. 242)

CHAKRAVARTTI AND DAS GUPTA JJ.

Shew Moni Shaw, Accused-Petitioner v. The State.

Criminal Revn. No. 129 of 1951, D/- 25-6-1951.

Evidence Act (1872), Ss. 101 to 103 — Criminal trial, burden of proof — (Criminal P. C. (1898), S. 367).

It should never be forgotten that in a criminal case the burden lying on the prosecution never shifts. It is the duty of the Court to require the prosecution to prove every part of its case affirmatively by sufficient and legal evidence and it is not possible to convict an accused person on the ground of any weakness in his defence. (Para 6)

Where the prosecution evidence falls short of proving the guilt of the accused with reasonable certainty, it is the duty of the Court to acquit the accused straightaway. It cannot convict on a finding of mere probability. (Para 7)

Anno: Evi. Act, Ss. 101 to 103 N. 3; Criminal P. C., S. 367 N. 6.

Chintaharan Roy and Arun K. Das Gupta, for Petitioner; A. N. Bagchi, for the State.

ORDER: This Rule is directed against the conviction of the petitioner under S. 326, I.P.C. and his sentence of rigorous imprisonment for one year as also a fine of Rs. 300/-, in default, rigorous imprisonment for three months more. The conviction was by a Magistrate of Barrackpore and it was upheld in appeal by an Additional Sessions Judge of Alipore.

(2) The prosecution case, in brief, was that one Harinarayan Shaw kept a shop at Kancharapara, dealing in tea and betel. The petitioner and his cousin Bidyananda were his customers and were in arrear in regard to their dues. On 23-7-1948, the petitioner and his cousin Bidyananda were passing by the road and they were near the shop of Harinarayan when the latter accosted them and demanded payment of his dues. It is said that the petitioner abused Harinarayan and thereupon an altercation ensued. As the trouble began to grow, people assembled and ultimately the parties were separated. Subsequently, so the prosecution story continued, at about 8 at night when Harinarayan was winding up for the night, he had his back towards the door and at that time the petitioner and his cousin Bidyananda entered the shop and the petitioner struck Harinarayan with a knife which he took from the hand of his cousin Bidyananda. There were two wounds, one on the neck and the other on the left shoulder as a result of which it was necessary for Harinarayan to remain in hospital for 23 days.

(3) The prosecution examined 7 witnesses and the Court examined two witnesses on its own account.

(4) The defence was that there was not merely an altercation in the evening but a scuffle too and it was in the course of that scuffle that Harinarayan fell down heavily on the earth and came into contact with broken pieces of glass which caused the wounds. That defence was disbelieved by the learned Magistrate and he convicted the petitioner as stated above.

(5) Bidyananda, however, was discharged. In his explanation submitted to this Court the learned Magistrate says that he discharged Bidyananda not because he disbelieved the prosecution evidence but because the evidence was insufficient.

(6) There was a first information report in the case lodged by the father of Harinarayan. The officer who recorded the first information was not examined, nor was it explained when and in what circumstances the petitioner was arrested or the knife with which the wounds were alleged to have been inflicted, seized. The learned Magistrate referred to this omission in the chain of prosecution evidence and described it as a serious lacuna. He, however, brushed it aside with the following rather extraordinary statement:

> "There appears a serious lacuna in evidence which the prosecution ought to have cleared up; and for this lacuna, the accused would have been granted benefit of doubt and acquitted but for the defence itself which, in my opinion, has made prosecution story believable."

If the conviction of the petitioner rested on this judgment or if the learned Additional Sessions Judge had followed the example of the trying Magistrate, there would not have been a moment's hesitation in setting aside the conviction of the petitioner. It is somewhat surprising that the learned trying Magistrate should have forgotten that in a criminal case the burden lying on the prosecution never shifts. He seems also to have forgotten that it was his duty to require the prosecution to prove every part of its case affirmatively by sufficient and legal evidence and that he could not possibly convict an accused person on the ground of any weakness in his defence.

(7) As, however, there was an appeal and the learned Additional Sessions Judge considered the evidence on his own account and purported to base his finding on that evidence, we may overlook the defect in the judgment of the trying Magistrate. But, if the learned Additional Sessions Judge succeeded in steering clear of the error into which the learned trying Magistrate fell, he himself seems to have fallen into another, hardly less serious. A number of points were urged before him regarding the inconsistency and discrepancy in the prosecution case. Some points bearing upon the alleged illegalities of procedure committed by the learned Magistrate were also urged. It was said that there had been no proper examination of the accused under S. 342, Cr. P. C. regarding the evidence given against him by the Court witnesses. The omission to examine the police officer, who had recorded the first information, and the absence of any evidence regarding the place where and the circumstances in which the petitioner had been arrested and the knife seized was also dwelt upon. So was the discharge of Bidyananda which, it was alleged, had made the conviction of the petitioner impossible.

The learned Additional Sessions Judge dealt with these points and repelled them and if one reads the first part of his judgment, one is led to believe that he had reached a state of mind in which he was prepared to make a firm finding that Harinarayan was in fact struck on 23-7-1948 by the petitioner. That impression of the judgment, however, is completely destroyed by a passage occurring towards the close of the learned Judge's pronouncement. He was dealing with the argument advanced by the petitioner as regards the discharge of Bidyananda. He rejected that argument as of no substance. He then proceeded to record what seems to be something like a final summing-up of his findings. In doing so, he made the following observation:

> "In my opinion there can be no reasonable doubt of the fact that P. W. 2 was the victim of a knife attack shortly after an altercation with the appellant and Bidyananda; it is highly probable that one of those two men was the assailant of P. W. 2. If Bidyananda, the discharged man, was the principal offender and the appellant only an accomplice or an abettor, there would hardly be any point in proceeding against the latter as the principal offender. I see no reason why the prosecution would spare Bidyananda and proceed against the appellant as the principal offender."

If the concern of this passage had been solely to apportion the criminality of the attack on Harinarayan as between the petitioner and Bidyananda, it might be unexceptionable. But the passage is not limited to that question. It begins by recording the learned Judge's finding that Harinarayan was the victim of a knife attack after the quarrel with the petitioner and Bidyananda. That finds the quarrel, finds the party with whom the quarrel took place and finds also a knife attack occurring shortly after that quarrel. Proceeding next to the question as to who made the knife attack, the learned Judge is only able to say that it was "highly probable" that one of the two, i.e., the petitioner and Bidyananda, was the assailant of Harinarayan. Just as the learned trying Magistrate seems to have forgotten that an accused person could not be convicted in a

criminal case, because the defence put forward by him was weak or improbable, so seems the learned Judge also to have forgotten that in a criminal case he could not possibly convict an accused person because it was "highly probable" that he had committed the offence. The learned Judge, if his impression of the prosecution evidence did not reach beyond making the allegation against the petitioner probable, that is to say, if the evidence fell short of proving it with reasonable certainty, his duty was to acquit the petitioner straightaway. He could not convict on a finding of mere probability. But worse follows. Dealing with the question as to whether the petitioner was the principal offender or Bidyananda, the learned Sessions Judge decides against the petitioner on the ground that

> "If Bidyananda ..... was the principal offender and the appellant only an accomplice or abettor, there would hardly be any point in proceeding against the latter as the principal offender",

and that he saw no reason why the prosecution would spare Bidyananda and proceed against the petitioner as the principal offender. In other words, the learned Judge seems to have held that since the prosecution had charged the petitioner as the principal offender, he must be so. It is hardly necessary to point out the utter impropriety of making use of any reason of that kind.

(8) From what I have said above, it is perfectly clear that the judgment of the learned Judge cannot be sustained. Indeed, the conviction of the petitioner suffers from two fatal taints one occurring in each judgment against him. If we are still not directing an acquittal, we are refraining from that course for the reason that there seems to be a considerable body of first hand evidence which, if true, would establish the guilt of the petitioner. On the other hand, there are points urged by the petitioner against the prosecution case which required to be considered more carefully than they appear to have been. It was stated to us in particular that the point which the defence sought to make out of the discrepancy between the first information report and the prosecution story as laid in Court was that in the first information report itself, there was admission of a scuffle which was in consonance with the defence story and which probabilised the case of the accused that in the course of such a scuffle there had been a fall on broken pieces of glass.

(9) It was complained that this aspect of the case had not received proper attention. As these and other matters do require proper judicial consideration, we think that the appeal ought to go back to be reheard in accordance with law.

(10) In the result, the Rule is made absolute to the extent that the judgment of the learned Sessions Judge in appeal is set aside and the appeal is sent back to be reheard by either the learned Sessions Judge himself or some Additional Sessions Judge to be nominated by him other than the learned Judge who heard it in the first instance.

(11) Pending the hearing of the appeal let the petitioner continue on the same bail.

(12) We desire to make it clear that we must not be understood to have expressed any opinion either as to the probability of the defence story or as to whether the gaps in the prosecution evidence, remarked on by both the Courts, were at all material or as to the effect of the alleged discrepancies. On these and all other matters, the learned Judge, re-hearing the appeal, will come to his own conclusion.

B/K.S. Appeal ordered to be reheard.

***AIR 1953 CALCUTTA 636 (Vol. 40, C. N. 243)**

DAS AND DEBABRATA MOOKERJEE JJ.

Sukhendu Bikash Barua, Appellant v. Hare Krishna De and others, Respondents.

A. F. O. O. (Mandamus) No. 160 of 1952, D/- 19-5-1953.

(a) Letters Patent (Cal.), Cl. 15 — Orders made in the exercise of revisional jurisdiction — (Civil P. C. (1908), S. 115).

No appeal lies under Cl. 15 of the Letters Patent against an order made by a Judge sitting singly in exercise of the powers of revision under S. 115, Civil P. C. AIR 1921 Cal 217, Rel. on. (Paras 11, 12)

Anno: L. P. (Cal.), Cl. 15 N. 5; C. P. C., S. 115 N. 32.

***(b) Letters Patent (Cal.), Cl. 15 — Order made in exercise of powers of superintendence — (Constitution of India, Art. 227) — (Civil P. C. (1908), S. 115).**

The relevant expression in Cl. 15 of the Letters Patent excludes a judgment pronounced by a single Judge in exercise of the powers of revision or in exercise of the powers of superintendence under Art. 227 of the Constitution. Case law Ref. (Para 11)

Anno: L. P. (Cal), Cl. 15 N. 6; C. P. C., S. 115 N. 32.

(c) Constitution of India, Art. 227 — Power of interference.

Article 227 of the Constitution allows the High Court to interfere in special cases but the interference will, however, be rare and only in cases where justice clearly demands such interference. AIR 1951 Cal 138, Rel. on. (Para 12)

Prafulla Kumar Roy and Anil Kumar Das Gupta, for Appellant; Bankim Ch. Dutt with Bhabani S. Bagchi, for Respondents.

CASES CITED:

(A) ('99) 8 Mad LJ 231: 22 Mad 68 (FB)
(B) ('14) AIR 1914 Cal 388(2): 41 Cal 323
(C) ('21) AIR 1921 Cal 217: 34 Cal LJ 489
(D) ('53) AIR 1953 Cal 433: 57 Cal WN 25 (SB)
(E) ('28) AIR 1928 Cal 640: 32 Cal WN 1130 (SB)
(F) ('51) AIR 1951 Cal 138: 56 Cal WN 23

DAS J.: This is an appeal by the defendant and is directed against a judgment of Chunder J., dated 28-3-1952.

(2) The facts are that in September, 1949, the plaintiffs respondents initiated proceedings under S. 41 of the Presidency Small Cause Courts Act alleging that they required the disputed premises for their own use. The proceedings were numbered as Suit No. 10455 of 1949. The suit was decreed on contest by Mr. B. P. Bakshi, learned Judge, 4th Bench, his decision being dated 28-8-1949. Against that judgment an appeal was taken by the defendant to the Special Bench. The Special Bench dismissed the appeal on 23-3-1951. Thereafter the defendant filed a petition purporting to be under S. 115, Civil P. C. and Art. 227 of the

Constitution. A Rule was issued being Civil Rule No. 1437 of 1951. The Rule came up for hearing before Chunder J. who by his judgment dated 28-3-1952, discharged the Rule. Before the learned Judge two points appear to have been raised, namely. (1) whether the question whether the premises were required for the bona fide use of the landlords must be judged by a reference to the provisions of the Rent Control Act, 1948, or the Rent Control Act, 1950. (2) Whether the requirement contemplated by the Rent Control Act must be requirement of any one or more of the landlords. Chunder J. overruled the contentions on behalf of the petitioner and discharged the Rule as I have already stated. Against the judgment pronounced by Chunder J. on 28-3-1952, the defendant has filed the present appeal under Cl. 15 of the Letters Patent. The appeal has come up before us for disposal. Mr. Dutt, learned Advocate on behalf of the respondents, has raised a preliminary objection that the appeal is incompetent.

(3) The question is whether an appeal against an order passed in an application purporting to be under S. 115, Civil P. C. and Art 227 of the Constitution lies under Cl. 15 of the Letters Patent.

(4) The Letters Patent was originally issued on 14-5-1862, and was amended on 28-12-1865. The relevant portion of Cl. 15 of the Letters Patent, as amended, is in these terms:

> "And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment not being a sentence or an order passed or made in any criminal trial of one Judge of the said High Court or one Judge of any Division Court pursuant to S. 13 of the said recited Act."

The said recited Act refers to the Indian High Courts Act, 1861 (24 and 25 Victoria, Ch. 104). It is necessary at this stage to state the provisions of the Code of Civil Procedure and of the different Acts relating to the powers of the High Court.

(5) The earliest Code of Civil Procedure was Act 8 of 1859. That Act did not confer on the Court any power of revision. Such powers of revision were conferred for the first time by the Civil Procedure Code of 1861 (Act 22 of 1861). Section 35 of the said Act conferred a very limited power of interference in revision, the power being limited to cases where the lower appellate Court exceeded its jurisdiction. Meanwhile, on 6-8-1861, the Indian High Courts Act, 1861, also called the Charter Act, conferred on the High Court by S. 15 thereof the power of superintendence over all Courts subordinate thereto. By Act 10 of 1877 the powers of revision conferred on this Court were extended so as to include cases similar to those contemplated in Cls. (a) and (b) of S. 115, Civil P. C. 1908. The powers of revision were further enlarged by S. 42 of Act 12 of 1879. The powers of revision which were conferred on this Court by the last two Acts are identical with the powers which this Court now enjoys under S. 115 of the Code of Civil Procedure, 1908. The aforesaid two Acts, namely, Act 10 of 1877 and Act 12 of 1879, were consolidated and S. 622 of Act 11 of 1882 conferred on this Court powers of revision identical with those specified in S. 115 of the Code of Civil Procedure, 1908. Act 11 of 1882 was superseded by the present Code of Civil Procedure (Act 5 of 1908), S. 115 of the latter Act corresponds to S. 622 of the Act of 1882.

(6) The Indian High Courts Act, 1861, was repealed by the Government of India Act, 1915. In the latter Act which is also a Parliamentary Statute, we find in S. 107 the analogue of S. 15 of the Indian High Courts Act, 1861. The Government of India Act, 1915, was repealed by the Government of India Act, 1935. S. 107 of the Government of India Act, 1915, was substituted by S. 224 of the Government of India Act, 1935. It may be pointed out that S. 224(2) of the Government of India Act, 1935 expressly took away from the High Court its power of superintendence in judicial matters.

(7) Shortly after the issue of the Letters Patent in 1865 questions arose as to whether an appeal would lie from a judgment of a Judge of this Court sitting singly passed in a Civil Revision Case. As was to be expected, difference of opinion in the different High Courts soon manifested itself. In an early case in Madras, namely, the case of —'Chappan v. Moidan Kutti', 22 Mad 68 (A), a Full Bench of the Madras High Court was of the opinion that an appeal lay against such a judgment. Subramania Ayyar J. who delivered the leading judgment was of the opinion that though the Letters Patent did not specifically provide for powers of revision, powers of revision exercised by the High Court were exercised by the Court and such jurisdiction was not original jurisdiction but rather akin to appellate jurisdiction. The question arose in this Court in the case of — 'Shew Prosad Bungshidhar v. Ram Chunder Hari Bux', AIR 1914 Cal 388 (2) (B). The judgment of the Bench was pronounced by Jenkins C. J. After referring to the decision of the Madras Full Bench and the relevant provisions of the Letters Patent the Charter Act and the Presidency Small Cause Courts Act which was then in question, it was observed as follows:

> "I think the fair reading of the Charter Act, the Letters Patent and the Presidency Small Cause Courts Act leads to the result that the High Court has a right to interfere by way of revision and if that interference takes the form of a judgment by a single Judge, then the High Court has the power to deal by way of an appeal with that judgment (page 389)."

(7a) In consequence of the divergence of opinion between the different High Courts on the question whether an appeal lay under cl. 15 of the Letters Patent against a judgment of a single Judge exercising powers of revision, the Letters Patent came to be amended on 11-3-1919, by substituting the following words

> "not being an order made in exercise of revisional jurisdiction and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act, 1915, or in the exercise of criminal jurisdiction"

for the words

> "not being a sentence or order passed or made in any criminal trial".

(8) Shortly after the amended Letters Patent the question whether an appeal lay from the judgment of a single Judge passed

in a Civil Revision case came up for consideration before a Bench of this Court in the year 1921. The Bench had to consider whether an appeal lay against an order passed by Newbould J. on 2-2-1920, that is, on a date subsequent to the amendment of the Letters Patent in 1919. In the case of —'Byomkesh Seth v. Bhutnath Pal', AIR 1921 Cal 217 (C), the Bench was of the opinion that no appeal lay. The other High Courts also took the same view.

(9) On 9-12-1927, the Letters Patent was further amended. It is necessary for the present purpose merely to state that for the words "pursuant to S. 13 of the said recited Act" were substituted the words "pursuant to S. 108 of the Government of India Act". The meaning of the expression "pursuant to S. 108 of the Government of India Act" came to be considered by the Special Bench in the case of — 'Chairman, Budge Budge Municipality v. Mangru Mia', AIR 1953 Cal 433 (D), which was a case arising out of an application under Article 226 of the Constitution. It was observed by the Chief Justice that by virtue, first, of S. 38(1) of the Interpretation Act, 1889, which applied to the Government of India Act, 1935, and then of S. 8 of the General Clauses Act which applied to the Constitution, the reference to S. 108 of the Government of India Act in Cl. 15 of the Letters Patent must not be construed as reference to Art. 225 of the Constitution (p. 438).

(10) The judgment of Chunder J. which was passed in an application under S. 115, Civil P. C. and Art. 227 of the Constitution must therefore be read as a judgment passed by a Judge sitting singly pursuant to S. 108 of the Government of India Act, 1915. It is not disputed that the decision of Chunder J. was a judgment within Cl. 15 of the Letters Patent. The question which has been debated before us is whether the judgment of Chunder J. can be regarded as not being a judgment made in a Civil Revision case or in exercise of the powers of superintendence under S. 107 of the Government of India Act, 1915.

(11) Mr. Roy who has appeared in support of the appeal has fairly conceded that in so far as the judgment of Chunder J. purports to be one made in exercise of the powers of revision under S. 115, Civil P. C., Cl. 15 of the Letters Patent does not confer a right of appeal. The concession is based on the Bench decision of this Court in the case of —'AIR 1921 Cal 217 (C)'. The question which Mr. Roy has pressed before us is that the judgment of Chunder J. in so far as it can be regarded as being a dismissal of the application under Art. 227 of the Constitution is not a judgment made by this Court in exercise of the powers of superintendence under S. 107 of the Government of India Act, 1915. I have already pointed out that s. 107 of the Government of India Act, 1915, was superseded by Section 224 of the Government of India Act, 1935. The contention is that S. 224 of the Government of India Act, 1935, took away from this Court its power of interference in judicial matters, and if Cl. 8 of the Letters Patent is deemed to have been attracted, and the reference to S. 107 of the Government of India Act, 1915, is read as reference to S. 224 of the Government of India Act, 1935, it would be meaningless. In order to deal with the contention I shall refer to the provisions of S. 8 of the General Clauses Act (Act 10 of 1897). That section provides inter alia that where any Central Act or Regulation or any Act of Parliament repeals or re-enacts with or without modification any provision of a former enactment, then reference in any Central Act or Regulation or Instrument to the provision so repealed shall, unless a different intention appears, be construed as reference to the provisions so re-enacted. S. 107 of the Government of India Act undoubtedly conferred on this Court powers of interference also in judicial matters. S. 224 of the Government of India Act, 1935, which replaced S. 107 of the Government of India Act was of a limited application, the jurisdiction of this Court to interfere in judicial matters being expressly taken away by S. 224(2). The question is whether S. 8 of the General Clauses Act would lead to the result that for S. 107 of the Government of India Act in Cl. 15 of the Letters Patent we must read S. 224 of the Government of India Act, 1935. Mr. Roy contends that as Cl. 15 provides for an appeal against a judgment which is a judicial matter, such a conclusion based on S. 8 of the Letters Patent is unwarranted. The only effect of the above conclusion is to suspend the right of appeal for the time being.

In my opinion, it is not permissible to cut down the plain words of S. 8 of the General Clauses Act. The whole intention of the amended Letters Patent was to take away the right of appeal which was held by this Court and the Madras High Court to have existed in cases of a judgment of a Judge sitting singly, made in a Civil Revision case. I cannot hold that reference to S. 107 of the Government of India Act in Cl. 15 of the Letters Patent cannot be read as reference to S. 224 of the Government of India Act, 1935. If this is so, then the repeal of the Government of India Act, 1935, by Art. 395 of the Constitution and the substitution of Art. 227 of the Constitution for S. 224 of the Government of India Act, 1935, and consequently of S. 107 of the Government of India Act, 1915, naturally follows. The question whether S. 8 of the General Clauses Act applies to the interpretation of Cl. 15 of the Letters Patent is a matter which is now covered by the decision of the Special Bench in the case of —'AIR 1953 Cal 433 (D)', to which I have already referred. I may point out that the applicability of the General Clauses Act to Cl. 15 of the Letters Patent was left undecided by a Bench of this Court in the case of —'AIR 1914 Cal 388(2) (B). In the case of — 'Sadar Ali v. Doliluddin', AIR 1928 Cal 640 (E), a Special Bench of this Court proceeded on general principles akin to those provided for in the General Clauses Act in interpreting the amended Letters Patent. The case of — 'AIR 1928 Cal 640 (E)', decided a point which was raised after the amendment of the Letters Patent in 1927, viz. whether the amendment affected pending second appeals. The Special Bench was of the opinion that on general principles the amendment had no retrospective operation. Whether we apply S. 8 of the General Clauses Act or proceed on general principles underlying the Letters Patent, in my opinion, the legitimate inference to draw is to hold that the relevant expression in Cl. 15 of the Letters Patent excludes a judgment pronounced by a single Judge in exercise of the powers of revision or in exercise of the

powers of superintendence under Art. 227 of the Constitution. In my opinion, the preliminary objection must prevail.

(12) We have also considered the merits of the contention raised before us. Mr. Roy discussed the scope of the powers of revision under S. 115, Civil P. C. It is not necessary to deal with the interesting argument addressed to us by Mr. Roy because it is common ground that no appeal lies under Cl. 15 of the Letters Patent against an order made by a Judge sitting singly in exercise of the powers of revision under S. 115, Civil P. C. The only question which we have to consider is whether a judgment of a Judge sitting singly made in exercise of the powers of superintendence under Art. 227 of the Constitution is appealable under Cl. 15 of the Letters Patent and whether in the present case the judgment of Chunder J. can be said to be one where the learned Judge failed to exercise his powers conferred on this Court by Art. 227 of the Constitution. The question which came up for consideration before Chunder J. related to two matters, namely, whether the test of bona fide requirement has to be judged by a reference to the provisions of the Rent Control Act, 1948, or the Rent Control Act, 1950, and whether the words "the requirement of the landlords" mean the "requirement of the landlords as a body or of some of them". A decision on such a question by Chunder J. affirming the views of the Courts below is not such a matter as, in my opinion, calls for interference by this Court under Art. 227 of the Constitution. In the case of —'Narendra Nath Shasmal v. Binode Behary Dey', AIR 1951 Cal 138 (F), a Bench of this Court was of the opinion that Art. 227 of the Constitution allows the High Court to interfere in special cases but the interference would, however, be rare and only in cases where justice clearly demands such interference. As a Court of appeal it is difficult for us to say that Chunder J. did not properly exercise his discretionary powers of interference under Art. 227 of the Constitution. The contentions raised on behalf of the appellant therefore fail.

(13) In the result this appeal fails and is dismissed, but in the circumstances of this case there will be no order for costs.

(14) DEBABRATA MOOKERJEE J.: I agree.

A/V.S.B. Appeal dismissed.

AIR 1953 CALCUTTA 639 (Vol. 40, C. N. 244)

SINHA J.

Kshitish Kumar Som, Applicant v. State of Bihar.

Suit No. 1995 of 1952, D/- 22-4-1953.

Letters Patent (Cal.) Cl. 12 — Leave under — Proper time.

Where leave under Cl. 12 is necessary, the granting of such leave is the condition precedent to the Court having jurisdiction to entertain the suit.

Therefore, such leave is to be obtained at the time of the institution of the suit. In the Original Side of the High Court, the practice is to present the plaint before the Master who places it before a Judge of this Court for granting the requisite leave. It does not mean, however, that such leave is granted after the institution of the suit. For the purpose of limitation the date of the presentation of the plaint may be relevant but the leave when granted is nevertheless leave granted prior to the institution of the suit.

Where by amendment of a plaint, a cause of action is altered or a new cause of action added, it is not a new suit but the old suit in a new form. In such a case, no amendment can be ordered if it requires leave to be granted under Cl. 12, at the time of the amendment.

It follows that leave under Cl. 12 cannot be granted in such a case, at any stage after the institution of the original suit.

But where a new party is added, the suit as regards the added party must be deemed to have been commenced on the date when he was so added. Consequently, if the cause of action against the added party requires leave under Cl. 12 it is open to the Court to grant such leave, if asked for at the time of the amendment. In fact, if such leave has not been asked for or obtained in such a case, the Court has no jurisdiction to entertain the suit against such an added defendant. Case law reviewed. (Para 10)

Anno: Civil P. C., App. II, Letters Patent, Cl. 12 N. 9.

S. Mukherjea, for Applicant; S. P. Mitra, for Respondent.

CASES CITED:

(A) ('07) 11 Cal WN 649: 34 Cal 619 (SB)
(B) ('91) 15 Bom 93
(C) ('39) AIR 1939 Bom 345: 184 Ind Cas 520
(D) ('46) AIR 1946 Cal 23: ILR (1944) 2 Cal 101
(E) ('52) AIR 1952 Cal 343: 84 Cal LJ 200
(F) ('51) Sugar Distributing Syndicate Ltd. v. The State of West Bengal, D/- 25-7-1951 (Cal)
(G) ('50) Suit No. 3797 of 1949, D/- 11-8-1950 (Cal)

ORDER: This is an application for an amendment of the plaint. The plaintiff instituted this suit on 26-5-1952 against the defendant. It is alleged in the plaint, as filed, that on or about 30-3-1949, it was agreed by and between the plaintiff and the defendant by means of letters exchanged between the parties that the plaintiff would sell and the defendant would purchase 100 tons of imported continental paper upon certain terms specified in the plaint. It is then stated that the plaintiff had supplied the defendant and the defendant had accepted 40 tons 756 lbs. of the contracted goods, as a result of which a sum of Rs. 80,663/8/3 became due and payable, out of which the plaintiff had been paid a sum of Rs. 58,943/14/3 on or about 14-11-1949, but the defendant had failed and neglected to pay the balance. In the alternative the plaintiff stated that he had supplied the said goods to the defendant not intending to do so gratuitously and that the defendant was liable to compensate the plaintiff for the benefits enjoyed. By the amendment the plaintiff wishes to add a paragraph making an alternative case that if the agreement between the plaintiff and the defendant as mentioned in para 1 of the original plaint be discovered void, the defendant was bound to compensate the plaintiff for advantages enjoyed by the defendant under the contract.

(2) I shall proceed on the footing that the plaintiff wishes to introduce an alternative cause of action and for that purpose requires fresh leave under Cl. 12 of the Letters Patent. I might mention that in the original plaint leave under Cl. 12 was asked for and obtained at the time of the filing of the plaint. Therefore, the short point that arises is as to whether it is possible at this stage to add by way of amendment an alternative cause of action during the pendency of the suit, a cause of action which requires fresh leave under Cl. 12 to be granted.

(3) In — 'Laliteshwar Singh v. Rameswar Singh', 34 Cal 619 (A), a Special Bench of this High Court presided over by Maclean C. J. held that leave of the Court under Cl. 12 of the Letters Patent had to be obtained before the institution of the suit. In that case the leave had been granted by the Registrar of this Court in its Original Side, but it was held that the Registrar had no jurisdiction to grant such leave and the defects could not be cured by grant of leave by a Judge at that stage of the litigation. namely, after the suit had already been instituted. The plaint was, therefore, directed to be taken off the file.

(4) In — 'Rampurtab Samruthroy v. Premsukh Chandamal', 15 Bom 93 (B) it was held that the leave granted under Cl. 12 of the Letters Patent was confined to the cause or causes of action set forward in the plaint at the time when leave was granted; hence the plaint could not be amended so as to alter the original cause of action or to introduce a different cause of action which would require leave under Cl. 12 of the Letters Patent. The Court could not try such a different cause of action except in another suit duly instituted.

(5) In —'Motilal Tribhovandas v. Shankarlal Chhaganlal', AIR 1939 Bom 345 (C), a suit was originally instituted in the name of a firm in which there were six partners. The defendant took the defence that he had not entered into any transaction with the firm but individually with one of the partners. Thereupon, the plaint was amended by substituting that partner in his individual capacity as the plaintiff. In the plaint as originally filed leave under Cl. 12 had been obtained. But when the amendment was made no leave was asked for or granted. It was held that the Court had no jurisdiction to try the suit inasmuch as the leave originally granted related to a cause of action which had been completely changed. Kania, J., said as follows:

> "The cause of action which is a right to sue vested in six persons alleged to be doing business together, is not the same as the right which exists in one individual. In the first case these persons are together appointed agents for the defendant and the act of one or the other of them will bind the rest. They will all be liable and can only give a joint discharge. When the claim is made by Motilal, he alone is alleged to be agent appointed by defendant, he alone is under the obligation to carry out instructions and he alone is liable to the defendant and can enforce the claim for damages or indemnity, if any, against the defendant. The two causes of action being thus entirely different and no leave having been obtained when Motilal, the individual, desired to carry on the suit, this issue must be found against the plaintiff and the suit should therefore be dismissed with costs."

It will be observed that the learned Judge does not decide whether leave could properly have been obtained when the amendment was made. Mr. Mukherjee argues that the case is an authority for the proposition that such leave could have been obtained if asked for. Obviously, that is not so. The learned Judge finds that the leave originally obtained could not be made to serve the purpose of the suit as it was framed when it came up for hearing. The learned Judge did not deal with the question as to whether the plaintiff could have obtained such leave at the stage if he had asked for it.

(6) The next case to be considered is — 'Barasat Basirhat Light Railway Co., Ltd. v. District Board, 24 Parganas', AIR 1946 Cal 23 (D). In this case the plaintiff company sued the District Board upon six agreements by which it was alleged that the Board guaranteed to supplement the net earnings of the Company. Leave was obtained under Cl. 12 of the Letters Patent at the time of the institution of the suit. When the suit came to a hearing before Gentle J.. the point was taken on behalf of the defendant that the agreements were not executed according to law. Thereupon, both the plaint and the written statement were ordered to be amended. By the amendment the plaintiff took alternative pleas under ss. 65, 70 and 72, Contract Act, but no fresh leave was asked for or obtained. The learned Judge said as follows:

> "The wording and meaning of Cl. 12 of the Letters Patent, 1865, is clear, namely, that the Court's leave shall previously be obtained before it has jurisdiction to receive a suit for which leave is required. The grant of leave is a condition precedent to the Court having jurisdiction to receive such a suit. An amendment to a plaint raising a new cause of action upon which a claim is made is not a fresh suit but is an additional claim made in an existing suit. The Court's leave is previously required in respect of a cause of action before the Court can have jurisdiction to receive the suit in which it is alleged. Further in the present case leave to sue was not sought with respect to the cause of action in the amendment either at the time application was made to amend or when leave was given for the amendment or when the plaint with the amendment was presented to the Court. ..... In my opinion, the Court has no jurisdiction to receive, try and determine the claims upon the causes of action in the amendment to the plaint since leave was not previously obtained in respect of those causes of action before the suit in which those claims are made was instituted in this Court."

In this case the amendment was allowed but leave although necessary was not asked for. Therefore, the Court had not been called upon to decide whether such leave could have been asked for. Mr. Mukherjee argues that the words

> "Further, in the present case leave to sue was not sought with respect to the cause of action in the amendment ..... when leave was given for the amendment or when the plaint with the amendment was presented to the Court"

show that the Court considered that such leave might have been granted if asked for. I do not think that is a correct reading of the judgment. The learned Judge was no

doubt referring to the fact that leave had not been asked for although required in respect of the amendment, but he also distinctly held that an amendment to a plaint, raising a new cause of action upon which a claim was made, was not a fresh suit but was an additional claim made in an existing suit, so that leave under Cl. 12 could not be granted at any stage subsequent to the institution of the suit.

(7) The next case cited is —'Benoy Shankar v. Chhotelal', AIR 1952 Cal 343 (E). In this case the plaintiff sued the defendant for partition of joint family properties, a part of which was situated outside jurisdiction so that the suit required leave under Cl. 12 which had been obtained. During the pendency of the suit, certain terms of settlement were arrived at, not only between the parties on record but other parties who were by the compromise decree itself joined as defendants. At the time the compromise was filed no fresh leave under Cl. 12 of the Letters Patent was obtained. It was held that the effect of adding new parties by an amendment was to enlarge the scope of the suit and, therefore, fresh leave had to be obtained as condition precedent to a Court obtaining jurisdiction against the added parties. Sinha, J., said as follows :

"It is not disputed that out of the four properties three were situated outside and one within the jurisdiction of the High Court. Leave was, therefore, necessary for filing a suit for partition, which is a suit for land against these minors. No such leave was obtained. It is now established that leave originally obtained at the time of the filing of a suit does not cover an amended plaint. Where the defendant is added fresh leave must be obtained when the suit was originally filed. It is contended that there was no change in the cause of action. Even so, if new parties are joined against whom it intended to proceed in the suit and to obtain a decree, the obtaining of the leave is imperative, because it is the foundation of the jurisdiction of the Court. The Court gets jurisdiction to decide the suit against the parties only if it grants leave which is condition precedent. No leave was obtained to proceed against the newly added defendants and it follows that the Court never got any jurisdiction to make any decree or order against them in the suit."

(8) There is no doubt that according to the learned Judge, when fresh parties are added it is permissible to the Court to grant fresh leave. Mr. Mukherjee argues that if fresh leave could be granted during the pendency of the suit in the case of additional parties, there does not seem to be any objection to the granting of such leave in the case of an additional cause of action. In my opinion, ne is not right.

(9) According to s. 22, Limitation Act, where, after institution of a suit, a new plaintiff or defendant was substituted or added, it not being a case of the assignment or devolution of interest during the pendency of the suit or transposition of a party, the suit is to be regarded, as against the added party to have been instituted when he is made a party. Therefore, the case of the addition of a party during the pendency of the suit stands on quite a different footing to the addition of a different cause of action against the same party.

(10) The point was recently considered by Sarkar, J., in an unreported judgment dated 25-7-1951, —'Sugar Distributing Syndicate Ltd. v. The State of West Bengal (F). The application was in a sense remarkable. The suit had been filed without any leave under Cl. 12 of the Letters Patent on 14-5-1950. Long after the suit had been filed, an application was made, not in the suit, but entitled "In the matter of clause 12 of the Letters Patent etc.", for grant of leave under Cl. 12. The learned Judge relying on —'Laliteshwar Singh v. Rameswar Singh', (A) (ibid) held that leave could only be granted in respect of the suit at the time of the presentation of the plaint and not afterwards. The learned Judge also relied on a similar view in an unreported judgment delivered on 11-8-1950 by S. R. Das Gupta, J., in —'Sree Sree Iswar Jew v. Brojendra Nath', in Suit No. 3797 of 1949 (G).

The result of all these authorities may be summarised as follows :

1. Where leave under Cl. 12 of the Letters Patent is necessary, the granting of such leave is the condition precedent to the Court having jurisdiction to entertain the suit.

2. Therefore, such leave is to be obtained at the time of the institution of the suit. In the Original Side of this High Court, the practice is to present the plaint before the Master who places it before a Judge of this Court for granting the requisite leave. It does not mean, however, that such leave is granted after the institution of the suit. For the purpose of limitation the date of the presentation of the plaint may be relevant but the leave when granted is nevertheless leave granted prior to the institution of the suit.

3. Where by amendment of a plaint, a cause of action is altered or a new cause of action added, it is not a new suit but the old suit in a new form. In such a case, no amendment can be ordered if it requires leave to be granted under Cl. 12 of the Letters Patent at the time of the amendment.

4. It follows that leave under Cl. 12 of the Letters Patent cannot be granted in such a case, at any stage after the institution of the original suit.

5. But where a new party is added, the suit as regards the added party must be deemed to have been commenced on the date when he was so added. Consequently, if the cause of action against the added party requires leave under Cl. 12 of the Letters Patent it is open to the Court to grant such leave, if asked for at the time of the amendment. In fact, if such leave has not been asked for or obtained in such a case, the Court has no jurisdiction to entertain the suit against such an added defendant.

(11) I must admit that these rules are quite artificial and there does not seem any logical reason why the Court should not be able to grant fresh leave under Cl. 12 of the Letters Patent at the time of amendment where a new or alternative cause of action is introduced. But that is a question of altering the law and the present case must be dealt with according to the law as it stands. For the reasons aforesaid, this application fails and must be dismissed with costs.

B/R.G.D. Application dismissed.

A. I. R. 1953 CAL 642 (Vol. 40, C. N. 245)

BACHAWAT J.

Union of India v. Kishorilal Gupta & Bros.

Award No. 254 of 1949, D/- 11-2-1953.

(a) Contract Act (1872), S. 62 — Novation of contract, effect.

Provisions of S. 62 do not apply after there has been a breach of the original contract. Therefore, under S. 62 the contract can be rescinded only after breach. The rescission under S. 62 may be express or implied. It is a question of construction of the new contract whether or not it rescinds the original contract. If the contract is rescinded wholly, the arbitration clause which forms part of that contract is also rescinded. 15 Cal 319; AIR 1942 Cal 87; 1918 AC 1; AIR 1920 Cal 143, Referred. (Paras 18, 19, 20, 21)

Anno: Contract Act, S. 62 N. 2, 6.

(b) Contract Act (1872), Ss. 63, 62—Necessity for consideration.

Section 62 requires an agreement which necessarily implies consideration. Section 63 does not require an agreement with or without consideration. Under that section the promisee may after breach, gratuitously release the promisor from his liability arising on such breach. The promisee may also accept instead of performance of. the promise such satisfaction as he thinks fit. AIR 1943 Cal 181; 15 Cal 319, Referred. (Paras 22, 23)

Anno: Contract Act, S. 63 N. 6; S. 62 N. 10.

(c) Contract Act (1872), S. 63 — Accord and satisfaction.

The accord and satisfaction discharges the causes of action for breaches of contrat already committed. Where the accord and satisfaction is by substituted agreement it is a question of construction of that agreement whether it also extinguishes all pre-existing rights and obligations and totally discharges the original contract. Case law referred. (Para 30)

Anno: Contract Act, S. 63 N. 5.

(d) Contract Act (1872), S. 39 — Scope and applicability.

Breach of the substituted agreement does not revive what has been discharged. Further complaint must be founded on the substituted agreement and not on the original contract. If the substituted agreement is put an end to under S. 39 of the Act on account of such breaches, the original contract is not thereby revived. (Para 31)

Anno: Contract Act, S. 39 N. 1.

(e) Arbitration Act (1940), S. 2 — Arbitration agreement — (Contract Act (1872), Ss. 10, 62, 63).

The arbitration clause is distinct from the other clauses in the contract. Total breach of the substantive stipulations even when it is accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke that clause. But the parties are not bound to have recourse to arbitration. They may settle the disputes directly and agree not to invoke the arbitration clause for that purpose. The arbitration clause ceases to exist with reference to the disputes which are thus settled. They may also enter into a substituted agreement in complete supersession of the original contract and thereby abrogate the contract and the arbitration clause contained in it.

Thus, where after a breach of original contract, there was a settlement contract which showed that parties intended to wipe out pre-existing claims once for all, that the performance of promise in original contract was deferred, that the settlement was immediate and not dependent, that old rights and obligations were not revived:

Held that there was complete and immediate abrogation of contract. There was accord and satisfaction by substituted agreement discharging and extinguishing original contract and the arbitration clause contained in original contract perished with it.

Held further that persistent breaches of substituted agreement .did not revive the original contract. The award drawn by the sole arbitrator appointed by the promisee in pursuance of the clause in original contract was therefore a nullity. 1942 AC 356, Ref. (Para 32)

Anno: Arbitration Act, S. 2, N. 4; Contract Act, S. 10 N. 1; S. 62 N. 2; S. 63 N. 1, 5, 6.

I. P. Mukherji with R. Guho, for Petitioner; A. K. Sen, for Respondent.

CASES CITED:

(A) ('88) 15 Cal 319
(B) ('42) AIR 1942 Cal 87: 45 Cal WN 830
(C) ('36) 63 Cal 194: 40 Cal WN 808
(D) (1918) 87 LJKB 145: 1918 AC 1
(E) ('20) AIR 1920 Cal 143: 46 Cal 534
(F) ('43) AIR 1943 Cal 181: 47 Cal WN 213
(G) (1933) 102 LJKB 775: 1933-2 KB 616
(H) (1919) 122 LT 142: 89 LJKB 186
(I) (1914) 1914 AC 618: 18 Cal WN 617 (PC)
(J) ('40) AIR 1940 Pat 121: 184 Ind Cas 705
(K) (1942) 111 LJKB 241: 1942 AC 356

ORDER: This is an application asking for an order setting aside an award for a declaration that the arbitration agreements under which the award was made have ceased to exist and for an adjudication that the award is a nullity and is void and without any effect.

(2) There were three contracts between the contractor firm Kishorilal Gupta and Bros. and Governor-General of India-in-Council through the Director-General of Industries and Supplies. Each of these contracts contains an arbitration clause. The material part of the arbitration clause is as follows:

"In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided for by these conditions the same shall be referred to the award of an arbitrator to be nominated by the purchaser and an arbitrator to be nominated by the contractor....."

(3) Under each of these contracts the Governor-General in Council now represented by the respondent supplied raw materials and the contractor made part supplies. All these three contracts were later cancelled.

(4) By the contract dated 2-4-1943, the contractors agreed to supply to the Government 43,000 laddles cook. This contract was cancelled on 21-5-1945 and a claim by the Government for price of raw materials supplied remained outstanding. On the 6-9-1948 the parties entered into a settlement contract which is as follows:

" (1) The contractor expressly agrees to pay the Government the sum of Rs. 3,164-8-0 only on this contract.

(2) The contract on payment of the amount mentioned in Cl. (i) shall stand finally determined."

(5) By the contract dated 15-9-1944 the contractors agreed to supply to the Government 15,500 bath ovals. This contract was cancelled on 21-5-1945 and there remained outstanding claims by the contractors for compensation and claims by the Government for price of raw materials supplied. On 6-9-1948 the parties entered into a settlement contract which is as follows:

" (1) The contractor expressly agrees to pay to the Government the sum of Rs. 36,276. If D. G. I. and S. has recovered any amount under the contract out of the sum due credit will be given to the contractor.

(2) The contract stands finally determined and no party will have any further claim against the other."

(6) By the contract dated 22-9-1944 the contractors agreed to supply to the Government 100,000 Kettles Camp. This contract was cancelled on 9-3-1946 and claims by the Government for raw materials supplied under this contract and by the contractor for compensation for breach of contract remained outstanding. On 22-2-1949 the parties entered into a settlement contract which is as follows:

"The firm will pay a sum of Rs. 45,000/- in full and final settlement of the amount due to the Government in respect of raw materials received against the contract and their claims for compensation for cancellation for the same contract.

2. The firm will retain all surplus partly fabricated and fully fabricated stores lying with them.

3. The firm agree to pay the above mentioned sum of Rs. 45,000/- only together with the sums owing by them to the Government under the settlements reached in two other cases A/T Nos. MP/75762/R-61/78 dt. 15-9-44 and MP 50730 8/R-1/90 dated 2-4-43, in monthly instalments for Rs. 5,000/- only for the first three months, first instalment being payable on 10-3-1949 and further instalment of Rs. 9000/- per month till the entire dues payable to Government are paid.

4. In the event of default of any monthly instalments interest will be charged by Government on the amount as defaulted at the rate of 6 per cent. per annum from the first day of the month in which the instalment shall be due. If the instalments defaulted exceed two in number the Government will have the right to demand the entire balance of the money payable by the firm together with interest thereon at the rate above mentioned on that balance and take such steps to recover from them from the security to be offered by the firm in terms of the settlement or otherwise.

5. In order to prove cover for the moneys payable to the Government the firm undertakes to hypothecate their moveable and immovable property in Bamangachi Engineering works together with all machinery sheds and leasehold interest in land measuring about 5.75 acres at mouja Bamangachi in Howrah. The firm further undertakes to execute the necessary stamped documents for the purpose as drafted by the Govt. Solicitor at Calcutta.

6. The contract stands finally concluded in terms of the settlement and no party will have further or other claim against the other."

(7) Between 28-10-1948 and 17-1-1949 the contractors had in all paid a sum of Rs. 9,000/- to the Government under the first two settlement contracts. Since the 3rd settlement contract the contractor paid in all a sum of Rs. 11,000/- i.e. Rs. 3,000/- on 10-3-1949, Rs. 3,000/- on 26-4-1949, Rs. 1,000/- on 12-8-1949, Rs. 3,000/- on 3-9-1949 and Rs. 1,000/- on 31-10-1949. The contractor defaulted in payment of all the instalments payable under the third settlement contract. By letters dated 28-3-1949, 1-4-1949 and 4-5-1949, the Government requested the contractors to pay the instalments in arrears and the instalments to fall due. By letter dated 17-5-1949 the Government requested the contractors to execute the hypothecation bond and also reminded them that in default of payment of instalments the Government had the right to obtain payment of the entire balance remaining unpaid under the settlement contracts. The contractors did not execute the hypothecation bond.

(8) On 10-8-1949 the Government referred its claim of Rs. 1,52,723 under all the three contracts to arbitration. By its letter of that date the Government appointed Bakshi Shib Charan Singh as its arbitrator and called upon the contractors to nominate their arbitrator. The contractor replied on 18-8-1949 stating that the matter had already been settled by arbitration. The contractors did not nominate their arbitrator and by its letter dated 29-3-1949, the Government appointed Bakshi Shib Charan Singh as sole arbitrator.

(9) By letter dated 3-9-1949 the contractors alleged that a new arrangement had been arrived at between them and the Government and stated that in view of that settlement they had not appointed their arbitrator. This new arrangement was denied by the Government in the subsequent correspondence.

(10) One of the partners of the contractor firm applied to this Court for a declaration that the arbitration clauses had ceased to exist. That application was dismissed by Banerjee J. on 15-6-1950 on the preliminary ground that all persons interested had not been joined as parties. While dismissing the application Banerjee J. also held that the arbitration clause contained in the contract dated 2-4-1943 for laddles cook had not ceased to exist. It was conceded before Banerjee J. that the arbitration clause contained in the contract dated 15-9-1944 for bath ovals had ceased to exist. With regard to the arbitration clause contained in the contract dated 22-9-1944 for kettles camp, Banerjee J. declined to express a final opinion but he was doubtful whether the settled contract had discharged the original contract.

(11) The Government filed its state of facts before the arbitrator on or about 12-9-1950. In that state of facts the Government claimed to appropriate the sum of Rs. 20,000/- paid since 6-9-1948 towards the contract dated 15-9-1944 for bath ovals. Upon such appropriation the Government claimed

" (a) the sum of Rs. 3,164-8-0 under the contract dated 2-4-1943 for laddles cook,

(b) the sum of Rs. 16,276/- under the contract dated 15-9-1944 for bath ovals,

(c) the sum of Rs. 1,13,282-4-5 on account of price of raw materials supplied under the contract dated 22-9-1944 for kettles camp after appropriating another sum of Rs. 20,000/- which had been paid sometime in June 1948.

The Government also stated that it did not claim relief in respect of the contract for bath ovals having regard to the concession before Banerjee J. that the arbitration clause in respect of that contract has ceased to exist. The contractors filed their counter-state of facts on or about 29-9-1950 challenging the jurisdiction of the arbitrator to arbitrate in the matter and

alleging that the arbitration clauses in the several contracts had ceased to exist. The contractors also challenged the claim of the Government and the appropriation of payments made in the state of facts.

(12) On 31-7-1951, the arbitrator made an award for the sum of Rs. 1,16,446-11-5 interest at 6 per cent. per annum from 10-8-1949 and Rs. 1,000/- for cost in favour of the Government and against the contractors. The arbitrator repelled the contention that the arbitration clauses had ceased to exist.

(13) This application is made by one Kishorilal Gupta. He admittedly was a partner of the contractor firm Kishorilal Gupta & Co. Originally, there were two other partners in that firm, viz., Banarashidas Gupta and Hanuman Prosad Boid. Benarashidas Gupta is now dead and Lilabati Devi is his only heir and legal representative. Both Hanumanprasad and Lilabati are respondents to this application. Mr. A. K. Sen, counsel for the Union of India at first contended that Lilabati Devi was not the only heir and a legal representative of Benarashidas Gupta, and on that ground this application was bad for non-joinder of parties. Eventually Mr. Sen abandoned this contention.

(14) Mr. I. P. Mukherjee, learned counsel on behalf of the petitioner contends that all the three contracts and arbitration clauses contained therein have been abrogated by the subsequent settlement contracts and have now ceased to exist, and consequently the award is a nullity.

(15) Mr. A. K. Sen, learned counsel on behalf of the Union of India contends that:

" (a) the original contracts could not be rescinded after breach.

(b) after breach the liabilities under the original contract can be discharged only by accord and satisfaction. In this case there was an accord but no satisfaction with regard to the contracts dated 22-9-1944 and 2-4-1943 and consequently those contracts were not abrogated."

(c) In any event the arbitration clauses have not been abrogated."

(16) Mr. A. K. Sen concedes that in the present case the arbitrator has no jurisdiction to decide the question whether the arbitration clauses have ceased to exist and his finding is not binding upon this Court and it is for the Court to determine whether or not the arbitration clauses have ceased to exist.

(17) It is at first necessary to advert to the provisions of Ss. 62 and 63, Contract Act which are as follows:

"S. 62: If the parties to a contract agree to substitute a new contract for them or to rescind or to alter it the original contract need not be performed.

S. 63: Every promisee may dispense with or remit whole or any part of the performance of the promise made to him or may extend the time for such performance or may accept, instead of it, any satisfaction which he thinks fit."

(18) In — 'Manohar Koyal v. Thakurdas', 15 Cal 319 at pp. 325-26 (A), this Court held that:

"We are of opinion that the Judge has erred in applying provisions of S. 62, Contract Act to this case at all. Section 62 is but a legislative expression of the common law and its provisions do not apply after there has been a breach of the original contract."

(19) The view of this Court, therefore, is that under S. 62, Contract Act the contract can be rescinded only after breach; — 'New Standard Bank v. Probodh Chandra', AIR 1942 Cal 87 at p. 90 (B). I notice that Panckridge J. found some difficulty in applying this principle to all cases — 'Brijmohon v. Mahabir', 40 Cal WN 808 (C).

(20) The rescission under S. 62 may be express or implied. It is a question of construction of the new contract whether or not it rescinds the original contract. — 'Morris v. Baron & Co.', 1918 AC 1 at pp. 35, 38 and 26 (D).

(21) If the contract is rescinded wholly, the arbitration clause which forms part of that contract is also rescinded. If the original contract is not rescinded by the new contract the arbitration clause contained in the original contract is also not rescinded. — 'Uttamchand v. Mahmood Jewa', AIR 1920 Cal 143 (E).

(22) Section 62 requires an agreement which necessarily implies consideration.

(23) Section 63, Contract Act does not require an agreement with or without consideration. Under that section the promisee may before breach gratuitously release the promisor from the obligation to perform the promise. — 'Jitendra Chandra v. S. N. Banerjee', AIR 1943 Cal 181 at pp. 184 and 187 (F). The promisee may after breach gratuitously release the promisor from his liability arising on such breach. The promisee may also accept instead of performance of the promise such satisfaction as he thinks fit. — '15 Cal 319 at pp. 325-7 (A)'.

(24) It is also beyond controversy that the liability arising out of breach of contract may be discharged by accord and satisfaction — 'AIR 1942 Cal 87 at p. 90 (B); that is to say, "by an agreement after breach whereby some consideration other than his legal remedy is to be accepted by the party not in fault, followed by performance of the substituted consideration" — see 'Chitty on Contracts, 20th Edition at p. 286'.

(25) I venture to think that the validity and effect of the accord and satisfaction must be judged by the general law of contract quite apart from the provisions of Ss. 62 and 63, Contract Act.

(26) The accord is an agreement for good consideration and is valid and enforceable under the general law of contract — '40 Cal WN 808 at p. 812 (C); — 'British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers Ltd.', (1933) 2 KB 616 at pp. 650, 651, 653, 654 and 644-5 (G), commenting on — '(1918) AC 1 at p. 35 (D).

(27) Mere accord without satisfaction does not discharge the liability arising on breach of contract. This rule had its origin in early days when the binding character of executory agreements was not recognised, see — '(1933) 2 KB 616 at pp. 650 and 643-4 (G).

(28) Equitable considerations may arise if there is part performance of the accord and the parties cannot be restored to the position they occupied before such performance; — '(1918) AC 1 at p. 36 (D).

(29) It may be shown that the accord itself is also the satisfaction. It is open to the injured party to accept the promise of the party in default in satisfaction of the existing cause of action. The question in modern law is purely one of construction of the accord: — '(1918) AC 1 at p. 35 (D) and — '(1933) 2 KB 616 at pp. 654-5 (G)'. The cases are illustrative of this question of construction. The promise itself was held to be the satisfaction in — 'Elton Cop Dying Co. v. Broadbent & Son Ltd.', (1919) 89 LJKB 186 (H); — '40 Cal WN 808 (C) and — 'P. R. L. Saminathan Chetty v. P. L. Palaniappa Chetty', 18 Cal WN 617 (PC) (I). Not the promise but its actual performance was held to be

the satisfaction in — '15 Cal 319 at p. 327 (A); — 'Babulal v. Tulsi Singh', AIR 1940 Pat 121 (J). In — '18 Cal WN 617 at pp. 619-20 (PC) (I)', Lord Moulton observed thus:

"The receipt given by the appellants and accepted by the respondent and acted by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the 'receipt'. It is a clear example of what used to be well known in Common Law Pleading as 'accord and satisfaction by a substituted agreement'. No matter what were the respective rights of the parties 'inter se'. They are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have, in fact, been extinguished for the new rights; and the new agreement becomes a new departure and the rights of all the parties are fully represented by it."

(30) The accord and satisfaction discharges the causes of action for breaches of contract already committed. Where the accord and satisfaction is by substituted agreement it is a question of construction of that agreement whether it also extinguishes all pre-existing rights and obligations and totally discharges the original contract.

(31) Breach of the substituted agreement does not revive what has been discharged. Further complaint must be founded on the substituted agreement and not on the original contract. If the substituted agreement is put an end to under S. 39, Contract Act on account of such breaches the original contract is not thereby revived.

(32) The arbitration clause is distinct from the other clauses in the contract.

"It is collateral to the substantive stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes..... It.....depends on there being a dispute or difference in respect of the substantive stipulation."

per Lord Wright in — 'Heyman v. Darwins Ltd.', 1942 AC 356 at p. 377 (K). Total breach of the substantive stipulations even when it is accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke that clause. — '1942 AC 356 at pp. 376-79 and 400 (K)'. But the parties are not bound to have recourse to arbitration. They may settle the disputes directly and agree not to invoke the arbitration clause for that purpose. The arbitration clause ceases to exist with reference to the disputes which are thus settled. They may also enter into a substituted agreement in complete supersession of the original contract and thereby abrogate the contract and the arbitration clause contained in it.

(33) Let us now turn to the document dated 22-2-1949. The parties had arrived at a settlement of their disputes and that settlement is embodied in this document. The words "in full and final settlement of" in Cl. 1 are strong evidence that the parties intended to wipe out the pre-existing claims once and for all in exchange of the contractor's liability for payment of Rs. 45,000/-. By Cl. 3 the performance of the promise to pay that sum is deferred. The settlement is immediate and is not dependent upon performance of the deferred promise. By Cl. 4, on default of performance of the promise the Government has the right to recover the balance of the promised amount remaining unpaid. The default does not revive the old rights and obligations. By cl. 5, the substituted promise is to be secured by hypothecation. Clause 6 clenches the issue. The contract stands finally concluded in terms of the settlement. The conclusion or termination is immediate. It is in terms of the settlement or the bargain which is embodied in the document. No party thenceforth will have further and other claims against the other. There is complete and immediate abrogation of the contract. The parties have settled all their disputes directly. There is accord and satisfaction by substituted agreement. The substituted agreement discharges the existing causes of action. It also totally discharges and extinguishes the original contract. The arbitration clause which is contained in the original contract perishes with it.

(34) Very soon after the settlement the contractors committed breaches of the several terms of the settlement. Even after such breaches the Government insisted on performance of the substituted agreement and received payment under it. Persistent breaches of the substituted agreement cannot and does not revive the original contract.

(35) In my opinion the arbitration clause contained in the contract for Kettles Camp dated 22-9-1944 has ceased to exist since 22-2-1949. The arbitrator, therefore, had no jurisdiction to entertain any claim with regard to that contract and the award, so far as it relates to it is a nullity. It is, therefore, not necessary to decide if there is any error of law on the face of the award so far as it relates to that contract.

(36) It is also clear that the contract dated 2-4-1943, for Laddles Cook and the arbitration clause contained in it have not been abrogated by the settlement contract dated 6-9-1948. By the express words of the settlement contract the original contract is to be determined only on payment in terms of the settlement. Such payment was not made and the original contract and its arbitration clause continued to exist. The arbitrator, therefore, had jurisdiction to make an award with reference to that contract. I am also satisfied that there is no error on the face of the award so far as it relates to that contract.

(37) Unfortunately the arbitrator has made an award the operative portion of which is as follows:

"The result is that, on a review of the entire evidence that has been produced before me, I have come to the conclusion that there ought to be an award for Rs. 1,16,446/11/5 in favour of the claimant — the Union of India — and against the respondent M/s Kishorilal Gupta and Bros. The amount awarded shall carry interest at 6 per cent. per annum from 10-8-1949 upto the date of payment. I award accordingly.

The stamp duty on this award has been paid by the Government. I direct that respondent firm should pay Rs. 1,000/- as cost of arbitration proceedings in addition to the amount awarded."

(38) The petition assumes that there is a separate award for Rs. 3,164/4/- in respect of the contract dated 2-4-1943 and another award of Rs. 1,13,382/3/5 in respect of the contract dated 22-9-1944. The court however must deal with the award as it stands. The award on the face of it is a lump sum award. On the face of it there is no separate award in respect of the contract dated 2-4-1943. The Court cannot ascertain with certainty the award which the arbitrator would have made if his verdict in respect of the contract dated 22-9-1944 were in favour of the petitioner. The petitioner claimed to appro-

priate the payment of Rs. 11,000/- made since 22-2-1949, towards all the three settlement contracts. The respondent claimed to appropriate that payment towards the contract dated 15-9-1944, for Bath Ovals but its witness C. C. Mookherji (Qq. 13 and 15) admitted before the arbitrator that the payment was appropriated towards the contract dated 2-4-1943 for Laddles Cook and the contract dated 22-9-1944 for Kettles Camp. A separate finding with regard to appropriation may not be necessary for a lump sum award but such finding is clearly necessary if the arbitrator were to make separate awards in respect of the last two contracts. Even if the figure of Rs. 1,16,446/11/- is split up into 2 figures the Court must add further words in the award to indicate in respect of which contract the good part of the award is made. If the Court were to pass judgment on the award for Rs. 3,164/8/- without specifying in the award that it is for the contract dated 2-4-1943 the Union of India may be met by a plea of res judicata when it subsequently enforces its rights in respect of other matters. The award of Rs. 1000/- for costs is clearly effected by the decision of the arbitrator with regard to the contract dated 22-9-1944. The Court is not certain in whose favour and for what sum the award for costs would have been if the arbitrator had decided in favour of the petitioner with regard to the contract dated 22-9-1944. The Court cannot re-write this award. Part of the award is void and the whole award is therefore bad.

(39) I pass the following order:

I declare that the arbitration clause contained in the contract dated 22-9-1944, for Kettles Camp has ceased to exist since the settlement contract dated 22-2-1949.

I declare and adjudge the award to be void and invalid and set it aside.

The respondent must pay to the petitioner the costs of this application.

A/H.G.P. Order accordingly.

A. I. R. 1953 CAL 646 (Vol. 40, C. N. 246)

DAS AND DEBABRATA MOOKERJEE JJ.

Ramtaran Das, Petitioner-Appellant v. Adhar Chandra Das and others, Respondents.

A. F. O. O. (F. M. A.) No. 6 of 1951, D/- 11-3-1953.

(a) Arbitration Act (1940), S. 14, sub-s. (2).

Where notice of the filing of the award was issued to all the parties except the party who had himself filed the petition in Court for a direction on the arbitrators to file their award and two other parties who had already appeared in Court and filed their objections, the award was filed according to law. (Para 8)

Anno: Arbitration Act, S. 14 N. 2.

(b) Arbitration Act (1940), S. 14, sub-s. (2).

The mere non-filing of khatas (account books) which were not received into evidence is not sufficient to vitiate the proceedings and render the filing of the award otherwise than in accordance with law. 12 WR 397, Distinguished. (Para 9)

Anno: Arbitration Act, S. 14 N. 2.

(c) Arbitration Act (1940), S. 14, sub-s. (1).

The object of a notice of the making and signing of the award is to apprise the parties to the arbitration agreement, of the fact of the making of the award so as to enable them to prefer objections before the Court in proper time. A mere omission on the part of some of the arbitrators to sign the notice required by the section is a mere irregularity and does not vitiate the proceedings. 43 Cal WN 924; AIR 1943 Bom 221, Distinguished. (Para 10)

Anno: Arbitration Act, S. 14 N. 1.

(d) Arbitration Act (1940), S. 30 — Misconduct, what amounts to.

If the making of an award is a judicial act the arbitrators must exercise their judgment in valuing the properties in dispute and in making proper allotments. The arbitrators cannot delegate their right to one of them or to strangers unless the parties to the reference consent thereto. If no evidence is taken by the arbitrators as regards the actual value of the different items of properties, a mere discussion between the arbitrators and the parties cannot be regarded as a substitute for arriving at a proper valuation of the premises.

Where therefore the work of valuing the agricultural lands and making allotments was done by the Surveyor and not by the arbitrators,

Held, that the arbitrators' proceedings were not properly conducted and the award made by the arbitrators could not be sustained. (Para 13)

Anno: Arbitration Act, S. 30 N. 10.

(e) Arbitration Act (1940), S. 14, sub-s. (2).

Where the facts indicated that the final award embodied a decision by the arbitrators as a whole, the mere fact that one of the arbitrators did not sign the final award, did not render the award invalid. If a contrary view is taken, the minority would be able to frustrate a decision reached by the majority of the arbitrators which, according to the arbitration agreement, was binding on all of them. Case law referred. (Para 14)

Anno: Arbitration Act, S. 14 N. 2.

(f) Arbitration Act (1940), Ss. 30, 16 — "Is otherwise invalid."

A division of the moveables is not inextricably bound with the division of the immoveables. The objection that the award was ineffective as it did not divide the moveables and left some of the immoveable properties joint cannot, therefore, be sustained. If there was any objection on this score, that could have been cured by a remission of the matter to the arbitrators under S. 16 of the Arbitration Act. AIR 1943 Pat 285, Ref. (Para 15)

Anno: Arbitration Act, S. 16 N. 2, S. 30 N. 6.

(g) Arbitration Act (1940), S. 30 — "Is otherwise invalid."

Where some of the property included in arbitration was held by a person benami for the joint family and the decision of the arbitrators required that person to make a conveyance in favour of all the parties to the reference, the mere fact that the person was not a party to the reference did not vitiate the award. (Para 16)

Anno: Arbitration Act, S. 30 N. 6.

(h) Arbitration Act (1940), S. 30 — Jurisdiction.

It is not the function of the Court to disturb the finding of the arbitrators if it has been reached bona fide. After an award has been filed if objections are raised by a party to the reference, the Court has to decide these objections. But

the ambit of the powers of the Court is either to modify, remit or set aside the award. No other duty is cast on the Court. Where the award has to be set aside no decree can follow on the basis of the award. (Para 20)

Anno: Arbitration Act, S. 30 N. 7.

Syamacharan Mitter, Rishikesh Chatterji, Bibhuti Bhusan Majumdar, for Appellant; Sarat Chandra Jana and Bhutnath Chatterji, for Respondents.

CASES CITED:

(A) ('69) 8 Beng LR 130: 12 WR 397
(B) ('39) 43 Cal WN 924
(C) ('43) AIR 1943 Bom 221: 210 Ind Cas 144
(D) ('26) AIR 1926 Bom 527: 97 Ind Cas 673
(E) ('25) AIR 1925 Oudh 227(2): 84 Ind Cas 490
(F) ('44) AIR 1944 Lah 149: 216 Ind Cas 231
(G) ('40) 44 Cal WN 866
(H) ('45) AIR 1945 Pat 140: 23 Pat 719
(I) ('51) AIR 1951 Mad 997: 1951-2 Mad LJ 56
(J) ('43) AIR 1943 Pat 285: 22 Pat 108

DAS J.: This is an appeal by Ram Taran Das and is directed against an order of Mr. B. P. Bakshi, learned Subordinate Judge, 1st Court, Hooghly, dated 5-10-1950.

(2) The appeal arises out of certain proceedings in arbitration which arose out of a dispute between the descendants of one Ram Jiban Das. The relationship of the parties is set forth in the following genealogical table.

RAM JIBAN DAS

Nibaran Chandra	Adhar Chandra Opposite Party No. 7	Banku Bihari	Gagan Chandra (predeceased) = Jogmaya Opposite Party No. 5
Gostho Opposite Party No. 6			

Purna Chandra = Renu Bala Opposite Party No. 2	Ram Taran	Nalini Kanta = Binapani Opposite Party No. 1

Amar Nath Opposite Party No. 3	Probhat Kumar Opposite Party No. 4

(3) In consequence of disputes between the descendants of Ran Jiban Das there was an agreement to refer such disputes to the arbitration of five persons as arbitrators. The agreement is dated 25-7-1945. The arbitrators chosen by the parties were Rama Prosad Choudhury, Rai Saheb Haradhone Chandra, Khitindra Nath Rai Choudhury, Jitendra Nath Palit and Kanti Charan Pal. The arbitrators met together on several occasions and ultimately an award was made on 12-10-1948. The award was signed by four out of the five arbitrators; Kanti Charan Pal did not sign the award. On 18-10-1948, an application was made by Ram Taran Das under the provisions of S. 14, Arbitration Act, 1940, for calling upon the arbitrators to file the award. In pursuance of a direction by the Court one of the arbitrators Jitendra Nath Palit filed the award on 28-3-1949. On 7-4-1949, objections to the filing of the award were made by Gostha, opposite party No. 6 and Adhir, opposite party No. 7. Thereafter on 15-4-1950, the Court directed a notice of the filing of the award to be served on opposite parties Nos. 1 to 5. No notice of the filing of the award was directed to be served on opposite parties Nos. 6 and 7 or on the petitioner Ram Taran Das. After a contested hearing, the learned Subordinate Judge by his order dated 5-10-1950, rejected the application filed by Ram Taran Das and refused to pass a decree in terms of the award. Being aggrieved by this order Ram Taran Das has appealed to this Court.

(4) Mr. Mitter, learned Advocate appearing in support of the appeal, has pressed several grounds challenging the finding of the learned Subordinate Judge on the various points referred to in his judgment.

(5) Before I deal with these grounds it is necessary to state that the learned Subordinate Judge by his order has dealt with what seemed to him various defects in the filing of the award and in the proceedings before the arbitrators. The judgment, however, does not deal with the facts bearing on some of these points. We have, therefore, perused the record with the assistance of the learned Advocates appearing on behalf of the parties.

(6) The first ground which was raised by Mr. Mitter relates to the finding of the learned Subordinate Judge that the award was not filed according to law. The learned Subordinate Judge was of the opinion that the award was filed by a party. This view is entirely erroneous and is opposed to an entry in the Order Sheet which clearly shows that Jitendra Nath Palit, one of the arbitrators, filed the award.

(7) The next ground on which the learned Subordinate Judge found against the petitioner was that notice of the filing of the award was neither issued nor served on the petitioner and opposite parties Nos. 6 and 7.

(8) Under S. 14(2), Arbitration Act, a duty is cast on the Court to give notice of the filing of the award once the award is filed in Court. In the present case, the facts which I have recited above show that such a notice was issued only on opposite parties Nos. 1 to 5 presumably because the petitioner Ram Taran Das had himself filed a petition in Court for a direction on the arbitrators to file their award, and opposite parties Nos. 6 and 7 had already appeared in Court and filed their objections. There is, therefore, no substance in the ground made by the learned Subordinate Judge that the award was not filed according to law because the notice of the filing of the award was not directed to be served on the petitioner and opposite parties Nos. 6 and 7.

(9) The learned Subordinate Judge was also of the opinion that the award was not filed according to law because certain account books were not filed in Court along with the award. The relevant provision is S. 14(2), Arbitration Act, 1940. The section requires that the arbitrators shall cause to be filed the award or a signed copy of it together with "any depositions and documents which may have been taken and proved before them." This section corresponds to para 10 of Sch. II, Civil P. C., 1908. In order to dispose of this ground it is necessary to state certain facts. It appears from the Order Sheet that on 1-9-1949, a petition was filed by opposite parties Nos. 6 and 7 for a direction on the petitioner to produce certain khatas (account books)

alleged to be in the latter's possession. This petition was disposed of by the Court by Order No. 58 dated 3-9-1949. The learned Subordinate Judge rejected the application on the ground that he saw no reason why the account books should be produced by the petitioner.

The evidence bearing on this point may now be summarised. One of the arbitrators Rama Prosad Choudhury was examined. In his deposition the witness stated that no account books were filed before the arbitrators. Further examined, the witness added that the account books were shown to the arbitrators but were left with the parties. The witness further stated that no statement of accounts was prepared. Nalini Kanta Das, witness No. 1 for the opposite parties, stated that khatas for ten years were shown to the arbitrators. They were not signed by the arbitrators but remained with the opposite parties. It appears from the above facts that these account books were not marked as exhibits in the case and were not received in evidence by the arbitrators. They were merely looked into by the arbitrators for certain purposes. No objection on the above ground was taken in the petition of objections filed by the opposite parties Nos. 6 and 7.

The question is whether the non-filing of the khatas (account books) along with the award was a defect which rendered its filing as not being in accordance with law. Section 14(2) requires the arbitrators to file documents which have been proved before them. These accounts were never marked as exhibits or received in evidence. In the case of —'Maharaja Sir Joy Mungal Singh v. Mohan Ram Marwaree', 12 W.R. 397 (A), Norman J. observed that all books and exhibits together with the proceedings which have been removed from the 'nathi' (records) should have been returned to the Court. That case turned on the corresponding provision of S. 320, Civil P. C., 1859. The facts of that case are entirely dissimilar. In that case the reference was made through the intervention of the Court. Certain papers and documents had been made over to the arbitrators along with the Reference made to them. These papers were a part of the proceedings and in spite of the objections filed by a party to the reference, they were returned to one of the parties to the reference. In those circumstances, the Court was of the opinion that this was an illegality vitiating the proceedings. In the present case, for reasons I have already given, the mere non-filing of these khatas which were not received into evidence is not sufficient to vitiate the proceedings and render the filing of the award otherwise than in accordance with law. There is, therefore, no force in the ground made by the learned Subordinate Judge against the petitioner. The learned Subordinate Judge was, therefore, not right in his view that the award was not filed in accordance with law.

(10) The learned Subordinate Judge was also of the view that as notice of the signing of the award was given by some of the arbitrators the proceedings were defective. Section 14(1) requires that the arbitrators shall make and sign the award and give notice of the making of the award to the parties to the reference. Our attention was drawn to a decision of this Court in the case of —'Mairamjan Bibi v. Asaraddi', 43 Cal WN 924 (B). That case turned on a construction of para 10, Sch. II Civil P. C., 1908, which was in terms similar to s. 14. In that case, however, no notice whatsoever was given of the signing of the award. It was held by a Bench of this Court that this rendered the proceedings invalid for the reason that unless notice is given to the parties of the filing of the award the parties would have no opportunity of filing objections, within the time prescribed by Act. Our attention was also drawn to the case of —'Luxmi Bai v. Sridhan Manik', AIR 1943 Bom 221 (C). That case, however, was one where the notice of the award was given by an Attorney acting on behalf of all the parties. The present case is not covered by the two decisions referred to above.

The question, therefore, is whether the fact that notice of the making and the signing of the award was given by some of the arbitrators rendered the proceedings invalid. The object of such a notice, in my opinion, is to apprise the parties to the arbitration agreement, if the fact of the making of the award so as to enable them to prefer objections before the Court in proper time. A mere omission on the part of some of the arbitrators to sign the notice required by the section is a mere irregularity and does not, in my opinion, vitiate the proceedings. There is, therefore, no substance in the ground that the proceedings should be regarded as invalid merely because the notice of the making of the award and the signing thereof was given by some of the arbitrators and not by all of them.

(11) The next ground which was made by the learned Subordinate Judge related to the valuation of the properties in dispute and of the making of the allotments by the arbitrators.

(12) This question has to be answered under two heads: first, as regards the homestead properties and as regards the agricultural lands. I shall first take up the homestead properties. In dealing with this matter, I shall consider first the valuation of these properties and secondly the allotment thereof. The proceedings before the arbitrator were marked as Ex. 7. The record of the arbitrators of 13-5-1946, shows that there was a discussion as to value of each one of the houses which were the subject-matter of arbitration. The meeting was adjourned to 21-5-1946, on which date, as the Order Sheet of the Arbitration Case shows, arguments were heard and discussions made by the parties in the presence of the arbitrators. Rama Prosad Choudhury, one of the arbitrators, who was examined in the case, deposed to say that in view of the experience of Rai Saheb Haradhone Chunder the question of valuing the properties was left to him. He also said that the arbitrators made enquiries from the parties and added that the parties did not want to adduce evidence. The proceedings before the arbitrators on 21-5-1946, and 29-5-1946, show that the suggestions of the parties as regards the allotment of the houses were considered and reasons are given as to why the different houses were being allotted to the different co-sharers.

(13) The above review of the proceedings and of the evidence shows that no evidence was taken by the arbitrators as regards the actual value of the different items of properties. A mere discussion between the arbitrators and the parties cannot be regarded as a

substitute for arriving at a proper valuation of the premises. The suit was one for partition and a fair partition obviously implied a fair estimate of the different items of properties and a fair allotment implied that each one of the co-sharers got an allotment proportionate to his share. It is true that the arbitrators can come to a rough and ready conclusion and that they are not required to proceed formally as in a Court of Law. At the same time, a decision on the question of valuation of the premises has to be reached by all the arbitrators acting jointly and they could not delegate this duty to one of them, even if the latter has special knowledge about valuation. The proceedings do not indicate that Rai Saheb Haradhone Chunder who was, on Rama Prosad's evidence, entrusted with the duty of valuing the homestead properties, stated to the other arbitrators or discussed with them the question of valuation. Mr. Jana appearing on behalf of the respondents referred us to a decision in the case of —'Daulatsing Bapusing v. Ratna Anadsing', AIR 1926 Bom 527 (D). That case lays down that there is no objection to parties having the assistance of an arbitrator who has special knowledge of a particular fact but even so the parties should be given the opportunity of considering the estimate made by such an arbitrator and of giving evidence in rebuttal of such an estimate if they are so advised. I shall refer to this matter again after I have referred to the evidence as regards valuation of the agricultural lands.

The arbitration agreement, Ex. 1, provides for the appointment of an Amin for the purpose of survey (vide para Gha). The proceedings before the arbitrators show that on 29-4-1946, the arbitrators decided that a list of the lands, classification thereof, would be made by an Amin with the assistance of Jitendra Nath Palit, one of the arbitrators. The proceedings also show that the Amin and Jitendra were entrusted with the task of appraising the income of the lands. Rama Prosad Choudhury in his evidence stated that the Amin gave a list. He further deposed that it was the Amin who prepared the 'tokes' of the landed properties. This clearly indicates that the work of valuing the agricultural lands and making allotments was done by the Surveyor and not by the arbitrators. The evidence, referred to above, shows on the contrary that the 'tokes' of the allotments were made by the Surveyor, and that the allotment of the lands was made by toss. The question, therefore is whether the proceedings for valuing the disputed premises and allotting the same were such as rendered the award invalid.

In the case of —'Puran Chand v. Ram Nath', AIR 1925 Oudh 227 (2) (E), Pullan A.J.C. was of the opinion that the allotment by lottery was not invalid in the case of arbitration proceedings. The facts of that case were that there was a difference of opinion between the arbitrators and the matter was referred to an Umpire. The Umpire finding it difficult to come to a decision had a toss up and in accordance with the result of the toss, made the allotments. It is not necessary for me to test the correctness or otherwise of the decision. I may, however, refer to the following observations of Norman J. in the case of — '12 WR 397 (A)'. At p. 400 the learned Judge observed that "the making of an award is a judicial act that must be done by the arbitrators in the presence of one another and at the same time". If the making of an award is a judicial act the arbitrators must exercise their judgment in valuing the properties in dispute and in making proper allotments. The arbitrators cannot delegate their right to one of them or to strangers unless the parties to the reference consent thereto. When people go to arbitration, they bind themselves to abide by a decision of the arbitrators of their own choice. They do not bargain for a decision of their disputes by a stranger in whom they may have no confidence. In the case of —'Punjab Province v. Dr. Lakhmi Dass', AIR 1944 Lah 149 (F), it was pointed out that the principle that no person should be bound by a proceeding had in his absence and to his prejudice, applies to arbitration proceedings. It does not appear from the Order Sheet of the arbitrators that the parties were present at any time when the Amin made the valuation or when the allotments were made & cast up. It is also well settled that a delegation by the arbitrators to a stranger is entirely invalid (see the case of —'AIR 1944 Lah 149 (F)',). On this ground I am of opinion that the arbitrators' proceedings were not properly conducted and the award made by the arbitrators cannot be sustained.

(14) The learned Subordinate Judge was further of the opinion that the award was ineffective as it was not signed by all the arbitrators. Section 14 no doubt requires that the arbitrators after they have made the award shall sign the same. In the present case, the arbitration agreement provided for a decision of the disputes by a majority of them. The proceedings show that a draft award was made and this draft award was signed by all of them. Mr. Jana contended that there is nothing to show that this draft award was signed by all the arbitrators. This, however, is not correct. Rama Prosad Choudhury, one of the arbitrators, deposed that all the arbitrators signed the draft award and he proved the draft award in Court. There is no rebutting evidence to show that Kanti Charan Pal did not sign the draft award. It has not been disputed that the final award follows the draft award. The facts, therefore, indicate that the final award embodies a decision by the arbitrators as a whole. The question, therefore, is whether the mere fact that one of the arbitrators Kanti Charan Pal did not sign the final award rendered the award invalid. The question has been considered in a number of cases and has been answered in the negative. In the case of —'Abinash Chandra v. Parasuram', 44 Cal WN 866 (G), which was a case under para 10 of Sch. II Civil P. C., 1908, Henderson J. was of the opinion that once the making of the award is discussed by all the arbitrators acting together and the majority comes to a certain conclusion and an award is drawn up, the mere fact that the dissenting minority does not sign the award does not render the award invalid. The learned Judge pointed out that this rule is based on commonsense. I respectfully agree with the above view. If a contrary view is taken, the minority would be able to frustrate a decision reached by the majority of the arbitrators which, according to the arbitration agreement, was binding on all of them. The same view was taken in the cases of — 'Raghubir v. Kaulesar', AIR 1945 Pat 140 (H) and — 'Johara Bibi v. Mohammed Sadak', AIR 1951 Mad 997 (I).

The view taken by the learned Subordinate Judge on this point cannot be sustained.

(15) It was also held by the learned Subordinate Judge that the award was ineffective as it did not divide the moveables and left some of the immoveable properties joint. As regards the last matter, this was done with the consent of the parties. As regards the partition of the moveables, the position is this: The arbitrators agreed that the moveables would be divided by Kanti Charan Pal. The latter, however, refused to act. The moveables were accordingly left joint. A division of the moveables is not inextricably bound with the division of the immoveables. If there was any objection on this score, that could have been cured by a remission of the matter to the arbitrators under S. 16, Arbitration Act. This view is supported by the decision in the case of — 'Ram Bahadur Jha v. Sree Kant Jha', AIR 1943 Pat 285 (J).

(16) The award directed Binapani, wife of Nalini Kanta, to execute a conveyance. The learned Subordinate Judge was of the opinion that as Binapani was not a party, this part of the award was ineffective. It appears, however, that on the finding of the arbitrators this property was held by Binapani benami for the joint family. The decision of the arbitrators required Binapani to make a conveyance in favour of all the parties to the reference. The mere fact that Binapani is not a party to the reference does not vitiate the award. The decision on this point benefited all the parties. What other steps may have to be taken to get a conveyance is a matter with which we are not concerned.

(17) The learned Subordinate Judge was also of the opinion that Jogmaya was given an allotment although she had no share, her husband having predeceased his father. There is no substance in this finding. The arbitration agreement expressly provided that Jogmaya would be given a share and this agreement has been given effect to by the arbitrators in their award.

(18) The learned Subordinate Judge was also of the opinion that the allotment was unfair because an item of property popularly called "Goalbari" was allotted to Adhar, opposite party No. 7. We have been referred to the evidence bearing on this point. It appears from the deposition of Gostho, opposite party No. 6, that Gostho's father used to live in this "bari" and on his death Adhar was in occupation. It was a tin-roofed structure and the arbitrators have given cogent reasons why this property was allotted to Adhar. After all, this is a matter entirely in the discretion of the arbitrators. It is not the function of the Court to disturb the finding of the arbitrators if it has been reached bona fide. There is no substance in this ground also.

(19) In the result, the decision of the learned Subordinate Judge is sustained on the ground that the award is defective in the matter of valuation of the disputed premises and in the matter of allotment of the same.

(20) The next question is as to the form of the order which has to be made. The learned Subordinate Judge was of the opinion that the arbitration proceedings were not maintainable and that the award was not valid and legal, and as such no decree can be passed on such an award. I may refer to the material provisions of the Arbitration Act on this point. After an award has been filed and objections raised by a party to the reference, the Court has to decide these objections. Under S. 15, Arbitration Act, the Court may correct or modify the award. Under S. 16 it may remit the award to the arbitrators for their consideration on grounds mentioned therein. Under S. 30 the Court can set aside the award on grounds stated therein. Section 17 provides that if the Court sees no reason to modify, remit or set aside the award, it shall pass a judgment in terms of the award. The ambit of the powers of the Court is, therefore, either to modify, remit or set aside the award. No other duty is cast on the Court. In this case, for reasons which are given by the learned Subordinate Judge and affirmed by us the award has to be set aside. As the award has to be set aside, no decree can follow on the basis of the award. The application filed by Ram Taran Das must, therefore, be dismissed.

(21) The question whether the arbitration agreement is subsisting or not is not a matter which arises in these proceedings. We are, therefore, not called upon to pronounce upon this question.

(22) In the result, this appeal fails and is dismissed with costs, hearing fee five gold mohurs.

(23) DEBABRATA MOOKERJEE J. : I agree.

B/H.G.P. Appeal dismissed.

A. I. R. 1953 CAL 650 (Vol. 40, C. N. 247)

LAHIRI AND GUHA RAY JJ.

Subal Chandra Kundu, Appellant v. State of West Bengal and others, Respondents.

A. F. O. O. No. 112 of 1951, D/- 9-12-1952.

(a) Bengal Rationing Order (1943), Cls. 3 (4), 10 (3) — Cancellation of permit.

The revocation of a permit is after all a matter of discretion of the revoking authorities and if the order of revocation is not contrary to any principle of natural justice, it is impossible for the Court to interfere with that order. Case law discussed. (Para 17)

(b) Bengal Rationing Order (1943), Cl. 22 — Delegation of power.

Held that the Director of Rationing had been authorised to exercise the powers under paras. 3 (1) and 10 (3) of the Bengal Rationing Order. (Para 19)

(c) Bengal Rationing Order (1943), Cls. 3 (4), 10 (3) — Validity.

(Quaere) Whether Paras. 3 (4) and 10 (3) of the Bengal Rationing Order are void to the extent that they empower the authorities concerned to revoke an appointment, or a ration document without assigning any reason. (Para 21)

Binayak Nath Banerjee and Sushil Kumar Biswas, for Appellant; J. Mazumdar, A. G. P., for Respondents.

CASES CITED:
(A) ('50) 54 Cal WN 883 (PC)
(B) ('50) 54 Cal WN 893 (PC)
(C) (1911) 80 LJKB 796: (1911) AC 179
(D) ('52) AIR 1952 Madh-B 128: MLR (1952) Civ 42

LAHIRI J.: The appellant Subal Chandra Kundu is the owner of an establish-

ment, named National Milk Company, at premises No. 1/9 Nilmony Mitra Row, and used to carry on the business of manufacture of condensed milk. After the introduction of sugar control in October 1949, the appellant was granted an establishment sugar permit for 3 mds. 12 srs. of sugar per week for the manufacture of condensed milk only. It is alleged that prior to the introduction of sugar control in 1949 the appellant also used to manufacture lozenges, sugar candy and toffees. In 1950 the appellant filed several applications to the Central as well as to the State Government for allotment of an additional quantity of sugar for the manufacture of sugar candy, lozenges etc. but his applications were rejected.

(2) On 9-9-1950 an Area Inspector of the Civil Supplies Department, named S. Mukherjee, inspected a lozenge manufacturing factory, named Oriental Confectionary, where the appellant was employed as the manager and asked the appellant to accompany him to the appellant's condensed milk factory. The appellant expressed his inability to comply with the request on the ground that it was not possible for him to remove himself from the lozenge factory leaving the charge to the workers.

(3) On 11-9-1950, the said area Inspector visited the appellant's condensed milk factory and made a note in the Daily Consumption Register which runs as follows:

"Stock of sugar could not be weighed. Found one full bag and two bags loose, — the total approximating 5 mds. 4 srs. Also found 44 tins of condensed milk (14 oz. each). Printed cash memos are not issued for sale of products. Found 'Kundas' in the Factory and one log of round solid wood. Account upto 6-9-50 i. e. in arrears for 4 days."

(4) On 23-10-1950 when the appellant went to purchase the sugar, allotted by his permit, he was informed that his permit had been suspended.

(5) Thereafter the appellant received a letter, dated 28-10-50 from somebody acting for the Joint Controller of Rationing asking him to show cause why his sugar permit should not be cancelled for misuse of sugar. The appellant showed cause by a letter dated 3-11-1950, in which he gave explanations for the presence of equipments for the manufacture of sugar candy in his condensed milk factory and also arrears of accounts and his inability to comply with the request of the Area Inspector on 9-9-1950.

(6) By a letter, dated 13-12-1950 somebody acting for the Joint Controller of Rationing informed the appellant that "his establishment had been cancelled." Against this order the appellant moved this Court under Article 226 of the Constitution of India and obtained a Rule calling upon the respondents to show cause why the order of cancellation of the appellant's establishment should not be withdrawn, or why the benefits under the appellant's sugar permit No. N/Me/8 (sug) No. 37688 should not be restored.

(7) The respondents showed cause by a counter-affidavit affirmed by Sri Bivacar Das, who is the Special Officer (Establishment) Directorate of Rationing and Distribution, Government of West Bengal. The material allegations in the counter-affidavit are that the respondents had no knowledge and made no admission about the allegation that the appellant had ever carried on the business of manufacture of sugar candy and lozenge, and that the Area Inspector ascertained on local enquiry that sugar candy was manufactured in the appellant's condensed milk factory. The Inspection Report of the Area Inspector and a statement in writing over the signatures of the residents of the locality have been produced in this Court and collectively marked Annexure "A" to the counter affidavit.

(8) Bose, J. who decided the case pointed out various irregularities in the counter-affidavit filed by the respondents, but in spite of those irregularities he came to the conclusion that there was a ring of truth in the statements made therein. He also held that Clause 3 (4) and Cl. 10 (3) of the Bengal Rationing Order are void in so far as they provide for the cancellation of a permit without assigning any reason. In the end, however, Bose, J. discharged the Rule upon the view that the authorities had justifiable reasons for cancelling the appellant's permit.

(9) Against the judgment of Bose, J. the appellant has filed this appeal and Mr. Banerjee, appearing in support of the appeal, has argued that in view of the irregularities in the counter-affidavit Bose, J. was not justified in relying upon the statements contained therein.

(10) I cannot accept this argument. The objections to the use of the counter-affidavit are twofold: in the first place, it is said that the deponent Sri B. Das does not state when he was employed by the Directorate of Rationing and as such he was not competent to depose to the facts of the case. It is true that Sri B. Das does not state when he joined the office of the Directorate of Rationing but he says that he is a Special officer of that office and has dealt with the case and is, therefore, acquainted with the facts of the case. I, therefore, see no reason to throw out the counter-affidavit on the ground suggested.

(11) The second objection is that the verification clause is not in accordance with law, inasmuch as it does not state which specific parts are true to knowledge and which are not. The relevant parts of the counter-affidavit upon which Bose J. relied are matters of record kept by the Directorate of Rationing that is, the inspection report submitted by the Area Inspector which is an annexure to the counter-affidavit. From the verification clause we find no difficulty in holding that this part was referred to therein as being a matter of record. It is not suggested that this report was not prepared by the Area Inspector. For these reasons, I am unable to give effect to the second objection raised by the appellant.

(12) The relevant part of the inspection report of the Area Inspector dated 11-9-1950 runs as follows:

"It has been made abundantly clear to me by the local people that the P. H. used to manufacture Sugar Candy in his Establishment. Bengali and non-Bengali people were contacted by me who all told me the same story, e. g. Gopechand, employee of a nearby Grocer's shop, 3 inmates (male and female) of the same premises have jointly given a written statement to this effect which is attached herewith.

Found 9 Kundas in the Factory and husk spread in one of the rooms in possession of P. H. and this husk is required for making the floor damp proof in connection with sugar candy manufacturing. Also found a log of round solid wood which is generally used by sugar candy manufacturers for breaking the lump candy.

Enclo: 1 statement.

Sd. S. Mukherjee
11-9-1950
Inspector (Estbts)
Sugar Section."

(13) As the written statement signed by the local residents on 9-9-1950 did not contain any

reference to the time when they saw the appellant manufacturing sugar candy, the Area Inspector again visited the locality on 21-11-1950. This time the residents of the locality signed a written statement to the effect that they saw sugar candy being manufactured in the appellant's establishment during the present sugar control.

(14) It has been suggested that none of the signatories have come forward to swear to the facts contained in their written statement. I think, however, that that is not necessary. All that we have to see is whether the authorities concerned had sufficient materials before them upon which they could pass the order complained of. Upon the evidence on the record, I must hold that the authorities had such materials before them.

(15) With reference to the presence of instruments for the manufacture of sugar candy, Mr. Banerjee has strenuously argued that his client used to manufacture sugar candy during the period of temporary decontrol of sugar. But the appellant has not produced any trade license, or document to prove that he used to manufacture sugar candy during the period of decontrol. Moreover, the presence of husk spread in one of the rooms occupied by the appellant points to the conclusion that he was manufacturing sugar candy quite recently, because husk is required for making the floor damp proof in connection with the manufacture of sugar candy.

(16) Bose, J. has relied on the decision of the Judicial Committee of the Privy Council in the case of —' Nakkauda Ali v. M. F. De S. Jayaratne', 54 Cal WN 883 (PC) (A) for the proposition that in a case of this description which deals with the revocation of a license the authorities concerned are justified in acting on reasonable suspicion which is not dissolved by the explanation offered by the licensee. This point has been brought out more clearly in the subsequent case of — 'M. F. De S. Jayaratne v. Bapu Miya Mohd. Miya', 54 Cal WN 893 (PC) (B) where it has been said that on no view could it be held that the authorities concerned were under a duty to treat the case as if they were conducting a criminal trial with the prosecution put to strict proof of what was charged. Mr. Banerjee strongly argued that these decisions of the Privy Council are not correct and referred us to the decisions of the House of Lords in the case of — 'Board of Education v. Rice', (1911) App Cas 179 (C) and of the Madhya Bharat High Court in the case of —'Bhatia Ghisalal v. R. T. Authority', AIR 1952 Madh B 128 (D).

(17) The decision of the House of Lords does not deal with the question of revocation of a license and the Madhya Bharat High Court deals with a case where a license was revoked without issuing any notice upon the licensee. We accordingly hold that the cases relied on by Mr. Banerjee have no bearing upon the facts of the present case. The revocation of a permit is after all a matter of discretion of the revoking authorities and if the order of revocation is not contrary to any principle of natural justice, it is impossible for us to interfere with that order.

(18) In the case before us, the permit-holder was asked to show cause and he did show cause, but the authorities were not evidently satisfied by the explanation offered. Mr. Banerjee argued that the final order of revocation communicated to the appellant by the letter, dated 13-12-1950, does not give any reason and therefore it is void. We have, however, to examine the entire proceedings to ascertain if any reasons were given. If we do so, we find that in the letter asking the appellant to show cause it was specifically stated that the appellant should show cause why his permit should not be cancelled for misuse of sugar and the appellant showed cause on that footing. From these facts it is abundantly clear that the appellant's permit was cancelled for misuse of sugar.

(19) Lastly, Mr. Banerjee argued that the order of cancellation was made by an authority not properly authorised to exercise the power. Paragraphs 3(4) and 10(3) of the Rationing Order authorise the Provincial Government to exercise the power of revocation, and para 22 empowers the Provincial Government to delegate this power. By Notification No. 10087 D. C. S. dated 19-10-1944, the Governor delegated this power to the Additional Controller of Rationing, Civil Supplies Department, Bengal, but in the counter-affidavit on behalf of the State it was stated that the order of cancellation had been passed by the Director of Rationing and Distribution. Mr. Banerjee has argued that the power of revoking a permit was not delegated to him under para 22 of the Bengal Rationing Order and accordingly the order of cancellation is void. This point, though raised in the pleadings, was not pressed before Bose, J. nor has it been taken in the grounds of appeal before us. We, therefore, allowed the learned Assistant Government Pleader time to ascertain the correct state of facts. Our attention has now been drawn to a Notification N. 5086 D. C. S. dated 21-4-1945 by which the powers under paras. 3(4) and 10(3) of the Bengal Rationing Order were delegated to the Director of Rationing in the Directorate General of Food Department of Civil Supplies Bengal.

This Notification was published in the Calcutta Gagette on 26-4-1945. But it is extremely unfortunate that it has not been included in the Enforcement Manual corrected upto 1-1-1952, which was published sometime in the year 1952. The omission to include this Notification in the Enforcement Manual gave rise to a suspicion if this Notification had not been subsequently withdrawn. To satisfy us on this point, Sri B. Das, Special Officer, Directorate of Rationing and Distribution, has filed an affidavit to the effect that this Notification No. 5086 D. C. S. has not been withdrawn and is still in force. The appellant has not also been able to point out any subsequent Notification by which the aforesaid Notification has been withdrawn. Upon these materials I am satisfied that the Director of Rationing has been authorised to exercise the powers under paras. 3(4) and 10(3) of the Bengal Rationing Order.

(20) In that view of the matter, the point raised by the appellant fails. But we desire to point out that considerable time of the Court was wasted on account of the non-inclusion of Notification No. 5086 D. C. S. dated 21-4-1945, in the Enforcement Manual, published by the Government in the year 1952.

(21) Bose, J. has held that paras. 3(4) and 10(3) of the Bengal Rationing Order are void to the extent that they empower the authorities concerned to revoke an appointment, or a ration document without assigning any reason. As in the case before us, reasons have been given by the authorities for revocation of the appointment, this point does not arise for consideration and we leave this point undecided.

(22) Before parting with this case, we desire to point out that our attention was invited to Notification No. 816/SC/Gen/102/51 — 31st March, 1951 published in the Calcutta Gazette Extraordinary of the same date, under which the ap-

pellant is entitled to purchase sugar from "free market" without any permit. If that be so, it is difficult to realise why the appellant is seeking restoration of the benefits of his permit No. N/ME/8 (Sug)37688. It has, however, been suggested that this Notification may be withdrawn at any time by the Government. For these reasons I have given my decision on all the points raised by the appellant.

(23) As all the points raised by the appellant fail, this appeal must be dismissed and the judgment of Bose J. affirmed.

(24) The respondents are entitled to costs of this appeal hearing fee being assessed at five gold mohurs.

(25) GUHA RAY J.: I agree.

C/D.H.Z. Appeal dismissed.

A. I. R. 1953 CAL 653 (Vol. 40, C. N. 248)

LAHIRI AND GUHA RAY JJ.

Ajit Kumar Addy and others, Appellants v. S. M. Maitra, Collector, 24-Parganas, Respondent.

A. F. O. O. (Mandamus) No. 71 of 1951, D/-3-12-1952.

(a) Bengal Embankment Act (2 of 1882), S. 7 (1) and (1a) — Neighbouring Country.

The expression "neighbouring country" in S. 7 (1) & (1a) means the country neighbouring the embankment in question. (Para 13)

(b) Bengal Embankment Act (2 of 1882), S. 25 — Construction of.

It is only after proceedings have started with a general notice under Ss. 7, 8 and 9 that the Collector is entitled, in an emergency contemplated by S. 25 to order the commencement of the work in anticipation of the completion of those intermediate steps in part II, other than the service of the general notice with which the proceedings themselves began, which cannot be gone through before action under S. 25 is taken. (Para 29)

The notice spoken of in proviso to S. 25 is a general notice of the work having already commenced and not a general notice of the Collector's intention to casue such works to be executed as contemplated by S. 7. This difference is deliberate and it can mean only that whereas the preparation of the estimates, specifications and plans etc. mentioned in S. 7 can be taken up even after action has been taken under S. 25, the general notice spoken of in S. 7 which is omitted from the proviso must precede the action under S. 25. (Para 26)

(c) Constitution of India, Art. 226 — Mandamus.

One of the conditions precedent to the issue of a writ of mandamus is that the party applying for it must have a right to enforce. Unless the applicant proves the existence of such a right he cannot succeed. AIR 1952 SC 12, Rel. on. (Paras 31, 32)

(d) Constitution of India, Art. 226 — Mandamus.

One of the conditions precedent to the issue of a writ of mandamus is that the party applying for it must not be guilty of any laches. (Para 34)

(e) Constitution of India, Art. 226 — Mandamus.

A writ of mandamus will not be issued if the issue of such writ is bound to prove infructuous. (Para 35)

Nirmal Chandra Chakravartty and Sailendra Nath Roy, for Appellants; J. Mujumdar A. G. P. and M. K. Sarkar, for Respondent.

CASE CITED:
(A) ('52) AIR 1952 SC 12: 1952 SCR 28 (SC)

GUHA RAY J.: The appellants are the joint receivers of the Auddy Estate, Chetla, who are the settlement holders from the Government in respect of certain Sundarban lands, known as Mouza Sridharnagore in P. S. Mathurapore in the district of 24-Parganas. One of the terms of the lease is that the lessees are responsible for the efficient maintenance of the existing embankments, sluice gates, etc. to the standard which is necessary for keeping the lot under cultivation and it was open to the Collector, in whose favour the lease was executed, to give notice to the lessees calling upon them to remedy the breach of any condition including the condition relating to the efficient maintenance of the embankment.

(2) On 4-5-1950, on receipt of a telegram from a number of cultivating tenants of the said lot, the Collector called for a report from the Assistant Engineer and the report of the Assistant Engineer, printed at page 11 of the paper book, is to the effect that there were several breaches in both the western and southern boundary embankments of village Sridharnagore on 2-5-1950, and the breaches in one of the embankments were being mended, and although the breaches in the other had been mended, they had not been mended so strongly, with the result that breaches occurred again therein on 31-5-1950, and upto 1-6-1950, they were all left to the mercy of the weather and the saline water was entering the paddy field.

(3) On the receipt of the said report, the Collector, on 15-6-1950, directed a copy of it to be forwarded to the receivers of the Auddy Estate for taking immediate action and report compliance by 20-7-1950. There was no response from the Auddy Estate till 10-8-1950, when they filed a petition before the Collector, printed at page 13 of the paper book, saying that the chakdars under them were responsible for the maintenance and repair of the embankments of their chaks under their contract with the lessees, and that the said chakdars had so long been maintaining the said bheris in pursuance thereof and it was their prayer that the Collector should call upon those chakdars to show cause for their wilful negligence in the works of repair.

(4) The Collector by his order, dated 10-8-1950, observed that the responsibility to maintain the embankment lay on the lotdars, that is, the Auddy Estate, but as a concession to the prayer of the lotdars he directed notices to be issued on the chakdars calling upon them to take up reparis & report compliance by 15-9-1950. Only one of the chakdars appeared and he denied his liability in the matter. When on 21-12-50 on behalf of the lotdars an undertaking was given that they would carry out substantial repairs before the end of February 1951 and agreed to file a written petition to that effect in two days' time, the Collector ordered that the papers should be put up on 2-3-1951 on which date appearance was to be put in by both the parties for assessment of the repair work carried out by the lotdars.

(5) On 2-1-1951, however, he passed the following order:

"Whereas the private embankment of Sridharnagar L. Plot P. S. Mathurapur (western and southern side) was badly damaged by the cyclone and flood in September last and it is necessary for the protection of life and property that repair work should be taken up immediately.

"And I am of opinion that the delay in the execution of the work occasioned by proceedings commenced by a general notice under the 7th and following sections of the Act would be attended with grave and imminent danger to life and property. I do not (sic) hereby order that the execution of the work should be taken up forthwith under Section 25 of the Embankment Act in anticipation of the completion of the proceedings.

"Issue notices under Ss. 25 and 7/8 of the Act fixing 22-2-51 for enquiry and hearing objection if any. A. E. will furnish the names of Mouzas to be benefited."

(6) The actual notice issued in pursuance of this order is printed at page 22 of the paper book. This was issued on 4-1-1951. On the same date another notice, printed at pages 26-27 of the paper book, was also issued and this was under S. 7.

(7) On 2-2-1951, evidently on the prayer of the receivers to stop the work under the Embankment Act, the Collector passed an order saying that he was not prepared to stop the work under the Bengal Embankment Act.

(8) On 21-2-1951, the receivers applied to this Court under Art. 226 (1) of the Constitution of India for a writ of Mandamus directing the opposite party to rescind the entire proceedings in R. M. Case No. 249-1950-51 (8), or at any rate, to rescind the order, dated 2-2-1951, in the said case. There was in the application a prayer for staying further proceedings but this prayer was not pressed, with the result that the work of repair which was directed by the Collector's order, dated 2-1-1951, was not stopped.

(9) The application for a writ of mandamus was refused by Bose, J. and this appeal directed against that order.

(10) On behalf of the appellants Mr. Chakravartty has argued first that Section 7, Bengal Embankment Act, has no application to this case, because, in the first place, as stated in the notice under Section 25, all the villages affected by the work were Sridharnagore and Rakhalpur, which appear from a copy of the lease executed by the Auddy Estate in favour of the Collector to be two of the Mouzas leased out to them, and the expression "neighbouring country" in Section 7 (1) and 7 (1a) excludes these Mouzas. In the second place, he has argued that Section 7 has no application, because the embankment in question does not satisfy the requirements of the various subsections of S. 7.

(11) He has next argued that the action taken under Section 25 is bad, because no notice had been issued under S. 7 previously to the initiation of proceedings under Section 25. On this point he has further argued that nothing happened between 21-12-1950, and 2-1-1951, to lead the Collector to apprehend an emergency as contemplated in S. 25.

(12) Thirdly, he has argued that the Collector's action was mala fide.

(13) On the first and the third points I might at once say that I could not persuade myself as to the correctness of Mr. Chakravarty's contentions. The expression "neighbouring country" in section 7 (1) and 7 (1a) obviously means the country neighbouring the embankment in question and there is nothing in the terms of the section even to suggest that this neighbouring country excludes the Mouzas leased out, if they, as must normally be the case, happen to adjoin the embankment.

(14) As to the second branch of this contention of Mr. Chakravartty, it is impossible to express any opinion, because the facts necessary for its determination have not been investigated, as this point was not raised before Bose J.

(15) As to the third point namely, whether the Collector's action was mala fide, there is nothing whatever to suggest that the Collector's action was anything but honest, although it might have been negligent. This contention, therefore, cannot succeed.

(16) The second branch of Mr. Chakravarty's argument on the second point is that it is quite clear from the counter-affidavit of the Collector that nothing happened between 21-12-1950, and 2-1-1951, to justify the Collector changing the order he had passed on 21-12-1950, under which the appellants were given time upto March 2, to have the embankment repaired and to undertake the work of repair under Section 25. As far as I could make out from the materials before the Court, this contention is not altogether unjustified and it seems as though the Collector was trying to make up by his order dated 2-1-1951, for the time he had lost in acting on the prayers of the appellants.

(17) This takes me to the second branch of Mr. Chakravarty's second contention which raises a very important question, namely the construction of Section 25 of the Bengal Embankment Act. The first thing to notice about the Bengal Embankment Act is that it defines in Section 3 "embankment" as well as "public embankment". Public Embankments are those maintained by the servants of the Government. The next important point to notice is that Chapter II of the Act deals only with embankments which are not public. In order to appreciate the correct meaning of Section 25, it is necessary to examine the sections in part II. Section 7 of which Sub-section (1a) only concerns us, runs as follows:

"Subject to the provisions of Part III, whenever it shall appear to the Collector that any of the following acts should be done, or works (including any work of repair) executed, that is to say:

(1) that any embankment which connects public embankments, or forms by junction with them part of a line of embankments, or that any embankment or watercourse which is necessary for the protection or drainage of the neighbouring country, should be taken charge of and maintained by the officers of Government;

(1a) that any embankment which connects public embankments or forms by junction with them part of a line of embankments or is necessary for the protection of the neighbouring country should be repaired;

(2) that any embankment, or any obstruction of any kind, which endangers the stability of a public embankment or the safety of any town or village, or which is likely to cause loss of property by interfering with the general drainage or the flood drainage of any tract of land, should be removed or altered;

(3) that the line of any public embankment should be changed or lengthened, or that any public embankment should be renewed or that a new embankment should be constructed instead of any public embankment, or that any embankment should be constructed for the protection of any lands or for the improvement of any water-course, or that a sluice in any public embankment should be made;

(4) that any sluice or water-course should be made, or that any public water-course should be altered for the improvement of the public health, or for the protection of any village or cultivable land;

(5) that any road which interferes with the drainage of any tract of land should be altered, or that any watercourse under or through such road should be constructed;

he shall cause to be prepared estimates of the cost of such works, including such proportion of the establishment charges as may be chargeable to the works in accordance with the rules for the time being in force under this Act, or as may be especially ordered by the State Government together with such plans and specifications of the same as may be required. He shall also cause to be prepared from the survey map of the district a map showing the boundaries of the lands likely to be affected by the said acts and works, and he shall cause a general notice to be given of his intention to cause such works to be executed."

(18) Then Section 8 says that the general notice to be issued under Section 7 shall as far as possible be in the form, and state the particulars mentioned in Schedule III to this Act annexed, and to this notice shall be annexed a list of all estates and villages, as far as is known, which are likely to be affected by the proposed work and to be chargeable in respect of the expenses of executing the same, and a copy of the said estimates specifications and plans together with a copy of the map as aforesaid shall be deposited in the office of the Collector and shall be open to the inspection of any persons interested, who shall be allowed to take copies thereof.

(19) Then S. 9 runs as follows:

"Every such general notice shall be published in the manner provided by section 80 not less than 30 days before the day appointed for hearing the persons interested."

(20) Stopping here for a moment to examine these three sections, one at once sees that before the Collector can proceed under these sections, which empower him to take up the repair etc. of certain kinds of embankments mentioned in the different sub-sections of the sections, he will have to form an opinion that the acts in question are necessary in respect of these embankments which, as I have said already, are not public embankments. Then he has got to cause to be prepared estimates of the costs of such works together with such plans and specifications of the same as may be required. He has also to cause to be prepared from the survey map of the district a map showing the boundaries of the lands likely to be affected by the said acts and works and lastly he has to cause a general notice to be given of his intention to cause such works to be executed.

(21) Section 8 prescribes the form of the notice and S. 9 the method of its publication. It is clear from the form of the notice as given in Schedule III that the first part gives publicity of the intention of the Collector to have a particular item or items of work done. The second part says that the estimates of the proposed work with the necessary specifications and plans together with a copy of the survey map showing the lands likely to be affected by the said work are open for inspection at the Collector's office by any interested person who is allowed to take copies thereof. The third part gives an estimate of the total probable cost.

(22) It will be convenient at this stage to dispose of the contention of Mr. Majumdar that the items of work referred to in S. 7 have to be done in the order in which they are mentioned, namely, that after the Collector is of opinion that certain items of work mentioned in the various sub-sections of S. 7 have got to be done, he shall cause to be prepared the estimates etc. Secondly, he shall cause to be prepared a plan and thirdly, he has got a general notice of his intention to cause such works to be executed to be given. The form of the notice itself goes to show that there is no substance in this contention. As a matter of fact, it is perfectly clear from the scheme of this part of the Act that what is of prime importance is the service of a general notice of the Collector's intention to cause such works to be executed. The reason for this is not far to seek. As already stated, part II deals with embankments which are not public and so unless the Collector causes the general notice referred to in S. 7 to be served, the people interested cannot possibly know that the works with which they were entrusted under the lease would really be done at the instance of the Collector.

(23) Section 10 empowers the Collector to hold an enquiry and hear the objections of any persons who may appear and under S. 11 after the enquiry he has to form an opinion as to whether the work is really necessary or not. In case he should be of opinion that the work is not necessary, the matter ends there. If, however, he is of opinion that the work has got to be done, he cannot proceed straightway to order commencement of the work. What he has got to do is to report to the Commissioner of the Division. Under S. 12 the Commissioner is also entitled to hold an enquiry if he thinks proper and after he has formed an opinion of his own as the result of an enquiry made by himself, or on the report of the Collector if he thinks no such enquiry is necessary, he has further to report to the Government and under S. 14 after the Government has made up its mind, that the work is really necessary, it passes the final order and it is after this final order is published in the Official Gazette that the work can be taken up. It is thus obvious that between the service of a general notice under S. 7 and the commencement of the work under the normal procedure outlined in this part of the Act, there is a large gap and it is this which is likely to cause the delay referred to in S. 25 with which I shall deal presently.

(24) Section 25 runs as follows:

"Whenever the Collector shall be of opinion that the delay in the execution of any work occasioned by proceedings commenced by a general notice under the 7th and following sections of this Act would be attended with grave and imminent danger to life or property, he may forthwith cause the execution of such work to be begun in anticipation of the completion of such proceedings:

Provided that he shall without delay cause to be prepared the estimates, specifications and plans of the proposed works, together with a copy of the map as provided in S. 7, and shall cause general notice to be given that the work mentioned therein has already been commenced; and thereupon such proceedings and inquiries shall be had as in and by Part II of this Act are directed."

(25) According to Mr. Chakravartty, the meaning of this section is that it is only after the Collector has started proceedings by a general notice under S. 7 that the Collector can proceed under S. 25, whereas, according to Mr. Majumdar, appearing for the State, the section means that

the Collector can initiate proceedings under S. 25 even without a general notice under S. 7 and he wants the Court to hold that the expression "by proceedings commenced by a general notice under the 7th and following sections of this Act" really means proceedings to be commenced by a general notice under the 7th and the following sections of the Act. In other words, his contention is that whenever the Collector is of opinion that the delay in the execution of any work occasioned by such proceedings is likely to be attended with grave and imminent danger to life and property, he may forthwith cause the execution of such work to be begun in anticipation of the completion of such proceedings. Thus, his contention really envisages only one type of circumstances, namely, where the Collector forms this opinion prior to the initiation of proceedings under S. 7. His contention would not cover a case where the Collector forms that opinion after proceedings have been initiated under S. 7 and when it was pointed out to him that normally speaking the far larger number of cases would fall in the second category, he wanted the Court to hold that the expression "proceedings commenced" etc. really means proceedings either to be commenced or proceedings already commenced.

The terms of the section, I must say, do not justify this interpretation of it. The proceedings commenced grammatically mean the proceedings already commenced. Now even according to Mr. Majumdar, even if it were possible to read into the section certain words viz., 'to be', or 'already' which are not there, the first set of supplementary words that Mr. Majumdar would have the Court read into the section would not really fit in with the scheme of the second part of the Act. Section 25, as much as S. 7 and the succeeding sections, apply, as already stated, to embankments which are not public. Consequently, unless and until the Collector has formed an opinion that the work referred to in S. 7 is really called for in connection with an embankment which is not public and unless and until he has actually notified his intention of causing such works to be done, the public or the persons interested cannot possibly have any idea that such work was intended to be done by the Collector and the Collector himself cannot possibly have any jurisdiction to proceed under S. 25 unless he has already notified his intention under S. 7. That this is so would be further clear from the use of the word "completion" in S. 25. If Mr. Majumdar's contention were correct, all that the section need have said was that the work might being in anticipation of such proceedings instead of the phrase in anticipation of the completion of such proceedings. The very use of this word "completion" suggests that proceedings have already commenced before action under S. 25 is taken.

(26) There is another thing worth noticing in this connection. The proviso to S. 25 makes it obligatory on the Collector to cause without delay to be prepared the estimates, specifications and plans of the proposed work together with a copy of the map as provided in S. 7 and then it says further that the Collector shall cause a general notice to be given that the work mentioned therein has been already commenced. It is significant that the notice spoken of in this proviso is a general notice of the work having already commenced and not a general notice of the Collector's intention to cause such works to be executed as contemplated by S. 7. What I should like to stress here is that this difference is deliberate and it can mean only that whereas the preparation of the estimates, specifications and plans etc. mentioned in S. 7 can be taken even after action has been taken under S. 25, the general notice spoken of in S. 7 which is omitted from the proviso must precede the action under S. 25.

(27) The qualifying phrase "subject to the provisions of part III" with which S. 7 opens indicates in the first place that the action to be taken under S. 7 is interlinked with that to be taken under S. 25 and that the latter is not really independent of the former. It is possible to argue, as Mr. Majumdar has argued, that the fact that S. 7 and S. 25 are interdependent does not necessarily mean that action under S. 25 must be preceded by a notice under S. 7, for even after the Collector has directed under S. 25 the work to be executed, he has to take action under S. 7 and the sections that follow in part II. The opening phrase of S. 7, to my mind, furnishes a complete answer to this. It shows clearly that the provisions of part III which consist of only three sections, beginning with S. 25 really constitute a proviso to S. 7, enabling the Collector in an emergency contemplated by S. 25 to skip over the stages lying in between the service of a general notice under S. 7 which should not take more time than the Collector himself thinks necessary and the commencement of the work and to go through these intermediate stages after the work is well on its way.

(28) I must confess the words "and following sections" in S. 25 caused at first a certain amount of difficulty, because proceedings are "commenced by a general notice under S. 7", so that these words "and following sections" seemed superfluous. On a closer scrutiny, however, it seems fairly obvious that these words really refer to Ss. 8 and 9, which also deal with the general notice in S. 7, the one prescribing its form and the other the mode of its publication.

(29) The construction of S. 25, therefore, which found favour with Bose. J., is not correct if I may say so with respect & its true meaning is that it is only after proceedings have started with a general notice under Ss. 7, 8 and 9 that the Collector is entitled, in an emergency contemplated by S. 25 to order the commencement of the work in anticipation of the completion of those intermediate steps in part II, other than the service of the general notice with which the proceedings themselves began, which cannot be gone through before action under S. 25 is taken.

(30) As Bose, J. accepted the interpretation of S. 25 which was put on it by the Collector and by the State, the question did not arise before him whether a writ of mandamus or a direction in the nature of mandamus can be issued in a case of this nature. On behalf of the State no objection was raised that such a writ or such a direction cannot be issued in a case of this nature, with the result that the question was not gone into. As I have respectfully differed from the construction put upon the section by Bose, J., the question necessarily arises whether such a writ or such a direction should be issued in this case and we have heard Mr. Chakravartty on behalf of the appellants at considerable length on this point.

(31) One of the conditions precedent to the issue of a writ of mandamus is that the party applying for it must have a right to enforce. Paragraph 1303 of Halsbury's Laws of England, Vol. 9, Hailsham Second Edition, page 768, says that

'the applicant for a writ of mandamus must show that there resides in him a legal right to the

performance of a legal duty by the party against whom the mandamus is sought. In order, therefore, that a mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposes a legal duty. It is only in respect of a legal right that mandamus will lie. The Court will not, therefore, enforce an equitable right by this remedy."

(32) In the case of —'State of Orissa v. Madan Gopal Rungta', AIR 1952 SC 12 (A), the Supreme Court also has laid down that the words "for any other purpose" in Art. 226 of the Constitution of India have to be construed with reference to the words that precede the existence of a right is the foundation of the exercise of jurisdiction of the court under this Article. It was a case in which the Orissa High Court had granted a writ, without deciding the question whether the applicants had any right, just in order to enable the applicants to file a suit. The Supreme Court on appeal held that it was not open to the High Court to do so without first deciding whether the applicants had a right or not. In order, therefore, that the applicants in this case may succeed, they must prove the existence of a right.

(33) Mr. Chakravartty's contention was that the maintenance of the embankment in a proper state of repair was itself a right. When it was pointed out that it was really a duty or obligation and not at all a right, he argued that if it was a duty in relation to the landlord it was a right in relation to the leasehold. It is difficult to appreciate this argument. If it was a duty in relation to the landlord, it is difficult to see how it could be anything else in relation to the leasehold. If it was a right at all, it would be the option of the lessees to exercise this right or not. But in the lease it is clearly stated that if the lessees did not carry out this obligation, the landlord would be entitled to re-enter. That in itself shows that it is nothing but a duty pure and simple. The conduct of the applicants themselves when they tried to shift the responsibility on to their chakdars points in the same direction. It is, therefore, quite clear that this is nothing but a duty and that the applicants had really no right.

(34) Another condition precedent to the issue of a writ of mandamus is that the party applying for it must not be guilty of any laches. In this case the duty of keeping the embankments in repair lay heavily on the lessee, namely the appellants. But they instead of carrying out those obligations at first tried to shift the same on to their chakdars. It is thus clear that they were guilty to a certain extent of laches, and the writ should not issue in their favour in these circumstances.

(35) Another thing which also goes to show that no writ should be issued in favour of the appellants is that the work has been carried out. The Collector refused to stay his hands when the appellants applied before him on 2-2-1951, and as already stated, the application for stay before Bose J. was not pressed, so that in all probability the work was carried out. In order to satisfy ourselves on this point, we asked Mr. Majumdar informally to have the records produced here and it was found that there was a report on the record to the effect that the work was done. Even if, therefore, the writ is issued, it is bound to prove infructuous. Mr. Chakravartty of course argued that his application was in two parts and the first part prayed for a writ to rescind the proceedings under S. 25 and the second part was to rescind the order of the Collector, dated 2-2-1951, refusing to stay his hands. The proceedings under S. 25 really mean the order, dated January 2, 1951, when the Collector said that imminent danger to property and life made it necessary that the work should be forthwith executed. When the work itself has been completed, rescinding the proceedings will be absolutely meaningless and so will the rescission of the order, dated 2-2-1951. In these circumstances, I am of opinion that no writ of mandamus or no direction in the nature of a writ of mandamus should issue in this case.

(36) The appeal is accordingly dismissed. In the circumstances of this case, the parties will bear their own costs in both the Courts.

(37) LAHIRI J.: I agree.

A/K.S.B. Appeal dismissed.

*** A. I. R. 1953 CAL. 657 (Vol. 40, C. N. 249)**

G. N. DAS AND DEBABRATA MOOKERJEE JJ.

Satya Charan Pal, Plaintiff-Appellant v. Asutosh Pal and others, Defendants-Respondents.

A. F. O. D. (probate) No. 192 of 1951, D/-4-3-1953.

(a) Civil P. C. (1908), O. 14, R. 1 — Failure to raise issue.

A failure to raise an issue at an earlier stage of the litigation does not cause a failure of justice where the parties are conscious of the fact that one of the points which arose for decision in the case was the question of revocation of the will. (Para 5)

Anno: C. P. C., O. 14, R. 1 N. 4.

(b) Succession Act (1925), S. 237 — Propounder to prove existence of facts.

The petitioner for the grant of probate who seeks to come within S. 237 must fulfil the conditions set forth in the section which would entitle him to obtain a limited grant as stated in the section itself. It lies on the propounder to prove the existence of these facts, namely, that the will was lost or mislaid since the testator's death. Failure of the propounder to satisfy the Court on the existence of these facts disentitles the propounder to a grant of probate. AIR 1928 Cal 307, Rel. on. (Para 6)

Anno: Suc. Act, S. 237 N. 1.

***(c) Succession Act (1925), Ss. 237 and 70 — Burden of proving revocation of will and presumption — (Evidence Act (1872), Ss. 101 to 103 and 114).**

The burden of proving that a will has been revoked rests on the objector. That burden may be discharged either by direct evidence or by an inference to be drawn from certain facts which the objector may succeed in establishing. In dealing with the question of revocation the Court may also resort to a presumption which has been raised in similar cases by the Courts in England and applied with caution by the Courts in this country. (Para 7)

The presumption raised in such cases is that where a will is traced to the possession of the testator and is not forthcoming after his death, the will must be taken to have been destroyed by the testator with the intention of revoking the same. No hard and fast rule can be laid down as to

whether or not the presumption should, as a matter of law, conclude the matter. The question has to be determined in the light of the facts which arise for decision in each case. Welch v. Phillips, (1836) 1 Mocre PC 299, Foll.; AIR 1915 PC 111; AIR 1928 Cal 307, Rel. on; Case law Ref. (Para 10)

Anno: Suc. Act, S. 237 N. 1; S. 70 N. 7; Ev. Act, Ss. 101 to 103 N. 52.

Bholanath Roy, for Appellant; J. K. Sen Gupta and Nirmal Ch. Choudhury, for Respondents.

CASES CITED:

(A) ('28) AIR 1928 Cal 307: 55 Cal 482
(B) (1836) 12 ER 828: 1 Moore PC 299
(C) (1876) 45 LJP 49: (1876) 1 PD 154
(D) (1864) 36 LJP 78: 1 P & D 371
(E) (1900) 69 LJ PC 141: (1900) AC 604
(F) ('04) 8 Cal WN 821: 31 Cal 885
(G) ('14) AIR 1914 Cal 365 (2): 18 Cal WN 527
(H) ('15) AIR 1915 PC 111: 19 Cal WN 929
(I) ('34) AIR 1934 Cal 17: 57 Cal LJ 447
(J) ('39) 43 Cal WN 824

G. N. DAS J.: This is an appeal by the propounder and is directed against a judgment and decree made by Mr. B. M. Roy Choudhury, learned District Judge, Berhampore, dated 27-4-1951, refusing an application for the grant of probate under S. 237, Succession Act, 1925.

(2) The testator Nandalal Pal executed a Will on 30-9-1913. It was registered by him at Domjur Registration Office. At the time the testator used to live ordinarily at Dhulian in the district of Murshidabad where he practised as a Medical Practitioner and also carried on business. The Will was executed at Dakhinpara Jhapardaha in the district of Howrah which was the ancestral residence of the plaintiff. At the date of the Will the testator had his wife Sreemati Lakshmimoni Dasi living who ordinarily resided at Dakhinpara Jhapardaha. He had five sons, Ashutosh, the objector, Abinash, Surendra, Debendra and Satyacharan, the propounder. Of the five sons of the testator, Debendra predeceased him. Abinash and Surendra survived the testator but died before the present application for probate. It may be pointed out that at the date of the Will the testator Nandalal had two businesses in medicine, one of which was located in Dhulian and was looked after by himself and Debendra. Another shop dealing in medicines was located at Raghunathgunge which was looked after by Abinash and the propounder Satyacharan. The testator's properties in the district of Howrah were looked after by his son Surendra. While this was the state of the family, the testator executed the Will to which I have referred and registered it on the same date. The testator died on 17-6-1920, at Dhulian. No steps were taken to obtain probate of the Will till 17-8-1949, when the present application for probate was made. The application for probate was accompanied by a certified copy of the Will. The allegation in the application was that the original Will was in the custody of the objector and the propounder was not in a position to file the same. In the application it was stated that the propounder came to know about the Will some years ago. On the application being filed, an objection was raised by Ashutosh, the only surviving son of the testator. His objection was that the Will was not duly executed and attested, that the application for the grant of probate was barred by estoppel, waiver and acquiescence and that the Will, if any, was revoked by the testator. On these allegations certain issues were raised, namely, an issue as to the genuineness of the Will, and to its due execution and attestation. This issue was found in favour of the propounder. The finding of the learned Judge on this point has not been challenged in this appeal. There was also an issue as to estoppel, waiver and acquiescence. The learned District Judge found in favour of the propounder on this issue. This finding has also not been challenged in this appeal. The only other issue which arose in the case was whether the Will was revoked. The learned District Judge found in favour of the objector and was of the opinion that the Will was revoked. This finding has been seriously contested in this appeal, on behalf of the propounder.

(3) Before I deal with this contention, it is necessary to set out the terms of the Will. The Will opens with a recital that the testator's eldest son Ashutosh (the objector) was well-off and that he had started a rival business in medicine and was practising as a Medical Practitioner at Dhulian where the testator himself practised and had his medicine shop. The Will then proceeds to state that Ashutosh will have no interest in any of his properties on his death. The testator bequeathes his entire properties to his four sons. Abinash, Surendra, Debendra and Satyacharan. The Will also contains a provision that the shop at Dhulian will be looked after by himself and his son Debendra, the shop at Raghunathgunge by his sons, Abinash and Satyacharan and the properties in the district of Howrah by Surendra. The Will then makes provision for the wife Lakshmimoni. The Will makes provision for her maintenance and states that she will be entitled to receive monies for the performance of religious ceremonies and in case of diffculty, the Will goes on to add, she will be entitled to the income of the properties in the district of Howrah. The Will makes provision for payment of Rs. 100/- on the occasion of the marriage of his grand-daughter. It also contains a provision that his daughter Sushila and Sushila's daughter will be brought to the family residence and such expenses will be borne by the estate. The Will concludes by appointing the four sons, Abinash, Debendra, Surendra and Satyacharan as executors.

(4) The Will therefore really excludes the eldest son Ashutosh. This fact will have to be borne in mind in connection with our discussion on the question of revocation of the Will.

(5) Mr. Roy who has appeared in support of the appeal has first contended that the learned District Judge was not right in going into the question of revocation at the time of trial. He has submitted that the question of revocation is a question of fact and the burden of proving this fact rests on the objector. As no issue was framed, the propounder has suffered a good deal of prejudice. Ordinarily, this would be so. In this case, however, in the petition of objection filed by the objector the objector stated in para. 14 that the Will had been revoked. No express issue was however raised on this point. It appears, however, that the objector Ashutosh, when examined on commission, was subjected to cross-examination on the point of revocation of the Will by the propounder. It also appears that when the case came to trial, both the propounder Satyacharan and his witness P. W. 5 Deb Nath Bhattacharjee deposed to certain facts which have a bearing on the question of revocation. In fact, Deb Nath's evidence is entirely concerned with this question. He deposed to the fact that the Will was found in the custody of the objector a few years before the date of trial. It cannot, therefore, be suggested that the parties were not conscious of the fact that one of the points which arose for decision in the case was the question of revocation of the Will. An issue was framed during the trial and

at that time the learned Pleader appearing on behalf of the propounder raised no objection. This is specifically stated in the Order Sheet. It cannot therefore be suggested that the failure to raise an issue at an earlier stage of the litigation has caused a failure of justice. In my opinion, the contention raised cannot be accepted.

(6) The next question relates to a question of fact, namely, whether the Will was in fact revoked. Before I deal with the authorities to which our attention was drawn by the learned Advocates on both sides and which have a bearing on the present question, it is necessary to discuss a preliminary question. That question is whether in the facts of this case the propounder has complied with the provisions of S. 237, Succession Act. Section 237 of the Indian Succession Act reads as follows:

"When a Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator and a copy of the draft or the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced."

This is an exception to the general rule contained in S. 276, Succession Act, that a copy of the Will must be annexed to a petition for probate. The petitioner for the grant of probate who seeks to come within S. 237 must fulfil the conditions set forth in the section which would entitle him to obtain a limited grant as stated in the section itself. The conditions are that the Will must be lost or mislaid since the testator's death. It must be proved that the Will was destroyed by wrong or accident and not by any act of the testator. As I read the section, it lies on the propounder to prove the existence of these facts, namely, that the Will was lost or mislaid since the testator's death. The only evidence which the propounder has sought to produce is that the Will was in the possession of the testator before his death. It was suggested that it must have been secreted by the objector whose interest it was to secrete the Will or to destroy it. We have therefore to consider how far the objector has succeeded in proving this fact. The evidence of the propounder is that the testator went alone to Dhulian from Raghunathgunge. His evidence further is that at the time of his death Ashutosh, the objector, was at Dhulian. His evidence also is that no information was sent to the propounder or to his brother at any time before the testator's death. The objector Ashutosh has denied the allegation that he had extracted the Will from the testator's box. The first question, therefore, is whether the Will was in the testator's box and was taken by him to Dhulian, when he went there. It is the evidence of Satyacharan, the propounder, that before his death the testator used to look after the shop at Raghunathgunge. It therefore follows that ordinarily the testator used to live at Raghunathgunge. If he was a resident of Raghunathgunge and had gone to Dhulian for an occasional purpose as is suggested on behalf of the objector, it is extremely unlikely that the testator would take along with him the Will whereby Asutosh the eldest son had been entirely cut off. In this connection it must be remembered that the Will itself was not executed at Dhulian where the testator then ordinarily used to reside. It was executed and registered at the Registration Office at Domjur in the district of Howrah. It is obvious that this step was taken by the testator in order to keep it concealed from the objector Ashutosh that a Will was being executed. If that was the object with which the Will was executed, it is not likely that the testator, unless he had changed his mind towards the objector, would take the Will along with him to Dhulian. It is also unlikely that the visit being an occasional one the testator would take his valuable things with him. At that time he was looking after the business at Raghunathgunge and must have been residing at Raghunathgunge. It is also significant to remember that at the time Debendra who was looking after the Dhulian business was dead and it was quite probable that the testator had wound up his business at Dhulian and was living at Raghunathgunge. At this distance of time, it is difficult to hold from the materials on the record that the testator took the Will along with him to Dhulian. As such there was no opportunity for the objector to secrete the Will. In my opinion, the propounder has failed to prove that the Will was extracted from the testator's box by the objector Ashutosh during his last illness or after his death, and that it was being kept back by him. The propounder has therefore failed to satisfy the Court that the preliminary conditions which would entitle him to a grant under S. 237, Succession Act have been complied with. This ground, in my opinion, is sufficient to disentitle the propounder to a grant of probate. A similar view was taken by this Court in the case of — 'Efari Dasya v. Podei Dasya', AIR 1928 Cal 307 (A).

(7) Conceding the position that the Court is required to go into the question of revocation, the question whether a Will has been revoked or not has to be answered in relation to the facts of each particular case. The burden of proving that a Will has been revoked no doubt rests on the objector. The burden may be discharged either by direct evidence or by an inference to be drawn from certain facts which the objector may succeed in establishing. In dealing with the question of revocation the Court may also resort to a presumption which has been raised in similar cases by the Courts in England and applied with caution by the Courts in this country.

(8) I shall first deal with the effect of the presumption which has been drawn by the Courts in England in cases where the Will is traced to the possession of the testator and is not found to be in existence after his death. The question as to how far this presumption can assist the Court in dealing with the question of revocation has to be determined, as I have said, in relation to the facts of each case. Section 237, Succession Act, is on similar terms as S. 24, Probate and Administration Act (Act 5 of 1881) and S. 208, Succession Act (Act 10 of 1865). In order therefore to appreciate the true meaning of S. 237 which has replaced S. 208 of Act 10 of 1865 it is permissible to refer to the practice that prevailed in England at the time when the Succession Act (Act 10 of 1865) was enacted. In fact, S. 208 of the Act (Act 10 of 1865) merely quotes a passage from—Tristram and Coote's Probate Practice, pp. 117 and 118. The law, so far as the raising of a presumption goes, was thus laid down in the case of — 'Welch v. Phillips', (1836) 1 Moore P. C. 299 (B),

"If a Will is traced to the possession of the deceased and last seen there and not forthcoming on his death it must be presumed to have been destroyed by himself."

It was also laid down that such presumption must have effect unless there is sufficient evidence to the contrary. The view taken in the above case was reaffirmed in the case of — 'Sugden v. Lord St. Leonards', (1876) 1 P. D. 154 (C). Cockburn C. J. observed as follows:

"Now, where a Will is shown to have been in the custody of a testator and is not found at his death, the well-known presumption arises that the Will has been destroyed by the testator for the purpose of revoking it but of course

that presumption may be rebutted by the facts.

Although presumptio juris, it is not presumptio de jure and of course that presumption will be more or less strong according to the character of the custody which the testator had over the Will."

Mr. Roy referred us to the case of — 'Finch v. Finch', (1864) 1 P. & D. 371 (D) where it was pointed out that a Will which was in the testator's possession and was not forthcoming after his death may be presumed to have been revoked but such presumption does not arise unless there is evidence to satisfy the Court that it was not in existence at the time of his death. This observation seems to indicate that it lies on the objector to prove, in the first instance, that the Will was not in existence at the time of the testator's death. The case in — '(1864) 1 P. & D. 371 (D)' and the other two cases to which I have referred were referred to by the Court of Appeal in the case of — 'Allan v. Morrison', (1900) A. C. 604 (E). The Judicial Committee distinguished the case of — 'Finch v. Finch', (D) on the ground that in that case the Court merely inferred the fact of revocation from the circumstances and other facts which were established in that case, and that it did not lay down any general proposition. The Court of Appeal approved of the view taken in the case of — 'Welch v. Phillips', (B) and in the case of — 'Sugden v. Lord St. Leonards', (C) to which I have already referred. So far as the English Courts are concerned, the law is summarised in a passage in Jarman on Wills, 8th Edition, Vol. 1, page 170 to which Mr. Roy drew our attention. The passage runs as follows:

"If a Will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it; but the presumption may be rebutted, and it will be more or less strong according to the character of the custody which the testator had over the Will."

(9) This passage merely summarises the law which was laid down in the two cases to which I have referred. The question, however, remains whether the above presumption has been applied by the Courts in this country. Mr. Roy drew our attention to the case of — 'Syed Anwar Hossain v. Secy. of State of India in Council', 31 Cal 885 (F). In that case the facts were that a wandering Fakir who had his residence at Bhagalpore had migrated from that place taking along with him certain papers. At the time of his death the Will which he had executed while at Bhagalpore bequeathing his properties to the Queen Empress of India was not discovered. An application for the grant of probate was made. The question then arose whether it could be presumed that as the Will was not found after the testator's death it was revoked by the testator. A Bench of this Court refused to draw the presumption & in that connection observed that the presumption which was raised in England should be applied with caution in this country having regard to the habits of people in India. As I read the judgment of the Bench in that case, the decision turned on the facts of the particular case. The only evidence in that case was that the Fakir had taken along with him the important papers. There was no evidence that the Will itself which he had executed at Bhagalpur was taken by him from Bhagalpore. The presumption, therefore, could not arise in the facts which were proved in that case. The next case to which Mr. Roy drew our attention is the case of — 'Sarat Chandra v. Golap Sundari', AIR 1914 Cal 365 (2) (G). The judgment in that case was pronounced by Coxe & Ray JJ. Coxe J. rejected the plea of revocation on the ground that the onus lay on the objectrix to prove the plea of revocation but no such plea having been raised in that case the objectrix necessarily failed. Ray J. in the course of his judgment observed that the rules of English law are founded on reasons and good sense. His Lordship added that revocation must be proved by the party who set it up and then observes that the presumption may be rebutted by the fact that the objector had access to the Will and must have destroyed it or removed it with an ulterior purpose. The discussion in the judgment clearly reveals that the Court was fully alive to the fact that the presumption which was applied by the English Courts would also apply in this country but that the Courts must proceed with caution. A similar view was taken by the Judicial Committee of the Privy Council in the case of — 'Padman v. Hanwanta', AIR 1915 PC 111 (H) and it was observed that the rule laid down in — '(1836) 1 Moore P. C. 299 (B)' should be applied with considerable caution in this country. In a later case, namely, in the case of — 'Brajabala Dhar v. Nityamayee Biswas', AIR 1934 Cal 17 (I) D. N. Mitter J. applied the principle which was affirmed by the Court of Appeal in the case of — 'Allan v. Morrison (E)'. So also in the case of — Harilal v. Sarat Chandra', 43 Cal. W. N. 824 (J) R. C. Mitter J. observed that the presumption did arise and cited in support of his observations a passage from Jarman on Wills to which I have made reference.

(10) In my opinion, the true rule to be applied in cases of this description is laid down by a Bench of this Court in — 'AIR 1928 Cal 307 (A)'. B. B. Ghose J. after referring to — '31 Cal 885 (F)' and to — 'AIR 1914 Cal 365 (2) (G) observed as follows:

"It seems to me that the question as to the presumption of the Will being revoked by the testator with reference to the fact to its being in his possession till the time of his death is to be decided more or less upon the circumstances of each case."

No hard and fast rule can be laid down as to whether or not the presumption should, as a matter of law, conclude the matter. The question has to be determined in the light of the facts which arise for decision in each case. In this case, as I have already observed, there is no proof that the Will was taken by the testator to Dhulian. There is no evidence that the objector had any hand in secreting or destroying the Will. It is the propounder's case that the testator was in possession of the Will because his whole case was that the testator had the Will with him at Raghunathganj and that he took that Will to Dhulian where he met with his death shortly thereafter. The Will was, therefore, traced to the possession of the testator. It is the propounder's case that after the testator's death he made enquiries about the Will and could not discover it. The Will is not forthcoming. The question therefore is whether the facts lead to an inference that the Will was destroyed before the testator's death or is missing since his death. The last supposition is not a correct inference which could be drawn from the facts of this case. Although in the petition for probate the propounder suggested that he came to know of the Will some years before the application, in his evidence the propounder specifically stated that the testator told him about the Will though he was not informed of the contents thereof. If the testator told the propounder that he had made a Will, it is natural that he would also tell him what the terms were. The propounder was the youngest child and was then not provided for. As the testator made a Will benefiting him, the testator would naturally tell him what the terms were.

In any event when the testator died and the Will was not discovered the propounder who was a beneficiary under the Will would make frantic efforts to search for the Will. The testator's widow Lakshmimani was alive. So also the testator's two other sons, Surendra and Abinash. Surendra was living at his native place. The testator was also living there. The propounder admits that he went to his native place two or three times after the testator's death. There is no reason why the propounder would not make enquiries from his mother or from his brother Surendra or from other person about the existence of a Will. In my opinion such an enquiry must have been made. If such an enquiry had been made it is likely that the real fact would have been ascertained. In fact three of the attesting witnesses are still alive and they have deposed in support of the execution and attestation of the Will. One of the witnesses, Matilal Banerjee, was, on his evidence, well acquainted with Surendra and had met him on several occasions. It is the evidence of P. W. 4 Hrishikesh that the Will was read over by Matilal and Matilal must have knowledge of the contents of the Will. As I read the evidence of these witnesses on behalf of the propounder, the impression that is left on my mind is that the propounder, if he had made an enquiry, would have found the real facts concerning the Will. I do not believe the propounder when he says that he waited till the year 1947 when he instituted a partition suit before he made an enquiry at his native place. It is not suggested that he had not met Matilal in the meantime because his own evidence is that he had been to the native place. It is significant to note the circumstances under which the present discovery has been made. The propounder had started a partition suit in the year 1947 against his brother Ashutosh, the objector, claiming certain properties as joint. It is suggested that after the filing of the partition suit he made the enquiries which led to the discovery about the existence of the Will and its possible secretion or destruction by the objector. In my opinion, the present attempt to propound the Will is motived by the partition suit. The fact that a will had been executed has been availed of as a second string to support his claim to the properties left by the testator. It has also to be borne in mind that the propounder stated that he made enquiries and was satisfied that the will was not in existence and that this fact accounted for the subsequent dealings in regard to the testator's properties on the footing that there was an intestacy. In my opinion, these dealings are consistent with the view that the enquiry which the propounder must have made led to a discovery that the Will was destroyed by the testator and that probate was therefore not taken after the testator's death. In my opinion, the facts as they are on record support the presumption which has been raised in cases of similar description, namely, that where a Will is traced to the possession of the testator and is not forthcoming after his death, the Will must be taken to have been destroyed by the testator with the intention of revoking the same. The conclusion, therefore, follows that the Will was revoked by the testator. The view taken by the learned District Judge must therefore be affirmed.

(11) The result, therefore, is that the appeal fails and is dismissed. Having regard to the facts of this case, although the appeal fails, we are of the opinion that the parties must bear their own costs in this appeal.

(12) DEBABRATA MOOKERJEE J.: I agree.

B/V.S.B. Appeal dismissed.

A. I. R. 1953 CAL. 661 (Vol. 40, C. N. 250)

MITTER AND S. K. SEN JJ.

Satyahari Choudhury, Petitioner v. The State.

Criminal Revn. No. 1233 of 1952, D/- 16-4-53.

(a) Criminal P. C. (1898), S. 496 — "Proceedings before a Court" — (Words and Phrases).

In S. 496 the words 'proceedings before a Court' are used in wider sense and not in the restricted sense of judicial proceedings alone. (Para 4)

Anno: Cr. P. C., S. 496 N. 1.

(b) West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949) (as amended in 1952), S. 12 — "Proceedings pending before a Court" — (Words and Phrases).

The words 'proceedings pending before a Court' in S. 12 mean judicial proceedings which started with the submission of a charge-sheet or a complaint or taking cognizance thereon. It cannot be argued that since the accused is produced before the ordinary Magistrate and the question of bail is considered, there is a proceeding before the Court and therefore S. 12 bars the jurisdiction of the Special Court. (Para 5)

(c) West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Sch. Items 3 and 8 — Private person conspiring with public servants to cheat — (Penal Code (1860), S. 420).

It is true that if there is a charge against a person who is neither a public servant nor a person dealing with property belonging to Government as an agent of Government, under S. 420, I. P. C. and no other section, the Special Court has, under Item 3 of the schedule, no jurisdiction to try the case. But if the offence under S. 420 is committed by the public servants then the offence is cognizable by the Special Court and if the petitioner though not a public servant is concerned in the offence of conspiracy to cheat with such public servants he is triable by the Special Court in view of item 8 of the Schedule. (Para 6)

(d) West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Sch. Item 8 — Jurisdiction to try offence of cheating — (Penal Code (1860), S. 420).

The Special Court has jurisdiction to try an offence under S. 420, I. P. C. if committed by a public servant. It is not necessary that he should be taking Government money by the offence of cheating. (Para 7)

(e) West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Sch. Item 8 — Cheating with respect to Government money.

Where there is cheating in respect of the sum included in an award given by the Land Acquisition Officer it is an offence committed in respect of the Government money. (Para 7)

A. K. Dutta, for Petitioner; J. M. Banerjee, for the State.

S. K. SEN J.: In this revisional application the petitioner Satyahari Choudhury has prayed for setting aside the order of the Special Judge Birbhum holding that he had jurisdiction to try the petitioner along with the other accused of the case — 'State v. Phani Bhusan Das', which was allotted to the Special Judge Birbhum by Government Notification No. 5596 J dated 9-10-1952.

(2) The facts of the case are briefly as follows: Some plots of land belonging to one Bholanath Gorain were acquired for irrigation purposes by the Land Acquisition Collector, Birbhum. In respect of one of the plots the award happened to be in the name of a fictitious person Tribhanga Murari Das and the amount awarded in respect of that plot was Rs. 1426/3/6. It appears that during the field work in connection with the land acquisition case, the land acquisition amin Phani Bhusan and the land acquisition Kanungo Ramesh Chandra Ghosh reported that though the plot originally belonged to Bholanath Gorain it was purchased by Tribhanga Murari and was in his possession and they prepared the preliminary papers in connection with the land acquisition. The award was based on these papers prepared accordingly by the amin and the kanungo. In Refund Case No. 596 of 1949-50 payment of the award was actually made and it appeared that a revenue agent Lal Mohan Das received a cheque for the amount and the petitioner Satyahari, who is a Muktear of the locality, cashed the cheque on 7-2-1951. The fraud was detected when Bholanath filed a petition before the Land Acquisition Collector complaining that he had not received the compensation for the particular plot of land and then it was found that the record of the Refund Case No. 596 of 1949-50 was also missing. The Land Acquisition Collector after a preliminary enquiry sent information to the officer-in-charge of Suri Police Station on 13-10-1951. According to the prosecution case a fraud in respect of the land acquisition money amounting to Rs. 1426/3/6 was committed by the amin Phani Bhusan and the kanungo Ramesh Chandra Ghosh, the revenue agent Lal Mohan and the Mukhtear Satyahari in conspiracy with one another and also in conspiracy with Gobinda Saran Sadhu who was then the peshkar of the Land Acquisition Collector, Birbhum, and Sachidananda Bhowmik, a peon of the Land Acquisition Department at Birbhum.

(3) Between 30-11-1951 and 14-8-1952, various accused appeared before the Sub-Divisional Officer, Suri, who granted bail to them. On 14-8-1952, charge sheet was submitted against the six accused including the petitioner Satyahari. The Sub-Divisional Officer then decided that the case was triable exclusively by the Special Court under Act 21 of 1949, the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, as amended by the Amending Act 12 of 1952; and on 26-8-1952, he sent the record to the District Magistrate of Birbhum for taking necessary action. The District Magistrate on 14-10-1952, directed the accused to appear before the Special Judge, Birbhum on 21-10-1952, the Government Notification for allotment of the case having been published in the meantime. As already stated the Government Notification is dated 8-10-1952. On 15-11-1952, the petitioner Satyahari filed a petition before the Special Judge claiming that the Special Judge had no jurisdiction to try the case or at least to try him along with the other accused in the case. The learned Special Judge, after hearing both sides, rejected the petition and held that he had jurisdiction to try the case and tried the petitioner along with the other accused. Against that order this revisional application is directed.

(4) Three points have been urged in support of the application. These points were also urged before the learned Judge. The first point is that since the petitioner and other accused had appeared before the Sub-Divisional officer who had granted bail to them it must be said that there was a proceeding before the Court in respect of the case before the allotment was made to the Special Judge and that therefore the Special Judge had no jurisdiction. In this connection Mr. Ajit Kumar Dutta has referred to S. 12 of Act 21 of 1949 as amended by the Amending Act 12 of 1952. This section runs as follows:

> "Nothing in this Act shall apply to any proceedings pending on the date of the commencement of the West Bengal Criminal Law Amendment (Special Courts) Amending Ordinance, 1952, in any Court other than a Special Court."

The Ordinance came into force on 9-4-1952. This was long before the submission of the charge-sheet, the charge-sheet having been submitted on 14-8-1952. The learned Special Judge held that pending proceedings as referred to in S. 12 of Act 21 of 1949 must refer to pending judicial proceedings and that no judicial proceedings were pending on 9-4-1952 when the Ordinance came into force because the case was then still under investigation and the charge-sheet on which the Magistrate could take cognizance had not yet been submitted. Mr. Dutta has urged that the word 'proceedings' in S. 12 of Act 21 of 1949 must be taken to have been used in a wider sense because in S. 12 there is only reference to proceedings pending in Court and not to judicial proceedings. In this connection Mr. Dutta has referred to S. 496, Criminal P. C. which provides that when any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. From this section it would appear that from the stage that an accused appears or is brought before a Court the existence of a proceeding before such Court is contemplated. There is no doubt proceedings of some sort as soon as an accused is brought before a Court even when there is no complaint or charge-sheet, but the question is whether in S. 12 of Act 21 of 1949 the word 'proceedings' before a Court is used in the wider sense or is used in the particular or restricted sense of a judicial proceeding. Even in the Criminal Procedure Code in which S. 4 (m) defines the term 'judicial proceedings' the word 'proceedings' is some times used in the restricted sense of judicial proceedings. Reference may be made in this connection to section S. 344, Criminal P. C. which refers to the power of a Court to postpone or adjourn "proceedings". The body of the section reads that if, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may do so for reasons to be recorded. It is, therefore, clear that the word 'proceedings' in this section is used in the sense of inquiry or trial, that is, it is used in the sense of judicial proceedings. Similarly in S. 435, Criminal P. C. it must be held that the word 'proceedings' is used in the sense of judicial proceedings. It is true that in S. 496, Criminal P. C. to which reference has been made by Mr. Dutta the words 'proceedings before a Court' are used in wider sense and not in the restricted sense of judicial proceedings alone. But in S. 12 of Act 21 of 1949 it would appear that the word 'proceedings' must have been used in a restricted sense of 'judicial proceedings'. In S. 12 there is reference to proceedings pending in a Special Court. Now proceedings pending in a Special Court could be only judicial proceedings because proceedings before a Special Court could be started only on

a complaint or on receipt of a charge-sheet. Since the term 'any proceedings in other Court' is used in the same context in S. 12 of Act 21 of 1949 it would be logical to hold that the proceedings pending in other Court also would mean judicial proceedings and not proceedings in the wider sense such as is used in S. 496, Criminal P. C.

(5) Under S. 167, Criminal P. C. if investigation cannot be completed within 24 hours the police must produce the accused before a Magistrate and the Magistrate even if he has no jurisdiction to try the case may order further detention from time to time not exceeding 15 days on the whole or he may grant bail if he so thinks fit. Under the provisions of the Constitution, production before a Magistrate within 24 hours is now compulsory, but a case would not be allotted to a Special Court until the charge-sheet is ready, and proceedings before a Special Court would commence ordinarily with the submission of charge-sheet or a complaint by a police officer after completion of the investigation. Before that stage is reached the accused must be produced before an ordinary Magistrate and it cannot be argued that since the accused is produced before the ordinary Magistrate and the question of bail is considered there is a proceeding before the Court and therefore S. 12 of Act 21 of 1949 bars the jurisdiction of the Special Court. We must agree, therefore, with the learned Special Judge in holding that the words 'proceedings pending before a Court' in S. 12 of Act 21 of 1949 would mean judicial proceedings which started with the submission of a charge-sheet or a complaint or taking cognizance thereon. In this case there were no proceedings pending on 9-4-1952, when the Ordinance came into force and therefore, S. 12 of the Act does not bar the jurisdiction of the Special Court.

(6) The second point urged is that under Cl. 3 of the Schedule of Act 21 of 1949 an offence punishable under S. 420, I. P. C. is within the cognizance of the Special Court only if it is committed by a public servant or by a person dealing with property belonging to Government as an agent of Government, and in this case the petitioner Satyahari is neither a public servant nor a person dealing with property belonging to Government as an agent of Government and that therefore, he cannot be tried by the Special Court. It is true that the petitioner Satyahari who is a Mukhtear practising at Birbhum is neither a public servant nor can he be said to be an agent of Government and dealing with Government property as such. Therefore, if there were a charge against him under S. 420, I. P. C. and no other section, the Special Court would have no jurisdiction to try the case. Clause 8 of the Schedule, however, provides that the Special Court also has jurisdiction to try any conspiracy to commit or any abetment of any of the offences specified in other items including item 3. In this case, according to the prosecution, the petitioner Satyahari was involved in the conspiracy to commit the offence of cheating and he also abetted the offence of cheating by other persons falling within the scope of item 3 of the Schedule. Four of the six accused in this case are definitely Government servants being respectively, amin, kanungo, land acquisition peshkar and a peon of the Land Acquisition Department. If the offence under S. 420, I. P. C. was committed by these public servants the offence would, clearly, be cognizable by the Special Court and even if the petitioner though not a public servant was concerned in the offence of conspiracy to cheat with such public servants he would also be triable by the Special Court in view of item 8 of the Schedule. This point, therefore, fails also.

(7) The last point urged is that the money alleged to have been taken as the result of cheating was not Government money because it was the money included in an award. Even if it were held that the money was not Government money, it would not affect the jurisdiction of the Special Court because the Special Court would have jurisdiction to try an offence under S. 420, I. P. C. if committed by a public servant and it would not be necessary that he should be taking Government money by the offence of cheating. In this case further it must be held that the money concerned was Government money although it was included in an award. The money included in an award has no separate entity until it was actually paid, and until it is paid out it remains Government money. Therefore, if there is cheating in respect of the sum included in an award it is an offence committed in respect of the Government money.

(8) No other point has been urged. The application, therefore, fails and the Rule is discharged.

(9) MITTER J.: I agree.

B/V.S.B. Application dismissed.

A. I. R. 1953 CAL. 663 (Vol. 40, C. N. 251)

G. N. DAS AND DEBABRATA MOOKERJEE JJ.

Land Customs Inspector, Central Preventive Circle and others, Appellants v. Jagannath Bhandar, Respondent.

A. F. O. O. No. 156 of 1952, D/- 14-5-1953.

(a) Land Customs Act (19 of 1924), Ss. 2(g), 3 and 4 — Land Customs area, meaning of.

Section 4 shows that land customs stations do not cover any area equivalent to the land customs area, the latter being obviously a wider unit. (Para 5)

The expression 'area adjoining a foreign territory' in S. 2(g) cannot be construed to mean an area of a reasonable depth which abuts on a foreign frontier. The specification of the area has to be made by a notification published in the official Gazette. This specification, determines the exact area which may be called the Land Customs area for the purposes of this Act. (Para 6)

A Land Customs Officer can be appointed in respect of any area which adjoins a foreign frontier and such area need not be limited to a belt of reasonable depth abutting on the foreign frontier. The notification which is envisaged in S. 3 may provide that a Land Customs Officer can be appointed in respect of any zone in India provided the zone abuts on a foreign frontier. (Para 9)

(b) Land Customs Act (19 of 1924), S. 3(1) — Notifications Nos. 5 and 6, D/- 27-2-1948, effect of.

The effect of the Notifications is not to limit the jurisdiction of the Collectors of Central Excise of Allahabad and Calcutta and their subordinate staff only to the belts which adjoined the frontier of the Dominion of Pakistan. (Para 11)

(c) Central Excise and Salt Act (1944), S. 37 — Notification No. 8, D/- 10-3-51, effect of — (Land Customs Act (1924), S. 3(1)).

Notifications Nos. 5 and 6 dated 27-2-1948, issued under S. 3(1), Land Customs Act referred to the then existing jurisdictions of the Collectors of Central Excise and of subordinate staff as descriptive of the area in regard to which the Collector of Land Customs and its subordinate staff would exercise jurisdiction. The jurisdiction of the Land Customs Collector or the subordinate staff was not made dependent on the retention by the Collector of Central Excise or the subordinate staff of their existing jurisdiction by the Central Excise and Salt Act, 1944. It cannot, therefore, be urged that on 10-3-1951, the jurisdiction of the Collector of Land Customs, Calcutta, was limited to the States of West Bengal and Orissa. The original jurisdiction which had vested in him under the Notification No. 5, was not, taken away as a result of this amendment and consequent curtailment of the jurisdiction of the Collector of Central Excise. The same remarks apply to the subordinate staff. (Para 12)

G. P. Kar, for Appellants; Burman, for Respondent.

G. N. DAS J.: This is an appeal against the judgment of Bose J. dated 16-5-1952. The facts as found by the learned Judge may be stated as follows:

(2) The respondent Jagannath Bhandar carried on business as Commission Agents at Bhagalpur. They dealt with various articles including betelnuts which were imported by merchants in East Pakistan into India. The respondent employed their agents for release of the goods at Katihar and retained these goods under their custody as commission agents. On 19-3-1951, appellant 1 who is the Inspector of Land Customs, Central Preventive Circle, seized 138 bags of betelnuts and detained the same and made a preliminary order restraining the respondent from disposing of the same. On 27-3-1951, a notice was served upon the respondent by the appellant 2, Superintendent of Land Customs calling upon the respondent to show cause why action should not be taken in terms of S. 7 of the Land Customs Act read with S. 167 (8) of the Sea Customs Act. On 15-6-1951, the respondent through his agent showed cause before the Land Customs Collector, Calcutta. On 21-6-1951, the Collector of Land Customs, Calcutta, directed release of 59 bags of betelnuts which had been confiscated and fixed redemption fee of Rs. 5000/-.

On 30-9-1951, the respondent filed an application for review of the order of the Land Customs Collector dated 21-6-1951. This matter was heard on 18-10-1951, when the Land Customs Collector made an order for further release of 61 bags and confiscated only 17 bags of betelnuts, the redemption fee being fixed at Rs. 1100. On 14-12-1951, the respondent moved this Court under Art. 226 of the Constitution of India and obtained a Rule directing the appellant to refrain from giving effect to the order made on 18-10-1951 and to release 138 bags of betelnuts. It may be pointed out that the mention of 138 bags of betelnut in the Rule issued by this Court was a mistake and the intention of the order was to release the 17 bags of betelnuts which had been confiscated. This Rule came up for hearing before Bose J. on 16-5-1952, and by his order of that date the Rule was made absolute on the ground that as Bhagalpur was situated far away from the foreign frontier, the Land Customs authorities had no jurisdiction to detain the goods in Bhagalpur and to make an order for confiscation subject to payment of redemption fee.

(3) Mr. Kar, learned counsel, who appeared in support of the appeal has contended that the view taken by Bose J. is not correct. The question depends on a construction of certain provisions of the Land Customs Act 1924 (Act 19 of 1924). I shall refer to the Sections of the Act which have a bearing on the question before us. Section 3 (1) of the Land Customs Act — hereinafter called the Act — empowers the Central Government by a notification in the Official Gazette to appoint for any area adjoining a foreign frontier and specified in the notification, a person to be the Collector of Land Customs and such other persons as it thinks fit to be Land Customs Officers. Section 2 (e) defines the expression 'foreign frontier' to mean the frontier separating any foreign territory from any part of India. Section 2 (f) defines 'foreign territory' to mean any territory declared under S. 5 of the Tariff Act 1894 (Act 8 of 1894) to be foreign territory for the purposes of this Act. Section 2 (g) of the Act defines 'land customs area' to mean any area adjoining a foreign territory for which a Collector of Land Customs has been appointed under S. 3.,

(4) The contention of Mr. Burman which found favour with Bose J. was that the jurisdiction of the Land Customs Collector or a Land Customs Officer was limited only to an area adjoining foreign territory. Mr. Burman submitted that an area adjoining foreign territory means an area which is either equivalent to the Land Customs Stations defined under S. 4 of the Land Customs Act or an area of a reasonable depth adjoining a foreign territory. I have to consider these alternative suggestions.

(5) As regards the first suggestion, on a reference to S. 4 it appears that the Chief Customs authority by a notification in the official gazette may establish a land customs station in any land customs area. This shows that land customs stations do not cover any area equivalent to the land customs area, the latter being obviously a wider unit.

(6) As regards the second suggestion that the expression 'area adjoining a foreign territory' means an area of a reasonable depth which abuts on a foreign frontier, it may be pointed out at the outset that such a view would leave in a somewhat indeterminate state the area which would be regarded as a Land Customs area under the Act. The Land Customs Act contains certain penal provisions and it is reasonable to think that the Legislature intended to fix definitely the Land Customs area. That this is so appears from the definition of the expression 'land customs area' in S. 2(g). The definition of Land Customs area in S. 2(g) refers only to S. 3 viz., the area in respect of which a land customs officer may be appointed. I have already quoted S. 3. That Section clearly says that Land Customs officer may be appointed in regard to an area adjoining a foreign frontier specified in a notification made in that behalf. The specification of the area had therefore to be made by a notification published in the official Gazette. This specification, in my opinion, determines the exact area which may be called the Land Customs area for the purposes of this Act.

That this is the true view follows from certain other Sections in the Act itself. Section 1 makes the Act applicable to the whole of India. Section 5(3) of the Act empowers any Land Customs Officer, duly empowered by the Chief Customs authority in this behalf, to require any person in charge of any goods which such officer has reason to believe to have been imported, or to be about to be exported, by land from or to any foreign territory,

to produce the permit granted for such goods and any such goods which are dutiable and which are unaccompanied by a permit or do not correspond with the specification contained in the permit produced, shall be detained and shall be liable to confiscation. Thus S. 5(3) empowers a Land Customs Officer duly empowered by the Chief Customs authority in this behalf to detain and to confiscate in certain cases any goods situate in any area which, in view of the extent of the operation of the Act, includes the whole of India. If the view contended for by Mr. Burman be accepted, viz., that the Land Customs officer has jurisdiction only to the belt adjoining a foreign frontier, it would be impossible to work out the provisions of S. 5(3) of the Act.

(7) The Land Customs Act, as its preamble indicates, was intended to safeguard "the levy of duties of customs" on certain goods imported or exported by land from or to any territory outside India. In interpreting S. 3 which is the empowering Section, we must take into account the other provisions of the Act and read the Section in the light of the preamble and we should not put such interpretation as would frustrate the very object for which the Act was passed. The interpretation which we have suggested is supported by the terms of the Sea Customs Act.

(8) Bose J. seems to be of the opinion that certain clauses appearing in S. 9 of the Land Customs Act indicate that a restricted view of the jurisdiction of Land Customs Officers was intended. I do not agree. Section 9 of the Land Customs Act makes certain provisions of the Sea Customs Act which are mentioned in the Schedule of the Land Customs Act. to be attracted in cases coming within the operation of the Land Customs Act. The Sea Customs Act extends to the whole of India. If one refers to certain clauses of S. 167 of the Sea Customs Act, e.g., Cls. (2) and (3) which is attracted under S. 9 of the Land Customs Act. the conclusion follows that the operation of the Land Customs Act which makes the Sea Customs Act applicable to seizure of goods throughout the whole of India, is concurrent.

(9) In my opinion, the above discussion clearly leads to the conclusion that a Land Customs Officer can be appointed in respect of any area which adjoins a foreign frontier and that such area need not be limited to a belt of reasonable depth abutting on the foreign frontier. The notification which is envisaged in S. 3 of the Land Customs Act may provide that a Land Customs Officer can be appointed in respect of any zone in India provided the zone abuts on a foreign frontier.

(10) In my view the contention of Mr. Burman cannot be accepted. This conclusion necessarily leads us to hold that the Inspector and other Land Customs Officers were duly empowered to detain goods at Bhagalpur even though Bhagalpur did not abut on any foreign frontier and was situate at some distance from such frontier.

(11) Mr. Burman further contended that the effect of certain notifications issued under the Land Customs Act pointed to the conclusion that the intention of the framers of these notifications was to limit the jurisdiction of the Land Customs Officer only to a belt of reasonable depth abutting on foreign frontier. I shall refer to the notifications to which our attention was drawn by learned counsel on both sides. The notification No. 15 dated 13-12-1924 which was published under S. 5(3) of the Land Customs Act empowered all Land Customs Officers to exercise powers under S. 5(3). Notification No. 5 dated 27-2-1948, which was published under S. 3(1) of the Land Customs Act, 1924, appointed with effect from 1-3-1948, the Collectors of Central Excise, ** Allahabad, Calcutta, ** to be Collectors of Land Customs "for the areas in their respective jurisdictions adjoining the land frontiers of the Dominion of Pakistan".

Mr. Burman contends that the governing expression in this notification consists of the words "adjoining the land frontiers of the Dominion of Pakistan" and argues that the jurisdiction of the Land Customs Officer was limited to only adjoining areas. In my view this is not a reasonable interpretation of the notification.. The jurisdiction of the Collectors of Central Excise** Allahabad, Calcutta, ** was limited to certain zones for administrative purposes. What the Notification intended was to appoint Collectors of Central Excise, Allahabad, to be Collectors of Land Customs of the zone in which Allahabad was situate and which had a land frontier of the Dominion of Pakistan. So also, the Collector of Central Excise, Calcutta, was appointed Collector of Land Customs for the zone adjoining the land frontier of Pakistan in which Calcutta was situate. It was not intended by the Notification to limit the jurisdiction of the Collectors of Central Excise, say of Allahabad and Calcutta, only to the belts which adjoined the frontier of the Dominion of Pakistan. The expression to which reference has been made merely describes the particular zone in regard to which a particular Collector would have jurisdiction.

The same remarks apply to the Notification No. 6 of the same date which refers to the jurisdiction of the subordinate staff. Reliance was placed on Notification No. 7 of the same date. It may be pointed out that Notification No. 7 was made not under S. 3 of the Land Customs Act but under S. 4. This Notification could therefore have specified only the land customs stations or land customs routes which are referred to in S. 4 and could not be intended to and in fact did not lay down the land customs area which is contemplated in S. 2(g) of the Land Customs Act. Mr. Burman however referred us to the heading occurring in two places in the Notification where words used are "Land Customs Area under the jurisdiction of the Collector of Central Excise, Calcutta." This was inserted not with a view to limit the Land Customs Area but to specify the particular zone within which the land customs stations and the land customs routes mentioned in the Notification are situated. In other words. they were inserted with a view to emphasise the fact that the land customs stations and routes were located within the land customs area which appertain to the jurisdiction of the Collector of Land Customs. Calcutta. There is therefore no force in the contention raised by Mr. Burman based on these Notifications.

(12) Mr. Burman raised a further argument based on certain Notifications made on 10-3-1951. I may refer to Notification No. 8 dated 10-3-1951. It was a Notification under S. 37 of the Central Excise and Salt Act, 1944 (Act 1 of 1944). The Notification amended Rule 2(ii) (A) of the Rules framed under the said Act. Sub-clause (d) was substituted by d(1) and the Collector of Central Excise, Calcutta, was stated to have jurisdiction over the States of West Bengal and Orissa. After sub-cl. (j) a new sub-cl. (k) was added which stated that the Collector of Central Excise, Patna, will have jurisdiction over the State of Bihar. The contention of Mr. Burman is that the effect of this Notification was to limit the jurisdiction of Collectors of Land Customs Calcutta and of the subordinate staff which was determined by Notification Nos. 5 and 6 dated 27-2-1948, to the States of West Bengal and of Orissa and to exclude Bihar from the province of their jurisdiction on and from the date of the Notification viz., 10-3-1951.

This contention is no doubt plausible but it seems to me that it has no substance. Notifica-

tions Nos. 5 and 6 dated 27-2-1948, referred to the then existing jurisdiction of the Collectors of Central Excise and of subordinate staff as descriptive of the area in regard to which the Collector of Land Customs and its subordinate staff would exercise jurisdiction. The jurisdiction of the Land Customs Collector or the subordinate staff was not made dependent on the retention by the Collector of Central Excise or the subordinate staff of their existing jurisdiction by the Central Excise and Salt Act 1944. It cannot therefore be urged that on 10-3-1951, the jurisdiction of the Collector of Land Customs, Calcutta, was limited to the States of West Bengal and Orissa. The original jurisdiction which had vested in him under the Notification No. 5 was not, in my opinion, taken away as a result of this amendment and consequent curtailment of the jurisdiction of the Collector of Central Excise. The same remarks apply to the subordinate staff. The contention raised by Mr. Burman based on these Notifications must therefore be overruled.

(13) For the reasons given above, I am of opinion that the view taken by Bose J. cannot be sustained. It must be held that the detention of the goods on 19-3-1951, and the subsequent order made by the Collector were made with jurisdiction. The respondent's application under Art. 226(1) of the Constitution is ill conceived.

(14) The appeal must therefore be allowed, and the application filed by the respondent under Art. 226 of the Constitution of India must be dismissed.

(15) In the circumstances of the case we are of opinion that there will be no order for cos's either in this Court or before Bose J.

(16) DEBABRATA MOOKERJEE, J.: I agree.

B/K.S.B. Appeal allowed.

A. I. R. 1953 CAL. 666 (Vol. 40, C. N. 252)

K. C. DAS GUPTA AND GUHA RAY JJ.

A. K. M. Zakaria, Appellant v. Choudhuri Golam Martuza and another, Respondents.

A. F. A. O. No. 3 of 1951, D/- 1-8-1952.

(a) Civil P. C. (1908), O. 22, R. 10 — Applicability.

Quaere—Whether O. 22, R. 10 applies to execution proceedings. (Para 4)

Anno: Civil P. C., O. 22, R. 10 N. 15.

(b) Civil P. C. (1908), O. 21, R. 16 — Where a decree has been transferred.

If there has been an assignment in writing in favour of a person of the decree, his application for being substituted in the place of the original decree-holder and to continue the execution must be allowed.

(Held on construction of the deed of conveyance that the deed transferred not only the vendor's right, title and interest in the property but also his right, title and interest in the compromise decree). (Paras 7, 10)

Anno: Civil P. C., O. 21, R. 16 N. 3, 4.

Hiralal Chakravartti, Ranjit Kumar Banerji and Radha Kanta Bhattacharya, for Appellant; Apurbadhan Mukherji and Hrishikesh Chatterji, for Respondent No. 1.

DAS GUPTA J.: The respondent Taheriatannessa brought a suit being Title Suit No. 66 of 1946 in the Court of the Subordinate Judge, Berhampore, for declaration of title and recovery of possession of certain properties. That suit was compromised and a decree in accordance with the terms of compromise was passed. One of the terms of the compromise was that on the plaintiff paying to the present appellant A. K. M. Zakaria Rs. 6000/- by the end of Falgun, 1355 B. S., Zakaria will give to the plaintiff possession of the properties of Schs. Ka, Kha and Ga. On 4-4-1949, Taheriatannessa applied for execution of the decree on a statement that she had deposited the amount in accordance with the terms of the compromise decree. On 6-5-1949, Zakaria applied for withdrawal of the amount in deposit. That application was as a result of Taheriatannessa's objection, unsuccessful. On 10-5-1949, Zakaria filed an objection under S. 47, Civil P. C., in which he stated that the deposit was a conditional deposit and so was not a valid performance of the term of the compromise and consequently the decree could not be executed. This application was, in the first instance, rejected by the executing Court on 27-6-1949, the Court being of opinion that a valid deposit had been made. That order was, however, set aside on appeal and the case sent back for rehearing. On 16-12-1949, Taheriatannessa executed a deed of conveyance in favour of respondent 1 Choudhury Golam Martuza. This conveyance was registered on 8-3-1950.

In the meantime Choudhury Golam Martuza filed a petition to the executing Court praying to be substituted in place of the decree-holder on the ground of assignment in his favour and for permission to continue the execution. On 6-2-1950, an application was filed by Taheriatannessa and Zakaria stating the Miscellaneous Case which was started on Zakaria's application under S. 47, Civil P. C., had been compromised and that the terms being that the deposit be held to be bad the money should be returned to her and the property should remain with Zakaria. On 22-2-1950, she however resiled from the position and through another pleader filed another application in which she stated that the compromise petition was filed under some misapprehension and that the matter had not really been compromised. Thereafter, she filed a further petition on 22-7-1950 in which she stated that she disowned the petition filed on 22-2-1950, and wanted to stand by the compromise. The executing Court held that by the deed of conveyance there was an assignment only of the property in suit and that Choudhury Golam Martuza was not entitled to be substituted so as to continue the execution proceedings. It rejected his application of 21-1-1950, and in view of the last application filed on behalf of Taheriatannessa decided that the matter had been settled and it directed that the solenama be recorded. The final order passed by the executing Court is in these words:

"The solenama is accordingly recorded and the Misc. case is disposed of accordingly. The amount of Rs. 6000/- deposited by Taheriatannessa be transferred to her credit and A. K. M. Zakaria be restored to possession of the properties on the basis of the terms of the solenama."

(2) Two appeals were taken from this decision by Choudhury Golam Martuza, one against the order refusing to substitute him, the other against the compromise decree. These appeals have been allowed by the learned District Judge. The learned District Judge is of the opinion that O. 22, R. 10 Civil P. C., applies to proceedings in execution and there having been an assignment of the property in suit the petitioner Choudhury Golam Martuza being a trans-

feree of the decree-holder's interest in the property involved in the decree is entitled to be substituted in his place and to continue the execution case. He held therefore that the decision of the learned Subordinate Judge could not be upheld and sent back the cases to the learned Subordinate Judge 'for execution of the decree after the disposal of the S. 47 case according to law.'

(3) It is against this decision of the learned District Judge that the present appeal has been filed.

(4) The decision of the appeal depends, in my judgment, on the answer to the question whether a deed of conveyance of December, 1949, effected in law an assignment not only of the property but also of the decree. A question which was raised and on which considerable arguments were pressed before us was whether the provisions of O. 22, R. 10, Civil P. C., apply to execution proceedings. There has been some conflict of judicial opinion on this question, but for reasons to be mentioned presently, I do not think it necessary for us to arrive at a conclusion on this question. The relevant portion of O. 22, R. 10, Civil P. C. is in these words:

"In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

If the correct position in law be that this rule applies to execution proceedings, it is obvious that in so applying it we have to read 'execution proceedings' for the word 'suit' wherever it occurs in this rule. For application to execution proceedings the rule would therefore read thus:

"In other cases of an assignment, creation or devolution of any interest during the pendency of an application for execution, the application may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

(5) Devolution of interest would then mean devolution of interest not in the subject-matter of the suit, but devolution of interest in the subject-matter of the execution proceedings, i.e., an interest in the decree, for the subject-matter of the execution proceedings is the decree.

(6) Unless there was therefore an assignment of the decree in favour of the respondent Choudhury Golam Martuza, his application for substitution would fail, even though O. 22, R. 10, Civil P. C. did apply to execution proceedings.

(7) On the other hand, even if O. 22, R. 10 of the Code did not apply to execution proceedings, the respondent's application must be allowed under the provisions of O. 22, R. 16, (Sic. 21?), Civil P. C. read with S. 46, (Sic. S. 47?) of the Code, if there has been an assignment in writing in his favour of the decree.

(8) It is necessary, therefore, as already indicated, to examine the deed of conveyance to see what, in fact, it did assign. The relevant portion of the deed of conveyance which is in Bengali may be translated thus:

"I am the owner of the property described in the schedule given below. Over this property there has been litigation between me and Syed Colam Mohbub and others being Title Suit No. 66 of 1946 of the Subordinate Judge's Court, Berhampore; that suit has been amicably settled between the parties and a solenama has been filed on 20-7-1948, under the terms of which, I have to pay Rs. 6000/- in cash to defendant 4 A. K. M. Zakaria. Being in need of money on this account I announced my intention to sell the properties mentioned in the schedule, thereupon you having expressed your desire to purchase the same I contracted to sell the property to you at Rs. 15,000/- which is the highest reasonable price for it and executed in your favour a Bainama, on receipt of Rs. 11,000/- as earnest money and I have informed the Court by a petition of this agreement to sell, and I have on 12-3-1949, deposited in the Berhampore Subordinate Judge's Court, Rs. 6000/- out of the earnest money mentioned above, in accordance with the terms of the solenama and I have obtained possession of all the properties. Defendant 4 has admitted in Court that I have without any obstruction obtained possession of the properties, and has filed an application for withdrawal of the Rs. 6000/- deposited by him. By executing this deed of sale in your favour this day, I undertake and admit that whatever interest, title, properties, possession & any other interest whatsoever I had in this property will cease to be in me and will stand fully transferred to you."

This deed was executed at an early stage on 16-12-1949, and was registered in March 1950.

(9) Reading the document as a whole, I am of the opinion that the vendor was transferring to the purchaser every thing that was necessary for the possession of the property. The recitals were no doubt to the effect that possession had already been obtained on the basis of the compromise; if that was the correct position there would be no need of execution. But I think it fair and reasonable to read into the document the implied stipulation that if any thing more remained to be done on the basis of the compromise decree that would be done by the purchaser.

(10) My conclusion therefore is that the deed of sale transferred not only the vendor's right, title and interest in the property, but also his right, title and interest in the compromise decree.

(11) I have therefore come to the conclusion that the appln. by Choudhury Golam Martuza for substitution in place of Taheriatanessa and to continue the application for execution has rightly been allowed. As a necessary consequence the order recording the compromise has been rightly set aside.

(12) The appeal therefore fails and is dismissed, with costs to respondent 1, hearing fee being assessed at three gold mohurs.

(13) In view of the order made in the appeal no order is necessary on the application filed by the appellant under S. 115, Civil P. C.

(14) GUHA RAY J.: I agree.

C/D.H.Z. Appeal dismissed.

A. I. R. 1953 CAL. 667 (Vol. 40, C. N. 253)

CHAKRAVARTTI C. J. AND S. R. DAS GUPTA J.

Kesoram Cotton Mills Ltd., Appellant v. Bal Govind, Respondent.

A. F. O. O. No. 128 of 1951, D/- 25-8-1952.

Workmen's Compensation Act (1923), S. 10 proviso — Limitation — Sufficient cause — (Civil P. C. (1908), S. 100).

Whether workman has made a claim within period of limitation is question of law.

The workman who was injured during his employment, and whose working capacity had been reduced was continued in his employment on lighter work but on same wages. But after some months he was asked to return to his original job for which he was incapacited by the injury. Thereupon he was dismissed. The workman filed an application for compensation in the Court. The application was beyond one year from the occurrence of the accident. The Commissioner took the view that the workman had sufficient cause not to provoke a conflict with his employers and not to prefer a claim within limitation so long as his interests were not prejudicially affected by dismissal and so long as he was receiving a kind of compensation in the shape of lighter work on the same wages:

Held that there was no misdirection and the finding was supported by evidence. (1921) 1 KB 655, Explained. (Para 9)

Anno: Workmen's Compensation Act, S. 10 N. 3; Civil P. C., Ss. 100-101 N. 44.

Phanindra Kumar Sanyal, for Appellant; Nalini Kanta Mukherjee, for Respondent.

CASES CITED:

(A) ('38) AIR 1938 Cal 348: 42 Cal W N 341
(B) (1921) 90 L J (K B) 290: (1921) 1 K B 655
(C) (1927) 137 L T 511: 20 B W C C 434
(D) (1927) 96 L J (K B) 1011: 20 B W C C 504
(E) ('52) AIR 1952 Cal 752: 56 Cal W N 187
(F) ('53) AIR 1953 Cal 74: 56 Cal W N 311

CHAKRAVARTTI, C. J.: The only question of substance argued in this case is one of limitation. The respondent used to be a workman under the appellant — Keshoram Cotton Mills Ltd. — and was employed in the hosiery department. In September 1948, he was going up a ladder with a load on his head, when it fell and as the workman himself slipped, the load descended on his left leg and in doing so, passed across his chest and spine. The injury caused by that accident was that he suffered a fracture of the left ankle which has been described as "Pott's fracture" and some injuries on his chest and spine.

(2) The workman was absent from duty for a few days, but continued in the employment of the Mill. He was, however, given lighter work. In July 1950, he was apparently asked to return to the job of carrying loads which he was unable to do. Thereupon he was dismissed. The application for compensation was filed in Court on 17-12-1949.

(3) It is not necessary to refer to the other defences raised by the appellant. As usual, they included a plea that no accident had taken place at all and that, in any event, assuming that the workman had suffered an accident, he had not done so in the course of his employment. Those pleas have been laid to rest by the judgment of the commissioner and need not trouble us further.

(4) The question as to whether the respondent had made a claim within the period laid down in S. 10 of the Act is, however, a question of law, and Mr. Sanyal who appeared on behalf of the appellant, concentrated his argument on that question. He contended that the commissioner had been wrong in holding that the failure of the workman to prefer the claim within one year from the occurrence of the accident had been due to sufficient cause. It may be stated here that the learned Commissioner relied on the fact that the workman, after having suffered the injury and after his working capacity had been reduced, had been continued in employment, had been given lighter work and had been in receipt of the same pay. In view of those facts, he considered that the decision in — 'Salamat v. The Agent, East Indian Rly.', AIR 1938 Cal 348 (A) covered the case and accordingly he held in favour of the workman.

(5) Mr. Sanyal contended that the mere fact that a workman after having suffered an accident, was retained in the employment of the employer could not be sufficient cause for his not perferring the claim within the statutory period. According to Mr. Sanyal, there would have to be some tacit understanding between the employer and the workman about paying his compensation in future if, on such facts, delay in preferring the claim was to be excused; or, at least, there would have to be something done by the employer which might create a belief in the workman that he could reasonably expect compensation, if need to claim it arose. In support of his contention Mr. Sanyal relied upon a series of cases, beginning inevitably with the decision in — 'Lingley v. Thomas Firth & Sons Ltd.', (1921) 1 K B 655 (B).

(6) 'Lingley's case (B)' as is well known, is the root authority on the question as to what is reasonable cause for not serving a notice or making a claim within the statutory period. The case if I may say so with respect, seems to have been widely misunderstood. The facts in that case were that a munition-worker was injured by a shell falling upon her toe and although, after that accident, she was in constant pain and could hardly work in a standing posture, she suppressed the accident from her employers and did everything in her power to make them think that she was in perfect health and in enjoyment of full working capacity. For example, if any of the officials employed by the concern she was serving, happened to pass before her, she used to stand up, just to create an impression that nothing whatever was the matter with her. It was pointed out by all the learned Judges who decided the case that the worker conducted herself in that fashion because she was in receipt of very substantial wages and did not want to take the risk of losing them by notifying the accident she had suffered. In those circumstances, the question which the Court had to consider was whether the fact that the worker herself did not consider the injury to be serious and kept it from the knowledge of the employers for her own purposes was a reasonable cause within the meaning of S. 2, sub-s. 1(b) of the corresponding English Act. The answer given by all the learned Judges was in the negative and they said that the fact that she contrived to be retained in her job could not be reasonable cause. It is difficult to see how this case could ever serve as an authority for the proposition that the fact that a workman continued in the employment of his employers, could not, as a matter of law, be sufficient cause for not preferring a claim within the statutory period whatever the other circumstances. The case, however, has often been quoted and relied upon as establishing that broad proposition.

(7) Mr. Sanyal next referred to the case of — 'Drewett v. Britannia Assurance Co. Ltd.', (1927) 20 B W C C 434 (C), and drew our attention particularly to the observations of Scrutton L. J. To my mind, it is perfectly clear from the facts of that case why it was held that no reasonable cause for not making the claim within the statutory period had been made out. The accident took place on 16-4-1926 and the workman was paid full wages, although he was incapacitated, till 3-9-1926. On the last-mentioned date he was summarily dismissed and thereupon he threatened to bring an action against his employers for wrongful dismissal, but did not make a claim under the Workmen's Compensation Act. The period prescribed by the English Act is a period of six months and it will be noticed that 3-9-1926, was within six months of April 16, of the same year.

What the learned Judges pointed out in that case is that, within six months from the accident, the parties were at arm's length, and if the workman could think of going to Courts of law with a claim for damages, there could be no reasonable cause for his not making a claim under the Workmen's Compensation Act. It is true that Scrutton, L. J. expressed himself in general language as well, because he said that if the failure to make a claim was prompted by the workman's own interests and was not induced by any action of the employer which would lead him to believe that he could get compensation without making a claim, no reasonable cause would be shown. These observations must, however, be read in the light of the facts of the case which I have broadly summarised.

The third case referred to by Mr. Sanyal is in the same volume of Butterworth's Compensation Cases, at page 504. It is the case of — 'Soyer v. Johnson Matthey & Co.', (1927) 20 B W C C 504 (D). That again was a case where a workman, employed as a chef, suffered an injury in his right hand but his employers, although they knew of the accident, were not aware that the workman could not do his full share of the work. When at last he was dismissed about ten months after the accident, he made a claim for compensation. The only excuse pleaded by the workman was that he had thought that he would receive compensation if incapacity supervened in the future without the necessity of making a claim, and in that state of the facts it was held that since the employers had done nothing to encourage such a view, no reasonable cause had been shown.

(8) I cannot see how these cases can be said to lay down any broad or inviolable principle. On the other hand, there is the case decided by this Court upon which the Commissioner has relied and so far as the judgment itself is concerned, the facts upon which it proceeds are certainly not weaker than the facts of the present case. Mr. Sanyal contended that the evidence extracted by the learned Chief Justice in his judgment in that case showed that some promise to pay compensation had been given. But the judgment itself did not proceed on any such fact. Reference was also made to the decision of Harries C. J. and Das J. in — 'Messrs. National Tobacco Co. (India) Ltd. v. Hardit Singh', AIR 1952 Cal 752 (E) and the decision of the same learned Judges in — 'Kamarhati Jute Mills Co. Ltd. v. Abdul Samad', AIR 1953 Cal 74 (F). In those cases it was held, on the facts which the Court had before it, that sufficient cause had not been shown. In so far as general principles were sought to be laid down, to a certain extent at least, they seem to me, with great respect, to be based upon a misreading of 'Lingley's case (B)'.

(9) We are sitting here in appeal and what we have to decide is whether the Commissioner took a view which is a reasonable view on the facts of the case and a view which is correct in principle. It need hardly be pointed out that "sufficient cause" admits of an infinite variety of forms and it will be a vain endeavour to lay down any general principles. The present case is not merely one of continuing in the old employment and nothing more. The broad facts in the present case are that the workman suffered an injury which reduced his working capacity; that the employers, knowing of that injury and knowing of the reduced working capacity, continued to employ him and paid him the same wages; and the most important of all is the fact that they put him on a lighter job. The commissioner has taken the view that, in those circumstances, the workman had sufficient cause not to provoke a conflict with his employers and not to prefer a claim till his interests were prejudicially affected by dismissal and so long as he was receiving a kind of compensation in the shape of lighter work and the same pay. With regard to that finding, I think I can rightly express myself in the language of the English cases by saying that there was evidence to support that finding and no misdirection.

(10) For the reasons given above this appeal is dismissed with costs, the hearing-fee being assessed at two gold mohurs.

(11) S. R. DAS GUPTA, J.: I agree.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 CAL. 669 (Vol. 40, C. N. 254)

GUHA J.

Sasanka Sekhar Hazra and another, Plaintiffs, Appellants v. Charu Chandra Dutta and others, Respondents.

A. F. A. D. No. 408 of 1948, D/- 8-4-1952.

(a) Civil P. C. (1908), S. 11 — Matter if not in issue is not res judicata.

When in the previous proceedings the executing Court had no jurisdiction to decide whether the plaintiff's title to the suit-land was affected by the execution sale, which point had arisen for decision directly in the subsequent suit, no question of res judicata could arise. (Para 4)

Anno: Civil P. C., S. 11 N. 12.

(b) Civil P. C. (1908), O. 21, Rr. 66 and 90 — Specification of property — (Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 162).

The paramount description in the sale certificate or sale proclamation is ordinarily the general description of the holding, and description of the plot number is secondary. The erroneous description of certain details cannot therefore affect the validity of the sale. 41 Cal 590 (PC); 18 Ind Cas 725 (Cal), Dist., 13 Ind Cas 324 (Mad); AIR 1921 Mad 583 and Civil Rule 175 of 1949 (Cal.), Ref. (Paras 5, 8)

Anno: Civil P. C., O. 21, R. 66 N. 9, 19; R. 90 N. 16.

Panchanan Choudhury, and Nirmal Chandra Choudhury, for Appellants; Purushottam Chatterjee, for Respondents.

CASES CITED:

(A) ('14) 41 Cal 590: 41 Ind App 38 (PC)
(B) ('13) 18 Ind Cas 725 (Cal)
(C) ('12) 22 Mad LJ 161: 13 Ind Cas 324
(D) ('21) AIR 1921 Mad 583: 44 Mad 35
(E) ('49) Civil Rule No. 175 of 1949 (Cal)

JUDGMENT: This appeal by the plaintiff arises out of a suit for declaration of title and confirmation of possession in respect of C. S. plot No. 8041 measuring 3.02 acres of Shali land recorded in the khatian No. 2766 of Mouza Bara Balun in the name of pro forma defendants 2 to 4. The plaintiff who was a mortgagee purchased the above holding by a kabala on 28-10-1940. In execution of a rent decree, however, the same holding is alleged to have been purchased by the landlord defendant on 20-8-1940. In the execution petition, sale proclamation and the sale certificate there is alleged to have been misdescription of the holding in that plot numbers were described therein as C. S. plots 12049, 12050 and 12051 (instead of C. S. plot 8041) and the area was also wrongly stated to be 90 acres instead of 3.02 acres. On an application for amendment to the executing Court by the defendants appellants who alleged that they detected the mistake at the time of taking delivery of possession through Court the amendment was allowed on 10-9-43 and the sale certificate was brought in conformity with Khatian 2766. Subsequent applications by the present plaintiff under S. 174, B. T. Act under Ss. 47 and 151, C. P. C. and under O. 47, R. 1, Civil P. C. proved abortive and hence the present suit by the plaintiff.

(2) The suit has been dismissed by both the lower Courts.

(3) The main points urged on behalf of the appellant are that as it has been found that there was no publication of sale proclamation on C. S. plot 8041 nor was that plot mentioned in the original execution petition, sale proclamation or sale certificate that plot to which the plaintiff had acquired valid title by his purchase on 28-10-40 from the owners (Pro forma defendants 2 to 4) would not pass to the respondent by virtue of his auction purchase and the latter was estopped from questioning the plaintiff's title, notwithstanding the order of amendment passed by the executing Court on 10-9-1943 in favour of the defendant behind the back of the plaintiff.

(4) It is contended on behalf of the respondent that the suit is barred by res judicata in view of the failure of the previous application under S. 174, B. T. Act, S. 47, Civil P. C. etc. in which it was urged that C. S. plot 8041 did not pass at the execution sale. As pointed out, however, by the trial Court the executing Court had no jurisdiction to decide whether the plaintiff's title to the suit land was affected by the execution sale—a point which has arisen for decision directly in the present suit and as such no question of res judicata can arise.

(5) It is next argued on behalf of the respondent and that is the main point in dispute between the parties — that in spite of the mistakes regarding the plot numbers and area in the sale proclamation, it was abundantly clear as to what was being sold: the rental, the number of the holding, the name of the tenants, the name of Mouza were all correctly described C. S. plots 12049, 12050, 12051 did not appertain to khatian 2766 of Barabalun Mouza nor did those tenants (viz., Pro forma defendants 2 to 4) held those lands nor is it anybody's case that they had any other jama of Rs. 7/-. As pointed out by the lower Appellate Court, the paramount description in the sale certificate or sale proclamation is ordinarily the general description of the holding sold and description of the plot number is secondary (cf. S. 162, B. T. Act). In view of the circumstances mentioned above, there could be no genuine doubt if the identity of what was being actually sold and the lower Appellate Court was justified in inferring that the sale proclamation was served on the real land and not on imaginary dags mentioned in the sale proclamation.

(6) On behalf of the appellant reliance has been placed inter alia on the case of — 'Thakur Barmha v. Jiban Ram', 41 Ind App 38 (PC) (A) wherein it was laid down that "that which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the Schedule to which the attachment refers" i.e. the schedule of the attached property in the proclamation of sale. In the present case, we have to deal with description and not identity unlike the Privy Council case referred to above. In the present case, part of the description in the original sale proclamation was incorrect: wrong plot numbers and wrong area which did not and could not possibly be referable to the holding sought to be sold were mentioned, but in spite of that the identity of the jama put up for sale could not be in serious question. What was actually offered for sale and bid for was the jama in arrears viz., the jama of Rs. 7/- held by pro forma defendants 2 to 4 in Bara Balun Mouza; that was correctly described in the sale proclamation though it contained erroneous statement of some particulars viz., area and plot numbers.

(7) Another case relied upon by the learned Advocate for the appellant is — 'Nazir Ahshan v. Dalip Mahton', 18 Ind Cas 725 (Cal) (B) where it has been held that a Court has no jurisdiction to amend a certificate of sale so as to show the purchase of a larger share of the property than what was stated in the sale proclamation. This is not, however, what has happened in the present case. That case might be attracted had the original sale proclamation mentioned a portion of C. S. plot 8041 as offered for sale whereas the amended sale certificate mentioned a larger portion or the whole of C. S. plot 8041 as having been actually sold; in the present case, the original sale proclamation did not contain any mention of C. S. plot 8041 at all.

(8) It is hardly necessary to deal in detail with several other cases referred to by the learned Advocate for the appellant e. g. — 'Kuppusami v. Subbaraya', 13 Ind Cas 324 (Mad) (C) — 'Jayarama Aiyar v. Vridhagiri Aiyar', AIR 1921 Mad 583 (D) and an unreported decision of this Court — 'Civil Rule No. 175 of 1949 (Cal) (E). Upon the facts of the present case, I agree in holding that the paramount description in the original sale proclamation was the jama in arrears; the erroneous description of certain details could not affect the validity of the sale of that jama.

(9) The appeal is dismissed with costs.

(10) Leave to appeal under Cl. 15 of the Letters Patent has been asked for and is refused.

B/H.G.P. Appeal dismissed.

A. I. R. 1953 CAL. 671 (Vol. 40, C. N. 255)

CHAKRAVARTTI C. J. AND SINHA J.

Gouri Sankar Show, Petitioner v. Anil Chandra Majumdar, Opposite Party.

Civil Rules Nos. 1666 and 1804 of 1952, D/- 19-12-1952.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 — Standard rent, fixation of — (Evidence Act (1872), S. 13).

Reduction of contractual rent — Tenant must place Rent Controller in possession of materials justifying reduction — Findings of fact in one case are no evidence of that fact in another case — Certified copies of judgments in other standardisation case containing statements of facts in those cases cannot be filed — Parties not objecting and adopting statements in other judgments as correct statements of fact — Court may proceed on that basis — All that the judgments legally prove is that a particular amount of rent had been fixed as the rent for a particular premises and nothing more, unless the authorities themselves inspect premises concerned and satisfy themselves as to the incidents of the premises covered by the judgment.

(Paras 7, 8, 14)

Anno: Evidence Act, S. 13 N. 10.

Sunil Kumar Mitter (in No. 1666) and Joy Gopal Ghose (in No. 1804), for Petitioner; Joy Gopal Ghose (in No. 1666) and Sunil Kumar Mitter (in No. 1804), for Opposite Party.

CHAKRAVARTTI C. J.: These are two Rules directed against the same order passed by the Fifth Judge of the Small Cause Court on 20-3-1952 in a proceeding for the standardisation of rent. Civil Revision Case No. 1666 of 1952 arises out of a Rule issued at the instance of the landlord, while Civil Revision Case No. 1804 of 1952 arises out of a Rule issued at the instance of the tenant. The subject matter of the tenancy is a room situated on the ground floor of premises No. 97 Harrison Road, Calcutta. It is said that at one time this room consisted of two rooms, Nos. 3 and 4, but some time ago the partition between the two portions was removed and the area was converted into a single room.

(2) The application for the standardisation of rent was made by the tenant. His case was that the contractual rent of Rs. 207/- per month was excessive and inasmuch as the rent borne by the same room in 1941 was Rs. 40/- per month, the standard rent should be fixed at a much lower figure than the contractual rent. The tenant was inducted in December 1949.

(3) The tenant's case that the identical room was let out in 1941 has not been accepted by either the Rent Controller or the Judge. Some attempt was made to prove that a portion of the room which was previously room No. 3, was occupied by a hotel but the finding of the learned Judge is that that case has not been proved. It has, however, been found that the hotel was in occupation of a room and a shed on the ground floor of the same premises in 1941 at a rent of Rs. 105/- per month.

(4) Both the Rent Controller and the learned Judge have proceeded on the footing that the premises were not let in 1941 and therefore the standard rent had to be fixed under the provisions of Section 9 (1) (e) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. That clause requires that the rent which would have been reasonably payable for the premises, if let on the 1st day of December, 1941, must first be ascertained and that being taken as the basic rent, the provisions of Sch. A should be worked out. Since the premises concerned are a shop room, the clause of Sch. A applicable would be Cl. (3).

(5) The tenant did not adduce any evidence as regards the rent borne by other rooms in the same premises. He filed two judgments in respect of the ground floor of premises No. 100 Harrison Road, from which, it appears that the basic rent for the premises there in question was fixed at Rs. 82/- and 25 per cent being added thereto, the standard rent was fixed at Rs. 102-8 under the Rent Act of 1948. Subsequently, the rent was refixed at Rs. 82/- on the ground that three months had not elapsed, since the rent had been fixed as mentioned in para. (1) (a) of Schedule A. Both the Rent Controller and the learned Judge have adopted premises No. 100 Harrison Road as a comparable unit, but arrived at different results. The Rent Controller thought that on a comparison with the rent borne by premises No. 100 Harrison Road, the reasonable rent for the premises in question in the present proceeding would be Rs. 60/- per month, whereas the learned Judge has held that it would be Rs. 80/-. The landlord claims more and the tenant insists that the rent should be less.

(6) It appears to us that the proceedings have been conducted in a most confused manner and there has also been obvious failure on the part of the authorities below to apply the principles of the Rent Act in an accurate manner. To give but one example, it is true that the tenant failed to prove his case that room No. 3 was not in the occupation of any tenant in 1941, but his case that the hotel was in occupation of some room in the ground floor of the premises has been established. If that be so, it is difficult to understand why for the purposes of getting a comparable unit the tenant should have travelled to premises No. 100 Harrison Road and overlooked the other premises in the very same building which were let out in 1941. Then, again, the authorities below adopted for comparison the rent fixed for premises No. 100 Harrison Road. They seemed to have forgotten altogether that what they were to look for purposes of comparison, was not the rent borne by other premises at the time the case was being tried, but the rent borne in 1941. Neither Rs. 82/- nor Rs. 102-8 was that rent, so far as premises No. 100 Harrison Road is concerned.

It appears from the second of the judgments adduced on behalf of the tenant that the rent was refixed at Rs. 82/- on the ground that three years had not elapsed since the rent had been standardised. The Judge there obviously was considering the terms of clause (3) (a) of Sch. A, but overlooked the fact that that clause speaks of rent fixed as mentioned in para. (1) (a) and that paragraph (1) (a) does not refer to fixation of rent under the Act of 1948. Be that as it may, it is clear that neither of the authorities below had present to his mind the necessity of looking for instances of rent borne by similar premises in 1941 but for the purposes of determining reasonable rent for the premises in question in 1941, they were adopting instances of rent borne by other premises in 1950 or 1951. It is clear that in doing so they misled themselves.

(7) It is now well settled that if a tenant wants the rent to be standardised and the contractual rent to be reduced, it is for him to place the Rent Controller in possession of materials which would justify a reduction. The tenant in this case does

not seem to have made any effort or at least any adequate effort to do anything of the kind. He adduced some evidence, the relevancy of which is doubtful and even that evidence has been viewed by both the authorities below from a completely wrong angle of vision. In our opinion, the case has been mishandled throughout and it ought to be re-heard.

(8) While on this subject, I desire to repeat what I have said on another occasion, namely, that findings of fact in one case are no evidence of that fact in another case, and therefore, it is not correct in law, when certified copies of judgments are filed, to adopt from those judgments statements of fact relating to the premises covered by them, as if the facts were proved by those statements. If, of course, the parties do not object and they adopt the statements as correct statements of fact, it may be permissible to proceed on the basis of the judgments, but otherwise, unless the authorities themselves hold an inspection of the premises concerned and satisfy themselves as to the incidents of the premises covered by the judgment, all that the judgment can be taken legally to prove is that a particular amount had been fixed as the rent for a particular premises and nothing more.

(9) In my opinion, this case ought to go back for a rehearing in accordance with law. The Rent Controller ought to apply his mind to the provisions of S. 9 (1) (e) of the Rent Act of 1950 and to those of Cl. (3) of Sch. A.

(10) There is one other matter to which it is necessary to refer. The learned Judge below has said that he was fixing the basic rent as the standard rent as the tenancy was one for non-residential purposes and three years had not elapsed since rent was being paid at an increased rate. Neither of the parties could enlighten us as to what the learned Judge was referring to and when any increased rate had been introduced in the present case. If no question of any increased rate having been introduced arises, the landlord was clearly entitled to an addition of 10 per cent to the basic rent, whatever the correct amount of the basic rent might be.

(11) For the reasons given above, both the Rules in my opinion ought to be made absolute. The judgments of both the Rent Controller and the learned Judge are set aside and the cases are sent back to the Rent Controller for decision in accordance with law.

(12) As both parties have been at fault, there will be no order for costs.

(13) SINHA J.: This is another glaring instance in which the assessing authorities below have misdirected themselves as to the principles that should be followed in fixing the standard rent. It has not been realised, and it seems that the arguments before us have been on the footing of no better appreciation of the position, that it was for the tenant who wants to have the rent standardised to prove that the contractual rent was not appropriate, but that the rent was in excess of what is provided for by the Rent Control Act and that it should be, therefore, reduced.

(14) It is argued before us that the tenant here was a man who came recently into the premises and was not expected to know what the position was in 1941. That may be his misfortune, but it does not affect the position in law and the onus is nevertheless upon him to show that the contractual rent is not the proper rent payable. After all, he has entered into a contract and wishes to alter it by virtue of the provisions of the Act, and, I think, it is by now well settled that it is for him to adduce evidence to show that the contractual rent should be scaled down. In this particular case, it appears that the evidence adduced showed that in the premises in question there was a tenant in December 1941, a hotel or an eating house, but the controversy raised was whether it paid a rent of Rs. 105/- or less or what space it actually occupied. At least, the appellate Judge was quite satisfied that there was no denying that there was such a tenant in occupation in December 1941; but he said that it was not established that room No. 3 formed the tenancy. Both the assessing authorities came to the conclusion that the standard rent was to be fixed according to the provisions of Section 9 (1) (e) of the Rent Act of 1950, namely, as to what the premises would have fetched on the first day of December 1941, if let out. One would have supposed that it being proved that some part at least of the premises was let out, the rent paid therefor would form the basis for calculating the standard rent. But this was completely ignored. Both the Rent Controller and the learned Judge went to a contiguous premises No. 100 Harrison Road and for the purposes of comparison certified copies of judgments in standardisation cases relating to certain rooms in premises No. 100 Harrison Road have been put on the record. These judgments are not 'inter partes' and no inspection was held in order to verify the facts stated in those judgments. The learned Judge relied on the measurements appearing in those judgments, but has not taken the trouble to have them verified. The judgments may be judgments 'in rem' to prove that the premises had been standardised at a particular rent, but the facts as to the measurements or the amenities etc. are not evidence in this case. Even so, there seems to be no evidence at all whether premises No. 100 was newly built or an ancient edifice and how it compared with premises No. 97. The amenities are not compared. In order to afford a comparison, the Court must have, whether it is acting under S. 9 (1) (e) or (g) sufficient facts to afford a comparison, and it is the duty of the applicant to adduce evidence to show it. A comparison with other premises could only be allowed if they are comparable units, that is to say, if they are similar in situation, user, extent or amenities. An arbitrary comparison is not permissible. The fullest reasons must be given so that the same can be verified.

(15) Lastly, as my Lord has pointed out, the learned Judge was completely confused as regards the provisions as to the increase of rent. But inasmuch as nobody could enlighten us as to how the question of increase at all arose, it is not possible to deal with the matter further. I quite agree that both the assessing authorities have been in utter confusion as to the principles to be applied and I agree with the order made by my Lord.

B/R.G.D. Rules made absolute.

A. I. R. 1953 CAL. 672 (Vol. 40, C. N. 256)

P. B. MUKHARJI J.

Satyaprasad Ghosal, Plaintiff v. Subodh Chandra, Defendant.

Suit No. 2357 of 1949, D/- 1-7-1952.

(a) Civil P. C. (1908), O. 40, R. 2 — Receiver appointing manager to manage business — Collections made through manager are collections of receiver — Receiver is entitled to charge commission on such collections. (Paras 7 and 9)

Anno: Civil P. C., O. 40, R. 2 N. 1.

(b) Calcutta High Court Original Side Rules (framed under Calcutta Official Receivers Act (7 of 1938)), Appendix 11, R. 3 — Receiver in charge of business of hotel — Supplies sold by hotel to its boarders and lodgers — Income therefrom comes within Item 3 of R. 3 — Bills realised from time to time from inmates of hotel come within Item 2 of R. 3 — Such bills will ordinarily include seat rents or room rents — If not, they come under Item 1 of R. 3.

(Para 8)

(c) Calcutta High Court Original Side Rules, Chapter 21, Rr. 9 to 11 (introduced in 1940) — Applicability.

Rules 9, 10 and 11 provide a scheme when there is objection or disagreement and have no application where the employment of a servant is by consent of all parties.

(Para 17)

(d) Calcutta High Court Original Side Rules, Chapter 21, R. 12 (introduced in 1940) — Applicability.

Where the Receiver at a meeting of all the parties is requested by consent of all to make an appointment, such appointment & the expenses therefor are not vitiated for lack of sanction contemplated under new Rule 12 which applies only in the case where the Receiver makes the appointment on his own initiative and no formal objection is made by any of the parties.

(Para 21)

C. Sarkar, for Defendant.

ORDER: These are objections to the passing of the accounts of the Official Receiver in this partnership suit and relate to three periods of time. The first period of time is the second half of 1949, the second period of time is the first half of 1950 and the third period is the second half of 1950. In other words these objections cover a period of one year and a half from the middle of 1949 till the end of 1950.

(2) The objections are made on three grounds. In the first instance it is said that the Official Receiver has charged commission on gross collections made by the Manager who is the defendant in this suit. Secondly the Official Receiver has debited the account with the salary of (i) a durwan at Rs 50/- per month and (ii) an estate clerk at Rs. 60/- per month. Thirdly it is said that the accounts as filed by the Official Receiver do not show what amount has been received by him in gross on which he has been charging the commission. These are the only three objections made before me to the passing of the Official Receiver's accounts.

(3) The order appointing the Official Receiver as Receiver in this suit was made by Banerjee J. on 21-7-1949. It is necessary to set out the relevant portions of that order because most of the arguments relating to the first objection concern the terms of that order. The relevant terms of the order appointing the receiver are:

"It is ordered that the Official Receiver of this Court be and is hereby appointed the Receiver of the business carried on under the name and style of 'India Hotel' at 62, Mirzapore Street, Calcutta including all the assets & books of account in the plaint in this suit mentioned (thereinafter collectively referred to as the said property) with power to him to get in (sic) collect the outstanding debts and claims due in respect of the said property and with all the powers provided for in O. 40, R. 1 cl. (d) of Civil P. C."

The order thereafter proceeds to direct:

"And it is further ordered that the defendant and all persons claiming under him do deliver up quiet possession of the said property together with all accounts books papers memoranda and writings relating thereto to the said Receiver."

Then the order continues to direct:

"And it is further ordered that the said Receiver do take possession of the said property together with the documents and papers as aforesaid and collect the issues and profits thereof."

Then the order proceeds to provide:

"And it is further ordered that subject to the defendant furnishing security within a fortnight from the date hereof for the sum of Rs. 5,000/- to the satisfaction of the Registrar of this Court the said Receiver be at liberty to appoint the defendant Manager of the said business of 'India Hotel' and it is further ordered that the defendant so to be appointed the Manager of the said business as aforesaid to submit a weekly statement of accuonts in respect of the said business."

Thereafter the order concludes by providing that:

"The receipt or receipts of the receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver and directs the receiver to file half yearly accounts."

(4) Upon this it is contended on behalf of the objectors by the learned counsel Mr. Sarkar appearing for them, that the defendant Manager was managing the business and the collections that were made from the hotel business were really his collections and not the Receiver's collections. Therefore it is his contention that the Receiver has earned no commission on such collections. This argument, in my view, proceeds on a wrong interpretation of the order appointing the Receiver. As I construe the terms of that order it appears to me that the Receiver is in possession of the entire business of the 'India Hotel' and that he was given the liberty to appoint the defendant as Manager in order to aid him as a Receiver in charge of the business.

This is a very usual and common form of the order when a Receiver is appointed of a running business. The Receiver, in such a case, although legally responsible for the running of the business, does not in fact run the business himself but through a competent Manager or an Agent and it is customary and the usual practice in such cases to give liberty to the Receiver to appoint such Manager. That is exactly what is done by the present order appointing the Official Receiver. It does not mean that the Manager is in legal possession of the business. That legal possession and the legal responsibility for the management of the business remain with the Receiver and not with the Manager.

In law, therefore, it is the collection made by the Receiver although the collection is through the hand of an agent who is described as the Manager. It is the Receiver's receipt that alone can give a proper discharge and it is to the receiver again who is by the express terms of the Order to collect all debts and claims of the business as well as all issues and profits. The order makes it clear that liberty was given to the Receiver to appoint the defendant as Manager but that does not mean that the order itself appointed the Manager so that the Manager also becomes an officer of the Court.

(5) At this stage it will be appropriate to notice an incidental argument made on this point by Mr. Sarkar. The basis of that argument is the Bond

signed by the Manager on 3-8-1949. By this Bond the defendant Subodh Chandra Sen Gupta and one Jatindra Nath Banerjee bound themselves to the Registrar of this Court for the sum of Rs. 5,000/- for the purpose of the security as Manager. This was in pursuance of the direction of the order to furnish security to the satisfaction of the Registrar. Jatindra Nath Banerjee acted as the surety. This Bond provides the condition that the Manager

"shall duly account for all and every sum or sums of money or other property which the Manager has received or shall hereafter receive or has or shall become or be held liable to pay or account for as such Manager as aforesaid and do and shall pay or deliver the same as the said High Court or a Judge thereof has directed or shall hereinafter direct."

(6) Upon this term of the condition of the Bond Mr. Sarkar argues that the Manager's liability to pay or account is to the High Court or to a Judge thereof and not to the Receiver. That again is an untenable argument. The condition of the Bond as I have quoted makes it quite clear that this liability of the Manager is to the High Court or to a Judge thereof according to the direction already given or to be hereafter given by the Court or the Judge. Now the Court had already given by its very order of appointment of the Receiver the direction upon the Manager to submit weekly statements of accounts to the Official Receiver. By express terms of the order the Receiver is to have possession of all accounts. The Official Receiver in this case by the terms of the order again is the arm of the High Court itself. Therefore this argument of Mr. Sarkar is also unavailing.

(7) On these grounds I hold that the collections made through the Manager were and are in law the collections of the Receiver.

(8) Mr. Sarkar then argues that there is no provision for the Official Receiver charging any commission even though it is held that the collections by the Manager are in law the Receiver's collections. This argument is based on Rule 3 Appendix 11 of the Original Side Rules framed under the Calcutta Official Receiver's Act. The relevant items provide that the Official Receiver is entitled to charge fee by way of percentage or otherwise (1) at the rate of 5 per cent on rents recovered from house properties, (2) 5 per cent on outstandings recovered, (3) 5 per cent on sales of properties movable or immovable calculated on the total value realised in any one estate and (4) 5 per cent on the estimated value of moveable properties (other than securities) not sold but taken charge of.

The argument on this point on behalf of the objector is that the Official Receiver in this case does not come in any of the items I have just mentioned and therefore, cannot charge a 5 per cent commission. It is clear from the terms and the nature of the order appointing the Receiver that the Official Receiver in this case is in charge of the business of the Hotel which includes rent for boarding and seats as well as outstanding bills on accounts of food and other supplies bought by the boarders and lodgers. So far as supplies are sold by the hotel to its boarders and lodgers I am satisfied that such income arises out of sales of movables and fairly comes within the meaning of item 3 under Rule 3 which provides 5 per cent

"on sales of properties movable or immovable calculated on the total value realised in any one estate."

The bills that are outstanding and realised from time to time from the inmates of the hotel also, in my view, come within Item No. 2 of Rule 3 which provides for 5 per cent "on outstandings recovered". These bills will ordinarily also include seat rents or room rents for the boarders. Even if they did not, such seat rents or room rents do, in my view, come within the meaning of Item (1) of Rule 3 which provides for 5 per cent "on rents recovered from house properties."

(9) For these reasons I hold that the Official Receiver is justified in charging the commission at the rate of 5 per cent on collections made from the hotel business and its assets even though such collections were made through the agency of the Manager. I would only refer here to the fact that the order appointing the defendant as Manager does not entitle the Manager to charge any commission on the collections made by him. I, therefore, overrule the first objection.

(10) The second objection relates to the debit made by the Official Receiver against the accounts of the estate with the salary of a 'durwan at the rate of Rs. 50/- per month and the salary of an estate clerk at Rs. 60/- per month.

(11) The substance of this argument is based on the New Rules 9, 10, 11 and 12 introduced by way of amendment in 1940 and added to Chapter 21 of the Original Side Rules of this Court. The argument is that such an appointment if objected to can only be allowed provided sanction of the Court being the senior Judge sitting on the Original Side is taken and that sanction has not been taken in this case. Before deciding this point it is necessary to set out the facts.

(12) To me it appears on the facts of this case that far from there being an objection to such appointment there was in fact a consent of the parties. With a view to get the real state of fact on this point a reference to the Minutes of 11-8-1949 show that both the parties represented by Mr. Ganguly, Solicitor for the plaintiff and Mr. Bose, Solicitor for the defendant made the categorical statement

"With regard to the preparation of inventory the Official Receiver is at liberty to appoint a clerk for the said purpose at a remuneration of Rs. 3/- per day. The Official Receiver will also appoint a whole time 'durwan' who will remain posted at the said Hotel.

It is true at that stage Mr. Ganguly, Solicitor for the plaintiff, said

"The plaintiff here and now gives an undertaking through me to pay and bear the salary of the 'durwan' and other establishment charges".

Thereafter Mr. Bose, Solicitor for the defendant, stated

"The Official Receiver should engage a whole time estate clerk who is unconnected with both the parties to this suit at a reasonable remuneration which he thinks fit and proper. The estate clerk shall check the account of running the Hotel every evening and will countersign the vouchers."

Thereupon the Official Receiver agreed by saying

"Yes, I shall appoint a 'durwan' and an estate clerk as requested by the parties".

While therefore the appointment of an estate clerk and a 'durwan' was agreed to by both the parties as these were intended to be independent persons not connected with the parties and as the defendant himself was going to be the Manager conducting the business Mr. Ganguly, Solicitor for the plaintiff, not unreasonably retracted his undertaking to pay for them by saying

"My client shall have no hand in the management of running the business, incurring of liabilities or in collecting of moneys. In these circumstances my client cannot give the undertaking required by the Receiver."

The word "undertaking" here refers to the demand for indemnity from the parties to the Official Receiver against all liabilities, if any incurred by the Official Receiver for running the business through the defendant as Manager.

(13) The next stage is reached at the Minutes of the Official Receiver held on 22-8-1949. Those Minutes definitely record consent to the appointments now objected to by the defendant. I will quote the Minutes on this point so that the consent will appear from the very language of such Minutes. The record of the Minutes is in these terms.

"The parties agree that a part-time supervisor be appointed by the Official Receiver at a remuneration of Rs. 60/- per month with effect from 13-8-1949. The appointment of the caretaker appointed is confirmed at a remuneration of Rs. 60/- per month with effect from the 13th August last."

(14) On these facts, therefore, I am satisfied that in this case the parties consented to both these appointments of the 'durwan' and supervisor or estate clerk. It is noteworthy that since 1949 when these Minutes recorded the appointment by consent there has been no objection at any stage by any of the parties to the correctness of these Minutes.

(15) Having set out the facts I propose now to interpret the Rules to which my attention has been drawn.

(16) Now Rule 8 provides that clerical or other establishment and the cost thereof chargeable to the estate shall "if possible" be detailed in the Order. Although the Form under the Rules so provides, ordinarily it is never possible to detail this in the order appointing the receiver for the simple reason that unless actual charge is taken of the estate, it is difficult to know and anticipate what charges are necessary to be incurred for establishment, and the order appointing the Receiver in this case also does not detail such costs. Now Rule 9 goes on to provide that a Receiver shall not "normally" be allowed to make any charge on account of establishment but if he is of the opinion that it is necessary in the interest of the estate that he should engage 'Durwans, Sircars' or other servants he shall be at liberty to do so.

But in that case the receiver shall within 7 days give notice to the attorneys or the parties that such engagements have been made and shall with such notice include a notice of a meeting to be held within 14 days where the question of such engagement shall be discussed. New Rule 10 then proceeds to say that if it is decided at that meeting that the employment is unnecessary the receiver shall forthwith dispense with the services of such servant or servants. But if there is any disagreement on this question between the Receiver and the parties or if any party objects to such appointment and the Receiver is still of the opinion that the retention of such servant is necessary in the interest of the estate, the Receiver shall forthwith make an application to the Judge on notice to the parties for permission to employ such servant. Upon such application the Judge shall then determine whether the engagement is necessary and if the Judge is of the opinion that objection to such employment was made on sufficient grounds, the Judge may direct the party objecting to bear the costs of the application.

(17) Now as I read New Rules 9, 10, and 11, they provide a scheme when there is objection or disagreement and have no application where the employment of such servant is by consent of all parties'

(18) Then comes New Rule 12 which provides that in the event of no objection, the Receiver shall prepare a statement for submission to the Judge setting out the particulars mentioned in R. 9 and such statement shall be submitted through the Registrar to the Senior Judge sitting on the Original Side for his confirmation of the engagement of the servant or servants.

(19) Strictly speaking on the language of this New Rule 12, it applies where there is "no objection." Now objections are referred to in the preceding Rule 10 and this obviously means and refers to the case where the Receiver has made the appointment on his own initiative under Rule 9 without consulting the parties and without their consent and then when he calls a meeting the party or parties object to the appointment but the Receiver nevertheless felt that in the interest of the estate such appointment should be made. This New Rule 12, therefore, on its terms is silent on the point which is now raised before me, as to what the Receiver should do in case where the initial appointment is made not on his own initiative, but after calling a meeting of the parties where all parties consent to the proposed appointment and ask the Receiver so to appoint.

(20) The procedure laid down in new Rule 12 appears to me to apply in the case where the Receiver makes an appointment on his own initiative which he has power to make under new Rule 9. But it does not apply to the case such as the present where the Receiver does not make the appointment on his own initiative but does so act on the consent of the parties concerned. That is why it is clearly provided in new Rule 9 that when the Receiver on his own initiative makes such an appointment he should call the meeting of the parties and obtain their consent and if there is no consent and the parties object he should apply to the Court under new Rule 11 read with new Rule 10.

In that context new Rule 12 coming as a sequel to this procedure can in my opinion only refer when it says "in the event of no objection being made" to the case where the Receiver makes an appointment on his own initiative and to which no formal objection is taken by any party and not to a case where the parties themselves consent and ask the Receiver to make the appointment.

(21) On a reading of these new Rules which I have mentioned, it appears to me that the only reasonable and practical construction is to hold that where the Receiver at a meeting of all the parties is requested by consent of all to make an appointment, such appointment and the expenses therefor are not vitiated for lack of sanction contemplated under new Rule 12 and that new Rule 12 applies only in the case where the Receiver makes the appointment on his own initiative and no formal objection is made by any of the parties. To hold otherwise and say that in spite of such consent and in spite of the Receiver acting only on the consent of parties the Receiver has still to obtain the sanction of the Court under new Rule 12 is to produce the most insensible procedure and unjustified red tape and expense.

After all for what purpose can that sanction be required even in that case? In ordinary cases, the Court in order to determine whether the appointment is justified or not has for all practical purposes to rely on the facts as presented by the parties and the Receiver and if they are all agreed as to that appointment I do not see the rationale of this ritual of a sanction as laid down under new Rule 12 and I do not see how in that case the Court is going to decide who is the party who should be responsible for the extra expenses dis-

allowed under new Rule 12 but nevertheless incurred in the meantime by the Receiver with the consent of all parties.

If by consent any gross or unreasonable expenditure is incurred in any particular case, then in that case the Court always has the power to disallow any grossly excessive expenditure at the time of the passing of accounts under new Rule 21 read with new Rules 18, 19 and 20. No question of grossly unreasonable expenditure in this case arises as a 'Durwan' at Rs. 50/- p. m. and an estate clerk at Rs. 60/- p. M. are, in my view, eminently reasonable and fair expenditure in this case. The objection on this score now appears to be a ruse of the defendant who as Manager finds that he does not earn a commission on the collections and that the Receiver is getting the commission on the work that the defendant is doing.

(22) As the point relates to administration by the receivers, I called for a report on this point from the Assistant Registrar (Accounts) of this Court to state what has been the practice in this Court since these new amended Rules came into operation in 1940. The practice so far confirms the interpretation I have given to these Rules and the report says:

"The Receiver convenes a meeting when such request is recorded and all other parties interested are consulted and only when they are of the opinion that the appointment should be made, their consent is also recorded in that meeting and the Receiver makes the appointment. He does not thereafter take any further step for obtaining confirmation from the Court."

(23) If this practice, however, was in my view in breach of the Rules, I would have had no hesitation in upsetting that practice, although it has lasted for these last twelve years. But it appears to me that the practice in this respect has followed the practical course and in my judgment is in accord with these Rules as I interpret them and the intention with which these Rules were made. I, therefore, overrule the second objection.

(24) The third objection does not properly mean any objection on principle. The main complaint on this third ground is that the account as filed by the official Receiver does not show the details of what amount has been received by him in gross on which he has been charging the commission. That is an objection to the method of keeping accounts rather than the principle. Regarding the method of keeping of accounts the Official Receiver's Act lays down under Section 9 of the Act and the Rules made under the Act including new Rule 17 what is to be done on this point. I do not find any breach of those Rules. The defendant could have seen not only the original accounts but also the explanation appended to any item in the account which he might have chosen to call from the Official Receiver and thus get any item explained in the account which according to him was not clear.

Mr. Sarkar did not ultimately pursue this point and I myself am of the opinion that there is nothing illegal or improper in the accounts filed. The only illustration on which Mr. Sarkar relied was an entry in the account filed under the date 31-8-1949,

"Government commission on Rs. 1,187-5-0 at 5 per cent vide note of S. K. Roy from 13th to 19th August 1949"

against which a sum of Rs. 94-6-0 is shown. Mr. Sarkar's comment is that the Official Receiver should have set out the note of S. K. Roy in that item. I do not agree. It gives sufficiently express indication to the reference by which it can always be checked and if Mr. Sarkar's client wanted to examine the note of S. K. Roy he could have easily called for it and satisfied himself.

(25) I, therefore, also overrule the third objection.

(26) In these circumstances I pass the Official Receiver's account disallowing all the objections of the defendant. The defendant will pay the costs of these proceedings as an application; certified for counsel.

B/V.R.B. Objections disallowed.

A. I. R. 1953 CAL. 676 (Vol. 40, C. N. 257)

P. N. MOOKERJEE AND RENUPADA MUKHERJEE JJ.

Manindra Nath Biswas, Judgment-Debtor-Appellant v. Radhasyam Biswas, Decree-Holder-Respondent.

A. F. O. O. No. 218 of 1952, D/- 21-5-1953.

(a) Civil P. C. (1908), O. 41, R. 1 — New plea involving question of fact.

A new plea that a compromise decree did not create a valid charge for want of registration involving a question of fact viz. whether the decree was registered or not cannot be allowed to be raised for the first time in appeal. (Para 6)

Anno: Civil P. C., O. 41, R. 1 N. 12.

(b) Civil P. C. (1908), O. 21, R. 22 — Notice of amendment of execution.

Application for amendment of execution application by inclusion of certain charged properties — Provisional order allowing amendment with notice under O. 21, R. 22 to judgment-debtor to show cause against such amendment — Judgment-debtor failing to appear and Court taking further steps in terms of amendment — Even assuming that O. 21, R. 22 applies to amendment of execution petitions, there is sufficient compliance with O. 21, R. 22 and order allowing amendment cannot be challenged on that ground. (Para 8)

Anno: Civil P. C., O. 21, R. 22 N. 2.

(c) Civil P. C. (1908), S. 151 and O. 21, Rr. 17 and 21 — Amendment of execution — (Limitation Act (1908), Art. 182).

A Court has inherent power to allow amendment of pending execution application in proper cases apart from the express provisions of O. 21, R. 17. The matter is one of discretion of the executing Court and except where the law of limitation raises an insuperable bar or where the decree-holder has been guilty of gross negligence,—and where no equitable consideration stands in the way, the power of amendment should be liberally exercised. Case law referred. (Para 9)

A decree-holder applied for execution of his decree by proceeding against the bills and security deposits standing to the credit of the judgment-debtor. The decree-holder could realise only a part of the decretal amount and found that he would be able to realise only a moiety of the amount due from the properties attached and that too not in the near future. He therefore applied for amendment of his execution application by praying for sale

of the immovable properties charged under the decree.

Held that in circumstances the prayer for amendment should be allowed under inherent powers as it had not the effect of changing the original character of the execution application and as no question of limitation came in the way. Even if the prayer for amendment is treated as an independent execution the Court would be justified in the circumstances to allow simultaneous execution in the exercise of its discretion. (Paras 10, 11 and 14)

Anno: Civil P. C., S. 151 N. 2, O. 21, R. 17 N. 3; O. 21, R. 21 N. 1; Lim. Act, Art. 182 N. 86A.

(d) Civil P. C. (1908), O. 34, Rr. 14 and 15 — Applicability to enforcement of charge — (T. P. Act (1882), S. 100).

When a charge is created by the decree and is enforceable in execution under the terms thereof, the statutory impediment, as contained in Order 34, Rr. 14 and 15 of the Code, does not apply and no suit is necessary or imperative in that behalf under the law. (Paras 16, 21)

Anno: Civil P. C., O. 34, R. 14 N. 3; O. 34, R. 15 N. 10a; T. P. Act, S. 100 N. 28.

(e) Deed — Construction — Consent decree — (Civil P. C. (1908), O. 23, R. 3).

When in a pending suit the parties come to a settlement and either party accepts a monetary liability and consents to a decree being passed against him in respect of the same, charging certain properties for the realisation of the decretal dues it is quite reasonable to hold that the charge, so created, would be enforceable in execution and would not, in the absence of express or specific words or any clear indication to the contrary, be merely declaratory, requiring a fresh suit for its enforcement. (Para 20)

Held on a construction of the consent decree that it was not merely a decree declaring a charge but the charge created thereby was enforceable in execution of the decree. (Paras 19 and 21)

Anno: C. P. C., O. 23, R. 3 N. 27, 33.

A. C. Sarkar, Nitya Ranjan Biswas, Sanat Kumar Rakshit and Kamalesh Banerjee, for Appellant; Apurbadhan Mukherjee and Amiya Kumar Mukherjea, for Respondent.

CASES CITED:

(A) ('35) AIR 1935 Cal 614: 158 Ind Cas 556
(B) ('18) AIR 1918 Cal 73: 22 Cal WN 540
(C) ('42) AIR 1942 Cal 306: ILR (1941) 2 Cal 251
(D) ('33) AIR 1933 PC 68: 60 Ind App 83
(E) ('32) AIR 1932 Cal 766: 36 Cal WN 618
(F) ('35) 39 Cal WN 1144
(G) ('48) AIR 1948 Bom 116: 49 Bom LR 673
(H) ('19) AIR 1919 Cal 1054: 47 Ind Cas 911
(I) ('24) AIR 1924 Cal 131: 50 Cal 743
(J) ('35) AIR 1935 Cal 143: 60 Cal LJ 123
(K) ('38) AIR 1938 Cal 162: 66 Cal LJ 57
(L) ('47) AIR 1947 Bom 430: 49 Bom LR 420
(M) ('23) AIR 1923 Pat 224: 2 Pat 328
(N) ('90) 17 Cal 631 (FB)
(O) ('29) AIR 1929 Pat 407: 8 Pat 462
(P) ('41) AIR 1941 Pat 635: 191 Ind Cas 492
(Q) ('43) AIR 1943 Pat 127: 21 Pat 838
(R) ('92) 19 Cal 139 (FB)
(S) ('22) AIR 1922 Cal 35: 35 Cal LJ 61
(T) ('24) AIR 1924 Cal 645: 28 Cal WN 550
(U) ('34) AIR 1934 Cal 327: 60 Cal 1467
(V) ('19) AIR 1919 Bom 56: 43 Bom 631
(W) ('29) AIR 1929 Bom 227: 119 Ind Cas 186
(X) ('34) AIR 1934 Bom 241: 151 Ind Cas 96
(Y) ('24) AIR 1924 Pat 20: 2 Pat 787
(Z) ('29) AIR 1929 Pat 439: 124 Ind Cas 81
(Z1) ('46) AIR 1946 Pat 216: 223 Ind Cas 173
(Z2) ('16) AIR 1916 Pat 252: 38 Ind Cas 791
(Z3) ('18) AIR 1918 Mad 668: 33 Mad LJ 601
(Z4) ('30) AIR 1930 Pat 108: 8 Pat 801
(Z5) ('34) AIR 1934 Pat 608: 13 Pat 387
(Z6) ('34) AIR 1934 All 524(1): 149 Ind Cas 1104
(Z7) ('18) AIR 1918 Cal 705: 45 Cal 530
(Z8) ('45) AIR 1945 Cal 322: 49 Cal WN 68
(Z9) ('95) 22 Cal 859
(Z10) ('95) 22 Cal 903

P. N. MOOKERJEE J. On 19-12-1950 the plaintiff Respondent Radha Shyam Biswas obtained a decree (including claim and costs) in Money Suit No. 15 of 1950 of the Court of the Subordinate Judge at Krishnagar against the Defendant Appellant Monindra Nath Biswas for a sum of Rs. 57,376/- upon a Solenama filed in the suit on 5-12-1950. Under the Solenama, the Respondent's dues were payable in several instalments extending up to April 1952 and the mode and manner of payment of these instalments were also clearly specified therein. It was also distinctly provided in the said Solenama that in case of any default on the part of the defendant Monindra Nath Biswas in the carrying out of the terms thereof the Plaintiff Radha Shyam Biswas would be entitled to realise his entire dues or the then outstanding balance thereof by immediate execution. The Solenama further expressly provided in paragraphs 5 and 6 thereof as follows:

"5. If the defendant violates any of the terms out of all the terms mentioned before or if he does not make payment according to the terms the plaintiff will be entitled to move against the defendant and to realise the unpaid decretal amount by attachment of the money payable from the defendants' bills or his earnest money or his moveable and immovable properties according to his rights.

6. As a consideration for the plaintiffs allowing the defendant to pay the decretal amount in instalments the defendant keeps the immoveable properties mentioned in the Schedule and owned and possessed by him charged by way of security for payment of the decretal dues."

and then followed the "Schedule of list of the properties" which were charged.

(2) On 8th March 1951, the plaintiff-decree-holder applied for execution of the decree and realisation of his dues by attachment of certain bills and security deposits of the judgment-debtor lying with the Government in its various departments upon the allegation that the said judgment-debtor had fraudulently violated the terms of the Solenama or compromise, referred to in the preceding paragraph. The Court ordered interim conditional attachment of the bills and security deposits and directed issue of notice to the judgment-debtor to show cause against the same. The notice was duly served but no objection was filed by the judgment-debtor and the execution proceeded for some time. In the course of the proceedings, it was discovered that one of the items of security deposits attached was already under attachment at the instance of some other decree-holders of the self-same judgment-debtor and, accordingly, the Respondent applied for rateable distribution in regard to the same and eventually

received a sum of Rs. 7,583/4/6 on such rateable distribution in part satisfaction of his decretal dues. As to the other items attached there was prolonged correspondence between the Court and the different Government Departments concerned and it appeared plain that the said moneys would not be available in the near future and that even upon realisation they would not be sufficient to satisfy even a moiety of the decree-holder's dues.

In such circumstances, the decree-holder applied on 27th March 1952 for amendment of his execution petition by incorporating therein a prayer for sale of the charged properties for the realisation of his dues and for including in the said execution petition a schedule of the said charged properties for that purpose. This prayer for amendment of the execution petition was allowed and the petition of amendment was directed to be treated as a part of the original petition of execution with a further order of issue of notice on the judgment-debtor under Order 21 R. 22 C.P.C. presumably with a view to give opportunity to the judgment-debtor to object to the decree-holder's prayer for amendment of the execution petition, as set out above, before any further steps were taken upon the same. Apparently, therefore, the Court's order allowing the decree-holder's prayer for amendment of his execution petition was only provisional at this stage and the Court intended to proceed further in the matter only after consideration of the judgment-debtor's objection, if any, to the same. According to the peon's return, the notice under Order 21, R. 22 Civil P. C. was duly served and as, on the date fixed in the notice, namely, 26-4-52, there was no appearance on behalf of the judgment-debtor and no objection to further proceedings in execution, the Court on that date recorded an order inter alia to the following effect:

"Notice served. Requisites filed. Issue notice under Order 21, Rule 66 C. P. C. upon judgment-debtor fixing 21-5-52 for return and orders.....
....."

(3) On 5-5-1952 the judgment-debtor appeared and filed an application under S. 47, C. P. C. and his chief objections were:

(1) That the execution was premature and in contravention of the terms of the compromise decree.

(2) That the notice under Order 21, Rule 22, C. P. C. had not been duly served and the judgment-debtor had been fraudulently denied opportunity to object to the execution in time, and

(3) That the order of amendment of the execution petition was illegal and without jurisdiction and the immoveable properties of the judgment-debtor could not in law be proceeded against in that execution. This application was registered as Misc. Case No. 56/52 under Section 47, C. P. C., and was eventually fixed for hearing on 31-5-52.

(4) At the hearing no evidence was adduced by the judgment-debtor in support of his objections (1) and (2), set out above, and there was no denial on oath either of the decree-holder's allegations of default and fraudulent breach of the terms of the Solenama or the compromise decree on the part of the judgment-debtor or of the statements of service of the notice under Order 21, Rule 22, C. P. C., in the relevant peon's return. The third objection was, however, strongly pressed before the learned Subordinate Judge & the Court's power and the validity of the order of amendment of the execution petition were seriously questioned. The learned Subordinate Judge overruled the judgment-debtor's objections and dismissed his application with costs to the decree-holder by his order dated 31-5-52. The present appeal is directed against this order.

(5) Mr. Sarkar, appearing for the appellant, has very fairly conceded that on the materials on record he cannot urge anything in support of objections (1) and (2), as set out above, but he has strongly pressed the 3rd objection and he has developed it under two heads. He has first contended that the order of amendment cannot be sustained in law in the circumstances of this case. He has next urged that, in any event, the immoveable properties of the judgment-debtor cannot be sold in this execution — not, at any rate, without attachment, — and, therefore, the order for sale thereof, as made by the learned Subordinate Judge, should be vacated. The real argument of Mr. Sarkar under this head is to the effect that on the question of charge over the judgment-debtor's immoveable properties the compromise decree is merely declaratory and contains nothing more than a mere declaration of charge and that, accordingly, the charge cannot be enforced except by a fresh suit brought for that purpose, and, if the decree-holder wants to proceed against the properties in question, not by way of charge but otherwise under the compromise decree, — either under the express terms thereof or impliedly thereunder or under the general law — he must proceed by way of attachment and sale, so that the present order of sale and the issue of sale proclamation without prior attachment is bad. The argument is attractive but, as we shall presently see, it is, in the ultimate analysis, not acceptable.

(6) Mr. Sarkar has also argued that no valid charge was created by the compromise decree, as, according to him, the properties, sought to be charged thereby, were not included in the subject-matter of the suit and the decree was not registered. Apparently, this objection on the ground of non-registration of the decree — if this fact of non-registration is correct and can be found — would possibly be a fatal objection to this part of the decree-holder's case but, upon the facts of the present case, we are unable to entertain it or to give effect to it. It is quite plain that it involves an issue of fact, namely, whether the decree was registered or not. The objection was not taken before the learned Subordinate Judge and, in the circumstances of this case, we are not inclined to allow the judgment-debtor to raise it for the first time in this appeal. Mr. Sarkar's argument, therefore, upon the footing of non-registration of the compromise decree is rejected and we proceed to consider his other arguments.

(7) The first question that now requires consideration is whether the learned Subordinate Judge was right in entertaining the Respondent's prayer for addition of the list of immoveable properties to the application for execution and his further prayer for the sale thereof. On behalf of the Appellant, two arguments have been addressed to us on this part of the case. Mr. Sarkar has strongly urged that the decree-holder's application for amendment of the execution petition was in law unacceptable in the circumstances of this case. He has also urged that, in any event, it ought not to have been allowed before giving the judgment-debtor an opportunity to object to the same under Order 21, R. 22, C. P. Code. We are unable to accept either of these two submissions and we shall presently give our reasons for this view.

(8) The second part of Mr. Sarkar's argument need not detain us long. We have already pointed out that the learned Subordinate Judge's order, allowing the amendment in the first instance,

was, on its proper construction only a provisional order and that, only when the judgment-debtor failed to appear and object to the same after service of the notice under Order 21, Rule 22 C. P. C, the learned Subordinate Judge took effective steps in terms of the decree-holder's prayers made in his application for amendment. We hold, therefore, that the judgment-debtor was given ample opportunity by the learned Judge in the Court below to object to the amendment, prayed for by the decree-holder, and the order, allowing the said amendment, is not open to challenge for non-compliance with the provisions of Order 21, Rule 22, C. P. C., even assuming — and this question is not altogether free from doubt but it is not necessary to express any opinion in the matter in the present case — that the said provision would apply to cases of amendment of execution petition. In this view of the matter, the observations in the case of — 'Piramal Goenka v. Basanti Das Chatterjee', A. I. R. 1935 Cal. 614 at page 617 (A) of the report would not help the appellant and the argument of his learned Counsel on this point must fail.

(9) Upon the broader question, raised in the other part of Mr. Sarkar's argument under this head, the position seems to be this:

The authority of an executing Court to allow an amendment of a pending execution petition in appropriate cases under its inherent powers under Section 151 of the Code is now too well established to be questioned. Such authority to amend exists apart from and in addition to the express powers, conferred in that behalf under Order 21, Rule 17 of the Code, and may normally be exercised in favour of the decree-holder where, at the date of the application for amendment, no question of limitation arises in regard to the decree-holder's right to execute the decree. Cases of gross negligence on the latter's part may disentitle him to the exercise of the Court's discretion in his favour but, in the absence of any such negligence, even where the application for amendment is made apparently beyond the time limited by law for the making of the application for execution but where it could legitimately be treated as a continuance or continuation of the original execution petition the Courts have very often allowed the amendment. (Vide — 'Gnanendra Kumar v. Shayama Sunder', A. I. R. 1918 Cal. 73 (B) and — 'Sekendarali Meah v. Abdul Gafur', A. I. R. 1942 Cal. 306 (C). The matter is one of discretion of the executing court (Vide — 'Abdulla Asghar Ali v. Ganesh Das', A. I. R. 1933 P. C. 68 at p. 70 (D), — 'Nourangilal v. Sm. Charubala Dasi', AIR 1932 Cal 766 (E) and —'Rohini Kumar v. Krishna Prasad', 39 Cal. W. N. 1144 (F) and subject, possibly, as aforesaid, — that is, except where the law of limitation raises an insuperable bar or where the decree-holder has been guilty of gross negligence, — and where no equitable consideration stands in the way the power of amendment should, in our opinion, be liberally exercised.

(10) Tested in the above light, the order of the learned Subordinate Judge, allowing the decree-holder's prayer for amendment, appears to be quite correct. There is no question of limitation in the present case, the decree-holder can hardly be said to have been guilty of any negligence, circumstances have changed since the filing of the original application for execution, obliging the decree-holder to proceed against the immoveable properties of the judgment-debtor, and equity is entirely against the latter and predominantly in favour of the decree-holder. In our opinion, therefore, the acceptance of the decree-holder's prayer for amendment of the execution application cannot be successfully challenged in the circumstances of the present case and the appellant's argument in that behalf must fail.

(11) In support of the view, taken by us, reference may be made to the decisions of this Court reported in — 'A. I. R. 1932 Cal 766 (E)' 39 Cal. W. N. 1144 (F)' and — 'A. I. R. 1942 Cal 306 (C)' already cited, and to the Bombay decision reported in — 'Hanamappa Shidappa v. Ningappa Rangappa', A. I. R. 1948 Bom. 116 (G) and also to another decision of our Court reported in — 'Mohini Mohan v. Navadwip Chandra', A. I. R. 1919 Cal. 1054 (H) which was really a case of amendment of the execution petition, though not expressly dealt with as such, — to cite only a few of the numerous judicial decisions where similar views were taken. The cases, cited on behalf of the appellant, lay down nothing to the contrary. In the case of — 'Hayatunnessa Chowdhurani v. Achia Khatun', AIR 1924 Cal. 131 (I) their Lordships declined to exercise their discretion in favour of the decree-holder as, in their opinion, she was guilty of gross negligence. In the other case cited, namely, — 'Badrinarayan v. Baidya Nath', AIR 1935 Cal 143 (J), there was really no pending execution petition which the Court could have amended. In —'Aziz Rahman v. Bepin Behari', AIR 1938 Cal 162 (K), S. K. Ghose J. refused the decree-holders' prayer to proceed against the other properties, viz., the moveable of the judgment-debtors as that prayer had not been made by way of amendment of the execution petition and as, further, the decree-holders' right to execute the decree had become time-barred by the time the said prayer was made. These cases were all considered and fully explained in 'AIR 1942 Cal 306 (C)' already cited. This latter case itself was relied upon by the appellant's learned Counsel but, in our opinion, such reliance was misplaced. The case really supports the respondent as here, as in the case cited, the decree-holder has been compelled, by sheer pressure of changed circumstances, to apply for leave, by way of amendment of the execution petition, to proceed against the other properties of the judgment-debtor &, on the authority of that decision, therefore, this prayer ought to be granted. In our opinion, the amendment, prayed for in the present case, as in the case cited 'AIR 1942 Cal 306 (C)', has not "the effect of altering the character of the execution proceedings" and cannot, therefore, be rejected on that ground.

(12) There remains now only the case of 'AIR 1935 Cal 614 (A)'. This case also really supports the view we have taken above and the appellant's argument that in Piramal's case their Lordships were inclined to hold that O. 21, R. 22, C. P. C. applied also to cases of amendment of execution petitions, even if correct, would at best raise a question of procedure of regularity of the execution proceedings and would not really affect the Court's power of allowing an amendment to a pending execution petition. In any event, this case 'AIR 1935 Cal 614 (A)' would not, as already discussed before, be of any avail to the appellant in the facts and circumstances of the present case.

(13) We may also observe in passing that in a Bombay case —'Vallabhdas Narandas v. Kantilal G. Parekh', AIR 1947 Bom 430 (L) Kania J. as he then was, even went to the length of holding that " the Court has power to permit an amendment even after the period of limitation has expired" and a similar view appears also to have been taken in — 'Ram Sumaran Prasad v. Ram Bahadur', AIR 1923 Pat 224 (M). It is not, however, necessary for our present purpose to

examine the correctness of this seemingly broad proposition and it will be enough in this case to hold — as we have already held — that subject, at the most, to the limitations, already stated, the executing court has very wide powers in the matter of amendment of execution petitions. On this point and in support of this position, reference has already been made to a number of leading decisions and it is only necessary to say that neither the Full Bench case of — 'Ashgar Ali v. Troilokhya Nath', 17 Cal 631 (N) nor any of the three Patna decisions, reported in —'Jagannath Das v. Chamu Raghunath', AIR 1929 Pat 407 (O) — 'Ram Ranbijaya Prasad Singh v. Keho Prasad', AIR 1941 Pat 635 (P) and — 'Gajanand Sha v. Dayanand Thakur', AIR 1943 Pat 127 (Q), weakens this proposition. In all these cases, amendment was refused because of the learned Judges' view that the decree in question had, on the dates the prayers for amendment were made, become time-barred and, if that view were correct, the refusal of the amendment would be justified even on the principle we have ourselves laid down above. The position, therefore, which we have accepted and approved in this case would in no way be affected.

(14) Even apart from the question of amendment, there is another way of looking at the decree-holder's prayer for proceeding against the immoveable properties of the judgment-debtor. At the worst, it can be looked upon as a fresh execution. There is clearly no question of limitation involved in this case. The possible question under Or. 21, R. 22 C. P. C., has already been discussed and found in the respondent's favour. The only other objection that may arise on this part of the case treating the decree-holder's prayer as one for a fresh or independent execution — is on the ground of what may be called simultaneous execution in that, in allowing the decree-holder's prayer, the Court would be permitting him really, or, in substance, to start a second execution, namely, against the judgment-debtor's immovable properties, while the first one viz., that against his moveable assets in the shape of outstanding bills and security deposits, remains pending. The Code, however, does not prohibit simultaneous execution and the worst that can be said on this matter is that law leaves this question to the discretion of the executing court. In the circumstances of this case, as discussed above, that discretion would be properly exercised if the prayer for simultaneous execution is allowed. Regarded in this light too, the decree-holder's prayer for proceeding against the immoveable properties of the judgment-debtor cannot but be accepted and the appellant's objection to the entertainment of the same must fail.

(15) We, accordingly, overrule the first point raised by Mr. Sarkar in support of this appeal.

(16) The other question raised by Mr. Sarkar and touching more directly the order for sale of the immoveable properties of the judgment-debtor, is not altogether free from difficulty. In our opinion, however, the answer to this question really depends upon the construction of the Solenama decree — more particularly of terms 5 and 6 of the Solenama. If the said terms, properly construed, give to the compromise decree the effect of a charge decree, that is, of creating or embodying a charge, enforceable in execution, against the judgment-debtor's immoveable properties, the conclusion would immediately follow that the said immoveable properties can be sold straightway in the present execution case and no attachment also would be necessary and, in that view, the order of sale, as made by the learned Subordinate Judge, must be upheld. This position is incontestable as, under a series of uniform decisions, the proposition is well established in this Court that, when a charge is created by the decree and is enforceable in execution under the terms thereof, the statutory impediment, as contained in O. 34, Rr. 14 and 15 of the Code, does not apply and no suit is necessary or imperative in that behalf under the law. If, therefore, the above be the true construction of terms 5 and 6 of the compromise decree, this appeal must fail and the execution case must be allowed to proceed from the stage at which it was interrupted by reason of the order for stay, passed in this appeal.

(17) If, however, a different construction has to be adopted and under the said terms 5 and 6 of the Solenama the respondent must be limited to a mere money decree with only a declaration of charge, not enforceable in execution, upon the appellant's immoveable properties until the realisation of his dues, the decree-holder's obvious remedy — if he wants to enforce the charge — may well be only by way of a suit. It is true that, in such a case, in view of term 5 of the Solenama, the decree-holder may also proceed in this execution against the charged properties, not by way of enforcing the charge but by way of a simple money execution, but, in that event, he cannot proceed to sell the said properties without prior attachment, and the order for sale, as made by the learned Subordinate Judge, would, accordingly, require modification, and his order issuing the sale proclamation must be recalled and the execution must proceed afresh from the initial stage starting with the statutory attachment of the properties to be sold.

(18) We have carefully considered the relevant terms 5 and 6 of the compromise decree in their proper context and in our opinion, they ought to be construed as embodying a charge decree — and not a mere declaration of charge, not enforceable in execution — against the judgment-debtor's immoveable properties, mentioned in the schedule to the Solenama. The language of term 6 of the Solenama may not be quite happy but, reading that term along with the preceding term 5 in the light of the context and the relevant circumstances, it seems to us clear that the intention of the parties was that the charged properties also would be available to the decree-holder for realisation of his dues in execution.

(19) For the realisation of his said dues, the decree-holder is entitled under term 5 of the Solenama to execute his decree against all the properties of the judgment-debtor (including the disputed charged properties). Term 6 creates the charge over the said charged properties for the payment of the said dues. There is nothing in the Solenama to indicate that the charge, so created, would be merely declaratory and would not be enforceable in execution. In the circumstances, we are inclined to hold that the charge created is enforceable in execution, or, in other words, that the decree in question is also a charge decree against the disputed charged properties of the judgment-debtor.

(20) We are also of the opinion that when in a pending suit the parties come to a settlement and either party accepts a monetary liability and consents to a decree being passed against him in respect of the same, charging certain properties for the realisation of the decretal dues as in the present case, it is quite reasonable to hold that the charge, so created, would be enforceable in execution and would not, in the absence of express or specific words or any clear indication to the contrary, be merely declaratory, requiring a

fresh suit for its enforcement. Such a conclusion would indeed be quite legitimate as, ordinarily, there being already a pending suit, the parties would hardly be contemplating at the moment another suit for recovery of the self-same dues for which a decree is suffered and obtained in the pending suit itself. Different considerations may arise when the decree is not made on consent but, as regards consent decrees, the rule of construction, suggested above, seems to be quite apposite.

(21) In the light of the discussion, so far made, the charge created by term 6 of the Solenama, upon which the decree in the present case was passed, should be held to be enforceable in this execution. That charge was created by a decree and so Or. 34, Rr. 14 and 15 of the Code would not apply. The decree in question was a consent decree and there is no express or specific provision or clear indication therein that the charge created would be merely declaratory and would not be enforceable in execution but would require a fresh suit for its enforcement. On the other hand, as already found by us, the terms of the Solenama themselves suggest, on their proper construction, that a charge decree was intended by the parties. We do not, therefore, feel persuaded to accept or justified in accepting the Appellant's argument that, for the realisation of his dues from the charged properties, the Respondent has to proceed by way of a fresh suit and cannot sell the said properties in this execution, or, that at any rate, he cannot sell them in these proceedings as charged properties, that is, without first attaching them under Or. 21, R. 54 of the Code. We hold, therefore, that the learned Subordinate Judge was right, in the facts and circumstances of this case, in ordering sale — and that also without attachment — of the disputed properties in the present execution and the appellant's objection against the said order or orders must fail.

(22) The view we have taken above is quite in conformity with the trend of judicial decisions in this country. In numerous instances Courts have enforced charges, very much alike the present, in execution of the decree creating the same. Such instances include not only cases of consent decree (Vide: —'Ashutosh Bannerjee v. Lukhimoni Debya', 19 Cal 139 (FB) (R), — 'Indramani Dasi v. Surendra Nath', AIR 1922 Cal 35 (S), —Kashi Chandra v. Priyanath Bakshi', AIR 1924 Cal 645 (T), — 'A. C. Dustoor v. H. A. Kandawalla', AIR 1934 Cal 327, — 'Ambalal Bapubhai v. Narayan Tatyaba', AIR 1919 Bom 56 (V), —'Shankar Kondappa v. Ganpat Shankar', AIR 1929 Bom 227 (W), —'Gurupadappa v. Karveerappa', AIR 1934 Bom 241 (X), —'Chaurasi Mahasarick v. Bhagan Sahu', AIR 1924 Pat 20 (Y), —'Raghunandan Prasad v. Wajid Ali', AIR 1929 Pat 439 (Z) and — 'Sheonandan v. Mt. Asarfi Kuer', AIR 1946 Pat 216 (Z1) but also cases where the decrees were not made on consent: Vide — 'Brajasunder Deb v. Sarat Kumari', AIR 1916 Pat 252 (Z2) and —'Sowbagia Ammal v. Manika Mudali', AIR 1918 Mad 668 (Z3) where different consideration might have arisen, as hinted before. Even more extreme instances are to be found in — 'Tata Iron and Steel Co. Ltd., v. Charles Joseph Smith', AIR 1930 Pat 108 (Z4), — 'Krishna Prasad v. Pratap Narayan', AIR 1934 Pat 608 (Z5) and — 'Mool Chand v. Lalta Prasad', AIR 1934 All 524 (1) (Z6). The two cases of this Court reported in —'Gobinda Chandra v. Kailash Chandra', AIR 1918 Cal 705 (Z7) & — 'Sudhamoyee Singha v. Jessore Loan Co', AIR 1945 Cal 322 (Z8) do not really affect this position. In either of the said two cases, apart from the fact that the decree in question was not a consent decree, it appears clear from the Report that in the suit a prayer for sale of the charged properties had been made but was either expressly refused or not granted by the Court. Those cases are, therefore, clearly distinguishable from the present case and the other cases, cited above, and in either of them, the Court's refusal to enforce the charge in execution appears to have been fully justified. The two older cases of this Court, reported in — 'Abhoyessury Debee v. Gouri Sunkur', 22 Cal 859 (Z9) and — 'Matangini Dassee v. Chooneymoney Dassee', 22 Cal 903 (Z 10) and like decisions before the introduction of Or. 34 of the Code to replace the corresponding provisions of the Transfer of Property Act need not trouble us as the law has materially changed in the meantime and in the light of that change those older cases have been fully explained in the later judicial decisions : Vide 'AIR 1918 Mad 668 (Z 3) 'AIR 1922 Cal 35 (S)' and 'AIR 1919 Bom 56 (V)'. It seems further that those older decisions are not easily reconcilable with the Full Bench case of this Court, viz., '19 Cal 139 (R)', cited in the earlier part of this paragraph.

(23) It thus appears that the appellant's contentions in the present case are opposed alike to principles, precedents and authority and they cannot, therefore, be accepted. This appeal must, accordingly, fail and it is dismissed but, in the circumstances of this case, we make no order for costs in this Court.

(24) RENUPADA MUKHERJEE J.: I agree.

B/K.S.B. Appeal dismissed.

A. I. R. 1953 CAL. 681 (Vol. 40, C. N. 238)

MITTER AND S. K. SEN, JJ.

Mahammad Ali, Petitioner, v. The State.

Criminal Revn. Case No. 39 of 1953, D/-17-4-1953.

(a) Prevention of Corruption Act (1947), S. 5 (1) (c) and (4) — Prosecution of public servant either under S. 5(1)(c) or under Penal Code (1860), S. 409.

In face of the amendment made in s. 5 of the Prevention of Corruption Act, 1947, by the substitution of a new sub-s. (4) in place of the old one by the amending Act, 59 of 1952, it cannot be argued that the operation of that Act, in the case of a public servant, excludes the operation of S. 409, Penal Code. The amendment makes it clear that the prosecution can elect to charge a public servant either under S. 409 of the Penal Code or under s. 5 (1) (c) of the Prevention of Corruption Act, 1947. Hence, the trial of a public servant before a Special Judge under S. 409 of the Penal Code is valid. AIR 1952 Punj 89, Superseded by amending Act 59 of 1952. (Para 4)

(b) West Bengal Criminal Law Amendment Special Courts Act (21 of 1949) (as amended by West Bengal Act 12 of 1952), S. 4 — Trial by Special Judge — (Criminal P. C. (1898), S. 268).

Where a public servant is charged with an offence which is triable by a Special Judge along with an offence which is ordinarily triable by a Court of Session, both the charges can be tried by a Special Court under the provisions of S. 4 of West

Bengal Act 21 of 1949, as amended by West Bengal Act 12 of 1952. (Para 4)

Bireswar Chatterjee, for Petitioner; Jnanendra Nath Bakshi for the State.

CASE CITED:

(A) ('52) AIR 1952 Punj 89: 1952 Cri LJ 316

MITTER, J.: This is a petition for quashing certain proceedings under S. 409, Penal Code which are now pending against the petitioner in the Court of the Special Judge of Bankura. The petitioner, who is a postal peon, has been charged with criminal breach of trust in respect of Rs. 30/-.

(2) The prosecution case against the petitioner is as follows. On 14-8-1951, one Kanai Krishna Sircar of 157, Netaji Subhas Road, Calcutta, remitted a sum of Rs. 30/- by a postal Money Order addressed to his wife Shrimati Shibarani Sircar who was then residing at a village called Sahaspur in the district of Bankura. As she did not receive the money, she wrote a postcard to her husband enquiring about it. This postcard never reached her husband. On 27-8-1951, the petitioner saw the said Kanai Krishna Sircar at his Calcutta residence and confessed that he had misappropriated the money by forging the signature of the addressee of the Money Order in the acknowledgment portion of the Money Order. The petitioner refunded the money to Kanai & asked his forgiveness. Kanai, however, reported the petitioner to the Postal Authorities. Thereafter, the petitioner was sent up to stand his trial before the said Special Judge who, after having examined a number of witnesses, framed a charge against the petitioner under S. 409, Penal Code. On 2-1-1953, an application on the petitioner's behalf was made to the learned Judge questioning the legality of the said charge. By his order of the same date, the learned Judge adjourned the case to enable the petitioner to move the High Court and observed that the contention raised on the accused's behalf was not altogether without foundation. Later the same day, the Public Prosecutor asked for cancellation of the accused's bail, on the ground that the accused might take advantage of the adjournment to abscond. The learned Judge thereupon cancelled the petitioner's bail and remanded him to 'hajat'.

(3) The question for decision is whether, in view of the provisions of the Prevention of Corruption Act, 1947 (Act 2 of 1947), a charge under S. 409, Penal Code, is maintainable. S. 5(1)(c) of Act 2 of 1947 speaks of a category of misconduct which would include criminal breach of trust on the part of a public servant. Therefore, a public servant, when accused of criminal breach of trust, could also be accused of an offence under S. 5(1)(c) of Act 2 of 1947. Mr. Bireswar Chatterjee appearing on behalf of the petitioner contends, on the authority of the unreported case — 'Hemanta Kumar Das v. The State' which I decided, that the petitioner should be tried under Act 2 of 1947 and not under the Penal Code. This application originally came up before Chunder, J. who came to the conclusion that the petitioner could be tried either under S. 409, Penal Code or under S. 5(1)(c) of Act 2 of 1947. The learned Judge expressed his disagreement with my decision, which was of a single Judge, and referred this application to a Division Bench.

(4) For the purpose of disposing of this application, it does not appear to us to be necessary to go into the reasons for my decision in — Hemanta Kumar Das v. The State', nor into those which appealed to the learned Judge of the Punjab High Court who decided the case of — 'State v. Guru Charan Singh', AIR 1952 Punj 89 (A), which I followed, for, since my decision, S. 5 of Act 2 of 1947 has been amended by Act 59 of 1952 by the substitution, for sub-s. (4), of the following sub-section:

"(4) The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceedings which might, apart from this section, be instituted against him."

In face of this amendment, it cannot be argued that the operation of Act 2 of 1947 would, in the case of a public servant, exclude the operation of S. 409, Penal Code. It is true that the Special Act provides for certain rights to which an accused is not otherwise entitled. But the amendment quoted above makes it clear that the prosecution can elect to charge a public servant either under S. 409, Penal Code or under S. 5 (1)(c) of Act 2 of 1947. Any doubt which may have existed in this regard has been resolved by the amendment concerned. That being so, the petitioner's trial before a Special Judge under S. 409, Penal Code, must be held valid. Mr. Chatterjee argues that the facts alleged against his client disclose an offence under S. 471, Penal Code, which is triable by a Court of Session, and that, accordingly, the petitioner cannot be tried by a Special Judge. This argument is entirely beside the point, because the petitioner has only been charged with an offence under S. 409, Penal Code. It appears, moreover, that if a public servant is charged with an offence which is triable by a Special Judge along with an offence which is ordinarily triable by a Court of Session, both the charges could be tried by a Special Court under the provisions of S. 4 of West Bengal Act 21 of 1949, as amended by West Bengal Act 12 of 1952.

(5) In the result, this application fails and the Rule is discharged. There is no prayer for bail, but it seems to us that the order for cancellation of bail was unduly harsh. It would, therefore, be open to the petitioner to apply for bail.

(6) SEN, J.: I agree.

B/V.S.B. Rule discharged.

A. I. R. 1953 CAL. 682 (Vol. 40, C. N. 259)

DAS AND DEBABRATA MOOKERJEE JJ.

Bipra Charan Sarkar and another, Plaintiffs Appellants v. Sm. Rupeswari Dasi and others, Defendants Respondents.

Letters Patent Appeal No. 3 of 1951, D/- 20-4-1953, from judgment of Mookerjee J., reported in AIR 1951 Cal 523.

Civil P. C. (1908), O. 34, R. 1 — Effect of non-joinder.

Where in the case of a simple mortgage the mortgagee brings a suit on his mortgage but omits to implead a subsequent transferee (lessee from the landlord who had purchased the mortgaged property in execution of his rent-decree) in possession of a part of the mortgaged property and

obtains a decree and in execution of the decree purchases the mortgaged property but fails to get possession of the part transferred, he is not entitled to recover by suit possession of the said part from the transferee by compelling him to redeem, if on the date of the suit the right of the mortgagee to enforce his mortgage has become barred by limitation. AIR 1951 Cal 523, Affirmed. Case law discussed.

(Paras 4, 34)

Anno: Civil P. C., O. 34, R. 1 N. 19.

A. D. Mukherjee, for Appellants; Jnanendra Nath Bakshi, for Respondents.

CASES CITED:
(A) ('20) AIR 1920 PC 79: 47 Ind App 71 (PC)
(B) ('22) AIR 1922 PC 11: 48 Ind App 465 (PC)
(C) ('97) 1897 All WN 154: 19 All 541 (FB)
(D) ('47) 83 Cal LJ 200
(E) ('07) 6 Cal LJ 609
(F) ('29) AIR 1929 Cal 233: 33 Cal WN 100
(G) ('35) AIR 1935 Cal 139: 62 Cal 75: 38 Cal WN 1178
(H) ('38) AIR 1938 Cal 634: 42 Cal WN 1065
(I) ('41) AIR 1941 Cal 613: 45 Cal WN 883: ILR (1941) 2 Cal 209
(J) ('29) AIR 1929 PC 288: 51 Cal LJ 70
(K) ('31) AIR 1931 All 466: 53 All 1023 (FB)
(L) ('43) AIR 1943 Cal 577: 47 Cal WN 682
(M) ('07) 11 Cal WN 314
(N) ('33) AIR 1933 Cal 728: 37 Cal WN 897: 60 Cal 948
(O) ('38) AIR 1938 Cal 524: 42 Cal WN 721
(P) ('41) AIR 1941 Cal 484: 45 Cal WN 530
(Q) ('44) AIR 1944 Pat 119: 22 Pat 761
(R) ('05) 9 Cal WN 728: 32 Cal 891
(S) ('07) 5 Cal LJ 315: 11 Cal WN 403
(T) ('21) AIR 1921 Cal 157: 25 Cal WN 253
(U) ('27) AIR 1927 Cal 259: 45 Cal WN 4
(V) ('28) AIR 1928 Cal 116: 55 Cal 602: 46 Cal LJ 570
(W) ('48) AIR 1948 PC 89: 53 Cal WN 114 (PC)
(X) ('45) AIR 1945 Cal 135: 79 Cal LJ 114
(Y) ('23) AIR 1923 Cal 274: 28 Cal WN 92: 49 Cal 1048
(Z) ('33) AIR 1933 Cal 912: 60 Cal 1193

DAS J.: This is an appeal by the plaintiffs under Cl. 15 of the Letters Patent against the judgment of Mookerjee J. dated 6-9-1950.

(2) The disputed property and certain other property belonged to one Mohan Chand Choudhury. On his death the property devolved on his sons Doman, Satish and Ananta. Doman's widow is Damayanti, defendant 4. Satish and Ananta are defendants 2 and 3. In 1929 Doman as Katra of the joint family of the Choudhurys mortgaged the disputed property and certain other lands comprising about 12 bighas in favour of the plaintiffs. As the rent of the mortgaged property was unpaid the landlords instituted a suit for recovery of rent and obtained a decree and in execution thereof auction-purchased the said property on 8-6-1935. Thereafter the landlord auction-purchaser let out the disputed property about 6 bighas to defendant 1, Rupeswari, who is the mother of Satish and Ananta, defendants 2 and 3. The remaining lands viz. 6 bighas were let out to Damayanti, defendant 4. On 15-4-1940 the plaintiffs instituted a suit to enforce their mortgage of the year 1929. In that suit Damayanti, Satish and Ananta were made parties. Rupeswari, defendant 1 was, however, not made a party. The suit was decreed finally on 17-2-1942. In execution of the said decree the plaintiff decree-holders auction-purchased the mortgaged property on 25-5-1942. The sale was confirmed on 29-7-1952 and possession was taken through court on 10-12-1942. Thereafter the plaintiffs were resisted by defendants 1, 2 and 3 in obtaining possession about the months of January, February 1943. The plaintiffs accordingly filed the present suit on 17-6-1944 for declaration of their title and for recovery of possession. The suit was confined to 6 bighas which was let out to defendant 1 Rupeswari. The suit was contested by defendants 1, 2 and 3.

(3) As a result of a contested hearing the trial court dismissed the plaintiffs' suit and on appeal by the plaintiffs the judgment of the trial court was affirmed. The findings of the lower appellate court may be summarised thus: that the decree in the suit for rent and the sale held thereunder were not collusive, that defendant 1 Rupeswari took a lease on her own account from the landlord auction-purchaser and that she was in possession thereafter through her sons, defendants 2 and 3, Satish and Ananta, that the plaintiffs were not served by the landlord auction-purchaser with a notice under S. 167, Bengal Tenancy Act, and the plaintiffs' morgage was, therefore, not annulled, that the plaintiffs' claim on the mortgage bond was barred at the date of the present suit. Against the concurrent decisions of the courts below a second appeal was filed in this Court by the plaintiffs. The second appeal was dismissed on 6-9-1950 by Mookerjee J. In his judgment the learned Judge referred to what he calls "great divergence of judicial opinion" but preferred to follow the current of decisions in recent time. The learned Judge gave the plaintiffs leave to file an appeal under Cl. 15 of the Letters Patent. The present appeal was filed by the plaintiff in pursuance of the said leave.

(4) The sole question which has been canvassed in this appeal is a question of law viz., where in the case of a simple mortgage the mortgagee brings a suit on his mortgage but omits to implead a subsequent transferee in possession of a part of the mortgaged property and obtains a decree and in execution of the decree purchases the mortgaged property but fails to get possession of the part transferred, is he entitled to recover by suit possession of the said part from the transferee.

(5) The plaintiffs appellants contend that he is entitled to recover possession conditional on the exercise by the defendant of a right of redemption.

(6) It is not disputed that in the present case a suit on the mortgage in the plaintiff's favour was barred at the date of the present suit.

(7) Mr. A. D. Mukherjee, learned Advocate for the plaintiffs appellants, contends that irrespective of the question whether a suit on the mortgage in the plaintiffs' favour was barred at the date of the present suit or not, the plaintiff can recover possession from the defendant, the latter having merely a right to redeem.

(8) In support of his contention Mr. Mukherjee has referred us to a string of judicial decisions and has contended that the true view which emerges from these decisions is that the defendant who subsequently acquired the mortgaged property takes it subject to the plaintiff's mortgage and cannot resist eviction by the plaintiffs except by redeeming the latter.

(9) It cannot be disputed that under S. 48, T. P. Act, 1882, a prior mortgagee has a better security than a puisne mortgagee. His title to the property, however, dates from his auction-purchase in execution of a decree for enforcement of the mortgage. The question whether the title so acquired is perfect or not depends on the frame

of the suit which he initiates for enforcing his mortgage.

(10) The law relating to suits on mortgages was formerly contained in Ss. 85 to 90, 92 to 94 and 99, T. P. Act, 1882. These sections were supplanted by O. 34, Civil P. C. (Act 5 of 1908), hereinafter called the Code. The principal changes made, which are relevant for our purpose may be set forth as follows:

(1) the words 'in the mortgage security or in the right of redemption' occurring in S. 85, T. P. Act, have been substituted for the words 'the property comprised in the mortgage'.

(2) For the words 'must be joined' the words 'shall be joined' have been substituted.

(3) The proviso to S. 85 about knowledge of the plaintiff has been deleted.

(4) An explanation has been added in O. 34, R. 1.

(11) The effect of these alterations has been (1) to require the plaintiff to implead his co-mortgagees or holders of derivative title from them either as co-plaintiffs or as defendants to the suit; (2) join as defendants the mortgagors and persons claiming under derivative title from them; (3) to make it discretionary with a puisne mortgagee to implead a prior mortgagee unless the case comes within Ss. 61 and 67A, T. P. Act. The effect of non-joinder is now not a question of jurisdiction.

(12) An important change has also been made in Section 89, T. P. Act, 1882, viz., the words 'the defendant's (mortgagor's) right to redeem and the security shall both be extinguished' have been omitted in the corresponding rule in the Code, viz., Order 34, Rule 5. The effect of the alteration has been that while under S. 89 the effect of an order absolute for sale was to extinguish the right to redeem and the right to security (—'See Matru Mal v. Durga Kunwar', A. I. R. 1920 P. C. 79 (A)), under the Code, the security is not extinguished and a puisne mortgagee or a person interested in the right to redeem who is not made a party to the suit by a prior mortgagee can redeem only on payment of the sum due under the mortgage: — 'Mt. Sukhi v. Ghulam Safdar Khan', A. I. R. 1922 P. C. 11 (B).

(13) The question before us being whether the auction-purchaser under the decree in a suit by the prior mortgagee is entitled to possession or not, the relevant enquiry must be whether he has a title to present possession at the date of the suit (per Sir John Edge C. J. in — 'Hargulal Singh v. Govind Rai', 19 All 541, (F. B.) (C).

(14) In India, unlike in England, a simple mortgage merely confers on the mortgagee a right to sell the mortgaged property for realization of the mortgage money. The ownership and possession of the mortgaged property ordinarily remain with the mortgagor.

(15) In the case of a simple mortgage a sale in execution of the decree in a suit to enforce the mortgage passes to the auction-purchaser the rights of the mortgagor and of the other defendants to the suit as they subsist at the date of the auction sale.

(16) The result of the above discussion may be stated as follows:

If the defendants to the suit include the mortgagor and all persons interested in the right to redeem, the auction-purchaser, be he the mortgagee or a stranger to the mortgage decree, gets a complete title to the mortgaged property including a right to possession of the same.

If, however, the defendants to the mortgage suit do not at all represent the equity of redemption, the sale in execution of the decree does not pass the right of the mortgagor or of persons who are interested in the right to redeem but who are not impleaded in the mortgage suit, with the result that the auction-purchaser acquires merely the right to the security and cannot successfully sue the excluded persons for possession. — 'Meer Muhammad Hossein Kalimuddin Meerza v. Meerza Muhammad Amanulla', 83 Cal. L. J. 200 (D). The persons so excluded may however recover possession from the auction-purchaser if the latter dispossesses the former. The remedy of the auction-purchaser in such cases is merely to enforce the security if not already barred. — 'Habibullah v. Jagdeo Singh', 6 Cal. L. J. 609 (E), — Digambar Suthar v. Sujan', A. I. R. 1929 Cal. 233 (F); — 'Jagat Chandra De v. Abdul Rashid', A. I. R. 1935 Cal 139 (G); — 'Guruprasad v. Tarini Charan', AIR 1938 Cal. 634 (H); — 'Bidhuranjan Sarkar v. Soleman Pramanik', AIR 1941 Cal. 613 (I).

(17) Where, however, the defendants to the suit on the prior mortgage represent only some of the persons interested in the right to redeem, the sale in execution of the decree passed in the suit merely passes to the auction-purchaser the rights of the parties to the suit as also the right to the mortgage security, but the rights of persons interested in the right to redeem, who are omitted from the suit, remain unaffected.

(18) The logical result is that if the person omitted was a simple puisne mortgagee who had no right to possession, the auction-purchaser at the mortgage sale will be entitled to sue for possession in case his possession is disturbed by the puisne simple mortgagee. — Bijai Saran Sahi v. Rudra Bageswari Prasad', AIR 1929 P. C. 288 (J).

(19) If, however, the puisne mortgagee had in execution of a decree on his mortgage, auction-purchased the mortgaged property and had gone into possession, the auction-purchaser in execution of the decree in the suit on the prior mortgage to which the puisne mortgagee was not a party cannot sue for possession, because his auction-purchase leaves unaffected the rights of the former including the right to redeem and the right to remain in possession.

(20) In such a case a question may arise whether the purchaser in the prior mortgagee's suit can compel the former to redeem.

(21) If at the date of the suit by the purchaser in the prior mortgagee's suit, the right to enforce the mortgage security was not barred, the court may, with a view to prevent multiplicity of suits, adjust the rights of the parties in the same suit, even though the suit might have been framed as merely one for possession and require the defendant to redeem the prior mortgage. If, however, the claim of the prior mortgagee was barred at the date of the suit, the court will not compel the defendant to redeem merely because the defendant's purchase was subject to the right of redemption of the prior mortgagee. The reason is that redemption is a privilege and not a liability — 'A. I. R. 1929 P. C. 288 (J)', and that it would be unjust to compel the defendant to redeem the mortgage which had become barred. The auction-purchaser under the decree in a suit by the prior mortgagee cannot make a grievance because it was he who had failed to comply with the statutory obligation imposed under Order 34, R. 1 of the Code by not impleading the defendant who was a person interested in the right to redeem.

(22) In some cases a qualification on the above rule, based on the doctrine of 'lis pendens' has been introduced. Thus it has been held that

where during the pendency of a suit by a puisne mortgagee, the prior mortgagee obtains a decree on his prior mortgage without impleading the puisne mortgagee and purchases the property, the latter acquires the mortgagor's right but is liable to redeem the puisne mortgagee. — 'Ram Sanehi Lal v. Janki Prasad', AIR 1931 All. 466 (F. B.) (K); — 'Muhammad Jaman Mia v. Akali Mudiani', AIR 1943 Cal 577 (L).

(23) A question of some nicety arises where the suit on the prior mortgage precedes a suit on the puisne mortgage but in the race for the acquisition of the right of the mortgagor, the latter succeeds. — 'AIR 1935 Cal. 139 (G)'. The present case is however devoid of such complications.

(24) The view I have already expressed as regards the right of a prior mortgagee to get possession is supported by the decisions in — '19 All 541 (F. B.) (C)', — 'Aghore Nath Banerjee v. Deb Narain Guin', 11 Cal. W. N. 314 (M) — 'A. I. R. 1931 All. 466 (F. B.) (K); — 'Nihar Mala Debi v. Saroje Bandhu', A. I. R. 1933 Cal. 728 (N); — 'Dhapubai Mini v. Chandranath Chakravarti', AIR 1938 Cal. 524 (O); — 'Sailendra Nath v. Amarendra Nath', AIR 1941 Cal. 484 (487) (P)', — 'Ganga Prasad Singh v. Mt. Ganeshi Kuer', AIR 1944 Pat 119 (Q).

(25) I shall now deal with the cases to which our attention was drawn by Mr. Mukherjee. In the case of — 'Har Pershad Lal v. Dal Mardan Singh', 32 Cal 891 (R), the question was whether the purchaser in execution of a decree on a puisne mortgage was bound to redeem an auction-purchaser under a decree on a prior mortgage in a suit to which the puisne mortgagee was not made a party. The case came up in the first instance before a Bench consisting of Rampini and Brett JJ. The learned Judges having differed,the case was referred to S. C. Mitra J. The learned Judge held that the title of the prior mortgagee auction purchaser was not wholly void but was merely imperfect. The learned Judge passed a decree for possession conditional on redemption by the auction purchaser in execution of the puisne mortgage.

(26) The next case referred to was the case of — 'Gangadas Bhattar v. Jogendra Nath', 11 Cal. W. N. 403 (S). This case was decided by Mookerji and Holmwood JJ. The learned Judges relied on the decision in — 'Har Pershad Lal's case (R)', already cited, and they took the view that the rights of the competing purchasers can be adjusted in one and the same suit by permitting the purchaser in execution of the decree on the puisne mortgage the right to redeem the prior mortgagee.

(27) Both the above cases were decided on the state of the law as it stood before the repeal of sections 85 to 90, 92 to 94 and 99, T. P. Act. The case of — 'Kalu Sharif v. Abhoy Charan', A. I. R. 1921 Cal. 157 (T), as also the case of — 'Bhagaban Chandra v. Tarak Chandra', AIR 1927 Cal. 259 (U), turned on different state of facts and are distinguishable. In both these cases the auction-purchaser in execution of the decree on the puisne mortgage was the plaintiff and was seeking to get possession from the purchaser in execution of the decree on the prior mortgage. The learned Judges were of opinion that the only right which the purchaser in execution of the decree on the puisne mortgage had in such cases, was the right to redeem. These cases do not touch the present question where the plaintiff is the purchaser in execution of a decree on the prior mortgage and is seeking to dispossess the purchaser of the equity of redemption who is in possession.

(28) The case of — 'Bhodai Sheikh v. Barada Kanta Dutt', A. I. R. 1928 Cal. 116 (V) is also distinguishable. In this case the plaintiff was the purchaser of the equity of redemption who was seeking to oust the purchaser in execution of a decree on a prior mortgage. The only question debated was whether the suit which was one for possession should be permitted to be considered as a suit of redemption. The Bench (Rankin C. J. and D. N. Mitter J.) was of opinion that there was no bar to the suit for possession being so considered and to permit the plaintiff the right to redeem the auction-purchaser under the prior mortgage.

(29) Mr. Mukherjee also referred us to the case of — 'Subramania v. Seshama Raju', A. I. R. 1948 P. C. 89 (W). This case, in my opinion, does not bear on the present question. The question which arose for decision in the case was whether a sub-mortgagee from a fourth mortgagee was entitled to execute his decree against the auction-purchaser under the decree on the prior mortgage. Their Lordships were of opinion that the plaintiff could not succeed because an opportunity had been given already to the fourth mortgagee as also to the sub-mortgagee to redeem the prior mortgages.

(30) Since the appeal was argued Mr. Mukherjee has also drawn our attention to the decision in the case of — Hemanta Kumar v. Jitendranath', AIR 1945 Cal. 135 (X). This case, in my opinion, is clearly distinguishable. The facts of this case are that in 1929 a mortgage was executed in favour of the plaintiff's father. In 1932 a lease for ten years was granted by the mortgagor to defendant 1. The mortgagee obtained a decree on his mortgage in 1936. Defendant 1 was not made a party to the suit. The mortgagee decree-holder auction-purchased the mortgaged property in execution of his decree and took symbolical possession but having failed to get actual possession brought a suit for recovery of possession. The Bench was of opinion that the plaintiff could get possession subject to redemption by the defendant. It may be noted that in that suit the claim on the mortgage was not barred at the date of the suit for ejectment.

(31) The decisions cited by Mr. Mukherjee are therefore clearly distinguishable. In my opinion there is no such conflict of decisions as would necessitate a reference of this matter to a Full Bench.

(32) Mr. Mukherjee also referred us to a passage from Jones on Mortgage, para. 1395. The paragraph says that the right of a party interested in the equity of redemption who is not joined as a defendant in a suit on the mortgage is only to redeem and that such a person cannot maintain ejectment against the purchaser in execution of the mortgage decree. The above paragraph has to be read along with paras. 1792, 1793 of the said book. If the paragraphs are read together, the conclusion follows that if the owner of the equity of redemption either in whole or in part is not made a party to the mortgage suit a decree for foreclosure or sale would leave unaffected the rights of the excluded party including his right to remain in possession. The same view is expressed by Dr. Ghose in his law of Mortgage, 5th Edn. Vol. 1, p. 656. The view already expressed by me does not militate against the observations contained in the said treatise but receives support from the same.

(33) I may add that in the following cases viz., — 'Kristopada Roy v. Chaitanya Charan', A. I. R. 1923 Cal. 274 (Y); — 'A. I. R. 1933 Cal. 728 (N); — 'Surendra Lal Kundu v. Ahmmad Ali', A. I.R. 1933 Cal. 912 (Z); the decision of the court was rested on the question whether the mortgagee had

notice of the derivative title. In view of the repeal of S. 85, T. P. Act, the question of notice is in my opinion, not of much moment.

(34) In the present case the plaintiffs failed to implead in their suit defendant 1, Rupeswari, though she was in possession as lessee from the owner of the mortgage property. The decree obtained by the plaintiffs and their auction-purchase did not therefore affect Rupeswari's right to redeem or right to remain in possession. At the date of the present suit the plaintiff's right to enforce his mortgage was barred. The plaintiffs cannot therefore compel defendant 1 to redeem his mortgage. The suit instituted by the plaintiffs was therefore rightly dismissed by the courts below and by Mr. Mookerjee J.:

(35) This appeal is accordingly dismissed but in the circumstances of the case the parties will bear their own costs in this Court.

(36) DEBABRATA MOOKERJEE J.: I agree.

B/K.S.B. Appeal dismissed.

A. I. R. 1953 CAL. 686 (Vol. 40, C. N. 260)

S. K. SEN J.

Satya Prasad Mitra, Petitioner v. Panchugopal Das, Opposite Party.

Civil Rule No. 3148 of 1952, D/- 5-9-1952.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 — Supply of electricity.

The supply of electricity is not an easement annexed to a premises, it is a supply or service and accordingly if the rent was exclusive of the electric charges the supply could not be comprised in the tenancy. and S. 34 could not at all apply. (Para 4)

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 34 — Burden of proof — (Evidence Act (1872), Ss. 101 to 103).

No adverse inference can be drawn against the landlord for not producing the certified copy of the order of the Rent Controller fixing the standard rent. The burden of proof can never be on him but is on the tenant who is in the position of a complainant. (Para 5)

Anno: Evidence Act, Ss. 101 to 103 N. 3.

Mrinal K. Ghose, for Petitioner; Nilkantha Chatterji, for Opposity Party.

ORDER: This is a revision application under S. 32(4) of the West Bengal Premises Rent Control Act of 1950 from an order of Sri D. N. Das Gupta, Second Subordinate Judge, Alipore, dismissing an appeal from an order of the Rent Controller, Calcutta, in case No. 191A of 1951 imposing a fine of Rs. 100/- on the petitioner landlord for cutting off supply of electricity to the premises of the tenant opposite party.

(2) The opposite party Panchugopal Das took lease of a portion of the first floor of the house at 43 Sasthitala Road, Beliaghata Calcutta, at the rent of Rs. 12/- per month in 1942. The rent was thereafter increased and it was standardised at Rs. 24/- per month in case no. 2272B of 1947. On 24-1-1951, the tenant opposite party Panchu Gopal Das filed an application under S. 34 of the Rent Control Act 1950, before the Rent Controller alleging that the supply of electricity was included within the terms of the tenancy and that on 19-1-51 owing to failure of the landlord to pay the electric charges the Electric Corporation had discontinued the supply and that thereby the landlord had committed an offence under S. 34 of the Rent Control Act. The landlord took the defence that the supply of electricity was not included within the terms of the tenancy. The Rent Controller held that the supply of electricity was included within the terms of tenancy and imposed a fine of Rs. 100 as already stated. On appeal the learned Subordinate Judge upheld the order of the Rent Controller.

(3) In this revisional application it is urged that the learned Judge committed an error of law inasmuch as he did not consider the necessary ingredients of the offence under S. 34 of the Rent Control Act, 1950, and that he made a mistake of law in throwing the burden of proof on the petitioner who was in the position of an accused in a criminal case.

(4) The supply of electricity is not an easement annexed to a premises; it is a supply or service and accordingly S. 34 can apply only when supply of electricity is comprised in the tenancy of the premises. Accordingly the observation of the learned Subordinate Judge that even if rent was exclusive of the electric charges, the landlord could not be instrumental in cutting off the electric supply without incurring the liability under S. 34 of the Rent Act, 1950 must be held to be clearly unreasonable; if the rent was exclusive of the electric charges the supply could not be comprised in the tenancy, and S. 34 could not at all apply.

(5) In respect of the finding that the supply of electricity was comprised in the tenancy, the Court below relied on the fact that the order of the Rent Controller standardising rent at Rs. 24/- had been withheld by the petitioner and that accordingly a presumption against him could be made. But I must agree with the learned Advocate for the petitioner that the petitioner was in the position of an accused in a criminal case and the burden of proof could never be on him but was on the complainant opposite party who was in the position of a complainant. No adverse inference could be drawn against the petitioner landlord for not producing the certified copy of the order of the Rent Controller fixing the standard rent.

(6) As regards the oral evidence there was only one witness examined on behalf of the tenant opposite party, as against three witnesses on the side of the petitioner landlord stating that the supply of electricity was not included within the terms of the tenancy. The learned Subordinate Judge's observation that the statement of P. W. 1 Probodh Kumar Rana that he acted as an agent of the landlord in settling the terms of the tenancy was not denied by the landlord opposite party (now petitioner) cannot be regarded as strictly correct, because the petitioner's son Debiprasad Mitra who deposed as O. P. W. 1 stated that the terms of the tenancy were settled by him with the opposite party and that P. W. 1 Probodh Kumar Rana was not then present. This amounted to denial of the claim of Probodh Kumar Rana that he had as agent of the landlord settled the terms of the tenancy. In respect of the admission of the landlord peti-

tioner that he had actually paid the electric charges for the period of 2½ years up to 19-1-51 when the supply was cut off, the further statement of the landlord has to be considered that from 1942 to 1948 when the landlord and his family were at Deoghar, the opposite party tenant was paying the electric charges all along. Accordingly this circumstance that the landlord paid the electric charges for 2½ years could not be regarded as a conclusive circumstance showing that the supply of electricity was included in the terms of the tenancy. The order passed under S. 34 of the Rent Control Act is therefore unsustainable and must be set aside.

(7) The Rule is therefore made absolute and the order imposing the fine of Rs. 100/- on the petitioner under S. 34 of the Rent Control Act is set aside.

(8) There will be no order as to costs in this Rule.

B/D.H.Z. Rule made absolute.

A. I. R. 1953 CAL. 687 (Vol. 40, C. N. 261)

K. C. DAS GUPTA AND GUHA RAY JJ.

Surendra Nath and another, Petitioners v. Dandiswami Jagannath Asram and others, Opposite Party.

Civil Rule No. 1506 of 1952, D/- 4-9-1952.

(a) Hindu Law — Maths — Succession to mohuntship.

The fact that the nominee is too young as a 'sanyasi' is not a good or sufficient reason for rejecting his nomination if the custom permits the election of a very young 'sanyasi' as a 'mohunt'. Similarly, the fact that consecration takes place in view of the prospective appointment is no objection to succession to 'mohuntship.' (Paras 8 and 13)

(b) Hindu Law — 'Maths' — Succession to 'mohuntship' — Advertisement in newspapers.

The procedure of calling for applications for appointment of a 'mohunt' by advertisement in the papers is wholly unsuitable for filling the office of an important religious institution. (Para 10)

(c) Hindu Law — 'Maths' — Succession to 'mohuntship' — Nomination of 'mandali'.

It would be wrong to reject the nominations of the 'mandali' without strong reason. In making appointments for purposes of religious institution, it is fit and proper that the Court should have respect for the faiths and beliefs of worshippers of such institutions and should not substitute its own ideals, however modern they may seem, for those faiths and beliefs. When the religious institutions have for over a century followed a particular custom as regards appointment of 'mohunts' this should be held to be in consonance with the religious faiths and beliefs of worshippers. (Para 12)

Rajendra Bhusan Bakshi and Satya Priya Ghosh, for Petitioners; Samarendra Nath Dutt and Amal Kumar Mukherjee, for Opposite Party.

DAS GUPTA J. The petitioners are two of the persons who filed on 31-8-1935 a suit under Section 92, C. P. C. for removal of Triloke Chandra Giri from the 'Mohuntship of the Bhotbagan and Amdanga 'Maths,' for appointment of a fit and proper person as 'Mohunt' of these 'Maths', for the framing of a scheme for the proper management of the 'Maths' and for several other reliefs. A decree was passed in that suit on 30-9-1942 by which Triloke Giri was removed from the 'Mohuntship' and two new 'mohunts for the two 'Maths' were ordered to be appointed in subsequent proceedings. This decree having been since confirmed by this Court, in appeal the learned District Judge took up the matter of selection of persons for appointment as 'mohunt' on 10-12-1951 and passed the following order:

"The custom of selection of the 'Mohanta' of the 'Maths' concerned by the brotherhood of the Tarakeswar 'Mandali' appears to have been recognised by the Hon'ble High Court in its appellate judgment and the plaintiffs suggest that to be followed in making such appointments. I also think it proper that the brotherhood of the Tarakeswar 'Mandali' should be consulted in making such selection in accordance with the custom. So notice be issued to the members of the 'Mandali' as named in the plaintiffs' petition filed on 20-4-51 for appearance in my Court for the purpose on 28-1-52".

Four 'mohunts' of the Tarakeswar 'Mandali' were present on that date, the fifth being absent. The learned District Judge explained to the 'mohunts' the custom regarding the succession to the 'mohuntship' of Bhotbagan and Amdanga 'Maths' each and asked them to be guided by their conscience in making their selection. Three 'mohunts' Dandiswami Narahari Asram, Kshitish Chandra Puri and Khagendrananda Asram recommended the names of Dadiswami Dibyasram, a 'Sannyasi', for appointment as 'mohunt' of Bhotbagan 'Math'. The fourth, 'Mohunt' Jnanananda Saraswati who had offered himself as a candidate did not join in the nomination, but had nothing to say against the nominee. The three 'mohunts' mentioned above namely, Dandiswami Narahari Asram, Kshitish Chandra Puri and Khagendrananda Asram also recommended Dandiswami Aschyutashram, a 'Sannyasi', for appointment as mohunt of the Amdanga 'Math'. 'Mohunt' Jnanananda Saraswati expressed that he had no objection to the appointment of Dandiswami Achyutashram as a 'mohunt' of the Amdanga 'Math'.

(2) The nominees expressed their willingness to act as 'mohunts' of the two 'maths' in writing.

(3) The learned District Judge however instead of accepting the nomination straight-off decided to publish the names of nominees in newspapers and invited objections. Several objections were received and the learned District Judge considered all of them. One objection was that the nominees were set up by the machination of one Sri Kamalakhya Choudhury, Private Secretary to the 'Mohunt' Maharaj of Tarakeswar. Another objector contended that the correct procedure had not been followed. A third objection was that the nominee Dandiswami Dibyashram was not a 'Sannyasi' of the Dashnami sect and being still a 'dandi' was not qualified as a 'mohunt' of the 'Math'.

(4) All the objections were overruled by the learned District Judge. He however came to the conclusion that the nominees were not fit and eligible for 'mohuntship', on grounds not taken in the objections. The nominee for the Amdanga 'Math' was consecrated as a 'sannyasi' only a few months before the date of nomination. The learned District Judge said that as such the nomination was not free from suspicion as regards 'bona fides'. He further thought that at any rate he was

"too young as a 'Sannyasi' to command respect and to be eligible for all the spiritual services and obligations."

(5) As regards the nominee for the Bhotbagan 'Math' also, the learned District Judge pointed

out that his consecration as 'sannyasi' took place after the High Court's judgment in appeal and he observed:

"That may naturally raise some suspicion as to his 'bona fides', when we see that the other nominee Aschyutashram was similarly consecrated after that judgment, in 'Ashar' last year."

He added:

"There is thus room for suspicion raised specially from the time of consecration. But even if that is not entertained in all respect for the religious head, the nominee is, undoubtedly too young a 'Sannyasi' to command much respect and be fit for all spiritual services and obligations incidental to the post."

(6) It appears clear therefore that the learned District Judge had no reason to think that the two nominees were not fit and proper persons in view of their past character or lack of erudition or their religious experiences but thought that they were first, too young as 'sannyasis' and secondly that the fact that they had been consecrated after the High Court judgment raised grounds for suspicion about their 'bona fides'.

(7) The learned District Judge has himself observed in his order dated 10-12-1951 that the High Court in its appellate judgment has recognised the custom prevalent for selection of a 'mohunt' for these 'maths'. The appellate judgment held that the custom as found by the District Judge had been proved. The learned District Judge himself relied on the decisions in two previous cases to show what the custom was. It is useful to turn therefore to the decision of the Subordinate Judge Hooghly in Title Suit No. 17 of 1906 in which the case put forward by Triloke Giri, defendant in the present case, as regards the rule of succession was accepted. The learned Judge recorded his conclusion in these words:

"Considering the evidence, I am of opinion that in all Dasnami 'Maths' of this part of the Province the custom regulating succession to the office of a 'Mohunt' is the same and that elective system prevails in such 'Maths' in the matter of appointment of a 'Mohunt', the rule being that on the occasion of the death of a 'Mohunt', the other Dasnami 'Mohunts' of the brotherhood forming a 'Mandali' or some of them assemble to elect a successor either out of the disciples of the deceased or from those of another 'Mohunt', or when necessity arises to make a qualified Brahmin boy a 'Chela' of the deceased and then to elect him as a successor and that in the case of a deceased 'Mohunt' leaving a single 'Chela', his succession depends upon their confirmation, and I hold that the said rule governs the succession to the 'Gadi' of the 'Math' in suit."

In view of the decision of this Court in appeal in the present litigation we must proceed on the basis that the custom as indicated above in the 1906 suit is the custom still prevalent.

(8) As Mr. Bakshi has pointed out, the custom permits the election of a very young 'Sannyasi' as 'mohunt' and the fact that consecration takes place in view of the prospective appointment is no objection to succession to 'Mohuntship.

(9) The learned District Judge followed the correct procedure in asking for nomination by the several "mohunts' of Dashnami 'Maths' who were available. The question is whether he acted rightly in the exercise of his jurisdiction in rejecting that nomination and in calling for applications for appointment of 'mohunts' by advertisement in the papers.

(10) I may say at once that the procedure of calling for applications for appointment is wholly unsuitable for filling the office of an important religious institution. It is more than likely that really suitable persons would not agree to come forward as candidates; they would consider it undignified and indeed improper to ask for 'Mohuntship' and would be averse to make an application, for which 'tadbir' in a Court of law would be thought necessary.

(11) The system of selection by the 'Mandali' which on the finding of this Court must be held to be prevalent to regulate the succession to these two 'maths' is clearly eminently suitable. If there was any reason to think that the nominees of the 'Mandali' were not fit to be appointed, the proper course would be to ask the 'Mandali' for fresh nomination and not to by-pass the 'Mandali' altogether and to call for applications by advertisement in the papers. The extreme step of rejecting the 'Mandali' as a competent body to select 'mohunts' should not be lightly taken.

(12) It is equally clear in my opinion that it would be wrong to reject the nominations of the 'Mandali' without strong reason. In making appointments for purposes of religious institutions, it is fit and proper that the Court should have respect for the faiths and beliefs of worshippers of such institutions and should not substitute its own ideas however modern they may seem, for those faiths and beliefs. When these religious institutions have for over a century followed a particular custom as regards appointment of 'mohunts' this should be held to be in consonance with the religious faiths and beliefs of worshippers and indeed in the best interest of the institution, very much more so than any other system.

(13) While I am not prepared to say that the learned District Judge is bound to accept the nomination of these 'mohunts' of Dashnami 'Maths' forming the 'Mandali', I am clearly of opinion that the learned District Judge should not reject their nomination without compelling reasons. His view that the nominees were too young as 'sannyasis' is not, in my opinion, a good or sufficient reason for rejecting the nominations. It is, in my opinion, equally clear that the suspicion he had in his mind as regards their 'bona fides' is unjustified. It is more than likely that because these persons were thought suitable for selection as 'mohunts' that persons who were interested in the welfare of these 'Maths' took the step of inducing them to become 'sannyasis'. The fact that the step of consecration took place after the High Court's decree is therefore not a good reason for regarding the conduct of these nominees or those who nominated them with suspicion.

(14) I have, therefore, come to the conclusion that the learned District Judge acted irregularly in the exercise of his jurisdiction in rejecting the nominations made by the three 'mohunts' mentioned above, to which as I have already indicated. 'Mohunt' Jnanananda Saraswati who was himself a candidate for appointment of 'Mohunt' of Bhotbagan Math, did not raise any objection.

(15) I would, therefore, set aside the order of the learned District Judge calling for nominations and direct the District Judge to appoint Dandiswami Dibyashram as 'Mohunt' of Bhotbagan and Dandiswami Achyutashram as 'Mohunt of Amdanga 'Maths' in accordance with the nominations of the Tarakeswar 'Mandali'.

(16) The Rule is thus made absolute.

(17) There will be no order as to costs.

(18) Let the records be sent down as early as possible.

(19) GUHA RAY J.: I agree.

B/V.R.B. Rule made absolute.

A. I. R. 1953 CAL. 689 (Vol. 40, C. N. 262)

CHUNDER J.

Manindra Nath, Complainant, Petitioner v. Anil Chandra and others, Accused, Opposite Parties.

Criminal Revn. No. 627 of 1952. D/- 12-8-52.

(a) Criminal P. C. (1898), S. 202 — Scope — (Penal Code (1860), Ss. 499 and 500) — (Criminal Trial — Practice and Procedure).

Before a petition under S. 500, I. P. C. can be dismissed, the complainant is entitled to an opportunity to prove that the allegations made by the accused were really 'mala fide' statements. (Para 2)

Anno: Criminal P. C., S. 202 N. 1; Penal Code Ss. 499 and 500 N. 15.

(b) Criminal P. C. (1898), S. 202—"Inquiry."

If in the course of enquiry the person delegated to hold inquiry considered it necessary to get the explanation or report of the accused on any matter, there is no law to prevent him from getting such explanation or report, provided the accused is willing to give such explanation or report. It is really to prevent a person who may be innocent, being harassed day after day in a prolonged trial by simply allowing him to help an enquiring officer to ascertain the truth with the least cost and risk at the initial stage. As the Code has not by express words or by necessary implication prohibited taking an explanation from the person complained against, and as no reported decision actually says that it is absolutely illegal but considers in particular cases such a course to have been improper, the contention that the Assistant Registrar of Co-operative Societies was wrong in calling for an explanation of the accused cannot be sustained. (Para 2)

Anno: Cr. P. C., S. 202 N. 12, 14, 17.

(c) Criminal Trial—Practice and Procedure.

It is the first principle of law that a delegated authority cannot be further delegated unless he has been given power to delegate such delegated authority.

Thus, when an inquiry was directed to be made by the Assistant Registrar of Co-operative Societies, he was acting under a delegated authority and he could not delegate that duty to someone else. (Para 2)

Ajit K. Datta, for Petitioner; Nirmal K. Sen, for (No. 1), Amaresh Chandra Roy, for (Nos. 2 to 6), Nalin Chandra Banerji with Dhruba K. Mukherji, for (No. 5), for Opposite Parties.

ORDER: This Rule was issued at the instance of a complainant against an order dismissing the complainant's petition under S. 500, Penal Code. The complainant came to Court with the allegation that at the instance of one Krishna Chandra Mukherji, an auditor appointed under the Co-operative Societies Act, viz., Sri Anil Chandra Banerji, had 'mala fide' submitted an audit report containing grave allegations of a defamatory character against him.

(2) The learned Magistrate in dismissing the petition has now given reasons that unless the audit is done over again it is difficult to say whether the allegations are 'mala fide' or not. This is the main reason for dismissing the petition of complaint. Two things may be said against this. The first is that the complainant should then have been given an opportunity to prove that these were really 'mala fide' statements in the audit report by such materials as might satisfy the learned Magistrate or an enquiring officer. Before his petition can be dismissed in this case he is entitled to this opportunity. Secondly, the learned Magistrate did not, when the complaint was first filed before him, proceed to dismiss the application on this ground. On the other hand, he was of opinion that an enquiry was necessary. He sent the matter for enquiry to the Assistant Registrar of Co-operative Societies. It appears that the Assistant Registrar of Co-operative Societies asked for an explanation from Anil Chandra Banerji and then someone signing for the Assistant Registrar forwarded this explanation to the learned Magistrate which is said to be now the report of the Assistant Registrar. What the learned Magistrate should have done was to point out to the Assistant Registrar that he was to hold an enquiry and not merely act as a Post Office. If in the course of enquiry he considered it necessary to get the explanation or report of the accused on any matter as he has done, there is no law to prevent him from getting such explanation or report provided the accused is willing to give such explanation or report.

There are many very wide expressions in reported cases in enquiries under S. 202. An enquiry means that it is an enquiry 'prima facie' into the truth of the complaint—not an enquiry just to take down something which the complainant or some persons produced on his behalf may say. If to find out the truth the enquiring officer considers it desirable to get an explanation from the accused and the accused is willing to help him; there seems to be no reason whatsoever why that help also should not be availed of. By accused I mean the person complained against. It is the right of the person complained against not to be troubled till a Court has decided that he should be troubled by appearance in Court. If by following a procedure of getting an explanation to clear up facts from a person complained against anyone is prejudiced it is the accused who has the right not to be questioned till the proper time comes. What I have always failed to see is how the complainant in such a case can make a grievance of this if the accused has not considered it as prejudicial to him. The Court when it orders an enquiry 'prima facie' has not accepted the story of the complainant but wants the truth to be ascertained as far as possible at that stage to help the Court in arriving at a conclusion whether process should be issued or not and the person complained against put to the risk and costs of a criminal trial. If in trying to have proper light it is considered necessary to get things cleared up by the person complained against and the person complained against is willing to waive his right and render that help, I fail to see any reason in any of the decisions of any High Court on this subject why the person complained against should not be allowed, if he is willing to do so, to help the enquiring officer to ascertain the truth for the benefit of the Magistrate and for his own benefit also in saving him trouble and expense.

There is nothing to prevent this course in any of the sections of the Criminal Procedure Code nor do I think that judicial legislation as has been attempted in some of the cases is in the interest of justice at all. It is really to prevent a person who may be innocent being harassed day after day in a prolonged trial by

simply allowing him to help an enquiring officer to ascertain the truth with the least cost and risk at the initial stage. In any case, as the Code has not by express words or by necessary implication prohibited taking an explanation from the person complained against, and as no reported decision actually says that it is absolutely illegal but considers in particular cases such a course to have been improper, I cannot accept the contention that the Assistant Registrar was wrong in calling for an explanation of the accused. The learned Magistrate should have pointed out to the Assistant Registrar that an enquiry does not mean merely taking an explanation from the accused. The Assistant Registrar should also try to ascertain the truth from the complainant and give the complainant an opportunity to convince him of the truth of his allegations so that he may make a fair report of the whole thing to the Magistrate. The Magistrate should further have pointed out to the Assistant Registrar that the enquiry having been directed to be made by him should be made by himself. He cannot delegate that duty to someone else. He is acting under a delegated authority and it is the first principle of law that a delegated authority cannot be further delegated unless he has been given power to delegate such delegated authority.

(3) In the present case, therefore, as the learned Magistrate considered an enquiry necessary and as there has not been at all a proper enquiry, the learned Magistrate will send back the matter for further enquiry to the Assistant Registrar or to the Registrar, if he thinks that the enquiry would be made better by a superior officer, and indicate what is necessary to be done by such authority. The complainant may show to the Registrar or the Assistant Registrar by having a proper audit made at his expense by some other auditor whether the allegations made against him are justified or not and he may also give such further proof of 'mala fides' as he may be advised to do.

(4) As far as opposite parties Nos. 3 to 6 are concerned, Mr. Datta very fairly conceded that except allegations vague and worthless there is nothing against them on which step can be taken in a criminal Court. Therefore, the order of dismissal as far as opposite parties Nos. 3 to 6 are concerned will not be disturbed.

(5) As far as opposite parties Nos. 1 and 2 are concerned, the order of dismissal under S. 203 of the Code is set aside and the matter is sent back to the learned Magistrate for a further enquiry in the light of this judgment. The Rule is thus disposed of.

C/H.G.P. Rule disposed of.

*** A. I. R. 1953 CAL. 690 (Vol. 40, C. N. 263)**

BACHAWAT J.

Jugaldas Damodar Modi & Co., Petitioner v. Pursottam Umedbhai & Co., Respondent.

Award Case No. 56 and Award Case No. 32 of 1952 (Motion), D/- 27-1-1953.

(a) Contract Act (1872), S. 28 — Agreement to refer matters in dispute in pending suit (Arbitration Act (1940), S. 21).

Like other arbitration agreements a contract in writing to refer to arbitration matters in dispute in a suit, while the suit is pending, is legal. Such contract does not oust the jurisdiction of the Court and is not in restraint of legal proceedings. Section 21, Arbitration Act, 1940, pre-supposes that such contract is legal and that its subject-matter is lawful. (Para 8)

Anno: Contract Act, S. 28 N. 1, 4.

(b) Specific Relief Act (1877), S. 21 — Contract to refer to arbitration — (Arbitration Act (1940), Ss. 20, 21 and 34) — (Civil P. C. (1908), O. 23, R. 3).

A contract in writing to refer disputes in a pending suit is an arbitration agreement to which the provisions of the Arbitration Act of 1940 apply and therefore is not specifically enforceable save as provided by the Arbitration Act in view of S. 21, Specific Relief Act. Such contract does not arrest the further progress and trial of the suit. The contract is not an adjustment or compromise of the suit and cannot be enforced under O. 23, R. 3, C. P. C. (Para 9)

Such contract cannot be enforced and filed in Court under S. 20, Arbitration Act, 1940. The suit cannot be stayed under S. 34, Arbitration Act, 1940, on the strength of such contract as it was not entered into prior to the institution of the suit. On the joint application of the parties the Court may possibly under its general jurisdiction stay further proceedings in the suit. While the suit is pending such contract may be enforced under S. 21, Arbitration Act, 1940, on the joint application of the parties by an order of reference by the Court. (Paras 11, 12, 13)

Anno: Sp. Rel. Act, S. 21 N. 8; Arb. Act, S. 20 N. 1, 4; S. 21 N. 4; S. 34 N. 2; C.P.C., O. 23 R. 3 N. 9.

***(c) Arbitration Act (1940), Ss. 17, 30 and 47 — Award in arbitration pending suit without order of reference — Validity and enforcibility — (Civil P. C. (1908), O. 23, R. 3).**

If the parties to a pending suit agree to refer their dispute and proceed to arbitration without an order of reference by the Court, the arbitration is not under the provisions of the Arbitration Act, 1940. An award obtained in such arbitration is invalid and illegal and cannot be enforced under the provisions of the Arbitration Act or in the suit under the general law of contract or as accord or satisfaction or as a compromise under O. 23, R. 3, Civil P. C. (Paras 19, 21, 22, 30, 31, 38)

Sections 21 to 25 read with S. 47 have provided a specific machinery for arbitration in a suit and amount to a clear prohibition of the suit otherwise than by recourse to such machinery. An award otherwise obtained is illegal and invalid. It is, therefore, not enforcible by separate action even if a separate suit to enforce a valid award is maintainable. AIR 1949 Cal 350; AIR 1950 Orissa 169, Rel. on; AIR 1945 Mad 294, Disapproved. (Para 32)

Anno: Arb. Act, S. 17 N. 8; S. 30 N. 6; S. 47 N. 1; Civil P. C., O. 23 R. 3 N. 9.

(d) Arbitration Act (1940), S. 47, Proviso — Scope.

The proviso to S. 47 applies to all arbitration awards obtained otherwise than under the provisions of the Act and enables the consideration of the award as

a compromise or adjustment of the suit with the consent of all the parties interested, by the Court before which the suit is pending and by no other Court. Consent of the parties to the submission is not sufficient if there are other parties interested. The joint consent of all parties interested is necessary at the point of time when the Court is to take the award into consideration as a compromise or adjustment. Antecedent consent is immaterial just as antecedent invalidity does not debar the Court from recognising it as compromise by common consent. The proviso does not render the award valid nor does it make it enforcible as an award proprio vigore. The proviso enables the recognition of the award for a limited purpose by consent. Where such consent is withheld, it cannot be recognised even for that limited purpose. (Paras 36, 37)

Anno: Arb. Act, S. 47 N. 1.

(e) Arbitration Act (1940), Ss. 30 and 33 — Jurisdiction to adjudicate award as invalid.

There is nothing in the Arbitration Act, 1940 which precludes the Court from exercising its power to set aside an award and adjudicate it to be invalid under Ss. 30 and 33 where the award is invalid because it is not obtained in conformity with the machinery of the Act. The proper course is to declare it to be invalid under S. 33. (Para 41)

Anno: Arb. Act, S. 30 N. 7; S. 33 N. 1.

P. P. Ginwalla, for Petitioner; I. P. Mukharji with R. Gcho, for Respondent.

CASES CITED:

(A) (1912) 81 LJKB 1092: 1912-3 KB 257
(B) ('82) 1882 All WN 135: 4 All 546
(C) ('87) 1887 All WN 13: 9 All 168
(D) ('05) 1 All LJ 398: 27 All 53
(E) (1900) 4 Oudh Cas 17
(F) ('91) 50 Pun Re 1891
(G) ('82) 130 Pun Re 1882
(H) ('96) 23 Cal 956
(I) ('03) 30 Cal 218
(J) ('14) AIR 1914 Bom 184: 38 Bom 687
(K) ('14) AIR 1914 Sind 95: 27 Ind Cas 369
(L) ('75-76) 1 Cal 42
(M) ('21) AIR 1921 Bom 310: 45 Bom 245
(N) ('27) AIR 1927 Bom 565: 51 Bom 908
(O) ('30) AIR 1930 Bom 98: 54 Bom 197
(P) ('08) 35 Cal 199
(Q) ('25) AIR 1925 PC 293: 53 Ind App 1 (PC)
(R) ('02) 29 Cal 167: 29 Ind App 51 (PC)
(S) ('22) AIR 1922 Cal 404: 49 Cal 608
(T) ('17) AIR 1917 Cal 481: 21 Cal WN 387
(U) ('18) AIR 1918 Cal 336: 27 Cal LJ 339
(V) ('35) AIR 1935 Mad 1053: 158 Ind Cas 1071
(W) ('79) 4 Bom 1
(X) ('50) AIR 1950 Orissa 169: ILR (1950) Cut 1
(Y) ('49) AIR 1949 Cal 350: ILR (1945) 2 Cal 70
(Z) ('21) AIR 1921 Cal 238: 25 Cal WN 127
(Z1) ('27) AIR 1927 Cal 887: 55 Cal 538
(Z2) ('34) AIR 1934 Cal 643: 38 Cal WN 648
(Z3) ('35) AIR 1935 Cal 239: 39 Cal WN 480
(Z4) ('21) AIR 1921 Lah 232: 67 Ind Cas 123
(Z5) ('35) AIR 1935 Pat 243: 14 Pat 799
(Z6) ('39) AIR 1939 Rang 300: 1939 Rang LR 280 (FB)
(Z7) ('39) AIR 1939 Nag 186: ILR (1939) Nag 250 (FB)
(Z8) ('96) 19 Mad 290
(Z9) ('09) 1 Ind Cas 105: 11 Bom LR 20
(Z10) ('34) AIR 1934 Bom 140: 151 Ind Cas 156
(Z11) (1818) 36 ER 291: 1 Swans 43
(Z12) ('15) AIR 1915 Cal 101: 18 Cal WN 1325
(Z13) ('30) AIR 1930 Lah 860: 127 Ind Cas 705
(Z14) ('37) AIR 1937 Rang 287: 14 Rang 766
(Z15) ('32) AIR 1932 Pat 205: 11 Pat 237
(Z16) ('28) AIR 1928 Mad 1025: 51 Mad 800 (FB)
(Z17) ('42) AIR 1942 All 145: ILR (1942) All 357 (FB)
(Z18) ('21) AIR 1921 Sind 65: 16 Sind LR 174 (FB)
(Z19) ('31) AIR 1931 Oudh 127: 6 Luck 591
(Z20) ('47) AIR 1947 Cal 106: 231 Ind Cas 187
(Z21) ('45) AIR 1945 Mad 294: ILR (1946) Mad 39
(Z22) (1891) 60 LJQB 110: 1891-1 QB 245

JUDGMENT: I will deliver one judgment covering the 5 matters in the list.

(2) Purshottam Umedbhai & Co. instituted Suit No. 3660 of 1949 in which they seek to vindicate a claim against Jugaldas Damodar Modi & Co. A Cross Suit No. 479 of 1951 was instituted by Jugaldas Damodar Modi & Co. against Purshottom Umedbhai & Co. While these suits were pending the parties to the suits by an agreement in writing dated 19-10-1951, agreed to refer the disputes in both these suits to arbitration of one M. Mehta and to confer summary powers on the arbitrator. The parties also agreed to withdraw the suits on the re-opening of the Court after the long vacation. The parties proceeded to arbitration without a formal order of reference by the Court. On 17-11-1951, the arbitrator made an award directing Pursottom Umedbhai & Co. to pay a sum of Rs. 25,000/- to Jugaldas Damodar Modi & Co. On 18-2-1952 the award was filed in Court and the award case is numbered 52 of 1952. The award is before me for judgment. Notice of the filing of the award was duly given on 26-4-1952. On 20-5-1952, Purshottom Umedbhai & Co. took out a notice of motion in award case No. 56 of 1952 for an order that the award be set aside and vacated and that the arbitration be superseded. The award is impeached, 'inter alia', on the ground that agreement to refer matters in dispute in pending suits is void, illegal and not enforceable at all and that the subject-matter in these suits could not be referred to arbitration and that the arbitration and award pending suit on the submission to arbitration is invalid as the suits were pending and no order of reference was obtained. The award is impeached on other grounds also. By consent of the parties only the grounds of invalidity of pending of pure questions of law have been tried in the first instance.

(3) On 16-8-1952, Jugaldas Damodar Modi & Co. instituted Suit No. 3299 of 1952 against Purshottom Umedbhai & Co. for specific performance of the award and for payment of the sum of Rs. 25,000/- awarded in favour of the plaintiff, for refund of Rs. 2500/- lying in Court in Suit No. 3660 of 1949 and for an injunction restraining prosecution of Suits Nos. 3660 of 1949 and 479 of 1951.

(4) On 24-11-1952, Pursottom Umedbhai & Co. took out a notice of motion in Suit No. 3299 of 1952 and in Award Case No. 56 of 1952 for an order that the plaint in Suit No. 3299 of 1952 be taken off the file and the suit be dismissed and for an injunction restraining prosecution of the suit. On this notice of motion the parties agreed that the suit be treated as placed in the list and the following preliminary issues in the suit be tried:

(1) Whether or not the suit is maintainable?

(2) Whether or not the suit is barred by any provisions of law and, in particular, by S. 12, Arbitration Act?

At the trial of these preliminary issues it was contended that the award is invalid and unenforcible and further that a suit on an award is barred by the Arbitration Act of 1940.

(5) On 15-12-1952, Jugaldas Damodar Modi & Co. took out a notice of motion in Suit No. 3299 of 1952 for an order for stay of the notice of motion dated 20-5-1952 for setting aside the award and for an injunction restraining further proceedings in Suits Nos. 3660 of 1949 and 479 of 1951 pending disposal of Suit No. 3299 of 1952.

(6) All these matters have been heard and tried simultaneously.

(7) The above facts are all admitted and the following questions of law arise:

(1) Is the submission of matters in dispute in a suit, while the suit is pending, legal?

(2) Can the subject-matter of a pending suit be lawfully referred to arbitration?

(3) Is such submission specifically enforcible?

(4) Is the award on such submission without any order of reference by the Court lawful and valid?

(5) Is such award enforcible at all?

(6) If so, is it enforcible by a separate suit?

(8) Like other arbitration agreements a contract in writing to refer to arbitration matters in dispute in a suit, while the suit is pending, is legal. Such contract does not oust the jurisdiction of the Court and is not in restraint of legal proceedings: S. 28, Contract Act. Matters in difference in a pending suit can lawfully be referred to arbitration; —'Doleman v. Ossett Corporation', (1912) 3 K B 257 at pp. 267-269 (A). Section 21, Arbitration Act, 1940, pre-supposes that such contract is legal and that its subject-matter is lawful.

(9) Formerly there was conflict of opinion on the point whether such contract and refusal to arbitrate under it, barred the pending suit by virtue of S. 21, Specific Relief Act. The Allahabad High Court held that the suit was barred: — 'Saligram v. Jhunna Koer', 4 All 546 (B); — 'Sheoambar v. Deodut', 9 All 168 (C); — 'Sheo Dat v. Sheo Shankar', 27 All 53 (D). The better view was that the suit was not barred: — 'Raza Ali v. Fida Ali', 4 Oudh Cas 17 (E) and — 'Fakir v. Jaimal', 50 Pun Re 1891 (F) — 'Budha v. Haku', 130 Pun Re 1882 (G). This section cannot apply as refusal to arbitrate before institution of the suit is necessary to attract the bar under the section. 'Crisp v. Adlard', 23 Cal 956 (H). The section has been successively amended. Now it does not apply to contract to refer, to which the provisions of the Arbitration Act of 1940 apply. A contract in writing to refer disputes in a pending suit is an arbitration agreement to which the provisions of the Arbitration Act of 1940 apply. Such contract does not arrest the further progress and trial of the suit. It is well settled that the contract is not an adjustment or compromise of the suit and cannot be enforced under O. 23, R. 3, C. P. C., 1908. 'Tincowry Dey v. Fakir Chand Dey', 30 Cal 218 (I), — 'Vyankatesh v. Ramchandra', AIR 1914 Bom 184 (J); — 'Ghulam Dastagir Khan v. Ghulam Hussein Khan', AIR 1914 Sind 95 (K).

(10) The Court of Chancery never decreed specific performance of a contract to refer to arbitration. '(1912) 3 K B 257 at p. 270 (A)'. 'Koeglar v. Coringa Oil Co.', 1 Cal 42 at p. 49 (L). Because of S. 21, Specific Relief Act such contract is not specifically enforcible save as provided by the Arbitration Act, 1940.

(11) Such contract cannot be enforced and filed in Court under S. 20, Arbitration Act, 1940. It was clear that the contract could not be filed even under para 17 Sch. II, C. P. C. 1908: — 'Manilal Motilal v. Gokuldas Rowji', 45 Bom 245 at pp. 248-9, 266-8 (M); — 'Chanbasappa v. Baslingayya', AIR 1927 Bom 565 at pp. 573-4; 578; 580-1 (N); — 'Dinkarbai v. Yasavantrai', AIR 1930 Bom 98 (O).

(12) The suit cannot be stayed under S. 34, Arbitration Act, 1940, on the strength of such contract as it was not entered into prior to the institution of the suit. 'AIR 1914 Bom 184 (J); — 'Ramjidas v. Howse', 35 Cal 199 (P). On the joint application of the parties the Court may possibly under its general jurisdiction stay further proceedings in the suit. 'Ram Protap Chamaria v. Durga Prasad Chamria', AIR 1925 PC 293 (Q).

(13) While the suit is pending such contract may be enforced under S. 21, Arbitration Act, 1940, on the joint application of the parties by an order of reference by the Court.

(14) Complicated questions of law arise if the parties proceed to arbitration and obtain an award without an order of reference by the Court on the strength of the arbitration agreement while the suit relating to the subject-matter is pending. In England such award is legal and partakes of the character of "accord satisfaction by substituted agreement" and is a good defence arising subsequent to the suit: — '(1912) 3 KB 257 at pp. 272, 263, 267 (A). The scheme of arbitration of disputes in a pending suit and the history of legislation with regard to such arbitration is very special in our country and we must turn to them for the solution of the problem.

(15) At the outset it is necessary to remove a possible misconception. The arbitration and award in such case does not infringe the rule in — (1912) 3 KB 257 (A)' namely, that where an action has been commenced on the subject-matter of a contract containing any arbitration clause and is pending and an application for stay of the suit is not either made, or if made, is refused an award made subsequent to the commencement of the action under such arbitration clause is invalid. This rule was followed in India under the Arbitration Act of 1899 and the C. P. C., 1908. The ground of this rule was that an arbitration clause does not oust the jurisdiction of the Court, and, as a corollary, the domestic tribunal under such submission cannot compete with the public tribunal and cannot by an award oust its jurisdiction. The domestic tribunal, therefore, becomes 'functus officio' on the institution of the action. The rule is not a rule of public policy. It is based upon the construction of S. 4, English Arbitration Act, 1889 and of corresponding sections in the Indian Law and a necessary consequence of the failure to obtain stay of the suit under those sections. By the express language of the Judges who enunciated this rule, the rule does not apply to submission to arbitration entered into after the commencement of the action and to an award under such submission: — '(1912) 3 K B 257 at pp. 269, 272 273 (A). In place of the strict rule in — 'Doleman's case (A)', the rule embodied under S. 35, Arbitration Act, 1940 now prevails in our country.

(16) The Arbitration Act, 1940 contemplates three classes of arbitration, viz., (1) arbitration in suits, (2) arbitration with the intervention of the Court where there is no suit pending and (3) arbitration without the intervention of the Court. The Code of Civil Procedure (Act 14 of 1882) and the Code of Civil Procedure Act 5 of 1908 also dealt with arbitration under three similar heads. 'Ghulam Khan v. Mahommed Hossain', 29 I. A. 51 (PC) (R); — 'AIR 1927 Bom 565 at p. 577 (N); —

'Amarchand Chamaria v. Banwarilal', AIR 1922 Cal 404 at pp. 405-6 (S).

(17) Sections 21 to 25, Arbitration Act like the Code of Civil Procedure 1908 — Sch. II — paras. 1 to 16 and the Code of Civil Procedure 1882 — Ss. 506 to 521 contain a special scheme for arbitration where the parties to a suit agree to refer to arbitration matters in difference with them in the suit. The parties may apply in writing to the Court for an order of reference to the arbitrator and the Court then shall make an order of reference on the matter in difference in the suit between them, if all the parties interested agree and apply. It may make the order if some of the parties apply and the matter in difference between them may be separated from the rest of the subject-matter of the suit. The Court must by the order of reference fix the time for the making of the award. Its jurisdiction to try the suit in open Court is arrested on the making of the order of reference but not before. On the making of the order, the Court cannot, save as provided for in the Arbitration Act, deal with the matter referred. It does not even then part with the duty of supervising the proceedings before the arbitrator: — 'AIR 1952 PC 293 (Q)'. The proceedings before the arbitrator from first to last is under its supervision and control: — '29 Ind App 51 (PC) (R)', and is a substitute for the trial of the suit in open Court. The award must be filed in the Court in which the suit was pending and that Court alone can deal with the award and pass judgment on it.

(18) The agreement to refer the matter in difference in the suit is a condition of the reference but the actual reference is the order of the Court: — '29 Ind App 51 (PC) (R)'. The foundation of the arbitration proceedings is not the agreement but the order of reference. The award on such reference does not bind even the parties to the agreement where the order of reference for some reason or other is invalid. — 'Doolychand v. Mamooji', AIR 1917 Cal 481 (T); — 'Girija Nath v. Kanailal', AIR 1918 Cal 336 (U); or where the award is not authorised by the order of reference: — 'AIR 1925 PC 293 (Q)'; — 'Lakshminarasu v. C. Nagamma', AIR 1935 Mad 1053 (V). The agreement does not give life and vitality to the arbitration and award independently of the order of reference because the parties did not intend to arbitrate independently of the order of the Court made on their joint application. They intended to go to arbitration under the reference by the Court.

(19) If the parties to a pending suit agree to refer their dispute and proceed to arbitration without an order of reference by the Court, the arbitration is not under the provisions of the Arbitration Act, 1940.

(20) Before the Arbitration Act, 1940, it was well settled that paras. 1 to 16 and Sch. 2, Civil P. C., 1908, were the only provisions of law which provided for arbitration in suits and under which the Court's jurisdiction to determine the disputes in suit after regular hearing could be ousted by submission and award. The parties to a suit who desired to refer their disputes to arbitration were required to go to the Court for an order of reference, if they desired the arbitration proceedings to continue under Sch. II, Civil P. C., 1908. An award on a submission of matters of difference in a suit without an order of the Court could not be enforced either under paras. 20-21 of Sch. II, Civil P. C., 1908 or under the Arbitration Act, 1899. — 'AIR 1921 Bom 310 at pp. 313, 316 (M), overruling — 'Harivalabdas v. Utamchand', 4 Bom 1 (W); — 'AIR 1927 Bom 565 at pp. 573-4; 578-9; 581 (N); — 'AIR 1922 Cal 404 at p. 405 (S)'.

(21) Similarly, Ss. 21 to 25, Arbitration Act, 1940, are the only provisions of law which now provide for arbitration in suits and under which the Court's jurisdiction to determine the disputes in suit after regular hearing can be ousted or suspended by award on a submission subsequent to suit. The trial of the suit is not arrested by arbitration and award on private submission made after the institution of the suit without an order of reference by the Court. — 'Indramoni v. Nilamoni', AIR 1950 Orissa 169 at p. 174 (X). The parties to a suit who desire to refer their disputes to arbitration must come to the Court for an order of reference if they wish the arbitration proceeding to continue under the Act. If they proceed to arbitration without an order of reference the award cannot be enforced under the Arbitration Act, 1940. — 'Ariff v. Bengal Silk Mills', AIR 1949 Cal 350 at p. 354 (Y).

(22) On this broad ground an award on a submission of matters in difference in a pending suit without an order of reference by the Court cannot be enforced under Ss. 14 to 17 or any other provisions of the Act. I base my conclusion on this broad ground notwithstanding that the scheme and wording of Ss. 14 to 17, Arbitration Act, 1940, are somewhat different from those of paras. 20 and 21 of Sch. II, Civil P. C., 1908. In — 'AIR 1950 Orissa 169 at p. 173 (X)', Roy C. J. has given other reasons for this conclusion.

(23) Before the Arbitration Act of 1940, our Court went further and held that arbitration on matters of difference in a suit could take place only under the provisions in paras. 1-16, Sch. II, Civil P. C., 1908 and under no other provision of law and that an award on such matter was required to conform to those provisions. "It is difficult to see" observed Rankin J. in — 'AIR 1922 Cal 404 at pp. 405-6 (S)':

> "what point there is in Sch. 2 saying or meaning that arbitration must be done in a particular way if, according to some other law or principle, it may still be done in another way. In any case the logical gap, if there be any, is stopped up by S. 89. Without adverting any further to the terms of S. 89, I desire to point out that if a submission to arbitration of matters in difference in a suit is to take place, there is no provision for it other than the provisions in Sch. 2."

(24) Our Court held that S. 89, Civil P. C., 1908 refers to a piece of legislation on the subject-matter of arbitration and did not let in O. 23, R. 3, Civil P. C., 1908 and consequently an award on a submission of matters in difference in the pending suit without an order of reference by the Court could not be enforced in the suit under the general law of contract or as accord or satisfaction or as a compromise under O. 23, R. 3, Civil P. C., 1908. — 'Dekari Tea Co. Ltd. v. India General Steam Navigation Co. Ltd.', AIR 1921 Cal 238 (Z); — 'AIR 1922 Cal 404 (S)'; — 'Guimoni Dasi v. Tarini Charan', AIR 1927 Cal 887 (Z1); — 'Rohini Kanta v. Rajani Kanta', AIR 1934 Cal 643 (Z2); — 'Muhammad Mia v. Osman Ali', AIR 1935 Cal 239 (Z3). This view was followed and accepted by the Lahore, Patna, Rangoon and Nagpur High Courts. — 'Hariprasad v. Mt. Soogini Devi', AIR 1921 Lah 232 (Z4); — 'Bhimraj v. Munia', AIR 1935 Pat 243 (Z5); — 'Maung Hlay v. U Ge', AIR 1939 Rang 300 (FB) (Z6); — 'Ramdayal v. Sheodayal', AIR 1939 Nag 186 (Z7).

(25) An arbitration proceeding on a submission of matters in difference in suit without reference by the Court was illegal and the resulting award was a nullity. — 'AIR 1927 Cal 887 (Z1)'. On this ground alone even before the Arbitration Act, 1940 such award could not be enforced by separate action.

(26) It is well to bear in mind that an award validly made can be specifically enforced on the same principles on which a contract can be specifically enforced. It is not a necessary condition of such enforcement that the award has been subsequently acquiesced in or agreed to. This has been always the law in our country. Specific Relief Act, Section 30; — 'Krishna Panda v. Balaram Panda', 19 Mad 290 (Z8); — 'Laldas Jibhai v. Bai Lala', 11 Bom LR 20 (Z9); — 'Govindlal v. Manekchowk S. W. Mills Co.', AIR 1934 Bom 140 (Z10); and also for over a century the law in England. — 'Woo v. Griffiths', (1818) 1 Swans 43 at p. 54 (Z11); Halsbury's Laws of England, Vol. 31, Art. 478; Russell on Arbitration 14th Edition, p. 208. I venture to say this notwithstanding the contrary opinion of Ray C. J. in — 'AIR 1950 Orissa 169 at p. 180 (X)'. The ground of non-enforcibility of an award on a submission of matters in difference in a pending suit without reference by the Court is not that the award has not been subsequently agreed to or acquiesced in. The non-enforcibility is based on much wider and different grounds.

(27) A distinct and subsequent agreement to abide by such award was always enforceable as a compromise even in our Court and in those Courts which followed the view of this Court. — 'Srilal v. Arjundas', AIR 1915 Cal 101 (Z12); — 'Nihal Singh v. Ashtawakar', AIR 1930 Lah 860 (Z13); — 'Alagappa Chettiar v. A. K. R. M. M. K. Chettyar Firm', AIR 1937 Rang 287 (Z14); — 'Ramadhar Rai v. Subedar', AIR 1932 Pat 205 (Z15). What was enforced in such case as compromise was not the award but the subsequent agreement between the parties directly settling the dispute.

(28) The Bombay High Court agreed that an arbitration on such submission was not an arbitration under Sch. II, Civil P. C., 1908 or the Arbitration Act, 1899. That Court, however, held that para. 1 of Sch. II was permissive and did not prohibit arbitration on matters of difference in suit without recourse to the machinery of paras. 1 to 16 of Sch. II and that the award could be enforced as a compromise under the provisions of O. 23, R. 3, Civil P. C., 1908. That Court held that the operation of other laws like O. 23, R. 3, Civil P. C., 1908 was saved by S. 89 and accordingly such award could be pleaded in defence in the suit and could also be enforced by a separate suit in which an application for stay of the original suit could be made. — 'AIR 1921 Bom 310 at pp. 315, 320 (M); — 'AIR 1927 Bom 565 at pp. 573 (N).

(29) The Madras, Allahabad, Oudh and Sind High Courts also came to similar conclusions. — 'Subbaraju v. Venkataramaraju', AIR 1928 Mad 1025 (Z16); — 'Dular Koeri v. Payag Koeri', AIR 1942 All 145 (Z17); — 'Haji Umar v. Shivaldas', AIR 1921 Sind 65 (Z18); — 'Basaoo v. Jagan Nath', AIR 1931 Oudh 127 (Z19).

(30) The Arbitration Act, 1940 now replaces Sch. II and S. 89, Civil P. C. 1908 and also the Arbitration Act, 1899. Sections 21 to 25 and the first part of S. 47, Arbitration Act, 1940 correspond to S. 89 and Sch. II — paras. 1 to 16, Civil P. C., 1908. Under this Act also arbitration of matters in difference in suit can take place under the provisions of Ss. 21 to 25, Arbitration Act and under no other provisions of law and an award on matters in difference in suit without a reference by the Court is not enforcible in the suit under the general law of contract or as accord or satisfaction or as a compromise under O. 23, R. 3, Civil P. C., 1908. — 'AIR 1950 Orissa 169 (X).

(31) The award being invalid and illegal is not enforcible by separate action. It is not necessary to consider whether a suit to enforce a valid award is now maintainable. The award is invalid and unenforcible even if such suit lies under the Arbitration Act, 1940.

(32) Sections 21 to 25 read with S. 47 have provided a specific machinery for arbitration in a suit and amount to a clear prohibition of the suit otherwise than by recourse to such machinery. An award otherwise obtained is illegal and invalid. It is, therefore, not enforcible by separate action even if a separate suit to enforce a valid award is maintainable under the Arbitration Act, 1940.

(33) In — 'AIR 1949 Cal 350 at p. 354 (Y), an award governed by the Arbitration Act, 1940 was set aside 'inter alia' on the ground that it was an award on submission of matters in difference in suit without an order of reference by the Court and was as such not enforcible under the Act and consequently invalid. The award was made by a Judge of this Court as umpire in the form of a judgment and decree and in appeal it was not contended that if the Judge was acting as umpire, his award ought not to have been set aside. — 'Bengal Silk Mills Co. Ltd. v. Aisha Ariff', AIR 1947 Cal 106 at p. 108 (Z20).

(34) Section 47 now has a proviso which had no counterpart in the previous Arbitration Law. It is well known that this proviso was enacted to resolve the conflict of opinion in favour of the Calcutta view — in consequence of para. 20 of the recommendation of the Civil Justice Committee. Section 47 reads as follows:

"Section 47: Subject to the provisions of S. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment to a suit by any Court before which the suit is pending."

(35) In the context of the first part of the section, "an arbitration award otherwise obtained" plainly means "an award obtained otherwise than under the provisions of the Arbitration Act". Parties to suit desiring to arbitrate are required to comply with the provisions of the Arbitration Act and an arbitration can take place under the provisions of the Act and under no other provisions of law. An award on submission of matters in difference in suit without an order of reference by the Court is "an arbitration award otherwise obtained", for parties to a suit desiring to arbitrate must go to the Court and obtain an order of reference.

(36) On a plain grammatical construction of the proviso, it is not confined to an award on matters in difference in suit without an order of reference by the Court, but is applicable to "all arbitration awards otherwise obtained" which may be taken into consideration as a compromise or adjustment of a pending suit.

(37) The proviso enables the consideration of the award as a compromise or adjustment of the suit with the consent of all the parties interested by the Court before which the suit is pending and

by no other Court. Consent of the parties to the submission is not sufficient if there are other parties interested. The joint consent of all parties interested is necessary at the point of time when the Court is to take the award into consideration as a compromise or adjustment. Antecedent consent is immaterial just as antecedent invalidity does not debar the Court from recognising it as compromise by common consent. The proviso does not render the award valid nor does it make it enforcible as an award proprio vigore. The proviso enables the recognition of the award for a limited purpose by consent. Where such consent is withheld, as in this case, it cannot be recognised even for that limited purpose.

(38) An award on submission of matters in difference in a pending suit without an order of the Court not being in conformity with the provisions of the Arbitration Act was and is invalid and unenforcible and continues to be so.

(39) I am aware that my opinion clashes with the observations in — 'Aramugha v. Balasubramania', AIR 1945 Mad 294 (Z21), and also with some of the observations in — 'AIR 1950 Orissa 169 at p. 180 (X). Those observations are based upon principles and concepts which were never recognised as sound by our Court.

(40) Ray C. J. in — 'AIR 1950 Orissa 169 at p. 178 (X)', seems to suggest that such award cannot be reviewed and set aside as it is under a reference not contemplated by the Act. In support of this view, he cites: — 'Darlington Wagon Co. v. Harding', (1891) 1 QB 245 (Z 22). The Court there had the statutory power to refer a pending suit to an arbitrator and the award of the arbitrator made on such reference unless set aside by the Court was under the statute equivalent to a verdict of the Jury. The Court, however, by consent of the parties referred all matters in difference including differences which were not the subject-matter of the suit. One of the parties moved to set aside and remit an award made on such reference. It was contended that the Court could review the award like a verdict of the jury and ascertain whether the arbitrator had been mistaken in law. It was held that the reference was not made under the statute and, therefore, was not reviewable as if it was a verdict of the jury. That case did not decide that the award was not reviewable at all. The Court expressly stated that it was reviewable on any ground upon which an ordinary award made on a reference by consent could be reviewed.

(41) I see nothing in the Arbitration Act, 1940 which precludes the Court from exercising its powers to set aside an award and adjudicate it to be invalid under Ss. 30 and 33, Arbitration Act where the award is invalid because it is not obtained in conformity with the machinery of the Act. The proper course is to declare it to be invalid under S. 33. In this case the petitioner asks the Court to set aside and vacate the award under S. 30. The parties desire that I should exercise my powers under S. 30 presumably because the losing party will have a right of appeal.

(42) My conclusion, therefore, is that (a) the award is invalid and not enforcible, (b) consequently the award must be adjudged to be invalid on that ground alone and (c) the award being invalid, the suit is not maintainable. It is plain that the plaintiff cannot succeed in the suit at all if the award is invalid and not enforcible. It is not necessary to decide the question whether under the Arbitration Act, a separate suit to enforce a valid award is maintainable. It is also not necessary to pronounce on the other grounds of invalidity of the award.

(43) Mr. Ginwalla's client deliberately agreed to refer the disputes to arbitration and is now backing out of the agreement on a technical plea. As is well said, his law is better than his morals. In my view, he ought not to get any costs.

(44) I, therefore, pass the following orders:

On the petition for setting aside the award in Award Case No. 56 of 1952, I pass the following order: The award is set aside and vacated and the arbitration is superseded. Each party will pay and bear his own costs.

(45) In the judgment on award matter in Award Case No. 56 of 1952, I pass the following order: There will be no judgment on award. Each party will pay and bear his own costs.

(46) In Suit No. 3299 of 1952 (— 'Jugaldas Damodar Modi & Co. v. Pursottam Umedbhai & Co.'), my finding on the preliminary issues is as follows:

Issue No. 1: The suit is not maintainable on the ground that the award is not valid and is not enforcible.

It is, therefore, not necessary to give any opinion on Issue No. 2.

It is plain that the suit cannot succeed if the award is invalid and not enforcible. Accordingly, the suit is dismissed. Each party will pay and bear his own costs.

(47) On the notice of motion dated 15-12-1952 in Suit No. 3299 of 1952, my order is as follows: The application is dismissed. Each party will pay and bear his own costs.

(48) On the notice of motion dated 24-11-1952, taken out in Award Case No. 56 of 1952 and Suit No. 3299 of 1952, my order is as follows:

The notice of motion was disposed of by consent when the parties agreed that certain preliminary issues would be tried in the suit. No further order is asked for. No further order is made on this application.

Each party will pay and bear his own costs of this application.

Both parties agreed that all these applications and matters should be dealt with by me.

A/K.S.B. Order accordingly.

A. I. R. 1953 CAL. 695 (Vol. 40, C. N. 264)

BOSE J.

Narayanprosad Jhunjhunwalla and others, Plaintiffs v. The Indian Iron & Steel Co. Ltd, Defendant.

Suit No. 4699 of 1952, D/- 30-1-1953.

(a) Constitution of India (1950), Art. 31 — Person who can complain — (Iron and Steel Companies Amalgamation Ordinance (8 of 1952) — (Iron and Steel Companies Amalgamation Act (79 of 1952).)

Neither the Iron and Steel Companies Amalgamation Ordinance nor the Iron and Steel Companies Amalgamation Act deprives the Iron and Steel Company of any of its undertakings or its assets or acquires its properties. If at all they do so it is Bengal Steel Corporation that suffers and hence only that company or its shareholders who can complain about the legislation and not the Iron and Steel Company or its shareholders. (Para 7)

(b) Constitution of India (1950), Art. 31, Sch. 7 List I Entry 33 and Sch. 7 List II Entry 36 — Scope.

Article 31 itself contemplates the existence of the requisite powers in the legislature of the country to pass laws authorising deprivation of property and such power cannot be limited by reference to Entry 33 of List 1 or Entry 36 of List II. AIR 1952 SC 252; AIR 1952 SC 59, Rel. on; AIR 1951 SC 41, Ref. (Para 8)

(c) Constitution of India (1950), Preamble.

A written Constitution should not be construed in a narrow or pedantic sense but in a broad and liberal spirit to illustrate and illuminate the full import of the general words used in the Constitution and giving the powers conferred therein the widest amplitude permissible. 1936 A. C. 578; AIR 1935 PC 158; AIR 1939 FC 1, Rel. on. (Para 11)

(d) Constitution of India (1950), Art. 31(2), Sch. 7 List I Entries 33, 43, 44 and 52 and Sch. 7 List II Entry 36 — Powers of Union Legislature — (Iron and Steel Companies Amalgamation Ordinance (8 of 1952)) — (Iron and Steel Companies Amalgamation Act (79 of 1952)) — (Companies Act (1913), Ss. 153A and 153B).

Sections 153A and 153B, Companies Act, indicate that amalgamation or merger of companies or Corporations is a matter which relates to incorporation or regulation of companies. The effect of the Ordinance 8 of 1952 and the Act 79 of 1953 is to combine the Bengal Steel Corporation and the Iron and Steel Company and make their shareholders the co-owners of the combined assets and not to deprive them of their entire interest or ownership, which is essential for acquisition. The effect of the legislation is amalgamation.

Since particular industry has been brought under control of the Union of India by Industries Development and Regulation Act, 1951 and as the legislations in question show that the Central Government has retained control in the amalgamated companies and that they have been passed in the interests of the general public and Union their pith and substance is that they legislate with regard to matters relating to Entries 43 and 44 of List I read with Entry 52 of the same list and not relating to matters which fall under Art. 31(2) and Entry 33 of List I or 36 of List II. For the same reasons the subject-matter of the legislation is also not within the exclusive jurisdiction of the Provincial Legislature. Case law discussed. (Paras 12, 15, 18, 19)

Even on the assumption that the impugned legislation relates to acquisition of property they fall within Entry 33 of List I and were validly enacted by the Union Parliament by reason of the declaration it has made under Entry 52 of List I and because they were made in the interests of the Union and the general public. (Para 20)

Article 31(2) is also not offended because the shareholders of Bengal Steel Corporation are compensated by shares in the Iron and Steel company and the Corporation itself acquires interests in the undertakings and assets of the latter company in addition to its own undertakings and assets. (Para 20)

(e) Constitution of India (1950), Arts. 19(1) Cls. (c), (f) and (g) and 14 — (Iron and Steel Companies Amalgamation Ordinance (8 of 1952) — (Iron and Steel Companies Amalgamation Act (79 of 1952).)

The legislation relating to the amalgamation of the Bengal Steel Corporation with the Iron and Steel Company does not interfere with the rights and privileges which the share-holders of the latter company have and does not fetter their rights to deal with their shares as they liked. It does not also affect the share-holders since it is the company which as a separate legal entity that carries on the business and not the share-holders and further the business of the company has not been stopped or restricted by the legislation. It does not also interfere with the right of share-holders to form association for they could, if they did not like to continue as members of the company, after the amalgamation, sell their shares and go out of the company. Thus it does not offend either sub-cl. (c), (f) or (g) of Art. 19(1). (Paras 29, 30, 31)

Even if the legislation infringes the rights under sub-cls. (c), (f) and (g) of Cl. (1) it is saved by cls. (5) and (6) of the Article as a reasonable piece of legislation where the combination of the two companies is for the general good of the country and no material has been placed before the Court to show that it is not bona fide or that it is a colourable piece of legislation introduced to benefit private enterprise. (Para 33)

This reasonableness of the legislation which saves it under Cls. (5) and (6), Art. 19 also protects it from being challenged under Art. 14. (Paras 35, 36)

(f) Specific Relief Act (1877) S. 42 — Scope.

Section is exhaustive and a simple suit for declaration that an Ordinance or Act is ultra vires and for an injunction is not maintainable. 49 Cal WN 172 and AIR 1946 Lah 247 Rel. on; 50 Cal WN 310, distinguished.

Such a suit would, however, be maintainable in England. (Paras 37, 38)

Anno: Sp. Rel. Act, S. 42 N. 1.

A. K. Sen with S. Roy, for Plaintiffs; S. Chaudhury with B. Das, for Defendant.

CASES CITED:

(A) ('51) AIR 1951 SC 41: 1950 SCR 869 (SC)
(B) ('52) AIR 1952 SC 59: 7 Dom LR (SC) 81 (SC)
(C) ('52) AIR 1952 SC 252: 31 Pat 565 (SC)
(D) (1936) 105 LJ PC 115: 1936 AC 578
(E) ('35) AIR 1935 PC 158: 1935 AC 500
(F) ('39) AIR 1939 FC 1: 1939 FCR 18
(G) (1898) 67 LJ Ch 596: (1898) 2 Ch 469
(H) (1904) 73 LJ Ch 657: (1904) 2 Ch 268
(I) (1899) 68 LJ PC 118: 1899 AC 580
(J) (1882) 51 LJ PC 11: 7 AC 96
(K) (1949) 1949 CLR 1
(L) ('16) AIR 1916 PC 66: (1916) 1 AC 588
(M) ('21) AIR 1921 PC 205: (1922) 1 AC 191
(N) ('51) AIR 1951 Mad 979: 1951-2 Mad LJ 277
(O) ('51) AIR 1951 All 674: 1951 All LJ 365 (FB)

(P) ('45) 49 Cal WN 172
(Q) ('46) AIR 1946 Lah 247: ILR (1947) Lah 22 (SB)
(R) ('46) 50 Cal WN 310

JUDGMENT: This is a suit by the plaintiffs who are five share-holders of a company known as the Indian Iron & Steel Co. Ltd.. for selves and on behalf of the other share-holders of the said company against the said Indian Iron & Steel Co. Ltd. and 8 other persons who are directors of the said company for a declaration that an ordinance known as The Iron & Steel Companies Amalgamation Ordinance 1952 (8 of 1952) and an Act replacing the said Ordinance being Act No. 79 of 1952 are void and inoperative and the Scheme of Amalgamation and merger contained therein is illegal and void and for an injunction restraining the defendants from giving effect to or acting upon the said Scheme of amalgamation and merger, and for certain other reliefs

(2) The case of the plaintiffs is that the defendant company being the Indian Iron & Steel Co. Ltd. was incorporated under the Indian Companies Act on or about 11-3-1948 and its business is, inter alia, the manufacture of iron and steel. The authorised capital of the company is Rs. 7,50,000,00/- divided into 50,000,00 Ordinary shares of Rs. 10/- each and 2,50,000 five per cent Preference shares of Rs. 100/- each. The issued and subscribed capital of the company is Rs. 4,05,25,960/- The total properties and assets of the company are valued at Rs. 14,08,15,203/- as at the end of 31-3-1952. The company holds among its investments 11,000,00 ordinary shares of the face value of Rs. 10/- each, valued at Rs. 1,10,00,000/- as at the end of 31-3-1952, of the Steel Corporation of Bengal Ltd., a company incorporated under the Indian Companies Act having its registered office at No. 12, Mission Row, Calcutta. The Managing Agents of the defendant company and the said Steel Corporation of Bengal Ltd. have at all material times been Messrs. Martin & Burn Ltd., a company also incorporated under the Indian Companies Act and having its registered office at No. 10, Mission Row, Calcutta.

It is alleged that some time in 1952 defendants 2 to 9 who are the Directors of the defendant company, formulated a Scheme of amalgamation of the defendant company with the Steel Corporation of Bengal Ltd. without any reference to the shareholders of the defendant company and they approached the Union of India with a request to give effect to that Scheme of amalgamation by promulgating an Ordinance for the purpose. On or about 29-10-1952 the President of India promulgated an Ordinance being the Iron & Steel Companies Amalgamation Ordinance 1952 (8 of 1952). The Heading and Preamble of the said Ordinance were as follows:

"An Ordinance to make special provision, in the interests of the general public and the Union, for the amalgamation of certain companies closely connected with each other in the manufacture and production of iron and steel, and for matters connected therewith or incidental thereto.

WHEREAS for the purpose of securing, in the interests of the general public and the Union, the efficient and economical expansion and working of the iron and steel industry in India, it is essential that the Steel Corporation of Bengal Limited, and the Indian Iron and Steel Company, Limited, which are engaged in the manufacture and production of iron and steel, should be amalgamated;

AND WHEREAS to give effect to the scheme of the Central Government for the expansion of the iron and steel industry and to make available further resources for such expansion, it is necessary that the said companies should be amalgamated with as little delay as possible:

AND WHEREAS the amalgamation of the said companies is also in pursuance of successive recommendations made by the Tariff Board and the Tariff Commission;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW THEREFORE, in exercise of the powers conferred by clause (1) of Article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:

...." etc.

(3) The said Ordinance provided inter alia (a) that the Steel Corporation of Bengal Ltd. would stand dissolved from 1-1-1953 and from the said date undertaking of the dissolved company would be transferred to and would vest in the Iron & Steel Co., Ltd. and all the properties, profits and assets of the dissolved company would from that date be deemed the properties and profits and assets of the Iron and Steel Co., Ltd.

(b) As soon as might be after 1-1-1953 the Iron & Steel Co. would allot to every person registered as shareholder in the dissolved company (i) if he was a holder of Preference share as many Preference shares in the Iron & Steel Co. as are equivalent in number and value to the Preference shares held by him in the dissolved company immediately before 1-1-1953, (ii) if he was a holder of Ordinary shares, four Ordinary shares of Rs. 10/- each in the Iron and Steel Co. for every five Ordinary shares of Rs. 10/- each, held by him in the dissolved company.

(c) Every officer or other servant of the dissolved company would from 1-1-1953 become an officer or other servant as the case might be of the Iron & Steel Co. & every Director of the dissolved company would become, from the said date, a Director of the Iron & Steel Company in addition to the other Directors of the Iron & Steel Company.

(4) The said Ordinance did not make any provisions regarding the said 11,00,000 Ordinary shares in the dissolved company held by the Iron & Steel Co. nor any Rules have been framed by the Central Government making any provision in this respect. The defendants 2 to 9, however, it is alleged, had decided without any authority from the shareholders of the defendant company to sell the said 11,00,000 Ordinary shares in the dissolved company to one Messrs. Dalhousie Holdings Ltd. inter alia on the terms and conditions that the said Dalhousie Holdings Ltd. would sell from time to time the said shares according to the instructions from the Directors of the Company and the sale proceeds less the commission payable to the Dalhousie Holdings Ltd. would be credited to the company and would form part of the working capital of the company. It appears that there has been an actual transfer of these shares to the Dalhousie Holdings Ltd. on or about 6-12-1952. The validity of this transfer has been challenged in another suit being suit No. 4916 of 1952 of this Court.

(5) The present suit was filed on 9-12-1952. During the pendency of this suit the Iron & Steel Companies Amalgamation Act, 1952, (Act 79 of 1952) was passed by the Indian Parliament on 29-12-1952 but it came into force with retrospective effect from 29-10-1952. The Act contained substantially the same provisions that were in the Ordinance except that S. 15 of the Act contained a provision repealing the said Ordinance. At the hearing of the suit the learned counsel appearing for the plaintiffs asked for leave to make

certain amendments in the plaint challenging the validity of the Act 79 of 1952 on the same grounds on which the vires of the Ordinance was challenged and I have granted such leave to amend the plaint. I have also granted leave to the defendants to amend the Written Statements. The contentions that have been raised on behalf of the plaintiffs may be summarised as follows:

(i) The substance of the Ordinance and the Act is acquisition of property belonging to the Steel Corporation of Bengal for the private use of the Indian Iron & Steel Company, which is not permissible under the Constitution — for private property of one person cannot be acquired for the private use of another person and given to the latter. Acquisition can only be made for a public purpose and upon payment of compensation.

(ii) Assuming such an acquisition for private use is possible it is only within the competence of the Provincial Government to so acquire by appropriate legislation made by the Provincial Legislature for the purpose.

(iii) The shareholders of the Steel Corporation of Bengal and the Iron & Steel Company have been without their consent and compulsorily brought into a Scheme which may eventually result in total loss — in which event there will be no compensation available to the shareholders for the acquisition of their property. The Scheme imposes an unreasonable restriction on the rights to hold, acquire and dispose of property and thus violates Art. 19(1)(f) of the Constitution. The legislation also infringes Art. 19 (1)(c) and 19 (1) (g) of the Constitution.

(iv) The legislation is discriminatory and infringes Art. 14 of the Constitution.

(v) The legislation in question is not covered by Entries 43, 44 or 52 of List I of the 7th Schedule. Under item 43 only such laws can be made as relate to the actual incorporation or winding up of trading corporations but it does not empower compulsory extinguishment of a company and transfer of its assets to another without the consent of either. Item 52 similarly connotes the power to exercise control over or to regulate an Industry. Under this item laws can be framed fixing the hours of work of the employees of an industrial establishment or about their wages and such like matters only.

(6) The Issues raised in the suit are the following:

1) Is the suit maintainable?
2) Is Ordinance No. 8 of 1952 or the Act No. 79 of 1952 valid?
3) To what reliefs, if any, are the plaintiffs entitled?

(7) I now propose to deal with the contentions raised by Mr. Sen attacking the validity of the Ordinance and the Act. The first point made is that the Ordinance and the Act in effect and substance purports to acquire property belonging to The Steel Corporation of Bengal for the private use of the Iron and Steel Company and to give it to the Iron and Steel Company. An acquisition of private property for the private use of another person is, it is said, not permissible under the Constitution of India. It is submitted that the only mode of acquisition recognised by the Constitution is acquisition for public purpose by the Union or the State upon payment of just compensation. In other words, the Government could have acquired the property of the Steel Corporation in the first instance and after it had become vested in the Government then the property have been transferred to the Iron & Steel Company. Reliance is placed upon Art. 31 and Item 33 of List I and Item 36 of List II of the Seventh Schedule of the Constitution. It appears to me that this argument of Mr. Sen is based on a misapprehension of the true scope and implications of Article 31 and the two items of the legislative lists referred to by him. By the impugned legislation the Steel Corporation of Bengal has been deprived if at all of its undertaking and assets which have been transferred to the Iron and Steel Company, and the dissolved company has been amalgamated with and has been merged in the Iron and Steel Company, by destroying the status and constitution of the Steel Corporation of Bengal. The Ordinance or the Act has not purported to acquire any property of Indian Iron & Steel Company or of its shareholders. The plaintiffs have not suffered any deprivation or dispossession by reason of the Ordinance or the Act. It is the Steel Corporation of Bengal and its shareholders who can complain of deprivation of property if at all by the Ordinance or Act in question but neither the dissolved Company nor any of its shareholders have come forward to challenge the validity of the Ordinance or the Act.

(8) The argument based on the Entries 33 of List I and 36 of List II to the effect that apart from these Entries there is no power in the Union or the State to legislate with regard to deprivation of property does not appear to be correct. In the case of — 'Chiranjitlal v. Union of India', AIR 1951 SC 41 (A), the questions whether Art. 31(1) and Art. 31(2) should be read together or independently of each other and whether Cl. (1) of Art. 31 contemplates only confiscation or destruction of property in exercise of what are known as police powers in American law were left open. But in the case of — 'Shamdasani v. Central Bank of India Ltd.', AIR 1952 SC 59 (B), Patanjali Shastri C. J. who delivered the unanimous judgment of the Court observed:

> "The argument based on the Entries in the List is fallacious. It is not correct to suggest that merely because there is no Entry in the lists of Schedule 7 relating to 'deprivation of property' as such, it is not within the competence of the legislatures in the Country to enact a law authorising deprivation of property. Such a law could be made, for instance, under Entry No. I of List I, Entry No. 1 of List 2 or Entry No. 1 of List III. Article 31(1) itself contemplates a law being passed authorising deprivation of the properties and it is futile to deny the existence of the requisite legislative power." (page 60 paragraph (6)).

(9) Again in the case of — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252 (C), the Chief Justice of Supreme Court observed that:

> "The Entries in the Lists of the Seventh Schedule are designed to define and delimit the respective areas of legislative competence of the Union and State legislatures and such context is hardly appropriate for the imposition of implied restrictions on the exercise of legislative powers which are ordinarily matters for positive enactment in the body of the Constitution" (page 264 — para. 13).

(10) In para. 14 (Page 264) the learned Chief Justice further pointed out that:

> "The police power of the State is only the general power to regulate and control the exercise of private rights and liberties in the interests of the community and does not represent any specific head of legislative power."

(11) Now the question that really arises for determination is whether the impugned legislation is one the subject-matter of which is "Acquisition

of property" as contemplated by Entry 33 in List I and Art. 31(2) of the Constitution or is it a law covered by Entry 43 of List I read with Entry 52 of the same List? Mr. Sen has argued that amalgamation or merger of companies is not comprised in the connotation of words "Incorporation or regulation of Corporations" as used in Entry 43 of List I and hence such matters are outside the legislative power or competence of the Union legislature. This argument appears to me to be without substance. It will be putting a very narrow construction on the words used in Entry 43 and Entry 44 of List I to deny to the Union Legislature the power to pass a legislation providing for amalgamation or merger of companies and of incidents and consequences resulting from such amalgamation or merger merely because the Constitution has not used the words "amalgamation or merger of corporations" in the Constitution. It is a well-settled rule of interpretation that a Written Constitution should not be construed in a narrow or pedantic sense but in a broad and liberal spirit to illustrate and illuminate the full import of the general words used in the Constitution and giving the powers conferred therein the widest amplitude permissible. (See — 'James v. Commonwealth of Australia (No. 2)', (1936) AC 578 at p. 614 (D), — 'British Coal Corporation v. King' (1935) AC 500 at p. 518 (E) and — 'In Re Central Provinces & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938', AIR 1939 FC 1 at pp. 4-5 (F)).

(12) Sections 153A and 153B, Companies Act, give very clear indication that amalgamation or merger of companies is a matter which relates to the incorporation or regulation of Companies or Corporations and can properly form the subject-matter of a law relating to Corporations. Section 153A provides for transfer of undertaking of one company to another, dissolution of transferor company, allotment of and appropriation of shares by the transferee company, and these are the very things which are sought to be effected by the impugned legislation in respect of the two companies in question. It is true that the Ordinance or the Act does not enact any general law with regard to all companies but it deals with amalgamation of only two individual companies. But I do not find any illegality in such a course being adopted. It is clear from the Industries (Development and Regulation) Act 1951 (Act 65 of 1951) that in exercise of the power conferred by Entry 52 of List I of the 7th Schedule of the Constitution of India, the Indian Parliament declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule; (S. 2 of Act 65 of 1951) and the Iron and Steel Industry (Item 5 in First Schedule of Act 65 of 1951) is one of the industries which was brought under the control of the Union inasmuch as the activities of such an Industry affect the country as a whole and the development of this industry is governed by economic factors of all India import.

(13) Clause 14 of the Ordinance which corresponds to S. 14 of the Act shows that the Central Government has retained control over the amalgamated companies by reserving to itself the Rule-making power and its right of representation in the Board of Directors of the new company. (Sub-cl. (d) of Cl. 14).

(14) The preamble of the Ordinance and the Act provide that it is for the purpose of securing, in the interests of the general public and the Union, the efficient and economical expansion and working of the iron and steel industry in India that it was essential that the two companies should be amalgamated.

(15) Thus the true nature and character of the legislation — its pith and substance is that it is a legislation with regard to Entries 43 and 44 of List I read with Entry 52 of the same List. The meaning and effect of amalgamation has been brought out clearly in the cases of — 'Wall v. London & N. Assets Corpn. (No. 1)', (1898) 2 Ch 469 at 478-479 (G) and — 'In re South African Supply and Cold Storage Co.', (1904) 2 Ch 268 at p. 287 (H).

(16) In the case of — 'Union Colliery Company of British Columbia v. Bryden', (1899) A C 580 (I), Lord Watson in delivering judgment of the Judicial Committee observed in construing S. 91, sub-s. (25), British North America Act, 1867, that:

"The subject of 'Naturalisation' seems prima facie to include the power of enacting what shall be the consequences of naturalisation or in other words what shall be the rights and privileges pertaining to residents in Canada after they have been naturalised" (page 586).

(17) The Amalgamation Ordinance has similarly dealt with Constitution of Corporations — the consequences of this particular amalgamation and has defined the rights of the shareholders of the amalgamated companies. In the case of — '1950 SCR 869: (AIR 1951 SC 41) (A)', the Governor General, finding that the mismanagement of the affairs of the Sholapur Spinning and Weaving Company Ltd. had prejudicially affected the production of an essential commodity and had caused unemployment amongst a section of the community, promulgated an Ordinance which had the effect of curtailing certain rights of the shareholders and placing the management in the hands of new directors appointed by the Government. The Ordinance was subsequently replaced by an Act. Upon the validity of the Act being challenged it was inter alia held by Mukherjee J. and Das J. that the legislation was valid as being covered by Item 43 of the Union List (page 915 — last but one paragraph; and pages 918 and 924).

(18) It has further pointed out in the case of — 'AIR 1951 SC 41 (A)', that

"Acquisition means and implies the acquiring of the entire title of the expropriated owner. The entire bundle of rights which are vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former."

(page 54 — Per Mukherjea J.)

The impugned legislation has merely the effect of combining the assets and undertaking of two companies and making them in substance and effect co-owners in respect of the combined assets though technically the Steel Corporation as an artificial person, ceases to exist. The share-holders of the two companies are also made participants in the combined assets of the two companies. There is no deprivation of their 'entire' interest or ownership, which is implied in acquisition. In place of their exclusive interest or ownership they become, if I may use the expression 'co-sharers'. It is amalgamation as defined by Lindley J. and Buckley J. in — '(1898) 2 Ch 469 at pp. 478-479 (G)' and — '(1904) 2 Ch 268 at p. 287 (H)', (cases cited above) and not acquisition.

(19) This disposes of the further argument of Mr. Sen that the legislation falls within Entry 35 of List II or that it is within the exclusive competence of the Provincial Legislature.

(20) Assuming that the legislation relates to acquisition of property, the Union Government having assumed control by reason of declaration made by Parliament under Entry 52 List I, and the legislation being made for purposes of the

Union and in the interest of the general public, it falls within Item 33 of List I and the Act was, therefore, validly enacted by the Parliament of India. It also satisfies the requirements of Art. 31 (2) because the share-holders of the Steel Corporation are compensated by allotment of shares in the Iron and Steel Company and the Steel Corporation itself acquires interest in the undertaking and assets of the Iron and Steel Company in addition to its interest in its own undertaking and assets.

(21-22) Mr. Sen relied on the case of — 'Citizens Insurance Co. v. Parsons', (1882) 7 AC 96 (J). In that case an Ontario Act (39 Vict. Ch. 24) which dealt with policies of insurance entered into in the Province of Ontario for insuring property situated in the province against fire, and which prescribed certain conditions which were to form part of such contracts, was held to be a valid Act inasmuch as words "regulation of trade and commerce" in Item No. 2 of S. 91 were interpreted to include political arrangements in regard to trade, regulation of trade in matters of inter-provincial concern and general regulation of trade affecting the whole Dominion but did not include regulation of the contracts of a particular business or trade such as fire insurance in a single province. The case turned on the construction of Item No. 2 of S. 91 and Item No. 13 of S. 92 and except as to the general principles of interpretation laid down therein, it is not of assistance in the determination of the questions arising in this case, before me.

(23) In the next case cited by Mr. Sen and reported in — 'In Re Dairy Industry Act', (1949) CLR 1 at pp. 60-67 (K), it was held that sub-s. (a) of S. 5, Dairy Industry Act, which was enacted by Parliament of Canada was a legislation in relation to "Property and Civil Rights" and could not be supported under any head of S. 91 and so was ultra vires of Parliament, except as to the prohibition of importation which was valid, being a legislation in respect of foreign trade. At pages 60-68 Kellock J. has referred to certain observations of their Lordships of the Judicial Committee for the purpose of determining the validity of the Dairy Industry Act and for construing the expressions "Peace, Order and Good Government of Canada" and "Property & Civil Rights in the Province".

(24) In the case of — 'Attorney General of Canada v. Attorney General of Alberta', AIR 1916 PC 66 (L), also relied on by Mr. Sen the expressions "Regulation of Trade and Commerce", "Peace, Order and Good Government of Canada" and "Property and Civil Rights in the Province" were considered, and regulation of a particular trade by introducing a licensing system was held as not covered by item (2) of S. 91 nor by the general power to legislate for peace, order and good government of Canada and consequently S. 4 of the Insurance Act, 1910, enacted by the Parliament of Canada was held to be ultra vires the Parliament of Canada.

(25) Similarly in the case of — 'In re, Board of Commerce Act, 1919', AIR 1921 PC 205 (M), cited by Mr. Sen the Judicial Committee held that the Combines and Fair Prices Act 1919 which authorised the Board of Commerce to restrain and prohibit the formation and operation of trade combinations in the Provinces, which the Board might consider to be detrimental to the public interest and also the Board of Commerce Act 1919 (9 and 10 Geo. 5 Dom. C. 37) which created the Board of Commerce were ultra vires the Dominion Legislature as the statutes were not covered by Item 27 of S. 91 or Item 2 of S. 91, British North America Act, 1867 (30 and 31 Vic. Ch. 3) but they trenched upon the legislative power of the Province to legislate with regard to "Property and Civil Rights in the Province".

(26) The case in — 'Narasaraopeta Electric Corporation v. State of Madras', AIR 1951 Mad 979 (N), referred to by Mr. Sen held that the impugned legislation (Madras Electricity Supply Undertakings (Acquisition) Act (Act 43 of 1949)) was in pith and substance a legislation with regard to "Electricity" an item appearing in the Concurrent List of the G. I. Act, 1935, and was therefore intra vires the Provincial legislature. The legislation did not fall within Entry 33 of List I which dealt with "Corporation and its incorporation and regulation". The observations made by the Madras High Court in para. 7 (concluding sub-paragraph of para. 7 of the judgment (page 932) and in para. 9 of the judgment which explains the Entry 33 of the Federal List) are of assistance to the defendants in the case before me and not to the plaintiffs.

(27) The cases cited by Mr. Sen are, therefore, of no assistance to him.

(28) It has been further contended by Mr. Sen that inasmuch as the legislation affects and interferes with the fundamental rights of the plaintiffs share-holders as guaranteed by Art. 19(1)(f) and 19(1)(g) and (c) of the Constitution it must be held to be invalid. This is an argument which I find difficult to follow. The amalgamation has not in any way interfered with the rights or interest which the plaintiff share-holders had in the Indian Iron and Steel Company before the amalgamation. Their holdings in the Company have been kept intact and have not been touched in any way. It was suggested that the effect of the legislation has been to deprive the plaintiffs of the opportunity to participate in the 11,00,000 (11 lakhs) ordinary shares which they otherwise would have. This is again an argument which it is difficult to follow. The 11,00,000 shares are the property of the Company as distinct from its share-holders viz., the plaintiffs. (See — 'AIR 1951 SC 41 at p. 65 (A)', where the distinction between interest of share-holders and interest or property of the company is brought out). The share-holders cannot assert or claim any right in respect of these shares so long as the Company is a running concern and is not wound up.

(29) The legislation in question, moreover, has not purported to deal with the 11,00,000 ordinary shares of the Steel Corporation in any way. The plaintiff share-holders can pledge or mortgage their own shares. They can sell them. They can do whatever they like. They can exercise all the rights and privileges which are available to them by reason of their holding the shares in the company. There is no fetter put on any of these rights by the legislation in question.

(30) It is also difficult to follow how Cls. (c) and (g) of Art. 19 have been violated. The share-holders do not carry on any business or trade but it is the company, which is a separate legal entity, which carries on the business. So share-holders are not in any way affected. Moreover, the business of the Iron and Steel Company has not been stopped or restricted by the legislation. The Iron and Steel Company goes on carrying on the business with augmented assets and extension of the undertaking.

(31) The right to form associations is also not interfered with in any manner. It is true that some new share-holders and the undertaking and assets of the Steel Corporation are brought into the constitution of the Iron and Steel Company

against the wishes of the share-holders of the Iron and Steel Company, but as the Legislature has power to regulate the trading corporations, such amalgamation is justified. No restriction is put on the right to form associations by the impugned legislation. There is no obligation imposed on any unwilling shareholder to continue as member in the company after amalgamation. He can sell his shares and go out of the company if he so chooses. The association or the company of which the plaintiffs are members is continuing and has not been put an end to by the legislation. The option to continue or not to continue as member is untouched and the matter is left to the will of the shareholders. In fact there is no compulsion of any kind. (See — 'Suryapalsingh v. U. P. Government', AIR 1951 All 674 at pp. 698-699 (O), paragraphs 127-132 of the judgment).

(32) Further, assuming that any of the rights under Art. 19 (1) (f) and (g) has been infringed, the question further arises whether the restrictions put are reasonable or not. If they are reasonable then Cls. (5) and (6) of Art. 19 will protect the legislation from any attack on its validity.

(33) Now it is clear from the materials placed before the Court that the two companies have all along been closely associated with each other. The Iron and Steel Company had Rs. 1,10,00,000 of its capital invested in 11,00,000 shares in the Steel Corporation and so was vitally interested in the undertaking and business of the latter company. The recommendations of the Tariff Commission and the Tariff Board were in favour of amalgamation. The amalgamation is made with the avowed object of efficient and economical expansion of iron and steel industry, and is necessary to give effect to the scheme of Government and in the interests of the general public. By the amalgamation the assets of the Iron and Steel Company are augmented and its undertaking is expanded. It is suggested that bringing in more shareholders will diminish the dividends of the existing shareholders. This is nothing more than a mere apprehension. It will be a rash conclusion to condemn as ultra vires a legislation upon such an uncertain factor. It may be that as a result of the augmentation of the assets and extension of the undertaking, there may be increase in the Iron and Steel Company's production and profits, and more dividends will be available to the shareholders. It is true that the existing shareholders are compelled to accept the new shareholders, and the Iron and Steel Company is being made to absorb the undertaking and assets of the Steel Corporation but individual interests must yield to the general good of the country. It need not be pointed out that iron and steel are commodities essential not only for the development, progress and defence of the country but for every day life. No materials have been placed before the Court to show that the legislation is not a bona fide one or that it is a colourable piece of legislation introduced only to benefit a private enterprise. The onus is entirely on the plaintiffs to show that the legislation is a colourable one.

(34) Thus as there is reasonable basis for the legislation, it is not open to the challenge of its being ultra vires the Constitution.

(35) Moreover it is this element of reasonableness which protects the Ordinance or the Act from the challenge that the legislation violates Art. 14 of the Constitution. As pointed out by Fazl Ali J. in — '(1950) SCR 869 at p. 883 (bot.): (AIR 1951 SC 41) (A)', by quotation from Professor Willis's book:

> "In determining the question of reasonableness the Courts must find some economic, political or other social interest to be secured and some relation of the classification to the objects sought to be accomplished.....The fact that only one person or one object or one business or one locality is affected is not proof of denial of the equal protection of the laws."

Again at page 877 the following passage from Prof. Willis is quoted:

> "If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed."

(36) Following the reasonings of the learned Judges of the Supreme Court who delivered the majority judgment in — 'Chiranjitlal's case (A)'. I hold that the classification is reasonable and the legislation in question is not open to attack on the ground of its violating Art. 14 of the Constitution.

(37) A point has also been raised on behalf of the defendants as to the maintainability of the suit. It was submitted that although the plaintiffs purport to sue for selves and on behalf of all other shareholders of the defendant company it is clear that that is not the correct state of affairs inasmuch as defendants 2 to 9 who are directors and shareholders have not consented to the suit being filed. There cannot be any doubt that defendants 2 to 9 who are also sharehoders have not agreed to the suit being instituted as otherwise they would not have been impleaded as defendants at all. It is not pleaded in the plaint either, that the majority of the shareholders have agreed in any meeting, or otherwise to institute the present suit. The plaint seeks a declaration that the Ordinance and the Act are ultra vires or void. The declaration, asked for is not one that is contemplated by S. 42, Specific Relief Act. The plaintiffs do not seek any declaration of any legal character or right to property but ask for a declaration that the Ordinance or Act is void. This, it is pointed out, is not permissible. It appears to me that this contention is not without substance. Although there is conflict of authorities on the point whether S. 42, Specific Relief Act, is exhaustive of declaratory suits or not, the view of this Court has been that it is exhaustive. The cases referred to in the judgment of Das J. in — 'Snow White Food Products Co. v. Punjab Vanaspati Supply Co.', 49 Cal WN 172 at p. 177 (P), show that the Calcutta view is that S. 42 is exhaustive. It has also been held by a Special Bench of the Lahore High Court that a simple suit for a declaration that an Ordinance is ultra vires and for an injunction is not maintainable. — 'Shingara Singh v. Callaghan', AIR 1946 Lah 247 at pp. 255-256 (whole) (Q).

(38) Mr. Sen submitted that a suit by shareholders of a company for declaration that certain acts of the Directors of the Company are ultra vires and on that basis to ask for an injunction restraining them from giving effect to the ultra vires acts, is a very normal thing and such suit has been held to be maintainable. Mr. Sen refers to the case reported in — 'Ramkissendas Dhanuka v. Satya Charan', 50 Cal WN 310 (R). In the present suit the point as to ultra vires nature of the Ordinance or the Act is not merely collaterally or incidentally in issue but it is directly and substantially in issue and without obtaining a determination from the Court to the effect that the legislation is void the plaintiffs cannot have the acts of the defendants declared

as ultra vires nor can they get an injunction against the defendants. In my view the suit as framed is not maintainable. It may be noted, however, that under the English or American law such a suit for declaration that a particular legislation is void would be maintainable.

(39) A point was also raised that without making the Steel Corporation a party to the suit, the suit is not maintainable, and a further point was raised that as the plaintiffs have not suffered any injury nor has there been any infraction of their rights by reason of the legislation, there is no cause of action for this suit and so it must fail. Reliance is placed on Chiranjitlal's case in support of the latter argument.

(40) In view of my decisions on the other points it is not necessary to deal with these points for the purpose of disposal of this case and I express no opinion on such points.

(41) In the result this suit fails and it must be dismissed. The plaintiffs must pay the costs of the suit on Scale No. 2 including reserved costs if any. Certified for two counsel.

A/M.K.S. Suit dismissed.

A. I. R. 1953 CAL. 702 (Vol. 40, C. N. 265)

CHAKRAVARTTI C. J. AND SINHA J.

Sm. Subodh Bala Biswas, Petitioner v. State of West Bengal, Opposite Party.

Civil Revn. Case No. 913 of 1952, D/- 17-12-1952.

(a) High Court Rules and orders—Calcutta Civil Rules and Orders—R. 720(2) and (3)—Scope—Arbitrator appointed under S. 19(1)(b), Defence of India Act (1939) awarding sum in excess of that tendered by Collector — R. 720 (3) does not apply — Government should not get any costs.

Rule 720 (2) of Civil Rules and Orders contemplates a case where claimant has got something in excess of the amount tendered by Collector — It does not apply so far as the Government is concerned — Rule 720 (3) contemplates a case where reference has entirely failed, i. e. where award of arbitrator does not add anything to sum tendered by Collector — Where the sum awarded by arbitrator under S. 19 (1) (b), Defence of India Act is not precisely the same which the Collector had tendered, but where the reference has succeeded in part and the arbitrator has awarded a certain sum in excess of that tendered by the Collector, Rule 720 (3) does not apply — In such a case, the Government being in a position of a defendant should not get any costs. (Para 6)

(b) Constitution of India, Art. 227 — Scope — Arbitrator committing error in applying Rule 720, Calcutta High Court Civil Rules and Orders — (High Court Rules and Orders — Calcutta Civil Rules and Orders, Rule 720).

On an application under Art. 227 of the Constitution it is not open to the High Court nor can it be proper, to embark upon an examination of the evidence and substitute for the decision of the Court or tribunal below, its own decision. Article 227 is intended to authorise the High Court to see that the Courts or tribunals which cannot be controlled under Section 115 of the Code of Civil Procedure are kept in their proper places and that they exercise their jurisdiction in accordance with the provisions of the laws they administer. If the court or the tribunal concerned does not exceed jurisdiction and if it does not depart from the principles that it is enjoined to follow by the statute or other law concerned, there can be no occasion for interference, under Article 227 of the Constitution, with the substance of the decision upon a further examination of its merits. (Para 1)

Where the arbitrator applied certain principles with regard to award of costs, which he thought were embodied in and warranted by Rule 720, of the Calcutta Civil Rules and Orders, but no such principles were either warranted by or were embodied in the rule, the arbitrator committed an error which could be corrected under Art. 227. (Para 8)

Apurbadhan Mukherjee and Tarak Nath Roy, for Petitioner; Jajneswar Majumdar, Asst. Govt. Pleader, for Opposite Party.

CHAKRAVARTTI, C. J.: The only point of substance in this Rule is the point taken about the order for costs. The petitioner before us is a claimant in a Land Acquisition case. An area of land, belonging to her and measuring 7.92 acres, was requisitioned in 1943 and derequisitioned in 1947. The Collector offered her a compensation of Rs. 410/- on a certain basis, but not being satisfied with the adequacy of the amount, the petitioner asked for and obtained a reference under S. 19(1)(b) of the Defence of India Act. The arbitrator was the Distirct Judge. The District Judge dealt with the various grounds urged before him, both as respects the adequacy of the compensation awarded for the actual area requisitioned and also as respects a further claim made on the ground of loss sustained because of the abandonment of some neighbouring areas by the cultivators because of the requisition of the aforesaid area of 7.92 acres. The grounds sought to be urged before us as regards the correctness of the arbitrators award are all grounds of fact, the decision of which depends upon evidence.

We are clearly of opinion that on an application under Art. 227 of the Constitution it is not open to us, nor can it be proper to embark upon an examination of the evidence and substitute for the decision of the Court or tribunal below our own decision. As I have had occasion to explain elsewhere the scope of Art. 227 of the Constitution is perfectly clear. It is intended to authorise the High Courts to see that the Courts or tribunals which cannot be controlled under S. 115 Civil P. C. are kept in their proper places and that they exercise their jurisdiction in accordance with the provisions of the laws they administer. If these two conditions are satisfied, namely, if the Court or the tribunal concerned does not exceed jurisdiction and if it does not depart from the principles that it is enjoined to follow by the statute or other law concerned, there can be no occasion for interference, under Art. 227 of the Constitution with the substance of the decision upon a further examination of its merits. The grounds sought to be urged by Mr. Mukherji against the decision of the arbitrator as regards the amount of the compensation cannot therefore be entertained.

(2) A point, however, was taken against the arbitrator's award for costs which in my opinion must be accepted as well-founded. As I have stated the amount offered by the Collector as compensation was Rs. 410/-. The amount claimed by the petitioner before the arbitrator was Rs. 14,270/-. By

his order, the arbitrator awarded her a further sum of Rs. 605-10 together with Rs. 56-14-3 as costs. Having done that, the arbitrator proceeded to pass a decree for costs in favour of the Government of West Bengal and he did so on a basis which is described by him in the following words:

"Parties to get costs in proportion to their success. Pleader's fees are to be calculated on the same scale as provided in Rule 720(2) of the Civil Rules and Orders".

(3) The arbitrator thought that the Rule referred to by him authorised him to pass a decree in favour of the State for pleader's fees, calculated on a sum of Rs. 13,256-6-0 which he arrived at by deducting Rs. 410/- offered by the Collector and the further sum of Rs. 605-10-0 awarded by himself from the total amount of Rs. 14,272/- claimed by the petitioner. The pleader's fee computed on that basis was Rs. 540-2-0. The arbitrator added to that sum two further amounts as costs of the stamp and demi papers and made an order for a total amount of Rs. 542-7-6 in favour of the State. Next, he set off the costs awarded to the State against the amount awarded to the petitioner and made a final order in favour of the petitioner for Rs. 120-0-9 which was the balance left after the set-off had been carried out.

(4) It was contended before us that the order made by the arbitrator as respects the costs to be recovered by the State was not only wrong in principle but also not even authorised by the Rules on which the arbitrator had relied. In my opinion that contention is plainly right and must be given effect to. The set of rules among which Rule 720 occurs are rules regarding fees payable to legal practitioners framed under S. 27(c) of the Legal Practitioners Act. It would appear that those rules are only intended to fix the scales of fees allowable to pleaders by decrees of Courts and I doubt whether they have any reference at all to the kind of order for costs which the Courts ought or ought not to make in particular cases. Be that as it may, what the arbitrator has done is to award costs both to the claimant & to the State in proportion to the success of the claimant in the first case and her failure in the second. It is as if in a suit for money, say for Rs. 5000/- a decree was passed for Rs. 2000/- and then the Court made an order for costs in favour of the plaintiff proportionate to Rs. 2000/- and a decree in favour of the defendant proportionate to Rs. 3000/-. It is true that even in the case of a civil suit, if the suit succeeds, the decree drawn up contains a statement of the costs payable to the defendant, but that is only for use in case the decree is reversed on appeal and the defendant is awarded the costs of the civil Court. The decree in the present case makes a certain amount of costs instantly payable to the defendant, although the plaintiff has succeeded, it may be in part. In my view, a decree of that kind is altogether wrong in principle, but the present case need not be decided by reference to any principle of a general character.

(5) The arbitrator relies upon Rule 720 and the incorrectness of the view taken by him appears from the terms of that rule itself. The two relevant clauses of that rule are clauses (2) and (3). They are in the following terms:

"(2) In this and in the following rules, cases under Part III of the Land Acquisition Act, 1 of 1894, shall be deemed to be suits, and the fees allowable therein may be calculated either on the amount of compensation decreed in excess of the sum tendered by the Collector, or on any smaller amount which the Court in its discretion may think proper.

(3) In the event of the sum tendered by the Collector being decreed, pleaders' fees may be awarded to Government on the difference between that sum and the sum claimed, or on any smaller amount which the Court in its discretion may think proper."

(6) The scheme of these two clauses of Rule 720 is perfectly clear, but before explaining what that scheme is, I would like to point out that the arbitrator is entirely wrong in relying upon clause (2) of the Rule as applicable to the present case. From the terms of the two clauses which I have just read, it is obvious that costs to be awarded to the State are dealt with, not in clause (2) but in clause (3). Clause (2) is concerned only with the case of the claimant. It contemplates a case where some compensation in excess of the sum tendered by the Collector has been decreed and it lays down that, in such a case, pleaders' fees may be allowed either on the amount of the compensation decreed in excess of the sum tendered by the Collector or any smaller amount. The case contemplated, therefore, is one where a claimant has got something in excess of the amount tendered by the Collectors, in other words, where the claim of the claimant has succeeded wholly in part. This, therefore, is a case where if one could draw an analogy from suits, a suit has succeeded and, quite intelligibly the clause makes a provision for costs in the plaintiff's or the claimant's favour. Clause (3) is concerned with the case of the Government and on the basis that Land Acquisition cases are suits, it may be said that it deals with the case of the defendant. The case contemplated by it is a case where the award does not add anything to the sum tendered by the Collector, in other words, a case where the reference has entirely failed. The case, therefore, is a case where if one can again draw an analogy from suits, a suit has wholly failed and therefore, quite intelligibly, the clause makes a provision for costs to be awarded to the Government which is in the position of a defendant in such proceedings. To sum up, clause (2) deals with the case of a successful plaintiff, although the success may be a partial success, while clause (3) deals with the case of a successful defendant but a defendant who has wholly succeeded. As I have pointed out, clause (2) can have no manner of application in the present case so far as the Government is concerned, because the clause deals solely with the case of the claimant. Clause (3) also cannot apply, because the present case is not one where the sum awarded by the arbitrator is precisely the same which the Collector had tendered. It is a case where the reference has succeeded in part and the arbitrator has awarded a certain sum in excess of that tendered by the Collector. There is thus no reason in principle as to why the Government, being in the position of a defendant should get any costs in such a case, but quite apart from any reason or principle, the terms of clause (3) do not provide for any costs being awarded to the Government in such a case at all.

(7) We invited Mr. Majumdar, who appears on behalf of the State, to inform us whether there was any provision contained in any law which authorised the arbitrator to make an order of the kind which he had made. Mr. Majumdar frankly confessed before us that he was unable to refer to any such law.

(8) In my opinion, the error committed by the arbitrator with regard to the award of costs is clearly an error which can be corrected under Art. 227 of the Constitution. He has applied certain principles which he considered to be warranted by Rule 720, but since no such principles are em-

bodied in those rules, he was in fact applying principles which did not exist. It is quite clear that in exercising his jurisdiction he had misdirected himself, and therefore the case is a fit one which can be properly dealt with under Art. 227 of the Constitution so far at least as this point is concerned.

(9) For the reasons given above, this Rule is made absolute in part. The order for costs made in favour of the State is set aside. The petitioner will therefore have the sum of Rs. 410/- offered to her by the Collector, the further sum of Rs. 605-10-0 added by the arbitrator and the still further sum of Rs. 56-14-3 awarded to her by way of costs. There will be nothing to set off against it, as the order for costs in favour of the State is being set aside by us.

(10) Subject to the modification mentioned above, the order made by the arbitrator is maintained. The Rule is disposed of in the above terms.

(11) The petitioner is entitled to the costs of this Rule, which we assess at three gold mohurs.

(12) SINHA, J.: I agree.

A/R.G.D. Rule made absolute.

A. I. R. 1953 CAL. 704 (Vol. 40, C. N. 266)

G. N. DAS AND DEBABRATA MOOKERJEE JJ.

Gouripada Bandopadhya and others, Appellants v. S. Banerjee, Secy. to the Govt. of West Bengal and another, Respondents.

A. F. O. O. No. 12 of 1952 (Mandamus), D/-11-6-1953.

(a) West Bengal Land Development and Planning Act (1948), S. 4 — Validity — (Constitution of India, Arts. 19(1)(f) and 19(5).)

Section 4, even if it offends Art. 19 (1) (f) is saved by Art. 19 (5). AIR 1951 Cal 111, Applied. (Para 12)

(b) West Bengal Land Development and Planning Act (1948), S. 4 — Section does not contravene Art. 31 (1) — (Constitution of India, Art. 31 (1)). **(Para 13)**

(c) West Bengal Land Development and Planning Act (1948), S. 4 — Notification under — "The satisfaction of Governor."

Although S. 4 speaks of the State Government, the notification under it is not bad because it recites "whereas it appears to the Governor * * * ". The executive authority of the State Government is vested in the Governor, and therefore the use of the word "Governor" in the notification means "the State Government". The fact that the words "it appears to the Governor" occur in the notification is immaterial. The words "it appears to the Governor", have the same connotation as the words in S. 4 which speaks of the satisfaction of the State Government. (Para 14)

(d) West Bengal Land Development and Planning Act (1948), Ss. 4 and 2 (d) — Notification should specify particular public purpose for which acquisition is necessary — It need not mention all the clauses of S. 2 (d). **(Para 14)**

(e) West Bengal Land Development and Planning Act (1948), S. 4 — Notification under Act held not opposed to natural justice — Different notifications and the Rules framed under the Act amply safeguard the rights of the owner and give the persons interested sufficient opportunity of objecting either to the scheme or to the intended acquisition. **(Para 15)**

Arun Kumar Dutt, for Appellants; J. Majumdar, Asst. Govt. Pleader, and Pramatha Kumar Chakravarty, for Respondents.

CASE CITED:

(A) ('51) AIR 1951 Cal 111: 55 Cal WN 778

G. N. DAS J.: This appeal is directed against the judgment of Bose J. dated 26-11-1951.

(2) The facts are that a block of land was directed by a notification under section 4, West Bengal Land Development and Planning Act, 1948, to be a notified area in terms of that Section. The notification was duly published on 21-12-1950. Thereafter on 28-12-1950 a declaration was made under Section 6 of the Act read with Section 7 thereof whereby a plot of land belonging to the appellant and lying within the notified area was declared to be needed for the purpose of settling immigrants from East Pakisthan. Before possession was taken by the Collector the appellant filed an application under Art. 226 of the Constitution praying for the issue of a writ of mandamus directing the respondents not to proceed further in the matter. Bose J. issued a rule nisi on 21-2-1951.

(3) On a perusal of the affidavits filed in this case on behalf of the parties Bose J. discharged the Rule by his order dated 26-11-1951. It is against this order that the present appeal has been taken.

(4) Mr. Dutt who has appeared in support of the appeal ultimately pressed the following contentions:

(5) He contended that the notification under section 4 of the Act was an unreasonable restriction on the appellant's fundamental right to acquire, hold and dispose of his property under Art. 19 (1) (f) of the Constitution. In the second place he contended that the notification under section 4 was invalid being in contravention of Article 31 (1) of the Constitution. In the third place he contended that notification under section 4 is not in compliance with the spirit of S. 4.

(6) The West Bengal Land Development and Planning Act (Act 21 of 1948) was intended to make provision for the acquisition and development of land for purposes mentioned in the Act. Section 2 (d) of the Act defines the expression "public purpose" to include (i) the settlement of immigrants who have migrated into the State of West Bengal on account of circumstances beyond their control, (ii) the establishment of towns, model villages and agricultural colonies, (iii) the creation of better living conditions in urban and rural areas, (iv) the improvement and development of agriculture, forestry, fisheries and industries.

(7) Section 4 of the Act empowers the State Government if it is satisfied that any area specified in the notification is needed or likely to be needed for any public purpose to declare by notification in the official gazette a certain area to be a notified area. Section 4 (2) confers on the prescribed authority to do certain acts for the purpose of facilitating a survey of the land comprised in that notified area. Section 5 of the Act provides that the State Government may authorise the prescribed authority or if it thinks fit, any local authority or a Company to prepare a development scheme in respect of the notified area.

(8) Rule 5 (2) of the Rules framed under Section 14 of the Act requires that the Committee appointed under Rule 3 (2) will cause a local enquiry to be made either by the Collector or by an officer authorised by the Collector, after giving all persons interested an opportunity of making representations, if any, against the scheme. Section 5 (2) read with the Rules makes provision for

the framing of the Scheme and after the Scheme is framed for sanction thereof with or without modification by the State Government. Section 6 of the Act then provides that when the State Government has sanctioned a development scheme and is satisfied that any land within a notified area is needed for execution of the development scheme, a declaration to the effect that such land is needed for public purpose, shall, unless already made in pursuance of Section 7, be made by the State Government. Section 7 of the Act provides that in case of urgency if the State Government is satisfied that the preparation of a development scheme is likely to be delayed, the State Government may at any time make a declaration under section 6 in respect of such notified area or any part thereof, though no development scheme has been prepared or sanctioned by the State Government.

(9) Section 6 (2) provides that a declaration made in terms of Section 6 shall be published in the official gazette and shall state certain of the particulars which are intended to apprise people affected by the scheme of the details of the development scheme.

(10) Section 8 of the Act provides that declaration under section 6 shall be conclusive evidence of the public purpose mentioned in the declaration. The Section then provides that after making the declaration under section 6, the State Government may acquire the land and thereupon the provisions of the Land Acquisition Act 1894 shall, as far as may be, apply. Proviso (a) to Section 8 provides that if the State Government so directs, the Collector may, at any time, after a declaration made under Section 6 take possession in accordance with the rules and thereupon the land, etc. of which possession has been taken, shall vest absolutely in the Government free from all incumbrances. Rule 8 of the rules framed under Section 14 of the Act (provides?) that the Collector may cause public notice to be given before taking possession. There is an explanation appended to the proviso which lays down that for the purposes of the clause, the decision of the State Government as to whether the land is or is not waste or arable shall be final. Proviso (b) to Section 8 provides that the value of the land as provided in Section 23 (1) (a), Land Acquisition Act, shall be deemed to be the market value on the date of publication of the notification under Section 4 (1) for the notified area subject to the condition that if such market value of the land on 31-12-1946, on the footing that the land was in the same condition on 31-12-1942, was in excess of the market value determined under Section 23 (a), Land Acquisition Act, no account shall be taken of the excess.

The validity of certain provisions of this Act was called in question in the case of — 'West Bengal Settlement Kanungoe Co-operative Credit Society v. Mrs. Bella Banerjee', AIR 1951 Cal. 111 (A). We are informed that that decision is now under appeal to the Supreme Court. The Bench was of opinion that proviso (b) to Section 8 of the Act in so far as it fixes the compensation payable as the value of the land in its present condition on 31-12-1946 offends Article 31 (2) of the Constitution and is void; but as the provision is severable, the other part of the proviso to Section 8 is not hit by the Constitution. The Bench also decided that the existence or otherwise of the public purpose specified in the declaration is justiciable. The Bench also held that the provision contained in S. 8 which made the declaration conclusive was invalid. The Bench also decided that the Act did not suffer from any invalidity on the ground of absence of personal notice, because in the opinion of the Bench the provisions of rule 5(2) of the Rules framed under the Act, entitle the owner to make representations against the details of the scheme or against the necessity of the acquisition. The Bench also decided that the decision that the land is waste or arable is not justiciable.

(11) For the purposes of this appeal the learned Advocates proceeded on the footing that the decision of the Bench is binding on us and is correct. In the light of the principles discussed above we shall deal with the three contentions raised by Mr. Dutt.

(12) The first contention of Mr. Dutt is that the notification under S. 4 is invalid as it interferes with the fundamental right of the appellant under Art. 19(1)(f) of the Constitution which confers on every citizen the right to acquire, hold and dispose of his property. Conceding that Art. 19(1)(f) of the Constitution does apply the question still remains whether the impugned piece of legislation can be said to be valid in view of the provisions contained in cl. (5) of Art. 19 which saves legislations which are enacted in the interest of the general public and contain reasonable restrictions in the exercise of the right conferred by Art. 19(1)(f). In view of the decision in the case of — 'West Bengal Settlement Kannungoe Cooperative Credit Society v. Mrs. Bella Banerjee', (A), already cited, the existence or otherwise of a public purpose is justiciable and the award of compensation on the footing of the market value as on 31-12-1946, is invalid. As such, the owner whose land is sought to be acquired under the Act is entitled to question whether the public purpose as recited in the declaration exists or not. He is also entitled to just and reasonable compensation in respect of his land. As the land is required for public purpose as defined in the Act it follows that the land is acquired in the interest of the general public. The payment of just and reasonable compensation amply safeguards the rights of the owner whose land is acquired. Compulsory acquisition of land may be necessary in the larger interest of the general public, and cannot per se be regarded as an unreasonable restriction. It cannot be said that even though the land is needed in the interest of general public and fair compensation is paid to the owner who is entitled to prefer objection to the scheme and the intended acquisition the notification u/s 4 should be per se regarded as an unreasonable restriction. I may point out that in the case already cited, the provisions of rule 5(2) provided for ample notice to the owners or persons interested to raise objection not merely to the details of the scheme but also to the acquisition itself. There is, therefore, no basis for the contention that the impugned legislation contains unreasonable restriction on the fundamental right of a citizen to acquire, hold and dispose of his property. In my opinion legislation is saved by cl. (5) of Art. 19 conceding that Art. 19(1)(f) of the Constitution is attracted in such cases.

(13) The second contention of Mr. Dutt is based on Art. 31(1) of the Constitution. Art. 31(1) deals generally with expropriation of a person's property. Art. 31(2) deals specifically with acquisition for a public purpose and contemplates cases like the present. In cases where land is acquired for a public purpose the Constitution provides for payment of compensation which obviously means just and fair compensation. If such compensation is paid, the Constitution authorises acquisition for a public purpose and a legislation intended to that end cannot, in my opinion, be said to offend Art. 31(1) of the Constitution. There

is, therefore, no force in the second contention raised by Mr. Dutt.

(14) The 3rd contention of Mr. Dutt relates to the invalidity of the notification u/s 4 of the Act. The notification is attacked on a two-fold ground. In the first place it is contended that although the Section speaks of the State Government, the notification recites "Whereas it appears to the Governor* * ". The executive authority of the State Government is vested in the Governor, and therefore the use of the word "Governor" in the notification means "the State Government". The fact that the words "it appears to the Governor" occur in the notification is immaterial. The words "it appears to the Governor", in my opinion, have the same connotation as the words in S. 4 which speaks of the satisfaction of the State Government.

It is also pointed out that the notification is defective because it recites only one of the purposes mentioned in S. 2(d)(i) viz., the settlement of immigrants. I do not understand the force of this contention. I have already quoted the 4 clauses of S. 2(d). The different clauses provided for different states of facts. Mr. Dutt seems to suggest that the notification ought to mention all these clauses. In my opinion such a statement would confuse the issues. The notification should specify the particular public purpose for which the acquisition is necessary under the Act so that the person interested may prefer objections under R. 5(2). In my opinion the notification which was issued in this case is consistent with the terms of the Act and cannot be said to be invalid. It does not accord with the true spirit of the Act. The third contention raised by Mr. Dutt must also be negatived.

(15) Nor can it be said that the notification contemplated by the Act is opposed to natural justice. The Act provides for a three-fold notification. First, a notification u/s 4, a notification of the declaration u/s 6 and a further notification before possession is taken. In my opinion the different notifications and the Rules framed under the Act amply safeguard the rights of the owner and give the persons interested sufficient opportunity of objecting either to the scheme or to the intended acquisition. It is true that the Act does not contain a provision similar to S. 5A, Land Acquisition Act, but the whole object of the present legislation is to acquire property for public purposes and speedily in certain contingencies. Such a purpose will be frustrated if personal notices are required to be served on the owners and persons interested who may be various persons and whose whereabouts may be unknown at the time when the notification u/s 4 is issued. There is nothing in the Act which makes it opposed to the principles of natural justice.

(16) The result is that this appeal fails and is dismissed with cost — hearing-fee being assessed at three gold mohurs.

(17) DEBABRATA MOOKERJEE, J.: I agree.

A/R.G.D. Appeal dismissed.

A. I. R. 1953 CAL. 706 (Vol. 40, C. N. 267)

MITTER AND SEN JJ.

Jagdish Chandra, Accused-Petitioner v. Corporation of Calcutta, Complainant-Opposite Party.

Criminal Revn. No. 897 of 1952, D/- 15-4-53.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 422 and 407 (1) (e) and (v) — Mustard oil — Presumption under S. 422.

Under S. 422 it is a certain quantum of deficiency in any of the normal constituents of mustard oil that raises a presumption that the oil is not genuine. That being so, unless the constituents are declared or known, the question of a deficiency does not arise. But the Notification No. 735 P. H. dated 20-3-1928 does not declare the normal constituents of mustard oil by prescribing the limits of its saponification and iodine values. Section 407 does not prohibit the manufacture or sale of mustard oil provided it is derived exclusively from mustard seed. That being so, unless Government declares the normal constituents of mustard oil, and a certain deficiency is shown to exist in any such constituent, no presumption can arise that the oil is not genuine. (Paras 4, 5)

(b) Municipalities — Calcutta Municipal Act (3 of 1923), S. 422 — Notification No. 736 P. H. dated 20-3-1928 — Strict construction.

Both S. 422 and Rule 7 of Notification No. 736 P. H. dated 20-3-1928 provide for a presumption against the genuineness of mustard oil in case of a certain deficiency in any of its normal constituents. That being the case, the relative provisions should be strictly construed. (Para 5)

(c) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 407 and 422 — Notification No. 735 P. H. dated 20-3-1928 is 'ultra vires'.

Notification No. 735 P. H. dated 20-3-1928 cannot take away a person's right to manufacture or vend mustard oil which is derived exclusively from mustard seed (S. 407 (1) (v)), irrespective of the quality of the seed. The Notification by prescribing a kind of mustard oil which has a particular saponification value as also a particular iodine value seeks to limit a person's right to sell mustard oil derived exclusively from mustard seed. That being so, the alleged declaration by Notification No. 735 P. H. offends against S. 407 of the Act. (Para 6)

(d) Municipalities — Calcutta Municipal Act (3 of 1923), S. 422 — Power of Government to make orders.

Section 422 gives the power in general terms to the Government to declare the normal constituents of any article of food or drug, and there is nothing to show that this power is limited to such items in S. 407 as contain a provision for the prescribing conditions or constituents. In respect of such items the Government may make special orders within the terms of the respective clauses of S. 407; but this does not affect the power of the Government to make orders under S. 422 in respect of any article of food or drug. (Para 17)

N. K. Basu and Pashupati Ghosh, for Petitioner; A. K. Sen; for the State; Sunil Kumar Basu, for Corporation.

CASES CITED:

(A) ('39) AIR 1939 Cal 667: 43 Cal WN 1030

(B) ('40) AIR 1940 Cal 324: 44 Cal WN 615: 41 Cri LJ 849

MITTER J.: This Rule was directed against the petitioner's conviction under S. 407 read with S. 488, Calcutta Municipal Act, 1923, for having sold adulterated mustard oil. The prosecution case was based upon an analysis of a sample of the oil concerned disclosing a saponification

value of 177.8. The petitioner's defence was that the oil was pure.

(2) The validity of the conviction depends upon the construction to be placed upon the relative words of two Government Notifications, numbered respectively 735 P. H. and 736 P. H., both dated 20-3-1928, issued in exercise of the power conferred by S. 422 of the Act.

(3) The material part of S. 407 of the Act is in these terms:

"407 (1) No person shall directly or indirectly, himself or by any other person on his behalf, sell, expose or hawk about for sale, or manufacture or store for sale, any of the following articles, namely,

....

(e) mustard oil,

....

unless the following conditions are fulfilled, namely,

....

(v) in the case of mustard oil — it shall be derived exclusively from mustard seed;"

It is clear from the section that what is prohibited is the sale etc. of mustard oil which is not derived exclusively from mustard seed. Section 422 is as follows:

"The Provincial Government may declare the normal constituents of any article of food or any drug and may determine, by rules in this behalf, what deficiency in any of these constituents, or what addition of extraneous matter or proportion of water in a sample of any article of food or drug, shall, for the purposes of this Act, raise a presumption until the contrary is proved that the article of food or drug is not genuine or is injurious to health; and a public analyst shall have regard to such rules in certifying the result of an analysis under this Act."

This section thus empowers Government (i) to declare the normal constituents of any article of food, and (ii) to determine, by rules in this behalf, what deficiency in any of these constituents shall raise a presumption until the contrary is proved that the article of food is not genuine. It also provides that a public analyst shall have regard to such rules in certifying the result of an analysis under the Act.

(4) The material portions of Notification No. 735 P.H. are as follows:

"In exercise of the power conferred by S. 422, Calcutta Municipal Act, 1923 (Bengal Act 3 of 1923), the Government of Bengal (Ministry of Local Self-Government) are pleased to declare that the normal constituents of the articles of food named below are those specified against each such article, namely:

....

Mustard oil is the fixed oil express or extracted from mustard seed and shall have a saponification value of not less than 169 and not more than 175 and an iodine value of not less than 96 and not more than 104."

Rule 7 of Notification No. 736 P.H. is in these terms:

"7. Mustard oil.—

(a) where in a sample of mustard oil the saponification value is less than 169 or more than 175 it shall be presumed, until the contrary is proved for the purposes of the Act, that the mustard oil is not genuine by reason of the addition thereto of extraneous oil.

(b) Where in a sample of mustard oil the iodine value is less than 96 or more than 104 it shall be presumed, until the contrary is proved for the purpose of the Act, that the mustard oil is not genuine by reason of the addition thereto of extraneous oil."

It is clear from the language of S. 422 that it is a certain quantum of deficiency in any of the normal constituents of mustard oil that raises a presumption that the oil is not genuine. That being so, unless the constituents are declared or known, the question of a deficiency does not arise. Section 407 provides that no one is to sell mustard oil unless it is derived exclusively from mustard seed. The question to be decided is whether the first-named Notification can be said to declare the normal constituents of mustard oil which is derived exclusively from mustard seed. If the words used in the Notification cannot be read as declaring the normal constituents of mustard oil, it would follow that the Notification is not in conformity with what is laid down in S. 422. It cannot be disputed that the saponification value or the iodine value of mustard oil must vary with the quality of mustard seed. The variation as to saponification and/or iodine value, within certain limits, is not necessarily dependant upon the addition of extraneous oil. If that be correct, it cannot be said that Notification No. 735 P.H. in fact declares the normal constituents of mustard oil by prescribing the limits of its saponification and iodine values. The learned Junior Standing Counsel on behalf of the Corporation argued that although the Notification did not in terms declare the normal constituents of mustard oil, the same could be deduced from the limits of saponification and/or iodine value, as the case may be, which are set out in the Notification. In our view, the Notification concerned prescribes standards for mustard oil in terms of chemical reactions and does not prescribe the normal constituents of mustard oil.

(5) Both S. 422 of the Act and Rule 7 of Notification No. 736 P.H. provide for a presumption against the genuineness of mustard oil in case of a certain deficiency in any of its normal constituents. That being the case, the relative provisions should be strictly construed, and unless the conditions mentioned in S. 422 are fulfilled, there can be no presumption that the oil concerned is not genuine. The fact that the Notification provides for limits both in the case of saponification value and the iodine value shows that the quality of mustard oil must depend upon the quality of mustard seed. Section 407 does not prohibit the manufacture or sale of mustard oil provided it is derived exclusively from mustard seed. That being so, unless Government declares the normal constituents of mustard oil, & a certain deficiency is shown to exist in any such constituent, no presumption can arise that the oil is not genuine.

(6) There is another aspect of the matter. Section 407 (1) (v) provides:

"(v) in the case of mustard oil — it shall be derived exclusively from mustard seed;"

There is no further limitation. Notification No. 735 P.H., however, imposes a limitation upon the use of mustard seed by requiring that it should be such as to produce mustard oil having a saponification value between 169 and 175 and an iodine value between 96 and 104. There can be no doubt that the Notification cannot take away a person's right to manufacture or vend mustard oil which is derived exclusively from mustard seed, irrespective of the quality of the seed. The Notification by prescribing a kind of mustard oil which has a particular saponification value as also a particular iodine value seeks to limit a person's right to sell mustard oil derived exclusively from mustard seed. That being

so, the alleged declaration by Notification No. 735 P.H. would appear to me to offend against S. 407 of the Act.

(7) In the case before us, the petitioner called one Om Prokash, Oil Expert to the U. P. Government, Head of Oil Section, H. B. Technological Institute and Officer-in-charge, Central Laboratory, Government of India. This witness deposed as follows:

"There are different specifications of mustard oil. Different States have got their own specifications and Government of India have got their specifications of mustard oils. These specifications are for pure mustard oil. In my opinion the saponification value of pure mustard oil can go up to 178. The Government of India's specification of the Department of Industries and Supply, the specification for mustard oil has been laid down 178 as the maximum limit of saponification value."

According to this witness, the saponification value of 177.8 found in the sample concerned is within the maximum limit of saponification value recognised by the Department of Industries and Supply, Government of India. There was, of course, no test as to iodine value of the sample. The petitioner also relied upon the following extract from a letter addressed by the Government of Bengal to the Deputy Director of Agricultural Marketing:

"I would inform you that the standards of purity of mustard oil as prescribed under Bengal Food Adulteration Act are not accepted as fixed and rigid standards by the West Bengal Public Health Laboratory and have not been so accepted for many years. Samples of mustard oil giving the saponification value of even 177.0 or iodine value of 106.0 are not declared as adulterated simply because of the high saponification and iodine values, but if special tests, e.g.....confirm the presence of adulterant. Under the new Pure Food Act this point will be made clear."

All authorities on oil seem to be agreed that mustard oil from mustard seeds of different kinds and/or grown in different parts of India would give different saponification and iodine values. It is also not disputed that mustard seeds grown in U. P. give a high saponification value. It is said that the mustard oil concerned was produced from seeds grown in U. P.

(8) In our view, the first of the two Notifications does not declare what the normal constituents of mustard oil are. There is, therefore, no room for any presumption, merely on the basis of the saponification value of the oil concerned, that there was adulteration. There was no evidence that the oil concerned was not derived exclusively from mustard seed. That being so, the petitioner's conviction must be set aside.

(9) In the result, this Rule is made absolute. The fine, if paid, must be refunded.

(10) SEN J.: The petitioner Jagadish Chandra Jain and a firm Messrs. Jagannath Ramchand were prosecuted before the Municipal Magistrate, Calcutta, on a charge under S. 407/488, Calcutta Municipal Act, 1923, for having stored for sale, and selling, adulterated mustard oil on 11-7-1949. A sample of the oil was taken by a Food Inspector, S. B. Nath, and sent to the Public Analyst of the Corporation of Calcutta. The Public Analyst gave the opinion that the sample was a sample of mustard oil adulterated with other oils, and he based his opinion on the data found by him, viz., Baudouin's test gave a negative result but saponification value was 177.8.

(11) The accused pleaded not guilty, and took the defence that the oil was pure mustard oil. For rebutting the presumption arising from the saponification value of the sample being above 175, the defence examined Sri Om Prakash, oil expert to the U. P. Government, and the witness stated that in his opinion, saponification value of pure mustard oil could go up to 178, that different States had slightly different specifications for pure mustard oil, and that the Department of Industries and Supply, Government of India, had laid down 178 as the maximum limit of saponification value of pure mustard oil. In view of the evidence of the above witness for the defence, the learned Municipal Magistrate considered that the presumption referred to in the rules made by the Government of Bengal and raised by the saponification value being 177.8 had been rebutted, and so he acquitted the accused.

(12) There was an appeal by Government against the acquittal, and this Court allowed the appeal, pointing out that in respect of a prosecution under the Calcutta Municipal Act, the presumption raised by the Act and the rules made thereunder could not be rebutted by evidence that according to the specifications prescribed by another State the sample of mustard oil could not be held to be adulterated, or by the opinion of an expert that pure mustard oil could have saponification value as high as 178, but that the accused must prove that the particular sample of mustard oil was pure. The case was remanded with the direction that the accused should be given an opportunity to produce further evidence to rebut the presumption and that they might apply for action under S. 425, Calcutta Municipal Act, 1923.

(13) When the case went back for retrial, the accused applied under S. 425 of the Act to have the sample in the custody of the Corporation sent to the Director of Public Health for analysis and for ascertaining adulterants if any. The sample in the custody of the Corporation was accordingly sent to the Director of Public Health who in due course submitted a report that the saponification value of the sample was 175.75 and the iodine value 106.6 and that the sample was a sample of adulterated mustard oil. The Director of Public Health did not, however, make any test for ascertaining adulterants, as such instruction was not given in due time by the Magistrate through oversight by his office. The defence also proved some correspondence between the U. P. Government and the Government of Bengal in 1936 relating to the standard specified for mustard oil, and between two Departments of the Government, West Bengal in 1948 relating to the standard prescribed for mustard oil under the Bengal Food Adulteration Act, which is the same as the standard prescribed under the Calcutta Municipal Act.

(14) The learned Magistrate held that such correspondence was inadequate for the purpose of rebutting the presumption arising in the case against the accused. Strictly speaking, such correspondence was not admissible as evidence. The Magistrate pointed out that the result of the analysis by the Director of Public Health supported the conclusion of the Corporation Public Analyst, and so he convicted the petitioner Jagadish Chandra Jain, who had actually sold the oil to the Food Inspector, under S. 407/488, Calcutta Municipal Act, 1923, and sentenced him to pay a fine of Rs. 200, though he acquitted the firm under the idea that a firm was not a person and could not therefore be prosecuted.

(15) Against such conviction the petitioner has filed this application. In the application the grounds taken are mainly that the learned Magistrate was wrong in holding that the presumption of adulteration, arising from the result of analysis of the samples taken with the rules under the Calcutta Municipal Act, had not been sufficiently rebutted; and that the accused petitioner was prejudiced by the fact that the sample of oil sent to the Director of Public Health was not tested for the presence of adulterants, owing to the failure of the Court officers to convey complete instructions to the Director in the first instance. At the hearing of the application, however, a point of law going to the root of the case has been urged for the first time, viz., that the rule or notification made by the Government providing that a presumption of adulteration shall be made when the saponification value falls outside the range 169-175 or when the iodine value is outside the range 96-104, is itself 'ultra vires' the Calcutta Municipal Act.

(16) Section 407 of the Act, in so far as it relates to mustard oil, is as follows: (Here his Lordship quoted the material portions of S. 407 (1) the text of which is already given in para. 3). Section 422 of the Act runs as follows: (For text of S. 422 see para. 3). In exercise of the power conferred by S. 422 of the Act, the Government made and published Notification No. 735 P.H. dated 20-3-1928, declaring (or purporting to declare) the normal constituents of certain articles of food, viz., milk, dahi, chhana, khoa, ghee, butter, mustard oil, cocoanut oil, wheat flour, atta and tea; and Notification No. 736 P.H. of the same date consisting of rules providing in respect of each of the above articles of food, what deficiency in its constituents, or addition of extraneous matter, or proportion of water therein shall raise a presumption until the contrary is proved that the article of food is not genuine or is injurious to health. In respect of mustard oil, Notification No. 735 P.H. is as follows: (for text, see para. 4). And Notification No. 736 P.H. is as follows: (for text, see para. 4).

(17) Mr. Ghosh appearing for the petitioner first took the point that in respect of mustard oil S. 407 contains the complete law and that Government cannot make a rule or notification under S. 422 laying down further provisions relating to the same; and that Government may make rules in respect of such articles of food as milk, butter, ghee, etc., in respect of which S. 407 itself provides that the Government may prescribe conditions they must fulfil or declare the constituents thereof. This argument, however, cannot be accepted. Section 422 gives the power in general terms to the Government to declare the normal constituents of any article of food or drug, and there is nothing to show that this power is limited to such items in S. 407 as contain a provision for the prescribing conditions or constituents. In respect of such items the Government may make special orders within the terms of the respective clauses of S. 407; but this does not affect the power of the Government to make orders under S. 422 in respect of any article of food or drug.

(18) Mr. Ghosh has next urged that S. 422 empowers the Government to declare the normal constituents of an article of food or drug, whereas Notification No. 735 P. H. prescribes standards of chemical reactions which mustard oil for instance must satisfy, and does not declare the normal constituents of the same, and is therefore ultra vires; that similarly, the second part of S. 422 enables the Government to provide by rules what deficiency in the prescribed constituents or what addition of extraneous matter shall raise a presumption that the article is not genuine, whereas Notification No. 736 P.H. provides for the raising of such presumption when the mustard oil sample gives chemical reactions outside the prescribed range, and it is, therefore, also 'ultra vires'. Mr. Ashok Sen, appearing for the Corporation has urged that though apparently the notifications prescribe standards for mustard oil in terms of chemical reactions, the notifications properly understood really prescribe the normal constituents of the same and provide for the raising of the presumption when there is deficiency of the normal constituents or addition of extraneous matter. To appreciate this argument, it is necessary to consider the chemical reactions concerned.

(19) Saponification means the decomposition of fats and oils by the action of alkalies like caustic soda or caustic potash into soap and glycerine; and the saponification value of a fat or oil is the no. of milligrams of potassium hydroxide (caustic potash) neutralised during saponification of 1 gram of the fat or oil; it is a measure of the mean molecular weight of the fatty acids in the fat or oil. The iodine value of a fat or oil is the amount of iodine that it will absorb expressed as a percentage of the molecular weight of the fat or oil; it is a measure of the unsaturated fatty acids present in a fat or oil, as saturated fatty acids absorb no iodine. (See Public Health Laboratory Practice, by Stewart and Boyd). Different fats and oils have widely different saponification values and iodine values, and these values are indices not only of the purity of a particular oil or fat, but also of the nature and constitution of the oil or fat. So when it is prescribed that mustard oil shall have a saponification value between 169 and 175, and iodine value between 96 and 104, it may be said that this means that mustard oil shall contain such fatty acids as give a saponification value of 169-175, and such amount of unsaturated fatty acids as give an iodine value of 96-104, and values outside the above ranges would indicate deficiency of the fatty acids which are the constituents of mustard oil and addition of some extraneous oil containing fatty acids with different values. It is urged, therefore, that the Notifications are within the terms of S. 422 of the Act.

(20) There can be hardly any doubt that the authorities who drafted the disputed notifications thought on the above lines. But it is necessary that an order or a rule made under a statutory provision should strictly comply with the terms of that provision. In respect of mustard oil, the two notifications do not directly comply with the terms of S. 422; they directly prescribe the specification or standard to which a sample of mustard oil must conform. It may be said that in respect of mustard oil Notification No. 735 P.H. is directly in terms of S. 407(1)(vii), which provides that an edible oil or edible fat must conform to the specification or standard prescribed for the same. Now mustard oil is an edible oil, and if there had been no separate provision for mustard oil in cls. (e) and (v) of S. 407(1), the specification or standard for mustard oil might be validly prescribed under S. 407(1)(vii). But in view of the separate provision for mustard oil, butter and ghee in other clauses, it must be held that the term 'edible oil and edible fat' in cl. (vii) excludes mustard oil, butter and ghee, and while for butter and ghee, conditions they must fulfil may be prescribed under the respective clauses of S. 407(1), for mustard oil we are thrown back on S. 422 and any rule or order made thereunder must declare the normal con-

stituents, and provide for raising of the presumption from a deficiency of such constituents or addition of extraneous matter. Clearly Notifications 735 P.H. and 736 P.H. do not do so, at least directly, in respect of mustard oil. As regards 736 P.H., the provision that when values are outside the prescribed range, the oil shall be presumed to be not genuine by reason of the addition of extraneous oil, is contrary to the terms of S. 422 that Government may prescribe what addition of extraneous matter will raise a presumption as to the article not being genuine. To follow the terms of S. 422, the rule might be put as follows:— that when there is such addition of extraneous oil as takes the saponification value and iodine value outside the prescribed ranges, the mustard oil shall be deemed to be not genuine. But this would be meaningless, because as soon as there is addition of any extraneous oil the mustard oil ceases to be genuine, and there is no need to raise a presumption. This makes it clear that Notification No. 736 P.H. is not really in terms of S. 422, but that it independently provides that a presumption against genuineness shall be made when a sample fails to give such values on chemical analysis as genuine mustard oil is known to give. Similarly, though Notification No. 735 P.H. might be paraphrased as follows:— that mustard oil shall contain such fatty acids as give a saponification value of 169-175 and such amount of unsaturated fatty acids as give an iodine value of 96-104, it would still be logical to hold that the notification really sets forth the chemical standard for pure mustard oil & does not declare the normal constituents of mustard oil. It must, therefore, be held that the Notifications in question are 'ultra vires' S. 422, Calcutta Municipal Act, 1923.

(21) Of the rulings cited before us, the question as to the validity of the notification as to mustard oil under S. 4, Bengal Food Adulteration Act, which corresponds to S. 422, Calcutta Municipal Act, was not raised in — 'Supt. & Remembrancer of Legal Affairs v. Kshitish Chandra', AIR 1939 Cal 667 (A), and the Court was concerned only with the question how the presumption arising under S. 4 taken with the Notification could be rebutted. In — 'Nowrangalal v. Chairman, Midnapore Municipality', AIR 1940 Cal 324 (B), the question was raised, but the question was not finally decided because the case related to ghee, and the Court held that under S. 6, Food Adulteration Act (corresponding to S. 407, Calcutta Municipal Act, 1923) chemical standards might be prescribed as conditions which ghee must fulfil. Henderson J. observed, however, in that case that the part of the notification prescribing standards of butyro-refractometer reading, saponification value and Reichert-Wollny value for ghee was ultra vires S. 4 of the Act; and Khundkar J., though he refrained from deciding the question, still observed that it was not easy to understand how rules laying down chemical standards come to be formulated under S. 4, under which Government might declare the normal constituents of any article of food, and determine what deficiency in any of the constituents or what addition of extraneous matter would raise a presumption against genuineness.

(22) In the case before us, the notifications under S. 422 having been held to be bad in respect of mustard oil, there remains only cl. (v) of S. 407 (1), and so the prosecution could succeed only if it were shown that the sample of mustard oil contained any extraneous oil. The test for sesame oil, Baudown's test, gave a negative result, i.e., no trace of sesame oil was found. No test was made for any other extraneous oil. Hence it must be held that there was no evidence to show that the sample of oil was adulterated; this application must therefore succeed and the conviction of the petitioner under S. 407/488, Calcutta Municipal Act, 1923, and the sentence passed thereunder must be set aside.

(23) It is no doubt regrettable that at a time when sale of adulterated mustard oil is a crying evil, the notification prescribing standards for genuineness or otherwise of mustard oil have to be found 'ultra vires'. It has already been indicated how by a slight amendment of S. 407 (S. 462 of the new Act) it would be possible to prescribe validly the standard of purity in respect of mustard oil. It is to be noted, however, that any standard laid down under S. 407 would be absolute, i.e., the same must be conformed to in all cases, and there would be liability to punishment for failure to conform to the standards, even if a particular sample were derived exclusively from mustard seed. If it is intended to provide a standard non-conformity into which would merely raise a presumption that the oil is not genuine, it would be necessary to amend S. 422 (S. 477 of the new Act) so as to empower the Government to lay down thereunder a standard of purity as well as to declare the normal constituents of any article of food or drug. Until such amendment of the sections and issue of fresh rules and notifications thereunder, prosecutions for adulterated mustard oil would be possible only by establishing that a particular sample thereof contains some extraneous oil.

B/V.S.B. Conviction set aside.

A.I.R. 1953 CALCUTTA 710 (Vol. 40, C. N. 268)

LAHIRI AND GUHA JJ.

Punyendra Narayan, Plaintiff, Petitioner v. Bhairabendra Narayan and others, Opposite Parties.

Civil Rule No. 2897 of 1951, D/- 17-3-1953.

Court-fees Act (1870), S. 7 (v) (a) (Bengal) — Net profits — Tests — Maintenance and education allowance paid to junior members and grants to medical institution, deduction of, in arriving at net profits of estate — Three times compensation payable under Assam Abolition of Zemindari Act does not furnish standard for assessing market value.

In order to entitle the plaintiff to deduct any amount from the gross collection it must be shown that the amount spent had some connection with the collection of rent or management and preservation of the estate. (Para 7)

Maintenance and education allowances paid to junior members of the family and widows and grants to medical and educational institutions cannot be deducted for arriving at net profits of the estate. (Para 7)

The expression "net profits" means the difference between the gross collection and the expenses incurred for collection, management and preservation of the estate including expenses incurred for payment of statutory public charges, for example, revenue, cesses, taxes, local rates and the like. (Para 7)

The fact that under Assam Abolition of Zemindary Act the owners of estates are to receive three times the net profits as compensation, does not furnish a proper standard for assessing market value under the Court-fees Act. (Para 9)

Anno: Court-fees Act, S. 7 (v) N. 17.

Amarendra Mohan Mitra, for Petitioner; Atul Chandra Gupta; J. N. Banerjee and Ashutosh Ganguly, for Opposite Parties.

CASES CITED:
(A) ('33) AIR 1933 PC 145: 60 Ind App 196 (PC)
(B) ('42) AIR 1942 Mad 585: 203 Ind Cas 457

ORDER: This Rule raises the question of court-fees payable by the plaintiff. The plaintiff instituted the suit claiming the Bijniraj Estate which was under the management of the Court of Wards together with certain movable properties. The suit as originally instituted was for declaration only and when it was held by the Court that a purely declaratory suit was barred by the proviso to S. 4, Specific Relief Act, the plaintiff filed a petition for amendment by adding a prayer for possession and giving up his claim to certain movable properties and also one item of immovable property which has been described as Monoharpur Chak which has been resumed by the Government. The question of court-fees arose when the plaintiff sought to add the prayer for possession.

(2)It is common ground that the court-fee payable should be determined by Art. 7, Para. 5 of the Court-Fees Act. The plaintiff valued his claim at Rs. 2,17,271/- odd on the footing that according to the administration report of the Court of Wards which was managing the estate, the net profits which had arisen from the properties during the year next before the date of presentation of the plaint amounted to Rs. 20,723-10-11 pies and three times this amount represented the market value of the property. The value of the immovable properties was thus stated to be Rs. 60,171/- odd to which the plaintiff added certain additional items about which there is no dispute between the parties. According to the plaintiff, the market value is three times the net profits, because under the provisions of the Assam Abolition of Zemindary Act the owners of estate are to receive three times the net profits as compensation.

(3) The defendants challenged the valuation made by the plaintiff on the ground that the net profits as shown in the administration report of the Court of Wards are wrong, that on a proper estimate the net profits would be much higher and that the provisions of the Assam Abolition of Zemindary Act did not afford a proper criterion for determining the market value of the properties in dispute.

(4) It is admitted that the properties described in Sch. A of the plaint are impartible. According to the administration report of the Court of Wards, the gross collection of the estate is Rs. 6,43,875/-. The total cost of management including litigation expenses and audit fees amounts to Rs. 1,79,000/-. The Subordinate Judge has held that the cost of management is too high and has reduced it to Rs. 96,500/- by making an allowance of 15 per cent. upon gross collection, with the result that the net profit has been increased by Rs. 82,500/-. On this basis, the net profits of the estate have been found to be Rs. 1,03,000/- and the plaintiff has been directed to pay court-fees on 15 times this amount, that is, on Rs. 15,45,000/-. The maximum court-fee of Rs. 10,000/- under the Court-Fees Act becomes payable as soon as the valuation reaches the figure of Rs. 11,00,000/-. The plaintiff has accordingly been directed to pay the maximum court-fee. Against this order the plaintiff has obtained the present Rule.

(5) Mr. Mitter appearing in support of the Rule has argued that under S. 7 Para. 5 of the Court-Fees Act the Court has to find the net profits which have actually arisen during the year next before the institution of the suit and has no jurisdiction to ascertain the net profits that ought to have arisen. Mr. Gupta appearing for the opposite parties has, on the other hand, contended that the expression "net profits" in S. 7 Para. 5 means the gross collection minus the expenses reasonably incurred for collection.

(6) Under S. 7, Para. 5 of the Court-Fees Act the plaintiff has to pay court-fees upon 15 times the net profit which has arisen from the lands during the year next before the institution of the suit, or if the Court thinks that such profits have been wrongly estimated, 15 times such amount as the Court may assess as such profits, or according to the market value of the land, whichever is lower. Upon the materials on the record, it appears to us that the rival contentions put forward by the petitioner and the opposite parties, as noted above, do not require any decision in this case, because even if we accept the contention of the petitioner, as noted above, he is not entitled to succeed. From the statement of valuation filed by the petitioner under S. 8A of the Court-Fees Act, we find that for the purpose of calculating the net profits which have arisen from the lands, the plaintiff has various items. Mr. Gupta has argued that the plaintiff is not entitled to deduct items Nos. 4, 5 and 6 of the list of disbursements as shown in the statement of valuation. The gross collection of the estate, as we have already stated, is Rs. 6,43,875/-. From this figure the plaintiff has deducted Rs. 36,780/- as the maintenance and educational allowances of the junior members of the impartible estate; Rs. 648/- as the maintenance allowance paid to widows forming charge on the estate and Rs. 69,473-13-0 as recurring expenditure for medical and educational institutions founded and maintained by the estate in commemoration of the memory of ancestors (Vide items Nos. 4, 5 and 6 of the list of disbursements in the statement of valuation. The total of these three items is Rs. 1,02,901/- odd. If we hold that these three items cannot be deducted from the gross collection for calculating net profits, the net profits, as shown in the statement of valuation, viz., Rs. 20,723 odd, would be increased by the aforesaid amount. We have, therefore, to consider the meaning of the expression "net profits which have arisen from the land" as used in S. 7 Para. 5 of the Court-fees Act.

(7) In our opinion, the expression "net profits" means the difference between the gross collection and the expenses incurred for collection, management and preservation of the estate including expenses incurred for payment of statutory public charges, for example, revenue, cesses, taxes, local rates and the like. Litigation costs and audit fees may be deducted as expenses incurred for the management of the estate, but we cannot hold that maintenance and education allowances paid to junior members of the family and widows and grants to medical and educational institutions can be deducted for arriving at the net profits of the estate. Mr. Mitter has argued that under the Hindu Law relating to impartible estate the maintenance of junior members is a charge on the estate and can, therefore, be legitimately deducted. We cannot, however, accept this contention. In order to entitle the plaintiff to deduct any amount from the gross collection it must be shown that the amount spent had some connection with the collection of rent or management and preservation of the estate.

(8) Mr. Mitter has relied upon the decision of the Judicial Committee in the case of — 'Bejoy Singh Dudhuria v. Commr. of Income-tax, Calcutta', AIR 1933 PC 145 (A), for the proposition

that under the Indian Income-tax Act the amount paid to any member of the family as maintenance allowance does not form part of the income of the assessee. In our opinion, that decision does not throw any light on the point which we have to consider in the present case. In this case we have to consider the meaning of net profits arising from the lands and not the income of an individual. We are inclined to hold that unless the expenses are incurred in connection with the earning of profits, they cannot be taken into account in ascertaining the net profits arising from the land. This is also the view taken by Chandrasekhara Ayyar J. in the case of — 'Ratnavelu Pillai v. Varadaraja Pillai', AIR 1942 Mad 585 (B). The disbursements shown in items Nos. 4, 5 and 6 of the list of disbursements in the statement of valuation are not expenses incurred for earning the profit, but in our opinion they were disbursements made out of the net profits. In this view of the matter, we hold that the plaintiff is not entitled to claim the deductions as mentioned in items Nos. 4, 5 and 6 of the disbursements in the statement of valuation and therefore the plaintiff has wrongly estimated the net profits. The net profits shown by the plaintiff in the statement of valuation, that is, Rs. 20,723/- odd, should be increased by Rs. 1,02,901/- odd, which is the total of items Nos. 4, 5 and 6, as stated above. The total net profits will thus amount to Rs. 1,23,624/- odd. The plaintiff should be directed to pay court-fee on 15 times this amount unless, of course, the market value is lower. The Subordinate Judge has found that the market value of the properties is Rs. 92,00,000/- on the basis of the valuation put by the plaintiff in the plaint as originally filed. Mr. Mitter has contended that the plaintiff has abandoned his claim to some of the items of the original plaint and accordingly the value to the claim has reduced. He has further argued that the original valuation was adopted by the plaintiff from another plaint in a suit instituted by defendant 1. Whatever may be the reason for the plaintiff's valuing the properties at Rs. 92,00,000/-, the statement in the original plaint is an admission which binds the plaintiff unless the plaintiff shows it to have been wrongly made.

In our opinion, the plaintiff has failed to show that the admission was wrongly made by him. From the plaint as originally filed, we find that the value was stated to be Rs. 92,00,000/-. Subsequently, there was an application for amendment of the plaint by adding two schedules, viz., Schs. D and E. The total value of the properties included in Sch. D was about Rs. 3,00,000/- odd. The total value of the properties included in Schedule is Rs. 4,00,000/- odd. The total value of all the properties after the amendment thus comes up to little over Rs. 99,00,000/-. The plaintiff has abandoned his claim to the properties described in Sch. E and also the claim to Monoharpur Chawk which is included in Sch. A. The annual demand in respect of Monoharpur Chawk as stated in the statement of valuation is Rs. 10,000/-. Therefore, the market value of the Monoharpur Chawk and all the properties described in Sch. E will have to be deducted from the total value of the properties as described in the plaint. Even if we assess the value of the Monoharpur Chawk at Rs. 2,00,000/- at 20 years' purchase, we find that the plaintiff is entitled to claim a deduction of a little over Rs. 6,00,000/- on account of the abandonment of a part of his claim. This will bring down the value of the properties to little over Rs. 92,00,000.

(9) It now remains for us to dispose of the contention that the market value of the property should be assessed at three times the profits. Under the Assam Acquisition of Zemindary Act, the compensation payable by the State has been fixed at three times the net profits. We agree with the learned Subordinate Judge in holding that this does not furnish a proper standard for assessing the market value under the Court-fees Act. As a result, we hold that the market value of the properties in dispute cannot be less than 15 times the net profits that have arisen from the land during the year next before the institution of the suit. The plaintiff will, therefore, have to pay court-fees upon 15 times the net profits as determined by us, that is, 15 times Rs. 1,23,624/-. In order to obtain any relief in this Rule, the plaintiff will have to show that the valuation of the properties claimed by him is less than Rs. 11,00,000/-. In our opinion, the plaintiff has failed to prove that, with the result that the plaintiff will have to pay maximum court-fee of Rs. 10,000/- upon the plaint.

(10) We, therefore, affirm the decision of the learned Subordinate Judge though on different grounds. This Rule is accordingly discharged, but in the circumstances of this case, there will be no order as to costs.

(11) The plaintiff will have to pay the deficit court-fees within a period of three months from this date.

B/R.G.D. Rule discharged.

A.I.R. 1953 CALCUTTA 712 (Vol. 40, C. N. 269)

BOSE J.

Major Soap Co. Ltd., Petitioner v. Asst. Commr. of Commercial Taxes Calcutta, Respondent.

Matter No. 105 of 1950, D/- 22-2-1951.

(a) Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), Ss. 2 (c) and 17 — Dealer.

Where a person acquires and takes over as a going concern the business of selling or supplying goods of another company which is a proprietary concern, including stock in trade, machinery, furniture and goodwill, etc., but neither the assets nor the liabilities, he becomes a transferee within the meaning of S. 17 of the Act and as such a 'dealer' within the meaning of S. 2 (c) of the Act. Merely because a portion of the assets or the liabilities is excluded from the scope of transfer that does not prevent the ownership of the business passing and divesting the transferor of its ownership. (Para 6)

(b) Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), S. 17 — 'Any tax payable in respect of such business remaining unpaid' — Meaning of.

The contention that the expression "any tax payable in respect of such business remaining unpaid" in S. 17 means tax which has already been assessed and the amount ascertained or determined and remaining outstanding or unpaid, and not tax which has not been assessed at the time of or before the transfer is based on a misapprehension of the scheme of the Act. Under S. 17 of the Act if the liability to pay the tax is there and such liability remains unsatisfied then the transferee becomes saddled with liability to pay such tax no matter

whether the ascertainment or assessment was made or not. (Paras 7, 8)

(c) Constitution of India, Art. 226 — Efficacious and adequate statutory remedy available — (Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), Ss. 15, 20, 21 and Rr. 71, 74) — (Bengal Ordinance (10 of 1950).)

The petitioner got himself registered under the Bengal Finance (Sales Tax) Act as transferee and dealer. A requisition calling upon the petitioner to produce books of accounts and records for the purpose of assessment of sales tax in respect of certain periods was made by the Sales Tax Authority. The petitioner applied for a writ under Art. 226 of the Constitution for quashing the requisition on ground that he had been registered as a dealer and a transferee under a misapprehension as to his correct status.

Held that there being effacacious and adequate legal remedy under the Act which was not availed the application was not maintainable. (Paras 9, 13)

Notwithstanding the repeal of S. 18 of the Act by Ordinance of 1950, the matter of registration of dealer, amendment of certificate of registration or cancellation of registration could be delegated to Commercial Tax Officer under S. 15 of the Act read with R. 71, and it had been so delegated. Hence, the petitioner could not contend that there was no officer to determine the question under the Act. (Paras 11, 12 & 13)

E. R. Meyer, for Petitioner; A. K. Sen, for Respondent.

ORDER: This is an application under Art. 226 of the Constitution for Writs in the nature of Mandamus, Prohibition or Certiorari for cancelling or quashing a requisition calling upon the petitioner to produce books of accounts and records for the purpose of assessment of sales tax in respect of certain periods mentioned in the petition.

(2) The petitioner is a company having its registered office at 25 Zakaria Street, Calcutta. The company was registered on 28-5-1948 and obtained Certificate of Commencement of its business on 31-5-1948 and got itself registered as a dealer under the Bengal Finance Sales Tax Act 1941 on 21-7-1948. The petitioner has acquired and taken over as a going concern the business of Major Soap Company which was a proprietary concern including the stock in trade, machinery, furniture and goodwill, etc., but neither the assets nor the liabilities and states that it is not a "transferee" within the meaning of S. 17, Bengal Sales Tax Act, nor is it a "dealer" within the meaning of the definition in the Act, and it has been registered as a dealer and transferee under a misapprehension as to its correct status. The Company asserts that it is not a "transferee" as the assets and liabilities of Major Soap Company have not been transferred to it.

(3) On 12-4-1950 the Commercial Tax Officer, Colootola charge, required the petitioner to produce books of accounts and records for the purpose of assessment of Sales Tax in respect of 4 quarters ending 31-3-48 and 4 quarters ending 31-3-49.

(4) It appears that S. 18, Sales Tax Act, 1941, has been repealed by an Ordinance promulgated by the Government of West Bengal being Ordinance 10 of 1950.

(5) On 14-9-1950 the Assistant Commissioner, Commercial Taxes Calcutta (South) by a requisition fixed 2-11-1950 for assessment of taxes for 4 quarters ending 31-3-48 and for 4 quarters ending 31-3-49.

(6) The petitioner charges that these acts are without jurisdiction and ultra vires. It is contended by Mr. Meyer the learned counsel for the petitioner that as the assets and liabilities of the business have not been transferred he is not a transferee of the business. This contention is fallacious and cannot be accepted. A business is a mercantile pursuit or a trading concern. A dealer as defined in S. 2 (c) of the Act is a person engaged in the business of selling or supplying goods. When the full rights in that business of selling or supplying goods are transferred to another person the latter becomes a transferee within the meaning of S. 17 of the Act. It appears that the petitioner company has acquired by virtue of the transfer the right to carry on the business, the stock-in-trade, machinery, furniture and goodwill and etc. In fact everything that is comprised in the connotation of a business has been assigned to the petitioner and the words "et cetera" bring in, any other thing in relation to the business that may not have been specifically mentioned, excluding of course anything that is expressly excluded from the operation or scope of the transfer. The expression "neither the assets nor the liabilities of the proprietor" has the effect of keeping out assets such as book debts due to the transferor or cash at the bank and also all liabilities. But the whole of the undertaking or enterprise has been transferred and because a portion of the assets or the liabilities is excluded from the scope of the transfer that does not prevent the ownership of the business passing and divesting the transferor of its ownership therein. I hold that the petitioner is a transferee within the meaning of S. 17 of the Act and as such a "dealer" within the meaning of the Act.

(7) The next point urged was that the expression "any tax payable in respect of such business remaining unpaid" means tax which has already been assessed and the amount ascertained or determined and remaining outstanding or unpaid, and not tax which has not been assessed at the time of or before the transfer. This argument also appears to be based on a misapprehension of the scheme of the Act and of the true nature of the implications of the various sections of the Act.

(8) Section 4 of the Act creates the liability to pay the tax, in other words the tax becomes payable by virtue of this section. Section 7 imposes duty to obtain and possess registration certificate. Section 10 lays down the mode of payment of tax. If the mode prescribed is not observed by the person liable to pay the tax the Commissioner may proceed to assess tax to the best of his judgment (S. 11). The question whether the amount of the tax is ascertained or not is immaterial and irrelevant. If the liability to pay the tax is there and such liability remains unsatisfied then the transferee becomes saddled with liability to pay such tax no matter whether the ascertainment or assessment was made or not. This is the plain implication of S. 17.

(9) The petitioner has got itself registered under the Act as a transferee and dealer and that registration stands and has not been cancelled. The petitioner has not applied or taken steps for cancellation. So long as it remains on the register it cannot escape liability to pay the tax.

(10) It was contended that by reason of the repeal of S. 18 of the Act by the Ordinance of 1950 there is no authority or officer to determine the question whether the petitioner is a dealer or not and so the petitioner is entitled to move this Court.

(11) But under S. 15 of the Act the Commissioner can now delegate any of his powers to any person appointed to assist him, including his functions under S. 18 now that S. 18 is out of the way as a result of the repeal, subject of course to restrictions contained in R. 71. Under R. 71 the matter of registration of a dealer, amendment of certificate of registration or cancellation of registration can be delegated to Commercial Tax Officer, and it has been so done.

(12) Section 20 and Rule 74 make provisions for appeals, revision and review. Section 21 of the Act provides for statement of case to High Court.

(13) Thus there is efficacious and adequate remedy under the Act. It is idle to suggest that by virtue of repeal of S. 18 the petitioner is without any remedy.

(14) The petitioner described itself through its pleader as transferee and was registered as dealer as a matter of course. No question whether it was a transferee or not or dealer or not at all arose for determination.

(15) There has been no refusal to exercise jurisdiction nor any excess of jurisdiction.

(16) The application is wholly misconceived. The petition, therefore, fails and the Rule must be discharged with costs.

B/K.S.B. Rule discharged.

A.I.R. 1953 CALCUTTA 714 (Vol. 40, C. N. 270)

K. C. CHUNDER J.

Kamala Bala Audhya, Petitioner v. Amulya Kumar Sen, Opposite Party.

Civil Rule No. 317 of 1952, D/- 21-5-1953.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 — Standard rent — Onus.

Application by tenant for standardisation of rent — Onus of establishing standard rent is on him — Onus not discharged — Application will be dismissed — Principles of S. 9, indicated. (Para 4)

Sudhanshu Kumar Sen, for Petitioner; Kanak Kanti Ghosh, for Opposite Party.

ORDER: This Rule was issued at the instance of a landlord. The matter is very simple & has been complicated merely by misunderstanding of the law on the part of the learned Subordinate Judge. It is regrettable that in spite of numerous published decisions of this Court, such wrong ideas of the law still can prevail in a Subordinate Judge's Court.

(2) The tenant asked for standardisation of rent. Therefore the onus of establishing standard rent and thereby evading payment of the contractual rent was clearly on the tenant. The tenant did not show which of the clause would apply. It has already been pointed out by this Court that there are four different methods of computation in that small Section 9 (1) of the Rent Control Act of 1950. The landlord tried to show that not only was the premises in existence in 1941, it was let out in 1941 and he sought to prove by witness what the actual rent in 1941 was. Both the Courts have disbelieved his story as to what the actual rent was but the trial Court definitely accepted his story that the premises were in existence in 1941. The trial Court applied wrong material to come to the conclusion as to what the reasonable rent would have been in December 1941 for this premises. In trying to arrive at a reasonably payable rent in 1941, it forgot that Section 9 (2) had to be applied and therefore rent, standard or otherwise, of any premises after 1941 December, namely, rent of 1943 or of 1946 would be absolutely irrelevant for the purpose of the standard rent in 1941 December.

The evidence has to show standard rents of similar premises in December 1941. In the present case there was no attempt to prove this by the tenant, that is, there was no attempt on the part of the tenant to discharge the onus that was on him after the landlord showed that the premises were in existence in December 1941. The appellate Court was even more muddled than the trial Court. It did not set aside what the trial Court had said about the rent in 1941 and did not come to any finding that the premises were not in existence in 1941. It accepted the trial Court's estimation of evidence that the actual rent in 1941 was not as high as the landlord tried to make out. It went on to apply Section 9 (1) (g) to a case in which it did not show how that section applied. In order to make that section applicable the premises must not be in existence or let out in December 1941 and must not be substantially completed after December, 1949. There is no such evidence in the present case and no such finding by the learned Judge. The learned Judge applied the wrong principle. The Rent Controller at least applied right principle but took wrong materials for comparison. The Appellate Court absolutely went wrong even as to the principle. The result is that neither Court saw that as the onus is on the tenant and as the tenant had not discharged that onus, the tenant's application should be dismissed.

(3) Mr. Ghosh has pointed out that things were not clearly understood in the Courts below and he had no opportunity to show that the landlord's contention that the premises existed in 1941 was not perhaps correct.

(4) The orders of both the Courts below are set aside and the petitioner landlord awarded costs in all the Courts upto this stage and the case is sent back to the Rent Controller first to ascertain whether the premises were in existence in 1941 December or not. If the answer is in the negative, it will proceed to other parts of Section 9 (1). If the answer is in the affirmative, then it will first of all ascertain what the actual rent paid for the premises in December 1941 was. If this cannot be done, then it will proceed under Section 9 (2) to determine on the principles clearly laid down in Section 9 (2) what the reasonable rent in December 1942 would be. In order to determine this, it will remember that the rents of similar premises, in December 1941 have to be considered and not subsequent rents of premises built later. Those are irrelevant. If it finds that the premises were in existence in December 1941 but the tenant cannot satisfy him by evidence which is relevant what the reasonable rent in December 1941 would have been, then remembering that the onus is on the tenant, it will dismiss the tenant's application. If the tenant satisfies him as to the reasonable rent for December 1941, he will proceed to pass an order in accordance with such determination of rent and apply Sch. 'A'.

If on the other hand, he finds that the premises were not in existence at all in 1941 December, he will go on to decide whether the premises were in existence prior to December 1949. In the present case as far as I can make out there is no con-

tention as yet that the premises were substantially construed after December 1949. If he finds that the premises existed after December 1941 and before December 1949, he will apply Section 9 (1) (g). In such a case it is unnecessary to compare standard or any rents but he will apply principles which are ordinarily applied to determine what is just and fair rent. That is all Section 9 (1) (G) requires to be determined. If on the other hand it is alleged and he finds that the premises are constructed after 1949 December, then he will apply the provisions of Section 9 (1) (f) and in future both the Rent Controller and the Appellate Court will remember these simple principles which I am crystallising here for their practical help from numerous decisions of this Court so that in future there may not be unnecessary revision applications.

(5) The Rule is thus made absolute and the case remanded to the Rent Controller for decision in the light of this judgment. He will allow the tenant and the landlord further opportunities of adducing evidence in the matter.

B/R.G.D. Rule made absolute.

A.I.R. 1953 CALCUTTA 715 (Vol. 40, C. N. 271)

K. C. DAS GUPTA AND GUHA RAY JJ.

Dhananjoy Mallick, Petitioner v. Annada Charan Maity and others, Opposite Party.

Civil Rule No. 1877 of 1951, D/- 8-7-1952.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), Sec. 26F (1) and (4) — Distinction — (Limitation Act (1908), Art. 181).

The remedies given by sub-ss. (1) and (4) (a) are distinct and independent remedies. If a co-sharer had his independent remedy to apply under sub-s. (1) of S. 26F, the period of limitation applicable must be governed by Art. 181, Limitation Act. He is in no way concerned with the period of limitation as laid down for application under sub-s. 4 (a) of S. 26F. 52 Cal WN 95 and AIR 1948 Cal 48 (FB), Rel. on; AIR 1950 Cal 265, Distinguished. (Paras 2, 4)

Anno: Lim. Act, Art. 181 N. 22.

Sarat Chandra Janah, for Petitioner; Manindra Krishna Ghose, for Opposite Party.

CASES CITED:

(A) ('48) 52 Cal WN 95
(B) ('48) AIR 1948 Cal 48: 52 Cal WN 64 (FB)
(C) ('50) AIR 1950 Cal 265: 54 Cal WN 442

K. C. DAS GUPTA J.: Two questions of law are raised in this application against an order allowing an application for pre-emption which was filed under the provisions of sub-section (1) of Section 26F, Bengal Tenancy Act. The first is whether the petitioner is estopped from saying that the tenancy in question was an occupancy raiyati holding. The second is whether the application was barred by limitation.

(2) The tenancy in question appears to have belonged to a number of co-sharers including Krishna Prosad Maity whose son Annada Charan Maity has filed the present application under S. 26 F (1) and others. Krishna Prosad sold a portion of his interest to one Bhagabati Charan and in the Kobala described the tenancy as a raiyati mokarari holding. That sale took place on 14-8-1919. On 2-11-1946, Bhagabati Charan sold this very interest to Dhananjoy Mullick. One Haradhan Ghorai filed an application under Section 26 F (1) on 21-4-1949. The present application by Annada Maity has been filed on 20-9-1949. It is admitted that notice under Section 26 C, Bengal Tenancy Act was not served on Annada Maity though he as a co-sharer was entitled to it.

It was urged on behalf of the present applicant that the application by Annada Maity not being within the period mentioned, sub-section 4 (a) of Section 26 F, Bengal Tenancy Act must be held to be totally barred. This argument overlooks the fact that the present application by Annada Maity is not the application to join in the application filed by Haradhan Ghorai. It is an independent application one under Section 26 F (1), Bengal Tenancy Act. Mr. Janah on behalf of the petitioner contended that clause (a) of sub-section 4 of S. 26 F, Bengal Tenancy Act does, by implication, take away a co-sharer's remedy under sub-section 1 of Section 26 F. This contention, in my opinion, should not prevail. The remedy given to a co-sharer by sub-section (1) is to apply to a Court for the portion which has been sold 'to be transferred to himself'. The remedy in cl. (a) of sub-section (4) is to apply to join in an application which has already been filed by some other co-sharer tenant under sub-section (1). It is quite clear that these are two distinct remedies. The matter is made very clear by the concluding words of sub-s. 4 (a) which runs thus:

> 'Any co-sharer tenant who has not applied under either sub-s. (1) or this sub-section shall not have any further power of purchase under this section'.

These words clearly indicate that the Legislature's intention was to treat the two remedies as distinct and independent.

(3) That the remedies are independent was the view taken by Mukherjea J. sitting singly in the case of — 'Jahiruddin Gain v. Mohammad Shoukat Ali Biswas', 52 Cal. W. N. 95 (A). His Lordship observed in this case thus:

> 'A glance at the language of sub-section (4) would convince anybody that the provision embodied therein is merely permissive, and the 1st line of the paragraph makes it perfectly clear that a co-sharer has a two-fold remedy open to him, namely, either to make an independent application under sub-section (1) of Section 26 F, or to join in an application already made by another co-sharer as provided for in sub-s. (4).'

(4) As the co-sharer Annada Maity had his independent remedy to apply under sub-section (1) of Section 26 F, the period of limitation applicable must be governed by Article 181, Limitation Act as laid down in the case of — 'Asmatali Sharip v. Mujaharali Sardar', AIR 1948 Cal. 48 (F. B.) (B). He is in no way concerned with the period of limitation as laid down for applications under sub-section 4 (a) of S. 26 F, Bengal Tenancy Act.

(5) The decision in the case of — 'Abdul Aziz Khan v. Lalit Mohan', AIR 1950 Cal. 265 (C) on which reliance was placed by Mr. Janah is, in my judgment, of no application to the case as in that case what their Lordships had to consider was the period of limitation applicable to an application 'to join as a co-petitioner under S. 26 F (4) of the Act'.

(6) We find therefore that the learned Courts below were right in holding that the application by Annada Maity was within time.

(7) On the question of estoppel the argument on behalf of the petitioner is that the petitioner acted on a representation made by Annada Maity's father Krishna Prosad Maity that the tenancy was a mokarari raiyati holding. That Krishna Prosad did assert in his kobala to Bhagabati Charan that it was a mokarari holding is clear from Ex. A(1). It appears further from Ex. A by which Bhagabati

sold to Dhananjoy that the previous kobala is mentioned therein. This, in my opinion, is not sufficient to show that in deciding to make the purchase Dhananjoy was in any way induced by the statement made by Krishna Prosad in the document Ex. A(1) that the tenancy was a mokarari raiyati holding. There is indeed nothing to indicate that Dhananjoy's attention was drawn to this particular statement or that he believed it to be true. In my judgment the facts proved do not attract the doctrine of estoppel.

(8) As both the points taken before us on behalf of the petitioner have failed this Rule must be discharged with costs.

(9) GUHA RAY J.: I agree.

B/D.H.Z. Rule discharged.

A.I.R. 1953 CALCUTTA 716 (Vol. 40, C. N. 272)

K. C. CHUNDER J.

Satya Charan Sarkar and others, Appellants v. Mohanta Rudrananda Giri and others, Respondents.

A. F. A. D. No. 428 of 1948, D/- 15-7-1952.

(a) Hindu Law — Religious endowments — Classes of — Nature of endowments — Determination of.

Under the Hindu Law there are two different classes of religious endowments, one in favour of religious institutions like a 'math' where the deity is immaterial and the institution is the primary thing and property belongs to the head of the institution as its owner as representing the institution itself. The other class is where the deity is the principal thing and the beneficial owner of the property is the deity. In the case of a public trust as also in the case of private trusts the deity is always the beneficial owner. The nature of the trust is determined according to the character of the persons entitled as of right to worship. (Para 4)

(b) Civil P. C. (1908), S. 92 — 'De facto' Trustees.

The trustees mentioned in S. 92 need not be 'de jure' trustees — 'de facto' trustees will sufficiently attract the operation of the section. (Para 4)

Anno: C. P. C., S. 92 N. 5 Pt. 40.

Apurbadhan Mukherji, for Appellants; Bijan Bihari Das Gupta, for Respondents.

JUDGMENT: This is an appeal against an appellate decree of the Subordinate Judge of Malda reversing that of the Munsif, 1st Court of the same place. The facts as far as necessary for decision of this second appeal are not very much in dispute.

(2) It appears that one Mohanta Rudrananda Giri Goswami sued on behalf of the Hindu villagers of five villages for recovery of possession of certain properties from the defendants. He brought the suit in a representative capacity under O. 1, R. 8, Civil P. C. No sanction under S. 92, Civil P. C. was taken or even applied for. It is clear that in the Settlement Record of Rights this property was stated as 'Jimma dakhal' Abhoy Charan Sarkar 'gramya Sadharan pakshay' and the property is shown as the property of Ratanti Kalimata for Kali 'pujah'. The present defendants are said to be the custodians of the property on the death of Abhoy Charan Sarkar. The suit was for removal of these defendants as they had neglected to perform the Ratanti Kali 'pujah' as required.

(3) The defence was that they were performing three other Kali 'pujahs' though not the Ratanti Kali 'pujah' and further that sanction under S. 92, Civil P. C. was essential to bring this suit which was a suit for removal of trustees from a public and religious endowment and as the worshippers who had the right to worship were the public of that village only the sanction should have been taken by the villagers of that village and not of any other surrounding village. The question which has been agitated in this second appeal is the question of S. 92, Civil P. C.

(4) The learned Munsif held that sanction was necessary but he was wrong in holding that the beneficial owners of the trust property were the public. The learned Subordinate Judge on the other hand held that the beneficiary of the trust was the deity but as the public was not the beneficiary therefore S. 92 did not apply. Both of them are wrong. The beneficial owner in case of every religious trust except when it is a trust in favour of a religious institution like a 'math' etc. is the deity. In a previous decision of mine I have already pointed out that under the Hindu Law there are two different classes of religious endowments, one in favour of religious institutions like a 'math' where the deity is immaterial and the institution is the primary thing and property belongs to the head of the institution as its owner as representing the institution itself. The other class is where the deity is the principal thing and the beneficial owner of the property is the deity.

In the present case, there can be no dispute that the deity is the principal thing. Therefore the beneficial owner in the present case is the deity and neither the public nor anybody else. In the case of a public trust as also in the case of private trusts the deity is always the beneficial owner. The nature of the trust is determined according to the character of the persons entitled as of right to worship. If such worshippers are the public, that is, a class or a large section or the entire general public, then the endowment is a public religious one. On the other hand, if such worshippers belong to a private family or a few private families, the nature of the endowment is a private religious one. In the present case, the Settlement Record makes it quite clear that the nature of the present endowment is a public religious one as the beneficial owner is a deity i.e., Ratanti Kalimata and the worshippers entitled as of right to worship are the public. The property is given and held for that particular purpose, namely, religious purpose, that is, the worship of the deity.

Therefore the only question which arises is whether the defendants are trustees. It has already been decided in many decisions not only of this Court but of other Courts as well that the trustees mentioned in S. 92 need not be 'de jure' trustees —'de facto' trustees will sufficiently attract the operation of the section. Therefore as the Settlement Record shows that Abhoy Sarkar was in custody on behalf of the deity, that is, he was a 'de facto' trustee whatever may be his legal right to hold the position of a trustee, S. 92 will apply. In the present case, as no sanction was taken under S. 92, Civil P. C. and the suit was brought under O. 1, R. 8 of the Code the suit was not maintainable and therefore the suit was rightly dismissed by the learned Munsif and the learned Subordinate Judge wrongly reversed that decision. It is not necessary for me, as no sanction at all was taken by anybody, to go into the next question whether sanction should be taken by the villagers of that locality or can be taken by other

persons as well as being interested as actual worshippers of the deity.

(5) The appeal is therefore allowed. The decree of the learned Subordinate Judge is set aside and that of the learned Munsif is restored. Each party will pay its own costs in both the Courts, namely, the Subordinate Judge's Court as well as this Court.

B/V.R.B. Appeal allowed.

A.I.R. 1953 CALCUTTA 717 (Vol. 40, C. N. 273)

G. N. DAS AND DEBABRATA MOOKERJEE JJ.

Uma Kanta Banerjee, Judgment-debtor v. Renwick and Co. Ltd., Decree-holder and others, Respondents.

A. F. O. O. (F. M. A.) No. 96 of 1952, D/-30-4-1953.

(a) Civil P. C. (1908), O. 21, R. 31 and O. 20 R. 10 — Execution of decree for specific movable property, modes of.

The decree-holder is entitled to apply for simultaneous execution of a decree passed in terms of O. 20, R. 10, by more than one of the modes of execution specified in O. 21, R. 31 of the Code. The decree-holder cannot be compelled to exhaust his remedy for delivery of the specific moveables before he can be permitted to seek his remedy by the other modes mentioned in O. 21, R. 31. AIR 1926 Lah 110, Rel. on; AIR 1927 Cal 652; AIR 1935 Cal 39, Ref. to; 13 Mad LJ 444, Distinguished. (Paras 8, 12, 15 & 16)

Anno: C. P. C., O. 20, R. 10 N. 1; O. 21, R. 31 N. 5.

(b) Civil P. C. (1908), S. 51 and O. 21, R. 21 — Simultaneous execution.

Where the law prescribes more than one mode of execution, the option to choose the particular mode by which the decree-holder will seek his remedy rests with him. The above power of the decree-holder is, however, subject to the exercise by the Court of a judicial discretion vested in it under O. 21, R. 21 of the Code. (Para 13)

Anno: C. P. C., S. 51 N. 2; O. 21, R. 21 N. 1.

(c) Civil P. C. (1908), S. 51 and O. 21, R. 31 — Power of Court to order conditional attachment.

The power of an executing Court to enforce execution is subject to such conditions and limitations as may be prescribed.

Where the decree-holder prays for execution of his decree by delivery of the movable property and also by attachment of other property of the judgment-debtor, the executing Court has power to order conditional attachment of the other property. (Paras 22 and 23)

Anno: C. P. C., S. 51 N. 1a, 2 and 4.

Lala Hemanta Kumar, with Sudhir Kr. Dutt, for Appellant; A. C. Mitra, with Sunil Kumar Mitra, for Respondents.

CASES CITED:

(A) ('27) AIR 1927 Cal 652: 55 Cal 26
(B) ('35) AIR 1935 Cal 39: 61 Cal 711
(C) ('26) AIR 1926 Lah 110: 6 Lah 548
(D) ('03) 13 Mad LJ 444

G. N. Das J.: This is an appeal by the judgment-debtor and is directed against an order of Mr. M. N. Mukherji, learned Additional Subordinate Judge, Birbhum, dated 16-2-1952.

(2) The facts may be shortly put as follows: On 6-6-1951, the decree-holder respondent obtained a decree inter alia for specific delivery of possession of certain machines described in Sch. D to the plaint. The decree further directed that if possession could not be had, the defendant would have to pay a sum of Rs. 54,794-14-0 as the value of the said properties. As the judgment-debtor did neither deliver the properties mentioned in Sch. D nor pay the price thereof as mentioned in the decree, the decree-holder filed on 3-8-1951, an application for execution of the decree. In the petition for execution the decree-holder prayed for a variety of reliefs including a prayer for delivery of the said specific properties and for attachment of a decree obtained by the judgment-debtor. The execution petition was registered on 3-8-1951, and on the prayer of the decree-holder for attachment of a decree obtained by the judgment-debtor the Court directed the issue of a notice to the judgment-debtor to show cause why the said decree should not be attached. The Court further directed provisional attachment of the said decree. The judgment-debtor appeared in pursuance of the notice to show cause and prayed for time. Later on, on 18-9-1951, the decree-holder made a prayer for a direction on the judgment-debtor to deliver the said properties.

This matter came up for hearing before the Court on 5-11-1951. The order of that date records that the Court heard the pleaders of the parties and directed the judgment-debtor to furnish security for the value of the moveables described in Sch. D, by 26-11-1951. It was further directed that failing compliance with this direction a writ for possession of the said moveables will issue. On 5-12-1951, the pleaders of the parties were again heard and the Court directed stay of issue of a writ of possession. The judgment-debtor was allowed time to furnish security till 20-12-1951. On 20-12-1951, as the judgment-debtor failed to furnish security, the Court directed the issue of a writ of possession. The judgment-debtor took no steps to have the order of 20-12-1951, directing issue of a writ of possession vacated by appropriate proceedings. The judgment-debtor, however, came up with a petition of objection under S. 47, Civil P. C. The relevant objection which has been pressed before us is that it was not open to the decree-holder to pray for simultaneous execution of the decree by the issue of a writ for seizure of the property and for attachment of the judgment-debtor's property. The petition of objection filed by the judgment-debtor was heard by the learned Subordinate Judge and was dismissed on 16-1-1952. It is the propriety of this order which has been challenged in this appeal.

(3) Mr. Lala Hemanta Kumar who has appeared in support of the appeal has raised only two contentions. In the first place, he has contended that in a decree passed in accordance with the provisions of O. 20, R. 10, Civil P. C. the decree-holder must, in the first instance, exhaust his remedy for delivery of the specific moveable property before he can pray for relief by way of arrest of the person of the judgment-debtor or attachment of his property.

(4) In support of this contention the learned Advocate has relied on two decisions of this Court, namely, the case of — 'Balmukunda Bisseswarlal v. B. N. Rly. Co., Ltd.', AIR 1927 Cal 652 (A) and the case of — 'Shivaprasad Sing v. Prayag Kumari', AIR 1935 Cal 39 (B). I shall deal with these cases before I refer to the relevant provi

sions of the Code bearing on this question. The decision in the first of the above two cases laid down that holders of a decree in terms of O. 20, R. 10 of the Code cannot execute the money part of it without having recourse to the procedure prescribed by O. 21, R. 31 of the Code.

(5) I fail to see how the above decision assists the appellant in the present case. The proposition of law laid down in the above decision does not say in terms that the holder of a decree in terms of O. 20, R. 10, Civil P. C. cannot have simultaneous execution of the decree by way of seizure of the property and attachment of the properties of the judgment-debtor. Moreover, the facts which came up for adjudication in the above case are entirely different. In that case a decree was passed for compensation for damages done to the properties of the decree-holder by the judgment-debtor which was assessed at Rs. 3500/-. The decree then provided for delivery of certain moveables belonging to the decree-holder and went on to add that if the moveables were not delivered the judgment-debtor would have to pay a sum of Rs. 500/-. This decree was executed by the decree-holder on a statement made by him that the decree-holder had demanded delivery of the goods from the judgment-debtor which the judgment-debtor had failed to comply and that as such the decree-holder prayed for recovery of Rs. 500/-. This Court came to a finding of fact that there was no demand by the decree-holder as alleged in the execution petition and in that view this Court held that the execution of the decree for recovery of Rs. 500/- for failure to comply with the direction for delivery of the moveables could not be allowed.

(6) The case of — 'Shivaprasad Singh (B)' merely followed the decision in the above case of — 'Balmukunda Bissweswarlal (A)'. In my opinion, therefore, the cases cited do not purport to lay down the proposition that the decree-holder cannot in a petition filed by him for execution of a decree under O. 20, R. 10, Civil P. C. claim relief both for recovery of the moveables and for attachment of the judgment-debtor's properties.

(7) The answer to this question must be found in the terms of O. 21, R. 31, Civil P. C. This rule supplanted S. 259, Civil P. C., 1882, with some modifications. I shall first interpret the terms of O. 21, R. 31 of the Code. The relevant provision of O. 21, R. 31(1) provides that where the decree is for recovery of any specific moveable, the decree may be executed, if practicable, by the seizure of the moveables and by the delivery thereof to the party to whom it has been adjudged or by the detention in the civil prison of the judgment-debtor or by attachment of his properties or by both.

(8) The sub-rule on its plain reading contemplates more than one of the modes of execution mentioned in the sub-rule. This is apparent from the use of the words "or by both". The fact that three alternative modes of execution are stated in the sub-rule does not indicate that only one of the modes should be availed of by the decree-holder first and before that is exhausted the decree-holder is not entitled to apply for execution in the other modes referred to in the sub-rule. Such an interpretation would render unnecessary, the use of the words "or by both" occurring in that sub-rule. In my view, the Legislature clearly intended that the decree-holder would have the option of pursuing his remedy by way of execution in any one of the three modes mentioned therein or in more than one of such modes.

(9) That that is the true view of O. 21, R. 31 (1) is supported by the two sub-rules 2 and 3 which follow.

(10) The first part of sub-rule 2 envisages a state of things where the attachment of the judgment-debtor's property is in force for three months and the judgment-debtor has not obeyed the decree for delivery of specific moveables. In such a case the Court may, on the application of the decree-holder, sell the attached property for recovery of the sum mentioned in the decree, or, if the decree is silent therein, for such compensation as may be assessed by the executing Court.

(11) Sub-rule 3 provides for cessation of the attachment of the judgment-debtor's property in two cases, namely, (a) where the judgment-debtor has obeyed the decree and (b) where the attachment has remained in force for three months and the decree-holder has not applied for sale of the attached property or his application for such sale, if made, has been dismissed.

(12) These two sub-rules, in my opinion, contemplate a state of things where the attachment of the property is in force and there is also a prayer in the execution petition for specific recovery of the moveable properties.

(13) In interpreting the above rule one must bear in mind the well-settled principle that where the law prescribes more than one mode of execution, the option to choose the particular mode by which the decree-holder will seek his remedy rests with him. The above power of the decree-holder is, however, subject to the exercise by the Court of a judicial discretion vested in it under O. 21, R. 21 of the Code.

(14) It must also be remembered that the rules of procedure are mere hand-maids of justice and that the Court should aid the successful litigant in obtaining the relief to which he has been declared to be entitled under the decree of the Court.

(15) I cannot accede to the submission made on behalf of the judgment-debtor that the decree-holder should be compelled to exhaust his remedy for delivery of the specific moveables before he can be permitted to seek his remedy by the other modes mentioned in O. 21, R. 31.

(16) A similar contention in regard to the interpretation of O. 21, R. 30 of the Code which provides for the execution of a decree for payment of money by arrest of the judgment-debtor or by attachment and sale of his property or by both, was negatived by a Bench of the Lahore High Court in — 'Hargobind Kissenchand v. Hukum Sing', AIR 1926 Lah 110 (C). At p. 111 Shadi Lal, C. J. made the following observation:

> "If" (the Court), "has no authority to decline to make an order for committal to prison on the ground that the decree-holder should proceed in the first instance against the property of the judgment-debtor."

In my opinion, the decree-holder is clearly entitled to apply for simultaneous execution of a decree passed in terms of O. 20, R. 10, Civil P. C. by more than one of the modes of execution specified in O. 21, R. 31 of the Code.

(17) I would also point out that under the Civil Procedure Code of 1882 a somewhat similar question arose for decision in — 'Manavikraman v. Moyankutti', 13 Mad L J 444 (D). This case was cited with approval in the two Calcutta decisions to which I have already referred. The relevant observation in the judgment of the Madras Court is in these terms:

> "It is, therefore, only when after putting in force S. 259, Civil P. C. it is found that it is impossi-

ble to obtain the property ordered to be delivered that the alternative amount in the decree comes into operation."

(18) In that case the decree-holder was the appellant before the High Court. The appeal succeeded. The judgment of the lower Appellate Court was reversed and that of the trial Court restored. What was the precise form of the order made by the trial Court or by the lower Appellate Court does not appear in the report which is extremely meagre.

(19) It must be remembered that S. 259 of the Code of 1882 was in slightly different terms. Section 259 of the Code provided inter alia for execution of a decree for recovery of specific moveables either by seizure of such moveables and delivery thereof to the decree-holder or by arrest or by attachment of the judgment-debtor's property or by both arrest and attachment of the judgment-debtor's property. The provision in O. 21, R. 31 is somewhat dissimilar. The provisi n in O. 21, R. 21 omits the qualifying words "arrest and attachment of the judgment-debtor's property" which followed the words "or by both" in S. 259 of the Code of 1882. This decision, therefore, is of no assistance in the present case. The first contention raised on behalf of the appellant must therefore be overruled.

(20) I may observe that Mr. Mitter who has appeared for the decree-holder respondent pressed us not to decide this question on the ground that in the Court below the judgment-debtor did not press this point. There is considerable force in this contention. As the objection was raised in the execution petition, we have preferred to dispose of the contention raised on behalf of the judgment-debtor also on its merits.

(21) The second contention on behalf of the appellant was that the executing Court had no power to direct a conditional attachment of the judgment-debtor's property. As I have already pointed out, the order for conditional attachment was made long ago and thereafter in spite of an order by the executing Court requiring the judgment-debtor to show cause he has not chosen to do so. It also appears that there was an order for furnishing security. The judgment-debtor took time to comply with it but did not do so. There was an order for issue of a writ for the seizure of the moveables decreed. The judgment-debtor did not at that stage raise any objection that the conditional attachment should be withdrawn. No attempt was made to have the conditional order of attachment set aside by appropriate proceedings nor was the previous order of the Court directing issue of a writ for delivery of possession challenged by a direct appeal. This objection, therefore, would not be available to the judgment-debtor at this stage.

(22) But even if the objection could be raised in this appeal I am clearly of opinion that the executing Court possessed the power to direct a conditional attachment in the facts of the present case. I have already held that it was competent for the decree-holder to pray for simultaneous execution by the issue of a writ for seizure of the specific moveables as also by a writ for attachment of the judgment-debtor's property in this case a decree obtained by the judgment-debtor against the Railway Administration.

(23) The powers of an executing Court to enforce execution are set forth in S. 51, Civil P. C. The section provides for execution in the following modes: (a) by specific delivery of property; (b) by attachment and sale or sale without attachment of the judgment-debtor's property; (c) by arrest and detention in prison; (d) by appointment of a receiver; or (e) in such other manner as the nature of the relief granted may require. This power is subject to such conditions and limitations as may be prescribed. In the present case, as I have already indicated, there is no provision which bars the power of the Court to order conditional attachment. As the Court has in the facts of this case the power to direct attachment, as an aid to the effective exercise of such power the Court is empowered to direct conditional attachment so that the exercise of the power of ordering attachment may not be rendered infructuous. In my opinion, the second contention has also no force.

(24) In the result, this appeal fails and is dismissed with costs.

(25) DEBABRATA MOOKERJEE J.: I agree.

B/K.S.B. Appeal dismissed.

A.I.R. 1953 CALCUTTA 719 (Vol. 40, C. N. 274)

P. N. MOOKERJEE AND GUHA RAY JJ.

Khagendra Nath, Petitioner v. Junior Assessor, Procurement P. S. Sonarpur, Opposite Parties.

Civil Revn. Cases Nos. 934, 1036 and 1312 of 1953, D/- 4-6-1953.

West Bengal Foodgrains (Intensive Procurement) Order (1952) — Hearing of appeals in batches — Appellate Officer should bear in mind that if by doing so individual cases do not get proper treatment on merits, there is a denial of justice to parties concerned and a failure to protect their statutory rights.

(Para 3)

Biswa Nath Naskar and Bankim Chandra Roy, for Petitioner in 934; Sen Gupta and Benoy Krishna Mukherjee, for Petitioner in 1036; Nitya Ranjan Biswas, (Not Present), for Petitioner in 1312; Hemendra Kumar Das, and Smriti Kumar Roy Choudhury, for Opposite Parties.

ORDER: These three Rules arise out of proceedings under the West Bengal Foodgrains (Intensive Procurement) Order, 1952. The Rules are directed against the order of the appellate officer rejecting the petitioners' appeals under the amended provision of the said Order giving a right of appeal to the persons aggrieved. Under the said provision the appeal has to be filed "within seven days from the date of service of the order in Form No. C", — to quote only the relevant part of that provision, —and in the particular cases before us it has been alleged by the petitioners,—and it has not been denied on behalf of the State—that the appeals in question were duly filed within the said time. In Civil Revision Cases Nos. 934 and 1036, the appeals were actually presented within three days of the date of service of the orders in Form No. C and in the other case the appeal was presented within six days from the date of such service. Clearly, therefore, the appeals were within time and it is surprising that the appellate officer has thrown out the appeals on the ground that they are time-barred and no extension of time is possible as S. 5 of the Limitation Act can have no application to such cases. It may be that this latter proposition of the appellate officer is quite correct and S. 5 of the Limitation Act may not apply to cases of appeals under the West Bengal Foodgrains (Intensive Procurement) Order, 1952, but at the same time it is quite clear that no question of extension of time and no

question, therefore, of applying S. 5 of the Limitation Act to the present cases arises or could have possibly arisen. This position, as we have already indicated, is not controverted by the State. These Rules are, therefore, made absolute with costs, hearing fee being assessed at three gold-mohurs in each case. The petitioners' appeals will be accepted as duly presented in time and will be heard now on the merits and decided according to law by the appellate officer.

(2) Before leaving this subject, we think it proper to point out that it has been alleged before us that in the group of appeals in which the three cases before us were included for hearing, there were other cases where also no question of limitation could have arisen upon the admitted facts and even those cases have been dismissed on the ground of limitation. If that is a fact, it is only fair that the learned appellate officer should examine the records of these cases and pass appropriate orders so that the subject's rights guaranteed by the statute may not be unlawfully or unduly prejudiced. When the statute has given a right of appeal, it is not only desirable—but it is just and proper and only fair,—that this right of appeal should be allowed to be exercised in accordance with law. The officers entrusted with the hearing of such appeals should be particularly careful that their orders do not amount in effect to a denial of this right of appeal.

(3) It has also been brought to our notice that these cases, namely, appeals under the Order, referred to above, are almost invariably taken up in batches of very large numbers and it may be that there is some substance in the general complaint that individual cases do not get proper treatment on their merits. If that is so, the result undoubtedly is that there is denial of justice to the people concerned and their statutory rights are not duly recognised or respected and they are not given the protection to which, to say the least, they are legitimately entitled. It is only desirable that this aspect of the matter also should be kept in view when appellate officers deal with appeals under the West Bengal Foodgrains (Intensive Procurement) Order, 1952.

(4) We would not make any further observations in these cases but we expect that the appellate officers will act and guide themselves in future in the matter of appeals under the Order in question in the light of the observations we have made in these Rules.

C/M.K.S. Order accordingly.

A.I.R. 1953 CALCUTTA 720 (Vol. 40, C. N. 275)

SEN J.

Krishna Chandra, Defendant-Petitioner v. Panchu Ghosh and others, Opposite Parties.

Civil Revn. No. 2891 of 1951, D/- 25-7-1952.

(a) West Bengal Bargadars Act (2 of 1950), Ss. 7 and 9 — Dispute as to division or delivery of 'barga' paddy — Dispute must be referred to Board — Civil Court has no jurisdiction — (Civil P. C. (1908), S. 9). (Para 3)

Anno: Civil P. C., S. 9 N. 51.

(b) West Bengal Bargadars Act (2 of 1950), S. 3 (2) — Division of produce.

The division of produce must be made, in the absence of a written statement in the manner recited in S. 3 (2). (Para 4)

Binayak Nath Banerjee, for Petitioner; Bireswar Chatterjee, for Opposite Parties.

ORDER: This is a revisional application under S. 25, Provincial Small Cause Courts Act from the decree passed by Shri A. K. Sen, Munsif, 1st Court, Baraset, sitting as S. C. C. Judge in S. C. C. Suit No. 129 of 1951. The plaintiff instituted the suit for recovery of Rs. 89/- as the price of 'Bhaga Paddy grown in 1357 B. S. in the plaintiff's land let out in 'Barga' to the defendants. The defendants contested the suit contending that they were in possession of the land not as 'bargadars' but as tenants at the rental of Rs. 8/- per year. The defendants also denied the plaintiff's claim as to the quantity of the produce and the price. The learned Munsif held that the defendants were 'bargadars'. On the evidence adduced before him as to the quantity of produce and the price, he found that the plaintiff was entitled to recover Rs. 67/-. The suit was decreed in part accordingly.

(2) Against that decree defendant 1 has filed this revisional application. The points urged in this Court are entirely new points viz., that in view of S. 7, West Bengal Bargadars Act 1950 taken with S. 9 of the same Act, the civil Court had no jurisdiction to decide the dispute relating to the delivery of barga paddy and that in any case the division should have been made in accordance with the principles laid down in S. 3 of the Act.

(3) It appears to me that there is substance in the contentions raised here. The West Bengal Bargadars Act 1950 came into force on 15-3-1950 and therefore it was in operation when the S. C. C. Suit No. 129 of 1951 was instituted. Section 7, Bargadars Act provides that every dispute between a 'bargadar' and the owner whose land the 'bargadar' cultivates with regard to the division or delivery of the produce shall be decided by a Board established for the local area within which such land is situated. Section 9(2) provides that no Court shall entertain any suit or any proceedings in respect of a matter required under sub-s. (1) of S. 7 to be decided by a Board referred to in that sub-section. The Board referred to in that sub-section is the Board established for the local area within which such land is situated. If therefore there is such a Board established, the dispute as to the division or delivery of the produce must be referred to that Board and in that case the civil Court would have no jurisdiction. It has, therefore, to be ascertained whether there is such a Board established. Only if it is found that there is no such Board the Civil Court will have jurisdiction.

(4) Even if the civil Court has jurisdiction division of the produce must be made in the absence of a written agreement in the manner recited in cl. (2) of S. 3, Bargadars Act. This section was not considered by the learned Munsif because, as already stated the objections were not taken in the Court below. Accordingly the suit must go back to the learned Munsif for disposal according to law after deciding whether there is a Board established in the local area where the land is situated. The Rule is therefore made absolute and the decree of the lower Court is set aside and the suit remanded for decision in accordance with the directions given.

(5) In view of the fact that the substantial questions of law were not raised in the lower Court, the plaintiff-opposite party will get the costs of this Court.

B/V.R.B. Rule made absolute.

A. I. R. 1953 CAL. 721 (Vol. 40, C. N. 276)

CHAKRAVARTTI C. J. AND SARKAR J.

Income-tax Officer, Companies District 1, Calcutta and another, Assessee v. Calcutta Discount Co., Ltd.

A. F. O. O. No. 54 of 1952, D/- 25-3-1953.

(a) Constitution of India, Art. 226 — Scope — Order under special Act — Revaluation of grounds — (Income-tax Act (1922), S. 34).

The terms of Art. 226 are very wide and the writs which the article contemplates are not limited to writs of the precise scope and character of the English writs. But, however wide the language of the article and however various the writs or orders it contemplates, the width of language has no effect of releasing the article altogether from the limitations which attach in England to interference by means of high prerogative writs. There are certain obvious directions in which more extended power can legitimately be exercised under the article, but a revaluation of the grounds on which a particular order was made in a pending income-tax proceeding, governed by its own special law and provided with its own special remedies, is not one of such directions. (Para 9)

(b) Income-tax Act (1922), S. 34 — Assessee's failure to disclose fact that he was dealer in shares — Notice under S. 34, held justified. (Para 9)

Anno: Income-tax Act, S. 34 N. 5.

(c) Income-tax Act (1922 as amended in 1948), S. 34 — Retrospective operation — Effect of substitution of new section — Finance Act and Income-tax Act, relationship.

Section 1 (2) of the Income-tax and Business Profits Tax (Amendment) Act, 1948, is really concerned with retrospective operation of provisions of the Amending Act and not of the amendments themselves, which must be judged by their own language and place assigned to them in the Act. (Paras 18, 21a)

The plain effect of the substitution of the new S. 34 with effect from 30-3-1948, is that from that date the Income-tax Act is to be read as including the new section as a part thereof and if it is to be so read, the further effect of the express language of the section is that so far as cases coming within Cl. (a) of sub-s. (1) are concerned, all assessment years ending within eight years from 30-3-1948, and from subsequent dates, are within its purview and it will apply to them, provided the notice contemplated is given within such eight years. What is not within the purview of the section is an assessment year which ended before eight years from 30-3-1948. (Para 18)

Scope of new S. 34 discussed. (Paras 22-28)

Even if a question of construction be assumed to be involved, there is no bar in any vested right to the new section being construed as operating retrospectively. Even if there be any vested right, the words of the section are sufficiently clear to indicate the Legislature's intention to affect it. (Para 30)

When the Finance Act of a particular past year, say 1943, was passed, it at once made tax, computed at the rates it fixed, chargeable on the total income of every assessee assessable in that year, whether or not such income was disclosed or fully disclosed. Section 34 only helps to bring the undisclosed part of the income to light, a part to which a charge of tax has already been attached by the relevant Finance Act, & in order that the part, so traced out, may be brought under assessment at the rate already fixed, the operative force of the Finance Act does not require to be invoked and applied again. The old Finance Act covered the whole of the true assessable income and is sufficient to attach a tax to the whole of it. So long, therefore, as an amendment of the Income-tax Act does not make a new category of income chargeable to tax with retrospective effect, no further aid from the Finance Act is necessary in order to make a retrospective amendment effective. (Para 22)

Their Lordships of the Privy Council in — 'AIR 1945 PC 89' laid down no general proposition that the Income-tax Act could not operate at all till a Finance Act made it applicable to a particular assessment year and that even the procedural sections required to be so applied. (Para 21)

Anno: Income-tax Act, S. 34 N. 1.

S. Mitra, for Assessee; E. R. Meyer and B. L. Pal, for the State.

CASES CITED:

(A) ('45) AIR 1945 PC 89: 72 Ind App 141 (PC)
(B) ('50) AIR 1950 All 270: 1950-18 ITR 75
(C) ('53) AIR 1953 Nag 185: 1953-23 ITR 131
(D) ('40) AIR 1940 PC 124: 67 Ind App 239 (PC)
(E) (1932) 144 LT 84: 16 Tax Cas 1
(F) ('14) AIR 1914 Cal 806: 41 Cal 1125 (FB)
(G) ('30) AIR 1930 Cal 34: 56 Cal 1117

CHAKRAVARTTI C. J.: This appeal involves a short and simple point, but it was sought to be presented as if it involved an intricate question of interpretation of statutes and also a profound question of constitutional law. In my opinion, whatever the true answer to the question may be, there is no room for either intricacy or profoundity.

(2) The facts are equally simple. The respondent is a private limited company, incorporated under the Indian Companies Act and having its registered office at 8, Clive Row, Calcutta. For the assessment years 1942-43, 1943-44 and 1944-45, assessments were made on it by three several orders, dated respectively 26-1-1944, 12-2-1944 and 15-2-1945. Those assessments were made under S. 23(3), Income-tax Act, upon returns being furnished and the amounts of tax demanded were duly paid. Subsequently, on 28-3-1951, three separate notices were issued to the respondent, calling upon it to submit fresh returns for the three accounting years, relative to the said three assessment years, with a view to re-assessments of the income. Those notices were issued under S. 34, Income-tax Act, as amended by the Income-tax and Business Profits Tax (Amendment) Act, (48 of 1948) on the ground that the Income-tax Officer concerned had reason to believe that the income for each of the years had been under-assessed.

(3) After some correspondence, the respondent furnished returns in compliance with the notices on 13-8-1951, doing so under protest, and it returned, as we were informed from the Bar, the same income for each respeotive year as on the

previous occasion. Thereafter, on 18-9-1951, the respondent moved this Court under Art. 226 of the Constitution of India for various reliefs, among them being appropriate writs on the first appellant, directing him to forbear from proceeding further on the basis of the notices issued and to certify and return to this Court the relevant records in order that the proceedings might be quashed. Bose, J., before whom the application was moved, issued a very comprehensive Rule and by an order made on 26-3-1952, he made the Rule absolute to the extent that he prohibited the appellants from proceeding with the assessment proceedings, pursuant to the notices issued on 28-3-1951. The second appellant, the Union of India, had been added as a party in the course of the proceedings on its own application.

(4) It appears that two points were urged before Bose J. It was contended that the proceedings were bad in law, inasmuch as the conditions precedent required to give jurisdiction to an Income-tax Officer to proceed under S. 34 were absent in the present case and, secondly, that the section, as amended in 1948, could not at all apply to assessments for the three years in question, as the amendment had no retrospective operation. The learned Judge overruled the first contention, but accepted the second. Thereafter the present appeal was preferred.

(5) The principal question to be decided in the appeal is thus whether the present S. 34, Income-tax Act, is retrospective in operation, but it will be convenient to dispose of first a contention faintly urged by the respondent against the learned Judge's conclusion on the first point. It was argued that he was wrong in holding that no writ of prohibition or certiorari could lie in the present case on the ground that the conditions precedent to the issue of notices under S. 34 did not exist.

(6) The point, to my mind an exceedingly thin one, arises in the following way. Sub-section (1) of S. 34, so far as is material, provides that if the Income-tax Officer "has reason to believe" that by reason of the omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for the assessment for any year, the income, profits or gains of that year have been under-assessed, he may issue a notice containing all or any of the requirements which may be included in a notice under S. 22(2), calling for a return from the assessee.

The facts in the present case, according to an affidavit of the officer who issued the notices, are that in each of the years in question there were profits arising from sales of shares, but those profits were left out of the assessments on a representation made on behalf of the respondent company that it was not a dealer in shares. The profits were, therefore, not taxed, as the assessing officer was led to believe that the dealings in shares were casual transactions and in the nature of mere changes of investments. During the assessments for subsequent years, however, it transpired that the respondent company had in fact been carrying on business in shares and thereupon the income from that source was included in the assessments. The Income-tax Officer, dealing with the subsequent assessments, was in those circumstances led to believe that the income for the three prior years in question had been under-assessed and he recorded the reasons for his belief in the following words:

> "At the time of the original assessment, the then I.T.O. merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying on a trade in the sale of investments. As such, the company has failed to disclose the true intention behind the sale of shares and as such S. 34(1)(a) is attracted."

(7) On those facts, Bose J. held that the case was not one where there were no materials before the Income-tax Officer on which he could form the belief. He pointed out that all that was necessary under S. 34 to give jurisdiction to the Income-tax Officer to proceed, was his personal satisfaction as to the existence of the conditions precedent required to attract the section and therefore the Legislature had given him power to determine for himself the existence of the preliminary facts on which the further exercise of his jurisdiction depended. The learned Judge added that though the reasons for the Income-tax Officer's belief might be examinable by a court of law, they were examinable only for the purpose of seeing whether there was some prima facie ground for the belief, but the court could not interfere by means of a writ on its own view of the grounds that they were not sufficient. If the Income-tax officer came to a wrong decision, the assessee's remedy lay in the proceedings provided for by the Income-tax Act itself.

(8) These propositions of the learned Judge were not questioned by Mr. Mitra who appeared on behalf of the respondent company, but what he contended was that, on his own showing, the Income-tax officer had no reason to believe that the respondent had failed to disclose fully and truly all material facts necessary for its assessment for the three years in question. It was argued that the facts were all known at the time of the original assessments and all that was being said now was only that the respondent "had failed to disclose the true intention behind the sale of the shares". It was therefore not a case of non-disclosure of facts on the part of the assessee and, on the part of the Income-tax Officer, it was only a case of change of opinion as to known facts.

(9) I am clearly of opinion that this contention of Mr. Mitra is not one that can be entertained in a proceeding under Art. 226 of the Constitution. I am aware that the terms of that Article are very wide and also that the writs which the Article contemplates are not limited to writs of the precise scope and character of the English writs. But however wide the language of the Article and however various the writs or orders it contemplates, I find myself unable to hold that the width of language has the effect of releasing the Article altogether from the limitations which attach in England to interference by means of high prerogative writs. There are certain obvious directions in which more extended power can legitimately be exercised under the Article, but a valuation of the grounds on which a particular order was made in a pending proceeding, governed by its own special law and provided with its own special remedies, does not appear to me to be one of such directions.

Even on the merits, Mr. Mitra's contention does not appear to me to have any substance in it. The expression that the respondent had failed to disclose "the true intention behind the sale of shares" may lack directions, but that deficiency of language is not sufficient to enable the respondent to contend, in view of the circumstances alleged, that no failure to disclose facts was being

complained of. On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was taking notice of a new fact. The contention of the respondent must therefore be overruled.

(10) Turning now to the contentions of the appellants, it was argued that in view of the terms of the new S. 34 and the provisions of the amending Act, no question of retrospective operation arose at all and, secondly, that, in any event, S. 34 was concerned with mere procedure in which no one had a vested right and therefore there was no bar to the applicability of the new section to past assessments.

(11) Before dealing with these contentions, it is necessary to set out the relevant portions of S. 34, as they stood before the amendment and as they stand now and also to state in what form the amendment was made.

(12) The Indian Income-tax Act, 11 of 1922, has recognised from the beginning that, for various reasons, the income of an assessee during a particular year may escape assessment altogether or that an assessment made of it may not bring the whole of the assessable income under tax or may not charge the proper amount of tax on it and it has therefore contained in S. 34 a provision for making assessments beyond the normal time or re-opening assessments. The section has been amended from time to time and immediately before the amending Act of 1948, the relevant portions of it stood as follows:

"34 (1) If in consequence of definite information which has come into his possession, the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act, the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice under that sub-section:

Provided that the tax shall be charged at the rate at which it would have been charged, had the income, profits or gains not escaped assessment or full assessment, as the case may be.

x x x x

(2) No order of assessment under S. 23 or of assessment or re-assessment under sub-s. (1) of this section, shall be made after the expiry, in any case to which cl. (c) of sub-s. (1) of S. 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable."

(13) By Ss. 2 to 12 of Act 43 of 1948, fairly extensive amendments of the Income-tax were made. Section 34 as dealt with by S. 8 and what that section did was not to make alterations in the old section, but to replace it completely by a new section of a self-contained character. The relevant portions of the substituted section are as follows:

"34 (1) If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under S. 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in cl. (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax has escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed, he may in cases falling under cl. (a) at any time within eight years and in cases falling under Clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains or compute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice under that sub-section:

Provided that —

x x x x

(ii) the tax shall be chargeable at the rate at which it would have been charged, had the income, profits or gains not escaped assessment or full assessment, as the case may be;

x x x x

3. No order of assessment under S. 23 to which Cl. (c) of sub-s. (1) of S. 28 applies or of assessment or re-assessment in cases falling within cl. (a) of sub-s. (1) of this section shall be made after the expiry of eight years, and no order of assessment or re-assessment in any other case shall be made after the expiry of four years, from the end of the year in which the income, profits, or gains were first assessable:

Provided that where a notice under sub-s. (1) has been issued within the time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from date of the

service of the notice, even if such period exceeds the period of eight years or four years, as the case may be."

(14) As already stated, amendments of the Income-tax Act were made by Ss. 2 to 12 of Act 43 of 1948. That Act itself came into force on 8-9-1948 but, by S. 1 (2), it prescribed the dates on which certain of its provisions and certain amendments made to the Income-tax Act were to come into force. Section 1 (2) is in the following terms:

"Sections 3 to 12 shall be deemed to have come into force on 30-3-1948 and the amendment made in the Income-tax Act, 1922 (11 of 1922) by S. 2 shall be deemed to be operative so as to apply in relation to all assessments subsequent to the assessment for the year ending on 31-3-1948."

(15) The first argument of the appellants was that by reason of the provisions of S. 1 (2) of the amending Act, the new S. 34 was to be deemed to have been on the statute-book on 30-3-1948 and if it was there on that date, then by its own express language it applied, on and from that date, to all assessment years, in cases coming under Cl. (a), from the end of which eight years had not elapsed on the date of the issue of the notice. There was no question of any retrospective operation. The earliest of the three assessment years involved in the present case ended on 31-3-1943. Eight years from that date would expire on 31-3-1951. The notice given on 28-3-1951 under the new section which was already in force and expressly authorised the issue of a notice within eight years, was thus clearly within time and the proceedings based on the notice were perfectly valid. The notices issued in respect of the two subsequent years were even more clearly within time.

(16) Unfortunately, Bose J. did not deal with this aspect of the matter at all, but proceeded on the well-known general lines. All that he held was that S. 34 did not relate to procedure, pure and simple, but affected a substantive right, viz., the protection given to the assessee not to be subjected to re-assessment except only under certain conditions and within a certain time and that, therefore, it could not have retrospective operation unless the statute indicated that it was intended to have such effect. The learned Judge seems to have thought that by providing by S. 1 (2) that the new S. 34 was to be deemed to have come into force on 30-3-1948, the amending Act had itself stated to what extent the new section was intended to operate retrospectively. He concluded as follows:

"The amendment is expressly made retrospective, so far as S. 34 is concerned, from 30-3-1948. It has no further retrospective operation."

(17) The learned Judge did not state expressly what he meant by "further retrospective operation", but since he held all the three notices and the proceedings pursuant thereto to be without jurisdiction, his meaning apparently was that the new section could not apply to any assessment year ended prior to 30-3-1948 or to any income-tax affair of any assessee prior to that date.

(18) In my opinion, the reasoning of the learned Judge does not dispose of the matter and if I may say so with respect, it does not seem to me to explore and examine fully the meaning of the new section being brought into force on 30-3-1948. It is true that the section must be taken to have come into force on that date and not on any earlier date. The date on which it came into operation cannot be pushed back further. But given that the section came into operation on 30-3-1948, in deciding in what manner it would operate, it is pertinent to enquire first what the section itself says. The learned Judge has observed that "the amendment is expressly made retrospective so far as S. 34 is concerned from 30-3-1948", but that really is not the retrospective operation of S. 34, but of the amending Act which, though it became law only on 8-9-1948, operates, so far as it substituted a new section for the old S. 34, with effect from 30-3-1948. The effect of S. 8 of the amending Act so operating with respect to S. 34 was that it placed the section on the statute-book as on 30-3-1948 and made it a part of the Income-tax Act on and from that date. But what was the effect of such introduction of the new S. 34 on the Income-tax Act itself? The effect was that the Income-tax Act, speaking on and from 30-3-1948 with the new section as a part of it, began to say in the words of the section itself, and therefore expressly by its own words, that in cases coming under cl. 1 (a) of the section, the Income-tax Officer would be entitled to issue a notice within eight years from the end of any assessment year in respect of which proceedings or further proceedings seemed to be called for. One has only to read the Act, standing so amended on 30-3-1948 and one finds at once a clear provision that all assessment years, ending within eight years from that date, are covered by it, as also all assessment years ending within eight years from subsequent dates. It is immaterial that some of them may be years ended before 30-3-1948. The question is not one of retrospective operation at all but a question of what the section says and how far the section, having come into force on 30-3-1948, extends by its own words. Had the section merely created a right in favour of the Income-tax Officer to issue a notice in respect of escaped or under-assessed income and not included a provision as to the period up to which computed from the end of the assessment year concerned, the right could be exercised, a question might conceivably arise as to whether it was intended to be retrospective in operation, but in view of its clear terms, the section gives rise to no such question.

The plain effect of the substitution of the new S. 34 with effect from 30-3-1948 is that from that date the Income-tax Act is to be read as including the new section as a part thereof and if it is to be so read, the further effect of the express language of the section is that so far as cases coming within cl. (a) of sub-s. (1) are concerned, all assessment years ending within eight years from 30-3-1948 and from subsequent dates, are within its purview and it will apply to them, provided the notice contemplated is given within such eight years. What is not within the purview of the section is an assessment year which ended before eight years from 30-3-1948. All the three assessment years in question in the present case ended within eight years from 30-3-1948 and also within eight years from the date of the notices and accordingly the proceedings taken are authorised by the section and are valid.

(19) It was, however, contended by Mr. Mitra that another principle had to be taken into account and that principle was that no section of the Income-tax Act could apply to the assessment of income in any year unless the Finance Act for that year made it applicable to such income. It was picturesquely urged that, by itself, the Income-tax Act was an inert machine

which could move only if the power of movement was imparted to it by a Finance Act and, therefore, where the Act was not applied to the income assessable in a particular year by the relevant Finance Act, such income remained unaffected by its provisions. As a corollary to that provision, it was argued that what the annual Finance Act made applicable to the income assessable in the year, was the Income-tax Act, as it stood at the date of the Finance Act and therefore amendments of the Income-tax Act, subsequently made, could not apply to such income, as there would be no Finance Act to make them applicable. Accordingly it was contended that the fact that the new S. 34, coming into force on 30-3-1948, authorised the issue of a notice in respect of assessment years ended within eight years was not sufficient to make the section practically operative in respect of years ended prior to 30-3-1948, the date on which the Indian Finance Act of 1948 also came into force, because the Income-tax Act applied to the earlier years by the relevant Finance Acts was an Act without the new section. According to Mr. Mitra, the Income-tax Act, as including the new S. 34, was first applied by the Finance Act of 1948 to the assessment year 1948-49 and it was only to that and subsequent assessment years that the new section could apply by the force of the successive Finance Acts. He added that the choice of 30-3-1948 as the date on which the amendment would come into force was a pointer to the intention of the Legislature that the new section would have effect only from the assessment year 1948-49, for that was the date on which the Finance Act of 1948 also came into force.

(20) Ingenious as the argument is, it is not, in my opinion, sound. Mr. Mitra founded his contention on the decision of the Privy Council in — 'Maharajah of Pithapuram v. Commr. of Income-tax, Madras', AIR 1945 PC 89 (A), and reinforced it by a reference to the decision of the Allahabad High Court in — 'In re Misrimal Gulabchand of Beawar', AIR 1950 All 270 (B), and that of the Nagpur High Court in — 'Niranjanlal Ramballabh v. Commr. of Income-tax, Madhya Pradesh and Bhopal', AIR 1953 Nag 185 (C). The root authority Mr. Mitra relies on was the decision of the Privy Council. In that case the assessee had made some revocable settlements in favour of his daughters in 1933 and up to the assessment year 1938-39, the income from the settled properties was assessed separately in the hands of the daughters under the provisions of the Income-tax Act, as they stood then, though the assessments were actually made on the assessee as their trustee. Then, by an amendment which came into force on 1-4-1939, S. 16 (1) (c), Income-tax Act, was amended so as to make the income from assets, revocably transferred, the income of the transferor and under that amended provision, the income from the subjects of the settlements during the year 1938-39 was included in the 1939-40 assessment of the assessee's own total income. It was argued that the words of the amendment which were "shall be deemed" had no retrospective effect and could not apply to the income of a year which had ended on 31-3-1939, but the Privy Council repelled that contention and held that the Finance Act of 1939, which made assessable in the 1939-40 assessment the total income of the previous year, "as determined in accordance with the provisions of the Indian Income-tax Act, 1922", could refer only to the Act as it stood at the date of the Finance Act, and as the former Act, as it then stood, already contained the amended provision, the income from the settled properties had rightly been added to the other income of the assessee. In the course of their judgment, their Lordships pointed out that, under the Indian Act, it was not the income of the assessment year but that of the previous year which was taxed and they added the following observation:

> "In the second place, it should be remembered that the Indian Income-tax Act, 1922, as amended from time to time, forms a Code, which has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act."

(21) In my opinion, it is perfectly clear that the annual Finance Act has no concern with the procedural provisions of the Income-tax Act and their Lordships of the Privy Council did not say that it had. They spoke only of "tax imposed for a particular fiscal year by a Finance Act". Section 3, Income-tax Act, provides that "where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year". The Central Act may be any Act, such, for example, as the Government Trading Taxation Act, but as a rule it is the annual Finance Act. The point to be noticed, however, is that the Central Act is referred to in S. 3 only for the purposes of the rate, but the rate fixed by the Central Act is to be charged in accordance with the provisions of the Income-tax Act and subject thereto. In other words, while the rate is to be taken from the Central Act, it is the Income-tax Act which governs the procedure according to which, the persons on whom and the circumstances in which the assessment is to be made. The provisions relating to these matters do not require to be applied to any particular assessment year by the relevant Finance Act. It is true that, at times, the Finance Act itself amends the Income-tax Act in these respects, but even in such cases the new provisions take effect as parts of the Income-tax Act and by their own force. In the passage quoted above, their Lordships were referring to the "tax imposed by the Finance Act" and they were doing so for the obvious reason that it is the Finance Act which fixes the rate of tax and makes an actual amount of tax chargeable. It is true that they also said that, by itself, the Income-tax Act had no operative effect, but it appears to me that they were not laying down a general proposition regarding the whole of the Act but only saying that the Act was not operative of its own force to impose any tax. That statement of the law can be easily understood, because the Income-tax Act deals only with the principles, the methods and the subjects of taxation.

A little reflection will show that what their Lordships were doing in the passage relied on was that they were repelling the argument that the income being of a year which ended on 31-3-1939 up to which it was not chargeable as the income of the assessee, the amendment which came into force on 1-4-1939 could not make it so chargeable. In repelling that argument they were saying that as, under the Indian Act, the income of a particular year was assessed in the next year, how the Income-tax Act stood in the previous year was immaterial, since by itself it imposed no tax, and since by the time when a tax came to be imposed on the previous year's

income by the Finance Act of the next year, the Income-tax Act had come to include the particular income in the income of the assessee, the tax came necessarily to be attached to it as a part of his total income. That is also the meaning of the other passage in which it was said that the tax was chargeable at the rates fixed by the Finance Act on the total income computed in accordance with the provisions of the Income-tax Act, as it stood at the date when the Finance Act came into force. Their Lordships laid down no general proposition that the Income-tax Act could not operate at all till a Finance Act made it applicable to a particular assessment year and that even the procedural sections required to be so applied.

(21a) The two Indian decisions may be shortly disposed of. In the Allahabad case it was held that the first proviso to S. 24 (1), Income-tax Act, which provided that loss incurred in an Indian State could not be set off against income accrued in British India and which came into force on 12-4-1944, did not apply to an assessment for the year 1944-45, as the Act, as it stood on 1-4-1944, did not contain the proviso. The learned Judges applied the principle of the Privy Council decision and did so conversely by excluding the operation of a provision which was not a part of the Income-tax Act at the beginning of the assessment year but was added subsequently after the date of the Finance Act. Whether they were right or wrong in doing so, the case is distinguishable, as it was concerned with a new provision which increased the taxable quantum of the income.

In the Nagpur case it was held that S. 33B, which empowered the Commissioner to revise orders passed by the Income-tax Officer and which also was introduced by Act 48 of 1948, was retrospective only to the extent of its applicability to the assessment year 1948-49 and did not authorise the Commissioner to set aside an order for the registration of a firm for the assessment year 1944-45. The learned Judges expressly repelled the contention that the provision being procedural was retrospective. They also relied on the decision of the Privy Council and in so far as they took the view that that decision required them to hold that even the procedural provisions of the Income-tax Act depended for their effectiveness on being brought into operation by a Finance Act, I find myself, with respect, unable to agree.

As regards the other reason given by them, viz., that S. 1(2) of the amending Act which brought S. 33B into force only with effect from 30-3-1948, itself showed that the retrospective operation of the latter section was limited to the assessment year 1948-49. I have already pointed out that S. 1(2) is really concerned with the retrospective operation of the provisions of the amending Act and not of the amendments themselves which must be judged by their own language and the place assigned to them in the Income-tax Act. The distinction appears clearly from the terms of S. 1(2) which, on the one hand, speaks of "Ss. 3 to 12" of the amending Act coming into force on a particular date, and on the other hand, of the "amendment made by S. 2" applying to certain assessments. The effect of S. 1(2) on S. 33B is to make it a part of the Income-tax Act on and from 30-3-1948 and since the section is in no way limited as to the assessment years to which the order revised must relate and only provides by sub-s. 2(b) that no order shall be made under it after the expiry of two years from the date of the order sought to be revised, I am unable to see why, after the section had come into force, the Commissioner could not revise any order, so long as he did not go beyond the time-limit prescribed. Mr. Meyer contended that the learned Judges had applied the latter part of S. 1(2) to a case governed by the first part. I do not consider that criticism justified. They did proceed on the date, 30-3-1948 and not on the expression "all assessments subsequent to the assessments for the year ending on 31-3-1948", but they attributed to the specification of the former date with respect to Ss. 3 to 12 of the amending Act an effect which, in my view, is not justified. That date may have been chosen, because, first Ss. 11 and 12 of the amending Act introduced certain new provisions which affected tax relief and were intended to apply to the assessment year 1948-49 which they could not do without the assistance of the Finance Act of 1948, and secondly, because S. 34 was intended to reach out to the assessment year 1939-40, the first of the War years.

(22) In my opinion, the cases cited by Mr. Mitra do not establish that the principle invoked by him is an obstacle to the plain meaning of the express language of S. 34 being given effect to in the case of assessment years prior to the year 1948-49. Section 34 does not impose any new charge, nor does it fix any new rate, but on the other hand provides expressly by Proviso (ii) to sub-s. (1) that the tax shall be chargeable at the rate at which it would have been charged, had the income not escaped assessment or full assessment. That rate has already been brought into force by the Finance Act of the relevant year and does not require to be brought into force again in order that it may be imposed on the income or further income which the assessment or re-assessment proceedings may bring to light. Mr. Mitra's argument would seem to imply that in order that the undisclosed income of any year prior to the amendment might be brought under charge under the provisions of the amended section, the relevant Finance Act also would require to be amended so as to apply to the Income-tax Act, as retrospectively amended — but that argument seems to me to involve a confusion of thought. When the Finance Act of a particular past year, say 1943, was passed, it at once made tax, computed at the rates it fixed, chargeable on the total income of every assessee assessable in that year, whether or not such income was disclosed or fully diclosed. Section 34 only helps to bring the undisclosed part of the income to light, a part to which a charge of tax has already been attached by the relevant Finance Act, and in order that the part, so traced out, may be brought under assessment at the rate already fixed, the operative force of the Finance Act does not require to be invoked and applied again. The old Finance Act covered the whole of the true assessable income and is sufficient to attach a tax to the whole of it. So long, therefore, as an amendment of the Income-tax Act does not make a new category of income chargeable to tax with retrospective effect, no further aid from the Finance Act is necessary in order to make a retrospective amendment effective. In my opinion, the considerations urged by Mr. Mitra do not displace the plain meaning of S. 34 and cannot avail against its applying to assessment years prior to its date. The first contention of the appellants, in my view, is right and the section applies directly to all the three assessment years without presenting any problem of construction.

(23) In the view I have taken of S. 34, no question of retrospective operation, as a question of interpretation, arises in the present case. The term 'retrospective operation', as has been observed, is ambiguous, because it is applied both to the

fact that a particular enactment operates from before its date or so as to affect pre-existing rights and to the problem of construction which may be presented by an enactment as to whether it extends backwards or not. When an enactment extends backwards by its own clear language, it operates retrospectively, but presents no problem of construction. There can be no doubt that the Legislature is supreme and it can, if it chooses, legislate so as to alter rights with effect from a prior date. It is only when the intention of the Legislature does not lie on the surface that a question of interpretation arises and, in such a case, in deciding whether the enactment concerned is intended to operate retrospectively, certain well-known principles are followed. The present case does not belong to that type, because the effect of the manner in which S. 34 was incorporated in the Income-tax Act and of the words in which the section is expressed, is clear.

(24) But the case was argued at great length by Mr. Mitra as if it involved a question of interpretation as to whether the new S. 34 was retroactive or not and he cited a multitude of cases. I do not propose to discuss them, because not one of them was concerned with a provision of the present character. For the general principles, one does not require, I venture to think, to refer to decide cases at this time of the day. In deference to the argument of Mr. Mitra, I shall test it by those principles on the assumption that a question of interpretation does arise, though in my view none arises.

(25) Mr. Mitra was concerned to make out that the new S. 34, if applied to assessment years prior to 1948-49, would affect vested rights. Assuming it would, the short answer to Mr. Mitra's argument is that vested rights can be affected by a new enactment operating retrospectively if it contains express words or exhibits a necessary intendment to that effect, as S. 34 clearly does. It is, however, pertinent to enquire what the vested rights in the present case are. Mr. Meyer contended that there were no vested rights at all, because the subject-matter of S. 34 was mere procedure. In support of his contention he referred to the observation of the Judicial Committee in — 'Commr. of Income-tax, Bengal v. Mahaliram Ramjidas', AIR 1940 PC 124 at p. 126 (D) that the section "deals merely with the machinery of assessment" and to that of Hanworth, M. R. in — 'W. H. Cockerline & Co. v. Commrs. of Inland Reveune', (1932) 16 Tax Cas 1 at p. 19 (E), quoting Lord Dunedin and Sargant, L. J., that an assessment only quantifies the tax-charge and the "provisions as to assessment and so on are machinery only". It seems to me, however, that to dispose of the question as to S. 34 affecting substantive rights merely by saying that the section is concerned with procedure, is to over-simplify the problem. A rule of procedure can affect substantive rights as, for example, a rule of limitation which takes away a right of suit which was still available under the previous law or enlarges the time for bringing a suit which had become barred. 'Gopeshwar Pal v. Jiban Chandra', AIR 1914 Cal 606 (F). The subject-matter of S. 34 being essentially a rule of limitation, the matter requires a little more careful scrutiny.

(26) But since S. 34 had a predecessor which prescribed the same limits of time for initiation of proceedings, more or less in the same circumstances, it would 'prima facie' appear that by the new section no pre-existing rights are adversely affected. It is important to remember that the section imposes no new burden of tax and indeed creates no liability at all. Where there is an assessable income, the liability to tax has already attached to it under the charging sections of the Act; its measure has also been determined under the provisions of the relevant Finance Act, although it may not have been computed or fully computed. Section 34 only authorises an enquiry with a view to verifying whether there was an assessable income which has escaped assessment or has not been fully assessed and it also authorises an assessment or re-assessment if the enquiry results in an affirmative finding. From one point of view, vested right claimed in such circumstances would seem to be a right not to pay the tax legally due or a right to retain one's concealments which, in the words of an English case, is a right worthy of little respect and indeed not a right at all. It is therefore necessary to see whether any right can be found when the position is looked at from any other point of view.

(27) As I have already pointed out, the section introduced by Act 48 of 1948 is not a new provision altogether, but a variant of an old provision which it replaced. In my opinion, so far at least initiation of proceedings is concerned, there is no substantial difference between the two from the point of view of the assessee's rights. The new section authorises, as the old section did, initiation of proceedings within eight years from the end of an assessment year or, in cases of an innocent escape or under-assessment of income, within four years. So far there is no difference. The basis for the initiation of proceedings is also the same, viz., escape of income from assessment or under-assessment, whether as to the quantum of the income or as to the rate, or allowance of excessive relief. There is an apparent difference in that, under the old section, there had to be a discovery of the basis on definite information, whereas under the new section it is sufficient if there is reason to believe its existence. This difference, however, is to a certain extent neutralised, because in providing when the Income-tax officer can start proceedings within eight years, the old section says that he can do so when, according to him, the assessee has "concealed the particulars of his income or deliberately furnished inaccurate particulars thereof", while the new section says that he can do so when, according to him, the escape or under-assessment has been due to the omission or failure of the assessee "to disclose fully and truly all material facts necessary for his assessment" — which seems to me to be practically the same — and both sections use the expression "has reason to believe". Another apparent difference that the new section mentions omission or failure to make a return as one of the causes of non-assessment or under-assessment is no difference at all, because it is not the absence of a return which gives the Income-tax officer jurisdiction to proceed, but the resultant non-assessment or under-assessment which was a ground for proceeding under the old section as well. The only real difference seems to me to be that whereas the old section allowed the same time for the initiation and the completion of proceedings, the new section allows one further year for the completion.

(28) But even assuming that the differences between the two sections are real, I am unable to hold that the new section invades any vested rights. I do not exclude vested rights merely on the ground that the sections concern procedure in which no vested right can be claimed, but I do so on the ground that no affection of any right is at all involved. It is true that the mere fact that the Income-tax officer initiates proceedings under S. 34 does not mean or prove that non-as-

sessment or under-assessment has in fact occurred, but the fact that the assessee may be subjected to some undeserved harassment by a proceeding under the new section, although no income has escaped assessment or full assessment, can be no ground for saying that any right is for the first time being affected. Under the old section as well, the Income-tax officer could proceed on his own view of a possibility that income might have escaped assessment or might have been under-assessed, although it was called 'discovery'; and since the time-limits for so proceeding were the same, the new section affects no rights previously unaffected. Assuming that the restrictions on the Income-tax officer's power to proceed under the section have been slackned by the new section, even then it cannot be said that any right of the assessee has been affected, because to be proceeded against under certain preliminary conditions rather than others, when the matter for which one is proceeded against is the same, is not a right. Nor is the enlargement of time for the completion of an assessment a violation of any right, for, if a man is liable to be proceeded against, he cannot say that he has right to be proceeded against within a certain time or not at all. Just as a man may have right to take a proceeding, but has no right to be allowed to take it upto a certain time, so has no man, liable to be proceeded against, a right to the initiation or completion of any proceeding against him being limited to any particular period. Provided that the right or liability is not itself affected, the time for asserting the right or enforcing the liability may always be enlarged or abridged. It is true that if time is enlarged by a new enactment, but at the date when the enactment comes into force, no proceeding can any longer be commenced in a particular case under the previous law, the new enactment will not apply to such a case, — 'Khondkar Mahammad v. Chandra Kumar', AIR 1930 Cal 34 (G), but no such situation has been caused here. Time has not been enlarged at all. On the day the new section came into force and on any day thereafter, proceedings in respect of the same assessment years could be initiated under the old section, if it had remained in operation, as under the new section.

(29) Bose, J. referred to a number of changes brought about by a new section which, according to him, affected substantive rights of assessees and he proceeded to hold that the section could not be taken as intended to operate retrospectively in the absence of some indication of such intention which he did not find. He thought that, on the other hand, a contrary intention was indicated by the fact that the section had been brought into force retrospectively with effect from 30-3-1948. According to the learned Judge, that date set the limit of time beyond which the retrospective operation of the section could not go. With great respect, it appears to me that none of the matters referred to by the learned Judge is a matter of substantive right at all. It must be remembered that the section does not make any income taxable under the Act for the first time, nor does it enlarge the quantum of income taxable. It creates no new liability to tax, nor authorises the Revenue to bring under assessment any category of income which was formerly exempt from taxation. It is concerned only with the time and the methods of the enquiry as to whether all the income, already liable to assessment, has in fact been assessed. The learned Judge mentioned the "protection given to the assessee not to be subjected to re-assessment except only under certain conditions and within a certain time" as a substantive right. As to time, none has a vested right in a period of limitation and a change of the period which does not altogether take away a right of action subsisting at the date of change or revive a right, then already barred under the old law, can always be made and the period applicable thereafter will be the new period, whether enlarged or abridged. Besides, the period has not in fact been enlarged in the present case. Nor can there be a vested right in the conditions in accordance with which a right enforceable against a person will be enforced, so long as the right itself, which, in this case, is the right to the tax imposed by the Act, is not enlarged by the change in the conditions. The change of discovery on definite information into reason to believe is not such a change. The learned Judge also says that the new section introduced a new ground, viz., failure to file a return, for invoking the jurisdiction to assess or reassess, but as I have already pointed out, the section does not make such failure a ground for proceeding under it, but mentions it only as one of the causes of re-assessment or under-assessment which is the circumstance that gives jurisdiction to proceed. The enlargement of the period within which the proceedings must be concluded does not also affect any substantive right for the same reasons as apply to enlargement or abridgement of the period for the initiation of proceedings, so long as the result is not to extinguish an existing right or revive a dead one. As regards the intention manifested by the fact that the section was brought into force retrospectively on 30-3-1948, I have already explained that the intention appearing from that fact is only the intention as to how far the relevant section of the amending Act, i.e., S. 8, will be retrospective, but how far or if at all, S. 34, on being placed on the statute-book retrospectively with effect from 30-3-1948, will itself operate retrospectively, is a further question. The answer to that question is furnished by the contents of the section itself and the language in which it is expressed.

(30) For the reasons given above, I am of opinion that even if a question of construction be assumed to be involved, there is no bar in any vested right to the new section being construed as operating retrospectively. Even if there be any vested right, the words of the section are sufficiently clear to indicate the Legislature's intention to affect it. How untenable the assessee's contention is, will appear if its implications are analysed. If the contention be correct, the Legislature enacted a new section in 1948 to operate forwards from the assessment year 1948-49, leaving the earlier four or eight years in respect of which proceedings could be initiated under the old section, wholly unprovided for or leaving them to the very doubtful charge of the repealed section, operating along with S. 6(e), General Clauses Act. I find no compelling reason to adopt so fanciful a construction.

(31) Mr. Mitra also raised a point of constitutional law which, I confess, I found it extremely difficult to appreciate. He contended that since India became a Dominion only on 15-8-1947 and was a Dominion when Act 48 of 1948 was enacted, it could have no concern with or interest in the pre-1947 income of any assessee, because the tax on such income belonged to the outgoing British Indian Government and with respect to it the Dominion of India could not legislate. Whether Mr. Mitra intended to say that an Act of the Dominion of India could not, as a matter of law, apply to the pre-1947 income of any Indian citizen or whether his meaning was that since the unassessed tax of the period prior to 15-8-1947 did not belong to the Dominion of India, the Dominion must be taken to have not intended to legis-

late for such tax by Act 48 of 1948, was not very clear. I invited Mr. Mitra to give the steps of his reasoning, but beyond saying that the pre-1947 revenue belonged to the British Power, though it may have left it to the Dominion of India under a treaty, he did not supply any further reasons. Asked where the treaty was to be found, he referred to the Indian Independence Act. He referred also to the Tax-Agreement between India and Pakistan and submitted that the pre-1947 tax, due from assessees resident in what was now India, belonged to Pakistan as well, for which the Dominion of India could not alone legislate.

I confess I am altogether unable to follow that argument and since, unfortunately, Mr. Mitra threw no further light on it, it remains to me obscure. I should have thought that by and under the Indian Independence Act, India became a practically sovereign power with respect to the territories allotted to her and she acquired full and unfettered legislative authority over her subjects and their affairs, whether in the past or in the present or in the future. It also appears to me that no agreement between the two States of India and Pakistan as to the division of the pre-partition assets can have anything to do with the powers of legislation of the two States within their respective territories, even if such legislation relates to the realisation of pre-partition liabilities of the subjects. Again, as to the argument about the British Indian Government being the real owner of the pre-partition revenues of the country, I am wholly unable to agree that it is correct, but even assuming it is, I cannot see how an enactment which does not impose any new charge but is aimed at merely collecting the charge already incurred under the old law can conflict with the British Government's ownership of the revenue. Lastly, I would add that if India had no concern with the pre-1947 revenue and no power to take any proceeding with respect to the same, as Mr. Mitra contended, it is difficult to understand what she would have to do if the old S. 34 continued to remain on the statute-book or whether that section also would have become a dead-letter with respect to the pre-1947 years. Speaking for myself, I am unable to find any substance in Mr. Mitra's argument and unable to see what practical bearing it has on the question as to whether the new section does or does not, as a part of the municipal law of India, operate retrospectively.

(32) A point was taken by Mr. Meyer that the present case was altogether outside the scope of Art. 226. In view of the conclusion I have arrived at on the merits, I would prefer to reserve that question for decision on a future occasion.

(33) On a consideration of S. 34, Income-tax Act, as introduced by Act 48 of 1948, I am of opinion that the view taken of it by Bose J. was not right. The appeal is accordingly allowed, the judgment and the order of Bose J. are set aside and the respondent's application dismissed with costs here and below.

(34) Certified for two Counsel.

(35) A. K. SARKAR J.: I agree.

A/R.G.D. Appeal allowed.

A. I. R. 1953 CAL. 729 (Vol. 40, C. N. 277)

SINHA J.

Mohammad Safi, Petitioner v. Union of India and another, Opposite Party.

Civil Rule No. 2219 of 1952, D/- 26-6-1953.

(a) Transfer of Property Act (1882), S. 108 (j) — Condition restraining alienation.

Where it is established that one of the conditions of his tenancy was that the tenant must carry on business on the premises let, then the application of S. 108 (j) is excluded. (Para 6)

Anno: T. P. Act, S. 108 (j) N. 1.

(b) Government Premises (Eviction) Act (1950), S. 2 (a) — "Competent authority" — Appointment by designation.

The "competent authority" under S. 2 (a) must be a "person." However, the argument that the appointment of the "Superintendent Metal and Steel Factory, Ichapore" is bad because it is an office is not acceptable. It is not the office which is appointed but the official who happens to fill the office for the time being. The object of such an appointment is obvious. If officials are appointed by name, it will mean frequent change in the notifications. (Para 9)

(c) Government Premises (Eviction) Act (1950), S. 3 — Notice to quit — Satisfaction of competent authority.

Section 3 makes the notice subject to the satisfaction of the "competent authority", that a certain state of fact exists. Thus, the competent authority has to be satisfied that the tenant has acted in contravention to the terms of his tenancy. Where, therefore, one of the terms of the tenancy is that the tenant should carry on business on the premises let and the facts show that at some point of time previous to the service of the notice the tenant had ceased to carry on business at the shops, the notice to quit the premises is valid. In such a circumstance, it is, therefore, unnecessary to go into the question whether he really wished to transfer the shops or merely effected a temporary transfer. (Para 10)

(d) Constitution of India, Art. 226 — Scope — Other remedy open by way of appeal — (Government Premises (Eviction) Act (1950), Ss. 3 and 5).

Where the notice under S. 3, Govt. Premises (Eviction) Act, 1950 is given by a person who is not a competent authority at all, an application under Art. 226, Constitution of India, directly to the High Court is maintainable. If, however, it transpires that the notice is properly issued, the High Court will refuse to go into the disputed fact of possession, which should have been agitated before the tribunal provided for such matters by the Act itself by way of appeal. AIR 1950 FC 129, Ref. (Para 11)

Binayak Nath Banerjee and Sudhir Kumar Bose, for Petitioner; Hemendra Kumar Das and Smriti Kumar Rai Choudhury, for Opposite Party.

CASE CITED:

(A) ('50) AIR 1950 FC 129: 51 Cri LJ 1480

JUDGMENT: This is an application to compel the respondents to withdraw an order of eviction passed upon the petitioner, in respect of two plots of land appertaining to shops Nos. 18 and 20 in the workmen's line market at Ichapore, situate within the boundaries of the Metal and Steel Factory at Ichapore. The facts are as follows:

(2) The petitioner took the ground tenancy of two pieces of lands on 1-12-1942 and 1-8-1943, situate in the workmen's line market at Ichapore, situate within the boundaries of the Government.

Metal and Steel Factory at Ichapore. On this he erected Stalls which were numbered as shops Nos. 18 and 20. Therein he carried on a cloth business under the name and style of "Nadia Cloth Store". During the communal disturbances in the locality about end of February 1950 the petitioner closed his shops. Upon the Factory authorities notifying in the newspapers that all shops must be reopened within a specified period, the petitioner reopened his shop early in June 1950. On 15-6-1950 two letters were written by the petitioner to the Estate Foreman, Metal and Steel Factory Ichapore, as follows:

"(1) I beg to bring to your kind notice that I wish to transfer shop at No. 18 at Workmen line Bazar Ichapur to Sri Kedarnath Agarwala of Ichapore Bazar from the month of June 1950. Kindly arrange to transfer the name accordingly to Sri Kedar Nath Agarwalla who is bound to pay the rent of the ground on which the said shop stands accordingly to your assessment. Please note and do the needful.

(2) I beg to bring to your kind notice that I wish to transfer my shop No. 20 at Workmen's line Bazar Ichapur to Sree Mewalal Shaw of Ichapur Bazar from the month of June 1950. Kindly arrange to transfer the name accordingly to Sree Mewalal Shaw who is to pay the rent of the ground on which the said shop stands according to your assessment. Please note and do the needful."

It appears that the Superintendent Metal and Steel Factory Ichapore got into communication with Kedar Nath Agarwal and Mewalal Shaw. On 31-6-1950, Kedar Nath Agarwal wrote to the Superintendent that he was a businessman residing at Ichapore Line Bazar and had purchased the shop for running the business and wanted to take a lease of the land upon paying a rent higher than the highest tender. On the same date Mewalal Shaw wrote a letter informing the Superintendent that he had purchased the shop from the petitioner for running the business and was continuing the business there for a long time. He also wanted a tenancy of shop No. 20 at a rent higher than the highest tender. It is not quite clear what they meant by the highest tender received. Probably the authorities had intimated to them that the lands will be let out upon the basis of fresh tenders and both these persons failed to make any offer in time and apprehended that fresh tenders had already been called and the highest tender accepted.

(3) On 29-7-1950, Kedarnath's pleader wrote to the Chief Secretary, Government of India and the Collector, 24 Parganas stating that the petitioner had sold his right title & interest in the land (upon which shop No. 18 was situate) to Kedarnath, together with the structures and had put him in possession, and threatening to file a suit for a declaration of his tenancy right and damages for dispossession. On 31-7-1950 Mewalal's pleader wrote a similar letter in respect of the plot of land upon which shop No. 20 was situated. It is by no means clear how they complained of dispossession.

(4) On 12-11-1950, Kedar Nath wrote a letter to the Superintendent that shop No. 18 was taken over by him to save the same being looted during the communal troubles upon condition that when the petitioner returned, the shop would be made over to him. He intimated that the shop had been made over again to the petitioner.

(5) According to the petitioner he wrote a letter on 3-7-1950 to the Superintendent stating that he had changed his views due to abatement of the communal disturbances and prayed that the shops may be kept in his name as before. This letter was not received by the Superintendent but he received a copy of this enclosed with another letter dated 31-10-1950.

(6) Before I proceed further, I will have to consider the terms of the petitioner's tenancy and whether he could be said to have acted in contravention of any of the terms thereof. The terms are not in writing. Paragraph 5 of the affidavit in opposition however is as follows:

"The petitioner Md. Safi took the ground tenancy of two pieces of lands on 1-12-1942 and 1-8-1943 respectively on which he created stalls on condition of carrying business there. The stalls on the aforesaid two pieces of land were numbered as shops nos. 18 and 20 in the old Workmen's Lines, Market at Ichapur. The land is situate within the boundary of the Metal and Steel Factory Estate and belongs to the Central Government."

The allegations in this paragraph are not denied in the petitioner's affidavit in reply. Therefore it is established that one of the conditions of his tenancy was that he must carry on business there. The application of S. 108(j) of the Transfer of Property Act is thus excluded. I now come to S. 3(1) of the Government Premises (Eviction) Act 1950 (27 of 1950) which runs as follows:

"3(1) 'Power to evict certain persons from Government premises'—(1) If the competent authority is satisfied—

(a) that the person authorised to occupy any Government premises has, whether before or after the commencement of this Act—

(i) sub-let without the permission of the Central Government or of the competent authority, the whole or any part of such Government premises or

(ii) otherwise acted in contravention of any of the terms express or implied under which he is authorised to occupy such Government premises, or

(b) that any person is in unauthorised occupation of any Government premises,

the competent authority may, by notice served by post or otherwise, that that person as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within fifteen days of the date of the service of this notice."

"Competent Authority" has been defined to mean any person authorised by the Central Government, by notification in the official gazette to perform the functions of the competent authority within the area notified. Such a notification, No. 13E was published in the Gazette of India (Exty.) on May 1, 1950. The notification was amended by a further notification No. S. R. O. 147 published in the Gazette of India dated 5-8-1950 whereby the Superintendent Metal and Steel Factory, Ichapore has been appointed as the competent authority within the Metal and Steel Factory Ichapore. This has been confirmed by another notification No. S. R. O. 291 gazetted on 18-11-1950 by which the area of the Rifle Factory at Ichapore has been added to his jurisdiction.

(7) On 16-11-1950 the respondent No. 2 who is the Superintendent of the Metal and Steel Factory Ichapore issued two notices upon the petitioner asking him to quit and vacate the two plots appertaining the shops nos. 18 & 20 upon the expiry of his next month of tenancy. It was stated in the notices that it appeared to the Superintendent that the petitioner had ceased to carry on

business in the said shops and had sold the structures to third parties.

(8) On 16-5-1952, notices were served by the respondent no. 2 upon "Jonab Mahammad Safi, his agent or whosoever be in unauthorised occupation of premises of 18 (and premises no. 20) in the Old Workmen's Lines Market at Ichapore". These notices purport to have been issued under S. 3, Government Premises Eviction Act, 1950 as amended by S. 25, Requisitioning and Acquisition of Immovable Property Act, 1952 (Act 30 of 1952) and require the abovementioned persons to vacate the premises within 15 days from the service of the notices. On the same date, notices under S. 4 of Act 27 of 1950 as amended by Act 30 of 1952 were also served for arrears of rent and damages for use and occupation.

(9) As the petitioner did not vacate the lands, force had to be used and it appears that police help had to be requisitioned. In the counter affidavit it is stated in paragraph 20 that one Ganpat Lal Agarwal appeared to be in possession of the shop rooms and claimed them to be his property. In reply it is stated that Ganpat Lal Agarwal was not authorised to take possession of the land. This can only mean that he was in unauthorised possession, since his possession is not denied. The superstructure has been removed and it has been offered back to the petitioner. Thereafter this rule was taken out. It will be observed that only the notices dated 16-5-1952 are specifically challenged in this application. Mr. Banerjee had at first taken the point that the notices dated 16-11-1950 were invalid because according to the respondent no. 2 himself (counter affidavit, para 3) he was notified to be a competent authority on 18-11-1950. It transpires however that the respondent is not accurate, because there is an earlier notification in existence. (No. 13E dated 1-5-50 as amended by notification No. S. R. O. 147 dated 5-8-1950). Notification S. R. No. 291 merely increased the area of his authority. Mr. Banerjee next argued that under Act 27 of 1950, the "competent authority" must be a "person" and the appointment of the "Superintendent Metal and Steel Factory Ichapore" was bad because it was an office. I regret I am unable to accept this argument. It is not the office which is appointed but the official who happens to fill the office for the time being. The object of such an appointment is obvious. If officials are appointed by name, it will mean frequent change in the notifications. I cannot find any valid objection to such an appointment. The definition of "person" in the General Clauses Act (section 3(39) (now S. 3(42)) does not assist us in solving the problem. Mr. Banerjee next argues on the merits of the case. He says that the letters dated 15-6-1950 written by the petitioner, merely express a desire to transfer the shops to Kedarnath and Mewalal but it was never effected and on 3-7-1950 the petitioner clearly revoked his previous prayer for effecting the transfer.

(10) Section 3 of Act 27 of 1950, makes the notice under S. 3, subject to the satisfaction of the "competent authority", that a certain state of fact exists. In this case, the competent authority had to be satisfied that the petitioner had acted in contravention to the terms of his tenancy. I have shown above that one of the terms of the tenancy was that he should carry on business there. It is clear from the facts stated above that at some point of time previous to the service of the notice dated 16-11-1950, the petitioner had ceased to carry on business at the shops. It is, therefore, unnecessary to go into the question whether he really wished to transfer the shops or merely effected a temporary transfer to wade over the difficult times brought on by the communal disturbances. The shops are situated within an area of military importance and it is understandable that the authorities cannot allow anybody and everybody to occupy the shops and the tenancy is subject to the actual tenant continuing to carry on business there. It is unnecessary therefore to consider the fact that Kedarnath and Mewalal have affirmed affidavits supporting the petitioner's case, except that I am unable to accept their evidence that the petitioner was in possession at all material time of the said two shops.

(11) Lastly it may be mentioned that there is a right of appeal given under S. 5 of the Act 27 of 1950. If the notice was given by a person who was not a competent authority at all, an application directly to this Court was maintainable. Since, however, it transpires that the notices were properly issued, I do not think that I should go into the disputed fact of possession, which should have been agitated before the tribunal provided for such matters by the Act itself. Mr. Banerjee has relied on the case of — 'Machindar v. The King', AIR 1950 FC 129 (A) and argues that this Court is competent to examine the reasonable probative value of the materials upon which the subjective satisfaction of the competent authority is based. Firstly that is a matter which should have been agitated before the appellate tribunal provided for by the Act. Secondly, upon an examination of the entire evidence I am myself unable to come to the conclusion that the petitioner could be said to have been carrying on business at the two shops at all material times. For these reasons this application must fail. The rule is discharged, the interim injunction vacated. There will however be no order as to costs.

(12) As the petitioner intends to prefer an appeal against this order, the interim injunction will continue for three weeks more, after which further stay, if necessary, must be obtained from the Appeal Court.

A/V.S.B. Rule discharged.

A. I. R. 1953 CAL. 731 (Vol. 40, C. N. 278)

P. N. MOOKERJEE AND GUHA RAY JJ.

Hrisikesh Bhattacharjee and another, Petitioners v. Brojendra Mohan Bhattacharjee and others, Opposite Party.

Civil Revns. Nos. 189 and 190 of 1953, D/- 15-6-1953.

(a) Bengal Village Self-Government Act (5 of 1919), S. 101 — Rules under — Rules 11 and 12 — Non-compliance with Rules.

The requirement that the notification under R. 12 and the publication under R. 11 must both be at least one week before the date fixed for the election, is not imperative but merely mandatory and any breach thereof would not necessarily invalidate the election if there has been substantial compliance in the matter of the said requirement: 57 Cal WN 613, Applied.

(Paras 6 & 7)

Hence where in a case there was delay by one or two days in the publication of notification under R. 12 and over 75 per cent of the voters participated in the elections:

Held, that as there was substantial compliance with the relevant statutory requirement and its purpose was sufficiently

achieved, the elections ought not to be set aside. (Para 7)

(b) Constitution of India, Art. 227 — Interference when election is unlawfully set aside.

It is only meet and proper that when an election has been unlawfully set aside and the matter has come to the High Court under Art. 227 for necessary redress, there being no other remedy open or available, the illegal order should not be allowed to stand: AIR 1952 Cal 526, Rel. on. (Para 16)

(c) Bengal Village Self-Government Act (5 of 1919), S. 17C — Irregularity in elections.

Where one of the qualified voters is illegally prevented by the Returning Officer from voting in the elections of a Union Board but the margin of votes between the successful candidate and the unsuccessful one is more than one vote, the illegal rejection of one vote would be of no material consequence and the irregularity, apart from the fact that it is not by itself sufficient to vitiate the election, is also fully covered and cured by S. 17C. (Paras 8 and 11)

Purushottam Chatterjee and Rabindra Narayan Chakravartty, for Petitioners; Manindra Nath Ghose and Anil Kumar Sett, for Opposite Party.

CASES CITED:

(A) ('53) 57 Cal WN 613

(B) ('52) AIR 1952 Cal 526: 56 Cal WN 124

(C) ('51) AIR 1951 Cal 255: 55 Cal WN 81 (SB)

P. N. MOOKERJEE J.: These two Rules arise out of two election petitions filed in connection with the election of members of Wards Nos. III and IV of the Bondul Union Board in the district of Burdwan. The elections were held on September 9 and 10, 1951. The petitioners in these Rules and the opposite parties were the rival candidates. The petitioners were elected as the members from those two Wards and against their elections the opposite parties filed election petitions, out of which the present Rules have arisen.

(2) The learned Additional District Magistrate of Burdwan who heard these election petitions came to the conclusion that the notification under R. 12 of the Rules under the Village Self-Government Act which admittedly applied to these elections was made in the case of both these Wards on 4-9-1951, and as, therefore, the said notification was not made at least one week before the dates fixed for the elections, namely, September 9 and 10, 1951, as required under the strict terms of the said rule, the elections in question were invalid and in that view of the matter, he set aside the elections of the petitioners.

(3) The petitioners then moved the learned Commissioner, Burdwan Division, against these orders of the learned Additional District Magistrate. The resulting cases were, however, dismissed as the learned Commissioner also was of the same opinion as the learned Additional District Magistrate. Against these concurrent orders of the learned Commissioner, and the learned Additional District Magistrate, the present Rules have been obtained by the petitioners.

(4) Rule 12, referred to above, is in these terms:

"The election shall be held on such date or dates and at such place or places within the union as may be fixed by the Circle Officer subject to rule 1. The place or places at which and the hours between which the voters will attend for the purpose of giving their votes shall be notified within the union by the publication of notices and by beat of drum at the same time as the list of candidates is published under R. 11."

(5) The reference to Rule 11 in the last part of the above quoted rule makes it necessary to set out here the terms of the said rule 11 for the purpose of the present cases. That Rule 11 is in these terms:

"If the number of candidates exceeds the number of vacancies, a list showing, ward by ward, the names of candidates who are duly qualified shall be published in each ward in a conspicuous place and by beat of drum at least one week before the date fixed for the election."

(6) It is clear from a reading of the two rules, quoted above, that the notification under R. 12 and the publication under R. 11 must both be at least one week before the date fixed for the election. The question, however, is whether this requirement as to a minimum period between the date of the said notification and publication and the date of election is imperative or merely directory. It is quite clear that if this requirement is imperative, any breach thereof would invalidate the election. It is also quite clear that if this requirement is directory, the breach thereof would not necessarily invalidate the election if there has been substantial compliance in the matter of the said requirement. In such a case strict compliance with the statutory requirement would not be necessary.

(7) The learned Commissioner and the learned Additional District Magistrate both appear to have been of the opinion that this requirement as to the minimum time is imperative and, accordingly, having regard to their finding that the notification under R. 12 in the present cases was made on 4-9-1951, whereas the elections were to be held on the 9th and the 10th, that is, within less than a week, and there being thus no strict compliance with the statutory provision as to the minimum time, they felt obliged to set aside the elections on account of the non-observance of this statutory requirement. In our opinion, however, that view is not correct. The requirement as to time in such statutes, although put in a mandatory form, is generally directory. That has been held in a series of English decisions which were all considered and the principle whereof was followed and applied in the recent decision of this Court in the case of — 'Ajit Kumar Sen v. State of West Bengal', 57 CWN 613 (A). In this latter case also, it was held that such a provision was directory in nature and substantial compliance therewith — as opposed to strict observance thereof — would be sufficient. In the present cases, the delay in one case was by one day and in the other only by two days and it also appears that over 75 per cent. of the voters in one case and over 88 per cent. in the other participated in the elections. There was thus substantial compliance with the relevant statutory requirement and its purpose was sufficiently achieved. In such circumstances, we are not prepared to agree with the two tribunals below that the elections ought to be set aside merely because of the above non-compliance with the provisions of R. 12.

(8) In one of the cases, viz. Civil Revision Case No. 190 of 1953, relating to Ward No. 4, there was another point raised in support of the election petition, namely, that one of the qualified voters, by name, Arjan Shah, had been illegally prevented by the Returning Officer from voting in the elections. It appears, however, that the margin of votes between the successful candidates and the unsuccessful one was four. The illegal rejection of

one vote, therefore, made no real difference and its inclusion would not have been of any material consequence.

(9) We, accordingly, hold that neither the non-observance of the requirement as to time, as prescribed in R. 12, nor the other ground mentioned, namely, the prevention of the voter Arjan Saha from voting in the elections, would be any valid ground for the setting aside of these disputed elections.

(10) Our attention has also been drawn in this connection to S. 17(C), Bengal Village Self-Government Act, the relevant portion of which runs in these terms:

"No act done or proceeding taken under this Act shall be questioned on the ground merely of .....

(b) any defect or irregularity not affecting the merits of the case."

(11) In our opinion, in the circumstances of these cases, the irregularities, complained of in the matter of the disputed elections, apart from the fact that they are not, by themselves, sufficient to vitiate the said elections even without S. 17 (C), are also fully covered and cured by that express provision of the statute.

(12) We hold, therefore, that the learned Additional District Magistrate was not right in setting aside the elections in question on the grounds, found by him, nor was the learned Commissioner justified in maintaining the said orders of the learned Additional District Magistrate.

(13) We would also add that the strictures, passed by the tribunals below, on the conduct of the President of the Union Board, are not justified by the materials on record.

(14) We would, accordingly, make these Rules absolute, set aside the orders complained of, and dismiss the election petitions, filed by the contesting opposite parties, unless we feel inclined to accept the last submission of Mr. Ghose that, in the instant cases before us, interference under Art. 227 of the Constitution would not be quite proper or justified.

(15) In opposing Rules under Art. 227 similar submissions are usually made but they are not necessarily accepted, and, although no hard and fast rule can be laid down in the matter, the basic principles upon which the Court should act in the exercise of its plenary and wide powers under that Article have been broadly discussed in the recent case of this Court reported in — 'Haripada Dutta v. Ananda Mandal', AIR 1952 Cal 526 (B). The Special Bench decision of this Court — 'Sabitri Motor Service Ltd. v. Asansol Bus Association', AIR 1951 Cal 255 (C), relied on by Mr. Ghose, contains nothing to the contrary, and as, in our opinion, the cases before us sufficiently come within the legitimate bounds of the rule of interference under Art. 227 of the Constitution, as expounded in — 'AIR 1952 Cal 526 (B), we feel no hesitation in rejecting Mr. Ghose's submission.

(16) The setting aside of a valid election apart from the manifold inconveniences and hardship, resulting from it, — causes grave injustice to the elected candidate and to the constituency or the electorate or the people concerned as well. It is, therefore, only meet and proper that when an election has been unlawfully set aside and the matter has come to this Court under Art. 227 of the Constitution for necessary redress, there being no other remedy open or available, the illegal order should not be allowed to stand.

(17) Admittedly, also, the petitioners in the present cases have no other remedy.

(18) We, accordingly, make these Rules absolute, set aside the orders complained against, and dismiss the opposite parties' election petitions, challenging the disputed elections.

(19) In the circumstances of these cases, however, we make no order as to costs.

(20) GUHA RAY J.: I agree.

A/G.M.J. Rules made absolute.

---

* **A. I. R. 1953 CAL. 733 (Vol. 40, C. N. 279)**

(FULL BENCH)

CHAKRAVARTTI C. J., DAS, DAS GUPTA, P. B. MUKHARJI AND SARKAR JJ.

Ajit Kumar Roy, Appellant v. Surendra Nath Ghose, Respondent.

Full Bench Reference No. 2 of 1952, in A. F. O. D. No. 20 of 1952, D/- 28-5-1953.

*(a) **Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950, as amended by W. B. Act 62 of 1950), Ss. 18(5) and 14(3), proviso — Applicability of S. 14(3), proviso in order to give relief under S. 18(5) — (Interpretation of Statutes — Proviso): 56 Cal WN 353: AIR 1952 Cal 898, Overruled; 56 Cal WN 346: AIR 1953 Cal 136, Partly overruled.**

Per Chakravartti C. J., Das and P. B. Mukharji JJ. (Das Gupta and Sarkar JJ. dissenting): In exercising under S. 18(5) of the Rent Act of 1950, as amended, the powers of granting relief against ejectment given by S. 14 in suits brought during the West Bengal Rent Control Act of 1948 and pending at the date of the main 1950 Act, sub-section (3) of S. 14 is to be applied with and not without the proviso.

The proviso, however, would not have effect in the case of such suits disposed of and terminated before the amending Act of 1950, because in such cases there would be no defaults, as contemplated by the proviso.

The proviso will have effect in the case of such suits pending at the date of the amending Act, but only with respect to defaults committed after the date of the said Act:

56 Cal WN 353: AIR 1952 Cal 898, overruled; 56 Cal WN 346: AIR 1953 Cal 136, overruled in so far as it held that pre-Amendment Act defaults were attracted by proviso to S. 14(3): AIR 1951 Cal 539, Approved. (Paras 24, 52, 53, 86 and 106)

(Construction of Ss. 14 and 18(5) discussed). (Paras 12, 13, 34, 35, 80, 92, 93 and 98)

(b) Interpretation of Statutes — Intention of Legislature — (Civil P. C. (1908), Pre.).

Per Das Gupta J.: If the legislature expresses one intention on the ordinary meaning of the words, the Court has no power to ascribe to the legislature any other intention that other circumstances may show; and even if such other intention may clearly be shown to have existed, the Court is bound to hold that the legislature meant what it said and that the

legislature's intention is as expressed in the words. (Para 27)

Anno: C. P. C., Pre. N. 7.

(c) Interpretation of Statutes — Reasonableness or unreasonableness — (Civil P. C. (1908), Pre.).

Per Das Gupta J.: The canons of construction of Statutes do not permit the Court to take the reasonableness or unreasonableness of the consequence of interpretation as a factor for deciding on the correct interpretation. Whether the result is reasonable or not is in substance a question of expedience and it is not for the court to dabble in it. (Para 41)

Anno: C. P. C., Pre. N. 7.

(d) Interpretation of Statutes — Dispensation or suspension of part of statute — (Civil P. C. (1908), Pre.).

Per Mukharji J.: It is not for the court to dispense with or suspend the operation of parts of a statute. That will be naked usurpation of legislative function by the Court. (Para 74)

Anno: C. P. C., Pre. N. 7.

(e) Interpretation of statutes — Principle — (Civil P. C. (1908), Pre.).

Per Mukharji J.: A construction which permits one to take advantage of one's own wrong or to impair one's obligation under a current statute should be discarded. (Para 80)

Anno: C. P. C., Pre. N. 7.

(f) Interpretation of statutes — Casus omissus — (Civil P. C. (1908), Pre.).

Per Mukharji J.: If a statute contains a gap it is not for the court to fill in but for the Legislature or else it will be mere speculation or guess work which the court should avoid. (Para 80)

Anno: C. P. C., Pre. N. 7.

Abinash Chandra Ghose and Biraj Mohan Roy, for Appellant; Shyama Charan Mitter, for Respondent.

CASES CITED:

(A) ('53) AIR 1953 Cal 136: 56 Cal WN 346
(B) ('52) AIR 1952 Cal 898: 56 Cal WN 353
(C) ('51) AIR 1951 Cal 539: 88 Cal LJ 233
(D) ('51) AIR 1951 Cal 442: 54 Cal WN 617
(E) ('52) AIR 1952 Cal 433: 87 Cal LJ 4
(F) ('52) AIR 1952 Cal 879: 57 Cal WN 1 (FB)
(G) ('53) AIR 1953 SC 148: 1953 SCA 191 (SC)
(H) (1902) 71 LJ KB 857: 1902 AC 484
(I) (1853) 23 LJ Ch 348: 4 HLC 1
(J) (1903) 72 LJ Ch 393: 1903 AC 120
(K) ('1891) 61 LJ QB 265: 1891 AC 531
(L) (1846) 4 Moo Ind App 179 (PC)
(M) ('33) AIR 1933 PC 63: 60 Ind App 13 (PC)
(N) ('51) Civil Revn No 877 of 1951 (Cal)
(O) ('51) Civil Revn No 769 of 1951 (Cal)
(P) ('51) S A No 1031 of 1951 (Cal)
(Q) ('53) AIR 1953 Cal 145: 56 Cal WN 528
(R) (1952) 1952 AC 139
(S) (1949) 1949-2 All ER 155
(T) (1844) 8 Jur 1167: 6 QB 649
(U) (1912) 81 LJ KB 918: 1912 AC 533

CHAKRAVARTTI, C. J.: An experiment in law-making with a view to establishing some control over the rents chargeable for premises let to tenants, primarily in Calcutta and other municipal areas, has been going on in this Province since 1943 and so far there have been five products of that experiment. As each of the successive pieces of legislation superseded its predecessor, there has on each occasion been some attempt to adjust the new law to the old or to extend some of the benefits of the new law to those against whom the old law had already been set in motion. The question involved in the present reference concerns one such extension made of the Act of 1950. It arises in the following way.

(2) The West Bengal Premises Rent Control (Temporary Provisions) Act came into force on 1-12-1948 and remained in operation till 30-3-1950. Under S. 12(3) of that Act, a tenant who committed default in paying the rent accruing due from him after the commencement of the Act for three consecutive months, ceased to be a tenant and his interest in the tenancy was, by such default, 'ipso facto' determined. Thereafter, he became a trespasser and if sued in ejectment, had no means open to him to avert either a decree or actual eviction. But the next Rent Act, West Bengal Act No. 17 of 1950, which superseded the Act of 1948 and came into force on 31-3-1950, contained no provision similar to S. 12(3) of the 1948 Act. It provided instead by proviso (i) to S. 12(1) that if a tenant committed default in paying duly the rent legally payable by him for two months, the protection conferred by the Act against a decree for ejectment would not be available to him and even that less stringent provision was made subject to an exception contained in S. 14. The exception was that if on a suit being brought, it was found that the only ground which excluded the tenant from the protection of the Act was a default as contemplated by proviso (i) to S. 12(1) and the tenant yet paid up all arrears of rent due from him upto date, as determined by the Court, which it would be the duty of the Court to determine, and also paid them by a date which it would be the duty of the Court to fix, ejectment would be refused, in spite of the previous default. This, therefore, was the last chance provided to a defaulting tenant to save himself from eviction. On the other hand, the exception itself was made subject to an exception, added by a proviso thereto. It was to the effect that if a tenant was found to have been in default within the meaning of S. 12(1), Proviso (i) on three different occasions within a period of eighteen months, he would not be entitled to the benefit of S. 14. Both the exception and the exception thereto are contained in sub-section (3) of section 14 which is in the following terms:

> 14(3). If within the time fixed in the order under sub-section (1), the tenant deposits in the Court the sum specified in the said order, the suit, so far as it is a suit for recovery of possession of the premises, shall be dismissed by the Court. In default of such payment the Court shall proceed with the hearing of the suit:
>
> Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months.

(3) When the Legislature passed the Act of 1950, it was mindful of the fact that at the date the Act came into force, there would be some persons against whom a decree for ejectment had already been passed on the ground of a statutory extinction of their tenancies under S. 12(3) of the Act of 1948, but who had not yet been actually evicted. Against some others, suits bound to succeed on that sole ground would be pending. Provision for some relief to those two classes of persons was

therefore made by S. 18 of the Act, as regards the former class, by sub-sections (1) to (4) and as regards the latter, by sub-section (5). But the language used in the section to describe the persons intended to be relieved was such that it was precisely they who were excluded: persons affected by a statutory extinction of their tenancies under S. 12(3) of the Act of 1948 and by decrees passed or suits pending on that ground were not covered by the language of S. 18 at all. When that strange result was pointed out in judicial decisions, the Legislature passed an amending Act, the West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act 62 of 1950. That Act, which came into force on 30-11-1950, altered the language of section 18 and did it in such manner as not only to make it applicable to persons who had ceased to be tenants under S. 12(3) of the Act of 1948, but also to confine it solely to them.

For some reason which it is not easy to divine, the Legislature seems also to have thought that a separate provision was necessary in regard to persons against whom a decree had been passed between the dates of the main Act of 1950 and the amending Act and from whom possession had not yet been recovered. Such provision was made by S. 6 of the Amending Act.

(4) It would appear from an examination of the law, as finally enacted, that the three different classes of persons affected by S. 12(3) of the Act of 1948 who have been dealt with by the main Act of 1950 and the amending Act, have been dealt with in different ways. To the first class belong those against whom a decree had already been passed before the commencement of the Act of 1950, but from whom possession had not yet been recovered. They are dealt with by sub-sections (1) to (4) of S. 18 of the main Act of 1950 and the provision made with regard to them is direct and unqualified. It is provided that if such a person makes an application within a certain time, the Court shall determine the amount of rent due from him upto the month of the order, treating the tenancy as always subsisting, as also interest thereon at a certain rate, and shall fix a time within a certain limit for payment of the same and if the person concerned pays the amount within the time specified, the decree for ejectment shall be vacated. If he does not, it shall stand. The next class is constituted of persons against whom a suit was pending either in a Court of first instance or in a Court of revision or appeal, at the date of the commencement of the main Act of 1950. They are dealt with by S. 18(5) of the Act and the provision made with regard to them is of a somewhat roundabout character. It is provided that in the case of such persons,

> "the Court shall exercise the powers of granting relief against ejectment given by S. 14 of this Act, following the provisions and procedure of that section as far as may be necessary."

The provision does not prescribe a straight and clear course but enjoins the Court to pay regard, in granting relief, to the provisions of S. 14. The last class is formed of those against whom a decree was passed between the date of the commencement of the main Act of 1950 and that of the amending Act, but from whom possession had not yet been recovered. They are dealt with by S. 6 of the Amending Act and the provision made with regard to them is not only of the same roundabout character as under S. 18(5) of the main Act, but also not mandatory. It is provided that if such a person makes an application within a certain time,

> "the Court may rescind or vary the order or decree on such terms and conditions as it deems necessary for the purpose of giving effect to the provisions of S. 18 of the said Act (i.e. the main Act of 1950), as amended by this Act."

Unlike sub-sections (3) and (5) of S. 18, not only does this provision make it discretionary with the Court to interfere with the decree or order for possession at all, but it also makes it discretionary even when the Court decides to interfere, to adopt a form of interference, short of rescission of the decree or order. Of the three classes of persons so dealt with by the two Acts and suffering from the same disability, the first, it would prima facie appear, is the most favoured and the third undoubedly the least favoured. It seems clear that although S. 18 was amended with retrospective effect, a person against whom a suit was pending at the date of the Act of 1950 but no longer pending when the amending Act came into force, would be in a less advantageous position than a person against whom a suit was pending at the date of the main Act and also pending at the date of the amending Act. Apart from the extent of the relief provided for the former, the relief lies in the discretion of the Court.

(5) In view of the broadness of the question we have to consider in the present case, it is pertinent to enquire how exactly S. 6 of the amending Act intends the persons covered by it to be dealt with. The section speaks broadly of decrees or orders for recovery of possession, but since it also speaks of "giving effect to the provisions of section 18", it must as a matter of language be taken to contemplate provisions contained in both sections 18(1) and 18(5). As I have already pointed out, the section gives only a discretion to the Court; it refers generally to S. 18 and not specifically to S. 18(1) or S. 18(5); and unlike S. 18, it refers to both decrees and orders for possession. It would therefore seem that the Court can interfere, whether the direction for ejectment is a decree or an order, and that it may apply either S. 18(1) or 18(5). Since the suit or proceeding has ended, S. 18(1) would seem to be the more appropriate provision, except for the reason that it had not ended before the Act of 1950, but I see no bar to or practical difficulty in applying S. 18(5) after rescinding the decree or order and treating the suit or proceeding as pending.

(6) The question involved in the present reference is the true construction of S. 18(5) of the Act of 1950, as amended. That section, the material terms of which have already been quoted, directs the Court to exercise the powers of granting relief against ejectment, given to it by S. 14, by following the provisions of that section as far as may be necessary. Section 14 gives the power by sub-section (3) which, however, contains a proviso, excluding the relief in certain circumstances, as has been seen. A question which has caused difference of opinion in this Court is, how much of S. 14 does S. 18 import? Does it import the whole of S. 14(3), including the proviso, or does it import only the main clause of the sub-section, whereby the power of granting relief is given in a general and unqualified form? In — 'United Commercial Press Ltd. v. Satyanarain Chamaria', AIR 1953 Cal 136 (A), it was held by Harries, C. J., and Benerji, J. that the proviso was also imported and that defaults of the specified kind, whether occurring before the amending Act of 1950 or after its commencement, would operate to exclude the relief. On the other hand, in — 'Balai Lal Das v. Manik Chand', AIR 1952 Cal 898 (B), it was held by Das Gupta and Bachawat JJ. that what was

imported by S. 18(5) out of S. 14(3) was only so much as was necessary for the purpose of granting relief and therefore only the main clause, without the proviso, was imported. In that view which the learned Judges took, it was not necessary for them to consider whether defaults occurring before the amending Act of 1950 and those occurring after it would have the same or different consequences.

(7) It is in order to have the above conflict of opinion resolved that the present reference to a Full Bench has been made. The Letter of Reference does not give the detailed facts of the case before the learned referring Judges. All that is stated is that the suit was brought on 6-1-1950, i.e., when the Act of 1948 was in force, and the plaint alleged that the tenancy-rights of the defendant had been 'ipso facto' determined by reason of non-payment of rent for three consecutive months viz., July, August and September, 1949. Thereafter, in the course of the trial the defendant filed an application under S. 18(5) of the Act of 1950, as amended, which had in the meantime come into force. The Letter of Reference does not give the date of the application, but it appears from the Paper Book to the First Appeal that the application was filed on 18-1-1951. By an order dated 6-2-1951, the learned trial Judge dismissed the application in the view that the proviso to S. 14(3) applied and by reason of that proviso, no relief could be given to the defendant. It appears from the Paper Book that the learned Judge relied on defaults which had occurred even before the main Act of 1950 had come into force. The suit was ultimately decreed on the 11th August, 1951 and the learned referring Judges had it before them on First Appeal. They found that the question whether the proviso to S. 14(3) was applicable to proceedings under S. 18(5), called for decision in the appeal and in view of the divergence of opinion on that question, they referred it to a Full Bench in the following broad form:

> Whether in a suit instituted while the West Bengal Rent Control (Temporary Provisions) Act of 1948 was in force and which was disposed of after the passing of the West Bengal Rent Control (Temporary Provisions) Act of 1950, the proviso to section 14(3) of the Act would be applicable in order to give relief to the tenant under section 18(5) of the Act.

(8) It will be seen that the question has been framed in very wide terms and it comprises certain points which do not strictly arise out of the facts of the present case. The reference to disposal of the suit after the passing of the Act of 1950 covers cases where the suit was disposed of before the amending Act of 1950, as well as cases where the disposal was after the amending Act had come into force. The question whether the proviso to S. 14(3) is applicable in giving relief under S. 18(5) is again divisible into two parts, (a) whether the proviso applies at all and (b) even if it applies, whether it applies only so as to make defaults occurring after the amending Act of 1950 a bar to relief or whether prior defaults are also contemplated by it and equally attract its operation.

(9) To what extent S. 14 is intended to be utilised in applying S. 18(5) must be ascertained primarily from the language of the section, though in case of obscurity or ambiguity, the aim and object of the section may properly be referred to. So far as language goes, the general direction contained in the section is that in suits to which it refers, the Court shall grant relief against ejectment. The method enjoined is that it shall do so by "following the provisions and procedure" of section 14 "as far as may be necessary". What it will exactly do by following such provisions and procedure is that it "shall exercise the powers of granting relief against ejectment given by section 14". What does that language mean? As has been seen, the power of granting relief against ejectment is contained in sub-section (3) of S. 14, but there is a proviso to the effect that if within a period of eighteen months, the tenant makes default of the nature mentioned in proviso (i) to S. 12(1) on three occasions, he shall not be entitled to the relief. Whether or not in applying S. 14(3) under S. 18(5), the proviso should be taken into account, must depend upon what the expression "powers of granting relief against ejectment given by S. 14" means.

(10) Of the two rival constructions which have found favour with the Courts, one proceeds on the view that the governing words in the expression are "granting relief", while the other proceeds on the view that the governing words are "given by section 14". The reasons which can be given in support of either view bear on the construction of both S. 18(5) and S. 14. Those in favour of the second view are that the use of the words "given by section 14" in S. 18(5) must have the consequence that the Court is intended to exercise only that power of granting relief which S. 14 confers and not any other or larger power. Accordingly whatever may be the power under S. 14 itself, that must also be the power which can be exercised under S. 18(5). The next step in the reasoning is that the power given by S. 14, which is to be found in sub-section (3), is only a limited power, conditioned as it is by the proviso which is a part of the provision where the power rests. It is not the main clause of S. 14(3), taken by itself, which gives the power, but that clause, read with the proviso, and therefore the words "powers .....given by S. 14", appearing in S. 18(5), cannot be read as contemplating only the power given by the main clause without the limitation which the proviso imposes on it. If the true content of the power given by S. 14(3) is itself power, as circumscribed by the proviso, it is clear that in construing S. 18(5) which speaks of "powers .....given by S. 14", the proviso must equally be taken into account.

This is the view which commended itself to P. B. Mukharji J. in — 'S. B. Trading Co. Ltd. v. Shyamlal Ram Chandra', AIR 1951 Cal 539 (C). It was acted on by Harries C. J. and Banerjee, J. in — 'AIR 1953 Cal 136 (A)', where no reasons were given. The same view of S. 18(5), before its amendment, was taken by Bose, J. in — 'Amarnath Misra v. Sreenarain Mansingka', AIR 1951 Cal 442 (D) and on appeal by Harries, C. J. and Banerjee J. in — 'Sreenarain Mansingka v. Amar Nath Misra', AIR 1952 Cal 433 (E).

(11) The reasons in favour of the other view are that S. 14 does not apply of its own force to suits contemplated by S. 18(5) and all that the Court is enjoined to do is to exercise the powers given by that section by following its provisions. The powers required to be exercised have been specified; they are "powers of granting relief against ejectment". There is thus no need to apply S. 14 in strict conformity with all its provisions, as would have to be done if the section applied directly; and since the powers to be exercised under S. 18(5) are powers of "granting relief", the section may legitimately be read as contemplating only so much of the powers given by S. 14 as would enable the Court to relieve against ejectment. On that construction, the proviso to

S. 14(3) which bars relief in certain circumstances, cannot be within the contemplation of S. 18(5). This is the view which commended itself to Das Gupta and Bachawat JJ. in — 'AIR 1952 Cal 898 (B)'.

(12) It will be noticed that the view taken by Das Gupta and Bachawat JJ. presupposes that it is possible to dissect the provisions of S. 14(3) and proper to take, for the purposes of S. 18(5), only the main clause. The view taken by P. B. Mukharji, J. is that a proviso, being an integral part of the main provision, cannot be so severed and that when a section contains a proviso, its true effect must be ascertained from taking it as a whole. That undoubtedly is the general rule regarding the construction of sections, carrying a proviso, but it may perhaps be said in the present case that, here, the proviso is rather of the nature of an exception than of a proviso, properly so called. The main clause of S. 14(3) directs the Court to dismiss the suit, so far as it is a suit for ejectment, and that clause, as also sub-sections (1) and (2) of the section, is so expressed as to refer to the powers and duties of the Court. The proviso, on the other hand, expresses itself by reference to the rights or rather a disability of the tenant. The structure of S. 14(3) would therefore appear to be that the Court's powers of granting relief against ejectment are contained in the main clause and all that the proviso does is to enact that the tenant will not be entitled to such relief in certain circumstances. In form at least, the proviso does not purport to modify the powers of the Court, but only bars the tenant from the benefit of the powers in the circumstances stated, so that the resultant effect may be said to be that the powers of the Court are as provided in the main clause, while the proviso affects only the tenant and therefore the proviso is not an integral part of the section in so far as it provides for the powers of the Court, but only an exception to the main clause, excluding a certain area from the sphere of the exercise of the powers. That might be said to appear further from the language of the proviso itself which says that, in certain circumstances, the tenant shall not be entitled to the "benefit of the protection against eviction under this section", implying thereby that the whole benefit, i.e., relief against ejectment, has already been given by other provisions, apart from the proviso.

It is true that whether the proviso is regarded in the one way or the other, the practical result of applying S. 14(3) as a whole will be the same, but the question we are considering here is whether the proviso is severable. It seems to be at least arguable that there is nothing in the structure of S. 14(3) which militates against the severability of the proviso. Even if it be not severable, the other justification for leaving it out in construing S. 13 (5) remains. It may be said that the integral character of the proviso is a relevant consideration only when S. 14(3) is to be applied in accordance with its strict terms; but when another section directs the Court to exercise the powers given by S. 14(3) and particularises what powers are to be exercised, there is no bar to exercising only such powers as are covered by the description and indeed it is legitimate so to exercise them. That is the reasoning on which Das Gupta and Bachawat JJ. proceeded.

(13) It appears to me that on the pure question of the textual construction of S. 18(5), each of the above two views is a plausible one and a possible view to take. To decide which of them ought to be preferred, it will therefore have to be seen which of them accords better with the object of the section and in order to do so, the practical results of applying S. 14(3) with and without the proviso may be compared. The practical result of applying the section for the purposes of S. 18(5) without the proviso will be that relief must be given to the defendant, irrespective of whether the proviso would bar relief in his case. The practical result of applying the section with the proviso will be that the defendant can be given relief against ejectment only if such relief is not barred by the proviso. In the first case, there are no further complications, because if the proviso is to be disregarded, relief will have to be given in all cases. But the second case is not so simple. It would appear that even if the proviso is to be taken into account in applying S. 14(3) for the purposes of S. 18(5), there are cases where the proviso would exclude itself by its own terms. This was pointed out by P. B. Mukharji, J. in — 'AIR 1951 Cal 539 (C)' to which reference has already been made. The view taken by the learned Judge was that although, as a matter of construction, he felt bound to hold that in interpreting the words "powers.....given by section 14" in S. 13(5), the proviso to S. 14(3) could not be disregarded, he felt bound also to hold that in the case of defaults occurring before the amending Act of 1950, the proviso could not be applied without making S. 18(5) itself wholly nugatory. The position may be explained.

(14) The suits contemplated by S. 18(5), as amended, are suits pending at the date of the Act of 1950 against persons who had committed default in respect of the rent for at least three consecutive months before that date. Having committed such default, they had ceased to be tenants and having ceased to be tenants, they could not thereafter be under any liability to pay rent till the status of a tenant was restored to them. Necessarily, they could not commit any 'default' during such period, even if they made no further payment. With that consideration in mind, we may examine the various classes of case which may come to be dealt with under S. 18(5). The following classes can be thought of:

A. Cases pending at the date of the Act of 1950 and also pending at the date of amending Act:

(1) Cases in which the defendant had committed default in respect of the rent for three consecutive months before the institution of the suit, i.e., before the Act of 1950, but not also default for two months on three occasions within a period of eighteen months;

(2) Cases in which the defendant had committed both kinds of default;

(3) Cases in which the defendant, whether coming under (1) or (2) above, had resumed payment after the amending Act of 1950 and had not been in default for two months on three occasions within a period of eighteen months after the amending Act;

(4) Cases in which the defendant whether coming under (1) or (2) above had committed such default after the amending Act.

B. Cases coming under (1) or (2) above disposed of before the amending Act.

(15) To cases coming under class B, section 18 (5) would be applicable, if at all, through S. 6 of the amending Act. Those cases may be, for the time being, left out of consideration. As to cases coming under class A, the only sub-clauses which require consideration are sub-clauses (3) and (4), because (1) and (2) are merged in them. It will appear that even if the defendant had committed default for two months on three occasions within

a period of eighteen months before the institution of the suit, those would be defaults committed before the Act of 1950. The proviso to S. 14(3) would not hit him on account of those defaults, because those would not be defaults "referred to in clause (i) of the proviso to S. 12" of the 1950 Act. If such a defendant made no further payment till the amending Act of 1950, he would not be, on account of such non-payment, in default at all, because having ceased to be a tenant, he would not be under any legal liability to pay anything as rent. It was only the amending Act which made him again a tenant and although it is true that it restored him to the status of a tenant with retrospective effect, it could not possibly be said that he must be deemed not only to have been a tenant, but also to have committed default even before the restoration took place. Before the amendment was actually enacted, the defendant could not have paid rent and he cannot obviously be regarded as having defaulted in doing something which he could not have done at the time. Upto the date of the amending Act, therefore, there is no possibility of any default. But once the amending Act came into force, the defendant again became a tenant and if he had thereafter been in default for two months on three occasions within a period of eighteen months, the proviso would hit him, if S. 14(3) were applied along with the proviso. The practical difference between applying S. 14(3) for the purposes of S. 18(5) with and without the proviso, therefore, is that in the former case, only defendants who had committed default of the requisite nature and number after the amending Act, would be excluded from relief whereas, in the latter case, relief would have to be granted to even such a defendant.

(16) It may be added that, as pointed out by P. B. Mukharji, J. in — 'AIR 1951 Cal 539 (C)', a ridiculous result will follow if the amending Act is taken to place the defendant under a liability to pay rent from the date of the main Act of 1950 and to make him a defaulter if he had not paid or paid in due time. The main Act came into force on 31-3-1950 and the Amending Act on 30-11-1950. The interval was eight months. It may be presumed that no defendant whose interests in the tenancy had been automatically extinguished and against whom a suit for ejectment had been brought, had made any payment between the dates of the main Act and the amending Act. But if the effect of the amending Act be to make him not only liable for the rent for the intervening period but also liable to pay it, as it accrued, month after month, he would necessarily be in default for two months on three occasions within a period of eighteen months at the date of the amending Act and therefore the relief provided for by S. 18(5) would not at all be available to him, if S. 14(3) was applied together with the proviso. The position would be a truly farcical one. It would be that the Legislature had proceeded to pass an amending Act in order to give relief to persons whose tenancies had been extinguished by law and against whom ejectment suits were pending, but fashioned the relief in such form that the very persons who were intended to be benefited were excluded from it. This certainly can be an argument in favour of the view that S. 18(5) does not intend the proviso to S. 14(3) to be applied, but in my opinion the question of any default occurring during the intervening period does not arise at all, because default in doing a thing which could not be done at the time is an impossible notion.

(17) In — 'AIR 1953 Cal 136 (A)', it was held by Harries C. J. and Banerjee J. that the proviso to S. 14(3) applied also to defaults committed before the amending Act. As the learned Judges themselves pointed out, it was not necessary for them to rely in that case on pre-amending Act defaults, for there were sufficient defaults committed after the amending Act. But since a considered opinion was given, I cannot properly brush aside the observations made by the learned Judges as mere 'obiter dicta'. I would respectfully dissent from them.

(18) To cases coming under Class B above, S. 18 (5) does not directly apply. They are dealt with in S. 6 of the amending Act and S. 18(5) can apply to them only if the reference to S. 18 of the main Act in S. 6 of the amending Act covers S. 18(5) and if the Court applies it in exercise of its discretion. In such cases, even if there were defaults for two months on three occasions within a period of eighteen months, those could only be defaults committed before the Act of 1950 or non-payment after that Act but before the amending Act. In neither case could there be defaults of the nature "referred to in Clause (i) of the proviso to sub-section (1) of S. 12", for reasons I have already explained, and therefore even if S. 14(3) were to be applied to such cases along with the proviso, it would be found that the proviso was excluded by its own terms and by the facts.

(19) It is now clear on a review of all possible cases that even if S. 18(5) be read as not requiring the application of S. 14(3) with the proviso thereto omitted, the proviso can apply and bar relief only in cases where defaults of the requisite number and nature have been committed after the amending Act came into force. Defaults committed before the Act of 1950 or non-payment between the dates of that Act and the amending Act would not attract the proviso and are therefore immaterial.

(20) Such being the scope of the proviso and the language of S. 18(5) being equally capable of being read as requiring its exclusion or inclusion in applying S. 14(3), the question we have to ask ourselves is this: Could the Legislature have intended that even if the defendant committed default after the amending Act had restored him to the status of a tenant and made him liable to pay rent, he would still not be affected by the disability created by the proviso? No tenant sued after the Act of 1950 can escape the proviso and get relief against ejectment under S. 14, if he has been in default to the extent mentioned. Was it intended that, nevertheless, persons against whom suits were pending at the date of the Act would be immune from the operation of the proviso and entitled to relief under S. 14, irrespective of the defaults they might commit? I can find no reason to take such to have been the intention of the Legislature. It is true that a consideration is pointed out by Das Gupta and Bachawat JJ. in — 'AIR 1952 Cal 898 (B)' which would seem to indicate at first sight that the contrary view also would involve some inequality of treatment. If of two suits brought during the Act of 1948, one terminated in a decree before the Act of 1950 and was not further proceeded with, S. 18(1) would apply to it and there could be no question of any defaults restricting the relief; but if the other suit was still pending in the trial Court at the date of the Act of 1950 or having been disposed of by the trial Court before that date, was even pending in a superior Court in appeal or revision, it would be governed by S. 18(5) and if the proviso to S. 14(3) was applied to it, the relief available to the defendant would be restricted by the proviso. The position of the defendants in two suits, brought at the same time, would thus be

different, according as the suit was pending or not pending at the date of the Act of 1950, although in both the suits, a decree by the trial Court might have been passed.

With great respect, it appears to me that the Legislature did intend to make a distinction between the two cases and also that the discrimination pointed out is only apparent and not real. In the case of suits terminated by a decree before the Act of 1950 and resting there, the Legislature made a simple provision in S. 18(1) that on payment of all arrears, together with interest, upto date, as determined by the Court on an application made within a certain time, the decree for ejectment would be vacated. If it was intended that in pending suits too, the claim for ejectment would be similarly dismissed, if the defendant simply paid up all arrears of rent, as determined by the Court, there was no reason why the Legislature should not have made a simple and direct provision to that effect, but should have imported S. 14 and provided for relief through that section. The importation of S. 14 is, to my mind, a clear indication that some limitation was intended in the case of pending suits. As to discrimination, there is, to my mind, none. The defaults to which the proviso to S. 14(3) can apply in cases coming under S. 18(5) being only defaults committed after the amending Act, it is clear that if the proviso is applied to suits pending at the date of the Act of 1950, the defendant is put under a liability only for some further defaults which the defendants in a suit terminated before the Act could not have committed. It is thus not that persons similarly circumstanced have been differently treated.

In order to have the relief provided for in S. 18(1), the defendant, against whom a suit had terminated in a decree before the Act of 1950, had to apply within 60 days of the amending Act. If he is treated by the Act in one way and the defendant in another suit, brought at the same time but going on for at least eighteen months even after the amending Act, is treated in a different way, when after being restored to the status of a tenant and made liable to pay rent, he again commits defaults, I do not think it can be said that equals are treated unequally. On the other hand, equals would be treated unequally, if a defendant in a suit brought after the Act of 1950 were to be under the restriction of the proviso, as he must be, but the defendant in a suit, brought before the Act and continuing after the amending Act, were to be free of it, although after the amending Act, he too would be under a liability to pay rent as much as the defendant in the other suit.

If S. 18(5) is read as requiring the application of S. 14(3), together with the proviso, the effect will be to place the defendants in all suits pending at the date of the amending Act in substantially the same position, while there will be no discrimination against the defendants in suits which had ended before the Act of 1950. To the latter class of defendants and to defendants in suits ended before the amending Act, the proviso will not apply on the facts, being excluded by its own terms, although S. 14(3) may be applied together with the proviso. Indeed, even on such construction of S. 18(5), the defendants in suits, pending at the date of the main Act of 1950 and also pending at the date of the amending Act, will be in a slightly favoured position, because in their case only default committed after the amending Act will count, whereas prior defaults will also count in the case of persons sued after the date of the main Act.

(21) Reverting now to the object of S. 18, as amended, it appears to me that the object was to extend to persons whose tenancies had been extinguished by the previous law and who had been sued in ejectment, the benefit of the new law on the conditions it carried. The object was not to provide anything more. That view solves all difficulties. The new Act provides for relief against ejectment on condition that all arrears of rent are paid up, but withholds that relief from cases where there have been defaults of a certain kind which the Act creates and specifies. The relief goes under S. 18(1) to persons against whom a decree had been passed under the old Act and the suit had ended, because the circumstance which would exclude the relief is not and cannot be present in their case. It also goes under S. 18(5) to persons against whom a decree had been passed between the dates of the main Act of 1950 and the amending Act and does so for the same reason. It goes under the latter section to persons against whom the suit was still pending at the date of the amending Act only if the disabling circumstance is not present, for that circumstance can be present in their case. So applied, the new Act deals with the persons sued under the old Act exactly as they would be dealt with if a suit under the new Act had been brought against them, but applied without the proviso to S. 14(3), it would be according to them a specially favourable treatment.

(22) For all the reasons given above, I am of opinion that the construction that S. 18(5) intends the whole of S. 14(3), including the proviso, to be applied is to be preferred. "Powers of granting relief against ejectment given by section 14" means powers such as S. 14, circumscribed and conditioned by the proviso, gives.

(23) This conclusion is in no way opposed to an observation made in the Full Bench case of — 'T. S. R. Sarma v. Nagendra Bala Debi', AIR 1952 Cal 879 (F), where the majority judgment was delivered by myself. With reference to S. 14(4), it was then stated that S. 18(5) had not the effect of attracting its terms and in that connection it was observed that the words by which the reference to S. 14 in S. 18(5) were qualified, suggested positively that the onerous parts of the section were not to be applied. But that observation was made with reference to a part of S. 14 which is only onerous and has nothing to do with granting relief against ejectment.

(24) In the result, I would answer the question referred in the following form:

(i) In exercising under S. 18(5) of the Rent Act of 1950, as amended, the powers of granting relief against ejectment given by S. 14 in suits brought during the Act of 1948 and pending at the date of the main 1950 Act, sub-section (3) of S. 14 is to be applied with and not without the proviso.

(ii) The proviso, however, would not have effect in the case of such suits disposed of and terminated before the amending Act of 1950, because in such cases there would be no defaults, as contemplated by the proviso.

(iii) The proviso will have effect in the case of such suits pending at the date of the amending Act, but only with respect to defaults committed after the date of the said Act.

(25) DAS, J.: I agree with the answers given by My Lord The Chief Justice.

(26) DAS GUPTA, J: After the amendment by the amending Act—Act 62 of 1950—S. 18(5) of

the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, runs in these words:

"If at the date when this Act comes into force, a suit for ejectment of a tenant is pending whether in trial Court or in Court of first or second appeal in which no decree for ejectment would be passed except on the ground that the interest of the tenant in such premises has been ipso facto determined under the provisions of sub-s. (3) of S. 12 of the West Bengal Premises (Temporary Provisions) Act, 1948, the Court shall exercise the powers of granting relief against ejectment given by S. 14 of this Act following the provisions and procedure of that section as far as may be necessary, and for the said purpose shall make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be necessary or just."

The question is: by enacting these provisions did the legislature intend that such power of granting relief will be exercised only in the cases where there has been no default in payment of rent referred to in cl. (i) of the proviso to sub-section (1) of S. 12 on three occasions within a period of eighteen months; or did it intend that the Court shall exercise the powers of granting relief against ejectment in all cases that are pending in which no decree for ejectment would be passed except on the ground of ipso facto determination of tenancy under sub-section (3) of S. 12 of the 1948 Act. Whether the intention was one or the other has to be ascertained from the actual words used in S. 18(5) of the Act. It is hardly necessary to add that for ascertaining the meaning of the words used in S. 18(5) it is necessary also to refer to the wording of the entire S. 14. What is important to remember is that if the intention of the legislature can be ascertained from the words used in the section the law does not permit the Court to travel beyond them for ascertaining such intention.

(27) It has been pointed out again and again that if the legislature expresses one intention on the ordinary meaning of the words, the Court has no power to ascribe to the legislature any other intention that other circumstances may show; and that even if such other intention may clearly be shown to have existed, the Court is bound to hold that the legislature meant what it said and that the legislature's intention is as expressed in the words. Vide — 'Nalinaksha Bysack v. Shyam Sunder Haldar', AIR 1953 SC 148 (G).

(28) For finding the correct answer to the question before us it is necessary, therefore, to turn to the words of S. 18(5) to find out what they mean on the ordinary natural sense of the words used. The important words in the section in ascertaining the intention are:

"shall exercise the powers of granting relief against ejectment given by section 14 of this Act following the provisions and procedure of that section as far as may be necessary....."

It will be convenient to consider first the meaning of the words "the powers of granting relief against ejectment given by S. 14 of this Act" and then consider the future phrase "following the provisions and procedure of that section as far as may be necessary" in any way confirm or modify that meaning.

(29) Section 14 of the Act is in these words:

"If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of section 12, the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the order mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eighths per centum per annum from the day when the rents became arrears up to such date, together with the amount of such costs of the suit as is fairly allowable to the plaintiff-landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before the date fixed in the order.

"(2) Such date fixed for payment shall be the fifteenth day from the date of the order excluding the day of the order.

"(3) If within the time fixed in the order under sub-section (1), the tenant deposits in the Court the sum specified in the said order, the suit, so far as it is a suit for recovery of possession of the premises, shall be dismissed by the Court. In default of such payment the Court shall proceed with the hearing of the suit:

"Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months.

"(4) If the tenant contests the suit, as regards claim for ejectment, the plaintiff-landlord may make an application at any stage of the suit for order on the tenant-defendant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any, and the Court after giving an opportunity to the parties to be heard may make an order for deposit of rent at such rate month by month and the arrears of rent, if any, and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defence against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the Court may permit him to do so.

"(5) The power given under sub-section (4) may be exercised by Courts of appeal with necessary adaptation."

(30) We find that this section gives two different kinds of powers to the Court. One power is the power to give relief to tenants by dismissing the suit in so far as it is against ejectment. The other power is the power to give relief to landlords by directing deposit of rent by the tenant on pain of the defence against ejectment being struck out on the deposit ordered not being made. It has been held by a Full Bench of this Court in — 'AIR 1952 Cal 879 (F)', that the Court's powers to direct such deposit of rent cannot be exercised in pending suits originally instituted before the 1950 Act came into force and that further the exercise of such powers is restricted to suits for recovery of possession in which the landlord would not get a decree for possession but for cl. (i) of the proviso to sub-section (1) of section 12.

(31) The other power, namely, the power of granting relief to tenants against ejectment, is provided in sub-section (3) the first portion of

which provides that if the tenant deposits in Court certain sums as ordered:

"the suit, so far as it is a suit for recovery of possession of the premises, shall be dismissed by the Court."

These words are followed by the words:

"In default of such payment the Court shall proceed with the hearing of the suit,"

and then comes the proviso in the following words:

"Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months."

(32) If a person who has read the entire S. 14 of this Act is asked the question "what are the powers of granting relief against ejectment that S. 14 gives to the Court" — will his answer be: The powers are if the tenant deposits in the Court the sum calculated as due in accordance with the provisions of sub-section (1) of the Act, the Court shall dismiss the suit; or will his answer be: The powers are that in cases in which there has been no default on three occasions within a period of 18 months in payment of the rent referred to in clause (i) to the proviso to sub-section (1) of S. 12, the Court shall dismiss the suit, if payments as directed are made; or will he say: "The powers are that suits for recovery of possession of premises in which the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of S. 12 and in which further there has been no default in the payment of rent as referred to in clause (i) of the proviso to sub-section (1) of S. 12 on three occasions within the period of 18 months, the Court shall dismiss the suit on certain payments being made".

(33) In my judgment nobody will give either the second or the third alternative of the answers suggested above and that a person who attaches the ordinary meaning of the words to the question—"What powers are given by S. 14 to the Court to grant relief against ejectment?" will give only the first of the three answers mentioned above, namely, that the powers are that if the tenant deposits in the Court the sum calculated as due in accordance with the provisions of sub-section (1) of S. 14 of the Act the Court shall dismiss the suit, in so far as it is for ejectment.

(34) It is said however that the words "given by section 14" necessarily import the proviso to S. 14(3) into the meaning of the word 'powers', and so the words "powers of relief against ejectment given by S. 14", must mean powers of such relief as circumscribed by the proviso. There can be no doubt that the proviso to S. 14(3) is as much a part of S. 14 as the main clause of the sub-section and if the proviso had given to the Court any power of giving relief, that power would have been included in the word "powers" as used in S. 18 (5). Thus, suppose the proviso had been in these words, "provided that in the case of tenants who are refugees from Eastern Pakistan, the Court shall dismiss the suit for ejectment, on half the amount in arrears being deposited". Here the power given by the proviso would be as much a power of granting relief against ejectment as the power in the preceding words of S. 14 (3); and would certainly be included in the words "powers.....given by S. 14", as used in S. 18 (5). As the Act stands however, the proviso gives no power of relief against ejectment. The fact that the proviso is part of the section cannot therefore in my opinion in any way affect the interpretation of the word "powers" in S. 18 (5).

(35) The very language of the proviso throws considerable light on the question. When S. 18 (5) says: 'the Court shall exercise the powers of granting relief against ejectment given by S. 14 of this Act.....' obviously it means the powers given to the "Court". The first part of sub-section (3) of S. 14 does give a power to the Court. The proviso, it is important to notice, does not even mention the word 'Court'. It does not say that the Court shall not have any such power. It merely mentions some cases in which the tenant shall not be entitled to the benefit of the exercise by the Court of the power mentioned in the main part of the sub-section. The manner in which the power is given to the Court in the first portion of sub-section (3), while the proviso, without saying anything about the Court's powers, says that "the tenant shall not be entitled to the benefit thereof" in certain cases, cannot, in my judgment, be lightly brushed aside. The very form of the proviso justifies the conclusion that all the power for, granting relief against ejectment is given in the first part of the sub-section and that the words in the proviso have nothing to do with the connotation of that power. The giving of power and the definition of the scope of the exercise of the power are to my mind two distinct and different things.

(36) What is perhaps even more significant is the use of the words "the benefit of protection against eviction under this section" in the proviso. These words clearly show that the legislature has in its mind a clear picture of the totality of the benefit of protection u/s. 14; and then goes on to say that certain tenants will not get the benefit of that protection. When the legislature with this clear picture in its mind of the totality of "the benefit of protection against eviction" under S. 14, uses in a later section, namely, S. 18 (5) of the Act, the words 'the powers of granting relief against ejectment' given by S. 14', I find it impossible to say that it meant different things. To my mind "the benefit of protection against eviction under this section" as used in the proviso to sub-s. (3) of S. 14 is exactly the same as benefit of the "power of granting relief against ejectment given by S. 14". I do not see how it can be possibly said that the legislature in using the words 'the benefit of protection against eviction under this section' in the proviso, was including the limitation of the proviso in the connotation of the words used. It must necessarily follow that the words "the powers of granting relief against ejectment given by S. 14 of the Act" used in S. 18 (5) as well as the words 'benefit of protection against eviction' used in the proviso to sub-s. (3) of S. 14 mean the power of the Court to dismiss the suit on the tenant depositing the sum specified in an order within the time fixed in an order, the sum being calculated in accordance with the provisions of sub-s. (1) of S. 14.

(37) My conclusion, therefore, is that on the plain and natural sense of the words used, the phrase "the powers of granting relief against ejectment given by S. 14' mean the power of dismissing a suit for ejectment on payments of arrears of rents with interest and costs, calculated in accordance with the provisions of S. 14 (1), being made within the period fixed by an order in accordance with the provision of S. 14 (2) wholly regardless of whether there have been three defaults of two months each within the last eighteen months.

(38) Turning now to the words "followed the provisions of that section as far as may be necessary", I am of opinion that these words do not in any way modify the meaning indicated above. For myself, I am inclined to the view that the use of the words 'as far as may be necessary' is merely short for 'as far as may be necessary for granting relief', and indicates that the legislature did not intend that those provisions of S. 14 — whether enacted in the form of a proviso or not — which are not necessary for the purpose of granting relief, should be applied. In this view, I hold that this further phrase "following the provisions and procedure of that section as far as may be necessary", confirms my conclusion mentioned above as regards the meaning of the words "powers of granting relief against ejectment given by S. 14", instead of modifying it.

(39) It is said, however, that if the intention of the legislature was that the powers of granting relief against ejectment given by S. 14 of the Act should be exercised in all cases which otherwise come under S. 18 (5) — irrespective of any defaults within the meaning of the proviso to S. 14 sub-s. (3), the obvious way of expressing that intention would be by saying in sub-s. (5) that the Court shall grant relief in the same manner as on an application under S. 18 (1). It is, in my opinion, wholly fallacious to argue that words should not be held to have a particular meaning because other words could have been used to express that meaning. It seems to me that a very good reason for giving a reference to "the powers of granting relief against ejectment given by S. 14 of the Act" in sub-section (5) instead of mentioning the powers of relief on an application under S. 18 (1), would be that in sub-s. (5) of S. 18 pending suits are being provided for and pending suits are also the subject-matter of S. 14 of the Act.

(40) It is next argued that the intention of the legislature could not possibly be that in all cases under S. 18 (5) the powers of granting relief against ejectment shall be exercised regardless of the fact that there had been defaults within the meaning of the proviso to sub-s. (3) of S. 14, as this would result in a discrimination between tenants against whom a suit was pending within the meaning of S. 18(5) and a tenant against whom a suit is brought after the 1950 Act came into force. Assuming 'A' to be a tenant against whom a suit within the meaning of S. 18 (5) is pending and 'A' has made three defaults of two months each in payment of rent after 30-11-1950, and 'B' a tenant against whom a suit is brought after 30-3-1950, for ejectment, and who has made three similar defaults of two months each in payment of rent. 'B' will clearly not be relieved against ejectment under S. 14, but 'A' will be entitled to such relief on the interpretation of S. 18 (5) which I have given above. It is contended that this would be unreasonable discrimination in favour of the tenant against whom the suit had been brought when 1948 Act was in force, and could not have been intended.

(41) In the first place, I must say that the canons of construction of Statutes do not permit the Court to take the reasonableness or unreasonableness of the consequence of interpretation as a factor for deciding on the correct interpretation. Whether the result is reasonable or not is in substance a question of expedience and it is not for the Court to dabble in it. It is, in my judgment, always useful for Courts to remember the observations of Lord Halsbury in — 'Janson v. Driefontein Consolidated Mines Ltd.', (1902) AC 484 at p. 491 (H), where he said:

> "What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the finespun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a Judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."

In the same vein are the oft-quoted observations of Parke B., in — 'Egerton v. Brownlow', (1853) 4 HLC 1 (I):

> "It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is a province of the Judge to expound the law only; the written, from the statutes; the unwritten or common law, from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference: not to speculate upon what is the best, in his opinion, for the advantage of the community."

As was said by Lord Halsbury in — 'Inderwick v. Tatchell', (1903) AC 120 at p. 123 (J):

> ".....even if I thought the result was unjust there is no canon of construction which entitles me on that ground to alter my construction of the words as they stand."

It is well to remember that these observations are as true for the Indian system of law as they are in England. In the voyage of discovery of the intention of the legislature, we should, if possible, avoid the rock of "consideration of reasonableness of the consequences".

(42) Even, therefore, if I thought that the interpretation which I have held should be given to the words of S. 18 (5) on a proper natural meaning of the words has the consequence of apparently unreasonable discrimination between tenants in suits brought when the old Act of 1948 was in force and tenants in suits brought after the 1950 Act came into force I would not consider it a ground for altering that interpretation.

(43) In my opinion, however, it is not right to say that there can be no good reason for making a distinction between tenants against whom suits were brought when the 1948 Act was in force and tenants against whom suits are brought after the 1950 Act came into force. In many, at least, of the suits which are pending from before the date on which 1950 Act came into force it is likely that the long pending litigation has itself made it difficult for the tenant to pay rent regularly; in suits brought after the Act of 1950 came into force the reasons for these defaults might have appeared to the legislature to be considerably less. Again, in many of the cases coming under S. 18 (5) the position will be that a decree for ejectment has already been passed. Defaults in payment of rent in such cases even after the amending Act can hardly be considered to be of the same degree of culpability in payment of rent in pending suits brought under the 1950 Act. It does not seem to me at all unreasonable that considerations such as these would weigh with the legislature in making a distinction between persons against whom suits have been brought when the 1948 Act was in force, and persons against whom suits are brought after the 1950 Act came into force, as

regards the penalty of defaults in payment of rent.

(44) As I have already emphasised, the reasonableness or otherwise of the consequence should not be taken as a guiding factor in the interpretation of statutes. If indeed reasonableness of the consequence were to be considered, I would point out that on the interpretation that powers of granting relief against ejectment mean 'power subject to the proviso to S. 13(3)', the position would be that if a tenant 'A' against whom a suit within the meaning of S. 18(5) is pending has not paid the rent for, say, April 1950 to September 1950, he would not be protected against eviction. Before the amending Act—Act 62 of 1950—the non-payment of what was formerly rent for the premises could not be considered default in payment of rent, as the tenancy had already been ipso facto determined. The Amending Act, however, substituted for the definition clause of the word 'tenant' a new clause under which 'every person whose interest in the premises has been ipso facto determined under sub-s. (3) of S. 12, West Bengal Premises Rent Control (Temporary Provisions Act, 1948) is a tenant. It is important to note that the Amending Act further provides that the new definition clause "shall be deemed always to have been substituted". The consequence of this last provision requires careful consideration. Obviously, in view of this provision, we have to "deem" that 'A' whose tenancy had been ipso facto determined under S. 12 of the 1948 Act, was still a 'tenant' in April 1950; we have also to "deem" that rent was payable by 'A' for April 1950; and if the rent remained unpaid up to the 15th May—or within the time specially fixed—we are bound in law to deem that there was default in payment of rent of April 1950. Similarly, if the rents for May, June, July, August, September and October have remained unpaid, when the suit against 'A' comes before the Court for consideration under S. 18(5) on or after 30-11-1950, we are bound to "deem" in law that there have been defaults in payments of rent of these months. If the correct interpretation of S. 18(5), is that the powers of granting relief are to be exercised subject to the proviso in S. 14(3), the Court is bound to refuse relief to 'A'.

(45) That this is the position in law, was recognised by P. B. Mukharji J. in — 'AIR 1951 Cal 539 (C)' and very rightly—I say with great respect —His Lordship considered this to be a 'nonsensical result'. P. B. Mukharji, J. considered that this nonsense resulted from the fact that the Legislature committed a blunder by forgetting to make consequential amendments in S. 18(5) which seemed to follow naturally as a result of the amendment by the substitution of tenants under statutory forfeiture for the ordinary short term defaulter. His Lordship further considered that in this "desperate position", it was the Court's duty to relieve people of the consequences of the blunder, and decided to hold that

> "retrospective condonation of the statutory forfeiture which occurred on 30-11-50 by the amendment making him a tenant again from 30-3-50 could not enable him to pay in the meantime and cannot, therefore, permit the defaults from March to November, to be brought into calculation so as to make him come within the default under cl. (i) of S. 12(1) on three occasions within a period of 18 months."

(46) With very great respect, I think that His Lordship has not here been able to resist the temptation to legislate the object being the very laudable one of preventing a "nonsensical result". I would respectfully add that the "nonsensical result" is the consequence of putting a strained interpretation in disregard of the plain and natural sense of the words, on S. 18(5), & not any 'blunder' of the legislature. If I had thought that the plain and natural sense of the words of S. 18(5) meant that the 'powers' are to be used subject to the proviso in S. 14(3) and could not mean anything else, I should have felt bound to allow the result which P. B. Mukharji, J. rightly characterises as 'nonsensical'—to ensue. The observations of the Supreme Court in — 'Nalinaksha Bysack's case (G)' may in this connection be usefully borne in mind. Delivering the judgment of the Court, Das J. said: "It must always be borne in mind, as said by Lord Halsbury in — 'Commissioner for special purpose of Income Tax v. Pensel', (1891) AC 531 at p. 549 (K) that it is not competent to any court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature, the Court cannot, as pointed out in — 'Cranferd v. Spooner', 4 Moo Ind App 179 (L), aid the Legislature's defective phrasing of an Act, or add and amend, or by construction, make up deficiencies which are left in the Act. Even where there is a 'casus omissus', it is, as said by Lord Russell of Killowen in — 'Hansraj Gupta v. Dehra Dun Mussoorie Electrical Tramway Co. Ltd.', AIR 1933 PC 63 (M), for others than the Court to remedy the defect", — 'AIR 1953 SC 148 (G)'.

(47) Another result that will follow from the view that powers in S. 18(5) have to be exercised subject to the proviso in S. 14(3), will be a distinction between a tenant against whom a decree for ejectment has been passed, and who has thereafter filed an application under S. 18(1) which remains pending on 30-11-1950, and a tenant against whom a similar decree has been passed, but who has filed an appeal, which is pending on 30-11-1950, and who therefore comes within S. 18(5) of the Act, as amended. In the former case, the tenant would be entitled to relief against ejectment, on payment of arrears up-to-date with costs and interest, even though he did not pay the rents from April to October 1950; in the latter case, he would not be so entitled. I cannot persuade myself that the fact that one tenant has filed an appeal against the decree for ejectment and the other has not, could be considered by the legislature a good reason for which the law should be so very different for the two. For, I cannot believe that the legislature would think of punishing people for exercising the right of appeal that the law has given.

(48) If I thought it necessary to consider for ascertaining the object of the legislature, the reasonableness or otherwise of the consequences that flow from the two rival interpretations of S. 18(5), I would hold without hesitation that the interpretation that the powers are to be exercised subject to the proviso would produce nonsensical and unreasonable consequences, while the interpretation that the powers are to be exercised regardless of the proviso would not produce any unreasonable consequence. If reasonableness & unreasonableness of consequences has to be accepted as a guide, I am therefore led to the conclusion that the correct interpretation is that 'powers' in S. 18(5), are not subject to the proviso to S. 14(3).

(49) My own view, however, is that it is neither necessary nor proper for the Court to interpret a statute, according to its own view of the reasonableness of consequences. The 'reason' of the legislature is not necessarily the 'reason of the Court'; and to think that what we as Judges con-

sider reasonable must have been the intention of the legislature is wholly fallacious.

(50) In the present case, I have no hesitation in coming to the conclusion that if the words in S. 18(5) are read in their natural and ordinary sense, without attempting to read hidden meanings therein, they clearly mean that the exercise of powers of granting relief are not subject to the proviso to S. 14(3).

(51) I have only to add that in my view, even if it were held that on the language of the section, "the powers under S. 18(5)" mean powers, subject to the proviso, the practical position will be that it will be impossible to apply the proviso. For, if I assume, as I must, that the view as laid down in a number of decisions of this Court, — 'Debendra Kumar v. Harinath Das', Civil Revn. No. 877 of 1951 (Cal) (N); — 'Krishna Gopal v. Banerjee Mukherjee and Co.', Civil Revn. No. 769 of 1951 (Cal) (O); — 'Krishna Chandra v. Bepin Behary', S. A. 1031 of 1951 (Cal) (P) and — 'Amal Krishna v. Chandi Charan', AIR 1953 Cal 145 (Q), that only defaults prior to the institution of the suit come within the proviso to S. 14(3), the defaults committed after the 1950 Act being ex hypothesi 'after' the institution of the suit will not come within the proviso. Defaults prior to the 1950 Act, will not come within the proviso, because they are not defaults under S. 12(1)(i). The practical consequence obviously is that it will not be possible to apply the proviso to any case under S. 18(5).

(52) In my view the cases, — 'AIR 1953 Cal 136 (A)' and — 'AIR 1951 Cal 539 (C)', in so far as they held that the proviso to S. 14(3) applied to the exercise of the powers under S. 18(5), West Bengal Premises Rent Control Act of 1950, were wrongly decided.

(53) My answer to the question referred to the Full Bench therefore is:

In exercising powers under S. 18(5) of the Rent Act of 1950, as amended, the Court must disregard the proviso to sub-s. (3) of S. 14, and must dismiss the suit in so far as it is against ejectment, on payments of arrears of rent, interest and costs, calculated according to S. 14(1) within the time fixed by the Court in accordance with S. 14(2)— whether or not there have been three defaults in payment of rent referred to in cl. (i) of the proviso to sub-section (1) of S. 12.

(54) P. B. MUKHARJI J.: To the West Bengal Premises Rent Control Act belongs the signal distinction in this age of being the most misunderstood statute of the State. On the interpretation of all its important sections, Courts and Judges have widely and frequently disagreed. Its meaning lies in the lap of the clouds of heavens beyond the ken of the astutest judicial vision. In the struggle for construction, judicial heroism has valiantly battled in difficult situations, to produce swans out of geese. One such situation is now before this Full Bench. The goose is the proviso of S. 14(3) of the Rent Act of 1950.

(55) Landlords and tenants are condemned by this statute to the vaguest speculation of their essential rights in an atmosphere of needless uncertainty. Frequent Full Bench and Special Bench had to be constituted to discover and re-discover the meaning of this Act over which other learned Judges had differed. Those unfortunate enough to have to receive the impact of this Act have the unenviable task of finding their way in a perilous voyage through the ocean of bewildering and conflicting judicial opinions, Full Bench and Special Bench [illegible], not to speak of the shoals of bad drafting that swelled over and across the Act.

(56) Notwithstanding such divergence of judicial opinions on almost all its significant provisions, the Legislature in its swift wisdom has just recently ordained that this state of oppressive uncertainty shall continue for another year. In, not understandably conscientious and not appreciably laborious discharge of its duties, the State Legislature by asking the people of the State to read 1954 for 1953 has chosen to continue this Act as it is with all its manifest and repeatedly declared uncertainty for thousands of people whom this Statute affects. At the moment public time of this Court is being taken in this Full Bench of five Judges for discovering the meaning of S. 18(5) of the Act as amended and over which five other Judges have expressed themselves differently. The heavy pressure upon the Courts today to do what ought to be the work of Legislatures, is a growing hindrance to normal administration of justice. All normal judicial work is frequently held up to find meaning of Statutes which should have been plain, and on that ground alone to-day, there is a colossal waste of judicial time. Unless a much greater care, then so far evinced, is exercised by those solemnly charged by the Constitution with the responsible task of framing the Statutes of the land, the Courts will soon be reduced to become suburban adjuncts of an inadequate Legislature, for publishing commentaries on illdrafted and immaturely expressed Statutes in the vain hope of injecting meaning into the meaningless and of explaining the inexplicable.

(57) Before the Full Bench the point of law referred for decision is:

> "Whether in a suit insituted while the West Bengal Premises Rent Control (Temporary Provisions) Act of 1948 was in force and which was disposed of after the passing of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950, the proviso to S. 14(3) of the Act of 1950, would be applicable in order to give relief to the tenant under S. 18(5) of the Act."

(58) The learned Subordinate Judge from whose decision this appeal arises followed the decision of the learned single Judge of this High Court in — 'AIR 1951 Cal 442 (D)'. There in that case Bose J. held that the Court's power of granting reliefs under S. 14 of the Rent Act, 1950, was limited by the proviso in that section and that S. 18(5) of the Rent Act of 1950 made the entire S. 14, including the proviso, applicable to pending suits. In an appeal from that judgment, S. N. Banerjee J. delivering judgment in the Court of Appeal in — 'AIR 1952 Cal 433 at p. 439 (E)' observed

> "The plain meaning of S. 18(5) of the Act of 1950 is this. If you want the relief you must come within the four corners of S. 14."

Now both these decisions of Bose J. and of the Court of Appeal were rendered on the original S. 18(5) of the Rent Act of 1950 without the amendment which now raises special difficulties on the way of applying the proviso of S. 14(3) under S. 18(5) of the amended Rent Act of 1950.

(59) The conflict of judicial opinion which has led to this reference before the Full Bench is to be found in two cases. One is — 'United Commercial Press Ltd. v. Satyanarayan', decided by Harries, C. J. and Banerjee, J. on 9-1-1952 and reported in — 'AIR 1953 Cal 136 (A). The other is — 'Balai Lal Das v. Manick Chandra', decided by Das Gupta and Bachawat JJ. in February 1952, reported in — 'AIR 1952 Cal 898 (B).

(60) In the first decision of — 'United Commercial Press Ltd. v. Satyanarayan Chamaria', (A) which was an appeal from one of my judgments, Harries C. J. came to the conclusion that the proviso of S. 14(3) of the Rent Act must be applied in granting relief in pending suits for ejectment under S. 18(5) of the amended Rent Act of 1950. The default in that case continued for the period prescribed in the proviso of S. 14(3) even after the amended Act came into operation, and I held that the tenant, on that ground, was disabled from getting any relief. Harries C. J. while upholding my decision made the observation that the proviso should even include pre-amendment Act defaults, a conclusion which, I thought, was unnecessary in that case having regard to the view I took.

(61) In the second decision of — 'Balai Lal Das v. Manick Chandra (B)', the learned Judges dissented from the decision of — 'AIR 1952 Cal 433 (E)' and came to the conclusion that the proviso to S. 14(3) of the Act should never be applied when granting reliefs to tenants in pending suits under S. 18(5) of the amended Act.

(62) There are, therefore, these two extreme views. One extreme view is that the proviso should be applied to all defaults whether before or after the amended Rent Act of 1950, so long as such defaults are for the time stated in the proviso. The other extreme view is that the proviso should never be applied in pending actions under S. 18(5) of the amended Act, whatever the defaults and whenever they may have occurred.

(63) There is an intermediate view which I took in — 'AIR 1951 Cal 539 (C)'. There I held that while the proviso of S. 14(3) of the Rent Act of 1950 should not be applied to attract the pre-Amendment Act defaults, it should nevertheless be applied to attract post-Amendment Act defaults, provided of course the defaults continued after the Amendment Act came into force, for the period mentioned in the proviso. To me that still remains the only logical and permissible conclusion justified not only by the principles of construction as I understand them, but also by the effect that such construction produces.

(64) A critical examination of the reasons in support of these different views is essential to decide on the applicability of the proviso of S. 14 (3) of the Rent Act of 1950 to pending actions within the meaning of S. 18(5) of the Act.

(65) I will take first the one extreme view which favours the application of the proviso to both pre-Amendment Act defaults and post-Amendment Act defaults and which view is represented by the decision in — 'AIR 1953 Cal 136 (A)'. In my opinion the main defect of that view is that the construction adopted there will nullify completely the only effect which it was the avowed object of the Legislature to achieve by the amendment. A construction of a Statute which completely destroys the only purpose for which the Statute was enacted is to be discarded. The reason for saying that this construction will defeat the Statute requires to be illustrated. The Rent Act of 1950 came into force on 30-3-1950. Retrospective condonation of the statutory forfeiture (under the Rent Act of 1948) on 30-11-1950 by the Amendment Act could not enable the tenant of the particular class, intended to be relieved by the amendment, to deposit or pay in the meantime, between the 30th March when the Act came into force and the 30th November, 1950 when the Amendment Act came into force. Neither legislative omnipotence nor judicial prowess can make time stand still. The result, therefore, is that within this period from the 30th March to the 30th November, 1950 these tenants could neither pay nor deposit rent. This period being one of 8 months would, therefore, include two monthly defaults on three occasions within a period of 18 months from the passing of the Act under the proviso of S. 14(3). No tenant, therefore, could get any relief under S. 18(5). The whole object of amendment of S. 18(5) of the Act would, therefore, be defeated by applying the said proviso to pending actions under S. 18(5) of the Act if the proviso is made to cover pre-Amendment Act defaults.

On this ground alone, I do not support the view taken by the Court of Appeal in — 'AIR 1953 Cal 136 (A)', only in so far as it holds that the pre-Amendment Act defaults are attracted by the proviso of S. 14(3) in considering reliefs to tenants in pending actions under S. 18(5) of the Amended Act of 1950. To that extent I hold the decision in — 'AIR 1953 Cal 136 (A)', to be wrong and I overrule it on that point.

(66) Coming now to the other extreme view represented by the decision in — 'AIR 1952 Cal 898 (B)'. I find myself unable to reach the extremity of that decision. I will analyse the reasons given in that decision for holding that the proviso should never be applied at all to a case of pending action under S. 18(5) of the Amended Act in order to show why I disagree with its wide conclusions.

(67) The ground put forward in that decision is that this proviso does not aid relief but defeats relief. The language of S. 18(5) of the Amended Act is emphasised as having said "powers of granting relief against ejectment". It is, therefore, said that the proviso does not represent such power. This is the first reason set out in that judgment for not applying the proviso to suits under S. 18(5).

(68) The next reason in that judgment is that the language of S. 18(5) of the Amended Act says "following the provisions and procedure of that section as far as may be necessary" with special emphasis on the words "as far as may be necessary". The idea is to say that not the entirety of S. 14 of the Act but only the necessary portion of S. 14 of the Act is to be followed and in determining what is necessary, one has only to see what is necessary to grant the relief and not to defeat the relief. It is a kind of combined utilitarian and eclectic application of S. 14.

(69) These are the two main reasons in that judgment on the problem of construction.

(70) The third reason in that judgment is one of imagined parity between S. 18(1) and S. 18 (5). It is said that the application of the proviso of S. 14(3) of the Act to pending actions under S. 18(5) of the Act as amended will make a great difference between the cases where decrees have been made under S. 18(1) and the cases where suits are pending under S. 18(5). The argument is to suggest that if in cases where decrees have already been made the Court is given power to vary or rescind such decrees under S. 18(1) of the Act without considering the default mentioned in the proviso of S. 14(3) then how very much more should the proviso of S. 14(3) be excluded in granting relief under S. 18(5) of the Act as amended where the suit is pending and no decree has been made at all.

(71) On a very careful and close consideration of these various reasons, I am unable to accept any one of them as sound and compelling. Dealing with the reasons in the way that I have set out above, I will take up, first, the points of construction.

(72) The proper construction of the words "the powers of granting relief against ejectment given by S. 14 of this Act" occurring in S. 18(5) of the amended Rent Act of 1950 is the basic question in this controversy. In my view the correct approach for this purpose is to examine the whole of S. 14 with all its parts and read them together in order to find out what the powers of granting relief against ejectment are under that section. In order to do so, I am of the opinion that the proviso should be read along with the other substantive parts of the section. In my judgment, the "powers of granting relief against ejectment given by S. 14 of the Act" cannot be dissociated from the proviso of S. 14(3) because I consider that proviso to define the basic content of the court's power of relief. Limitation on the power provides the very context of the power itself. The antithesis defines the thesis.

In construing and deducing the power to grant relief against ejectment, S. 14 of the Act must therefore be read with particular reference to this proviso. Power to grant relief cannot be considered in the abstract. Such power must be understood with reference to the objects for whom the power to grant relief is exercised. That object here is always the tenant. To say that the proviso is framed "tenantwise" in the sense that tenants with particularly specified defaults are disabled from obtaining the benefit of protection against eviction whereas the other sub-sections of S. 14, specially sub-ss. (1), (2) and (3), are framed "Courtwise" in the sense that they alone indicate what power of relief the Court exercises, is to make a distinction without a difference. That will be a verbalistic approach which misses the substance for the form. The whole of S. 14 begins with the marginal note "when a tenant can get the benefit of protection against eviction" and the one and only provision where it is said that he cannot get such protection appears to me to be the very central core of that section when its power to grant relief is being deduced. Power of the Court to grant relief postulates exclusion of non-relievable cases. Reduced in simple terms, the whole S. 14 read with the proviso means that there is no power of relief in the Court if the tenant has suffered defaults for the period specified in the proviso. Power to grant relief and the power to defeat relief, in this particular context of legal construction represent the two sides of the same medallion. One predicates the other.

(73) In my opinion, there are inherent and inescapable indications in S. 18(5) of the amended Rent Act of 1950 to show that the proviso was intended to apply in case of post-Amendment-Act defaults. That internal evidence is supplied by the significant words "for the said purpose shall make such order for amendment of pleadings". In ordinary language these words mean that in this kind of pending actions, for the purpose of relief Court is given express power to amend the pleading. No power to amend pleading need have been given by a Special Statute because the Civil Procedure Code has given liberal powers of amendment to Courts. The reason here is obvious. Court's usual power to amend pleadings is not understood in relation to granting reliefs against ejectment. Why should pleadings require amendment for the purpose of granting relief? The only conceivable case is the one where in such pending action the disputed issue of fact is raised whether there has been default for the period mentioned in the proviso of S. 14(3) so as to disable tenant from obtaining the relief against ejectment. In order to determine if relief can be granted this issue should be raised properly on pleadings, specially when such issue is disputed. Being an action instituted under the 1948 Rent Act, and pending when Rent Act of 1950 came into force, the pleadings will naturally have no reference to such default of the proviso and will therefore require to be amended to raise the issue whether the defaults have occurred for the period mentioned in the proviso or not. There can be no other conceivable instance where pleadings can require amendment in such pending actions for the purpose of relief. This consideration, therefore, also supports the construction that the power of relief cannot be considered without the proviso in the context of this section.

(74) It has been argued on the strength of the word "follow" in S. 18(5) of the Act that the Court shall exercise the powers of granting relief by "following" the provisions and procedure of S. 14 "as far as may be necessary" and, therefore, the Court need not apply S. 14 but only "follow" it. Whether one "follows" or one "applies" the provisions and procedure in S. 14 of the Act, it should not in substance make a difference in the consequence. The point is, as I have said before, what is the total power of granting relief under the section? Is that power of granting relief to be construed in the abstract or is it be construed in its total context under S. 14 which states in the proviso to sub-s. (3) that a tenant with a default for a particular period shall not obtain the benefit of protection under that section? The disability is basic and is statutory. It is in my judgment the inescapable mandate upon the Court to see that in the garb of granting relief under S. 14 of the Act it does not grant it to a person who, the Statute says expressly, should not have the relief. To do more will be to legislate. To quote the recent words of the House of Lords in — 'Magor & St. Mellow's Rural District v. New Port Corporation', (1952) AC 189 (R) where Lord Simonds criticised the view of Denning L. J. which I quoted previously in my decision in — 'AIR 1951 Cal 539 at p. 549 (C)', Lord Simonds describes Lord Justice Denning's rule of construction as "naked usurpation of legislative function" by the Court and observes at p. 191 of — '(1952) AC 189 (R)':

> "The Court having discovered the intention of Parliament and of Ministers too must proceed to fill in the gaps. What the legislature has not written, the Court must write. This proposition which restates in a new form the view expressed by the Lord Justice in the earlier case of — 'Seaford Court Estates Ltd. v. Asher', 1949-2 All E R 155 (S), cannot be supported. It appears to me a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an Amending Act."

It will not do for the Court, therefore, to say that its power of granting relief is unqualified and only a certain class of tenants is disabled from getting relief. Court exercises its power and jurisdiction not in vacuum but in express relation to persons and subject matter. If the persons and subject-matter come within the meaning of the proviso, then the Court has no power of granting relief under S. 14 of the Act. It is not for the Court to dispense with or suspend the operation of parts of the Statute. That will be in the words of Lord Simonds "naked usurpation of legislative functions" by the Court.

(75) To hold that even if the defaults continued for the period mentioned in the proviso to S. 14(3)

after the amended Act of 1950 came into force, such defaults should be disregarded in granting relief in pending actions to tenants under S. 18(5) on the ground that the proviso does not relate to power of relief but to its deprivation, will, apart from the question of construction, lead to the most illogical conclusion. That illogical conclusion is that if instead of prosecuting the pending suit under S. 18(5) of the Amended Rent Act of 1950, the plaintiff allows it to be struck off for non-appearance or default of the plaintiff and a new suit is filed by the plaintiff on the next day, then in such new suit there is no defence against ejectment on the same facts of default because the Amended Rent Act of 1950 is in operation and the ejectment decree must follow for the proviso to S. 14(3) will then be a clear bar to any relief against ejectment. Yet quite the opposite result is achieved by granting relief against ejectment if the plaintiff prosecutes the pending suit under S. 18(5) of the Act according to this construction which excludes the operation of the proviso even in case of such defaults. To my mind, this is too illogical a conclusion. A construction which produces such a result must on that ground also be rejected.

(76) The general Scheme of the Rent Act of 1950 does not encourage this situation. In this connection the opening words of S. 12 of the Rent Act of 1950 and the scheme of exclusions provided therein are important. In simple terms they mean that no decree for the recovery of possession of any premises shall be made by any court except where the amount of two months' rent legally payable by the tenant is in arrears subject to provisions of S. 14 of the Act. In the case, therefore, of a default mentioned in the proviso of S. 14(3) a decree for ejectment can be made after the Act came into operation.

(77) To adopt the construction laid down in — 'Balai Lal Das v. Manik Chandra', (B) will be to adopt still more startling consequences. It makes defaulters under the amended Rent Act of 1950, have far worse terms than the chronic defaulters who began their defaults under the Rent Act of 1948 and continued them for the period mentioned in the proviso of S. 14(3) even after the operation of the Act as amended. By this interpretation the former will be ejected and the latter will be relieved against ejectment. I cannot persuade myself to believe that the legislature intended to produce these insensible results in this case and make such a raging discrimination.

(78) Therefore this construction is not justified by the consequences it produces.

(79) Now about the argument of uniformity. The gist of this argument is based on the tacit assumption that relief against ejectment where there have been decrees for ejectment and where suits are still pending must be equated to the same level and same consideration and in that light S. 18(1) and S. 18(5) of the amended Act of 1950 must be so construed as to produce equal result under the two sub-ss. (1) and (5) of S. 18 although they are worded differently. In other words the point of this argument is that if in cases where decrees of ejectment have already been made, relief under S. 18(1) is granted against ejectment without considering the default mentioned in the proviso of S. 14(3), then there is all the greater reason to exclude the proviso of S. 14(3) in granting relief under S. 18(5) where the suit is pending and no decree has been made. The argument is more plausible than sound.

(80) The obvious answer to this line of reasoning is that where the decrees have been made, they are rescinded and varied without the application of the proviso of S. 14(3) on the simple ground that such judgment-debtors could not act by paying or depositing the rent according to the amended Act of 1950 as tenants, whereas tenants in pending actions and pending appeals under S. 18 (5) of the amended Act of 1950 can pay or deposit and thus avoid the default mentioned in the proviso of S. 14(3) of the Act. Such payment or deposit can be made by reason of the definition of 'tenant' in S. 2(11)(ii) of the Amended Act of 1950 read with Ss. 19 and 20 of the Rent Act of 1950. A construction which permits one to take advantage of one's own wrong or to impair one's obligation under a current Statute should be discarded. In a pending suit or appeal of the class mentioned in S. 18(5) of the amended Act of 1950, it is in my judgment the duty of the tenant if he wishes to avoid ejectment after the amendment came into force on 30-11-1950 to pay or deposit the rent as he is entitled under the amended Act and not continue the default for the period stated in the proviso and thus disable himself from obtaining the relief. That is the crux of the reason why judgment-debtors under S. 18(1) of the amended Act are relieved without application of the doctrine of default as contained in the proviso to S. 14(3), and tenants in a pending action under S. 18(5) of the amended Act are not. In the one case the tenants never get a chance, and in the other the tenants do. That is good enough reason for making this difference. This I consider to be a complete answer to this argument of uniformity because it has been suggested in the judgment under consideration and elsewhere that S. 18(5) and S. 18(1) must be put on a par and should be regarded as entirely complementary. To do so would be, in my opinion, not to construe these sections but to legislate according to our private notions of some fancied analogy between S. 18(1) and S. 18(5), a course which, in my view, this Court is not permitted to adopt. As Lord Simonds observed, elsewhere quoted in this judgment:

> "And it is the less justifiable when it is guess work with what material the Legislature would, if it had discovered the gap, have filled it in."

The basic assumption, therefore, that judgment-debtors and tenants in a pending action should be put on the same level is in that context entirely erroneous & if there is that intention, the Statute contains a gap and it is not for this Court to fill in but for the Legislature or else it will be mere speculation or what Lord Simonds calls 'guess work' which this Court should avoid. According to my interpretation there is no such intention in the Statute to pare off sub-ss. (1) and (5) of S. 18.

(81) The other answer to this argument of uniformity between S. 18(1) and S. 18(5) of the Act is to say that if that was the intention of the Legislature, then the simplest way to express such uniformity would have been to say in S. 18(5) that such tenants would also get the same relief as in the foregoing sub-ss. (2), (3) and (4) of S. 18. That would have meant about the same reliefs as under sub-ss. (1), (2) and (3) of S. 14 without the proviso. If uniformity between S. 18(1) and S. 18 (5) was the objective then the circumlocution adopted in S. 18(5) to say so would be quite inexplicable. The true answer is that they were not intended to be uniform and that for the reason I have discussed and that is why they are so differently expressed.

(82) In my opinion, the intermediate view which I took in — 'AIR 1951 Cal 539 (C)' is the only view that can be consistently taken with regard to the construction of S. 18(5) of the amended Act

with reference to the proviso of S. 14(3) of the Act. I have set forth, briefly, the reasons why in my view the proviso to S. 14(3) of the Rent Act of 1950 should not be applied to the defaults in pending suits under S. 18(5) of the amended Rent Act of 1950 where such defaults were only pre-Amendment Act defaults. The reason for not applying the proviso is the reason not to render S. 18(5) plainly impossible. I will, therefore, avoid that construction. But only to this extent to avoid making nonsense of the amendment and no more. To do more will, as I have said, be to legislate under the cloak of interpretation. I do not see however any reason why I should avoid application of the proviso if the defaults continue for the offending period after the passing of the amended Act of 1950 even though such pending actions are of the class mentioned under S. 18(5) of the amended Act. To exclude the operation of the proviso to such class of pending actions where the pre-Amendment Act defaults continue and extend for the period mentioned in the proviso of S. 14(3) of the Act after the amended Act comes into operation, will be in my judgment unjustified both by the principle of construction and by the results that such construction produces.

(83) Section 14 of the Act relates to suits instituted under the Rent Act of 1950. Section 18(5) of the amended Rent Act expressly states that the Court should follow the powers of granting relief given in S. 14 in the case of pending actions mentioned under S. 18(5). A rational conclusion to draw from this express reference to S. 14 is that pending actions of the nature mentioned in S. 18 (5) of the amended Act of 1950 are intended to be brought on a par with the suit for ejectment instituted under the Rent Act of 1950. If otherwise, there was no need for any express reference to S. 14 for the reasons I have already given. To hold that the proviso of S. 14(3) applies to cases of suits instituted after the Rent Act of 1950 where the defaults mentioned in the proviso have occurred, but that it does not apply to the cases of defaults under S. 18(5) of the amended Act where there were the same defaults which continued after the Act for the necessary period, is to pave the way for a discrimination which does not appear to be sensible. Why should such a difference be made between tenants with defaults after the amended Rent Act of 1950 and tenants with defaults starting from before the Rent Act of 1950 but continuing and existing for the period mentioned in the proviso even after the operation of the amended Act of 1950? It is said that in the case of statutory forfeiture for the non-payment of the rent for the three consecutive months under the Rent Act of 1948 there was forfeiture for a shorter duration than the period of non-payment for six months under the proviso which under the Rent Act of 1950 disables a tenant from the relief against ejectment. True that is so. It is, therefore, that the pre-Amendment Act defaults should not be taken into consideration under the proviso. The other reason for this exclusion of pre-Amendment Act defaults, is supplied by the fact of construction that the proviso by its very nature could not refer to the defaults under the Rent Act of 1948 for the simple reason that such defaults are created for the first time by the Rent Act of 1950. But then the answer is, therefore, irresistible that the proviso should apply to defaults occurring after the amended Act came into operation, specially when S. 14 is made expressly applicable to pending actions under S. 18(5) of the amended Rent Act of 1950. To make an eclectic construction of S. 14 of the Act by excluding the proviso on the ground that it does not relate to a power of relief, is indefensible on construction and is to suspend the Statute and, therefore, to legislate. After all, the Rent Act of 1950 is clearly enacted in express terms that a tenant with the default mentioned in the proviso is not entitled to any protection under S. 14 of the Act.

(84) I, therefore, hold that — 'AIR 1952 Cal 898 (B)' was wrongly decided in so far as it held that the proviso of S. 14(3) was never applicable to pending actions under S. 18(5) of the amended Rent Act 1950, and the reasons given there cannot be supported and should therefore be overruled.

(85) My own view on this point is fully set forth at pages 548-551 in — 'AIR 1951 Cal 539 (C)'. The reasons I have given there are not met by any arguments that I have heard in this Full Bench, and I am, therefore, unable to modify or alter the conclusion I reached there in that case. I have heard nothing in the arguments made at the Bar before this Full Bench and I have seen nothing in the decisions since my own in that case which either induces me to alter my views or which meets any of the reasons that I had set out in that judgment delivered long before the two conflicting decisions of the Court of Appeal leading to this Full Bench.

(86) For these reasons I, therefore, entirely agree with the answers given in the judgment just delivered by my Lord the Chief Justice to the question before this Full Bench.

(87) SARKAR J.: I agree with the view entertained by my brother Das Gupta.

(88) Section 12 (3), West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, provided that

> "(3) Notwithstanding anything contained in this Act or in any other law for the time being in force, if a tenant fails for three consecutive months to pay or deposit in accordance with the provisions of this Act any rent payable by him in respect of any premises which has accrued due after the commencement of this Act, the interest of the tenant in such premises shall on such failure be ipso facto determined and he shall no longer be deemed to be a tenant."

On 6-1-1950, the respondent in the appeal in which the present reference has been made, filed a suit against the appellant for ejectment on the ground that his tenancy under the respondent had been ipso facto determined under this section by reason of non-payment of rent for the months July to September 1949. While this suit was pending in the trial Court, an Act called the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 came into force on 31-3-1950 and it repealed the Act of 1948. The Act of 1950 as it originally stood did not affect the suit. It was however amended on 30-11-1950 by Act 62 of 1950. Section 18 (5) of the Act of 1950 as amended by the latter Act, provides as follows:

> "In all applications made under sub-s. (1) of S. 18 of the said Act, which are pending at the commencement of this Act and in all suits referred to in sub-s. (5) of the said section which are pending at such commencement, the said Act as amended by this Act shall apply and shall be deemed always to have applied."

(89) After the amendment, the section became applicable to the suit and thereupon the appellant made an application to the trial Court for relief under it. This application was dismissed on 6-2-1951 and the Court subsequently passed a decree in ejectment. From that decree an appeal has been taken to this Court. The Division Bench

hearing the appeal finding itself faced with two conflicting Bench decisions of this Court mentioned in the order of reference, framed the following question for decision by a Full Bench:

"Whether in a suit instituted while the West Bengal Premises Rent Control (Temporary Provisions) Act of 1948 was in force and which was disposed of after the passing of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950, the proviso to S. 14 (3) of the Act of 1950 would be applicable in order to give relief to the tenant under S. 18 (5) of the Act."

(90) I think it is perfectly clear that S. 18 (5) does not make the whole of S. 14 applicable. That indeed was held in the Full Bench decision of this Court in — 'AIR 1952 Cal 879 (F)', where it was said (p. 883) that the terms of S. 18 (5)

"do not provide that S. 14....., as such, shall apply but only that the Court shall exercise the powers of granting relief against ejectment given by S. 14 and, to that end, shall follow the provisions and procedure of the section as far as may be necessary."

What then are the powers of granting relief against ejectment given by S. 14? That section, so far as is relevant, is set out below: (After quoting S. 14 (1) (2) and (3), the judgment proceeded:).

(91) The Court's power hence is to calculate the amount of arrears of rent and add thereto certain interest and costs and if the tenant pays the total amount within fifteen days, to dismiss the suit in so far as it is for ejectment. That is all the power of granting relief against ejectment given by S. 14. That is the power, therefore, that the Court acting under S. 18 (5) must exercise. It would follow that the proviso has no application when the Court is acting under S. 18 (5) because it does not give the Court any power to relieve against ejectment. That seems to be the plain meaning of the language used.

(92) But it is said that the proviso is an integral part of the section and must be read with it and that, so read, the power contained in the section becomes as circumscribed by the proviso. The power to be exercised under S. 18 (5), therefore, is the power as so circumscribed. That is the view taken by P. B. Mukharji J. in — 'AIR 1951 Cal 539 (C). I feel the greatest difficulty in accepting that view. It may be true that in construing a section containing a proviso, the whole is to be read. But here we are not construing S. 14. We are concerned only with finding out the power of granting relief against ejectment given by S. 14. If the proviso does not help in ascertaining that power, it is of no consequence for our present purpose even though it is a part of S. 14. With such a part of S. 14 we are not now concerned.

(93) Again, it appears to be a settled rule of construction that a proviso would not apply unless the section to which it is tacked, applies. That I find to be the uniform decision of the Courts of law in England. I will cite two of these decisions. In 1844 in — 'Ex parte Partington' (1844) 6 QB 649 (T), the Court had to deal with a section which had given a certain power to the Commissioner in Bankruptcy and which contained a proviso limiting the scope of that power. It appeared that the Commissioner had done something which, if it had been done under the section, would have been illegal because of the proviso. The Court nevertheless, refused to apply the proviso as the Commissioner had not acted under the section but by a power generally incidental to his jurisdiction. It was held that the proviso was in restraint of the power given by the section and not of any other power. In — 'Thompson v. Dibdin', (1912) AC 533 (U), Lord Ashbourne said at p. 544,

"Much, if not the main, reliance has been placed by the appellant's counsel on the first proviso to S. 1. I do not think that the argument founded on it is well founded. It is opposed to the settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso..... It is not a separate or independent enactment. The words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context."

(94) Now, the proviso in this case says that the power to grant relief against ejectment shall not exist in certain circumstances. Read as dependent on the main enactment to which it is attached and in the context in which it appears, as it has to be, it means that in these circumstances, the power to grant relief against ejectment which would have 'arisen under S. 14' shall not arise. If it circumscribes any power, it circumscribes only the power arising under the section. It cannot, therefore, affect or circumscribe a power to grant such a relief arising otherwise. To allow it to do that would be to treat it as an independent enactment and this is forbidden. In the case in hand the power of granting relief against ejectment arises under S. 18 (5): that indeed, is the hypothesis on which the question referred to the Full Bench is based. Plainly, in the present case the power could not arise under S. 14, for the power under that section arises in a suit to which S. 18 (5) would not apply and, therefore, in a case contemplated by S. 18 (5) since the power could not have arisen under S. 14, it must arise under S. 18 (5). It follows that the proviso cannot affect the power arising under S. 18 (5). Section 14 has been referred to only as the place where the power is enumerated and not for finding out whether the power arises or does not arise. This rule of construction has also been expressly embodied in the proviso, for it states that, the tenant shall not be entitled to the benefit "under the section". It does not purport to touch a benefit not "under the section" and hence a benefit under S. 18 (5).

(95) Furthermore, it seems to me that the proviso does not really circumscribe the power given by S. 14. I have already stated what the power is. The proviso does not affect the quantum of that power. It only states that in certain circumstances, the power, which would have arisen under the section, shall not arise. It therefore circumscribes only the conditions relating to the existence of the power itself. I am not concerned now with the conditions relating to the existence or non-existence of the power contained in S. 14. The Court has the power because S. 18 (5) gives it and not because of anything contained in S. 14. Considered symbolically the matter becomes clear. It was said that the power given by S. 14 was the net power, A-B, B being the proviso. What then is A? It must be, if anything, the circumstances which under S. 14, give rise to the power. With these circumstances I have nothing to do. The power does not arise because of them — indeed they do not exist here — but because of S. 18 (5) that is to say because of a wholly different set of circumstances. Thus A disappears and therefore A-B also disappears. The result is that there is no such thing as net power in S. 14, which only the Court acting under S. 18 (5) can exercise.

(96) Nor do I think that the provision at the end of S. 18 (5) relating to amendment of pleadings leads to the conclusion that the proviso applies because, as it was said, amendments of the pleadings would be necessary to raise the issue as to whether the case comes within the proviso. It seems to me that if amendments are necessary for this purpose they will as well be necessary for deciding how much is in arrears and for inserting claims for rent in the place of claims for mesne profits. The provision for amendment does not inevitably point one way. That provision is therefore of no help in deciding the present question.

(97) There seems to me to be yet another reason why the proviso should not be held to be applicable when the Court acts under S. 18 (5). In my view taking S. 14 by itself, the defaults mentioned in the proviso must have occurred before the institution of the suit mentioned in the section. Section 14, sub-ss. (1), (2) and (3) say that in a suit of a certain kind the Court shall give relief against ejectment. So in such a suit it is the defendant's right to get the relief. If this is the defendant's right in the suit, he has it as soon as the suit is filed. He can come the next day the suit is filed and ask for the relief. Indeed the Court is bound to give it to him even without his asking. If the circumstances mentioned in the proviso exist at the institution of the suit, the tenant never acquires any right to relief against ejectment, neither is the Court bound to give him such relief. But suppose — as will most often happen — the Court is unable to attend to the matter till sometime later and by that time the circumstances mentioned in the proviso have come into existence. Is it to be said that the tenant has lost a right because the Court could not attend to the matter earlier? That of course cannot be. It is important to note that the section does not require the tenant to move the Court for the relief. It would be a somewhat strange construction of the section to say that it gave a shifting right, that under it a right arises at one stage of the suit and disappears at a later stage.

Section 14, sub-ss. (1), (2) and (3) without the proviso says that a tenant is entitled to the right. When does this title arise? Since it arises from the nature of the suit, it must arise at the institution of that suit. The proviso says that in certain circumstances the title shall not exist. When is it to be decided whether the title arises or not, if not, at the institution? Is it when the tenant seeks to enforce his right? Is it when the Court comes to consider the question? The section does not say either of these. It therefore has to be decided at the institution of the suit. If then it has to be decided at the institution of the suit whether the right arises or not, the circumstances disentitling the tenant to the right must also have occurred at that time. This view has been expressed by some Judges of this Court. See — 'AIR 1953 Cal 145 (Q)'. Now it is impossible in a case contemplated by S. 18 (5) that the circumstances disentitling the tenant to the right could have happened at the institution of the suit. The proviso requires at least six months' rent legally payable to remain unpaid and in the case of a tenant whose tenancy has been ipso facto determined under the Act of 1948 at most three months' rent legally payable can remain unpaid before the suit for ejectment against him is filed under that Act. If then the proviso cannot in any event hit such a tenant, it cannot be said to apply to him.

(98) I have so long considered the matter as one of construction and have arrived at the conclusion that the proviso is not applicable when the Court acts under S. 18 (5). That conclusion seems to me to receive support from the anomalous position that would result from the application of the proviso to a case of the kind in hand. I will now try to show this. The proviso says that the tenant shall not be entitled to the benefit of protection against ejectment if he makes default in payment of rent referred to in S. 12 (1), prov. (i) on three occasions within a period of eighteen months. Section 12 (1) prov. (i) is in these terms:

> "(i) Subject to the provision of S. 14, where the amount of two months' rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract, or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with S. 19."

Therefore the rent in contemplation in S. 12 (1) prov. (i) and hence in the proviso to S. 14, is rent legally payable by the tenant. I want to note here two matters. First the default in payment of rent contemplated by the proviso must be failure to pay or deposit within the time limited by the contract of tenancy or by the Rent Act where there is no provision in the contract. If the tenant could pay or deposit all arrears at any time and thereby avoid being in default the proviso would be made nugatory. The Act makes this quite clear. Secondly, S. 19 of the Act of 1950 makes provision for the deposit of rent with the Controller in certain cases and S. 20 (3) provides that such deposit will, subject to certain conditions, amount to payment to the landlord.

(99) Section 18 (5) deals with a case where the tenancy has been ipso facto determined before the Act of 1950 came into force. The tenant in such a case had failed to pay three months' rent legally payable by him and this had happened before the Act of 1950. After the failure to pay the three months' rent the tenancy was ipso facto determined by the Act of 1948 and thereafter, therefore, no rent could be legally payable by the tenant. Section 12 (3) of the Act of 1948 puts that beyond doubt. It is not necessary to decide whether the default contemplated by the proviso would include these three months' default. It seems to me, however, that it would not but I do not wish to be understood as having come to that finding. On 31-3-1950, when the Act of 1950 came into force therefore, default may be said to have been made in payment of at most three months' rent. As it originally stood, the Act of 1950 made no alteration in the position of the tenant that we are considering, so that after 31-3-1950 he continued to be a person who was not a tenant. He could not, and, therefore, did not, pay any rent. This continued till 30-11-1950 when the amending Act, Act 62 of 1950, took effect. Section 2 of the amending Act provides as follows:

> "2. In S. 2, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (hereinafter referred to as the said Act), for clause (11) the following clause shall be substituted and shall be deemed always to have been substituted, namely:
>
> (11) "tenant" means any person by whom rent is, or but for a special contract would be, payable for any premises, and includes:
>
> (i) any person who is liable to be sued by the landlord for rent; and

(ii) any person whose interest in the premises has been ipso facto determined under sub-s. (3) of S. 12, West Bengal Premises Rent Control (Temporary Provisions) Act, 1948."

(100) Under this new definition, since 30-11-1950 the person we are dealing with, became a tenant and is to be deemed to have been a tenant from 31-3-1950 if not from an earlier date. It may be that it is to be deemed that rent was legally payable by him from the date last mentioned. If rent was not so payable by him of course no further question arises, for then the proviso to S. 14 can never hit him. I will, however, proceed on the basis that rent was and was deemed to have been payable by him. Up to 30-11-1950, he, however, had not paid rent because he could not do so. After 30-11-1950 assuming the contract was to pay the rent by the fifteenth of the following month, which would be a very liberal assumption to make, he could pay or deposit in respect of the previous period, only the rent for November, peyment or deposit after 30-11-1950 for all other months prior to that month would be too late under the contract assumed or under the Act of 1950. On 30-11-1950, therefore, the position is that the tenant would be deemed to have made default in payment of rent for seven months from April to October, 1950. In arriving at this figure I have left out the defaults occurring prior to 31-3-1950 for the sake of simplicity and avoiding disputed questions. On 30-11-1950, therefore, the tenant has made such defaults that the proviso hits him. Now it will be remembered that S. 18 (5) was amended by Act 62 of 1950 and it was only thereupon that it was made applicable to the case of a tenant whose tenancy had been ipso facto determined. So the occasion for applying that section to a case of the kind in hand arose only on 30-11-1950 when the amending Act came into force. The position of the tenant on that date would, however, be that he would be inevitably hit by the proviso he having made default in paying 7 months' rent, assuming the proviso was intended to apply to him. The result of that would be to render S. 18 (5) nugatory. That of course could not have been the intention of the legislature. In order to give effect to S. 18 (5) it should, therefore, be held that the proviso does not apply to a case coming under that section. It is contended, however, that there is another way out. It is said that the defaults occurring between March 31, and November 30, 1950 are not to be taken into account in applying the proviso for the tenant could not have avoided committing them. It seems to me that this way out of the difficulty should not be preferred for it does violence to the plain meaning of the language used, specially as a more unobjectionable solution of the difficulty is possible, namely by saying that the proviso does not apply. The amending Act plainly makes the non-payment of rent between March 31 and November 30, 1950 defaults for the purpose of the proviso. The suggested method would make us ignore this plain meaning. Such a method is undesirable and should be avoided if possible. I have already shown that it is so possible.

(101) However this may be, a greater difficulty arises when we consider the defaults occurring subsequently to 30-11-1950. It is said that in respect of these defaults there is no difficulty and the proviso would be applicable, since the tenant can prevent them from happening by paying the rent to the landlord or depositing it under S. 19 within due time. This may be so where the suit is pending in the trial Court. Section 18 (5), however, also applies where the suit is pending in appeal. Is it to be said that the tenant who is a party to the appeal can pay or deposit rent for the period subsequent to 30-11-1950 in a case where the appeal is pending after that date? I do not see that this can be said. How can rent be said to be legally payable by such a tenant? The amended definition of the word tenant includes a person whose tenancy has been ipso facto determined. But the amended definition does not include a person whose tenancy has not only been ipso facto determined but who has also suffered a decree in ejectment based on such determination. The tenant who is a party to the appeal which we are now considering, is such a person. The situation would be absurd if after the decree in ejectment the liability to pay rent subsisted and in this respect it can make no difference that an appeal from the decree is pending. We come, therefore, to the position that no rent is legally payable by a tenant who has suffered a decree in ejectment. When an appeal is pending from the decree the tenant continues not to be liable to payment and cannot hence commit any default within the meaning of the proviso in respect of any period after 30-11-1950 — that being the period which I now have under consideration. The result, therefore, is that when S. 18 (5) applies to an appeal the tenant can never be hit by the proviso. If he can never be hit by it, it is not applicable to him. It then comes to this that under S. 18 (5) the proviso would be applicable if the suit is in the trial stage but would not be applicable if it is pending in appeal. Such a position could not have been in the contemplation of the legislature and an interpretation which leads to it cannot be correct. I am, therefore, again led to the position that the proviso is not applicable when the Court exercises its powers under S. 18 (5).

(102) It is said that if it was intended that the proviso in S. 14 shall not apply why was it not said that the Court shall exercise the powers in S. 18, sub-ss. (1), (2), (3) and (4)? These sub-sections are set out below.

"18 (1) Where any decree for recovery of possession of any premises has been made on the ground that the interest of the tenant in such premises has been ipso facto determined under the provisions of sub-s. (3) of S. 12, West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, but the possession of such premises has not been recovered from the tenant, the tenant may apply to the trial Court within sixty days of the coming into force of this Act for vacating the decree for ejectment against him and within such period no order for delivery of possession shall be made by any Court, nor if an application is made by the tenant under this sub-section till the application has been dismissed under sub-s. (4).

(2) The Court shall, as early as may be, serve notice of the application on the landlord and after hearing the parties if the landlord appears, determine the amount of rent which would have been payable by the tenant and would be in arrears if the tenancy continued unbroken upto and including the month in which the order stated hereafter is to be made, and order the tenant to pay the said amount as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eighths per centum per annum together with such costs, if any, as may be adjudged to the landlord, within such time, not later than forty days from the date of the order, as the court may fix.

(3) If the tenant pays the said sum within the time fixed, the court shall vacate the decree for ejectment with all consequential orders, and the tenancy shall continue as if it never terminated.

(4) On failure of the tenant to make the payment within time his application shall be dismissed with such costs as the court may award to the landlord."

(103) It may be answered that if it was intended that the proviso shall apply why was it not said that S. 14, sub-ss. (1), (2) and (3) with the proviso shall apply. This sort of argument does not seem to me to help. In any event S. 18, sub-ss. (1), (2), (3) & (4) could not have applied to a case under S. 18(5) because under the earlier sub-sections provision had to be made for setting aside a decree.

(104) It is also said that if the proviso does not apply to a case under S. 18(5), a distinction would be made between a person whose tenancy has been ipso facto determined under the Act of 1948 and a tenant who has made default under the Act of 1950 and that the former though a worse offender, would be put in a more favoured position. I am unable to see that the creation of a distinction is a sufficient ground for not following the plain meaning of the language of the statute and the recognised rules of construction — matters which I have already discussed. In any event a distinction must exist between the two cases. In the former case the benefit is given though no payment was made between March 31 and November 30, 1950 but not so in the latter case. Furthermore why should a distinction not be made? Section 18(1) which deals with a case which may be worse than a case under S. 18(5) does make the distinction, so why should S. 18(5) not make the same distinction? If the resulting distinction is to decide the question of interpretation, S. 18(1) contains sufficient indication of the legislature's intention that in cases of the kind in hand, the distinction shall be made. Again if the proviso is made applicable to a case under S. 18(5) a distinction would be made between this sub-section and sub-s. (1) of the same section. How can that be justified?

(105) The question as framed by the referring Bench would include a case where the decree had been passed between the commencements of the Act of 1950 and the amending Act. Such a case was not before that Bench and the question applying to such a case does not arise at all. I shall, therefore, confine my answer to the question framed as relating to a case where the decree is passed after the amending Act. I like, however, to express my views but only tentatively as no argument was heard on it, with regard to the case where the decree is passed between March 31 and November 30, 1950. It seems to me that in such a case the question as framed would not arise. Section 18(5) only applies when the suit or appeal is pending on 31-3-1950 and gives the Court hearing the suit or appeal as the case may be certain powers. Now when the decree is passed after 31-3-1950 a suit no doubt was pending on that date but it has been disposed of without reference to S. 18(5) — indeed at a time when the section as then framed would not have applied to it. There is no more any suit in which powers under S. 18 (5) can be exercised. An appeal no doubt has been taken from that decree but S. 18(5) does not apply to that appeal, as it applies so far as appeals go, to appeals pending on 31-3-1950. In an appeal not pending on 31-3-1950 no question of acting under S. 18(5) arises at all. It may be that when a decree is passed between the two dates S. 6 of the amending Act would apply and that by its terms might bring in S. 18(5). It is not necessary to say anything more on the matter as the question as framed does not refer to a power arising under S. 18(5) of the Act of 1950 when S. 6 of Act 62 of 1950 applies.

(106) I have now said all that I have to say on the matter and I am of the opinion that the question should be answered in the negative. In my view the case of — 'AIR 1953 Cal 136 (A)' so far as it decides the question referred to the Full Bench was wrongly decided and that — 'AIR 1952 Cal 898 (B)' was correctly decided.

A/G.M.J. Answer accordingly.

A.I.R. 1953 CALCUTTA 752 (Vol. 40, C. N. 280)

MOOKERJEE AND GUHA RAY JJ.

Gopal Mistri, Defendant 1, Petitioner v. Madan Gopal Ghosh and another, Plaintiffs-Opposite Party.

Civil Rule No. 3262 of 1952, D/- 26-5-1953.

Tenancy Laws — Calcutta Thika Tenancy (Amendment) Ordinance (15 of 1952), S. 5(2) — Forum.

Application under S. 5(2) has to be filed before Court which passed the decree — Decree for ejectment by trial Court — Matter pending in appeal — Application under S. 5(2) cannot be entertained by appellate Court. (Para 2)

Kshetramohan Chatterjee, for Petitioner; Samarendra Krishna Deb and Narayan Chandra De, for Opposite Party.

ORDER: This Rule arises out of an application under S. 5(2), Calcutta Thika Tenancy Amendment Ordinance 15 of 1952.

(2) The petitioner was the defendant in a suit for ejectment brought by the opposite parties on the allegation that the petitioner was a trespasser. That suit was decreed by the trial Court and the matter was pending in appeal before the learned Additional District Judge when the application under S. 5(2) of the Ordinance was filed before that Court. It is quite clear that under S. 5(2) referred to above the application contemplated therein has to be filed before "the Court which passed the decree" to quote only the portion relevant for our present purpose. In the present case the decree for ejectment or recovery of possession had been passed by the trial Court and the matter was pending in appeal. But the appellate Court has not even now passed any decree. In these circumstances, in view of the express terms of S. 5(2), quoted above, no application under the said section was entertainable by the appellate Court. On this ground, therefore, the dismissal of the petitioner's application by the learned Additional District Judge must be upheld and no other question need be considered by us.

(3) In the result, therefore, this Rule fails and it is discharged, but in the circumstances of this case, there will be no order as to costs.

(4) Let the records go down as early as possible.

B/R.G.D. Rule discharged.

A. I. R. 1953 CAL. 753 (Vol. 40, C. N. 281)

BOSE J.

Monoranjan Roy, Applicant v. The Collector of Customs, Respondent.

Matter No. 85 of 1950, D/- 19-2-1951.

(a) Constitution of India, Art. 226 — Proceedings for prerogative writs — Extent of Court's powers.

In proceedings for Writs of Mandamus or Certiorari the Court does not constitute itself a Court of appeal and it cannot go into the merits of the conclusion of the inferior Court or Tribunal. Where therefore the lower court or Tribunal has not acted in an arbitrary manner or has not exceeded its jurisdiction, the High Court cannot interfere with its decision on the ground that it is erroneous on the merits. (Para 14)

(b) Constitution of India, Art. 226 — Prayers — Power of High Court to amend.

It is true that the prayers in the petition for a writ under Art. 226 should be specific but the High Court has power to amend the relief at the hearing. AIR 1951 SC 41, Rel. on. (Para 15)

(c) Constitution of India, Art. 226 — Existence of alternative remedy — Effect.

Alternative remedies are factors which are taken into consideration in exercise of Court's discretion in issuing Prerogative Writs. But the remedies must be adequate. (Para 16)

(d) Sea Customs Act (1878), S. 198—Absence of notice under — Effect.

Unless the acts complained of are outside the section and unless there is want or excess of jurisdiction, S. 198 operates as a bar to all the proceedings when the notice required under the section is not given. AIR 1952 Cal 103, Relied on. (Para 18)

P. C. Mullick, for Applicant; A. K. Sen, for Respondent.

CASES CITED:

(A) ('51) AIR 1951 SC 41: 1950 SCR 869 (SC)
(B) (1884) 53 LJQB 229: 12 QBD 461
(C) ('52) AIR 1952 Cal 103: (Matter No. 113 of 1950, D/- 16-2-1951)

ORDER: This is an application under Art. 226 of the Constitution and S. 45, Specific Relief Act, for an order on the respondent to cancel or withdraw the order dated 7-8-1950 made by the respondent imposing a penalty of Rs. 3300/- in respect of a consignment of goods imported by the petitioner without the requisite licence and also for an order for refund of the said sum of Rs. 3300/- paid by the petitioner pursuant to the said order of the respondent.

(2) The petitioner carries on business as dealer in paper of various kinds and is one of the largest importers of single faced corrugated paper in this country. The single faced corrugated paper is known in this country as also in the countries from which they are imported as "paper" as opposed to "board". Between May 1945 and June 1947 paper could be imported from the United Kingdom by importers of this country under Open General Licence No. VII and no restrictions were imposed by the Government upon the import of single faced corrugated paper from the United Kingdom. Since July 1947 the Government of India imposed vigorous restrictions on the import of paper from foreign countries including the United Kingdom and no paper could be imported without an import licence granted by the Government. Such restrictions continued till June, 1948. Thereafter and until May 1949 paper could be imported in India from all Sterling and Soft Currency areas under Open General Licence No. XI. Between July and November 1948 the petitioner imported 2200 rolls of single faced corrugated paper from Czechoslovakia, Finland and United Kingdom and the petitioner was charged with duty payable for

> "paper including Poster and Stereo and all coated papers except art paper, all sorts, not otherwise specified"

as referred to under the then Customs Tariff Items No. 44. From May 1949 the Government of India again imposed restrictions on the import of paper including single faced corrugated paper and no merchant could import single faced corrugated paper without a licence from the Government. The Government, however, notified at the time that in case where traders of this country had already entered into firm contracts for the import of paper under Open General Licence No. XI they would be allowed to import such paper under a special licence to be granted by the Government. In or about April 1949, the petitioner placed orders with Thomson & Norris Manufacturing Co. Ltd. of Middlesex in the United Kingdom for import of 1000 rolls of single faced corrugated paper of which 500 rolls arrived at the Calcutta Port in July 1949 and the remaining 500 rolls in October 1949. The petitioner duly applied to the Government for a special licence for the import of these 1000 rolls of paper and was granted a special licence No. 091546/48 C.C.I. dated 30-7-1949. Upon the arrival of the said 1000 rolls of paper at the Calcutta Port the Customs authorities imposed a penalty of Rs. 2900/- for each lot on the basis that they were not paper but came under the heading of "Paste Board, Mill Board, Card Board and Straw Board all sorts" as referred to under Customs Tariff Item No. 44 (4) and as the petitioner had not the necessary licence required for the import of such goods and the Customs Authorities purported to act under S. 167 (8) of the Sea Customs Act. On 20-12-1949 the petitioner appealed to the Central Board of Revenue from the said order of the Collector of Customs but the said appeal is still pending. Thereafter the petitioner obtained from the Government further licences for the import of "paper and other sorts" the last of such licences being No. 220699/48 C. C.-I. dated 6th April 1950. By virtue of this licence No. 220699/48 the petitioner in April 1950 placed an order with Messrs. Donaldson & Filter Ltd. of Glasgow through the latter's local representative in Calcutta one Antoine Bentz of Stephen House, Calcutta, for the import of 340 rolls of single faced brown corrugated paper. The said goods arrived on or about 18th July, 1950. Upon the arrival of the said goods the petitioner paid the ad-valorem duty of 37½ per cent. on the said goods, on or about 20-7-1950 and the Customs Officers made the necessary endorsements on the licence of the plaintiff and on the relevant Bill of Entry. Thereafter, on 7-8-1950 the respondent imposed a penalty of Rs. 3300/- on the said consignment in lieu of confiscation on the basis that the goods came within the description of Customs Tariff Item No. 44 (4). The respondent acted under S. 167 (8) of the Sea Customs Act.

(3) On or about 10-8-1950 the petitioner paid the said penalty of Rs. 3300/- for getting the goods released. It is stated in the petition that it will appear from the correspondence that passed between the Import Authorities and the said Antoine Bentz that single faced corrugated

paper was always considered in the past by the Customs authorities as "Paper" and not "Board". The petitioner charges the order dated 7-8-1950 as mala fide, arbitrary and illegal and as an abuse of the statutory powers possessed by the respondent Collector of Customs and his officers. It appears that the petitioner has obtained another licence No. 272312/48 C.C.I. dated 4-8-1950 for the import of paper and other sorts. It is alleged by the petitioner that the order of the Collector is an invasion upon his fundamental rights to acquire, hold and to dispose of property and to carry on his trade as importer of single faced corrugated paper under the said licences. The petitioner has been prevented from exercising his right to trade and utilise the said licences for the import of single faced corrugated paper.

(4) In the circumstances the petitioner asks for the reliefs stated above.

(5) Mr. C. T. Pillai the Assistant Collector of Customs has affirmed an affidavit. He states that each case of appraisement of the goods by the Customs Authorities is dependent on its own facts and any recognition or description in previous cases is irrelevant. The quality and character of the goods imported may be different in respect of different consignments imported.

(6) The Customs authorities had in respect of two previous consignments of goods imported in 1949 adjudged a penalty of Rs. 2900/- for each lot on the basis that the goods answered the description of "Paste Board, Mill Board, Card Board and Straw Board all sorts" as referred to in Customs Tariff Item No. 44 (4) and as the petitioner did not take out the requisite Licence for importation of the goods he was liable to pay the said penalty.

(7) In spite of this warning the petitioner in April 1950 again placed orders for 340 rolls of corrugated brown paper and imported such goods without obtaining any special licence therefor.

(8) Mr. Pillai states that if in the past any such goods were passed by the Customs authorities as "paper not otherwise specified" it must have been done through mistake. In his opinion the correct classification is to place the goods in question in the category of Customs Tariff Item No. 44 (4). The Customs Appraiser who directed 3 per cent. of the goods to be opened for appraisement and checking, decided after giving full consideration to the matter that the goods were assessable under Item No. 44 (4). The Collector of Customs has also agreed with the decision of the Appraising authorities. It is further stated that the opinion expressed by the Chief Controller of Imports in course of correspondence with Antoine Bentz is not conclusive and cannot be said to be binding on the Customs Authorities.

(9) In the 'Century' and Oxford Dictionaries "Board" is described as "a kind of thick stiff paper; a sheet formed by layers of paper pasted together". It appears to me by looking at and feeling the sample of goods annexed to the affidavit of Antoine Bentz affirmed on 7-9-1950 that the goods in question cannot be considered with any definiteness or certainty as not falling within the description of goods as in Item 44 (4).

(10) The Appraising authorities who guide or assist the Collector or Assistant Collector in the matter of appraisement have expressed the opinion that the goods fall within the description of Item No. 44 (4). The Assistant Collector or the Collector sees no reason to differ from them.

(11-12) It appears that the Customs authorities have applied themselves to the consideration of the matter arising before them and they have arrived at a determination and adjudged the penalty. I find it difficult to hold that the Customs authorities have acted in an arbitrary manner or have exceeded their jurisdiction.

(13) It was contended at the hearing that the petitioner had not been given any opportunity to put forward his case or to make representations before the Customs authorities before the penalty was adjudged, and there has been violation of the principles of natural justice. No such case however is made in the petition or in any of the affidavits. There are no materials before me on affidavits to show that the decision as to the imposition of the penalty was arrived at without giving any opportunity to the petitioner to defend himself or to present his case.

(14) It is clear law that in proceedings for Writs of Mandamus or Certiorari the Court does not constitute itself a Court of appeal and it cannot go into the merits of the conclusion of the Inferior Court or Tribunal. The decision of the Customs authorities on the merits may be erroneous but this Court cannot interfere on that ground.

(15) It was contended by Mr. A. K. Sen that the prayers of the petition are not for a Writ of Certiorari as quashing of the proceedings has not been asked for. It is true that the prayers should be specified but it has been held by this Court as also by the Supreme Court that the Court has power to amend the relief at the hearing. It may be noted that in the present case the petition has in prayer (c) asked for further or other directions which are wide enough to cover a relief in the nature of a Writ of Certiorari. In the case of — 'Charanjit Lal v. Union of India', AIR 1951 SC 41 at p. 53 (A), Mukherjea J. of the Supreme Court observed as follows:

> "Article 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper Writ or direction has not been prayed for."

(16) It was contended by Mr. Sen that the petitioner has alternative remedy by way of appeal under the Sea Customs Act and he has also a right of action under the general law and so he cannot be allowed to have recourse to the extraordinary Writs of Mandamus or Certiorari. Alternative remedies are factors which are taken into consideration in the exercise of the Court's discretion in the matter of issuing Prerogative Writs but I do not think that an appeal under the Act would in the circumstances of this case have been an adequate remedy. The petitioner has already filed an appeal under the Act in respect of a previous consignment of similar goods on or about the 20th December 1949 but the same has not yet been disposed of. I do not see any reason however why the petitioner could not file a suit and proceed expeditiously with it.

(17) It was contended by Mr. Sen that the prayer for refund of the sum of Rs. 3300/- cannot in any event succeed in this application. I think the contention is sound. The money paid has gone into the Government exchequer and has become part of the general revenue or fund of the country. The respondent cannot be called upon to pay the alleged claim of the petitioner out of his own pocket. Action or proceedings should be taken against the Government for realisation of the money. The money deposited by way of penalty was not paid to the Customs authorities either in their official capacity or to them individually. It was paid to them merely as ser-

vants or agents of the Government. They have no right to hold it or to deal with it as against the orders of the Government. The appropriate Government is not a party to these proceedings. The prayer for refund of the money cannot in any event be acceded to in this application. — 'In Re Nathan', (1884) 12 QBD 461 (B).

(18) It was also contended that S. 193 of the Sea Customs Act is a bar to these proceedings as the requisite notice was not served on the respondent. I have already expressed my view on the point in — 'Soorajmull Nagarmull v. Assistant Collector of Customs', AIR 1952 Cal 103 (C). Unless the acts complained of are outside the section and unless there is want or excess of jurisdiction the section operates as a bar.

(19) In the result this petition fails and the Rule must be discharged with costs.

A/D.R.R. Rule discharged.

A. I. R. 1953 CAL. 755 (Vol. 40, C. N. 282)

K. C. DAS GUPTA AND LAHIRI JJ.

Chhatu Lal Shaw, Petitioner v. Panchanan Shaw and others, Opposite Party.

Civil Rule No. 1375 of 1951, D/- 24-4-1952.

(a) Court-fees Act (1870), S. 7 — Relinquishment of claim — (Civil P. C. (1908), O. 7, R. 11).

When a plaintiff after making prayers for several kinds of relief wishes to abandon some of these with a view to save court-fees, the Court is bound to allow such application. Whether as the result of deletion of prayers for some reliefs, the suit fails or not is a matter which shall be decided at the time of the hearing of the suit. (Para 3)

Anno: Court-fees Act, S. 7 N. 13; Civil P. C., O. 7, R. 11 N. 5.

(b) Court-fees Act (1870), S. 7 (iv) (c) — Suit for avoiding deed of transfer.

Plaintiff in possession with other co-sharers — Suit for declaration that sale deed executed by other co-sharer is void and for permanent injunction — Suit is one for declaration with consequential relief — There being no objective standard for valuing relief plaintiff can put his own valuation. Case law relied on. (Para 5)

Anno: Court-fees Act, S. 7 (iv) (c) N. 9, 21.

(c) Court-fees Act (1870), S. 7 (iv) (c) — Valuation of suits coming under Cl. (c).

Suit for declaration with consequential relief — The correct mode of valuation in such a case is to put a single valuation, the option of valuing the relief resting with the plaintiff. AIR 1950 Cal 85, Rel. on. (Para 6)

Anno: Court-fees Act, S. 7 (iv) (c) N. 23.

Syama Charan Mitter, for Petitioner; Benoy Bhusan Sen, for Opposite Party.

CASES CITED:

(A) ('39) AIR 1939 Cal 278: 184 Ind Cas 106
(B) ('39) AIR 1939 Pat 531: 182 Ind Cas 153
(C) ('41) AIR 1941 Lah 307: 197 Ind Cas 609
(D) ('50) AIR 1950 Cal 85: 54 Cal WN 139

ORDER: This Rule was directed against an order of the learned Subordinate Judge of 24-Parganas by which he directed the plaintiff to pay 'ad valorem' court-fees on Rs. 6000/- on the plaint and refused to pass any final orders on the application filed by the plaintiff for amendment of the plaint.

(2) The plaintiff along with defendant 2 and other co-sharers is in joint possession of the premises in suit. Defendant 2 executed a kobala on 6-5-1949, in favour of defendant 1 in the present suit. The plaintiff's allegation is that the kobala was obtained by fraud and undue influence and he prayed, first, for a declaration that this sale deed was void and secondly, for a permanent injunction restraining defendant 1 from interfering with the plaintiff's possession and thirdly, in the alternative, for an order by the Court allowing the plaintiff to pre-empt. The relief for declaration was valued at Rs. 20/-, the relief for injunction was valued at Rs. 50/- and the relief for pre-emption was valued at Rs. 100/-. The court-fees were paid accordingly. After the Court passed an order that the proper valuation of the suit was Rs. 6000/- and the court-fees should be paid thereupon, the plaintiff made an application for amendment of the plaint by deleting the prayer for pre-emption. The learned Subordinate Judge held that the court-fees were payable in accordance with the provisions of S. 7(iv)(c), Court-fees Act, that the relief should be valued at Rs. 6000/- and that after the court-fees thereupon were paid, he would consider what orders should be passed on the application for amendment.

(3) In the first place, we are clearly of opinion that the learned Subordinate Judge failed to exercise his jurisdiction that was vested in him to pass an order on the prayer for amendment. When a plaintiff after making prayers of several kinds of relief wishes to abandon some of these with a view to save court-fees, the Court is bound to allow such application. Whether as the result of deletion of prayers for some reliefs, the suit fails or not is a matter which shall be decided at the time of the hearing of the suit. The plaintiff in asking for deletion of his prayer for certain reliefs takes that risk. We see no reason why the Court should refuse the plaintiff to withdraw his prayers for pre-emption.

(4) We therefore, order that the application for amendment by deleting the prayer for pre-emption should be allowed.

(5) The question that remains for consideration is what is the court-fee payable on the plaint after deletion of the prayer for pre-emption. Obviously the suit is one for declaration with consequential relief in the form of a permanent injunction. Ad valorem Court-fees are therefore payable; but it is open to the plaintiff to give his own valuation. Where there is an objective standard, for valuing the relief, the Court has the right to amend the valuation to the figure it thinks proper. If there is no objective standard, the plaintiff's own valuation will remain. The question is whether there is any objective standard for valuing the relief in this suit. In our opinion, as the plaintiff himself is in possession along with other co-sharers of the property in suit, there is no objective standard for valuing the relief he seeks. If he was out of possession altogether and was asking for delivery of possession, it would be quite a different matter. The distinction has been drawn in several cases of which mention may be made of the decision of this Court in the cases of — 'Bagala Nanda v. Shrish Chandra', AIR 1939 Cal 278 (A); — 'Mt. Deokali Kuari v. Mahadeo Prasad', AIR 1939 Pat 531 (B); — 'Ghulam Nabi v. Umar Bakhsh', AIR 1941 Lah 307 (C) and — 'Balaram Mandal v. Sahebjan Gazi', AIR 1950 Cal 85 (D). In our judgment it is obvious that when it is not known as to the portion of the property with regard to which there will be interference or whether there will be interference at all or not,

the relief can only be valued at what the plaintiff subjectively thinks it is worth.

(6) We notice in the present case that the plaintiff has not followed the correct mode of valuation. As was pointed out in the case reported in — 'AIR 1950 Cal 85 (D)', the correct mode of valuation in such a case is to put a single valuation, the option of valuing the relief resting with the plaintiff.

(7) We therefore set aside the order passed by the learned Subordinate Judge fixing the valuation at Rs. 6000/- and order that the plaintiff be allowed to put his own valuation on the relief for declaration and for the prayer for permanent injunction which will remain in the plaint after the deletion of his prayer for pre-emption, and direct that Court-fees will be payable ad valorem on the value put by plaintiff.

(8) The Rule is accordingly made absolute in the above terms with costs.

B/D.H.Z. Rule made absolute.

A. I. R. 1953 CAL. 756 (Vol. 40, C. N. 283)

SINHA J.

Annapoorna Farming and Fishery Ltd., Petitioner v. State of West Bengal and others, Opposite Party.

Civil Rule No. 156 of 1953, D/- 1-6-1953.

(a) Constitution of India, Art. 226 — Demand of justice and failure.

Where issue of a writ in the nature of Mandamus is asked for, there must be an averment of a demand of justice having been made and its refusal. AIR 1951 Cal 396; AIR 1952 Cal 601, Rel. on. (Para 3)

(b) West Bengal Food Grains (Intensive Procurement) Order (1952), Para 2 (1) — 'Director'.

Provisions in the definition of 'Director' empowering the director to authorise any officer to exercise the powers of the director are not 'ultra vires'. AIR 1952 Cal 118, Rel. on; AIR 1951 Cal 3, Distinguished. (Para 5)

(c) West Bengal Food Grains (Intensive Procurement) Order (1952), Form A — Validity.

Held that as the petitioner company was in entire possession of whatever lands it cultivated and there were no tenants or Adhiars or Bhagdars whatever the mistake in the translation of the directive in Form 'Ka' had not misled it and thereby vitiated the acquisition. The available surplus was calculated according to the declaration in Form 'B' or Form 'Kha' in which there was no defect. (Para 6)

(d) West Bengal Food Grains (Intensive Procurement) Order (1952), Para. 3 — Estimate of director.

The Director is entitled to base his estimate on reliable data furnished by a committee of experts and specially on results of actual crop-cutting experiments. A I R 1953 Cal 548 and Civil Revn. No. 293 of 1953 (Cal), Foll. (Para 7)

(e) Constitution of India, Art. 226 — Disputed question of fact.

It is not right that the High Court should deal with a disputed question of fact in an application under Article 226 and the petitioner ought to have preferred an appeal before the Tribunal provided for by the West Bengal Food Grains (Intensive Procurement) Order (1952). (Para 7)

Harideb Chatterjee, for Petitioner; Hemendra Kumar Das, Jagneswar Majumdar, and D. N. Basu, for Opposite Parties.

CASES CITED:

(A) ('51) AIR 1951 Cal 396: 55 Cal WN 255
(B) ('52) AIR 1952 Cal 601: 56 Cal WN 232
(C) ('53) AIR 1953 Cal 548: 57 Cal WN 397
(D) ('51) AIR 1951 Cal 3: 55 Cal WN 53
(E) ('52) AIR 1952 Cal 118: 55 Cal WN 693
(F) ('53) Civil Revn. No. 293 of 1953 (Cal)

ORDER: This is a rule issued upon the Opposite Parties to show cause why the directive dated 31-12-1952 served upon the petitioner under the West Bengal Foodgrains (Intensive Procurement) order 1952 (hereinafter referred to as the 'order'), should not be cancelled or why a writ in the nature of mandamus should not issue directing them to forbear from giving effect to the same.

(2) The facts are briefly as follows: The petitioner is a private limited company incorporated under the Indian Companies Act. Amongst other things, it carried on farming. On or about 12-11-1952, a notice dated 5-11-1952 was served upon the petitioner under the said order in Form 'Ka' (equivalent to Form 'A') in the Bengali language. As this notice has been attacked, I shall deal with it more fully later on. Pursuant to this notice in Form 'Ka', the petitioner filed a declaration in Form 'Kha' (equivalent to Form 'B') on or about 13-11-1952. That is also in the Bengali language. On 12-1-1953, the petitioner was served with a directive in Form 'C' calling upon the petitioner to sell and deliver 1528 mds. 5 seers of paddy which had been determined as the 'available surplus'. The petitioner objected to delivering the paddy and has taken out this Rule on 19-1-1952. The petitioner however has not preferred an appeal as provided for by the order.

(3) A preliminary objection has been taken on behalf of the opposite parties that there is no averment of any demand of justice having been made and its refusal, although the petitioners are asking for the issue of a Writ in the nature of Mandamus. This is a matter which is now well-settled and such averments have been held to be essential. In — 'Surendra Nath v. State of West Bengal', AIR 1951 Cal 396 (A), it has been held that this Rule is not only applicable to applications under S. 45, Specific Relief Act, but also under Art. 226 of the Constitution. Also see — 'Union of India v. Elbridge Watson', AIR 1952 Cal 601 (B). Mr. Chatterjee has drawn my attention to p. 605, where Banerjee, J. has referred to Halsbury's Laws of England, page 770, where it is pointed out that the principle does not apply to all possible cases and does not apply where a person through inadvertence had done or omitted to do some act which he was under a duty to do and where the time within which he should do it has passed. That principle however has no application to the present case because no time limit is fixed for demand and refusal and there is no averment that failure to demand justice was by inadvertence. This preliminary point by itself is sufficient to dispose of this application but I do not propose to decide it merely on this preliminary point but shall deal with the merits of the application.

(4) The constitutional points taken in this application are covered by my decision in — 'Atulla Kumar De v. Director of Procurement and Supply', AIR 1953 Cal 548 (C). Mr. Chatterjee appearing on behalf of the petitioner has however raised

several new points which I shall now proceed to deal with. The first point taken is as follows: The determination of the available surplus under the Order is to be made by a person described as the 'Director'. In the order which operated at the time relevant to this application 'Director' was defined as follows:

> 'Director' means the Director of Procurement and Supply in the Department of Food, Relief and Supplies, Government of West Bengal, and includes any officer who may be authorised by the said Director to exercise all or any of the powers conferred on the Director by or under this Order.

(5) Mr. Chatterjee argues that the matter is covered by a decision of this Court reported in — 'Khagendra Nath v. District Magistrate of West Dinajpur', AIR 1951 Cal 3 (D), where, dealing with the West Bengal Security Act 1950, it was held that the provisions of that Act, in so far as it entitled the Government to delegate its power to "any officer" subordinate to it, irrespective of whether that officer was fit to make such order or not, was a procedure which was wholly unreasonable and therefore ultra vires. It was pointed out in that case that if this was a valid law, the liberty of the subject may then be taken away by the lowliest of officers. Mr. Chatterjee argues that if the 'Director' means any officer to whom power can be conferred by the Director, then the fundamental right to hold property conferred upon the citizen can also be taken away by the lowliest of officers. This argument was considered by Bose, J., in — 'Abhimanya Adak v. State of West Bengal', AIR 1952 Cal 118 (E), in connection with the Bengal Food Grains (Disposal and Acquisition) Order 1947, which is a piece of legislation analogous to the one we are considering. The learned Judge pointed out that the object and scope of the provisions of the West Bengal Security Act were quite different from those of the Bengal Food Grains Order and so the observations made in regard to the said Act were not applicable to cases arising under the Bengal Food Grains Order. In my opinion, this distinction is well-founded. The liberty of a citizen and the deprivation of it requires mature consideration and I do not think that it is possible to compare it with the deprivation of a quantity of paddy belonging to a citizen. I do not say that the particular commodity is of no value. I merely wish to say that the two matters are not comparable and do not merit the same level of consideration. The definition of a 'director' has now been amended and the officers who can act as directors have been specified. The second point relates to the notice in Form 'Ka'. The notice in Form 'A' that had to be given under the Order at the relevant date contained the following words:

> ".....is hereby directed to make a declaration, in the enclosed Form of paddy lands held or cultivated by him in any capacity and also of the total quantity of portion or share of produce received or receivable by him from such land on or before the....."

(6) It is not easy to comprehend what exactly is the meaning of the word "the total quantity of portion or share." Does it mean the total quantity of the produce of yield of the land or is it only for eliciting the information as to whether the producer is in enjoyment of the entirety of the produce of his lands or only a portion thereof? Mr. Majumdar has drawn my attention to a decision of Lord Justice Denning where the learned Judge has said that legislation seldom attains mathematical precision. That may be so, but is it a sufficient excuse for using language so obscure that nobody can understand it? To take away the property of a citizen compulsorily is bad enough, but to attempt to take it away by serving notices which no one but an expert in the interpretation of statutes can be expected to understand, is a serious thing and must be condemned by all right-thinking persons. However I am glad to say that the authorities have realised it and now this Form has been suitably amended. Pondering upon the language of it, I have at last come to the conclusion that what it does require the producer to do is to set out, not the total quantity of his yield or produce, but to state whether he receives the whole of the produce or any fractional part thereof. This interpretation finds support in the contents of the declaration in Form 'B' (which follows Form 'A',) and in which there is no heading to show the total quantity of the produce or yield of the land of the producer.

The shortcomings of the notice in Form 'A' are however magnified in the translation thereof into the vernacular. As I see it, and Mr. Majumdar has not denied it, the translation is totally wrong. Instead of stating that the producer should show the share he receives from his land, he is (in His bengali version of the notice) asked to give a declaration as to the lands in respect of which he carries on cultivation or is in enjoyment of any share in the produce. That being the position, the question arises as to whether the whole requisition has been vitiated. Mr. Majumdar has pointed out that though this mistake has crept into the translation, the notice itself directs the producer to give a declaration in the "annexed Form" namely the Form 'Kha'. There is no mistake in the Form 'Kha' corresponding to the Form 'B'. Mr. Chatterjee tried to argue that his client was misled by this because his client might have omitted to answer the heading 3 in the declaration in Form 'Kha' because of the peculiar frame of the directive. I could have understood this argument if his case was that his client was in receipt of a part only of the produce of any land. As it appears from the affidavits however, the petitioner company is in entire possession of whatever lands it cultivates and are no tenants or Adhiars or Bhagdars whatever. Under the circumstances I cannot see how the mistake in the translation of the directive in Form 'Ka' has misled his client and thereby vitiated the acquisition. The available surplus is calculated according to the declaration in Form 'B' or Form 'Kha'. As there is no defect in Form 'Kha' I do not see how the petitioners have been prejudiced and the procurement vitiated. As I have already pointed out, the Form 'A' has now been simplified and amended and these problems are no longer likely to arise. In the amended Form, there is a simple direction to give a declaration in Form 'B'.

(7) The next point taken is that on 23-12-1952, the specification of prices had been rescinded and therefore it was argued that on 26th December there was no price fixed. Mr. Majumdar has however produced the Notification No. 1258(1) F. D. dated 23-12-1952 by which the Government re-fixed the prices. In fact after seeing this Notification Mr. Chatterjee has not pressed this point any further. Mr. Chatterjee has also taken the point that the Director in calculating the available surplus, makes his estimation not founded on any standards laid down either in the Order or in the Essential Supplies Act, and therefore such estimation is likely to be arbitrary. It is pointed out that he has based his estimate on the reports of certain committees and therefore the estimate is not his own estimate. I have already dealt with this point

in — 'AIR 1953 Cal 548 (C)', and in Civil Revn. No. 293 of 1953 (Cal) (F), and I need not deal with it again. In my opinion, the Director is entitled to base his estimate on reliable data furnished by a committee of experts and specially on results of actual crop-cutting experiments. Mr. Chatterjee lastly argues that the respondents have not given his client credit for about 400 maunds of paddy of which he had taken a loan. It is said that this matter formed the subject-matter of another rule disposed of by Bose, J., and was within knowledge of the respondents. With regard to this it is stated in the counter affidavit that the petitioner failed to satisfy the officers about this loan. This is therefore a disputed question of fact and the petitioner ought to have preferred an appeal before the Tribunal provided for by the Order and it is not right that I should deal with this disputed question of fact in an application under Article 226. I might mention that the Government offered before me, to look into the matter of the loan provided the petitioner otherwise delivered the paddy according to the directive but this offer was turned down.

(8) For the reasons aforesaid, I cannot grant any relief to the petitioner in this application and it must be dismissed.

(9) The Rule is discharged. Interim injunction is vacated and undertaking discharged. There will be no order for costs.

(10) As the petitioner wishes to appeal against this order, interim injunction and the undertaking will continue for six weeks more, after which, further stay, if necessary, must be obtained from the Appeal Court.

A/D.H.Z. Rule discharged.

A. I. R. 1953 CAL. 758 (Vol. 40, C. N. 284)

P. B. MUKHARJI J.

Ambalal Purusottamdas and Co., Defendants-Applicants v. Jawarlal Purusottam Dave and others, Plaintiffs-Respondents.

Suit No. 886 of 1953, D/- 22-5-1953.

(a) Constitution of India, Art. 14 — Discrimination.

Infringement of Art. 14 of the Constitution occurs where similarly situated or similarly circumstanced individuals are treated differently by the same law. If the law creates a classification, which is reasonable and has a basis not capricious or arbitrary then such classification is not discrimination so as to be an infringement of Art. 14 of the Constitution and, therefore, bad. AIR 1951 SC 41 and AIR 1951 SC 318, Rel. on. (Para 10)

†(b) Civil P. C. (1908), O. 37 — It is not unconstitutional — (Constitution of India, Art. 14).

Order 37, Civil P. C. is not unconstitutional and it does not infringe Art. 14 of the Constitution. The procedure under O. 37 is not against principles of natural justice and it is not an unreasonable law within any constitutional prohibition. (Para 18)

Though a difference is made between defendants in ordinary suits and defendants in suits based on negotiable instruments there is a good reason for this classification and for making difference in the treatment of defendants in the two classes of suits. The comparison between the defendants in two classes of suits is not a comparison between similarly circumstanced individuals. It is no discrimination on this ground. (Para 11)

Universal application of the same procedure to all Courts is not an unfailing requirement of the constitutional principle of equality before the law or of equal protection of laws. The fact that O. 37 does not apply to all Courts in the land does not 'ipso facto' make it unconstitutional on that ground. (Para 13)

Order 37 is based on a reasonable and justifiable classification of Courts between those specified in R. 1 of that Order and other courts. The comparison between one Court's procedure with the procedure of another court is not ordinarily a comparison between similarly circumstanced and similarly situated litigants. The importance of commercial cases in such courts can reasonably and substantially justify the summary procedure of O. 37. It is open equally without discrimination to all litigants provided they or their causes of action are within the jurisdiction of the Courts specified in R. 1 thereof. The executive or the State Government has no power to select either cases or litigants where O. 37 would apply. (Para 14)

(c) Negotiable Instruments Act (1861), Ss. 4 and 13 — Essentials.

The mere description of an instrument as a promissory note will not make it a promissory note if it fails to satisfy the statutory requirements of Ss. 4 and 13. (Para 21)

The fact that a promissory note is written on a page in an account book of the creditor does not make it illegal or any the less a promissory note. Though such a note cannot be negotiated from hand to hand, there is nothing in the Negotiable Instruments Act to make even a promissory note not negotiable by express terms or by necessary implication. (Para 21)

If a document in order to entitle a person to the money specified therein requires proof of succession, it cannot be construed as a negotiable instrument. (Para 21)

One of the basic tests of a promissory note is that the payee or bearer must be certain. The words 'we as well as our successors are bound herewith to fulfil your dues whenever and wherever you or your successors ask or demand the said sum' do not satisfy the test of certainty of the payee and cannot amount to a promissory note. (Paras 21, 23)

Anno: Negotiable Instruments Act, S. 4 N. 2, 6, 7.

(d) Civil P. C. (1908), O. 37, R. 2 — Applicability.

Order 37 of the Code is applicable to all suits on promissory notes, bills of exchange or hundis even though they are made non-negotiable by specific terms. (Para 22)

Anno: C. P. C., O. 37, R. 2 N. 9.

S. C. Deb, for Applicants; M. M. Sen, for Respondents.

CASES CITED:
(A) ('51) AIR 1951 SC 41: 1950 SCR 869 (SC)
(B) ('51) AIR 1951 SC 318: 1951 SCR 682: 52 Cri LJ 1361 (SC)
(C) ('52) AIR 1952 SC 75: 1952 SCR 284: 1952 Cri LJ 510 (SC)
(D) ('36) AIR 1936 PC 171: 63 Ind App 279 (PC)
(E) ('28) AIR 1928 Bom 436: 52 Bom 810

ORDER: This is an application by the defendants for leave to appear and defend this suit which has been instituted by the plaintiff under Order 37, Civil P. C. The summons was taken out on 30-3-1953.

(2) The suit is one for the recovery of a sum of Rs. 16,129-12-6 as principal and Rs. 500/- as interest due on a promissory note dated 17-4-1952.

(3) Many interesting and important points have been raised in this application. The defendants contend first that Order 37, Civil P. C. is 'ultra vires' the Constitution and is against the principle of natural justice. The next point taken is that the promissory note in this case is not really a promissory note because it is endorsed on an account book of the plaintiff and also because the language is not really the language of the usual promissory note. On merits, however, there is very little defence except some agreement is pleaded in the presence of one Doyalal Dave No. 24/25, Rup Chand Roy Street, Calcutta, by which it is said that the defendant firm would pay the sum of Rs. 16,129-12-6, by ten annual instalments. It is said that the defendants carry on business as members of a joint Hindu family under the name and style of Ram Sankar Purushottam Dave. There is no supporting affidavit, however, of Doyalal Dave, and the reason given is that he is in his native place laid down with Typhoid.

(4) The argument that Order 37, Civil P. C. is unconstitutional is based on the contention that the defendants have no right to be heard in these suits. It is argued then that this is against the principle of natural justice. It is also challenged on the ground that Order 37 dispenses with even the proof which an ordinary plaintiff litigant is required by Court to produce before even an ex parte decree is made in his favour. The complaint on this branch of the argument is against the provision where Order 37 Rule 2 (2) says that if no leave is taken within the period mentioned, the allegations in the plaint are deemed to be admitted. The unreasonableness of such a law is pointed out by emphasising the fact that no copy even of the plaint, as in other suits, accompanies the summons in a suit under Order 37 which is served on the defendant. In this case it must be remembered that the summons is only endorsed with the copy of the promissory note or any other negotiable instrument upon which the suit is filed stating the amount due on such note or instrument.

(5) Rights to any particular legal procedure in civil cases or a particular kind of proof in civil suits, except in so far as they come within the ambit of Article 14 of the Constitution of India are not the express concern of the Constitution in any of its articles, and should not be confused with the safeguards provided by the Constitution for protection of life, liberty and property. Article 14 of the Constitution is the only relevant Article which needs to be examined to test the argument that Order 37, Civil P. C. is unconstitutional. That Article states one of the fundamental rights under the Constitution. That fundamental right is equality before the law or the equal protection of the laws within the territory of India. Reduced, therefore, in terms of conflict with this constitutional provision, the applicant's argument is recast in the following way.

(6) Ordinarily, in a civil suit a defendant has a right to appear and defend without having to obtain any leave from the Court. He claims it as a matter of right to appear and defend himself. A discrimination is, therefore, said to be made in cases of suits under Order 37, Civil P. C. where such right is denied to the defendants in these suits because the law stipulates that such defendants must first obtain the leave of the Court to appear and defend. It is, therefore, said that his law of procedure creates inequality among defendants in different suits. It is also said on the very same ground that there is no equal protection of laws for the defendants in different suits. Some defendants get the right to defend, others do not. It is also said that no plaintiff in other suits is permitted to obtain a decree even ex parte against the defendant without proof of the facts alleged in the plaint, but a discrimination is made against a defendant in suits under Order 37, Civil P. C. where the allegations in the plaint are by law deemed to be admitted although the defendant not being served with a copy of the plaint along with the writ of summons as in other suits never gets an opportunity to see what is in the plaint, which the law asks him to admit.

(7) The argument on the basis of inequality is further developed on the ground that suits on negotiable instrument filed in Courts other than those specified in Order 37 Rule 1 do not enjoy the privileged procedure. It is, therefore, said that there is discrimination between the courts with regard to the same class of suits on negotiable instruments.

(8) In substance the argument that Order 37, Civil P. C. is ultra vires the Constitution being in breach of Article 14 thereof is reduced to the following propositions:

(1) No right to appear and defend without leave.
(2) Allegations in the plaint deemed to be admitted without proof.
(3) Difference between the same kind of suits in different courts.

(9) It is argued that each one of the above grounds creates an unconstitutional discrimination.

(10) Infringement of Article 14 of the Constitution occurs where similarly situated or similarly circumstanced individuals are treated differently by the same law. If the law creates a classification, which is reasonable and has a basis not capricious or arbitrary then such classification is not discrimination so as to be an infringement of Article 14 of the Constitution and, therefore, bad. That appears to be the ratio of the decisions of the Supreme Court in — 'Charanjitlal v. Union of India', A. I. R. 1951 S. C. 41 (A) and the — 'State of Bombay v. F. N. Balsara', AIR 1951 S. C. 318 (B). Analysing the argument addressed on the basis of discrimination, some important considerations arise. They may be briefly summarised to show how they do not infringe the Constitutional doctrine of equal protection of the laws or equality before the law under Article 14 of the Constitution.

(11) It is true a difference is made between defendants in ordinary suits and defendants in suits based on negotiable instruments. There is good reason for this classification and for making difference in the treatment of defendants in these two classes of suits. Having regard to the law of negotiable instrument, specially of its presumptions in favour of consideration, it is, in my judgment, a

legitimate provision of law to say that in any suit based on such instrument the defendant will not have the same rights as an ordinary defendant where consideration has to be proved and not presumed, but that the defendant should come in the first instance and obtain the leave of the Court to defend such a suit. The idea behind this procedure is that the Court is given a chance to see whether there is any substantial and honest defence to the suit or whether it is merely a device to delay or prevent recovery of moneys due on negotiable instruments whose place and importance cannot be over-emphasised in law merchant. In obtaining leave the defendant normally has to show & satisfy the court that although it is a suit on negotiable instrument and although consideration is presumed, he has nevertheless a good defence and he should be allowed to defend. In a proper case where the Court is so satisfied, the defendant does get leave to defend. I am of the opinion, in this context, therefore, that the comparison between defendants in ordinary suits and defendants in suits on negotiable instruments is not a comparison between similarly circumstanced individuals. I am also of the opinion for the same reasons that the classification of suits based on negotiable instruments and those which are not, is not an unreasonable or baseless classification. I hold, therefore, that it is no discriminaton on this ground.

(12) The second step in the argument on discrimination is that between the different courts, that is to say between courts specified in Order 37 Rule 1 and other courts there is a discrimination. A good deal of the force of this argument is taken away by the fact that by recent adaptations and amendments Order 37 has been extended to many courts and in respect of this State the Calcutta Amendment No. 27206-G of 19-11-33 extends it even to the district courts in 24 Parganas. But nevertheless the argument is still relevant and requires consideration because even after adaptations and amendments this Order has not been made universally applicable to all courts in the land.

(13) Universal application of the same procedure to all courts is not an unfailing requirement of the Constitutional principle of equality before the law or of equal protection of laws. The fact that Order 37, Civil P. C. does not apply to all Courts in the land does not ipso facto make it unconstitutional on that ground. To my mind the basic reason for holding this provision to be constitutional is that it is, in my opinion, still founded on a reasonable and substantial classification which cannot be said to infringe this Constitutional principle of equality before the law. The courts in India are necessarily graded and with varying jurisdictions, powers and procedures. Not all procedures for trial and appeal are common to all the Courts. The different classes of Munsiffs' Courts, Subordinate Judges' Courts, District Judges' Courts and Presidency and Provincial Small Causes Courts are all examples of such reasonable and substantial and justifiable classifications. The procedure in the Small Causes Courts is in many ways different from the procedure in the High Courts and other courts of record. Again there are many procedures open to the High Court which are not open to the other courts in the land. It is indisputable that a rule of procedure laid down by the Statute comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law. But the whole question here is whether the procedural provision of Order 37, Civil P. C. is one such procedure which infringes the Constitutional guarantee of equality before the law or equal protection of the laws. In my opinion, it does not.

(14) My reasons for that opinion are two-fold. First, Order 37, Civil P. C. is based on a reasonable and justifiable classification of Courts between those specified in Rule 1 of that Order and other courts. Comparison between one court's procedure with the procedure of another court is not ordinarily a comparison between similarly circumstanced and similarly situated litigants. The importance of commercial cases in such courts can reasonably and substantially justify the summary procedure of Order 37. Secondly it does not come within the rule laid down by the Supreme Court in the — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 S. C. 75 (C). Order 37, Civil P. C. is open equally without discrimination to all litigants provided they or their causes of action are within the jurisdiction of the Courts specified in Rule 1 thereof. The executive or the State Government has no power to select either cases or litigants where Order 37 would apply. As Mukherjee J. points out in the Supreme Court in — 'Anwar Ali Sarkar's case (C) at p. 91' of the Report already quoted

> "for the difference in the treatment rests here solely on arbitrary selection by the State Government"

and again at p. 92 of that Report

> "The fact that it (West Bengal Special Courts Act 10 of 1950) gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory."

Order 37 Civil P. C. does not come within the rule of "arbitrary selection by the State Government".

(15) The next argument is that in these suits the procedure under Order 37 is against the principle of natural justice. It is necessary to analyse this particular complaint against natural justice in the procedure laid down under Order 37 Civil P. C.

(16) First it is said that the defendant is condemned unheard. I do not think that criticism is justified on the facts or in law. The defendant has, in a suit under Order 37, Civil P. C. the right to come to the Court and apply for leave to appear and defend. It is a right to come to the Court. He is not condemned unheard. True, it is not the unqualified right to defend as in other cases; but that is very far from saying that the defendant in this case is being condemned unheard. He has a right to apply for leave to appear and defend within a particular time. If he comes within that time and shows good cause, he almost always gets leave to defend. If he fails to satisfy the court, he is refused leave to appear and defend. But then he is heard before leave is refused.

(17) It is then said that although the copy of the plaint is not served with the Writ of Summons in these classes of suits, the defendant is expressly said to be admitting the plaint which he has never seen or with which he has never been served. This is said to be insensible law and against the principles of natural justice because a man cannot be said to admit something which he has never known or seen. This argument has a right of plausibility about it. But the fact remains that although the plaint is not served, the promissory note or the negotiable instrument itself is endorsed on the Summons and the whole claim under Order 37 is and can only be a claim on the promissory note for principal and interest with costs and nothing more. In other words, what Order 37, Civil P. C.

does is to provide an expeditious and summary procedure to recover moneys due on negotiable instruments, and it is the policy of the legislature that such suits should have specially expeditious and summary procedure. In fact, the provision in the law that the allegations in the plaint are deemed to be admitted, does not work any hardship at all. The reason is that the substantive law of Negotiable Instruments Act provides in clearest terms that the consideration is to be presumed in such cases and it is for the defendant to come and prove the contrary that there was no consideration. When the summons in such suit with the negotiable instrument endorsed thereon is served on the defendant, he is at once apprised of the negotiable instrument on which suit is brought and that it is charged against him that he has failed to honour the instrument. If the defendant wants either to say that he did not execute the same, or the execution was under circumstances which invalidates the instrument or that there are other facts which destroy his liability on such instrument, he has only to state them in his application for leave to appear and defend, and if he satisfactorily does it, he is certain to get the leave.

(18) For these reasons I hold that O. 37, Civil P. C. is not unconstitutional and that it does not infringe Article 14 of the Constitution. I am also of the opinion for reasons I have just stated that Order 37, Civil P. C. is not against any principles of natural justice and is not an unreasonable law within any constitutional prohibition.

(19) The next argument advanced on behalf of the applicant is that this is not a primissory note and as such invocation of Order 37, Civil P. C. is improper and unjustified. Now in order to appreciate this particular point, it is essential that the promissory note on which the suit is brought is set out in full.

(20) The promissory note is in these terms:

"We two brothers on behalf of Messrs. Pranshankar Pursuttom Dave of 8/3/4, Harrison Road, Calcutta (shop address) and of Nadiad Dt. Kaira (Gujrat) (Residential address) declares hereby Messrs. Ambalal Purshottamdas & Co. of 1, Rup Chand Street, Calcutta as our creditor for the amount mentioned below on d/- 17-8-52 (Gujarati Sambat 2008 Shrawan Wadi 12 Sunday) Cr..... ..... Dr. ....

We the undersigned promise to pay the amount of Rs. 16129/12/6 (Rupees sixteen thousand one hundred twenty nine annas twelve and pies six only — on demand and we as well as our successors are bound herewith to fulfil your dues whenever and wherever you or your successors ask or demand the said sum. We are giving you this in writing wholeheartedly and willingly as promissory note.

For Pranshanker P. Dave
Sd/- (1) Jawaharlal Purshottam Dave
4 as.
Revenue Stamp
(2) Shankerlal Or Prabha Shanker Purushottam Dave on
d/- 17-8-52."

Now this document is said not to be a promissory note or at any rate a negotiable instrument so as to attract the summary procedure laid down in Order 37 of the Code. The argument is that it is a document in the shape of an acknowledgment with an agreement to pay. The reasons for the argument that it is not negotiable instrument may, briefly, be summarised. First, it is said that the note is not addressed to bearer or order but is said to be "you or your successors ask or demand." Secondly, it is argued that the entry is in a book of account signed by the debtor and is in the form of a debit entry. Therefore, there can be no negotiation from hand to hand to endorsement, and it is also said in this connection that there was no delivery in the sense understood in relation to negotiable instruments.

(21) In support of this contention reliance is placed on Section 4, Negotiable Instruments Act, which defines a promissory note as an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of a certain person, or to the bearer of the instrument, and on Section 13, Negotiable Instruments Act, that defines a negotiable instrument as meaning a promissory note payable either to order or to bearer. The fact that the promissory note is written out on a page in the book of account does not, in my opinion, make it illegal or any the less a promissory note. It is quite true that it cannot be negotiated by delivery specially because here on the reverse side of this book of account other writings appear, so that the possibility of even tearing away the page has also to be ruled out. The note here, therefore, cannot pass from hand to hand. But that can at best mean that it is not negotiable by delivery from hand to hand. But there are negotiable instruments which are made expressly not negotiable. I see nothing in the Negotiable Instruments Act to make even a promissory note not negotiable by express terms or by necessary implication. The words "you or your successor" can only mean this that there is no unlimited negotiation permitted of this promissory note. The word "Successor" does, in my view, however, raise a great difficulty because the name is not specified as to who the successor is and secondly, it is not said to be according to the order of "you". Now if a document in order to entitle a person to the money specified therein requires proof of succession, then I do not think it can be construed as a negotiable instrument. It appears to me that on a construction of this note the payee is not certain. In the first instance there are no words here which say unequivocally that the defendants promise to pay to the plaintiff. In the first part of the writing there is only a promise to pay, without specifying the payee. In the second half of the note the words used are

"We as well as our successors are bound herewith to fulfil your dues whenever and wherever you or your successors ask or demand the said sum."

In my view these words on a proper construction do not satisfy the test of the certainty of the payee of the promissory note. Therefore writ under O. 37 was not available for this instrument. I am not unmindful of the fact that the borrower has described the writing to be a promissory note. But his description will not make an instrument a promissory note if it fails to satisfy the statutory requirements in Section 4 and Section 13, Negotiable Instruments Act. In this connection courts will do well to remember the wholesome caution uttered by Lord Atkin in — 'Mahomed Akbar Khan v. Attar Singh', AIR 1936 P. C. 171 at p. 174 (D) "Serious embarrassment would be caused in commerce if negotiable net were cast too wide." Obviously the parties knew in this case what a promissory note was and they deliberately chose not to execute it either in the usual form or in the usual language. Both the manner and the method adopted were unusual and I do not see why the usual summary procedure for actions on negotiable instruments will be rendered open to the plaintiff.

(22) The question here is important from the point of view of Order 37, Civil P. C. The chapter heading of that order is "Summary Procedure on Negotiable Instruments." It has been argued before me that because of this heading Order 37 should not be made applicable to an instrument which though negotiable in character, is expressly made non-negotiable by specific terms. It is difficult to accept that argument, and I am not convinced that such an argument is sound. Rule 2 of Order 37, Civil P. C. provides that all suits upon bills of exchange, promissory notes or hundis may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed. That seems to make the procedure available to all suits on promissory notes. It is not said there that the promissory note or the bill of exchange or hundi has to be negotiable. Therefore, if the promissory note or bill of exchange is there, Order 37 should apply even though such promissory note or bill of exchange is non-negotiable.

(23) But the more fundamental question remains. Is it at all a promissory note within the meaning of Rule 2 in Order 37, Civil P. C.? It is an unconditional promise to pay. The maker is certain; the sum is certain. But, in my opinion, the payee is not certain. That being so the writing on the Account Book does not, in my view, satisfy one of the basic tests of a promissory note under Section 4, Negotiable Instruments Act, which insists that the payee or the bearer must be certain. Here it is neither. An instrument made payable to a Bank "their successors or assigns or order" is not one payable to a certain person and was held not to be a promissory note in — 'Mercantile Bank of India Ltd. v. L. D'Silva,' . AIR 1928 Bom 436 (E). That was a case of Municipal debentures where Marten C. J. held one such Debenture not to be negotiable instrument because it was payable to "successors or assigns or order" 'at p. 440 of the Report. Lord Atkin in — 'AIR 1936 P. C. 171 (D)', observed that it was necessary to be careful lest we introduce "usual visitors in the accustomed circles of negotiable papers". The present one sued upon is certainly very unusual. I will, therefore, not visit the defendant with the restrictions of an Order 37 suit. As the suit is instituted under Order 37 I will certainly give him leave to appear, defend and put him on the same level as a defendant in any other suit. Fresh service of writ of summons is waived by defendant and the plaintiff will furnish him with a copy of the plaint by next Wednesday.

(24) As the defence on merits does not impress me at this stage I will expedite the hearing of the suit.

(25) There will be an order granting leave to the applicant to appear and defend the suit and to file the written statement within one week from the date of the supply of the copy of the plaint. Cross order for discovery within a fortnight from thereafter, inspection within a week following and the suit will appear as a short cause on my prospective list on the last Friday in July next. The costs of this application will abide the result of the suit. Certified for counsel.

A/K.S.B. Leave to defend granted.

A. I. R. 1953 Cal. 762 (Vol. 40, C. N. 285)

K. C. CHUNDER J.

Jamini Khan, Defendant-Petitioner v. Dhirendra Nath Kundu, Plaintiff, Opposite Party.

Civil Revn. Case No. 143 of 1952, D/- 22-4-53.

Houses and Rents — West Bengal Premises (Temporary Provisions) Rent Control Act (17 of 1950), S. 14 (4) — Defence against ejectment.

Obiter—Anything which is a defence against ejectment will not be gone into before compliance with an order under S. 14 (4): AIR 1953 Cal 409, Doubted. (Para 4)

Bankim Chandra Roy, for Petitioner; Prafulla Kamal Das and Sudhansu Kumar Hazra, for Opposite Party.

CASE CITED:

(A) ('53) AIR 1953 Cal 409: 57 Cal WN 294

ORDER: This Rule was issued at the instance of a tenant who has been ordered by the Munsif to deposit rent under S. 14(4), West Bengal Premises Rent Control (Temporary Provisions) Act, 1950.

(2) The point urged before me is that in the written statement there was an allegation that there was no relationship of landlord and tenant. Therefore, no deposit should have been ordered. It appears that in a previous proceeding between the same parties the question whether there was a relationship of landlord and tenant between these two parties themselves was raised and was decided against the petitioner. That case was dismissed on another ground. Over and above this, when S. 14(4) application came to be heard, the petitioner himself was examined. His deposition was that there was an adjustment of some dues over the value of betel purchased from him against the cost awarded in the previous suit and the rent due to the plaintiff. He himself, therefore, accepted that he was a tenant and that rent was due. He pleaded a story of adjustment which the Munsif rightly disbelieved, the reasons having been given in his judgment.

(3) Under the circumstances, it is futile now to say that no order under S. 14(4) should have been passed on the ground of the defence mentioned in the written statement but not persisted in at the hearing. The order was, therefore, proper.

(4) My attention has been drawn to a decision in the case of — 'D. R. Gellatly v. J. R. W. Gannon', AIR 1953 Cal 409 (A) in which an observation has been made that the defence against ejectment on the ground that there is no relationship of landlord and tenant should be first decided before a decision to deposit the rent claimed and last paid under S. 14(4) is made. No doubt, the use of the word "tenant" may lend some justification to an observation of this kind. But at the same time, the section must be given a workable meaning. The intention of the Legislature is quite clear that anything which is a defence against ejectment will not be gone into before compliance with an order under S. 14(4).

Therefore, the Legislature perhaps intended that questions which are defences to ejectment should not be taken up at the stage when an order under S. 14(4) is passed to safeguard the interest of the plaintiff against harassment and subsequent pecuniary loss. If a defence against ejectment can be gone into prior to S. 14(4), it would appear that there would be no meaning in the provision that on failure to deposit the amount the defence against ejectment will be struck off. It is not necessary for me to give a final decision in this matter or to refer the question to the Division Bench so that a larger Bench may decide the question because, in the present case, as I have pointed out, the materials from record sufficiently justify the order passed by the Munsif and negative the defence of absence of relationship of landlord and

tenant. In a suitable case, it may become necessary to make an attempt to find out what really was the intention of the Legislature as expressed through the wordings of the section itself.

(5) The Rule is, accordingly, discharged with costs.

C/V.R.B. Rule discharged.

A. I. R. 1953 CAL. 763 (Vol. 40, C. N. 286)

SINHA J.

Atindra Nath Mukherjee, Petitioner v. G. F. Gillett and others, Opposite Parties.

Civil Rule No. 2017 of 1952, D/- 25-5-1953.

Army Instructions (India) (1949) No. 212 — Civilian paid from Defence Services Estimates — (Civil Services (Classification, Control and Appeal) Rules (1930), R. 55) — (Constitution of India, Art. 311 (2)).

Where the petitioner was an employee under the Control of the Director General of Ordnance Factories and was a civilian paid from Defence Services Estimates:

Held that the petitioner was governed by the rules adopted from the Army Instructions (India) No. 212 and R. 55, C. S. (C. C. A.) Rules did not apply in his case and, therefore, it was not necessary to serve him with a copy of the report of the Court of enquiry. (Para 4)

Held further that even if the petitioner was considered as holding a purely civilian post, it could not be said, considering the facts of the case, that he had no "reasonable opportunity" of defending himself because he did not receive the report of the court of enquiry. AIR 1948 PC 121, Distinguished. (Para 5)

Priti Bhusan Barman, with H. N. Rai Chaudhury, for Petitioner; Hemendra Kumar Das, with Smriti Kumar Rai Chaudhury, for Opposite Parties.

CASE CITED:

(A) ('48) AIR 1948 PC 121: 52 Cal WN 761 (PC)

ORDER: The petitioner in this case was employed in the Indian Ordnance Factories, Metal & Steel Factory, Ishapore, which is run under the Ministry of Defence, Government of India. On or about 2-4-1940 he was holding a civilian post under the Army Department as a godown keeper, senior grade in the pattern shop. It is not denied that this is a service coming under the description 'subordinate services' as dealt with in Part IX of the Civil Services (Classification, Control and Appeal) Rules. It appears from the affidavits that in or about that time, information reached the security staff of the factory that various irregularities were taking place in the belting section and that unauthorised works were being carried out. Mr. Dugal of the security staff is stated to have received certain definite information on 29-8-1951 and paid a surprise visit to the belting section. He found that one Sabdar Hossain, Beltman, was preparing a pair of new leather Sandals from material belonging to the Government but without any authority to do so and without the knowledge of his superior officers.

Upon being questioned the workman said that it was a pair of chappals belonging to Atin Babu, the petitioner. Thereafter the petitioner was served with a charge-sheet dated 6-9-1951. The charges were two in number & are set out in Para. 2 of the petition. The first charge was that a wrongful order was given by the petitioner to the workman to prepare a pair of new leather Sandals and the second charge was that materials belonging to the Government were supplied for the purpose of preparing the Sandals on a false plea that it was required against a certain requisition made by the Power House. The petitioner was given 7 days' time to answer the charge-sheet which he did on 11-9-1951 denying the charges. Thereupon, a Court of enquiry was formed, which called upon the petitioner to answer the charges. Upon the petitioner's application, the Court caused the official records to be produced before it.

Witnesses were examined and the petitioner was given the fullest opportunity of cross-examining witnesses deposing against him. The report of the Court of enquiry was however not disclosed to the petitioner, nor was he given a copy of such report. On or about 9-3-1952, an order dated 29th February/ 4th March 1952 passed by the Director General, Ordnance Factory, was served upon the petitioner, stating that the Director General had carefully examined the proceedings of the Court of enquiry and had come to the conclusion that both the charges had been established as true and the petitioner was asked to show cause why he should not be removed from service. The petitioner thereupon duly submitted his explanation. On or about 12-6-1952 an order was served upon the petitioner removing him from service. On or about 22-7-1952 the present Rule was issued.

(2) The case of the petitioner is based on Rule 55, C. S. (C. C. A) Rules. It is said that this Rule has not been complied with because the copy of the report of the Court of enquiry was not made available to the petitioner before he was asked to show cause why he should not be removed from service. The Rule as it appears in the Fundamental Rules does not say or lay down that any copy of such report should be supplied, but it appears from the notes appearing at the bottom of the Rule that there exists some kind of an executive instruction to the effect that the Government servant concerned should be supplied with a copy of the report of the enquiring authority before he was called upon to show cause. The reason for this is to be found in the case of — 'High Commrs. for India & Pakistan v. I. M. Lall', AIR 1948 PC 121 (A). The facts of that case are shortly as follows:

(3) I. M. Lall was a member of the Indian Civil Service. It appears that Government decided at some point of time to hold a departmental enquiry under Rule 55, C. S. (C. C. A.) rules against him and eight charges were framed. He put in his written statement in answer to the charges and one Mr. J. D. Anderson, Commissioner, Rawalpindi Division, was appointed to hold the departmental enquiry. Mr. Anderson examined Mr. Lall when he pleaded guilty to the first two charges and denied the rest. Mr. Anderson did not examine any witnesses but made his report to the effect that the remaining six charges were unproven and there should be a further and fuller enquiry.

This report was not disclosed to Mr. Lall but one Mr. Brayne was deputed to complete the enquiry. He did so and made a report. Mr. Lall, was then served with notice to show cause why he should not be dismissed, removed or reduced in rank or subjected to such disciplinary action as the competent authority might think fit to enforce. It was held that Mr. Lall had not had a "reasonable opportunity" of showing cause as he was entitled to have under S. 240 of the Government of India Act 1935. The Judicial Committee agreed with the following observation of the Federal Court:

"It seems to us that the section requires not only notification of the action proposed out of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that what punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given reasonable opportunity of showing cause why such punishment should not be imposed."

It was held that Mr. Lall was entitled to receive a copy of the report of the Court of enquiry before he was called upon to submit his explanation. It was pursuant to this decision of the Federal Court that the Government issued an executive instruction directing a copy of the report of the Court of enquiry to be furnished to a Government servant before he was called upon to furnish his explanation. It will be observed that in 'Lall's case, (A)', a variety of alternative penalties were proposed to be imposed and he did not know what was the penalty to which he would be subjected to and the particular offence connected with it.

Coming to the facts of the present case, it is firstly argued that the petitioner is not governed by Rule 55 of the C. S. (C. C. A.) Rules but by rules based on the Army Instructions (India) No. 212 which was promulgated by Government on 25-6-1949. I have been informed that these Rules were framed in respect of civilians paid from the Defence Services estimate. So far as the conduct of the enquiry in this particular case is concerned, the Rules contained in the Army Instruction have been followed and no other Rules. According to the Army instructions it is unnecessary to serve the public servant concerned with a copy of the report of the Court of enquiry. It is argued that there was no reason why Rule 55 of C. S. (C. C. A) Rules should not apply as the petitioner holds a civilian post. But it must not be overlooked that the petitioner does not hold a civilian post 'simpliciter' but a civilian post which is paid out of the army estimate.

(4) By virtue of a resolution No. 2228 in the military department, published in the Gazette of India dated 22-12-1917, the decisions of the Governor-General in Council on matters affecting the Army as a whole were issued in a form designated as "Army Instructions (India)" over the signature of the Secretary to the Government of India. The present Army Instruction (India) No. 212 dated 25-6-1949 was issued by the Government of India over the signature of the Secretary to the Government of India (Ministry of Defence) on the strength of the said resolution framing a set of rules regarding discipline in respect of civilians paid from Defence Services estimates. The Ordnance Factories in India are under the control of and are administered by a Directorate General in the Ministry of Defence.

In pursuance of power delegated under Rule 44 Civil Services (Classification, Control and Appeal) Rules 1930 the Government of India in the Ministry of Defence has framed rules by adopting the provisions of the said Army Instructions and has made it applicable to civilians paid from the Defence Services Estimates under the control of the Directorate-General Ordnance Factories. It appears that the decision of the Government was conveyed by an office memorandum dated 8-7-49 to the Director General, Ordnance Factories by the Under Secretary, Ministry of Defence who was empowered to sign the orders. The petitioner before his removal was an employee in the Metal Steel Factory under the Control of the Director General of Ordnance Factories and was a civilian paid from Defence Services Estimates, and as such is governed by the rules adopted from the Army Instructions (India) No. 212; Rule 55, C. S. (C. C. A) Rules does not apply in his case. These rules (based on the Army Instructions) continue to apply even after the Constitution came into operation, until specific provisions are made (See Article 313 of the Constitution) barring their operation.

(5) But even if the petitioner is to be considered as holding a purely civilian post, what is the position in law? Both under S. 240 of the Government of India Act 1935 and Art. 311 of the Constitution, the government servant concerned must have a "reasonable opportunity" of defending himself and explaining his own conduct. I have already pointed out that Rule 55, C. S. (C. C. A) Rules, by itself does not contain any provision that a copy of the report of the Court of inquiry should be supplied. In — 'Lall's case, (A)', (ibid) it was held that on the particular facts disclosed therein, it could not be said that a reasonable opportunity (as required by S. 240 of the Government of India Act) was given, without making available a copy of the report of the Court of inquiry. The Federal Court was careful to say that the matter must depend upon the facts of each particular case.

As I have pointed out above, Mr. Lall was called upon to show cause why he should not be subjected to a variety of penalties upon a variety of charges. Without getting a copy of the report of the Court of inquiry, he was not in a position to know which penalty was going to be imposed and to which charge it related. In the present case however the facts are entirely different. The charge is fairly simple and consists of the allegation that the petitioner was getting a pair of Sandals made for himself by a Government employee and with government materials. The penalty which was proposed to be imposed was his removal from service. The Court of inquiry gave every possible opportunity to the petitioner to prove his case. A large number of witnesses were examined. The petitioner was granted the opportunity of cross-examining them and he fully availed himself of it. All the official records were produced. How then can it be said that he had no "reasonable opportunity" of defending himself? On the facts of this case I do not see why he was prevented from explaining why he should not be removed from service because he did not receive the report of the Court of inquiry. In my opinion, the petitioner has had every reasonable opportunity of defending himself and justice has been done.

(6) The application must therefore be dismissed. The rule is discharged. I make no order as to costs.

A/V.R.B. Rule discharged.

A. I. R. 1953 CAL. 765 (Vol. 40, C. N. 287)

G. N. DAS AND DEBABRATA MOOKERJEE JJ.

Sm. Saralabala Devi, Appellant v. Shyam Prosad Chatterjee and others, Respondents.

A. F. O. O. No. 141 of 1950, D/- 23-2-1953.

(a) Civil P. C. (1908), S. 11 — Constructive res judicata — Executive proceedings.

Principles of constructive 'res judicata' apply to execution proceedings — Condition of S. 11, however, must be complied with as far as possible. (Para 11)

Anno: Civil P. C., S. 11 N. 23, 33.

(b) Civil P. C. (1908), Ss. 11, 42 and O. 21, R. 28.

Decree transferred for execution to another Court — Transferee Court cannot question propriety or correctness of the order of transfer — Objections to order raised but not decided by transferee Court — Principles analogous to constructive 'res judicata' do not apply. (Para 11)

Anno: Civil P. C., S. 11 N. 23, 33, 36; S. 42 N. 1; O. 21, R. 28 N. 1.

(c) Civil P. C. (1908), Ss. 39 and 42 — Transfer of decree — Order passed 'ex parte' — No service of notice on judgment-debtor — Order of transfer is not binding on him — Order is a judicial and not ministerial act — 'Ex parte' order passed on misleading affidavit — Successor-in-office finding conduct of decree-holder not bona fide — Judgment-debtor in fact having sufficient property within jurisdiction of Court — Successor-in-office recalling order of transfer — Discretion held rightly exercised. (Para 9)

Anno: Civil P. C., S. 39 N. 11; S. 42 N. 1, 3.

Chandra Nath Mukherjee, for Appellant; Shyama Charan Mitter, for Respondents.

CASES CITED:

(A) ('40) AIR 1940 Cal 161: 70 Cal LJ 438
(B) ('33) AIR 1933 Mad 844: 146 Ind Cas 317
(C) ('53) AIR 1953 SC 65: 1953 SCR 377 (SC)
(D) ('52) AIR 1952 Cal 673: 6 Dom LR (Cal) 138
(E) ('89) 5 Cal 736
(F) ('85) 1885 All WN 21: 7 All 330
(G) ('97) 21 Bom 456
(H) ('37) AIR 1937 Rang 477: 173 Ind Cas 107

G. N. DAS J.: This is an appeal by the decree-holder and is directed against an order of Sri R. R. Biswas, learned Subordinate Judge, Nadia, dated 1-9-1950.

(2) The facts are not in controversy and may be briefly stated as follows:

In 1935 the appellant instituted a suit for partition of certain joint lands against the respondents who are her co-sharers. The suit was registered as Title Suit No. 11 of 1935 of the Court of the Subordinate Judge, Nadia. The suit ended in a compromise decree on 30-11-1936. The substance of the terms of the compromise was that the appellant gave a lease of her undivided share in the property in suit in favour of the respondents at a monthly rent of Rs. 100/-.

(3) The rents so reserved not having been paid by the respondents, the appellant instituted a suit for recovery of rent being Rent Suit No. 4 of 1946. The Rent Suit was instituted in the Court of the Subordinate Judge, Nadia. The suit was decreed on 23-11-1948. On 13-7-1949 the appellant filed an application for transfer of the decree passed in Rent Suit No. 4 of 1946 of the Subordinate Judge's Court at Nadia to the Subordinate Judge, Alipore, through the District Judge, Alipore. The application for transfer is not printed in the paper book but the affidavit which was filed in support of the application is on the record. It is an affidavit sworn to by one Satish Chandra Banerjee, a son-in-law of the appellant. The affidavit is somewhat vague and, in my opinion, misleading. It purports to say that the judgment-debtors had no sufficient property in the district of Nadia but had property in the district of 24-Parganas. The object of the affidavit was to get an order from the Court in terms of S. 39(b)(c), Civil P. C. It appears from the order-sheet that this application for transmission of the decree was registered on the same day, viz., 13-7-1949. The Court directed the matter to be put up on 20-7-1949. On that date the learned Subordinate Judge, Nadia, made an order transmitting the decree passed in Rent Suit No. 4 of 1946 to the Court of the Subordinate Judge, Alipore, through the District Judge, Alipore. No notice was issued on the judgment-debtors.

(4) After the decree had been transmitted to the Subordinate Judge, Alipore, the appellant filed an application for execution as required in terms of O. 21, R. 11, Civil P. C. giving rise to Money Execution Case No. 33 of 1949 of the first Court of the Subordinate Judge, Alipore. It appears that the appellant prayed for sale of certain immovable properties belonging to judgment-debtor 1, who is respondent 1 in this appeal. The property sought to be sold is No. 6B, Kabir Road. After the attachment had been effected on 30-9-1949 the judgment-debtor 1 filed an objection under S. 47, Civil P. C. on 8-11-1949. This gave rise to Misc. Case No. 96 of 1949.

The first objection was that the execution was barred under S. 163A, Bengal Tenancy Act. The second objection was that the judgment-debtor had sufficient property in the district of Nadia and as such the order for transfer was bad in law. This Miscellaneous case came up for hearing before Mr. P. N. Lahiri, learned Subordinate Judge, First Court, Alipore. It appears from his order dated 18-2-1950 that the learned Subordinate Judge merely dealt with the objection under S. 168A, Bengal Tenancy Act. In his opinion, as the decree passed in Rent Suit No. 4 of 1946 related to a tenancy governed by the Transfer of Property Act the objection under S. 168A, Bengal Tenancy Act was incompetent. In this view he dismissed the Miscellaneous Case No. 96 of 1949.

(5) We have been informed that against this order there was an unsuccessful appeal to this Court. Thereafter the premises No. 6B Kabir Road was put up to sale, the date for sale being fixed on 10-7-1950. On 20-6-1950, judgment-debtor 1 filed an application under S. 39, Civil P. C. It was alleged in this application that the judgment-debtor was a resident of the district of Nadia and he had sufficient property within that district and that the order for transfer was made without notice to him and as such should be recalled. To this petition the appellant decree-holder filed an objection. It was pleaded inter alia that the order for transfer not having been appealed against was final and binding between the parties. It was also pleaded that the judgment-debtor had not sufficient property in the district of Nadia from which the decree-holder's dues could be realised. It was further pleaded that the judgment-debtor having taken identical objections in Misc. Case No. 96 of 1949 was barred by principles of constructive res judicata from re-agitating the matter.

(6) The learned Subordinate Judge has overruled the objections of the decree-holder and has made an order recalling the decree from the Court of the Subordinate Judge, Alipore. It is

the propriety of this order which is challenged in this appeal.

(7) Before I deal with the contentions raised in support of the appeal I may state the findings of the learned Subordinate Judge which are as follows: That no notice under S. 21, R. 22, Civil P. C. was served on the judgment-debtors, that the decision in Miscellaneous Case No. 96 of 1949 did not operate as res judicata, that the judgment-debtors had sufficient properties within the district of Nadia and as such the order for transfer should be recalled.

(8) Mr. Mookerjee who has appeared in support of the appeal has contended in the first place that the finding of the learned Subordinate Judge that the judgment-debtors had sufficient properties in the district of Nadia is not correct. We have been referred to the evidence on record but having perused the same, we are of opinion that the finding of the learned Subordinate Judge cannot be assailed. (His Lordship considered the evidence and proceeded:) In any view, the value of the properties of the judgment-debtors is more than sufficient to meet the decretal dues. The first contention raised on behalf of the decree-holder must therefore be overruled.

(9) Mr. Mookerjee next contended that the order for transfer of the decree by the Court of the Subordinate Judge, Nadia not having been appealed from was binding upon the parties and it was not open to the Subordinate Judge, Nadia, who is the successor-in-office of the learned Judge who made the order, to question the validity or propriety of this order. I have already pointed out that the order for transfer was made ex parte without service of any notice on the judgment-debtors. The order for transfer of a decree is not a ministerial act but is a judicial act and like all judicial acts it did not acquire finality as no notice was served on the parties affected thereby. This view is fully supported by a Bench decision of this Court in — 'Firm Ganeshdas Badrinarain v. Amulak Chand', AIR 1940 Cal 161 (A). A similar view of the effect of an ex parte order was taken by the Madras High Court in — 'Suryaprakasa Rao v. Venkata Dikshitalu', AIR 1933 Mad 844 (B). The ex parte order for transfer cannot therefore be binding on the judgment-debtors. This disposes of the second contention raised by Mr. Mookerjee.

(10) The third contention raised by Mr. Mookerjee concerned the effect of the order of dismissal of Miscellaneous Case 96 of 1949 filed by judgment-debtor 1 before the transferee Court, viz., the Court of the first Subordinate Judge, Alipore. As I have said that order disposed of an application under S. 47, Civil P. C. filed by the judgment-debtor 1. In that petition of objection judgment-debtor 1 specifically raised a plea that the order for transfer was bad, because the learned Subordinate Judge in making the order overlooked the fact that the judgment-debtors had sufficient properties in the district of Nadia which would have wiped out the decree obtained by the decree-holder. The order passed by the Subordinate Judge did not decide this objection.

It is contended that although the particular objection was not expressly disposed of, on principles of constructive res judicata it must be held that the objection was overruled by the learned Subordinate Judge and as such the decision in Miscellaneous Case No. 96 of 1949 would operate as res judicata disentitling the judgment-debtor 1 from reagitating the self-same objection viz., whether the order for transfer under S. 39(b) and (c), Civil P. C. was properly passed or not.

Reliance was placed on a recent decision of the Supreme Court in — 'Mohanlal Goenka v. Benoy Krishna Mukherjee', AIR 1953 SC 65 (C). The majority judgment was delivered by Golam Hossain J. It laid down that the principle of constructive res judicata applies to proceedings in execution even on a matter affecting the jurisdiction of the executing Court. In that case however, the executing Court was a transferee Court who had received on transfer a decree of this Hon'ble Court, for execution. The question that was mooted was whether the transferee Court had jurisdiction to execute the decree, the ground suggested being that the transferee Court had lost jurisdiction by reason of re-transfer of the decree to the transferor Court, viz., the High Court at Calcutta. This objection had been taken at an earlier stage of the execution proceedings before the transferee Court but had not been pressed and had not been expressly disposed of by any previous order of that Court. The contention was that on principles analogous to constructive res judicata the judgment-debtor was precluded from raising the objection he had taken but on which no decision had been given at an earlier stage of the execution case. The majority of the Supreme Court Judges held that the judgment-debtor was precluded from re-agitating the question.

It must be noted however that in that case the jurisdiction of the transferee Court rested on a question of fact viz., whether the decree had been re-transmitted and a certificate of non-satisfaction had been sent to the transferor Court, viz., the High Court at Calcutta. This fact was specifically pleaded in earlier stages of the execution case in the transferee Court but had not been disposed of by that Court. No question arose as to whether the transferee Court was competent to decide upon the validity or otherwise of the order for transfer. The only question debated was whether the transferee Court had retained jurisdiction or had lost the same by reason of what had happened in the course of execution proceedings in the transferee Court. This case therefore is not on all fours with the facts of the present case and is distinguishable. The question before us is somewhat different. In the present case an objection had been taken to the jurisdiction of the transferor Court in the transferee Court and this objection had not been adjudicated upon by the transferee Court.

(11) It is undoubtedly true that the principles of res judicata apply to proceedings other than suits including proceedings in execution. It must be taken as held by the Supreme Court that the principles of constructive res judicata are also applicable to execution proceedings. But the conditions of applicability of the principles of res judicata actual or constructive, contained in S. 11, Civil P. C. must be complied with in such cases, as far as possible. It is not the law that when a Court applies the principles analogous to res judicata, that Court can override the conditions specified in S. 11, Civil P. C. Those conditions must be fulfilled as far as possible: See — 'Abinash Chandra v. Madhusudan Mazumdar', AIR 1952 Cal 673 (D). One of the explanations appended to S. 11 is explanation V. Explanation V requires that a matter would be regarded as constructively in issue if such a matter might and ought to have been raised in the suit or the proceedings.

In the present case the question therefore arises whether the objection to the jurisdiction of the transferor Court might and ought to have been raised in the transferee Court. This depends on the extent of the powers which are possessed by the transferee Court. These powers are defined in S. 42, Civil P. C. which corresponds to the old

S. 228, Civil P. C., 1882. Section 42 provides that the Court executing a decree sent to it for execution

"shall have the same powers in executing the decree as if it had been passed by itself."

It is true that the words used are very general but they have to be read in the light of O. 21, R. 28, Civil P. C. which corresponds to S. 239, Civil P. C., 1882. Order 21, R. 28 says that an order of the Court which passed the decree in relation to the execution of that decree shall be binding on the Court to which the decree is sent for execution. In other words, the order of a transferor Court in relation to the execution of a decree shall be binding on the transferee Court. If we read S. 42 along with O. 21, R. 28 Civil P. C. the meaning of the words "powers in executing the decree' must mean powers in carrying out the purpose of executing the decree. Such powers only pass to the transferee Court. The transferee Court acts under delegated authority from the transferor Court and must, in my opinion, accept the order of the transferor Court under which the delegated authority is conferred on it. That this is the correct view is fully supported by a number of decisions to which our attention was drawn by Mr. Mitter on behalf of the respondents.

In — 'Beerchunder Manikya v. Maymana Bibi', 5 Cal 736 (E), it was laid down that the transferee Court cannot question the propriety or correctness of the order for transfer and that if the transferee Court makes an order challenging the propriety or correctness of an order of the transferor Court, the order of the transferee Court must be deemed to be ultra vires.

The same view was taken in — 'Ramlal v. Radheylal', 7 All 330 (F); — 'Mulla Abdul Hussein v. Sakhinaboo', 21 Bom 456 (G) and — 'Kannappa v. Ishaar Singh', AIR 1937 Rang 477 (H). The Court of the Subordinate Judge, 1st Court, Alipore, which had disposed of the Miscellaneous Case No. 96 of 1949 was therefore not competent to adjudicate upon the objection raised by the judgment-debtor 1 before it, to the effect that the transferor Court, viz., the Nadia Court had no power to make an order for transfer. In regard to such an objection it cannot be said that the principles of constructive res judicata would apply. The third contention raised by Mr. Mookerjee must therefore be overruled.

(12) A further question arises, viz., whether the Subordinate Judge, Nadia, should have in the exercise of his discretion under S. 39, Civil P. C., recalled the order made by his predecessor. An order under S. 39, Civil P. C. is a judicial order and like all judicial orders the discretion vested in the Court must be judicially exercised. In the present case the following facts appear from the record. The order for transfer was obtained on the basis of an affidavit which, in my opinion, was somewhat misleading and vague. No notice was given to the judgment-debtors prior to the order for transfer. After the decree had been received in the Court of Alipore, the decree-holder chose to select the judgment-debtor 1 as the person against whom the execution would proceed. It is true that the liability of the judgment-debtors is joint and several. But in my opinion, having regard to the findings of the learned Subordinate Judge that the judgment-debtors have sufficient properties in the district of Nadia of the value of about a lac of rupees and to the facts just stated, the conduct of the decree-holder in getting the decree transferred from the Court of Nadia to the Court at Alipore cannot be regarded as entirely bona fide. In these circumstances, in my opinion, the learned Subordinate Judge exercised his discretion properly in recalling the decree sent by his predecessor to the Court of the second Judge, Alipore. The order complained of must therefore stand.

(13) In the result this appeal is dismissed but having regard to the fact that the decree-holder has not been able to realise the decretal dues for a long period I direct that the parties will bear their own costs in this Court and in the Court below.

(14) DEBABRATA MOOKERJEE J.: I agree.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 CAL. 767 (Vol. 40, C. N. 288)

SINHA J.

Ramesh Chandra Chatterjee, Petitioner v. Director General of Observatories and another, Opposite Parties.

Civil Rule No. 673 of 1952, D/- 26-6-1953.

(a) Constitution of India, Art. 226 — Calcutta High Court's jurisdiction to issue writ against Director-General of Observatories, New Delhi, and Government of India.

The Director-General of Observatories, New Delhi, cannot be said to be carrying on his normal activities within the State of West Bengal and, as such, he would not be amenable to the jurisdiction of the Calcutta High Court which cannot therefore issue a writ under Art. 226 against him, nor can it issue such a writ against the Government of India. AIR 1953 SC 210 and Matter No. 38 of 1952, D/- 29-5-53 (Cal), Foll.; AIR 1953 All 477 (FB), Not foll.

(Paras 15, 16)

(b) Constitution of India, Art. 311 (1) — Government servant appointed by Director-General of Observatories — Servant accepting schedule of pay under Central Civil Services (Revision of Pay) Rules — By such acceptance servant cannot be deemed to have been appointed by Government of India — Notice of compulsory retirement given by Director-General cannot, therefore, be said to be incompetent — (Central Civil Services (Revision of Pay) Rules 1947).)

(Para 19)

(c) Constitution of India, Art. 311 (2) — Dismissal or removal — Compulsory retirement — (Civil Services (Classification, Control and Appeal), Rules, Rr. 49 and 55).

The dismissal or removal contemplated by Art. 311 (2) or R. 55 of C. S. (C. C. A.) Rules must be read with R. 49 of C. S. (C. C. A.) Rules and must therefore be based on indiscipline or misconduct. It follows that compulsory retirement is not such a dismissal or removal as would attract the provisions of either Art. 311 (2) or R. 55.

(Para 24)

Priti Bhusan Barman and Naresh Nath Banerjee, for Petitioner; Sankar Banerjee and Balai Lal Pal, for Opposite Parties.

CASES CITED:

(A) ('53) AIR 1953 SC 210: 1953 SCA 203 (SC)

(B) ('53) Matter No. 38 of 1952, D/- 29-5-1953 (Cal)

(C) ('51) Lloyds Bank Ltd. v. The Lloyds Bank Indian Staff Association (Calcutta Branches), D/- 17-1-1951 (Cal)

(D) ('53) AIR 1953 All 477: 1953 All LJ 148 (FB)

(E) ('51) AIR 1951 All 793: 52 Cri LJ 1450
(F) ('53) AIR 1953 SC 250: 1953 SCJ 323 (SC)

ORDER: This is an application directed against an order dated 20-1-1952 passed by the officiating Director-General of Observatories, whereby the petitioner has been ordered to retire from service on 20-1-1952, on attaining the age of 55 years. According to the petitioner, he is entitled to continue in service until he has attained the age of 60 years.

(2) The facts are briefly as follows: The petitioner joined Government service in 1929, at Karachi. Thereafter he continued in such service, obtained promotions in his permanent cadre as well as officiated in higher posts. In 1946, he was transferred to the office of the Director Regional Meteorological Centre, Alipore, Calcutta. In 1947, the petitioner elected to accept the scale of pay prescribed by the Central Civil Services (Revision of pay) Rules 1947, and his post came to be known as that of a 'Scientific Assistant'.

(3) On or about 21-11-1950, the petitioner was transferred to a temporary post under the Damodar Valley Corporation as a Senior Accountant. On or about 13-7-1951, it was communicated to him that although by the letter of the Ministry of Communications No. 1-M(1)/50 dated 29-6-1950 the post of a Scientific Assistant was declared to be a non-ministerial one, as a personal concession, the petitioner would be continued to be treated as a ministerial servant for the purposes of F. R. 56.

(4) Under F. R. 56, a non-ministerial Government Servant must retire at the age of 55 except in the special circumstances mentioned therein. A ministerial Government servant should ordinarily be retained until the age of 60 if he continues to be efficient, but may be required to retire at the age of 55 years. To put it more simply, a ministerial government servant may be compelled to retire at the age of 55, if he does not continue to be efficient.

(5) 'Ministerial Servant' has been defined (F. R. 9(17) S. III Ch. II) to mean a Government servant of a subordinate service whose duties are entirely clerical, and any other class of servant specially defined as such by general or special order of a local Government. I have the gravest doubt whether it was open to the Government to declare a post to be non-ministerial and yet continue to treat a particular incumbent as occupying a ministerial post. I have asked Mr. Burman to show me any rule which authorised Government to do so, but he could do no better than point out C. S. (C. C. A.) Rr. 8-9. In my opinion, these rules promulgated in 1930 do not affect the question at all.

(6) However, for the purposes of this application I shall proceed upon the footing that the petitioner was a ministerial government servant. On or about 5-12-1951, a charge-sheet was served upon the petitioner by the opposite party 1, through the Director, Regional Meteorological Centre Alipore, Calcutta to show cause why he should not be removed from service upon his attaining the age of 55 years on 19-1-1952. The charge-sheet contained 5 charges. The gravamen of the charges seems to be that he was constantly preoccupied with grievances real or imaginary and his work had deteriorated and he had ceased to be efficient. It was charged that not only was he discharging his duties inefficiently but his attitude was affecting the morale and efficiency of the office in which he worked. He was asked to submit his written statement within 15 days and also to intimate whether he wished to be heard in person.

(7) On or about 10-12-1951 the petitioner wrote a letter asking about various particulars required by him to make a statement and enquiring about the constitution of the tribunal. He also intimated that he would also like to be heard in person. On 15-12-1951 he was informed that it was not proposed to set up any special tribunal as the normal procedure would be followed as required under the provisions of Art. 311 (2) of the Constitution read with R. 55 of C. S. (C. C. A.) and that the petitioner would be given normal facilities for presenting his defence to the D. G. O. in writing or orally. On 31-12-1951, the petitioner sent in his statement in writing. He asked for an opportunity to call evidence to prove his defence. On 18-1-1952, the officiating Director-General of Observatories informed the petitioner that after a careful consideration of the statements made by him, he saw no reason to withhold action to retire the petitioner from service on 20-1-1952, and ordered him to do so. On 8-2-1952 the petitioner asked that the decision be reconsidered. This rule was taken out on 12-3-1952.

(8) The learned Standing Counsel, appearing on behalf of the opposite parties has taken a preliminary point. He argues that this Court has no jurisdiction to issue any writ or pass any order under Art. 226 of the Constitution against the opposite parties.

(9) According to learned counsel, the Director-General of Observatories neither resides nor has his office here. Hence, according to the recent Supreme Court decision, — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (A), this Court would have no jurisdiction to deal with him under Art. 226 of the Constitution.

(10) Opposite Party 1 has been described in the Cause-title as having his regional office at Alipore, Calcutta. In para. 1 of the petition, however, it is stated that he holds his office in the Indian Meteorological Department, Government of India which has its regional office at Alipore. The present incumbent of the office has affirmed an affidavit stating that by an order of the Government of India dated 28/31-12-1946, (A true copy thereof is annexed to his affidavit and marked 'A') his office is located in New Delhi. He states that the headquarters of one of the sub-offices of the India Meteorological Department which is responsible for meteorological work in the region comprising Assam, West Bengal, Bihar and Orissa is located at Alipore.

(11) It appears from the affidavits that the Indian Meteorological Department is an all-India department and that the regional office at Alipore has its own Director, who is described as the "Director, Regional Meteorological Centre, Calcutta". In the affidavit-in-reply, the petitioner states that he was functioning in an office subordinate to the head office at New Delhi, directly under the Central management and supervision of the Director-General of Observatories.

(12) But besides this statement, I have no evidence before me that the Director-General of Observatories, New Delhi, actually carries on or is concerned with, any work that is carried on at Alipore. There is a bland statement in the affidavit-in-reply that his rubber stamp is being used for official work on some documents. The nature of this work or the documents is not mentioned, and none produced. It therefore seems that the Alipore office is a regional office of the Indian Meteorological Department, but there is no evidence that the Director-General of Observatories

New Delhi, carries on any part of his normal activities there.

(13) The Indian Meteorological Department being an all India concern, must have numerous officials. Even assuming that the Director-General of Observatories, New Delhi, is an official very high up in its hierarchy, I have nothing to show that he normaliy functions at Alipore, so that it can be said that part of his office is situated in West Bengal and that he carries on his normal activities within this State.

(14) After the conclusion of the argument, Mr. Burman appearing on behalf of the petitioner has drawn my attention to a publication issued by the Government of India, being a report on the Administration of the Meteorological Department of the Government of India in 1949-50. Strictly speaking, this is a new material which ought not to be allowed to be used but in view of the fact that it is a Government Publication, I think I ought not to ignore it. At page 28 of that report I find the following statement:

"Offices of the Director-General of Observatories and the Deputy Director-General of Observatories (Administration), New Delhi.

These offices functioned as a single unit and dealt with questions of general policy and organisation and the administrative and technical control of the Department as a whole."

(15) I do not think that this description, cryptic as it is, throws any more light on the question as to whether the Director-General of Observatories actually has any function to perform within this State and at the regional centre at Alipur. There seems to be another Director-General of Observatories (Administration) at New Delhi. Presumably the administration of the various observatories throughout India is carried on from New Delhi. It further appears from the report that there are various directorates in the Meteorological Department. There is one, for example, in Climatology, one for Geophysics and so forth. They have their different offices situated at different places in India. It is therefore impossible to say on the materials such as is placed before me, that the Director-General of Observatories, New Delhi, has any normal function to perform at the regional office at Alipur.

No doubt, he may be connected with the work, that is being carried on there, because an all-India Department must have its ramifications all over India and each part is connected with the other. That however is not the scope of my enquiry. What I am concerned with is to find out whether the Director-General of Observatories, New Delhi, can be said to be carrying on his normal activities within the area of this State and, as such, whether he would be amenable personally to the jurisdiction of this Court and whether Writs issued by this Court could be executed so far as he was concerned. On the facts as stated before me, I do not see how these questions can be answered in the affirmative.

(16) These being the facts, let me examine the authorities on the point. In the Supreme Court decision (Supra) the facts were as follows: The Election Commission is a Statutory Authority constituted by the President and having its offices permanently located at New Delhi. The respondent filed his nomination to a by-election for a reserved seat in the Kakanada Constituency of the Madras Legislative Assembly. He was disqualified under S. 7 (b), Representation of the People Act, 1951, as he had been convicted and five years had not elapsed after his release. He was elected and took his seat as a member. He had applied for exemption to the Election Commission but the application was rejected. The Speaker referred the case to the Governor who forwarded the case to the Election Commission.

The Chief Election Commissioner came down to Madras and heard the respondent and it was agreed that any further representations should be sent in writing to Delhi. The respondent then applied to the Madras High Court which issued a rule. The Election Commission took objection to the jurisdiction of the Madras High Court. This objection was overruled by the Madras High Court which issued a writ of prohibition, prohibiting the commission from proceeding with the enquiry. On appeal the Supreme Court has overruled this decision and has held that the Madras High Court had no jurisdiction. "These writs" said Patanjali Sastri C. J.

"were thus specially directed to the persons or authorities against whom redress was sought and were made returnable in the Court issuing them and, in case of disobedience were enforceable by attachment for contempt. These characteristics of the special form of remedy rendered it necessary for its effective use that the persons or authorities to whom the Court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned Judge below that if a tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, such tribunal or authority must be regarded as "functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226."

The next case cited is — 'Sukhlal Chundermull v. A. N. Shah', matter No. 38 of 1952. judgment delivered by Das and Mookerjee JJ. on 29-5-1953 (Cal) (B) where the appeal bench held that this Court had no jurisdiction over an income-tax tribunal sitting at Bombay, although the original tribunal held its sitting in Calcutta, and it was only upon the two Judges of the Calcutta Tribunal disagreeing that it was referred to a third judge, who held his sitting at Bombay.

"Article 226 of the Constitution" said Das J. "empowers the High Court to issue directions, writs or orders throughout the territories in relation to which it exercises jurisdiction and to any person or authority including in appropriate cases any government within those territories. Thus the direction, writ or order cannot run beyond the territorial limits of the jurisdiction of the High Court and the person or authority to whom it may go must be amenable to the jurisdiction of the High Court, i.e., the presence of the person or the authority must be within the said limits: AIR 1953 SC 210 (A)."

As these authorities are fully binding upon me, I must hold that I have no jurisdiction to make any order against opposite party 1 under Art. 226 of the Constitution. Mr. Burman has pointed out that the Director-General of Observatories is empowered to draw his pay at any treasury in India. To my mind this is quite irrelevant upon the point we are considering and is of no assistance in solving the problem of the jurisdiction of this Court. As regards opposite party 2, the matter is concluded, so far as this High Court is concerned by the appeal Court decision in — 'Lloyds Bank Ltd. v. Lloyds Bank Indian Staff Association (Calcutta Branches)', Harries C. J. and Banerjee J. D/- 17-1-1951 (Cal) (C). Harries C. J. said as follows:

"It was faintly suggested at the outset that a 'mandamus' could issue against the Government

of India which is a respondent in this matter restraining that Government from giving effect to the award. Article 226 of the Constitution expressly allows writs in the nature of prerogative writs to issue against Government which is a departure from English practice. That Government must however be located in the territory over which the Court exercises jurisdiction and in my view the Government of India cannot be said to be located in the State of West Bengal and therefore writs under Art. 226 cannot issue against it at the instance of this Court."

(17) A Full Bench of the Allahabad High Court has expressed a contrary view, — 'Maqbulenessa v. Union of India', AIR 1953 All 477 (FB) (D). I am however bound by the view expressed by our own Court. The preliminary point is quite sufficient to dispose of the case. I shall however deal with the other points raised.

(18) Mr. Burman appearing on behalf of the petitioner raises two points:

(1) That the appointing authority of the petitioner is not the opposite party 1 but the Government of India, so that the notice of compulsory retirement was incompetent (vide Art. 311 (1) of the Constitution).

(2) That the petitioner was not given an opportunity to present his case personally and was therefore deprived of a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. (Vide Art. 311 (2) of the Constitution read with C. S.(C. C. A.) R. 55).

(19) With regard to the first point, Mr. Burman does not deny that the original appointing authority was the Director-General of Observatories, New Delhi. He however argues that by reason of his client electing to accept the schedule of pay under the Central Civil Services (Revision of Pay) Rules 1947, and the substantive post being renamed as 'Scientific Assistant' by the Government of India, the petitioner must be deemed to have been appointed by the Government of India. I am unable to accept this argument. By those rules, a Government servant was put to his election as regards the acceptance of his scale of pay but there is nothing in the rules to show that by such acceptance he changed the whole nature of his appointment and that he was to be deemed to have been appointed by the Government of India, or by some person other than the original appointing authority.

(20) The second point is however much more difficult. Assuming that the Director-General of Observatories is the appointing authority, the fact remains that although the petitioner was offered to be heard in person, no such opportunity was granted to him eventually. He asked for an opportunity to produce witnesses but this was denied to him. There can be no doubt that R. 55 C. S. (C. C. A) was not complied with. In his letter dated 15-12-1951, the acting Director-General of Observatories proposed to follow the procedure laid down by Art. 311 (2) of the Constitution read with R. 55 C. S. (C. C. A.) but he has not kept to his offer. The question is whether this has vitiated the order dated 18-1-1952.

(21) The learned Standing Counsel frames his argument thus. He says that R. 49 of C. S. (C. C. A.) Rules prescribes the penalties which can be imposed upon a Government servant for good and sufficient reason. Both Art. 311 (2) and R. 55 C. S. (C. C. A.) have selected three of these penalties, viz., dismissal, removal or reduction in rank, as meriting special safeguards, and have prescribed the rights of a government servant in respect thereof. These penalties he argues, can only be imposed for indiscipline and misconduct. On the other hand, compulsory retirement under F. R. 56 (b) does not necessarily involve any indiscipline or misconduct. A Government servant of the ministerial class may be required to retire if he does not continue to be efficient. It is argued that in such a case he cannot be said to have either been dismissed or removed for indiscipline or misconduct. In — 'Jayanti Prosad v. State of Uttar Pradesh', AIR 1951 All 793 (E), Agarwalla J. said as follows:

"Article 311 only applies to a case in which a person is dismissed or removed or reduced in rank. These are technical words used in cases in which a person's services are terminated for misconduct. They do not apply to cases in which a person's period of service determines in accordance with the conditions of his service."

(22) This view is upheld by the Supreme Court in — 'Satish Chandra Anand v. Union of India', AIR 1953 SC 250 (F), Bose J. states as follows:

"The services in India have long been afforded certain statutory guarantees and safeguards against arbitrary dismissal or reduction in rank. Under S. 240, Government of India Act 1935, the safeguards were limited to those two cases. Under the present constitution a third was added, namely removal from service. In order to understand the difference between 'dismissal' and 'removal' from service, it will be necessary to turn to the rules which governed, and with modifications still govern the 'services' in India because of Art. 313 of the Constitution.

Part 12 of the C. S. (C. C. A.) Rules relating to conduct and discipline includes R. 49 which sets out the various penalties to which a member of the services can be subjected for indiscipline and misconduct. They are seven in number.... The Act of 1935 selected only two of these possible penalties as serious enough to merit statutory safeguards namely reduction in rank and dismissal from service. The Constitution has added a third to the list....."

(23) Mr. Burman tried to argue that compulsory retirement for inefficiency amounted to a removal or dismissal for misconduct, the lack of efficiency being the misconduct. I am unable to accept this argument. A man may be by nature inefficient, but it has nothing to do with his conduct.

(24) Of course, compulsory retirement at 55 when a man might work till 60, is in a sense dismissal or removal and neither Art. 311 (2) nor R. 55 C. S. (C. C. A.) speaks about misconduct or indiscipline. But the law has now been interpreted by the Supreme Court and I am bound to hold that the dismissal or removal there contemplated must be read with R. 49 C. S. (C. C. A.) and must therefore be based on indiscipline or misconduct. It follows that compulsory retirement under F. R. 56 (6) is not such a dismissal or removal as would attract the provisions of either Art. 311 (2) or R. 55 C. S. (C. C. A.). It follows that there was no particular form which had to be observed to hear the petitioner and the order complained of is perfectly valid.

(25) For these reasons, the application fails and must be dismissed. The Rule is discharged. There will be no order as to costs.

A/V.R.B. Application dismissed.

A.I.R. 1953 CALCUTTA 770 (Vol. 40, C. N. 289)

K. C. CHUNDER J.

Jogai Chamarin, Appellant v. Atul Krishna Laha and others, Respondents.

A. F. A. O. No. 47 of 1952, D/- 30-4-1953.

Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), Ss. 28, 29—Applicability—(Tenancy

Laws — Calcutta Thika Tenancy (Amendment) Act (6 of 1953), Ss. 1 proviso, 8).

Application under S. 28 — Appeal and alternative revision pending on 21-10-1952— As far as pending proceedings are concerned, in view of the proviso to S. 1 of the Amendment Act S. 28 being omitted, appeal as well as the alternative application for revision are incompetent. (Paras 2, 3)

Satindra Nath Roy Choudhury and Sovendra Madhab Bose, for Appellant; Jyotirindra Nath Das, for Respondents.

JUDGMENT: This is an appeal against an appellate decree of the first subordinate Judge of 24-Parganas affirming that of the first Munsif of Sealdah.

(2) An application was made under S. 27, Thika Tenancy Act 1949 for rescinding or varying the decree. Against the order passed by the Munsif, an appeal was taken to the Court of the Subordinate Judge and the Subordinate Judge decided that no appeal was competent. Against that an appeal as well as an alternative revisional application have been filed in this Court. Those were pending on 21-10-1952. In view of S. 1 of the Amendment Act of 1953 and its proviso, it is clear that in pending proceedings the old Act as amended by this Amendment Act of 1953 has got to be applied and shall be deemed to have application always. Now as far as Amendment Act is concerned, in S. 8 it says that Ss. 28 and 29 of the original Act shall be omitted. The result therefore is that it is to be deemed always not to have Ss. 28 and 29 as far as pending proceedings are concerned in view of the proviso to S. 1 of the Amendment Act.

(3) The result therefore is that S. 28 being omitted this appeal as well as the alternative application for revision are incompetent and do not lie and these are therefore dismissed.

(4) There will be no order for costs.

(5) Let the records be sent down without delay.

B/D.H.Z Appeal and revision dismissed.

A.I.R. 1953 CALCUTTA 771 (Vol. 40, C. N. 290)

P. N. MOOKERJEE J.

Ramani Mohan, Defendant, Petitioner v. Jogesh Chandra Das, Plaintiff, Opposite Party.

Civil Rule No. 1399 of 1951, D/- 11-9-1952.

(a) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 — Order under, on application under S. 6 of W. B. Act 62 of 1950 — Extension of time — (Civil P. C. (1908), S. 151) — (Houses and Rents — W. B. Rent Control (Temporary Provisions) (Amendment) Act (62 of 1950), S. 6).

In an application under S. 6 of the Amending Act 62 of 1950, the Court may grant relief under sub-ss. (1) to (4) or sub-s. (5) of S. 18 of the W. B. Act 17 of 1950. In either case, however, the law clearly contemplates that whatever time is given to the tenant to make the requisite deposit, that time is final and therefore, cannot be extended by the Court under S. 151, Civil P. C. (Para 3)

(b) Civil P. C. (1908), S. 115 — Application under S. 6 of W. B. Act 62 of 1950 — Order directing tenant to deposit rent within 15 days and fixing date for further orders — Order if held final, is appealable as decree — If not a final order, need not be interfered with at interlocutory stage — In either case no revision lies against it. AIR 1953 Cal 524, Rel. on. (Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) (Amending) Act (62 of 1950), S. 6). (Para 7)

Anno: Civil P. C., S. 115 N. 4, 5.

Sudhir Chandra Majumdar, for Petitioner; Jitendra Nath Guha and Paritosh Sarkar, for Opposite Party.

CASE CITED:

(A) ('53) AIR 1953 Cal 524: (C. R. No. 1465 of 1951, D/- 10-9-1952)

ORDER: In this Rule the tenant-petitioner challenges two orders of the learned Munsif, 1st Additional Court, Alipore, one dated 11-4-1951 allowing his application under S. 6 of the new West Bengal Act 62 of 1950 for rescission of an ejectment decree passed against him on 25-9-1950 but directing him to deposit a sum of Rs. 313-15-3 within fifteen days and the other dated 5-6-1951 rejecting his application under S. 151, Civil P. C. for accepting the deposit, then offered to be made, by enlarging the time given under the previous order dated 11-4-1951.

(2) The relevant circumstances may be shortly stated as follows:— The landlord-opposite party brought the ejectment suit against the tenant-petitioner on 13-5-1949 alleging that the tenancy had been ipso facto determined under the Rent Control Act of 1948 then in force. This suit was decreed ex parte on 25-9-1950. In the meantime the Rent Control Act of 1950 (West Bengal Act 17 of 1950) had come into force and this Act was later amended by West Bengal Act 62 of 1950 to which reference has been made above. On 22-1-1951 the petitioner applied under S. 6 of this new Rent Control (Amendment) Act of 1950 (West Bengal Act 62 of 1950) for rescission of the ejectment decree. This was allowed on 11th April 1951 and the petitioner was directed to make the requisite deposit, viz., deposit of a sum of Rs. 313-15-3 within fifteen days. The deposit was not made within the time allowed but the Court instead of passing any final orders in the matter directed it to be put up for further orders on 7-5-1951. On 5-5-1951 the tenant-petitioner filed an application under S. 151, Civil P. C. offering to make the deposit forthwith and praying for acceptance of the same upon enlargement of the time given therefor by the previous order dated 11-4-1951. This application was eventually fixed for hearing in June 1951 and meanwhile the tenant petitioner made the deposit at his risk on 17-5-1951. Thereafter by his order dated 5-6-1951 the learned Munsif dismissed the petitioner's application under S. 151 of the Code of Civil Procedure. The present Rule was then obtained from this Court on 21st June 1951.

(3) From what I have stated above it is quite clear that S. 151, Civil P. C. can have no application to this case. The order dated 11-4-1951 was passed on an application under S. 6, West Bengal Act 62 of 1950. Under that section the Court may grant appropriate relief under S. 18, Rent Control Act of 1950 (West Bengal Act 17 of 1950). This relief can be granted either under S. 18, sub-ss. (1) to (4) or under sub-s (5) of the said section read with S. 14 of the Act. In either case, however, the law clearly contemplates that whatever time is given to the tenant to make the requisite deposit that time is final and therefore cannot be extended by the Court under S. 151, Civil P. C. The learned Munsif was, therefore, right in rejecting the

petitioner's application under S. 151 of the Code and that order cannot be touched.

(4) The question that still remains is whether the learned Munsif's order dated 11-4-1951 granting the petitioner only fifteen days' time to make the necessary deposit was right in law. It is quite clear from the said order that the learned Munsif obviously granted that time upon the view that in an application under S. 6 of the amending Act (West Bengal Act 62 of 1950) the part of S. 18 of the original Act (Act 17 of 1950) that is attracted is sub-s. (5) and that that sub-section entitles the Court only to grant relief under S. 14 of the Act and that, therefore, the maximum time that can be given for the making of the deposit would be fifteen days. It is contended before me by the learned Advocate for the petitioner that the learned Munsif's view of the law was wrong and he ought to have held that in an application under S. 6 of the amending Act 62 of 1950 the part of S. 18 of the original Act 17 of 1950 which is attracted is the earlier part, viz., sub-ss. (1) to (4) and that, therefore, the Court has power to grant time up to a limit of forty days for making the necessary deposit. It is, accordingly, urged that the order passed by the learned Munsif on 11-4-1951 was wrong and should be revised in accordance with law.

(5) In the view which I am taking it is not necessary for me to express any opinion on this question of law raised by the learned Advocate for the petitioner, viz., whether in an application under S. 6 of the amending Act 62 of 1950 the Court has power to grant relief under sub-ss. (1) to (4) or sub-s. (5) of S. 18 of the original Act 17 of 1950 and accordingly I express no opinion on the said question.

(6) The material portion of the order dated 11-4-1951 runs as follows:

> "Defendant is directed to deposit the sum of Rs. 313-15-3 within fifteen days. On such deposit the decree passed against the defendant would be vacated. To 27-4-1951 for further orders."

This may or may not have been a final order on the petitioner's application under S. 6 of Act 62 of 1950. But it is not necessary for me to decide that question too as whatever be the nature of that order, whether final or not, that will not affect the decision of this Rule as will be presently seen below.

(7) It has been held by a Bench of this Court in — 'Sm. Radharani Das v. Sisir Kumar', AIR 1953 Cal 524 (A) that a final order on an application under S. 6, Rent Control (Amendment) Act of 1950 (West Bengal Act 62 of 1950) or S. 18 of the original Rent Control Act of 1950 (West Bengal Act 17 of 1950) is a decree under the Code of Civil Procedure and is appealable as such. If, therefore, the learned Munsif's order dated 11-4-1951 was a final order on the petitioner's application under S. 6 of the amending Act 62 of 1950 it was open to appeal and, therefore, not revisable under S. 115, Civil P. C. If, on the other hand, it was not a final order but was to be followed by a further order, this further order finally disposing of the petitioner's application under Section 6 of the amending Act would be appealable under the Code and, in such circumstances, the interlocutory order dated 11-4-1951 ought not to be interfered with under S. 115 of the Code, the petitioner's remedy obviously lying in an appeal against the final order to be passed on his said application under S. 6, Rent Control (Amendment) Act 62 of 1950. In either view, therefore, the learned Munsif's order dated 11-4-1951 cannot or at any rate, ought not to be interfered with in revision.

(8) This Rule must, accordingly, fail and it is discharged leaving it open to the petitioner to take such steps in the matter as he may be advised to do in the light of the observations contained in this judgment.

(9) There will be no order for costs in this Rule.

B/D.R.R. Rule discharged.

A.I.R. 1953 CALCUTTA 772 (Vol. 40, C. N. 291)

P. N. MOOKERJEE AND GUHA RAY JJ.

Ajay Kumar Das, Appellant-Petitioner v. Pramatha Kumar Das, Respondent, Opposite Party.

Civil Revn. No. 1297 of 1953, D/- 12-6-1953.

Press and Registration of Books Act (1867), S. 4 — Cancellation of declaration.

There is no provision in the Act for the Magistrate to direct the cancellation of any declaration. (Para 4)

Anno: Press and Registration of Books Act, S. 4 N. 1.

Hiran Kumar Roy, for Petitioner; Basanta Kumar Panda, for Opposite Party.

GUHA RAY J.: This Rule obtained by Ajay Kumar Das on an application under Art. 227 of the Constitution of India is directed against an order of the Senior Deputy Magistrate and Press Act Magistrate, Midnapore, refusing to re-consider an order cancelling the declaration filed by this applicant under S. 4, Press and Registration of Books Act as the keeper and printer of a press known as Vidyasagar Press at Tamluk.

(2) It appears that on 1-11-1950, the applicant filed a petition before the District Magistrate saying that his father Sri Pramatha Kumar Das had purchased a Press known as Vidyasagar Prass at Tamluk and asking for permission to file a declaration under the Press Act for starting printing works. The petition was enquired into by the police and under the orders of the District Magistrate Ajay Kumar Das was allowed to file a declaration under Ss. 4 and 5 of the Press Act and Ajay Kumar Das actually filed the declaration on 10-12-1951. On 2-8-1952, Pramatha Kumar Das filed a petition asking for permission to file another declaration to the effect that he was the proprietor, keeper and printer of the Vidyasagar Press. He also was allowed to file this declaration. There was thereafter an investigation into this quarrel between the father and the son by the police. From the police report it appeared that Pramatha Kumar Das purchased the Press, but the house where the Press was located was the property of the wife of Pramatha Kumar Das, that is, the mother of Ajay.

(3) The learned Magistrate then finds that Pramatha Kumar Das was the real owner of the Press and directed cancellation of the declaration filed by the son the applicant before us. He was asked to re-consider this decision and he refused to do it. It is against this that the present Rule is directed.

(4) It appears to us that there is no provision in the Press Act for the Magistrate to direct the cancellation of any declaration. All that the Magistrate has to do under the Act is to keep the declarations filed in his office. Beyond this he has no responsibility and no powers. If there is a dispute between two or more persons about the

ownership of a Press, it is not open to him to decide that dispute. The order of cancellation of the declaration, therefore, passed by the Magistrate is clearly without jurisdiction and must accordingly be set aside.

(5) We accordingly make this Rule absolute, set aside the order of the Magistrate cancelling the declaration of the applicant. The dispute between the parties as regards the ownership of the Press cannot obviously be decided in this proceeding and must be left for the Civil Court.

(6) In view of the relationship between the parties, we make no order as to costs.

(7) P. N. MOOKERJEE J.: I agree.

B/V.R.B. Rule made absolute.

A.I.R. 1953 CALCUTTA 773 (Vol. 40, C. N. 292)

R. P. MOOKERJEE AND GUHA RAY J.

Corporation of Calcutta, Appellant v. Chandoolal Bhai Chand Modi, Respondent.

F. M. A. No. 80 of 1950, D/- 9-9-1952.

(a) Municipalities — Calcutta Municipal Act (3 of 1923), S. 141 — Objection regarding period of assessment.

Section 139 has not in any way circumscribed the nature of the objection which may be raised by the assessee before the Chief Executive Officer. He may also take any objection before the Court of Small Causes in the appeal under S. 141. (Para 13)

Further, the period for which the liability is to exist is inseparable from and is an integral part of the question about the determination of the liability. It is, therefore, competent for the Court of Small Causes to decide the question about the period of currency of the valuation fixed. (Para 15)

(b) Municipalities — Calcutta Municipal Act (3 of 1923), Ss. 131(2)(b) and 147 — Distinction.

The circumstances under which the provisions contained in Ss. 131(2)(b) and 147 can be attracted are clearly distinguishable as there is a clear distinction between a "cancellation" of the annual value and a "revised" value referred to in S. 147. There is no connection between these sections. (Paras 31, 36)

Section 147 would be attracted only when either the Chief Executive Officer or the Court, on an appeal being preferred to it, modifies a valuation made by the Chief Executive Officer and substitutes a new revised valuation. Section 131(2)(b) on the other hand applies in cases where the authority hearing the objection cancels a valuation made, without fixing a new valuation in the order. On such cancellation the property has no valuation and the steps which are to be taken by the Corporation, if such further steps are available to the Corporation under the law, are that the Corporation starts the proceedings from the beginning. Unreported decision of S. R. Das J. in North British and Mercantile Insurance Co. v. Corporation of Calcutta, Rel. on. (Para 36)

(c) Municipalities — Calcutta Municipal Act (3 of 1923), S. 131(2)(b) — Cancellation on the ground of irregularity — Meaning.

The provisions contained in cl. (b) are of a very general character. It does not limit the order for cancellation by any particular officer or authority. The order for cancellation by any authority will attract this provision. The term 'irregularity' is used in the ordinary dictionary meaning without predicating any special legal significance. The valuation which cannot be sustained either being wrong on legal objections or for a procedural defect will be equally hit by cl. (b) above. (Para 32)

(d) Municipalities — Calcutta Municipal Act (3 of 1923), S. 147 — 'Appeal is preferred under S. 141' — Interpretation (Interpretation of Statutes).

The phrase "or an appeal is preferred under S. 141" does not fit in with the grammatical structure of the section. The whole sentence gives a correct and complete sense if in place of "an appeal is preferred under S. 141" we read "or an appeal preferred under S. 141". With the omission of the word "is" there can be no doubt whatsoever as to what the legislature had meant. (Para 40)

This is one of those very rare occasions where the Court will interpret the section ignoring the word 'is' as redundant and meaningless. The position would have been otherwise if the section could have been given sense with the word 'is'. Then the Court would have had no jurisdiction to interpret the section ignoring the word 'is'. (Para 41)

Further, the provisions being in the nature of a taxing provision, have to be strictly interpreted and if there be any doubt, the Court must lean in favour of the assessee. (Para 42)

Atul Chandra Gupta and Krishnalal Banerjee, for Appellant; Santosh Kumar Bose, Probhat Kr. Sen Gupta, and Sudhir Ranjan Banerjee, for Respondent.

CASES CITED:

(A) ('39) AIR 1939 Cal 706: 43 Cal WN 789

(B) ('43) North British and Mercantile Insurance Co. Ltd. v. Corporation of Calcutta, D/- 13-5-1943 (Cal)

R. P. MOOKERJEE J.: This is an appeal on behalf of the Corporation of Calcutta and arises out of proceedings initiated by the respondent assessee under S. 141, Calcutta Municipal Act, objecting to the assessment made in respect of premises No. 18/13 Dover Lane, Calcutta.

(2) The principal objection raised on behalf of the assessee was that the assessment made would take effect from 1-7-1948 and not from 1-4-1946. For a proper appreciation of the point raised by the assessee reference need be made to the circumstances under which the present assessment was made.

(3) The annual value of the premises in question was determined by the department under S. 127(a), Calcutta Municipal Act, with effect from the first quarter 1946-47 for the 6 yearly general revaluation of the Ward under S. 131(1) of the said Act. Objection was raised under S. 139 of the Act and the Deputy Executive Officer reduced the annual value from Rs. 1350 to Rs. 891 confirming the valuation under cl. (a) of S. 127. An appeal was taken to the Court of Small Causes by the assessee against that decision under S. 141 of the said Act. The learned Judge of the Court of

Small Causes set aside the valuation holding that the valuation should have been made under cl. (b) and not under cl. (a) of S. 127. This judgment was passed on 13-12-1947. The Corporation of Calcutta accepted the decision and did not prefer any appeal to this Court.

(4) On 14-6-1948, the Assessor of the Corporation of Calcutta gave notice to the assessee in the following terms:

"Please take notice that the assessment of the above premises under cl. (a) of S. 127, Calcutta Municipal Act, 1923, which was to take effect from the first quarter of 1946-47 having been set aside by an order made by the Judge of the Small Causes Court at Sealdah on 13-12-47, the above premises has been assessed under cl. (b) of S. 127, Calcutta Municipal Act, 1923, at an annual valuation of Rs. 1491 and the said value will remain in force for 6 years from the commencement of the first quarter of 1946-47. Please note that the land value of the above premises is taken at Rs. 3000 per cottah."

(5) On receipt of this notice objection was filed under S. 139 of the Act both about the quantum and the proposed period of currency of the said valuation. The Deputy Executive Officer of the Corporation disposed of the objection under S. 140 of the Act confirming the period of currency as from 1-4-1946 but reduced the quantum from an annual value of Rs. 1491 to Rs. 823.

(6) Against this decision the assessee filed an appeal under S. 141 of the Act maintaining that the annual value at Rs. 823 would only operate under S. 131(2)(b) of the Act for the unexpired portion of the six years, viz., from 1-7-1948.

(7) On behalf of the Corporation it was contended that the assessee was not entitled to file an appeal under S. 141 of the Act inasmuch as no objection was raised with regard to the quantum but the objection was limited only to the period of currency of the new assessment. Secondly if the Court was competent to enter into the point raised the assessment made would operate for the entire period of the General Revaluation from 1-4-1946. The learned Judge overruled the objections raised by the Corporation and held that the valuation as determined by the Deputy Executive Officer would take effect from 1-7-1948 for the unexpired portion under S. 131(2)(b) and not from 1-4-1946. It is against this decision that the Corporation of Calcutta has preferred the present appeal.

(8) The first question to be considered is about the scope of an appeal preferred by an assessee under S. 141, Calcutta Municipal Act.

(9) Chapter 10, Calcutta Municipal Act, 1923, deals with the Consolidated Rate. Section 131(1) provides, inter alia, that an assessment made by the Executive Officer is to have effect for 6 years. On a valuation being fixed under S. 131, the Executive Officer is to cause under S. 137 to give public notice when the valuation has been completed and where the list may be inspected. In every case where the premises is for the first time valued or where the valuation previously made is increased under S. 131 a special notice is required to be given to the owner or occupier under S. 138 of the Act.

(10) Section 139 provides:

"Any person who is dissatisfied with a valuation made under this Chapter may deliver at the Municipal office a written notice stating the grounds of his objection to such valuation."

(11) Section 140 requires that the Executive Officer or some other officer authorised "shall hear the objection" and determine the said objection.

(12) It is manifestly clear that S. 139 does not, in any way, limit the nature of objection which may be raised by the assessee. The objection raised need not be only about the quantum of the valuation made. The assessee, if dissatisfied may raise any objection and under S. 140 "all such objections" shall have to be heard and decided by the Executive Officer. "Any person dissatisfied with the order passed" under S. 140 may under S. 141 appeal to the Court of Small Causes.

(13) It is clear that the Legislature has not, in any way, circumscribed the nature of the objection which may be raised by the assessee before the Chief Executive Officer. He may also take any objection before the Court of Small Causes.

(14) It is argued on behalf of the Corporation that the only objection which may be raised before the Executive Officer should be about the quantum without raising any question on law about the jurisdiction far less about the period of currency of the valuation fixed. We do not think that there is any substance in this contention. As observed in — 'Government of Bengal v. Corporation of Calcutta', AIR 1939 Cal 706 (A), an order of the Executive Officer comes within the scope of an appeal under S. 141.

(15) It is incontestable that the period for which a valuation is being enforced is an integral part of the order appealed against. That which the Court is called upon to determine is the question of the liability of the assessee and the date from which the liability is to take effect is prima facie a matter for determination by the Tribunal which has to consider the liability of the assessee. The period for which the liability is to exist is inseparable from and is an integral part of the question about the determination of the liability. In this view, it must be held that it is competent for the Court of Small Causes to decide the question about the period of currency of the valuation fixed.

(16) We have now to consider whether the annual value as fixed by the Deputy Executive Officer on 28-8-1949 under S. 140 of the Act after hearing an objection filed by the assessee is to take effect from 1-4-1946, as contended on behalf of the Corporation of Calcutta, or from 1-7-1948 as decided by the Court of Small Causes upholding the contention raised by the assessee.

(17) According to the assessee the valuation as had originally been proposed having been cancelled by the Court of Small Causes on 30-12-1947, Cl. (b) of sub-s. (2) of S. 131 of the Act is attracted. The new valuation as notified by the Assessor's letter dated 14-6-1948 (Ex. 1) could be levied only for the unexpired portion of the six-year period and not from the beginning of the first quarter, 1946-47.

(18) On behalf of the Corporation it is contended that Cl. (b) of sub-s. (2) of S. 131 could not be attracted in the present case as the Small Causes Court had not cancelled the previous valuation "on the ground of irregularity" but because the basis of calculation only was modified and it was declared that the annual value should have been fixed not under Cl. (a) but under cl. (b) of S. 127 of the Act. The annual value as notified to the assessee by Ex. 1 on 14-6-1948 was really a revised valuation in consequence of an objection made by the assessee and an order passed after "an appeal is preferred under S. 141". Section 147 of the Act makes a special and specific provision which would apply under such circumstances and

"the revised valuation shall take effect from the quarter in which the first mentioned valuation would have taken effect"

i.e., from the beginning of the 1st Quarter 1946-47.

(19) It is the common case of both the parties that the annual value now being fixed is under sub-s. (1) of S. 131 of the Act and the relevant portion of the sub-section provides that the annual value as may be fixed by the Executive Officer, of lands and buildings situated in the several Wards of the City

"shall after such assessment has been made by the Executive Officer, have effect for a period of six years and may be revised thereafter by the Executive Officer at the termination of successive period of six years."

Sub-section (2) of S. 131 of the Act makes provision when the annual value fixed by the Chief Executive Officer under sub-s. (1) of that section may be amended or the effect of the annual value as fixed being suspended before the expiry of the six year period.

(20) Clause (a) of sub-s. (2) above mentioned makes it possible for the valuation to be fixed annually and not sexennially.

(21) Clause (b) of the same sub-section will be considered later on after we have referred to the other sub-clauses.

(22) Clauses (c) and (d) provide for a revaluation of the premises during the six-year period. If during the currency of such period either any substantial alteration and improvement is made or if any new building is erected. In both these cases the new intermediate valuation is to remain in force until the expiration of the original six-year period.

(23) Clause (e) of that sub-section allows on the fulfilment of certain conditions the assessee to apply for revaluation if during the currency of such six year period the building standing thereon is demolished or there is depreciation of value on grounds beyond the control of the owner or occupier. In these cases also the revised valuation is to be in force for the remaining period of six years.

(24) Clause (f) of the sub-section gives authority to the Corporation to revalue a premises if after valuation is reduced under cl. (e) above on the ground that subsequent to the depreciation above mentioned if substantial alterations and improvements had been made to the building. This second revision during the currency of the six years period would have effect for the remaining portion of the six year period.

(25) Clauses (g), (h) and (i) provide for revision of valuation during the currency of the six year period when a property is acquired by the Calcutta Improvement Trust or when a transfer is effected by the Trust of properties already vested in it. In each of these three contingencies the new valuation as may be fixed on the altered conditions and circumstances would take effect from 1st date of the quarter following the date of acquisition or transfer as the case may be.

(26) Clause (b) of sub-s. (2) of S. 131 on which reliance is placed on behalf of the assessee may be quoted in extenso.

"(b) Any land or building the valuation of which has been cancelled on the ground of irregularity, or which for any other reason is not annual value assigned to it under this Act may be valued by the Executive Officer at any time during the currency of the period prescribed in respect of such land or building by sub-s. (1), and such valuation shall remain in force, and the consolidated rate shall be levied according to it, for the unexpired portion of such period."

(27) The two conditions under which the Corporation may value a property, not at the beginning of the six year period referred to in sub-s. (1) of S. 131 but during the currency of the period are

1. when the valuation of a premises has been cancelled on the ground of irregularity or
2. when for any other reason "no annual value is assigned" to it under the Act.

(28) What is really meant by the expression that a valuation has been cancelled on the ground of irregularity? Mr. Gupta on behalf of the Corporation frankly stated that the real implication on the first part of this clause is not at all clear but it seems that the legislature intended to limit the application of this clause to cases where the valuation has been cancelled "on the ground of irregularity", that is, where a valuation is to be cancelled on the ground of some procedural defect. This clause will not be attracted when the valuation is found to be illegal or when a valuation is either directed to be revised or is revised for which specific provision is made under S. 147 of the Act.

(29) Mr. Gupta contends that though the language used in cl. (b) of sub-s. (2) of S. 131 of the Act is far from being clear it appears that those provisions will be attracted if and when an assessment is made by a person other than one competent to make the valuation. The valuation so made or fixed is wholly without jurisdiction and assessment made on such illegal valuation would be set aside. In such circumstances the proper steps which are taken for the first time for determining the annual value under sub-s. (1) of S. 131 will have the effect, from when the correct valuation is made, and not from the beginning of the six-year period till the end of that period.

(30) He further contends that if a valuation is made which is objected to as not having been properly made, as when a property is required to be valued under cl. (a) of S. 127 is initially valued under cl. (b) or vice versa. If such an error is committed, that is not on a question of procedure but one affecting the jurisdiction of the valuing authority, such an error may be detected either by the Chief Executive Officer when hearing an objection under S. 140 or by the Court of Small Causes under S. 141, or by this Court when hearing an appeal from the decision of the Court of Small Causes. In the latter case cl. (b) of sub-s. (2) of S. 131 cannot be attracted. It is contended that in such a case the steps taken by the Chief Executive Officer in valuing a property under sub-s. (1) of S. 131 are not washed out. The effect of such an order is merely to authorise the Chief Executive Officer to take further steps for completing the valuation. It is that what has been done by the Chief Executive Officer after such an order is made. It is not a new valuation. It is in continuation of the previous steps taken. The revised valuation so made is in consequence of an objection made under S. 139 or S. 140(2) or in consequence of an appeal having been preferred under S. 141. Section 147 of the Act clearly refers to such revised valuations and they are to take effect and are to be in force for the period for which the original valuation which had not been found acceptable would have taken effect, i.e., from the beginning of the six year period.

(31) In our view such an interpretation of the provisions contained in cl. (b) of sub-s. (2) of S. 131 and of S. 147 is not well founded. To us it appears that the circumstances under which the provisions contained in the two sections can be attracted are clearly distinguishable. There is a clear distinction between a "cancellation" of the annual value and a "revised" value referred to in S. 147 of the Act.

(32) Mr. Gupta could not ask us to overlook the fundamental difference indicated above; he wants,

however, to restrict the operation of cl. (b) of sub-s. (2) of S. 131 to a case of "cancellation" on the ground of irregularity as contra-distinguished from a cancellation case on 'legal objections'. There is no foundation for such differentiation in the present case. The provisions contained in cl. (b) are of a very general character. It does not limit the order for cancellation by any particular officer or authority. The order for cancellation by any authority will attract this provision. The term 'irregularity' is used in the ordinary dictionary meaning without predicating any special legal significance. The valuation which cannot be sustained either being wrong on legal objections or for a procedural defect will be equally hit by cl. (b) above.

(33) This interpretation will be clear from the other clauses appearing in cl. (b). If in respect of a property no annual value has been assigned to it for whatever reason it may be, the attempts made by the Chief Executive Officer to assess it for the first time under sub-s. (1) of s. 131 will have effect not from the beginning of the six year period but for the unexpired portion of such period. The circumstances under which cl. (b) may be attracted are of the same species—there is no existing annual value fixed for the premises, either because the earlier valuation is cancelled or that no annual value had been assigned.

(34) Reference was made in this connection in the lower court and also before us to an unreported judgment of this court in the matter of 'North British and Mercantile Insurance Co. Ltd. v. Corporation of Calcutta (Judgment delivered by S. R. Das J. on 13-5-1943) (B). The order in this case was made on the court being moved under S. 45, Specific Relief Act. A particular premises belonging to the assessee North British Mercantile Insurance Co. Ltd. had been valued under sub-s. (1) of s. 131 for general revaluation under s. 127 (a) of the Act. The objection raised by the assessee was overruled by the Deputy Executive Officer and an appeal was taken therefrom to the Presidency Small Cause Court. That court on consideration of the evidence adduced held that the assessment made under s. 127 (a) could not be sustained and it was accordingly set aside. The Court further observed

> "the case is remanded and the respondent Corporation is directed to assess the valuation of the premises in accordance with law".

This direction by the Court was taken to be in the nature of a remand order and fresh assessment made after splitting up the premises into 3 separate numbers and this order was placed before the learned Chief Judge. The assessee raising an objection to the procedure followed the court did not further consider the fresh assessment made. The Corporation during the hearing of the application under s. 45, Specific Relief Act, accepted the position that the procedure followed by the Corporation was one which was not contemplated by law. The Corporation thereafter without taking any further step for determining the annual value under sub-s. (1) of S. 131 issued rate bills in connection with the premises with effect from the beginning of the 6-year period and at the rate which was in force during the previous six-year period. The assessee came to this court to restrain the Corporation of Calcutta from realising the amount mentioned in the rate bills. This Court held that the Corporation was not entitled to issue the rate bills on the basis of the old valuation and that the further direction given in the concluding sentence in the judgment of the Court of Small Causes was wholly without jurisdiction. A restraint order was accordingly issued.

(35) An appeal had been taken against this decision by the Corporation of Calcutta in Appeal No. 6 of 1943 but it appears from the records (which we had called for) that the appellate bench was intimated on 9-11-1943 that the appeal would not be proceeded with. The appeal was accordingly dismissed with costs.

(36) S. R. Das J. came to the conclusion that there was no connection between S. 131 (2) (b) and S. 147 of the Act. The latter section would be attracted only when either the Chief Executive Officer or the Court on an appeal being preferred to it modifies a valuation made by the Chief Executive Officer and substitutes a new revised valuation. Section 131 (2) (b) on the other hand applies in cases where the authority hearing the objection cancles a valuation made without fixing a new valuation in the order. On such cancellation the property has no valuation and the steps which are to be taken by the Corporation, if such further steps are available to the Corporation under the law, are that the Corporation starts the proceedings from the beginning . The objection which had previously been raised by the assessee on the original valuation fixed by the Corporation is finally determined and disposed of and the same proceedings did not continue thereafter.

(37) When the Corporation proceeds to fix the annual value after the previously fixed annual value is cancelled, the assessee has again the right to file objections to the new valuation and the whole gamut of the procedure laid down from s. 138 is available to the assessee. Such objections raised to the new valuation have to be heard by the authorities concerned giving further right to the assessee to come up on appeal under Ss. 141 and 142 of the Act.

(38) On the other hand when a valuation fixed by the Corporation is modified by the Chief Executive Officer while hearing an objection under S. 140 or by the court either under S. 141 or S. 142 and such valuation is revised substituting another figure for the original one, the assessee has no right to file any fresh objection under S. 139 of the Act. Except for the ordinary right of taking an appeal from the decision of one to another under S. 141 or S. 142 of the Act, no other right enures to the benefit of the assessee.

(39) While in the case of S. 131 (2) (b) there is no revised valuation but a new valuation, in the case of S. 147 a reference is made to a revised valuation.

(40) In passing, reference may be made to what appears to be a clear printing mistake appearing in S. 147 which has made a part of that section wholly meaningless. Section 147 as it now stands begins with

> "When the valuation of any land or building is revised in consequence of an objection made under S. 139 of S. 146, sub-s. (2) or an appeal is preferred under Section 141, the revised valuation shall take effect ...."

The phrase "or an appeal is preferred under S. 141" does not fit in with the grammatical structure of the section. Further, when an appeal is preferred, that fact by itself cannot always lead to a revised valuation. Only if an appeal is successful and the Court fixes a revised valuation the contingency referred to in that section may arise. The whole sentence gives a correct and complete sense if in place of "an appeal is preferred under S. 141" we read "or an appeal preferred under S. 141". With the omission of the word "is" there can be no doubt whatsoever as to what the legislature had meant, — the section to be attracted only when the valuation is revised in consequence of an objection

under S. 139 or S. 146 (2) or an appeal under section. It is worthy of note to refer to the fact that S. 147 in Act 3 of 1923 was S. 169 in the old Repealed Act 3 of 1899. The language now appearing in S. 147 in the present Act is exactly in the same terms as in S. 169 of the Repealed Act, with this exception that the word "is" absent in the old section between the words "an appeal" and "preferred under S. 141".

(41) We have not been able to trace out how and when this word "is" appearing in the 1923 Act, which introduces doubts and makes the section meaningless, was introduced. The present case is one of those very rare occasions where the Court will interpret the section ignoring the word 'is' as redundant and meaningless. The position would have been otherwise if the section could have been given some sense with the word 'is' being present — the Court would have had no jurisdiction to interpret the section ignoring the word 'is'.

(42) The provisions which we are required to interpret are in the nature of a taxing provision and the provisions have to be strictly interpreted and if there be any doubt the Court must lean in favour of the assessee.

(43) The result, therefore, is that the Court of Small Cause had rightly decided the issue about the date from which the assessment now made is to take effect that is from 1-7-1948.

(44) This Appeal is accordingly dismissed with costs.

(45) GUHA RAY, J. I agree.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 CALCUTTA 777 (Vol. 40, C. N. 293)

MITTER AND SEN JJ.

Bholanath Dhar and others, Petitioners v. Gour Gopal, Opposite Party.

Criminal Revn. Case No. 1165 of 1952, D/- 24-7-1953.

(a) Criminal P. C. (1898), Ss. 435 and 439(1) — High Court's power to call for records.

The High Court's power to call for records is not restricted to the cases in which the Sessions Judge or the District Magistrate has been moved even though under S. 435 the High Court, the Sessions Judge and the District Magistrate have a concurrent jurisdiction to call for the records of any case. (Para 4)

Anno: Cr. P. C., S. 435 N. 5 Pt. 4; S. 439 N. 8.

†(b) Criminal P. C. (1898), S. 192(1) and 559(1) — Transfer of case of which cognisance was taken by predecessor.

A Sub-divisional Officer can by virtue of S. 559(1) transfer to a Magistrate subordinate to him a case of which cognisance was taken by his predecessor. (Para 7)

Anno: Cr. P. C., S. 192 N. 1; S. 559 N. 1.

(c) Criminal P. C. (1898), S. 145(4) — Consideration of documentary evidence.

It is true that in a proceeding under S. 145 the main point for decision is the actual possession, or where dispossession took place within two months before the drawing up of the proceedings, the main point is actual possession prior to the alleged date of dispossession. But the Magistrate in such a proceeding has to peruse the written statements put in by the parties who claim the right to possess the subject-matter of the dispute, and he has to consider the effect of all such evidence as may be produced by the parties respectively and so the Magistrate must consider and deal with the documentary evidence produced in the case. (Para 9)

Anno: Cr. P. C., S. 145 N. 38.

(d) Criminal P. C. (1898), S. 145 — Order under S. 145 — Order is not bad merely because all interested persons are not made parties — Order is valid so far as parties actually before Magistrate are concerned. (Para 10)

Anno: Cr. P. C., S. 145 N. 20 and 58.

Binayak Nath Banerjee and Bibhuti Bhusan Das Gupta, for Petitioners; S. S. Mukherjee, A. C. Roy, Sunil Mookerjee and Hemendra Nath Banerjee, for Opposite Party.

CASES CITED:

(A) ('38) AIR 1938 Cal 195: 42 Cal WN 246: 39 Cri LJ 417

(B) ('53) AIR 1953 Cal 109: 56 Cal WN 193: 1953 Cri LJ 344

(C) ('53) AIR 1953 Cal 573: 57 Cal WN 512: 1953 Cri LJ 1355

(D) ('68) 9 WR Cr 10 (FB)

(E) ('10) 11 Cri LJ 407: 37 Cal 642

SEN J.: This revisional application is directed against an order of Sri S. L. Banerji, Magistrate first class, Alipore, in a proceeding under Section 145, Cr. P. C., declaring the first party's right to the possession of the disputed land and forbidding disturbance of such possession by the second party. The disputed land is the eastern half of c. s. plot 113 of 'Mouza' Gangarampur, P. S. Behala Measuring .09 acre, on the Cattle Shed Road of South Suburban Municipality. C. S. Plot 113 in its entirety measuring .18 acre belonged to Pramatha Nath Mukherji, who sold the western half by a 'kabala', on 7-3-20 to Gopal Dhar, father of Bholanath Dhar, second party-petitioner 1, and who sold the eastern half of the plot on the same day to Haripada Maity by another 'kabala'. Haripada Maity is the tenant recorded in the c. s. 'khatian' in respect of the eastern half of the plot, i. e. in respect of the disputed land.

The first party Gourgopal Chakravarti purchased the disputed land on 24-9-47 by a 'kabala' in the name of his wife Suprova Debi from the heirs of Haridapada Maity who died in 1944. The case of the first party was that ever since the purchase in the name of his wife, he was in possession of the disputed land; that on the last Sunday of May 1950 (28-5-50) he was informed that the second party had made an excavation on the disputed land for making the plinth of a building and had also collected building materials on the land; and so he sent his clerk and other men to the land to protest, but the second party threatened them with violence and compelled them to leave the place. Thereupon the first party filed a petition before the Subdivisional Officer upon which the proceeding under Section 145 was started.

The case of the second party was that Gopal Dhar not only purchased the western half of c. s. plot 113, but that he also purchased the eastern half thereof though in the 'benami' of Haripada Maity; that Gopal Dhar was all along in possession of the entire plot till his death when the land devolved on his son Bholanath Dhar; that Bholanath transferred 2 'kathas' of the disputed land to his wife Binodini (petitioner 4) and 4 'kathas' to his daughter Sudharani (petitioner 3) and that Sudharani had started construction of a building on the disputed land in February 1950 and not in May 1950 and that Sudharani and her husband

Sushil Das (petitioner 2) were in possession of the disputed land.

(2) On the petition filed before the S. D. O. by the first party Gourgopal Chakravarti, the S. D. O. Sri F. M. Sanyal on 31-5-50 issued an order under Section 144, Cr. P. C., on the second party directing them not to go upon the disputed land and not to proceed with the construction of the building on the land and to show cause by 15-6-50. After hearing both parties and considering the police report received in the meantime, the S. D. O. Sri F. M. Sanyal on 23-6-50 drew up proceedings under S. 145, Cr. P. C., and also attached the disputed land under Section 145 (4), Cr. P. C. On 29-8-50 written statements having been filed by both parties, Sri A. B. Mukherji transferred the case to Sri S. L. Banerji, Magistrate, first class, for disposal. Sri S. L. Banerji heard the case and passed final orders on 3-9-52 declaring the first party's right to possession in the disputed land.

(3) Three points have been urged in support of this revisional application by the second party — firstly, that Sri S. L. Banerji had no jurisdiction to try the case, the case not having been validly transferred to him; secondly, that the learned trying Magistrate dealt with the question of title and not with the question of actual possession and that, therefore, his order cannot be sustained; and thirdly that there was defect of party inasmuch as notice of the proceedings under Section 145 was not served on the ladies, viz., Sudharani and Binodini.

(4) A preliminary objection has been urged on behalf of the first party O. P., viz., that this revisional application is not maintainable as no application was filed before the Sessions Judge, Alipore, for referring the case to the High Court under S. 438, Cr. P. C. This argument is based on the principle that when a superior court and an inferior court have concurrent jurisdiction in a matter, the inferior court should be moved first. This is, however, not a case where the High Court and the Sessions Judge have concurrent jurisdiction; it is only the High Court that can set aside or modify an order passed by a Magistrate in a proceeding under Section 145, Cr. P. C., the Sessions Judge could only refer the case to the High Court under Section 438, Cr. P. C., for order if he were satisfied that there was any illegality in the order of the Magistrate. It is no doubt true that there are rulings to the effect that even in such cases the Sessions Judge ought to be moved first, but the rulings are not uniform and it has been held in some cases that where the High Court has issued a rule, the matter should be disposed of on merits even if the Sessions Judge has not been moved.

It is not necessary to discuss the case law on this question, for the statute is clear; Section 439 subsection (1), Cr. P. C., provides that the High Court may in its discretion exercise its revisional powers in the case of any proceeding the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge. Thus the High Court may deal with cases reported under Section 438 by the Sessions Judge or the District Magistrate, as well as with cases of which the records have been directly called for by itself. The High Court's power to call for records is not restricted to the cases in which the Sessions Judge or the District Magistrate has been moved, even though under Section 435, Cr. P. C., the High Court, the Sessions Judge and the District Magistrate have a concurrent jurisdiction to call for the records of any case. The preliminary objection, therefore, fails.

(5) The first point urged on behalf of the petitioners is that Sri S. L. Banerji had no jurisdiction to try the case as the case was not validly transferred to him. Sri F. M. Sanyal, S. D. O., heard both parties and considered the police report and then drew up proceedings under Section 145, Cr. P. C., on 23-6-50; he therefore took cognisance of the case and it is urged that under Section 192 (1), Cr. P. C., he alone was competent to transfer the case to another Magistrate for disposal, and that the transfer made on 29-8-50 by Sr. A. B. Mukherji was without jurisdiction. If Sri A. B. Mukherji had been merely a First Class Magistrate of Alipore, no doubt the contention above would have been unanswerable. But it has appeared that on 29-8-50 Sri A. B. Mukherji was the S. D. O. at Alipore, having taken over from Sri F. M. Sanyal in the meantime. As successor in office to Sr. F. M. Sanyal he must be deemed to have stepped into the shoes of Sri F. M. Sanyal and he could, therefore, transfer all cases in which Sri F. M. Sanyal had taken cognisance. This follows directly from the terms of S. 559 (1), Cr. P. C.

(6) On behalf of the petitioners it has, however, been urged that Section 559 (1), Cr. P. C. strictly interpreted does not authorise a successor S. D. O. to transfer the cases of which cognisance was taken by his predecessor. Section 559 (1) runs as follows—

> "Subject to the other provisions of this Code, the powers or duties of a Judge or Magistrate may be exercised or performed by his successor-in-office."

Section 192 sub-section (1), Cr. P. C., runs as follows

> "Any Chief Presidency Magistrate, District Magistrate or Subdivisional Magistrate may transfer any case, of which he has taken cognisance, for inquiry or trial, to any Magistrate subordinate to him."

Since a Subdivisional Magistrate's powers may be exercised by his successor-in-office "subject to the other provisions of this Code" and since the Code provides that a Subdivisional Magistrate may transfer a case "of which he has taken cognisance", it is urged for the petitioners that the successor S. D. O. cannot transfer cases of which he has not taken cognisance, being subject to the provisions that only a Magistrate who has taken cognisance of a case may transfer the case. In support of this proposition, reference is made to some observations made by Biswas J. in the case — 'Ramkrishna Sinha v. Emperor A. I. R. 1938 Cal. 195 at page 198 (A); referring to Section 559, Cr. P. C., the learned Judge observed as follows—

> "A difficulty may, however, arise in applying this section, from the words 'subject to the other provisions of this Code'. These words may be supposed to exclude Section 192 from the operation of Section 559. If Section 559 is read subject to Section 192, it may well mean that the powers under the latter section are not intended to be exercisable by a successor-in-office. The question is not free from difficulty, and as cl. (f) of Section 529 would be enough to dispose of this case, we do not feel called on to express any opinion on this point."

Biswas J. was dealing in the above case with the question of validity of a transfer of a case to himself by the second officer who was dealing with the general file of the Subdivisional Officer during the temporary absence of the latter from the headquarters. The learned Judge observed that in such a case there was undoubtedly a defect of jurisdiction, but held that in the view generally taken by the Calcutta High Court, the defect was cured by Section 529 (f). There has, however, been a departure in recent cases from the view that such a defect can really be cured by Section

529 (f); vide — 'Tulsibala Rakhit v. N. N. Hosal', AIR 1953 Cal 109 (B) and — Khudiram Ghosh v. State', A. I. R. 1953 Cal 573 (C) where the contrary view has been taken. In the present case it is not argued for the opposite party that Section 529 (f) has any application; it is, however, urged that Section 559 (1) is a sufficient answer to the contention that the transfer was invalid.

(7) There appears to be no case where this particular question, viz., the powers of a successor-in-office under Section 559, has been directly considered. In — 'AIR 1938 Cal 195 (A)' the question was touched upon but not decided. The tentative discussion in that case gives only one side of the picture but does not touch the other side. A functionary like the Sub-divisional Officer has powers by virtue of his office under various sections of the Code; the exercise of these powers does not depend on his being the successor-in-office of another functionary. Thus a Sub-divisional Officer may under Section 190 by virtue of his office take cognisance of offences and under Section 192 (1) transfer any case of which he has taken cognisance to any other Magistrate subordinate to him. It is only when he has to deal with matters partly dealt with by his predecessor that the question comes of his exercising powers of this predecessor.

The Sub-divisional Officer transfers a case of which he has taken cognisance himself, by virtue of his own powers of office; but when he transfers a case of which cognisance was taken by his predecessor, he exercises, by virtue of Section 559 (1) the powers of his predecessor to transfer a case of which the predecessor had taken cognisance. To take another instance, a Magistrate taking cognisance of an offence when satisfied that there is sufficient ground for proceeding shall issue summons or warrant against the accused under Section 204; in this matter, where a Magistrate, who has himself received the petition of complaint and taken cognisance of the case, issues the summons or the warrant, he exercises the powers conferred on him by virtue of his office, but where his predecessor had received the complaint and taken cognisance and the Magistrate issues the summons or the warrant on receiving the report of an inquiry under S. 202 ordered by his predecessor, he exercises the powers of his predecessor by virtue of S. 559 (1).

On behalf of the petitioners, it has been urged that this interpretation ignores the words 'subject to the other provisions of this Code.' The reply is that the words are by no means ignored; a successor-in-office is bound by the other provisions of the Code. For instance, where a Second Class Magistrate succeeds a First Class Magistrate as the S. D. O., he cannot try cases triable by a First Class Magistrate by claiming to exercise the powers of his predecessor in office, and a successor is further subject in the matter of trial of a part-heard case to the provisions of S. 350. Thus the interpretation made above does not ignore any of the words of S. 559(1).

On the other hand, the interpretation that a successor S. D. O., cannot deal whether under S. 204 or S. 192 with matters of which he did not take cognisance would make S. 559(1) altogether infructuous; it would be difficult to say in that case that the legislature enacted S. 559 for any useful purpose. An interpretation having this result cannot be regarded as correct. It must be, therefore, held that a Subdivisional Officer can by virtue of S. 559(1), Cr. P. C., transfer to a Magistrate subordinate to him a case of which cognisance was taken by his predecessor; and that, therefore, this particular case under S. 145, Cr. P. C., was rightly and validly transferred by the then S. D. O. Sri A. B. Mukherji to Sri S. L. Banerji, a Magistrate subordinate to the S. D. O. and that, therefore, Sri Banerji had jurisdiction to try the case.

(8) Section 599(1), Criminal P. C., relating to the powers of the successor-in-office was enacted only in 1923. The question naturally arose also before 1923 whether and when the successor-in-office could exercise the functions of his predecessor. The general trend of decisions was that the word 'court' implied an idea of continuity, and that the powers under the Code having been conferred on courts, they could be exercised by the successor-in-office (vide Chitaley and Rao's Criminal Procedure Code, note 1 to S. 559). The Calcutta High Court definitely took that view. As early as 1868, in interpreting the provision that the court which sentences an offender to fine may levy the fine (S. 61 of the Code of 1861, corresponding to S. 386 of the present Code) it was held that the successor-in-office of the Judge or the Magistrate who passed the sentence might levy the fine imposed by his predecessor, vide Chunder Coomar Mitter v. Madhoosoodun Dey', 9 W. R. Cr. 10 (FB) (D). The principle of continuity of a court was affirmed by another Full Bench in 1910 in — 'Bahadur v. Eradatullah Mullick', 37 Cal 642 (E), where it was held that in respect of offences specified in cls. (b) and (c) of sub-s. (1) of S. 195, the successor-in-office of the Judge or Magistrate before whom the offence was committed was competent to make the complaint. The provision of the Code is that where any of the aforesaid offences is committed in or in relation to a proceeding in any court, such court or some court to which such court is subordinate may make the complaint; it was held that the court continued the same notwithstanding a change of officers presiding therein and, therefore, the term 'such court' included the officer before whom the offence was committed as well as his successor-in-interest.

Presidency Magistrate and Magistrates of the first and second (and third) classes are courts when acting judicially, vide S. 6 of the Code; the Subdivisional Magistrate and the Chief Presidency Magistrate are also Courts appointed under Chapter 2 of the Code. A Chief Presidency Magistrate or a Subdivisional Magistrate takes cognisance of offences and cases as a Court; therefore the power of transfer of a case of which a Presiding officer of a Subdivisional Magistrate's court or a Chief Presidency Magistrate's court has taken cognisance may be exercised by his successor-in-office. This has always been the practice and there has been no difficulty in this matter, for the practice is founded on sound law.

(9) The next point urged for the petitioners is that the learned Magistrate in dealing with the case relied upon the documentary evidence as if it were a title suit, and did not decide the case on the evidence as to actual possession. It is true that in a proceeding under S. 145 the main point for decision is the actual possession, or where dispossession took place within two months before the drawing up of the proceedings, the main point is actual possession prior to the alleged date of dispossession. But the Magistrate in such a proceeding has to peruse the written statements put in by the parties who claim the right to possess the subject-matter of the dispute, and to consider the effect of all such evidence as may be produced by the parties respectively (sub-s. 4), and so the Magistrate must consider and deal with the documentary evidence produced in the case.

The documentary evidence in the case is 'prima facie' in favour of the first party O. P.; the c. s. Khatian as well as the Municipal assessment register showing the name of the first party's predecessor-in-interest Haripada Maity; and the assessment register showing also the name of Suprava Debi (wife of the first party) after the purchase of the disputed land in her name; moreover the existence of two 'kabalas bearing the same date and executed by the same vendor in respect of the two parts of c.s. plot 113, in favour of Haripada Maity and Gopal Dhar respectively, is apparently against the petitioners' case that Gopal purchased the disputed land in the 'benami' of Haripada. It was the duty of the learned Magistrate to consider all this documentary evidence. If the learned Magistrate had, however, relied entirely or even chiefly on the documentary evidence, he would undoubtedly be wrong; for the question of actual possession and the date of such possession are the most important questions in the proceeding.

But the learned Magistrate did not overlook these points; he discussed the oral evidence carefully and came to the definite conclusion that the first party was in possession till the first week of Jyaishtha 1357 B. S., i.e., the 3rd week of May 1950, and that the second party started construction of the building on the disputed land from the 4th or 5th of 'Jyaishtha' 1357 B. S. It has been urged for the petitioners that the proceedings were drawn up on 23-6-50 and the land was attached at the same time; and then it was found that there was a building on the disputed land the construction of which had proceeded up the first floor level (ground floor roof level) and that if the construction had started on the 18th or 19th May, 1950, it could not have proceeded to that extent by 23-6-50, all the more because there was an injunction against construction issued on 31-5-50.

There was evidence, however, that the petitioners pushed on construction by employing many men, and P. W. 3 stated that construction went on at night also. Hence it could not be said that the existing building could not have commenced on 18th or 19th May and that it must have commenced in February or March as alleged by the petitioners second party. There was evidence in support of the finding on the questions of fact made by the learned Magistrate; and he did not overlook the importance of the question of actual possession and the time thereof; and therefore there is no substance in the point urged.

(10) The last point is that there was defect of party as notice of the proceeding under S. 145 was not served on the ladies, petitioners 3 and 4. It appears from the order sheet of the case that though Sudharani and Binodini were made parties, notices on them were not properly served; the first party filed a petition for reissue of notice on them but the learned Magistrate observed as follows, vide his order dated 6-10-50:

> "Considered the petition of the first party. As the husbands of Sudharani Dasi and Binodi Dasi have been made parties in the case and as they in their written statements have admitted possession through their wives (perhaps the learned Magistrate meant on behalf of their wives) I do not find any reason for including Sudharani Dasi and Binodini Dasi as members of the second party".

The ladies were originally made parties but after defective service of notice on them, no fresh notice was issued on them and, therefore, it has to be deemed that they were not validly made parties. But an order under S. 145, Cr. P. C., is not bad merely because all interested persons are not made parties. So on this ground there is no reason to set aside the final order of the learned Magistrate. The order is valid so far as the parties actually before the learned Magistrate are concerned.

(11) Hence this application fails and the rule is discharged.

(12) MITTER, J.: I agree.

A/V.R.B. Rule discharged.

A.I.R. 1953 CALCUTTA 780 (Vol. 40, C. N. 294)

G. N. DAS AND S. K. SEN JJ.

Bamapati Bhattacharjya and others, Appellants v. Sm. Laxshmi Bibi, Respondent.

Letters Patent Appeal No. 13 of 1952, D/- 11-12-1952, from judgment of R. P. Mookerjee J., in A. F. A. O. No. 11 of 1951, D/- 25-4-1952.

(a) Tenancy Laws — Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 4 — Order under — Effect on execution completed by delivery of possession (Tenancy Laws — W. B. Non-Agricultural Act (20 of 1949), S. 88).

Where after the delivery of possession to the decree-holder in execution of his decree for ejectment, the Court makes an order under S. 4 of the Bengal Act 9 of 1940, restoring possession back to the tenant, the effect of the order is to set aside the order for delivery of possession made in favour of the decree-holder and the satisfaction of the prior execution petition becomes illusory. The result is that the prayer which was made by the decree-holder in his application for execution in 1940 remains undisposed of, as no further proceedings could be taken in that execution proceeding so long as the 1940 Act was in operation. The execution proceedings, therefore, must be deemed to be pending within the meaning of S. 88 of the Non-agricultural Tenancy Act of 1949 and action can be taken in that execution proceeding provided it is available to the decree-holders in view of the provisions of 1949 Act. (Para 4)

(b) Tenancy Laws — W. B. Non-Agricultural Tenancy Act (20 of 1949), S. 2 (5) — Non-agricultural tenant includes ex-tenant.

For the purpose of applying the Act to proceedings pending at its commencement, the words "non-agricultural tenant" must be taken to include a tenant whose tenancy was determined by a notice to quit, but who remained in possession in spite of the notice and a decree in ejectment. (Para 4)

(c) Tenancy Laws — W. B. Non-Agricultural Tenancy Act (20 of 1949), S. 91 (1) and (2) — Effect of repeal of Bengal Act, 9 of 1940.

Section 91 (1) merely repeals the 1940 Act. What the consequence of the repeal would be, would depend on the effect of repeal of a temporary Act under the general rules of interpretation.

It cannot be said that S. 91 (2) necessarily implies that all the provisions of and all the orders made under the 1940 Act must be deemed to be non est. On the other hand as regards the order which had been completed and which had full effect

before the repeal of the 1940 Act must be taken to have been properly passed.

(Para 5)

Benoyendra P. Bagchi and Jnanendra Mohan Dey, for Appellant; Manindra Nath Ghose and Anil Kumar Sen, for Respondent.

CASE CITED:

(A) ('42) AIR 1942 Cal 49: 46 Cal WN 174

G. N. DAS J.: This is an appeal on behalf of the decree-holders under cl. 15, Letters Patent, and is directed against a judgment of Mookerjee J.

(2) By a Kabuliyat dated 11-3-1921, the respondent Lakshmi Bibi took a lease of the disputed property from the predecessors of the appellants. This lease, it is not disputed, created a non-agricultural tenancy. The appellants served a notice to quit and thereafter on the expiry of the notice, instituted a suit in ejectment. The suit was decreed on 26-2-1940. This decree was executed and the appellants who are the decree-holders took possession on 26-4-1940. It is stated that in pursuance of the order of the Court the decree-holders paid for the value of the structures. The possession of the decree-holders was thereafter confirmed on 26-5-1940.

On 30-5-1940, the Non-agricultural Tenancy (Temporary Provisions) Act of 1940 came into force. Thereafter, on 20-6-1940, the respondent filed a petition under Section 4 of the said Act for setting aside the order for delivery of possession and for recovery of possession of the disputed property. On 27-7-1940, the decree-holders not opposing the application, the Court made an order in terms of S. 4 setting aside the order for delivery of possession and directing restoration of possession. The learned Judge has found that thereafter Lakshmi Bibi continued in possession. The life of the Non-Agricultural Tenancy Act of 1940, was in the first instance, for a term of two years and it was thereafter extended. It was superseded by the West Bengal Non-agricultural Tenancy Act of 1949 which came into force on 5-5-1949. Section 91 (1) of this Act repealed the Non-agricultural Tenancy Act of 1940. On 11-1-1950, the appellants made an application for execution of the decree which they had obtained as far back as 26-2-1940 and prayed for recovery of possession. Notice under Order 21, Rule 22, Civil P. C., was directed to be served. The two courts below differed on the question whether the notice under Order 21, Rule 22 of the Code had been served.

In this Court Mookerjee J. has not come to a finding on the question. When the application for execution was made, the respondent filed an objection that she was entitled to protection under the 1949 Act. The trial court gave effect to the objection but on appeal the lower appellate court reversed the decision of the trial Judge and directed delivery of possession. Against this order, the respondent took an appeal to this Court. Mookerjee J. set aside the order of the lower appellate court and allowed the appeal filed by the respondent. It is the propriety of this judgment which is now in controversy in this appeal.

(3) Mr. Bagchi, learned Advocate for the appellants decree-holders, has contended, in the first instance, that the respondent Lakshmi Bibi cannot now be regarded as a non-agricultural tenant in view of the fact that the decree-holders had paid for the price of the structures. This question which is essentially a question of fact was not canvassed in any of the courts. On the other hand, when the respondent Lakshmi Bibi made an application under Section 4 of the 1949 Act, the decree-holders conceded that she was entitled to restoration of possession. It does not appear from the record that the huts have been removed. In these circumstances, it is too late in the day now for the decree-holders to agitate this question of fact in the third court of appeal. This contention must therefore be overruled.

(4) Mr. Bagchi has next contended that the present execution which was levied by his clients was a new execution, and that the old execution which was started in 1940 had come to an end'. On this supposition, he has contended that Section 88 of the 1949 Act has no application. He has therefore suggested that the decree-holders were entitled to execute their decree for ejectment passed in the year 1940, limitation having been saved by the express terms of Section 7 of the 1940 Act and S. 89 of the 1949 Act. This contention would have required consideration if we had accepted the basic argument on which the contention was based, namely, that the present execution was a new execution and the execution proceedings taken in 1940 had come to an end. In my opinion, the execution which was started in 1940 had not been completely disposed of. The decree-holders prayed for recovery of possession in execution of their decree in ejectment. They had obtained an order from the executing court for delivery of possession and had got an order from that court confirming delivery of possession. There is also an order that the execution case was disposed of on full satisfaction.

If the matter has rested there, there might have been some force in the contention but then the respondent came up with an application under Section 4 of the 1940 Act. Whatever the reasons might be, the Court made an order in terms of Section 4. The effect of that order was to set aside the order for delivery of possession made in favour of the decree-holders and to direct restoration of possession. Once the order for delivery of possession made in favour of the decree-holders was set aside, the effect is that the satisfaction of the execution petition must be deemed to have been illusory. The result is that the prayer which was made by the decree-holders in their application for execution remained undisposed of. No further proceedings could be taken in that execution proceeding so long as the 1940 Act had remained in operation. In my opinion, it cannot therefore be said that the execution proceedings started in 1940 had lost its vitality. It remained undisposed of, and must be deemed to be pending within the meaning of Section 88 of the Non-agricultural Tenancy Act of 1949. Action could be taken in that execution proceeding provided it is available to the decree-holders in view of the provisions of 1949 Act.

The question therefore is whether the decree-holders are entitled to remedy under the provisions of the 1949 Act. It was first contended that even so the respondent cannot be called a non-agricultural tenant because his tenancy had been determined by a notice to quit which was followed by a decree and was worked out in execution by an order for delivery of possession. As I have already stated, the order for delivery of possession was set aside in the proceedings under Section 4 & restoration of possession was directed to be made. The respondent got back possession on the strength of the order under S. 4. In my opinion, the effect of the orders made in the execution proceedings of 1940 is that the possession of the respondent Lakshmi Bibi must be deemed to be continuing. The result, in my opinion, is that Lakshmi Bibi must be deemed to have remained in possession in spite of the notice and the decree in ejectment.

The question therefore is whether for the purposes of the 1949 Act Lakshmi Bibi could be regarded as a non-agricultural tenant. It is no doubt true that the 1949 Act does not expressly say that a non-agricultural tenant includes an ex-tenant, but if we apply the principles which were enunciated by a Special Bench of this Court in — 'Sukumari Devi v. Rajdhari Pandey', AIR 1942 Cal 49 at p. 51 (A), namely, that the word must be used in a popular sense as including a tenant who has remained in possession in spite of the service of notice to quit coupled with a decree in ejectment, it may be justly said that the corresponding word in the 1940 Act should bear the same construction. In other words, for the purpose of applying the 1949 Act to proceedings pending at its commencement, the words "non-agricultural tenant" must be taken to include a tenant whose tenancy was determined by a notice to quit but who remained in possession in spite of the notice and a decree in ejectment. It cannot be disputed that if the words are taken in that sense, the respondent Lakshmi Bibi is entitled to protection under Section 7 of 1949 Act.

(5) Mr. Bagchi also contended that Section 91 must be read as implying that after the passing of the 1949 Act the operation of the 1940 Act was wiped out. He has referred us to the two clauses of Section 91 and has drawn our attention to the principles governing cases of 'casus omissus'. In my opinion, Section 91 (1) merely repeals the 1940 Act. What the consequence of the repeal would be, would depend on the effect of repeal of a temporary Act under the general rules of interpretation. It cannot be said that Section 91 (2) necessarily implies that all the provisions of and all the orders made under the 1940 Act must be deemed to be 'non est'. On the other hand, in my opinion, as regards the order which had been completed and which had full effect before the repeal of the 1940 Act must be taken to have been properly passed. This contention of Mr. Bagchi must also fail.

(6) In the result this appeal fails and must be dismissed with costs.

(7) SEN J.: I agree.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 CALCUTTA 782 (Vol. 40, C. N. 295)

CHUNDER J.

Hridoy Krishna, Petitioner v. Mrinal Bala, Opposite Party.

Civil Rule No. 1243 of 1952, D/- 13-5-1953.

Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9, Sch. A — Applicability — (Civil P. C. (1908), S. 11).

Schedule A held applicable because the premises under the very same tenant were actually let out though as part of another premises — Reasonable rent previously assessed — Decision cannot be 'res judicata' as regards rent actually payable — Rent actually payable held was known — AIR 1953 Cal 234, Distinguished. (Paras 2, 3)
Anno: Civil P. C., S. 11 N. 12, 15.

Bijan Behari Das Gupta, for Petitioner; Abinash Ch. Ghose, for Opposite Party.

CASE CITED:
(A) ('53) AIR 1953 Cal 234: 56 Cal WN 120

ORDER: This Rule was issued at the instance of a landlord against a re-fixation of rent. What happened was that these very premises were let out to the same tenant as part of a bigger premises which included one room more in December, 1941. The landlord by surrender from the tenant took this other room and had let it out at Rs. 15/-. These facts are not in dispute. There was a rent fixation case under the Act of 1948. The Rent Controller as well as the appellate court decided that the rent which would be reasonably payable, not the rent actually payable, would be Rs. 140/- per month from 1-12-1941. After making certain additions which are difficult to understand, the rent was assessed at Rs. 182-14-0. We are not concerned with these additions. As soon as the 1950 Act came into operation, there was an application by the tenant for re-fixation of the rent, the tenant contending that the rent as actually payable for the tenancy in December 1941 was Rs. 120/- and then with the addition now allowable the rent would be Rs. 132/-.

(2) Mr. Ghose has pointed out that if Schedule A can be applied & none of the other clauses mentioned from 9(1)(d) to 9(1)(g) can be applied then rent has got to be fixed on the basis of Schedule A. Now, Schedule A is applicable because these premises under the very same tenant were actually let out and the rent actually payable could not be more than Rs. 120/-. On the other hand, the landlord having let out another room for Rs. 15/- the courts rightly considered that the rent actually payable in December 1941 would be Rs. 105/-. Then the courts allowed two increments namely as there had been previously an increment of 10 per cent. and as this was a residential house let out at over Rs. 100/- another fresh increment of ten per cent. bringing up the total to about Rs. 126/- and odd.

(3) Mr. Das Gupta has contended that the question of what is reasonably payable as rent is 'res judicata'. The question of what would be reasonably payable as rent is different from what is rent actually payable. There has been no decision previously as to what was the rent actually payable. In the present case, Mr. Ghose has pointed out that S. 9(1)(e) can have no application because the premises were let out though it may be as part of another premises to the same tenant so that the relationship of landlord and tenant also was the same and he has pointed out that the decision in — 'Bata Shoe and Co. Ltd. v. Narayan Das Mullick', AIR 1953 Cal 234 (A) has no application as the question is entirely different. There the question was of two different tenancies under two different tenants being combined. Here the question is that single tenancy has continued though shorn of one room and the rent of the one room is known. Therefore, the rent actually payable is known. Under the circumstances, Mr. Das Gupta's contention as to 'res judicata' cannot be supported.

(4) Then comes the question of the additions given. The courts below were right in giving the two additions. Mr. Das Gupta has pointed out that the tenant fixed the standard rent as payable as Rs. 132/-. Mr. Ghose is willing to accept what his client herself put as standard rent. Therefore the standard rent is varied and is made Rs. 132/- per month. Mr. Ghose wants effect to be given to the reduced rent from the

next month, that is, from June 1, 1953. Mr. Das Gupta has no objection to the prayer being given effect to.

(5) So by consent, it is ordered that this refixed rent will take effect from June 1, 1953. Each party will bear its own costs in this revision case.

(6) The Rule is thus disposed of.

C/D.H.Z. Order accordingly.

A.I.R. 1953 CALCUTTA 783 (Vol. 40, C. N. 296)

SINHA J.

Samir Kumar, Petitioner v. Someswar Mukherjee and others, Opposite Parties.

Civil Revn. No. 681 of 1953, D/- 31-7-1953.

(a) Universities Act (1904), S. 25 (1) — Regulations under — Chap. 16, Regn. 7 — Scope.

The National Council of Education, Bengal with its object to foster education on patriotic lines held three examinations, last being the Final School Standard examination. Calcutta University accepted this examination as equivalent to the Matriculation examination of the University. The petitioner a student of the Calcutta University had appeared at the School final examination and also at the final school standard examination of the Council as an external or private student. He failed in the former but passed in the latter but submitted an application through the College authorities of the Ashutosh College together with all necessary documents, migration fee and registration fee, in order to obtain sanction to his migration. He then got admission to the College. Meanwhile, the Syndicate decided that no student who has passed the final school standard can be admitted to any College if he has failed in any test examination or the School final examination of the Board of Secondary Education West Bengal. The Registrar of the University issued circulars to the Colleges to the effect that any student who has passed Final School Standard examination may be admitted to College provided his guardian makes a declaration that the student has not failed at the test examination of any school or School Final examination of the Board & in case declaration is found false, admission shall stand dismissed. Principal of Ashutosh College asked petitioner's father to make the declaration against which this petition for mandamus.

Held, that this was not a bona fide case of migration. The University was entitled to take a view that the petitioner failed to come up to its own standard but somehow passed the examination of another institution whose examination has been recognised but held suspect and there was nothing illegal in it, because the facilities of mutual recognition extended to sister universities or educational institutions are not meant to be used as devices to circumvent the educational programme of the University, or to destroy its own standards. In such an eventuality, the Syndicate has the power to refuse sanction and it must be allowed to use that power. High Court is not called upon to interfere.

The contention that even if the Syndicate has power to refuse sanction to migration, it has no power to ask the college to remove a student from the rolls is not tenable. Because when the Syndicate can refuse its permission, there is no reason why it cannot impose conditions for granting such permission. Besides, since the admission was provisional, and the college was entitled to put an end to it, it was in the interest of the student himself since the admission was not capable of being sanctioned by the University.

(Result of the relevant regulations, resolutions and circulars summarised).

(Paras 12, 13)

(b) Universities Act (1904), S. 25 — Regulations under — (Constitution of India, Arts. 14 and 19 (1) (g)) — (Words and Phrases — "Occupation").

If the Syndicate of a University makes special rules for students who migrate to it from another University that is not discrimination. All categories of students cannot be treated alike. To treat students migrating from another University as a separate class, from students passing the University's own examinations, is not an unreasonable classification and certainly has a rational basis.

Study in an University is not an "occupation" within the provisions of Art. 19 (1) (g). The dictionary meaning is "Employment, business, calling" none of which is applicable to academical pursuit simpliciter. A teacher may be said to have an occupation. A student cannot be said to be following any occupation, in the generally accepted sense of the term. The regulations of the Calcutta University regarding the migration of students do not therefore violate Art. 19 (1) (g). AIR 1951 SC 318, Ref.

(Paras 15, 16)

Prakash Chandra Mallock, Tapodhir Krishna Ray Dastidar and Somnath Chatterjee, for Petitioner; A. K. Sen, Arun Kumar Mukherjee and Sunil Kumar Mitra (for Nos. 2 and 3) and K. K. Basu and Manick Chandra Mitra (for No. 1), for Opposite Parties.

CASES CITED:

(A) ('52) 56 Cal WN 730

(B) ('51) AIR 1951 SC 318: 52 Cri LJ 1361 (SC)

ORDER: This is a rule, calling upon the respondents, the principal Ashutosh College, the Registrar Calcutta University, and the University of Calcutta, to show cause why a writ in the nature of mandamus should not issue directing the said Registrar to withdraw certain directions contained in Circular No. Misc. 13 dated 1-7-1952; and directing the principal Ashutosh College to restore the name of the petitioner in the College Register. The facts are shortly as follows:

There is an institution called "The National Council of Education, Bengal", (hereinafter referred to as the council) having its headquarters at Jadavpur, in the suburbs of Calcutta. The object of this institution appears to be to foster education on patriotic lines with a particular leaning towards vocational education. It appears from the "outline scheme of studies for national schools", published by the institution (Annexure A to the counter affidavit in C. R. 3175 of 1952), that three courses have been prescribed namely Primary or 'adyaman', intermediate or 'madhyaman' and Final or 'antaman'. In this application we are concerned only with the Final School Standard examination.

In or about 1949, a number of students who had passed the Final School Standard examination of the council applied to the University of Calcutta (hereinafter referred to as the 'University') for recognition of the said examination as equivalent to the Matriculation Examination of the University which has now been supplanted by the School final examination under the Board of secondary education, West Bengal. Thereupon the Syndicate of the University made certain enquiries from the Council, and by a resolution dated 16-12-1950, accepted the final School Standard Examination of the Council as equivalent to the Matriculation Examination of the University. The petitioner appears to have sat for the School Final Examination of the Board of secondary education, as well as for the Final School Standard examination of the Council, held in the year 1952. He failed in the former examination; but passed in the latter one. He then applied for admission to the Ashutosh College Calcutta and was admitted as a student on or about the 17th day of June 1952. He also paid into the hands of the College authorities, a fee for migration and Registration amounting to Rs. 22/-.

(2) On or about 1-7-1952, respondent 2 issued a circular to the heads of all affiliated Colleges which is set out below:

Exhibit — "A".
Calcutta University.
Circular No. Misc. 13

The Heads of all affiliated Colleges are informed that the recognition granted to the final School Standard Examination of the National Council of Education, Bengal, has been withdrawn with effect from the examination of the year 1953.

Any student who has passed the Final School Standard Examination of the National Council of Education, Bengal, may be admitted to any college affiliated to this University, provided the guardian of the student makes a declaration in writing to the Principal of the College that the student in question has not failed at the Test Examination of any School or the School Final Examination of the Board of Secondary Education, West Bengal, and that in case the declaration be found to be false, the admission of the student shall stand cancelled from the very date on which it was made.

The Heads of Colleges are requested to forward to the Registrar a list of such candidates within one month of the date of their admission for the purpose of checking and verifying the correctness of the declaration by their guardians:

Senate House:— Sd. S. Dutta,
The 1st July, 1952. Registrar.

(3) On 24-7-1952, respondent 1 wrote to the petitioner's father and guardian requesting him to make a declaration in writing to the principal that his ward (the petitioner) had not failed at the test examination of any school or the School Final Examination of the Board of Secondary Education, West Bengal. It was intimated to him that unless he filed such a declaration within 7 days, the name of his ward will stand cancelled. The petitioner's father was of course unable to make such a declaration and on 3-12-1952 respondent 1, further intimated to him that his ward's admission would not be sanctioned by the University. On or about 17-12-1952, the petitioner's father made an application to this Court and a rule was issued by Bose J. on similar lines to the present rule, and an ad interim injunction was granted. This rule came up before me for hearing on 10-3-1953, when I held that the petitioner in that application (the father of the present petitioner) had no locus standi to maintain such an application. The rule was accordingly discharged. The present rule was issued on 11-3-1953 and a similar ad interim injunction granted.

(4) I have before me a detailed explanation as to why the University caused the circular dated 1-7-1952 to be issued. It is as follows:

It appears that upon receiving several applications in the year 1949, to recognise the final standard examination of the Council, the Syndicate made enquiries and found that the subjects prescribed compared favourably with those prescribed by the University for the Matriculation. The Syndicate of the University took favourable note of the fact that in addition to the theoratical studies, a student had to undergo training in practical or vocational training in one or more subjects like spinning and weaving, carpentry and smithy, survey and draughtsmanship etc.

Candidates for the Final Standard Examination of the Council are of two kinds — 'Interval' i.e., those sent up by the Schools affiliated to the Council 'and external or private'. The University found nothing to indicate that an external candidate was exempted from the practical training, and as a certain percentage of attendance at the workshop or office was compulsory to qualify a student for appearing at the examination, it was presumed that even an external student, somehow managed to get the necessary practical and vocational training. Before external students applied for permission to present themselves at an examination they had to produce a certificate by the Headmaster of a High School or the Principal or Professor of a College, or a member of the Council or a legal practitioner of a rank not lower than a district court pleader that the applicant possessed sufficient fitness to be permitted to appear in the above examination.

(5) It is stated that the University never contemplated that students who had failed in the test examinations of schools under the University, for the Matriculation or had become unsuccessful in the Matriculation examination itself, should somehow procure a certificate of the nature mentioned above and sit in the Final School Standard Examination of the Council and thus qualify themselves for admission into the intermediate Arts or Science Courses of the University. It is pointed out that students reading in Schools affiliated to the University could never legitimately sit for the Final School Standard Examination of the Council, inasmuch as the schools affiliated to the University do not impart the necessary practical or vocational training. Anyhow, such a state of things was not contemplated. This brings us to the real genesis of the situation, which has given rise to this application and a number of others. I am told that the matter affects hundreds of students who have taken admission into various colleges under the University, having passed the Final School Standard Examination of the Council. They have, however, either failed in the test examination of a school affiliated to the University or failed in the Matriculation or the School-final.

(6) The problem would become clearer upon a closer investigation of certain Statistics furnished by the Registrar of the Council in his letter dated 13-6-1952, to Respondent 2. In the year 1949, six candidates appeared in the Final Standard Examination of the Council, all from schools affiliated to the Council. In 1950, twenty candidates appeared, all from schools similarly affiliated. The Council had several schools affiliated to it in that

part of Bengal which has after partition become Eastern Pakisthan. There was one school in Calcutta which has now been disaffiliated. In 1951, thirty-seven students appeared, 9 from schools affiliated to the Council and 28 as external or private candidates. In 1952, thirty-two candidates appeared from Schools affiliated to the Council and as many as 1664 candidates appeared as external or private.

(7) It is alleged that unfair advantage had been taken of the recognition of the Final School Standard Examination as an equivalent to the Matriculation or the School Final Examination, by students who had either failed in a test examination or the school final examination of the Board of secondary education West Bengal. It is stated that they "some how obtained false certificate of fitness" and appeared at the final Standard Examination of the Council without possessing the requisite qualifications.

That something like this has happened is only too clear from the Statistics given above. I must however point out that there is no evidence before me that the petitioner used any false certificate or that he has passed the final School Standard Examination of the Council without complying with the rules of that institution. It must therefore be assumed that he had passed an examination which the Syndicate of the University had recognised as an equivalent to the Matriculation examination of University, which now equates with the School Final Examination of the Board of Secondary Education, West Bengal. No argument has been advanced before me that the University had recognized the Final School Standard Examination of the Council as equivalent to the Matriculation and not the School Final. It is assumed that this makes no difference.

(8) The point therefore lies within a small compass. Suppose there is a student pursuing his regular studies in a School affiliated to the University. He appears at the test, and for the School Final Examination of the Board of Secondary Education and is either disallowed in the test or fails in the School Final. As a second string to the bow, he appears as an external or private candidate in the Final School Standard Examination of the Council and passes. He then applies for admission into a College affiliated to the University and is admitted therein. Thereafter, can the University:

(a) Refuse to sanction such admission
(b) Direct a College not to admit such a student
(c) Direct a College to remove such a student from the rolls if already admitted
(d) Can the College remove such a student from its rolls after having already admitted him and allowing him to study therein for a length of time.

(9) A decision on these points must depend upon the interpretation put upon the Indian Universities Act 8 of 1904; the regulations made by the Senate, framed under powers granted by the said Act, and the Act of incorporation of the University of Calcutta Act 2 of 1857. As there is no question of any denial of natural justice in this case, the petitioner in order to succeed must show that the respondents have acted in violation of these Acts or regulations. It is not denied that the respondents must keep strictly within the four corners of the Acts and regulations and cannot be permitted to act in contravention thereof 'University of Calcutta v. Dipa Pal', 56 Cal. W. N. 730 (A). It is also argued on behalf of the petitioner that if the Acts and regulations warrant his removal from the rolls, they infringe his fundamental rights under Arts 14 & 19 (1) (g) of the Constitution & are therefore unconstitutional and void.

(10) I shall at first examine the regulations of the University. The most important chapter to consider is Chapter XVI, which is headed 'Non-Collegiate Students'. Rule 1, lays down that no person who could not produce a certificate from a College affiliated to the University to the effect that he had completed the course of instruction prescribed by the regulations, should ordinarily be admitted as a candidate at any University examination other than an examination for Matriculation. Rule 2 gives power to the University to grant exemption from the operation of this rule upon the recommendation of the Syndicate. The most important rule is R. 7 which runs as follows:-

"7. The Syndicate shall have power in any case to admit to any University Examination in any faculty any person who shall present a certificate from any institution authorised to grant certificates by the Governor-General of India in Council, or by a local Government or from such other institutions as may be from time to time recognised for the purpose by the Syndicate showing that he has attended courses of study, passed examinations or taken degrees equivalent to those which are required in the case of students of the Calcutta University."

(10a) This is the only rule to be found in the regulations which deals with the case of students who have not passed the Matriculation or any other examination of the University itself and yet wish to sit at a University Examination.

(10b) The rule itself seems inappropriate to students who are not appearing as non-collegiate but have been actually studying in Colleges affiliated to the University and have taken a complete course therein. In such a case, how can the question arise of having taken a course "equivalent to those which are required in the case of students of the Calcutta University", since the student has been taking a course prescribed by the University itself? Mr. Sen has argued that the rule applies only to non-collegiate students who have passed an equivalent examination and have pursued a course not under the University itself but recognised by it.

(11) Now, it is common knowledge that the degrees of other sister University in India are recognized by the University of Calcutta (with just exceptions) and students migrating to this University have to bring migration certificates and have to file them in the University and get themselves registered. I asked both parties to point out to me rules concerning these students. I was surprised to hear that there are no specific regulations bearing on this important topic. My attention was however drawn to the following:

(1) According to the Indian Universities Act (8 of 1904,) S. 25 (1), the Senate, with the sanction of Government may from time to time make regulations consistent with the Act of incorporation (Act 2 of 1857) as amended by the Indian Universities Act, to provide for all matters relating to the University.

(2) According to S. 15, Indian Universities Act, the executive government of the University is vested in the Syndicate.

(3) Under Ch. IV, R. 1 of the regulations as made by the Senate and sanctioned by the Government, the executive government of the University is vested in the Syndicate. Under R. 12, the Syndicate is empowered generally to conduct the affairs of the University in accordance with the Act of incorporation and the

Indian Universities Act, the regulations and the resolutions of the Senate and the Syndicate.

(4) The Syndicate passed a resolution dated 15-1-1916, to the effect that no students except Matriculates, undergraduates & graduates of the Calcutta University shall be admitted to any College affiliated to the University without the express sanction of the Syndicate, previously obtained. Circulars were to be sent to all the affiliated colleges.

(5) Circular No. 94 (originally 9624) dated 26-1-1916, 118 (originally 20) dated 18-1-1917, were sent to all affiliated colleges. They require a foreign student desirous of continuing his studies in the University to obtain previous sanction of the Syndicate to his migration for which a formal application was to be submitted by him through the head of the institution in which he sought admission. The particulars to be stated therein and the documents to be annexed are then set out. These circulars are to be found (or relevant portions thereof) in a handbook published by the University entitled, "Handbook of information for colleges affiliated to the University of Calcutta". The circulars are based upon resolutions passed by the Syndicate and the standing orders.

(6) In the handbook, extracts from circulars and standing orders have been set out in Ch. II, item VII, showing the requirements of an application from a student migrating from a foreign University or Education Board, together with the fees prescribed for that purpose.

(7) Ch. XX, R. 4 of the regulations makes it mandatory upon affiliated colleges to maintain an admission register in such form as the Syndicate may from time to time prescribe. The form is set out in Appendix B. The seventh heading is "School or College last attended". (In the case of a student migrating from a different University or Board, the name of the University or Board to be noted).

(8) In the Handbook, Appendix C (page 46) sets out the form of Statement to be filled in by the College and forwarded to the University, in the case of a student migrating from a foreign University or Education Board. Item 9 is -"The date of his provisional admission into the College affiliated to this University."

(12) In my opinion, Chap. XVI, R. 7 of the regulations is not intended to cover the case of a student migrating from another University or Education Board, to the University of Calcutta and seeking to get admitted in a College affiliated thereto, on the strength of having passed an examination equivalent to the Matriculation (to the school final as the case may be) or a higher examination, and intending to go through the full prescribed course therein. The rules governing such cases are to be found in the regulations and the resolutions of the Syndicate or the Senate; and the circulars and standing orders issued in pursuance thereto. Some of the relevant resolutions and circulars have been noticed above. The result may be summarised as follows:

(1) The Syndicate has general power of carrying on the administration of the University, according to the Universities Act, the Act of incorporation, the regulations, own resolutions and the resolutions of the Senate.

(2) The Syndicate has the power of recognising an examination of a recognised University or Education Board as equivalent to the Matriculation Examination (or the School final examination as the case may be) by passing a proper resolution to that effect (unless a regulation to that effect is made by the Senate).

(3) Where students migrate from a foreign University or Education Board after passing an examination recognized as an equivalent to the Matriculation (or the School final examination as the case may be), they have to make an application to the Syndicate through the heads of the Institutions into which they propose to study, in the prescribed form and with prescribed fees.

(4) The permission of the Syndicate is a condition precedent to their right to enter the University and their admission, until such permission is granted, is entirely provisional.

(5) The Syndicate is not bound to grant such permission.

(13) I will now consider the regulations from the view point of the Colleges into which such students seek admission or have been provisionally admitted. The regulations are contained in Chap. XXIII. According to R. 7, a student will be recognised as admitted to a College as soon as he has been accepted by the Principal, and has, where fees are required by the College, paid his admission and first month's fee. Rule 8 states that a student who has been admitted to an affiliated College, shall be considered to belong to that College until he has given notice to withdraw, or has been expelled or struck off the rolls for absenting himself or not-paying his fees. It will also terminate at the end of the academical year when he has been sent up for a University examination or when he takes a transfer. A Principal may expel a student for breach of College discipline. Rule 4 lays down that a student who has passed the Matriculation or the Intermediate in Arts or Science or the B. A. or B. Sc. examination may be admitted to a College. It is argued on behalf of the petitioner that once having been admitted to the College, he could not be expelled until R. 8 was satisfied. There is of course no case of indiscipline to be considered. On the other hand, it is argued by the respondents that the petitioner could not be admitted into the College at all because the Colleges are not entitled to admit anyone not qualified under R. 4. Both these arguments are inaccurate.

The Acts, regulations, resolutions and circulars referred to above, entitle a student who is migrating from another University or School Board and has passed an examination equivalent to those mentioned in R. 4 and recognised as such by the University to make an application for admission into a College. The College then forwards the particulars to the University (Hand book page 46 appendix C) under the signature of the Principal. Until the Syndicate grants permission, the admission necessarily remains provisional. Since the Syndicate can refuse its permission, I do not see why it cannot impose conditions for granting such permission.

(14) Let us now examine the facts of the present case, in the light of these rules and regulations. The University has accepted the final school standard of the Council as equivalent to the Matriculation, and for the School Final Examination of the Board of Secondary Education, West Bengal. The petitioner is a student of the Calcutta University and appeared at the School final examination. He however, also appeared at the final school standard examination of the Council as an external or private student. He fails in the former but passes in the latter. He states that he submitted a formal application through the College authorities of the Ashutosh College together with

all necessary documents, migration fee and registration fee, in order to obtain sanction to his migration. He then got admission to the College. This admission must necessarily be provisional. As I have shown above, no College can admit such a student without previous sanction of the Syndicate. No such application has yet been received by the University and no sanction has been given.

Meanwhile, the Syndicate has decided that no student who has passed the final school standard can be admitted to any College if he has failed in any test examination or the School final examination of the Board of Secondary Education West Bengal. In other words it would not sanction the migration of such a student, if it can be called a migration at all. It is quite clear that this is not a bona fide case of migration. A student of a School affiliated to the University fails to come up to its own standard but somehow passes the examination of another institution whose examination has been recognised but in view of recent facts, held suspect. The Syndicate is not satisfied that such a student has achieved a standard which would make him fit for admission to a College affiliated to it and refuses to sanction it.

I think it is entitled to take that view and there appears to be nothing illegal in it. If the petitioner had been a proper bona fide student of the Council, there would have been some injustice if he was arbitrarily shut out. It might then have been said that the student was suffering from the caprice of the Syndicate, who give recognition with one hand and take it away with another. But these facilities of mutual recognition extended to sister universities or educational institutions are not meant to be used as devices to circumvent the educational programme of the University, or to destroy its own standards. In such an eventuality, the Syndicate has the power to refuse sanction and it must be allowed to use that power. This Court is not called upon to interfere.

I must here mention that the University offered before me to grant sanction if the petitioner sat for an examination specially held for the purpose, upon the subjects which the petitioner had studied in the intermediate science course and upto the point which he had reached. The idea is to make certain that the petitioner is capable of following the course leading upto the intermediate examination. The petitioner has refused to sit for such a test.

It is next argued that even if the Syndicate has power to refuse sanction to migration, it has no power to ask the college to remove a student from the rolls. This is a curious argument. If the Syndicate refuses to sanction migration, what is the point of a student being kept on the rolls, and how can he be permitted to remain there and continue his studies? If the admission was provisional, the college is entitled to put an end to it, as it must do in the interest of the student himself since the admission is not capable of being sanctioned by the University. Nor can there be any exception taken to the University, through the Syndicate attempting to control the admission of such students or directing the Ashutosh College to remove the petitioner from the rolls if the requisite conditions were not satisfied. The Syndicate, as the body in whom the administration of the University is vested, has a plain duty to see that the affiliated colleges admit students who will, when the time comes, be allowed to sit in the University Examinations. There would be little point in continuing to impart education to any student upon a false pretence that he will be allowed to do so.

Finally it is argued that such regulations or rules if they exist are unconstitutional, as they violate the fundamental right under Arts. 14 & 19 (1) (g) of the constitution. It is further submitted that the respondents are not acting according to their own rules and should be compelled to do so.

(15) I have entirely failed to see how Art. 14 has been violated. If the Syndicate makes special rules for students who migrate to it from another University that is not discrimination. All categories of students cannot be treated alike. To treat students migrating from another University as a separate class, from students passing the University's own examinations, is not an unreasonable classification and certainly has a rational basis. 'State of Bombay v. F. N. Balsara', AIR 1951 S. C. 318 at P. 326 (B).

(16) Also, I do not see, how Art. 19 (1) (g) has been violated. It is argued that study in an University is an "occupation". Firstly, I do not see how that is so. The dictionary meaning is "Employment, business, calling" none of which is applicable to academic pursuit simpliciter. A teacher may be said to have an occupation. A student cannot be said to be following any occupation, in the generally accepted sense of the term.

(17) Next comes the question as to whether the respondents were violating their own rules. I have shown above that none of the respondents are guilty of violating the rules. The University is within its rights to refuse sanction (through the Syndicate), the college cannot continue a provisional admission without any prospect of such sanction being obtained. Respondent 2 is of course a mere employee of the University and has no independent volition in the matter. He must carry out the rules, regulations and orders of the Syndicate.

(18) I must confess that I somewhat regret the conclusion which I have reached in the matter. It will inevitably result in the wastage of much invaluable time and affect the careers of hundreds of students. I cannot but feel that they have been ill-advised to turn down the offer of the University to sanction their migration, subject to a test. It is however for them and their guardians to do what they think is most beneficial. While I am compelled to dismiss this application, I must observe that the University should have been more thorough in its appraisal of the merits of the council. The awakening has been somewhat belated. Respondent 1 also should have made it perfectly clear to the petitioner that his admission was purely provisional. I do not also see what justification there was in receiving the application for sanction together with the fees and not forwarding the same to the University for such a length of time.

(19) The rule is accordingly discharged, the interim orders vacated. There will be no order as to costs.

(20) As the petitioner intends to appeal, the interim order will remain in operation for a further period of 3 weeks after which any further stay must be obtained from the Court of Appeal.

A/H.G.P.

Order accordingly.

A. I. R. 1953 CAL. 787 (Vol. 40, C. N. 297)

S. R. DAS GUPTA J.

Ramnath Narendranath, Applicant v. Nanjee Shamjee & Co., Respondent.

Award Case No. 52 of 1953, D/- 20-5-1953.

(a) Arbitration Act (1940), Ss. 3, 11, 28 (1), 33 and Sch. I, Para 3 — Bengal Chamber of Commerce, Tribunal of Arbitration Rules, Rr. 5 (3), 6, 7 and 25 — Effect of.

The effect of Rules 6 and 7 of the Tribunal of Arbitration, Bengal Chamber of Commerce, which form part of the arbitration agreement between the parties, is that the first Court to be constituted by the Registrar must make its award within four months and if they do not do so and if there has been no extension of time under R. 25 to make the said award, then the Registrar must appoint another set of persons who shall proceed with the arbitration and make their award. The same persons cannot after four months have expired and if no extension has been granted within that time, proceed to make the award and the same persons cannot also be appointed by the Registrar to constitute the second Court and make the award and if they do so, they must be held to have acted without jurisdiction. In such case there is no question of extending the time for the arbitrators to make their award. (Para 13)

The extended time mentioned in R. 7 within which the first Court is to make its award must be the time extended before the expiry of the period of four months and it cannot be the time extended after the expiry of the period of four months. (Para 14)

Where the persons constituting the second Court are the same persons who constituted the first Court, the award will be declared void under S. 33. In such case the question whether or not the persons appointed are proper persons to act as arbitrators as contemplated by R. 5(3) does not arise but the question is whether these persons can at all be appointed as arbitrators. (Paras 16, 17 and 18)

Anno: Arbitration Act, S. 28 N. 1; S. 33 N. 1.

(b) Arbitration Act (1940), S. 28 (2) — Bengal Chamber of Commerce, Tribunal of Arbitration, Rules, R. 7 — Validity.

Rule 7 of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce is not in conflict with S. 28 (2) of the Arbitration Act and is not ultra vires on that ground. Rule 7 is not a provision which empowers the arbitrators at their pleasure without the consent of the parties to the agreement to enlarge the time for making the award. (Para 15)

Anno: Arbitration Act, S. 28 N. 2.

D. C. Sethia, for Applicant; A. N. Roy, for Respondent.

CASE CITED:

(A) ('52) Award No. 45 of 1952 (Cal)

ORDER: This is an application under S. 33 of the Arbitration Act for an order declaring the award No. 1347 of 1952 made by the Bengal Chamber of Commerce and Industry, Tribunal of Arbitration, to be null and void, alternatively for an order setting aside the said award.

(2) The principal ground taken in support of this application is that the second Court constituted by the Registrar, Bengal Chamber of Commerce under R. 7 of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, had no jurisdiction to make the award. In other words, it is contended that the Registrar, Bengal Chamber of Commerce, in constituting the second Court under R. 7 of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, cannot appoint the same persons who constituted the first Court but must appoint different persons, different from the persons who constituted the first Court, to determine the dispute which has been referred to the Bengal Chamber of Commerce. In this case, it is said that, the persons who constituted the second Court were the same persons who constituted the first Court and therefore such constitution is void and contrary to the provisions of R. 7 of the said rules and the arbitrators so constituted had no jurisdiction to make the award.

(3) Previously in a number of applications I have already held that if the Registrar appoints the same persons who constituted the first Court as members also of the second Court, then such appointment is invalid and the arbitrators who constituted the second Court would have no jurisdiction to make the award and on that ground I have set aside a number of awards. The point which is now agitated before me on behalf of the respondent to this application is that although the arbitrators as constituting the second Court had no jurisdiction to make the award, they had jurisdiction to make the award as constituting the first Court and under R. 25 of the Rules of the Tribunal of Arbitration this Court has power to extend the time for making the award.

This Court, it is also contended, has the power to extend the time to make the award under S. 28 of the Arbitration Act and this Court can so extend even after the award is made. In other words, it is urged before me on behalf of the respondent that the arbitrators who constituted the first Court no doubt neglected to make their award within the time specified in R. 7, but this Court has the power to extend the said time and although the said arbitrators have already made their award, this Court can under S. 28 of the Arbitration Act extend the time even after the award is made. Therefore the respondent prayed before me that I should exercise my discretion and extend the time for the arbitrators constituting the first Court to make their award.

(4) Mr. Roy appearing on behalf of the respondent urged two points before me in support of his client's case. In the first place, he contended that this Court should grant an extension of time for the arbitrators to make their award. His second contention is that R. 7 of the Rules of Tribunal of the Arbitration is ultra vires being in conflict with the provisions of sub-s. 2 of S. 28 of the Arbitration Act. In order to appreciate the contentions of the respective parties made before me on this application it would be necessary to set out some of the provisions of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce as also of the Arbitration Act. The provisions of the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce which are material for the present purpose are as follows:

'Rule 1, sub-rule 2' — "Court" means the Arbitrator or Arbitrators appointed for determining a particular dispute, or the umpire where an umpire has been appointed.

'Rule V(1)' — "In every case where a dispute or difference has arisen between parties who have agreed that such dispute or difference shall be referred for decision to the Chamber or the Tribunal, an application for arbitration may be addressed by either party to the Registrar which application, in the case of disputes relating to piece-goods shall be in such form as the Committee of the Chamber may from time to time prescribe."

(2) "On receipt of such application, the Registrar shall constitute a Court for the adjudication of the dispute."

(3) "In constituting any Court the Registrar shall select, as arbitrator or arbitrators or umpire as the case may be, so far as possible, persons or a person having a practical knowledge of the subject-matter of the contract or contracts in question, and the Registrar shall not appoint any person who for any reason within his knowledge would not be a proper person to act as arbitrator or umpire in the particular matter, but no award shall be invalid nor shall any objection be taken thereto by any party, on the ground that any person so appointed did not possess such practical knowledge, or was not in fact a proper person to act as arbitrator or umpire."

VI — "Unless the agreement to refer the dispute or difference to the Chamber or Tribunal otherwise expressly provides the Court shall consist of two arbitrators, who shall be selected by the Registrar from the Tribunal and appointed in writing under his hand."

VII — "If the Court have allowed the time or extended time to expire without making any award, and without having signified to the Registrar that they cannot agree, the Registrar shall constitute in manner aforesaid another Court which shall proceed with the arbitration and shall be at liberty to act upon the record of the proceedings as then existed and on the evidence, if any, then taken in the arbitration or to commence the arbitration de novo."

XXV — "The Court shall make its award in writing within four months after entering on the reference or on or before any later day to which the Court, with the consent of all parties concerned in the proceedings, by any writing signed by them, may from time to time, enlarge its time therefor or any extension of time granted by the Court of Judicature at Fort William in Bengal."

(5) The material provisions of the Arbitration Act with which we are concerned in this application are as follows:

Section 3 — "An arbitration agreement unless a different intention is expressed therein, shall be deemed to include the provisions set out in the first Schedule in so far as they are applicable to the reference."

(6) Paragraph 3 of the First Schedule runs as follows:

"The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators by any writing signed by them, may from time to time enlarge the time for making the award."

(7) Section 11 of the Arbitration Act provides as follows:

"The Court may on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award."

(8) The rest of the section is not material for the present purpose.

Section 28(1): "The Court may, if it thinks fit, whether the time for making the award has expired or not, and whether the award has been made or not, enlarge from time to time the time for making the award."

(9) Mr. Roy contended before me, in the first instance, that the real position in the present case is that the arbitrators, who constituted the first Court have made their award. The effect of R. 6 and of Para. 3 of the First Schedule to the Arbitration Act is that the arbitrators who constituted the first Court should make their award within four months. The first Court so constituted did not make its award within the said four months, but this Court under Sub-S. 1 of S. 28 of the Arbitration Act has the power to extend the time for the said arbitrators to make their award and Mr. Roy contended that he is applying before me for such extension. Mr. Roy further contended before me that the R. 25 of the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce there is also a provision for such extension and he is also applying before me under the said rule for such extension and his contention is that such extension can be given even after the award has been made.

(10) Mr. Roy further contended before me that even if it is held that the provision of R. 7 of the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce has not been complied with, the result in that event may be that the second Court constituted under R. 7 is invalid but that does not mean that the first Court cannot still proceed to make its award. He contended that the same arbitrators who constituted the first Court have also been appointed arbitrators constituting the second Court, and they have made their award. They may not make the award as arbitrators constituting the second Court but they can make the award as arbitrators constituting the first Court and even if the award has been made beyond time this Court acting under S. 28 of the Arbitration Act can extend the time for the arbitrators to make the said award.

(11) This argument at first sight is attractive, but I am unable to accept the same. The real position in the matter to my mind is as follows:

(12) The parties by agreement between them had agreed to refer their disputes to the arbitration of Bengal Chamber of Commerce. They also agreed that the said arbitration is to be effected under the rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce. In other words, the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce were in effect incorporated in the said agreement and the parties are bound by the said rules. The effect of R. 6 and of R. 7 of the Rules of Tribunal of Arbitration, Bengal Chamber of Commerce, to my mind, is as follows:

(13) After a dispute or difference has arisen between the parties, who agreed to abide by the arbitration of the Bengal Chamber of Commerce, and the said dispute has been referred to the decision of the Chamber, the Registrar shall constitute a Court for the adjudication of the dispute. Under R. 6, the said appointment is to be in writing under the hand of the Registrar. The said arbitrators so appointed are to make their award within four months or they are to make their award within the time extended under the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce. The provision for such extension is to be found in R. 25 of the rules of Tribunal, Bengal Chamber of Commerce. But if the first Court constituted by the Registrar fails to make its award within the period of four months or within the time so extended, then the Registrar shall constitute another Court which shall proceed with the

arbitration and make its award. In other words, the said rules which are part of the agreement between the parties, provide that if the first set of arbitrators or the persons who constituted the first Court do not make their award within four months or within the extended time, then the Registrar shall appoint other persons to constitute a second Court and they shall thereafter proceed with the reference.

The effect of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, which form part of the agreement between the parties, to my mind, is that the first Court to be constituted by the Registrar must make its award within four months and if they do not do so and if there has been no extension of time to make the said award, then the Registrar must appoint another set of persons who shall proceed with the arbitration and make their award. The same persons cannot after four months have expired and if no extension has been granted, proceed to make the award and the same persons cannot also be appointed by the Registrar to constitute the second Court and make the award and if they do so, they must be held to have acted without jurisdiction. In such case there is no question of extending the time for the arbitrators to make their award.

Thus, for example, if A and B, who constituted the first Court, do not make their award within the time, then persons other than A and B are to be appointed arbitrators and shall proceed with the arbitration. If then A and B do not make the award within the said period of four months, they become functus officio by virtue of the agreement between the parties and some other persons have to be appointed arbitrators to proceed with the reference. It is not a case, as I have just now indicated, where there is any question of extending the time for the arbitrators to make their award. This is a case where a new set of arbitrators has to be appointed, a new Court has to be constituted with new set of persons under R. 7 of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce.

The question which then arises is whether the said rules have been complied with. If not, then the persons appointed in contravention of the said rules must, in my opinion, cannot have any jurisdiction to act. Rule 7 makes it clear that the persons who are to constitute the second Court must be persons different from the persons who are to constitute the first Court.

(14) The next question is whether the extended time, as mentioned in R. 7, within which the first Court is to make its award should be a time extended before the four months have expired or whether such time can be extended even after the expiry of four months. Mr. Roy's contention before me amounts to this that the time can be extended even after the four months had expired and therefore, his client is entitled even at this stage to apply before this Court to have the said time extended. In my opinion, the extended time within which the first Court is to make its award must be the time extended before the expiry of the period of four months and it cannot be the time extended after the expiry of the period of four months. The reason seems to me to be obvious.

Rule 7 inter alia provides that if the Court has allowed the time to expire without making any award, then the Registrar shall constitute another Court. The time there referred to is the period of four months from the date when the arbitrators entered on the reference. After the expiry of the said period of four months, the first Court ceases to have any jurisdiction whatsoever, and the Registrar must constitute in the manner indicated in R. 7 another Court who shall proceed with the arbitration. That being so, there cannot be any question of extending the time after the expiry of the period of four months because, as soon as the said period of four months expires, the Registrar is bound to constitute another Court and that is the agreement between the parties.

In other words, the effect of agreement between the parties is that as soon as the period of four months expires and if the time has not been extended within that date, then the persons constituting the first Court cease to have any jurisdiction in the matter and the Registrar must constitute another Court who is to proceed with the arbitration and whose award will be binding upon the parties. In that view of the matter, I am also of the opinion that the extended time mentioned in R. 7 must be the time extended before the period of four months has expired. That being so, I am unable to accept the contention of Mr. Roy.

In my opinion, there is no question of extending the time for the arbitrators to make their award, but the question really is whether or not the second Court constituted by the arbitrators had jurisdiction to proceed with the arbitration and make the award. I see no reason to revise my previous decision that the Court constituted under R. 7 must consist of persons other than the persons who constituted the first Court. This seems to be clear from the definition of the word "Court" as given in R. 1. In the premises, the first ground taken before me by Mr. Roy fails.

(14a) The next contention of Mr. Roy is that R. 7 itself is ultra vires, being in conflict with the provisions of sub-s. 2 of S. 28 of the Arbitration Act. The said sub-section, as I have already mentioned, provides that any provision in an arbitration agreement whereby the arbitrator or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Mr. Roy contended before me that although the arbitration proceedings are to take place under the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, but the arbitrator in this case is the Bengal Chamber of Commerce. That being so, R. 7 which according to him in effect allows the arbitrator to enlarge the time to make its award to such period as it may desire must be held to be void and of no effect. In other words, his contention is that if R. 7 is given effect to, then the Registrar, by constituting one Court after another at the expiry of every four months, can go on enlarging the time for the arbitrator, which is Bengal Chamber of Commerce, to make its award as long as it desires and such a provision is in conflict with the provisions of sub-s. 2 of S. 28 of the Arbitration Act.

(15) Mr. Roy drew my attention to S. 3 and to Para 3 of the first Schedule of the Arbitration Act and contended that the arbitrator must make its award within a period of four months as prescribed therein. He contended that if there is any agreement between the parties whereby it is provided that the arbitrators, without the consent of the parties to the agreement, may enlarge the time for making the award, such a provision must be held to be void. Rule 7, according to him, is such a provision and therefore it must also be held to be void. This very point came up for decision before Bachawat J. in the case of "In Re 'Arbitration Ladhuram v. Dunichand', 'Award' No. 45 of 1952 (Cal) (A) ". Bachawat J. fully dealt with all the arguments which were advanc-

ed before him in support of the said contention. His Lordship could not agree with the same. I had the advantage of looking into the judgment of His Lordship and the reasonings given therein. I find no reason to disagree with the view taken by him on this point.

In my opinion, R. 7 is not such a provision as is contemplated in sub-s. 2 of S. 28 of the Arbitration Act. It is not a provision whereby the arbitrators may extend the time without any reference to the parties as is contemplated in S. 28. The effect of the said rule, to my mind, is — and it must be remembered that the said rule is a part of the agreement between the parties — that time is fixed within which the arbitrators are to make their award. In other words, the parties agree that a Court is to be constituted in the first instance which is to make its award within a period of four months and if the said Court does not make its award within the said period of four months, (and if the period is not extended before the said period expires) then a new set of persons is to be appointed who shall proceed with the reference.

In other words, the parties fixed the time by agreement amongst themselves. Rule 7 is enacted for that purpose. Rule 7 is not a provision which empowers the arbitrators at their pleasure without the consent of the parties to the agreement to enlarge the time for making the award. If the rule was to that effect, then, no doubt, the rule would have been repugnant to the provisions of sub-s. (2) of S. 28 and would have been void. In this connection it should be remembered that S. 3 of the Arbitration Act which includes the provisions set out in the First Schedule does not apply to a case where there is a different intention expressed in the arbitration itself. The period of four months mentioned in Para. 3 of the First Schedule is subject to any contrary intention which may be expressed in the arbitration agreement. In other words, the parties if they so choose, can fix any period of time, within which the arbitrators are to make their award. In R. 7 the parties have made provision as to the period within which the arbitrators are to make their award. It is not a provision whereby the arbitrators can extend the time without the consent of the parties to the agreement at their own pleasure. I am unable to accept this part of Mr. Roy's contention.

(16) Before concluding the matter I ought to mention that at the hearing of this application I allowed all learned counsel who are appearing in other applications in which this very point has cropped up, to make their respective submissions before me so that I can decide this point once for all after hearing all of them. Mr. Kar appearing for one of the parties, in one of such applications, referred me to sub-r. 3 of R. 5 of the Rules of the Tribunal of Arbitration in support of his contention that the award should not be declared void on the ground that the second Court constituted by the Registrar consisted of the same persons constituting the first. The said sub-r. 3 of R. 5 of the Rules of Tribunal of Arbitration provides that in constituting a Court, the Registrar shall select persons having a practical knowledge of the subject-matter of the contract and the Registrar shall not appoint any person who for any reason within his knowledge would not be a proper person to act as arbitrator or umpire in the particular matter. The said rule then provides that no award should be invalid nor any objection be taken on the ground that any person so appointed did not possess such knowledge or was not in fact a proper person.

Mr. Kar's argument before me is that the effect of non-compliance with the provisions of R. 7 of the Rules of Tribunal of Arbitration, that is to say, the effect of appointing the very same persons to constitute the second Court, is that the said persons constituting the second Court are not proper persons to act as arbitrators or umpires and therefore, in view of the provisions of sub-r. 3 of R. 5 no award can be set aside on that ground. I am unable to accept this contention. Whether or not the persons appointed are proper persons to act as arbitrator or umpire as contemplated in sub-r. 3 of R. 5, is not the question before me but the question is whether or not these persons can at all be appointed. In other words, the question is whether or not those persons had the jurisdiction to act as arbitrators. In my opinion, this contention of Mr. Kar must also fail.

(17) It is not disputed before me that in this case the persons constituting the second Court were the same persons who constituted the first Court.

(18) The result, therefore, is that there will be an order declaring the award No. 1347 of 1952 made by the Bengal Chamber of Commerce Industry, Tribunal of Arbitration, in case 379G of 1952 to be null and void. The respondent is to pay to the petitioner the costs of this application.

A/K.S.B. Petition allowed.

A. I. R. 1953 CAL. 791 (Vol. 40, C. N. 298)

K. C. CHUNDER J.

Sajjad Hossain, Accused-Petitioner v. Askari Mirza, Complainant-Opposite Party.

Criminal Revn. No. 633 of 1952, D/- 6-1-1953.

Criminal P. C. (1898), S. 198 — Case under S. 500, Penal Code — Petition of complaint.

Where all that was asked for by the petitioner was an order upon the opposite party to show cause why proceedings should not be taken against him, and there was no complaint as required by S. 198, the petition is not such whereby a case under S. 500, Penal Code may be instituted under S. 198. Case under S. 500 must be instituted by petition of complaint by person defamed. (Para 1)

Anno: Cr. P. C., S. 198 N. 3.

S. S. Mukherji, for Petitioner; G. D. Bhattacharjya, for Opposite Party.

ORDER: This Rule was issued at the instance of an accused person for quashing of proceedings. Under S. 198, Criminal P. C., it is necessary that a case under S. 500, Penal Code must be instituted by a petition of complaint by the person defamed himself. The complaint must be in accordance with the definition of a complaint, given in the Code of Criminal Procedure. In the present case, all that was asked for by the person who petitioned the Magistrate was for an order upon the accused summoned to show cause why proceedings should not be taken against him. There was no complaint as required and therefore the present proceedings must be quashed leaving it open to the complainant, if so advised, to file a proper complaint.

(2) The Rule is therefore made absolute. The accused is discharged from his bail bond.

B/R.G.D. Rule made absolute.

***A.I.R. 1953 CAL. 792 (Vol. 40, C. N. 299)**

GUHA RAY AND DEBABRATA MOOKERJEE JJ.

State v. Abdul Rahaman Mandal, Accused-Appellant.

Criminal Reference No. 2 of 1953 and Appeal No. 132 of 1953, D/- 7-8-1953.

***(a) Criminal P. C. (1898), Ss. 211, 212 and 537 — Non-compliance with provisions of Ss. 211 and 212 — Trial is not vitiated.**

Sections 211 and 212 which are intended to serve a two-fold purpose, one of which is a safeguard against an unnecessary trial and the other of which confers upon the accused a right of having the witnesses cited by him when required to do so under S. 211 summoned for the trial, do not go to the root of the matter or the jurisdiction of the Magistrate committing the accused for trial. A non-compliance with the provisions of these sections does not vitiate the trial. The trial will be vitiated only if the commitment is totally invalid in law, for, in that case there will be no basis for the committal of the accused to the Court of Session or the High Court, as the case may be; but if the commitment is not totally invalid in law, the trial can hardly be held to be vitiated. (Para 14)

Section 537 applies to a final order on a trial. It does not apply to an interlocutory order such as the commitment order. It follows that it was not the intention of the Legislature to confer upon Ss. 211 and 212 an imperative character. Hence, the disregard of these provisions while it will certainly entitle the aggrieved party to have a commitment quashed on the ground of such contravention, will not entitle the aggrieved person to challenge the final order of conviction unless that has occasioned a failure of justice. Case law considered. (Para 16)

Anno: Cr. P. C., S. 211 N. 1; S. 537 N. 18.

(b) Criminal P. C. (1898), S. 215 — Time for quashing commitment.

The remedy for quashing a commitment is available to the aggrieved party only before a trial is over and not after the trial is over. The question of quashing a commitment cannot possibly arise after a trial is over because it is no use quashing a commitment unless the result of the trial itself is at the same time set aside and if the result is set aside, it will be unnecessary in most cases to quash the commitment. 6 Cal 584; 12 Cal LR 120, Ref. (Para 19)

Anno: Cr. P. C., S. 215 N. 10.

N. K. Sen, for the State; Annada Majumdar, for Appellant.

CASES CITED:

(A) ('53) AIR 1953 Cal 12: 56 Cal WN 202: 1953 Cri LJ 160
(B) ('53) AIR 1953 Cal 10: 89 Cal LJ 28: 1953 Cri LJ 128
(C) ('52) Cri Revn No 42 of 1952 (Cal)
(D) ('51) Cri Revn No 1083 of 1951 (Cal)
(E) ('51) Misc Case No 290 of 1951 (Cal)
(F) (1758) 1 Bunns 445
(G) (1834) 4 LJ KB 21: 2 A & E 84
(H) (1861) 13 LT 494: 30 LJ Ch 379
(I) (1875) 44 LJ CP 293: LR 10 CP 733
(J) ('48) AIR 1948 Bom 20: ILR (1949) Bom 791
(K) ('52) AIR 1952 Orissa 176: ILR (1949) 1 Cut 392
(L) ('27) AIR 1927 PC 44: 54 Ind App 96: 28 Cri LJ 259 (PC)
(M) ('47) AIR 1947 PC 67: 51 Cal WN 474: 48 Cri LJ 533 (PC)
(N) ('01) 25 Mad 61: 28 Ind App 257 (PC)
(O) ('81) 8 Cal LR 265: 6 Cal 584
(P) ('83) 12 Cal LR 120
(Q) ('46) AIR 1946 PC 82: 73 Ind App 77: 47 Cri LJ 616 (PC)
(R) (1917) 86 LJ PC 113: (1917) AC 170

GUHA RAY J.: Abdul Rahaman Mandal alias Rahim Mandal was put on his trial before an Addl. Judge, 24 Parganas, sitting with a Special Jury under S. 302, I. P. C., and convicted under that Section on the unanimous verdict of the jury and sentenced to death. The proceedings have been submitted to this Court under S. 374, Cr. P. C., for confirmation of the death sentence and Abdul Rahaman Mandal has also preferred an appeal so that the entire case is now before us.

(2) The case for the prosecution briefly is that Abdul Rahaman Mandal used to stay in a south-facing pucca room along with his son Fate Ali aged about 12, and Arfan Bibi, his daughter, used to stay in another hut in the same compound with her husband Miajaddin Mondal. On 4-2-1953, in the afternoon Moslem Mondal of Bishnupur who was the husband of a sister of Miajuddin's father visited the house of Abdul Rahaman Mandal, took his meal there at night and slept on a separate bed in the same room where the accused Abdul Rahaman Mandal slept with his son Fate Ali on a different bed. At about 1.30 a.m. that night Fate Ali woke up on hearing a groaning sound and in the light of the hurricane lantern burning inside the room he saw his father striking Moslem Mandal with a Hesho which is a kind of dao. On seeing that he started crying out and his father asked him not to cry out like that and at the same time threatened to kill him if he went on doing so. He then caught hold of Fate Ali by the hand but Fate Ali somehow succeeded in opening the door with his left hand. His cries had meanwhile brought Arfan Bibi and Miajaddin near the room where the incident took place.

When Miajaddin saw the accused catching hold of Fate Ali he released him from his grip and Fate Ali went outside and raised a hue and cry. The accused then struck Miajaddin with a baton and Miajaddin fell down on the court-yard while the accused sat upon his chest and tried to throttle him. Meanwhile some neighbours of the accused came along on hearing the hue and cry raised by Fate Ali and his sister Arfan Bibi, released Miajaddin from the grip of the accused and tied him to a plantain tree with a rope. Moslem Mandal had died on his bed inside the room as a result of the injuries he had received and a blood-stained spade (Ex. I), a blood-stained Hesho (Ex. II), and a Chheni (Ex. III) were found lying close to the dead body of Moslem Mandal. To the neighbours who had assembled on hearing the cries of Fate Ali and Arfan Bibi, Fate Ali is alleged to have stated that it was his father who had killed Moslem Mandal. One of the neighbours was Narendra Krishna Halder. He sent for the Chowkidars and when the

Chowkidars arrived he himself left for Rajarhat Police Station which was about 5 miles away & reported the occurrence at 4.30 a.m. The Sub-Inspector after having recorded the first information report arrived at the place of occurrence next morning, held an inquest on the dead body of Moslem Mandal which was lying inside the room of the accused and sent it for post mortem examination to Basirhat. The Sub-Inspector found the accused tied to a plantain tree with a rope, took him into custody, seized the blood-stained spade and the blood-stained Hesho, Exhibits I and II respectively, and the Chheni. Ex. III, and certain other Alamats. Miajaddin who had been roughly handled by the accused, and the accused himself were also sent for examination of their injuries by a Doctor of Rajarhat viz., Dr. Taranath Bhattacharya, and the blood-stained clothings etc., were sent to the Chemical Examiner for examination and report. The Police after investigation submitted a charge sheet against the accused.

(3) The defence of the accused was that he was not guilty. In the cross-examination of the witnesses various suggestions were thrown out viz., that the occurrence did not take place in the room of the accused as alleged by the prosecution and that Moslem Mandal was murdered elsewhere and that the accused was falsely implicated at the instance of Narendra Krishna Halder and Abdul Sattar who wanted to grab the homestead and the land of the accused. The accused, however, in a lengthy statement under S. 342, Cr. P. C., said that when Moslem Mandal was introduced to him by Miajaddin as an intending purchaser of his property and was asked to sleep in his room, the accused objected because Moslem Mandal was stout and strong but as no heed was paid to his objection and Moslem Mandal was allowed to sleep on a different bed in the same room, he himself could not sleep out of fear and sat outside the mosquito curtain under which his son Fate Ali was sleeping. At about 3 a.m. Moslem Mandal came to assault him with a knife and so for fear of life the accused aimed a blow with a Hesho at the leg of the customer but he could not definitely say on which part of the body of the customer that blow actually fell. Then his son Fate Ali woke up and either he or his son Fate Ali opened the door when Miajaddin and another man entered the room and started beating him, and one Budha Mandal protested but Miajaddin said that as the accused had murdered a man there was no reason why he should not be beaten. The accused further said that he became unconscious as a result of the assault and he did not recover consciousness till the next morning when he found many other persons assembled in the house.

(4) Before dealing with the facts and the evidence in the case it is necessary to dispose of the last point raised by Mr. Majumdar on behalf of the accused, because if that point succeeds, the conviction of the accused and the sentence would have to be set aside.

(5) The point which Mr. Majumdar barely raised rather than fully argued is that after a charge was framed against the accused by the committing Magistrate he did not ask him as required by S. 211, Cr. P. C., to submit a list of defence witnesses, and that being so, the Magistrate did not comply with the provisions of Ss. 211, 212 and 213, Cr. P. C., so that the commitment was made in disregard of the provisions of these Sections. It is the contention of Mr. Majumdar that not merely the commitment was illegal but the illegality of the commitment affected the entire trial so much so that the whole trial was vitiated by it. In support of his contention he relied on the case of — 'Kashinath Das v. Kalipada Das', AIR 1953 Cal 12 (A); — 'Sripati Dulay v. The State', AIR 1953 Cal 10 (B) and certain unreported decisions viz., — 'Renuka Bag v. The State', Cri Revn No. 42 of 1952 (Cal) (C); — 'Radharani Dassey v. The State', Cri Revn No 1083 of 1951 (Cal) (D) and — 'Satyahari Choudhury v. The State', Misc Case No 290 of 1951 (Cal) (E). These were cases in which petitions were filed for quashing the commitment made in disregard of the provisions of Ss. 211 and 212, Cr. P. C. It was held in all these cases that Ss. 211 and 212, Cr. P. C., are substantial provisions of procedure, non-compliance with which vitiates the commitment and the illegality is not curable under S. 537 Cr. P. C. In all these cases the question was raised before the accused were actually placed on their trial and the commitments were quashed with directions that the provisions disregarded should be duly complied with and the cases disposed of in accordance with law. In none of these cases the question arose as to whether the illegality involved which vitiated the commitment would go to the length of vitiating the trial also. The question, therefore, raised before us is much more fundamental than the question with which this court was confronted in the cases referred to. We have, therefore, given an anxious consideration to the point.

(6) The question whether the illegality complained of which was held to vitiate the commitment would also vitiate the trial depends on the nature of the illegality and we have therefore, to examine the question at some length.

(7) In the English Courts a distinction has always been recognised between two classes of mandatory provisions of law, one being termed absolute and the other merely directory. Provisions of law which were held to be absolute in their character involved a nullification of subsequent proceedings if they were not obeyed. Provisions, however, which were merely directory in their character do not involve any such consequence. This distinction has also been recognised in this country. We shall only refer to some of the important cases on this point in England and in this country. One of the earliest cases in England is — 'Rose v. Londale', (1758) 1 Bunns 445, at p. 447 (F). In this case two Justices of the Peace appointed 5 overseers of a Parish while the statute provided a maximum of 4 appointed within a particular time and the question was if this could be legally done. Lord Mansfield in quashing the order observed:

> "There is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament and clauses merely directory. The precise time, in many cases, is not of the essence."

(8) The next important case on the point is — 'Pearse v. Morrice', (1834) 2 A & E 84, at

p. 96 (G). In this case the relevant statute made rent payable to the Treasurer of the Trustees and unless payment was made to him according to the terms of the sections, the lease, contract or agreement would be null and void to all intents and purposes whatever. Taunton J., in deciding that this provision was absolute observed as follows:

"There may be many reasons why it should be desirable to make the rent payable to the treasurer only. But looking into the words of the Act, if they are not obligatory, I cannot conceive to myself any words which can have a prohibitory force. The distinction between directory and imperative statutes has long been known. * * * I understand the distinction to be, that a clause is directory where it contains a mere matter of direction and nothing more, but not so where they are followed by such words as are used here viz., that anything done contrary to such provisions shall be null and void."

The next important case on the point is — Liverpool Borough Bank v. Turner', (1861) 30 LJ Ch 379 at p 380 (H). The question here was whether there could be a mortgage of a ship without the formalities required by the Merchant Shipping Act, and in deciding that there could not, Campbell L. C., said:

"The forms of transfer and mortgage required by Ss. 55 and 66 must be substantially followed although there be no negative words declaring that all transfers and mortgages in any other form shall be null and void. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

In —'Woodword v. Sarsons', (1875) LR 10 CP 733, at p 746 (I), where the question was whether the rules and forms contained in the schedules of the Ballot Act were directory only or not, the Ballot Act having been divided into two parts, one containing the number of sections & the other containing two schedules of certain rules and forms, and one of the sections providing that the schedules and the notice thereto and the directions therein shall be construed to have effect as part of the Act, Lord Coleridge C. J., says:

"The general rule is that an absolute enactment must be obeyed and fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

(9) It is clear from these cases that in England the distinction was long recognised between provisions of law held to be merely directory and those that were held to be absolute or imperative. This distinction has been recognised in India also. In — 'Shripad Amrit v. Harsiddhbhai Divatia', AIR 1948 Bom 20 (J) and — 'Giridhari Dhal v. Hrishikesh Roy', AIR 1952 Orissa 176 (K), some of these cases were referred to and this distinction was recognised. In these cases also it was held that where the provisions of the statute are of an imperative character, disobedience or contravention thereof results in the invalidity of the subsequent proceedings, but where they are merely directory no such consequence is involved. It was further held there that in deciding whether a provision of law is directory or imperative, one has to look into the entire scope of the provisions in question.

(10) Sections 211 and 212, Criminal P. C. have now to be examined in the light of the principles laid down in the cases cited above and the question we have to put ourselves is, "do Ss. 211 and 212, Cr. P. C., lay down one of those imperatives of law, contravention of which must mean a nullification of all subsequent proceedings?"

(11) Sections 211 and 212 appear in Chapter 18 of the Code, a Chapter which bears the heading: "Of Inquiry into cases triable by the court of Session or High Court." Section 206 with which the Chapter opens lays down that certain Magistrates may commit any person for trial to the court of Session or the High Court for any offence triable by such court. In other words, this is the Section giving jurisdiction to the Magistrates concerned for committing for trial to the Court of Session or the High Court. Then S. 207 is as follows:

"The following procedure shall be adopted in inquiries before Magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court."

The sections that follow S. 207 are the sections which lay down the procedure for an enquiry into cases triable by the Court of Session or the High Court. Section 208 says how evidence is to be taken and S. 209 empowers the Magistrate to discharge the accused, if after he has taken the evidence for the prosecution and for the defence, if any, he thinks there are not sufficient grounds for committing the accused. Section 210 entitles the Magistrate to frame a charge if he is satisfied that there are sufficient grounds for committing the accused for trial and then follows S. 211 which is as follows :

"(1) The accused shall be required at once to give in orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this Section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial."

Then S. 212 runs as follows:

"The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under S. 211,"

and S. 213 under which the Magistrates can commit an accused person provides :

"(1) When the accused, on being required to give in a list under S. 211, has declined to do so or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under S. 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be)

and (unless the Magistrate is Presidency Magistrate) shall also record briefly the reasons for such commitment."

and sub-s. (2) of S. 213 provides that

"(2) if the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused."

Section 215 lays down that

"A commitment once made under S. 213 by a competent Magistrate or by a Civil or Revenue Court under S. 478, can be quashed by the High Court only, and only on a point of law."

Then follow certain provisions regarding the summonses to witnesses for defence after committal, the bond of complainants and witnesses, the detention in custody of witnesses in case of refusal to attend or to execute the bond, the notification of the commitment etc. Section 219 entitles the Magistrate to summon supplementary witnesses for the prosecution and S. 220 with which the Chapter ends provides for the custody of the accused pending the trial.

(12) It is clear from an examination of the entire chapter that Ss. 211 and 212 are meant to serve a two-fold purpose, the first is that the accused, if he furnishes a list of witnesses when required to do so u/s 211, is entitled as a matter of right to have these witnesses summoned at the trial. Of course he is entitled to furnish, if the Magistrate allows him to do so, a supplementary list of witnesses also and he is entitled to have these also summoned at the trial. That is obviously the first purpose served by S. 211.

(13) The next object of these sections seems to be this: that the Magistrate may in his discretion summon and examine any or all of these witnesses, and if on an examination of these witnesses he thinks that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused. In other words this provides safeguard against an unnecessary trial.

(14) The question now is whether these provisions are to be construed as imperative or merely directory. The jurisdiction to commit an accused person to the court of Session or to the High Court, as already stated, is conferred by S. 206, and when the Magistrate frames a charge u/s 210, he has to be satisfied that there are sufficient grounds for committing the accused for trial. In other words, even at that stage he has to apply his mind to the facts of the case and to satisfy himself that there are sufficient grounds for committing the accused for trial. It is only if he be so satisfied that he is entitled to frame a charge. In other words, even before he frames a charge, he must satisfy himself if the committal is justified. Sections 211 and 212 which, as already stated, are intended to serve a two-fold purpose, one of which is a safeguard against an unnecessary trial and the other of which confers upon the accused a right of having the witnesses cited by him when required to do so under S. 211 summoned for the trial, do not, therefore, in our opinion, go to the root of the matter or the jurisdiction of the Magistrate committing the accused for trial. The trial will be vitiated only if the commitment is totally invalid in law, for, in that case there will be no basis for the committal of the accused to the Court of Session or the High Court, as the case may be; but if the commitment is not totally invalid in law, the trial can hardly be held to be vitiated. In the cases already referred to which, as we have already pointed out, all arose before the accused were actually tried, the question for consideration was quite different from what we have to consider here. There the question was whether the disregard of the provisions would justify the commitment being quashed, and this court decided that it would, and it was further held that S. 537 of the Code would not cure the illegality involved.

(15) Section 537, Cr. P. C., runs as follows:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter 27 or on appeal or revision on account —

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in an inquiry or other proceedings under this Code, or

* * *

(c) of the omission to revise any list of jurors or assessors in accordance with S. 324, or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation. : In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

(16) It is clear from a wording of this Section that the order contemplated by this section is a final order and not merely an interlocutory order such as a commitment order. If that be so, S. 537 of the Code cannot possibly apply to a commitment order and the view taken in the cases referred to, that S. 537 would not cure the illegality involved in contravention of the provisions u/ss. 211 and 212, is a view which can hardly be objected to; but S. 537 certainly applies to the final order such as the conviction of an accused person on a trial and the sentence passed upon him. If S. 537 does apply to a final order on a trial, as we think it does, and if it does not apply to an interlocutory order such as the commitment order, it follows that it was not the intention of the Legislature to confer upon Ss. 211 and 212 an imperative character. In other words, the disregard of these provisions while it will certainly entitle the aggrieved party to have a commitment quashed on the ground of such contravention, will not entitle the aggrieved person to challenge the final order of a conviction unless that has occasioned a failure of justice.

(17) As regards S. 537, Cr. P. C., their Lordships of the Privy Council in — Abdul Rahman v. Emperor', AIR 1927 PC 44 (L), in which the question was whether the reading over of depositions of witnesses to them while the

case was otherwise proceeding, was not a violation of S. 360 of the Code, their Lordships of the Privy Council held that the passage beginning with 'unless such error" in S. 537, Cr. P. C., does not qualify (d) only but also the other letters of the alphabet, and that such irregularities would not by itself be a ground sufficient for quashing a conviction.

(18) In a later case, — 'Pulukuri Kottaya v. Emperor', AIR 1947 PC 67 (M), where the record of the statements of witnesses made to the Police were made available to the defence, though too late to be effective, their Lordships held that as the contents of the statements were known, this by itself was not decisive and the case was under S. 537 and the trial was held to be valid as in the circumstances of the case no prejudice was occasioned. Their Lordships in this connection overruled as too narrow a construction of S. 537, Cr. P. C., the view taken in some Indian Cases that S. 537 applies only to errors of procedure and not to cases of disregard of mandatory provisions of the Code and that failure to examine the accused u/s 342, Cr. P. C. was fatal to the validity of the trial and could not be cured u/s 537. Their Lordships further held that where a trial is conducted in a manner different from that prescribed by the Code, as in — 'Subramania Iyer v. King Emperor', 28 Ind App 257 (PC) (N), where the accused was charged with 41 different acts extending over two years, against the definite provisions of S. 234 of the Code, the trial was bad and no question of curing an irregularity arose but if the trial conducted is substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity could be cured under S. 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn between illegality and irregularity being one of degree rather than of kind.

(19) That S. 215 occurs in the same Chapter which deals with inquiries into cases triable by the Court of Session or the High Court goes to suggest that the remedy for quashing a commitment is available to the aggrieved party only before a trial is over and not after the trial is over. In the nature of things it must be so, for the question of quashing a commitment cannot possibly arise after a trial is over because it is no use quashing a commitment unless the result of the trial itself is at the same time set aside and if the result is set aside, it will be unnecessary in most cases to quash the commitment. After a trial the question is, as in this case, whether the trial is vitiated by the illegal commitment and whether the final order passed in a trial held on the basis of such a commitment should be set aside. In saying this we are not unmindful of the conflicting decisions of this Court in 2 cases under this Code of 1872 — 'Empress v. Shibo Behara', 6 Cal 584 (O) and — 'Empress v. Sagambur', 12 Cal LR 120 (P), in the record of which it was held that a commitment could not be quashed after the accused had pleaded to the charge and after evidence had been gone into and in the first, that the commitment could be quashed at any stage. In none of the cases, however, the question arose after the trial was over. What happened in the second case was that the Judge trying the case postponed it and made a Reference to the High Court in quashing the proceedings on the ground that the accused had been committed on evidence recorded in his absence when he was absconding. None of these cases, therefore, decided if a commitment could be quashed after the trial was over.

(20) Now, if it is correct to say that the remedy of quashing a commitment is available only before the conclusion of a trial, it necessarily follows that questions which could be raised in a proceeding for quashing a commitment would be available for use after the conclusion of a trial only in the circumstances mentioned in S. 537 of the Code, namely, if the omission, etc., occasioned a failure of justice, by which is meant the conviction of an innocent man and the acquittal of a person proved guilty. — 'Abdul Rahim v. Emperor', AIR 1946 PC 82 (Q). The Explanation to S. 537 makes it further clear that in deciding whether it did occasion a failure of justice, a Court has to bear in mind if the objection could be raised earlier, the obvious implication being that when it may be but is not raised earlier, the normal inference is to be that there was no failure of justice.

(21) Another thing to be remembered is that if a trial is to be held null and void on such a ground, acquittals as well as convictions on such trials would be liable to reversal, so that it is bound to cause serious inconvenience to parties who have no control over the Magistrate's action. The observations of Sir Arthur Channel in — 'Montreal Street Rly. Co. v. Narmandin', (1917) AC 170 at p 174 (R), may be recalled in this connection

> "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of such duty would create serious general inconvenience or injuries to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions directory only, neglect of them, though punishable, not affecting the validity of the acts done."

(22) The scheme, therefore, of Chapter 18 or of S. 537 of the Code does not, in our view, favour the conclusion that the provisions of Ss. 211 and 212 are imperative.

(23) In this case the accused in his examination u/s 342, Cr. P. C., was asked whether he would cite any defence witness and his answer was in the negative. That being so, there is hardly any question of any prejudice having occurred to him as a result of the omission of the learned Magistrate to require him to furnish a list of defence witnesses as required by S. 211, Cr. P. C. In these circumstances the defect, such as it is, could not have vitiated the commitment to the extent of making it invalid in law nor could it have affected the trial in any way because if the commitment was not altogether invalid, the cognisance of the case by the Court of Session could not be said to be bad in law in any way. In our opinion, therefore, there is no substance in this contention raised by Mr. Majumdar.

(24) Having disposed of this point of law raised by Mr. Majumdar, it is necessary to look

into the facts and the evidence. (After considering the evidence elaborately his Lordship concluded:) In the circumstances, we are of opinion that there is no reason whatever to doubt or disbelieve any part of the prosecution evidence and the jury were fully entitled to believe these witnesses and to base their verdict on this evidence. Their verdict, therefore, in our opinion, is fully justified on the evidence on the record. That the intention of the accused could be nothing but to cause his victim's death is clear from the nature of the injuries inflicted. It would, therefore, have to be held that he was rightly convicted under S. 302, I. P. C., if he did not really attack Moslem Mondal in self-defence as stated by him. (His Lordship then held that the defence story of an assault on the accused by Moslem Mondal with a knife was not true and that no question arose of the accused having done what he did in self-defence.)

(25) The next question to be considered is the question of sentence. I have already stated that a large number of incised injuries were inflicted on the deceased by a cutting weapon which is a hesua and all these injuries were inflicted in the region of the head, the neck and the shoulder. That the assault was of a brutal nature admits of no doubt; what makes it much worse is that the deceased was a guest of the accused. At the same time the fact remains that the prosecution did not even try to prove a motive for such a murderous and brutal assault. It was further elicited in the cross-examination of Fateh Ali that he stated before the Committing Magistrate that he saw Moslem Mondal being cut by his father ('Pagal', mad man) with a hesua. Although the statement of Fateh Ali was not put in at the trial under S. 288, Criminal P. C. and only this part of the statement was put in under S. 145, Evidence Act, we are entitled to take this into consideration in order to determine the proper sentence to be passed in this case. The other fact to be considered is the assault on Fateh Ali when he shouted out on seeing the accused assaulting Moslem Mondal and the subsequent assault on Miajuddin. The question for our consideration now is whether these are facts which go to indicate that the accused when he made this murderous assault on Moslem Mondal and when he later assaulted his own son and his son-in-law was in an abnormal state of mind. It is undoubtedly true that the very atrocity of a crime should not be made an excuse for passing a lesser sentence. The criminality, however, of an act in the last analysis depends on the state of mind of which the act is an external expression. When the act itself is almost inhuman and when there is no discernible motive for such an inhuman act, the Judge is at once put upon his enquiry as to the state of the mind which prompted such an act & the question he has got to put to himself is "Was this man perfectly normal when he committed this act?" In our opinion the sentence to be passed depends on the answer to this question.

We are not unmindful here of the view expressed by the learned trial Judge that the act was an atrocious one and that there was no extenuating circumstance to justify a lesser sentence. The facts, however, that there was really no motive for the inhuman murder, that the accused attacked his son when he cried out, that he next attacked his son-in-law when he rescued Fateh Ali and that finally he admitted to others having done Moslem Mondal to death are,in our opinion, indications of an abnormal state of mind in the accused which, though it does not amount to such insanity as can be a complete answer to the charge, might well have produced in him an uncontrollable murderous impulse of such intensity that he hacked his unsuspecting and sleeping guest to death. The facts proved are more consistent with such an abnormal mental state of the accused than anything like a cold & calculating piece of monstrosity. In that view, the accused himself was as much a victim of this inexplicable and uncontrollable impulse as Moslem Mondal was of the act in which this impulse found its expression.

(26) In our opinion, this constitutes an extenuation of an offence which at first sight strikes one as brutal beyond words and will justify the imposition of the lesser sentence in preference to the extreme penalty of the law. The sentence of death is accordingly commuted to transportation for life.

(27) The result then is that the Reference under S. 374, Criminal P. C. is rejected, the appeal of Abdul Rahaman is dismissed and the conviction of the appellant under S. 302, Penal Code, is confirmed subject to the modification that the sentence of death passed on him is commuted to transportation for life.

(28) DEBABRATA MOOKERJEE J.: I agree.

B/V.S.B. Conviction confirmed.

A. I. R. 1953 CAL. 797 (Vol. 40, C. N. 300)

P. B. MUKHARJI J.

Ranjit Shaw, Applicant v. Samarendrajit Shaw and others, Official Receiver.

Appln. in re: Suit No. 958 of 1940, D/- 19-6-1953.

Civil P. C. (1908), O. 40, R. 1 — Suits by or against receiver — Leave of Court.

Scope of leave to sue receiver granted depends on terms of order granting the leave. Usual form in which Calcutta High Court grants leave is only for leave to sue receiver either for possession or for arrears of rent or other reliefs and that will not permit execution against the properties in the hands of the receiver without further leave from Court. Court will not normally grant leave in such wide terms so as to cover execution against property in the hands of receiver because leave to execute may have to depend on considerations arising subsequent to the grant of initial leave to sue the receiver. (1904) 52 WR (Eng.) 207, Rel. on. (Para 5)

Anno: C. P. C., O. 40, R. 1 N. 31.

Ganguli, for Applicant; P. N. Ghosh, Attorney for Official Receiver.

CASE CITED:

(A) (1904) 73 LJ Ch 143: 52 WR (Eng) 207

ORDER: This is the plaintiff decree-holder's application for leave to execute the decrees obtained by him against the Official Receiver in Rent Suits Nos. 546 of 1952, 548 of 1952, 549 of 1952, 654 of 1952 and 329 of 1950, all of the Second Munsif's Court, Howrah, by attachment and sale of the properties of Sri Birendrajit Saha, Sri. Ranjit Saha and Sri Samarendrajit

Saha, the tenants of the applicant, and which properties still continue to be in the possession of the Official Receiver. The applicant also asks that the costs of and incidental to this application be added to his decrees and be costs in the execution proceedings.

(2) There is no opposition from the judgment-debtors to this application. But the Receiver has appeared through Mr. P. N. Ghose, Solicitor. The objection on behalf of the Receiver is that this application was not necessary because leave had already been granted to the applicant as plaintiff in those suits to sue the Receiver. It is contended that such leave to sue for rents includes and covers leave to execute the rent decree against properties in the hands of the Receiver. As the point was of some importance I adjourned the matter to Court, although it came on Chamber Summons.

Mr. Ganguli, the Solicitor who appears for the applicant, draws my attention to a decision of Buckley J. in — 'Morris v. Baker', (1904) 52 WR (Eng.) 207 (A). There it appears that almost an identical point was raised at the Bar and decided by the Court. At page 208 of that report Buckley J. observes :

"The question is whether the leave thus given extended beyond proceeding to judgment, to the issue of a writ of possession. In my opinion it did not. The true way of looking at the matter is this : The Court being in the possession of land or chattels by a Receiver, is asked to allow proceedings to be taken by one person against another to determine the title. Leave is given. The party who succeeds ought to say to the Court, "this is my land, these are my chattels, but the fruits of my victory are in your possession, and I want them." If there is nothing more in the case the court would give leave for possession. But the party is not entitled, as against the receiver, to obtain possession without leave — that is to say, without the consent of the court, in whose possession the property is.

Take another case. Suppose that an action is sued to judgment. Does that always in itself give the right to issue execution? The answer is that it does not. When judgment has been obtained the court has, in certain cases, to be approached again, in order to see whether it will give leave to issue execution or whether there are not other circumstances to which the court ought to have regard. It does not follow that because judgment has been obtained, some other person is not entitled to rights in the property in respect of which leave is to be asked to issue execution. It is the duty of the court, while the property is, as it were, 'in medio', to see that the rights of all parties in respect of it are protected."

(3) On this ground Buckley J. came to the conclusion that the leave which was given to issue a writ for the recovery of possession did not extend beyond leave to try the question who was entitled to judgment for possession. It must be made clear that the whole question before Buckley J. turned on the construction of the words "leave to issue a writ for the recovery of possession" which occurred in the order of the Master of 17-9-1903 in that case.

(4) In this case before me the leave of the court was granted to sue the receiver for the "recovery of arrears of rent" and I think that the principles of the decision in — 'Morris v. Baker (A),' and the reasons given therein should be followed and applied here.

(5) I will however add my own exposition of the law on the point. When a court grants leave to a litigant to sue the receiver the scope of such leave depends entirely on the terms of the court's order granting the leave. Whether, in a particular case, such leave to sue the receiver includes leave to execute against the assets in the possession of the receiver must therefore be determined by reference to the terms in which the leave was granted.

The usual form in which leave is ordinarily granted in this court is only for leave to sue the receiver may be for possession or for arrears of rent or other reliefs as the case may be. That, in my judgment, will not permit execution against the properties in the hands of the receiver without further leave from the court. It is quite possible that in a proper case the leave may be given in such wide terms that it will cover even leave to execute. Normally, however, no court will grant leave in such wide terms because leave to execute against property in the hands of the receiver may have to depend on considerations arising subsequent to the grant of the initial leave to sue the receiver and therefore, it will be for the court at the later stage to see whether leave should be given to execute against properties in the hands of the receiver.

(6) There will, therefore, be an order in terms of the Summons. I grant leave to the applicant to execute his decrees against properties in the possession of the receiver. The applicant will also be entitled to costs of this application to be added to his decrees and treated as costs in execution proceedings. I assess the costs of this application at Rs. 68/-.

B/M.K.S. Order accordingly.

A. I. R. 1953 CAL. 798 (Vol. 40, C. N. 301)

J. P. MITTER AND SEN JJ.

Panchanan Maity, Accused-Petitioner v. The State and another, Opposite Party.

Criminal Revn. No. 1121 of 1952, D/- 13-5-53.

Penal Code (1860), S. 464 — Making a false document — (Criminal P. C. (1898), S. 297).

A person to be guilty of forgery under the first clause of S. 464 must make a false document or part of a false document and not merely cause it to be made. 14 Cri LJ 129, Rel. on. 7 Cal 352 and AIR 1951 Cal 581, Referred to. (Para 4)

Facts proved by prosecution not sufficient to hold accused guilty of making a false document — Jury recording a verdict of guilty due to Judge's failure to explain the meaning of "making a false document" — Held there was non-direction amounting to misdirection which induced the erroneous verdict of the jury and hence the conviction and sentence which followed must be set aside. (Para 5)

Anno: Penal Code, S. 464 N. 1; Criminal P. C., S. 297 N. 12.

Sambhu Nath Banerjee and Anil Kumar Sen, for Petitioner; J. M. Banerjee, for the State; Sudhanshu Kumar Hazra, for Complainant.

CASES CITED:
(A) ('13) 14 Cri LJ 129: 17 Cal WN 354
(B) ('81) 8 Cal LR 572: 7 Cal 352
(C) ('51) AIR 1951 Cal 581: 52 Cri LJ 1480

J. P. MITTER J.: This is an application for revision of an order of conviction under S. 467, Penal Code. The petitioner was tried by a learned Judge, sitting with a jury, upon a charge of forgery under the following circumstances: The Complainant Brahmamoyee Dasi, an old lady of about 80, is a resident of Contai. In addition to her homestead, she had 12 bighas and 15 cottas of land scattered over several 'mouzas'. One Pramatha Nath Banerjee was the lady's landlord in respect of her homestead. The landlord brought a suit for ejectment against her. The petitioner looked after that suit on the lady's behalf. In Kartick 1356 B. S. he suggested to the lady that she should execute an 'Ammukhtearnamah' in his favour, so that he could take necessary steps in connection with her defence in the said suit. The lady agreed, whereupon on or about 29th Falgun 1356 B. S., corresponding to 13-3-1950, the petitioner, who was then accompanied by three others, obtained the lady's thumb impression on a blank stamp paper as well as on a few blank cartridge papers, on the representation that the papers would be utilised for the purpose of a Power of Attorney. The petitioner took the papers away and thereafter they were caused to be written up as a 'kobala', purporting to convey certain of the lady's lands to Panchanan for a consideration. Later on the same day, the petitioner took the lady to the office of the Sub-Registrar. There the document was presented for registration and was duly registered. Two months later, the lady discovered that a fraud had been practised upon her. Upon enquiry she discovered that she had in fact registered a 'kobala', whereas her intention was to execute and register a Power of Attorney only. Thereafter a complaint was lodged not only against the petitioner but also against other persons, including one Prafulla Kumar Das who admittedly was the scribe of the document.

(2) The petitioner along with Prafulla was twice tried. His first conviction upon a charge of forgery was set aside by this Court, with a direction for his retrial. At the first trial he was sentenced to six years' rigorous imprisonment. On his second trial the petitioner was again convicted of forgery. This time he was sentenced to four years' rigorous imprisonment. The present application arises out of his conviction at the second trial. The other accused persons who were originally tried with him as well as Prafulla who was the petitioner's co-accused at the last trial were acquitted.

(3) The alleged forgery is said to have taken place on or about 13-3-1950. Three years have thus elapsed since the alleged offence was committed.

(4) The first point taken by Mr. Sambhu Nath Banerjee, appearing on behalf of the petitioner, is that even assuming the prosecution case to be true, no offence of forgery within the meaning of the first clause of S. 464, Penal Code could have been committed by the petitioner. Although the learned Judge pointed out to the jury that the forgery charged was one under the first clause of S. 464, he failed to direct the jury as to the meaning of 'making a false document' under the first clause of the section. Mr. Banerjee accordingly contends that in the absence of any evidence to bring the case within the third clause of S. 464 as well as in the absence of any direction as to the meaning of 'making a false document' under the first clause, the jury's verdict was manifestly erroneous. In our view, Mr. Banerjee's contention is sound. Forgery is defined in S. 463 as follows:

> "Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

Section 464 is as follows:

> "A person is said to make a false document
> First Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or
> Secondly Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or
> Thirdly—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration."

It appears to us that a person to be guilty of forgery under the first clause of S. 464 must make a false document or part of a false document and not merely cause it to be made. As was held in — 'Haidar Ali Pradhania v. Emperor', 17 Cal W. N. 354 (A), a charge of forgery could not lie against a person who was not the writer of the forged document or who did not sign the forged name. Making a false document is one thing and causing a false document to be made is another. It may well be that the petitioner in this case abetted the making of a false document. Mr. Banerjee on behalf of the petitioner also relies upon the early Calcutta Case — 'The Empress v. Riasat Ali', 7 Cal 352 (B), which was followed in a recent case of this Court — 'Pramatha Nath v. The State', AIR 1951 Cal 581 (C).

(5) Had there been proper evidence to bring the case within the third clause of S. 464, the matter would have been different. It is clear that on the facts proved by the prosecution, the petitioner could not be said to have been guilty of making a false document within the meaning of the first clause of S. 464. The learned Judge's failure to explain to the jury the meaning of 'making a false document' under the first clause of the section was a non-direction amounting to a serious misdirection, which induced an erroneous verdict. In that view of the matter, the verdict of the jury and the conviction and the sentence which followed must be set aside.

(6) Mr.Banerjee took several other points, but it is not necessary to deal with them, as we have, after considerable hesitation, decided to acquit the petitioner and not to order a retrial. We have gone through the evidence and are of the view that the petitioner having already been through the ordeal of two Sessions trials must be acquitted. The complainant, if so advised, can have recourse to the Civil Court for the purpose of having the deed cancelled.

(7) In the foregoing circumstances, we set aside the verdict of the jury and the conviction and the sentence which followed and acquit the petitioner. The petitioner need not surrender to his bail bond from which he is discharged. This Rule is made absolute.

(8) Sen J.: I agree.

C/M.K.S. Rule made absolute.

A. I. R. 1953 CAL. 800 (Vol. 40, C. N. 302)

K. C. CHUNDER J.

Surendra Nath, Defendant, Appellant v. Tarasashi, Plaintiff, Respondent.

A. F. A. D. No. 913 of 1952, D/- 5-2-1953.

Limitation Act (1908), S. 5 — Mistake of Court.

Ejectment suit in Small Cause Court — Change in law requiring drawing up of proper decree not noticed by court and only an after judgment statement maintained on record — Appeal filed according to practice without filing formal decree — Court realising defect after High Court pointed out effect of change in law — Held in the circumstances, time should be extended until date of filing of decree.

(Para 1)

Anno: Lim. Act, S. 5 N. 22.

Jitendra Nath Ghose, for Appellant; Manindra Nath Ghose, for Respondent.

JUDGMENT: This is an appeal against an appellate judgment of the Special Appellate Bench of the Court of Small Causes, Calcutta, affirming that of the Judge, 6th Bench. It appears that an ejectment order was passed by the Small Cause Court Judge. An appeal was filed to the Special Bench. It appears and cannot be contested from the papers on record that at the time when this ejectment decree was passed a formal decree as required under the Code of Civil Procedure in the form prescribed thereunder was not drawn up in that Court.

Indeed, till the High Court pointed out that a formal decree was necessary in view of the changes introduced by the Rent Control Act that the question of filing a decree ever arose. Indeed, in the present case, the so called decree on record is what has been always known in the court of Small Causes, Calcutta as an after-judgment statement and as it appears that there was never the practice of filing an after judgment statement in any appeal in the Calcutta Court of Small Causes following the usual practice none such was filed. Having been told by this court the learned Judges of the Special Bench, it seems, blamed the poor lawyers of the court that they did not know, although the Rent Control Act was in existence for such a long time, that filing of a formal decree in the form prescribed by the Code of Civil Procedure was necessary. When Judges from whom the Bar is to receive light are in darkness themselves, it does not lie in the mouth of the judges to taunt the Bar for ignorance and penalise clients for alleged ignorance of the lawyers. The opinion of the Special Bench was that as the law was in existence for such a long time the lawyers should have known the law and they should have filed a non-existent decree in the form prescribed by Civil P. C. by taking the after judgment statement as an imitation decree under the Civil P. C. A little exercise of commonsense is always required in court proceedings and if commonsense had been exercised in this case time should have been extended and limitation condoned.

(2) I, therefore, set aside the order of the Special Bench, extending the period of time under S. 5, Limitation Act and as the appeal is now in time the Special Bench to which the appeal is remitted will now proceed to hear it on the merits. Courts will abide the result.

(3) The appellate court will hear the appeal as expeditiously as possible.

(4) Let the records be sent down without delay.

B/M.K.S. Order accordingly.

END

THE

ALL INDIA REPORTER

1953

[Vol. 40]

HIMACHAL PRADESH SECTION

CITATION : A. I. R. (40) 1953 HIMACHAL PRADESH

PUBLISHERS
THE ALL INDIA REPORTER, LTD.,
NAGPUR, M. P.
1953

Printed by L. MELA RAM, at the All India Reporter Press, Nagpur, and Published by D. V. CHITALEY, B.A., LL.B., Advocate, for the All India Reporter Ltd., at Congress Nagar, Nagpur.

(All Rights Reserved.)

HIMACHAL PRADESH
JUDICIAL COMMISSIONER'S COURT
1953

JUDICIAL COMMISSIONERS :

The Hon'ble Shri Radha Krishna Chowdhry, M.A., LL.B.
" " T. Ramabhadran, I. C. S.

GOVERNMENT-ADVOCATE : .

Shri Bakshi Sita Ram, B.A. (Hons.) Punjab, M.A., LL.B. (Allahabad) Advocate.

REPORTER :

Shri Amolak Ram Kapur, B.A. (Hons.), LL.B., Advocate.

EDITORIAL COMMITTEE :

DR. SIR M. V. JOSHI, KT., K. C. I. E., LL.D., Ex-Law Member, C. P. Government, Nagpur.
SHRI V. V. CHITALEY, B.A., LL.B., Senior Advocate, Supreme Court of India, Bombay.

EDITORIAL STAFF :

SHRI S. APPU RAO, B.A., B.L., Advocate (Madras), *Chief Editor.*
" D. V. CHITALEY, B.A., LL.B., Advocate, *Joint Editor.*
" V. S. BALKUNDI, B.A., LL.B., *Assistant Editor.*
" V. B. BAKHALE, M.A., LL.B., *Assistant Editor.*
" R. K. MANOHAR, B.A., LL.B., Advocate, Supreme Court of India, Nagpur.
" M. D. RAO, Advocate (Bombay).
" D. W. CHITALEY, B.A., LL.B., Pleader.

NOMINAL INDEX

Attra v. Atma Ram 29
Bal Mukand v. Har Dev 22
Barikam v. Charnu 63
Bhagwandas v. Debi Ram 25
Bhajnu v. Raiya 59
Bindraban v. The State of Himachal Pradesh 103
Brikmu, Mt. v. Jodha 73
Budhe Ram v. Hira 52
Chamba Valley Transport, Ltd. v. State of Himachal Pradesh 8
Chanchal Ram v. Union of India 79
Choudhri v. Ram Saran Das 49
Dasondhi v. The State 36
Daulat Ram v. The State 61
Devi Das v. Bushahr Sangh 110
Devi Ram v. Murli 89
Dhingroo Mall v. The Financial Commissioner 74
Dissu v. The State 1
Duni Chand v. Munshi Amar Nath 68
Ganga Datt v. Mandir Narayan Deota 31
Guddumal v. The State 38
Halayudh v. Tek Chand 85
Hari Das v. Lachhmi 19
Hazari Lal Bhanna Mal v. State of Himachal Pradesh 41
Hira Singh v. The State of Himachal Pradesh 57
Indira Debi v. Ganga Ram 60
Jagat Ram Sud, Dr. v. The State of Himachal Pradesh 5
Japhu v. Parshottam Ram 84
Kanhu v. Sangat Ram 72
Kanshi Ram v. Mt. Dharmi 102
Kanshi Ram v. Lajju Ram 70
Kirpa v. Deviditta 23
Kundan v. Kanahya 91
Mehar Chand v. The State 3
Mela Ram v. Mt. Pratibha Devi 4
Mohindra, R. N. v. State of Himachal Pradesh 125
Munshi Ram v. Raghubir Chand 15
Nandu Ram v. Jagannath Parshotam Das 55
Narotam v. Sardaru 122
Nirma v. State 126
Padam Chand v. Ram Lal 11
Ranvijai Singh v. Divisional Forest Officer 33
Sabhu v. Ramsa 123
Sadh Ram v. State 121
Saju v. The Union of India 81
Santokhu, Mt. v. The State 82
Sant Ram v. The State 105
Satya Dev v. Ghanshiam 117
Shiv Dutt v. State of Himachal Pradesh 95
State v. Jahlu 40
State v. Jorawar 18
State of Himachal Pradesh v. Chamba Valley Transport, Ltd. 77
State of Himachal Pradesh v. Lalchand Shahi 75
Surat Ram v. Mt. Nardu 50
Thunthi v. Dhani Ram 66

SUBJECT INDEX

Arbitration Act *(10 of 1940), S. 34* — "Steps in the proceedings" 75*a*

——*S. 34*—"Ready and willing" 75*b*

Arms Act *(11 of 1878), S. 22*—Possession 121*a*

Certiorari — *See* under Constitution of India, Art. 226

Civil Procedure Code *(5 of 1908), S. 9* — *See* Tenancy Laws — Punjab Tenancy Act (16 of 1887), S. 77 (3) (n) 89*b*

——*S. 11*—Two appeals tried together – Appeal from decision in one 85*a*

——*S. 80*—Scope and object — (Constitution of India, Art. 226) 95*b*

——*S. 80*—Notice after amendment of plaint 123*d*

——*S. 100* — *See also* Evidence Act (1872), S. 65 52*c*

——*S. 100 and O. 7, R. 14*—Objection based on O. 7, R. 14 cannot be raised for first time in second appeal 52*b*

——*S. 110* — *See* Himachal Pradesh (Courts) Order (1948), Para. 32 (1) (b) (ii) 19*a*

——*S. 115*

See also (1) ibid, O. 21, R. 61 49

(2) Himachal Pradesh (Courts) Order (1948), Para. 35 19*b*

——*S. 115* — Lower appellate Court not complying with O. 41, R. 31 — Power of High Court to interfere in revision 23*a*

——*S. 115*—Decision arrived at after consideration of facts—No interference 25*a*

——*S. 115*—Unregistered document required by law to be registered erroneously admitted and considered — No revision lies — (Evidence Act (1872), S. 90) – (Registration Act (1908), S. 49) 29*a*

——*S. 115*—Want of jurisdiction in lower Court —Revision 29*d*

——*S. 115*—Interlocutory orders 89*a*

——*S. 115 and O. 41, R. 22* — Point waived in lower appellate Court if can be raised in revision 91*a*

——*S. 115*—Error of procedure 91*d*

——*S. 115*—"Exercised a jurisdiction not vested in it by law" 123*b*

——*S. 151, O. 9, R. 9 and O. 41, R. 19*—Applicability to revision dismissed for default 102*a*

——*O. 1, R. 10* — Necessary party and proper party 123*c*

——*O. 2, R. 2*—*See also* ibid, O. 8, R. 6 11*f*

——*O. 2, R. 2* — Subsequent suit with different cause of action not barred 11*c*

Civil P. C. *(contd.)*

——*O. 3, R. 4* — Vakalatnama filed for purpose of appeal — Case remanded — Subsequent appeal under same Vakalatnama is incompetent 11*a*

——*O. 6, R. 2*—Variance between pleading and proof 91*b*

——*O. 7, R. 1*—*See* Hindu Law—Reversioner 73*b*

——*O. 7, R. 14*—*See also* ibid, S. 100 52*b*

——*O. 7, Rr. 14 and 18*—Non-compliance with R. 14 52*a*

——*O. 7, R. 18*—*See* ibid, O. 7, R. 14 52*a*

——*O. 8, R. 1 and O. 27, R. 1*—Written statement by Government — (Constitution of India, Art. 226) 95*a*

——*O. 8, R. 6*—Omission to claim set-off—Suit for amount of set-off is not barred 11*e*

——*O. 8, R. 6 and O. 2, R. 2*—Defendant pleading set-off — He is bound to do so in respect of his entire claim 11*f*

——*O. 9, R. 9*—*See* ibid, S. 151 102*a*

——*O. 20, R. 16; O. 41, R. 1* — Delegation of function by Commissioner to others 110*e*

——*O. 21, R. 61* — While deciding objection, Court can incidentally go into question of title—Wrong decision—No revision—(Civil P. C. (1908), S. 115) 49

——*O. 21, R. 77 (2)*—*See* ibid, O. 21, R. 80 11*b*

——*O. 21, Rr. 80 and 77 (2)* — Sale of pronote in execution of decree — Endorsement under R. 80 or execution of sale-deed not necessary—(Negotiable Instruments Act (1881), S. 48) 11*b*

——*O. 21, R. 100* — Objection of third party challenging right of decree-holder to eject him 122

——*O. 27, R. 1* — *See* ibid, O. 8, R. 1 95*a*

——*O. 41, R. 1*—*See* ibid, O. 20, R. 16 110*e*

——*O. 41, R. 2* — Court if can raise suo motu new point of law 82*a*

——*O. 41, R. 19* — *See* ibid, S. 151 102*a*

——*O. 41, R. 22* — *See* ibid, S. 115 91*a*

——*O. 41, R. 25*—Order of remand, validity: 85*b*

——*O. 46, R. 1* — *See* Tenancy Laws—Punjab Tenancy Act (3 of 1887), S. 100 (1) 31*a*

Civil Service (Classification Control and Appeal) Rules, *R. 55* — *See* Constitution of India, Art. 311 125*a*

Constitution of India *(1950), Preamble* — Retrospective operation 82*b*

——*Arts. 14, 19 (1) (g) and (6) and 226* — Validity of order directing retail dealers in cloth to carry on business through co-operative societies

Constitution of India *(contd.)*
— (Himachal Pradesh Cotton Cloth Dealers Licensing Order, 1948) 41c
——*Art. 14* — Discrimination between citizens in a State and those outside it 41d
——*Arts. 19 and 132 (1)*—Substantial question of law 77b
——*Arts. 19 (1), 32 and 226* — Infringement of fundamental right — Another remedy is not open 8b
——*Art. 19 (1) (f)*—*See also* ibid, Art. 226: 95c
——*Arts. 19 (1) (f) and 31* — Scope 95e
——*Art. 19 (1) (g) and (6)* — *See* ibid, Art. 14 41c
——*Arts. 19 (1) (g) and 226 (1)*—Infringement of fundamental right — Right non esse before Constitution — Acquiescence in infringement — Retrospective operation of Art. 19 — (Evidence Act (1872), S. 115) 8a
——*Art. 19 (1) (g)* — Right to carry on trade or business 41b
†——*Art. 23*—Chamba Paid Forced Labour Act (3 of 2004B) invalid 18
——*Art. 31* — *See* ibid, Art. 19 (1) (f) 95e
——*Art. 31 (1)* — *See also* ibid, Art. 226 57b
——*Art. 31 (1)* — Infringement of fundamental right 57a
——*Art. 31 (2)*—*See* East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948) 5a
——*Art. 32* — *See* ibid, Art. 19 (1) 8b
——*Art. 132 (1)* — *See also* ibid, Art. 19 77b
——*Art. 132 (1)* — Substantial question of law 77a
——*Art. 226*
See also (1) ibid, Art. 14 41c
(2) ibid, Art. 19 (1) 8b
(3) Civil P. C. (1908), S. 80 95b
(4) Civil P. C. (1908), O. 8, R. 1 95a
——*Art. 226* — Laches — Petition on the 18th day after attachment—*Held* did not suffer from laches 33a
——*Art. 226* — Other remedy open — Petition, maintainability of 33b
——*Art. 226* — Deliberate misstatement of facts 41a
——*Arts. 226, 31 (1)*—Invasion of fundamental right by executive — Duty of Court 57b
——*Art. 226* — Exercise of discretion—(Punjab Land Revenue Act (17 of 1887), S. 16) 74
——*Arts. 226 and 19 (1) (f)* — Frame of and contents in petition under Art. 226 95c
——*Art. 226* — Laches 95d
——*Art. 226* — Scope of 95f
——*Art. 226* — Who may apply 95g
——*Art. 226* — Retrospective operation 95h
——*Art. 226* — Condition of service founded on contract—Benefit of maxim 'audi alteram partem' not given — Issue of writ 103b
Constitution of India *(contd.)*
——*Art. 226* — Contract of personal service — Specific performance—Writ petition for reinstatement — (Specific Relief Act (1877), S 21 (b)) 103c
——*Art. 226* — Applicant concealing facts — Application will be dismissed 125b
——*Art. 226 (1)*—*See* ibid, Art. 19 (1) (g) 8a
——*Art. 227* — Power of superintendence — (Punjab Tenancy Act (16 of 1887), Ss. 84, 5 (1) (c) and 8) 59
——*Art. 227*—Scope — Article is meant to keep subordinate Courts within bounds of their jurisdiction 60a
——*Art. 227* — Limitation — (Limitation Act (1908), S. 3) 60c
——*Art. 311*—Employee holding civil post under State 103a
——*Art. 311* — Civil Service (Classification Control and Appeal) Rules, R. 55—Termination of service — Resignation—No enquiry 125a
——*Sch. 7 List II Item 36* — *See* East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948) 5a
Contempt of Courts Act *(12 of 1926), S. 3, 1st Proviso*—Proviso gives Court power to review its judgment — Proviso is other law within S. 369, Criminal P. C. — (Criminal P. C. (1898), Ss. 369 and 561A) 3
Contract Act *(9 of 1872)*
——*S. 73*—*See* East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), S. 5 (1) (e) 5b
Court-fees Act *(7 of 1870), S. 7 (v) (d) and (e)* —Suit for possession—Dispute in appeal same as in trial Court — Ad valorem court-fee in appeal has to be paid 4
Criminal Procedure Code *(5 of 1898), S. 164* —Confession must be voluntary 105e
——*S. 164*—"Upon questioning the person"—Shape or form of question is to be left to the discretion of the Magistrate 105f
——*S. 164* — Retracted confession — Rule of caution that it must be corroborated must be followed—(Evidence Act (1872), S. 24) 105g
——*S. 164*—Acceptance of confession should be of the whole — (Evidence Act (1872), S. 24) 105h
——*S. 195*
See (1) Representation of the People Act (1951), S. 36 117b
(2) Representation of the People Act (1951), S. 86 117c
——*S. 195 (1) (b)* — Prosecution for forgery—Complaint by proper Court—(Himachal Pradesh (Courts) Order (1948), Para 15) 38
——*S. 195 (1) (c)*—Document produced 117a
——*S. 195 (1) (c)*—"Produced"—Interpretation 117d
——*S. 195 (1) (c)*—"By a party to any proceeding in any Court" 117e

Criminal P. C. *(contd.)*
——*S. 195 (1) (c)*—"To any proceeding" : A I R 1936 Bom 221; A I R 1937 Bom. 14, Dissented from 117*f*
——*S. 195 (1) (c)* — Document produced or given in evidence — A I R 1920 Pat 147, Dissented from 117*g*
——*S. 195 (1) (c)*—Forgery committed in respect of proceeding before Election Tribunal—Necessity of complaint 117*h*
——*S. 195 (1) (c)*—Section 465, Penal Code, is included under the comprehensive S. 463, Penal Code 117*i*
——*Ss. 211 (1), 213 and 537* — Compliance with S. 211 (1) after order of commitment: 105*b*
——*S. 213*—*See* ibid, S. 211 (1) 105*b*
——*S. 225*—Charge under S. 302, Penal Code—(Penal Code (1860), S. 302) 105*a*
——*Ss. 241, 254, 255, 256 and 537*—Non-compliance with Ss. 254 to 256 — Illegality — Acquittal 121*b*
——*S. 254*—*See* ibid, S. 241 121*b*
——*S. 255*—*See* ibid, S. 241 121*b*
——*S. 256*—*See* ibid, S. 241 121*b*
——*Ss. 289 (1) and 537*—Non-compliance with S. 289 (1) 105*d*
——*Ss. 342 and 537* — Accused charged under S. 9 (b), Opium Act — Duty to question about conscious transport—Failure—Effect 36*b*
——*S. 345* — Who can compound — Presiding Officer of court 22*a*
——*Ss. 364 (2) and 533*—Non-compliance with S. 364 (2) 105*c*
——*S. 369*—*See* Contempt of Courts Act (1926), S. 3, 1st Proviso 3
——*S. 439* — Concurrent findings based on circumstantial evidence — (Evidence Act (1872), S. 3) 36*d*
——*S. 526*—Magistrate's explanation 126*a*
——*S. 526 (1) (a)*—Fair and impartial inquiry or trial not being possible—Magistrate suo motu making suggestion of compromise — Families of Magistrate and complainant belonging to same place — Magistrate contributing article to complainant's journal — Complainant referring to above facts to accused in attempting to make him come to compromise—Case should be transferred 22*b*
——*S. 526 (1) (a)*—Fair trial not possible 61
——*S. 526 (1) (a)* — Taking up case after closing hours of Court 126*b*
——*S. 526 (1) (a)* — No opportunity given to accused to know what case against him was—Transfer should be ordered 126*c*
——*S. 526 (1) (a)* — Magistrate making up his mind to frame charges even before knowing what accused's statement would be 126*d*
——*S. 533*—*See* ibid, S. 364 (2) 105*c*
——*S. 537*
See (1) ibid, S. 211 (1) 105*b*
(2) ibid, S. 241 121*b*
(3) ibid, S. 289 (1) 105*d*
(4) ibid, S. 342 36*b*
——*S. 561A* — *See* Contempt of Courts Act (1926), S. 3, 1st Proviso 3
Custom (General)—Proof — *See* Evidence Act (1872), S. 48 66*b*
——**(Himachal Pradesh)**—Legitimacy 63*a*
——Inheritance—Illegitimate son 63*b*
——Inheritance—Pleas open to illegitimate son 63*c*
——Inheritance—Sartora son 63*d*
——Marriage — Re-marriage — Ceremonies—Proof—Presumption—(Hindu Law—Marriage—Ceremonies)—(Evidence Act, S. 114—Marriage—Presumption—Rebuttal) 66*a*
——**(Mandi)**—Adoption 72
——**(Punjab)**—*See* Hindu Law—Reversioner 73*a*
Easements Act *(5 of 1882), S. 13* — Easement of necessity — Right of way 23*b*
East Punjab Requisitioning of Immovable Property (Temporary Powers) Act *(48 of 1948) (as amended in 1951)*—Validity — (Constitution of India, Art. 31 (2) and Sch. 7, List II, Item 36)—(Punjab Requisitioning of Immovable Property (Amendment and Validation) Act (2 of 1951), Ss. 3, 6) 5*a*
——*S. 5 (1) (e)*—Compensation—Determination of — Basis—Principle in S. 73, Contract Act — Applicability — Property subject to Punjab Rent Restriction Act, 1949 — Effect — (Contract Act (1872), S. 73) 5*b*
East Punjab Urban Rent Restriction Act *(3 of 1949)*
See under HOUSES AND RENTS.
Evidence Act *(1 of 1872), S. 3*—*See also* Criminal P. C. (1898), S. 439 36*d*
——*S. 3*—Circumstantial evidence must be consistent with guilt 36*c*
——*S. 21*—Admission by 'Mukhtar' 52*e*
——*S. 24*—*See* Criminal P. C. (1898), S. 164 105*g, h*
——*S. 34*—Account book extracts—Proof 68*b*
——*S. 48*—General custom, proof of — (Custom (General) — Proof) 66*b*
——*Ss. 60 and 78 (2)* — Scope — Newspaper report is only hearsay evidence and does not fall within the section 41*e*
——*S. 65*—Objection as to admissibility—(Civil P. C. (1908), S. 100) 52*c*
——*S. 78 (2)*—*See* ibid, S. 60 41*e*
——*S. 89*—Plaintiff's allegation that document had been effected and was in defendant's possession found to be correct — Defendant cannot, without producing document, contend that it was not stamped according to law 52*d*
——*S. 90*—*See* Civil P. C. (1908), S. 115 29*a*
——*Ss. 101 and 102* — Affirmation of fact and onus 79*b*

Evidence Act *(contd.)*
——*Ss. 101 to 103*—Welfare of minor — (Guardians and Wards Act (1890), S. 25) 50*b*
——*S. 102*—*See* ibid, S. 101 79*b*
——*S. 114*—Marriage—Presumption — Rebuttal —*See* Custom (Himachal Pradesh) 66*a*
——*S. 115* — *See also* Constitution of India, Art. 19 (1) (g) 8*a*
——*S. 115*—Estoppel by conduct 123*a*
General Clauses Act *(10 of 1897), S. 3* — *See* Limitation Act (1908), S. 14 15*c*
——*S. 6*—*See* Himachal Pradesh Application of Laws Order (1948), S. 7 (1) 79*a*
Guardians and Wards Act *(8 of 1890), S. 25* — *See* Evidence Act (1872), S. 103 50*b*
——*S. 25*—Father's right to custody 50*a*

HIGH COURT RULES AND ORDERS

Punjab High Court Rules and Orders, *Vol. I; Chap. 15, Rr. 3 and 15* — *See* Tenancy Laws — Punjab Tenancy Act (3 of 1887), S. 100 (1) 31*a*

Himachal Pradesh (Application of Laws) Order *(1948), S. 7 (1)*—Effect of — (Mandi Land Revenue Regulation (8 of 1975 St.), S. 19) —(General Clauses Act (1897), S. 6) 79*a*
Himachal Pradesh Cotton Cloth Dealers Licensing Order *(1948)* — *See* Constitution of India, Art. 14 41*c*
Himachal Pradesh (Courts) Order *(1948), Para. 15* —*See* Criminal P. C. (1898), S. 195 (1) (b) 38
——*Para. 32*—Second appeal — Maintainability —"Valuation of suit" 25*b*
——*Para. 32 (1) (b) (ii)*—Competency of second appeal — Two alternatives — Proper interpretation — (Civil P. C. (1908), S. 110) 19*a*
——*Para. 35* — *See* Provincial Small Cause Courts Act (1887), S. 25 68*i*
——*Para. 35* —Erroneous finding of fact or law by lower Court—Jurisdiction—(Civil P. C. (1908), S. 115) 19*b*
Hindu Law—Marriage ceremonies—*See* Custom (Himachal Pradesh) 66*a*
——Reversioner — Suit to challenge widow's alienation—(Custom (Punjab)) 73*a*
——Reversioner — Remote reversioner's suit to declare widow's gift invalid — Contents of plaint —(Civil P. C. (1908), O. 7, R. 1) 73*b*
——Widows' estate—Alienation—Suit for declaration that alienation was not binding on reversioners—Proper decree 84*a*
——Widow's estate—Alienation—Legal necessity 84*b*

HOUSES AND RENTS

East Punjab Urban Rent Restriction Act *(3 of 1949), Ss. 6 and 13 (2) (i)*—Fixation of fair rent—Date of operation 55
——*S. 13 (ii) (a)*—Eviction of sub-tenant 60*b*

Limitation Act *(9 of 1908), S. 2 (7)*—*See* ibid, S. 14 15*c*
——*S. 3*—*See* Constitution of India, Art. 227 60*c*
——*S. 5*—*See also* ibid, S. 14 15*a*
——*S. 5* — Existence of circumstances contemplated by S. 14 110*d*
——*Ss. 5, 14*—Applicability of principle of S. 14 to appeals 110*a*
——*S. 14* — *See also* ibid, S. 5 110*a*
——*S. 14*—'Due diligence'—Conduct of Counsel —Scrutiny 15*b*
——*Ss. 14, 5* — Applicability to appeals 15*a*
——*Ss. 14 and 2 (7)*—'Due diligence' and 'good faith' — Erroneous conduct of counsel — Scrutiny of—Standard of good faith—(General Clauses Act (1897), S. 3) 15*c*
——*S. 14*—"In good faith"—Conflicting views on point — Party adopting one view — Court adopting contrary—Party should be taken to have acted in good faith 110*b*
——*S. 14* — 'In good faith' — Appeal held was presented in good faith 110*c*
——*Art. 124, Explanation*—Adverse possession of right to hold office of a pujari 91*c*
——*Arts. 142 and 144* — Adverse possession — Cosharers 25*c*
——*Art. 144* — *See* ibid, Art. 142 25*c*
——*Art. 168*—*See* ibid, Art. 181 102*b*
——*Arts. 181, 168* — Application for restoring revision dismissed for default 102*b*
Mandi Land Revenue Regulation *(8 of 1975 St.), S. 19*—*See also* Himachal Pradesh Application of Laws Order (1948), S. 7 (1) 79*a*
——*S. 19*—Scope 82*c*
Mandi Transfer of Immovable Property Regulation *(2 of 1975 (Samvat)), S. 3* — Will does not come within mischief of section 81*b*
——*S. 3 (2)*—Retrospective operation 70
——*S. 3 (2)*—Scope 81*a*
Negotiable Instruments Act *(26 of 1881), S. 48*—*See* Civil P. C. (1908), O. 21, R. 80 : 11*b*
Opium Act *(1 of 1878), S. 9 (b)* — There should be finding that accused knew that he was transporting opium 36*a*
Penal Code *(45 of 1860), S. 302*—*See* Criminal P. C. (1898), S. 225 105*a*
——*S. 325*—Blows on neck—Accused held guilty under S. 325 1
——*Ss. 380 and 392*—Robbery or theft in dwelling house 105*i*
——*S. 392*—*See* ibid, S. 380 105*i*
Provincial Small Cause Courts Act *(9 of 1887), S. 3 (c)*—*See* ibid, S. 25 68*i*
——*Ss. 25 and 3 (c)* — Conflict in S. 25 and Himachal Pradesh (Courts) Order (1948), Para. 35 68*a*
——*S. 25*—Interference in revision 68*c*
Punjab High Court Rules and Orders
See under HIGH COURT RULES AND ORDERS

Punjab Land Revenue Act *(17 of 1887), S. 16* —*See* Constitution of India, Art. 226 74

Punjab Requisitioning of Immovable Property (Amendment and Validation) Act *(2 of 1951), S. 3* — *See* East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948 as amended in 1951) 5*a*

——*S. 6* — *See* East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948 as amended in 1951) 5*a*

Punjab Tenancy Act *(16 of 1887)*
See under TENANCY LAWS

Reformatory Schools Act (*8 of 1897*), *S. 8 (3) (b)* — Rules under, Rr. 3, 4 — Youthful offender of 14 years of age at time of conviction under R. 3, should be sent to a Reformatory School — A sentence of 3 years is not according to law : 40

Registration Act *(16 of 1908), S. 49*—*See* Civil P. C. (1908), S. 115 29*a*

Representation of the People Act *(43 of 1951), S. 36*—Returning Officer is not Court — (Criminal P. C. (1898), S. 195) 117*b*

——*S. 86*—Election Tribunal is Court—(Criminal P. C. (1898), S. 195) 117*c*

Specific Relief Act *(1 of 1877), S. 21 (b)*—*See* Constitution of India, Art. 226 103*c*

Stamp Act *(2 of 1899), Sch. I, Art. 23* — Applicability 11*d*

TENANCY LAWS

Punjab Tenancy Act *(16 of 1887)*

——*S. 5 (1) (c)* — *See* Constitution of India, Art. 227 59

——*S. 8*—*See* Constitution of India, Art. 227: 59

——*S. 14*—*See* ibid, S. 77 (3) (n) 89*b*

——*S. 50* — *See* ibid, S. 77 (3) 29*c*

——*S. 50A*—*See* ibid, S. 77 (3) (g) 29*c*

——*S. 77 (3) (d)*—Suit by tenant—No question of establishment of plaintiff's right to occupancy —Suit does not fall under Cl. (d) 29*b*

——*Ss. 77 (3) (g), 50 and 50A* — Suit not coming within S. 50 but coming within circumstances mentioned in S. 50A can be filed in civil Court 29*c*

——*Ss. 77 (3) (n) and 14*—Suit for recovery of mesne profits — Jurisdiction of civil Court — (Civil P. C. (1908), S. 9) : 19 Pun Re 1891 and AIR 1918 Lah 185, *Dissented from* 89*b*

——*S. 84*—*See* Constitution of India, Art. 227: 59

——*S. 100 (1)*—Reference under — Court must submit its opinion along with record—Court not to submit opinion on merits—(High Court Rules and Orders—Punjab High Court Rules and Orders, Vol I, Chap. 15, Rules 3 and 15 — Civil P. C. (1908), O. 46. R. 1) 31*a*

——*S. 100 (1) and (2)* — Decision by Court of incompetent jurisdiction— Inference of prejudice 31*b*

THE
ALL INDIA REPORTER
1953
Himachal Pradesh J. C.'s Court

A. I. R. 1953 HIMACHAL PRADESH 1

CHOWDHRY, J. C.

Dissu, Appellant v. The State.

Criminal Appeal No. 8 of 1952, D/- 20-9-1952.

Penal Code (1860), S. 325 — Blows on neck — Accused held guilty under S. 325.

The accused asked the deceased, his wife to bring hay. She not only refused to carry out the behest but foully abused him involving his mother. This enraged the accused and he gave her two blows with a 'tehanta', causing her simple injuries. The woman repeated the foul abuse, and thereupon he gave a blow on her back with a 'danda' causing simple injury and catching her by the locks and holding her close to the ground with her face downwards gave two blows on her neck which proved fatal. The deceased was a well-built young girl of 22 years and did not suffer from any extreme and perilous sensibility:

Held that the blows in question were inflicted on a vital part of the body, i.e., the neck. That being so, even though the accused stopped raining blows upon his wife on being reprimanded, the blows already inflicted by him on the said vital part of the body must not only have been so hard as to have endangered life, but the accused would be deemed to have intended to cause or at least to have known that he was likely to cause hurt which endangered the life of the victim of his assault. There could therefore be no doubt whatsoever that the accused voluntarily caused grievous hurt to the deceased and was therefore guilty under S. 325, I. P. C. AIR 1941 Mad 560, Dissented from. Case Law Ref. (Para 6)

Anno: Penal Code, S. 325 N. 2, 4.

Ved Vyas Mahajan, for Appellant; B. Sita Ram, Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('78-80) 2 All 522 8
('78-80) 2 All 766 8
('81) 3 All 597: (1881 All WN 37) 8
('31) AIR 1931 All 1: (32 Cri LJ 362 FB) 4
('20) AIR 1920 Cal 401: (21 Cri LJ 666) 8
('31) AIR 1931 Lah 275: (32 Cri LJ 1248) 7
('38) AIR 1938 Lah 714: (40 Cri LJ 261) 8
('41) AIR 1941 Mad 560: (42 Cri LJ 707) 8

JUDGMENT: Dissu, aged 25 years, of village Sanhol, pargana Bakan, district Chamba, was challaned under Section 302, I. P. C., for causing the death of his wife Mt. Chelo, aged 22 years, at his own house in the afternoon of 12-12-1951. The Magistrate concerned committed him to Sessions to take his trial for an offence punishable under paragraph 2 of section 304, I. P. C., and the learned Sessions Judge has convicted him under section 325, I. P. C., and sentenced him to five years' rigorous imprisonment. Against that conviction and sentence Dissu has filed the present appeal.

(2) The facts, as found from the testimony of P. W. 3 Musahibu, who was an eye-witness to the occurrence and is the appellant's mother's brother, and from the confession of the appellant himself to which he stuck in the main to the last, are not in dispute. The appellant had acquired Mt. Chelo for his wife by exchange. The bargain was however not a happy one, for the woman was a termagant. A day before the occurrence she had been coaxed against her will to return to his house from her parental home. In the afternoon in question the appellant asked her to bring hay. She not only refused to carry out the behest but foully abused him involving his mother. This enraged the appellant and he gave her two blows with a 'tehanta', causing her simple injuries. The woman repeated the foul abuse, and thereupon the appellant gave a blow on her back with a 'danda' causing simple injury and catching her by the locks and holding her close to the ground with her face downwards gave two blows on her neck which proved fatal.

(3) The appellant was in the act of giving these blows when Musahibu reached the scene of occurrence. The latter asked him not to beat his wife whereupon the appellant stopped giving her blows. But the blows already inflicted proved fatal, and within a short time the woman expired. The injuries on the neck, which proved fatal, have been described by the doctor in his post-mortem report as marks of contusion on both sides of the neck all over joining with each other with ecchymosis of underlying tissues. The doctor found the pupils dilated, mouth slightly open with frothy discharge, the liver, spleen, both the lungs and the brain congested and the larynx and trachea congested with some mucus. The victim has been described by the doctor in the report as a young well-built girl of about 22 years. In the opinion of the doctor death was due to asphyxia due to strangulation and must have been caused within five to thirty minutes of the infliction of the injuries.

(4) There are two particulars in respect of which the confession differs from the other evidence on the record, and it was argued by the learned counsel for the appellant on the authority of — 'Balmukand v. Emperor', AIR 1931 All 1 (FB), that the other evidence on the record being inconclusive, the confession must be accepted as a whole. The first is as to whether Musahibu reached the scene of occurrence after Mt. Chelo's death, as stated by the appellant in his confession, or whether he reached there while blows were being given, as stated by the witness himself. The confession of the appellant on this point appears to be false because he admitted that Musanibu asked him not to beat his wife. The warning could have been administered by Musahibu to the appellant only if the former saw the latter inflicting blows on his wife. The point is not of any importance, however, because the infliction of blows is admitted by the appellant.

The other fact is however important, and that relates to whether Mt. Chelo died as a result merely of the blows inflicted on her neck by the appellant, or of strangulation. There is nothing in the confession of the appellant suggesting that he throttled her to death, but the post-mortem report is clear that death was due to asphyxia caused by strangulation. The other details of the post-mortem report given above also point to the same conclusion. Had the difference between the post-mortem report and the statement of the appellant stood at that, there would have been no difficulty in accepting the former and disregarding the latter. It was however elicited from the doctor in cross-examination that the fatal injury in question (described above as marks of contusion on both sides of the neck all over joining with each other with ecchymosis of underlying tissues) could have been caused by fist blows. After this statement it was incumbent upon the counsel for the prosecution, and, if he failed to do so, on the Sessions Judge, to question the doctor further as to whether it was possible for fist blows to have caused strangulation. It is very unlikely that they should have, but as the point was not clarified the matter is left in doubt. This is not the only circumstance showing the unsatisfactory nature of the trial before the Sessions Judge, for there was no question put to the doctor as to the number of fist blows which in his opinion could have caused the said fatal injury. The argument of the learned Government Advocate that this was a clear case of strangulation, or in any case of a large number of blows having been persistently inflicted on the neck of the deceased, cannot therefore be accepted, and it has to be taken on foot of the appellant's confession that the said fatal injury was caused only by two blows inflicted by him on the deceased's neck.

(5) The main point argued before me was as to the offence committed by the appellant. The learned counsel for the appellant argued that, regard being had to the fact that death was caused only by two blows struck on the neck, it could not be said that the hurt was a grievous one endangering life under the eighth clause of section 320, I.P.C. He further argued on the same ground that the appellant could not also be said to have voluntarily caused grievous hurt to the deceased because he neither intended to cause or knew himself to be likely to cause the hurt in question. According to the learned counsel therefore this was merely a case of simple hurt under section 323, I.P.C. On the other hand, the contention of the learned Government Advocate was that even if it be conceded that the prosecution had failed to establish a case of strangulation, or of repeated and persistent blows on the neck, this was a clear case even on facts conceded by the defence of culpable homicide not amounting to murder under section 304, I.P.C. He therefore advocated that after giving the necessary notice to the appellant the conviction be altered by this Court in exercise of its appellate jurisdiction to one under section 304, I.P.C., and the sentence of the appellant enhanced in exercise of its revisional jurisdiction.

(6) It is not necessary to adopt the course suggested by the learned Government Advocate since the sentence imposed upon the appellant is adequate even under section 304, I.P.C. At the same time, it must be remarked that the learned Sessions Judge was clearly wrong in his view that this was a case of merely a hurt which endangered life within the purview of the eighth clause of section 320, I.P.C. The hurt in the present case did not merely endanger but extinguished the life of Mt. Chelo. In view of the adequacy of the sentence, however, I would confine myself to the argument of the learned counsel for the appellant that this was not a case of even grievous hurt. The victim was a young and well-built girl of 22 years of age. The blows in question were inflicted on a vital part of the body, i.e. the neck. That being so, even though the appellant stopped raining blows upon his wife on being reprimanded by Musahibu, the blows already inflicted by him on the said vital part of the body must not only have been so hard as to have endangered life, but the appellant will be deemed to have intended to cause or at least to have known that he was likely to cause hurt which endangered the life of the victim of his assault. There can therefore be no doubt whatsoever that the appellant voluntarily caused grievous hurt to Mt. Chelo.

(7) The learned counsel for the appellant cited a number of rulings. The first was — 'Emperor v. Shah Alam', AIR 1931 Lah. 275. That was a case where the accused put his safa round the neck of a boy on his refusal to accompany him to a certain place and dragged him for a distance of about 50 or 60 yards as a result of which the boy subsequently died. It was held that as it was a common practice to put a pugree round the neck of a boy and to drag him in order to compel him to go in a particular direction, and as the practice generally led to no more evil consequences than a swollen neck, the accused could not be saddled with the knowledge necessary to constitute an offence under section 304, Part II, nor could he be presumed to have caused grievous hurt inasmuch as such grievous hurt was not the natural consequence of his act. It could not however be said in the present case that hard and determined blows struck on a vital part of the body like the neck leads to no more evil consequences than a swollen neck. On the contrary, it must be presumed from the nature of the blows and the vital part of the body where the blows were struck that at least grievous hurt was the natural consequence of the act of the appellant.

(8) The next case cited by him was that of — 'In re Marana Goundan', AIR 1941 Mad 560. That was a case where the accused kicked a man twice on the abdomen as a result of which the man collapsed and died soon after, and it was held on the ground that there was no mark

of external or internal injury that the accused could not be said to have intended or known that he was likely to endanger life, and therefore he was convicted only under section 323, I.P.C. With all respect, I find myself unable to agree with the view expressed in this case. In view of the clear finding that the accused kicked the deceased twice on the abdomen as a result of which the latter died, it was quite immaterial that there was no mark of external or internal injury. And as two kicks were administered on a vital part of the body like the abdomen, the kicks must have been hard enough to impute the intention or at least the knowledge to the accused that he was likely to cause hurt which endangered life.

Another case cited by the learned counsel was that of — 'Radha Kishen v. Emperor', AIR 1938 Lah. 714. That was a case where conviction under section 304 was altered to one under section 325 I.P.C., but as for reasons recorded above I am not going into the question of culpability of the appellant under section 304, I.P.C., it is not necessary to consider this ruling.

Four other rulings were cited by the learned counsel, all of which fell under one and the same category: — 'Emperor v. Saberali Sarkar', AIR 1920 Cal. 401; — 'Empress of India v. Fox', 2 All 522; — 'Empress of India v. O'Brien', 2 All. 766 and — 'Empress of India v. Randhir Singh', 3 All. 597. They are all cases where the victim of the assault was suffering from a diseased spleen, and the accused was unaware of the fact. That being so, it was impossible to conclude, as held in — 'Empress of India v. Fox', that the accused could have had in view the victim's death as a probable or even possible consequence of his acts, and the measure of the accused's culpability was therefore not that fatal result but only the blows themselves. Owing to the diseased spleen of the victim, although no great violence may have been used, the hurt was no doubt grievous as it endangered life, but as the "extreme and perilous sensibility of the body" which made it susceptible to fatal consequences as a result of the infliction of what was seemingly only a simple hurt was not known to, or even reasonably suspected by the accused, the latter could not be said within the purview of section 320 I.P.C. to have voluntarily caused grievous hurt. In the present case Mt. Chelo did not suffer from any such extreme and perilous sensibility of the body, but was, on the contrary, a young well-built woman 22 years of age. These rulings have no application in the present case.

(9) In the result, therefore, I see no reason to alter the conviction of the appellant or the sentence imposed upon him. In fact, had he been rightly convicted under section 304, I.P.C., the chances are that the sentence would have been severer. The appeal is dismissed and the conviction and sentence of the appellant are maintained.

A/R.G.D. Appeal dismissed.

A. I. R. 1953 HIMACHAL PRADESH 3

CHOWDHRY, J. C.

Mehar Chand, Petitioner v. The State.

Criminal Review No. 53 of 1951 D/- 21-8-1952.

Contempt of Courts Act (1926), S. 3, 1st Proviso — Proviso gives Court power to review its judgment — Proviso is other law within S. 369, Cr. P. C. — (Criminal P. C. (1898), Ss. 369 and 561A).

Though the High Court has no inherent power under S. 561 A to review its judgment, the first proviso to S. 3 of the Contempt of Courts Act gives the Court a power of reviewing its judgment awarding punishment to an accused under the Act in a case where the accused offers an apology to the satisfaction of the Court. The Proviso is "other law for the time being in force" within the purview of S. 369, which permits review. The power of review is discretionary: AIR 1923 Mad 426, AIR 1926 Mad 420; AIR 1935 All 466 and AIR 1938 Nag 74, Disting. (Paras 4, 5, and 6)

Anno. Contempt of Courts Act S. 3 N 1. Cr. P. C. S. 369 N. 6: S. 561 A. N. 2.

K. C. Pandit, for Petitioner; S. N. Sethi, Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('35) AIR 1935 All 466: (36 Cri LJ 1286) 3
('35) AIR 1935 All 60: (35 Cri LJ 1485) 5
('23) AIR 1923 Mad 426: (24 Cri LJ 439) 3
('26) AIR 1926 Mad 420: (27 Cri LJ 184) 3
('38) AIR 1938 Nag 74: (39 Cri LJ 116) 3

ORDER: This is an application for review of the judgment of this Court passed on 20-8-1951 whereby, although seven other persons were discharged on their tendering unconditional apologies, the present petitioner was sentenced to a fine of Rs. 100/- under section 3 of the Contempt of Courts Act, 1926. The petitioner was treated differently from the others because he did not put in appearance in this Court on the date of hearing. He had sent a telegram asking for adjournment on the ground of sickness, but it was disregarded because no communication relating to a judicial matter can be acted upon unless made formally. An application for adjournment supported by a medical certificate was received from the petitioner subsequently, but that was too late because received after the judgment.

(2) In the present petition for review of the said judgment, although the petitioner seeks in the first instance to explain that he had no complicity in the matter interpreted as amounting to a contempt of the Court, he tenders an unconditional apology at the end of the petition. Such an apology not being unqualified, might not have been accepted as satisfactory, but the learned counsel for the petitioner did not seek at all to justify the conduct of the petitioner but contented himself with merely offering an unconditional apology on behalf of his client for the conduct in respect of which proceedings were taken against him.

(3) Two objections were, however, taken by the Government Advocate. The first was that this Court has no power to review the judgment delivered by it on 20-8-1951. And in support of this contention he cited the following rulings: — 'Kunhahamad Haji v. Emperor, AIR 1923 Mad 426; Arumuga Padayachi In re, AIR 1926 Mad 420; — 'Banwari Lal v. Emperor', AIR 1935 All 466, and — 'Laxmanrao Parashram v. Emperor, AIR 1938 Nag 74. These cases lay down that the High Court has no inherent power under section 561A, Cr. P. C., to review its judgment. In none of these cases, however, was review sought of a judgment delivered under the provisions of the Contempt of Courts Act, 1926. This Act lays down a special procedure, as I shall presently show, and therefore the above rulings have no application in the present case.

(4) The special provision just referred to is contained in the first proviso to section 3 of the Act. The section and the first proviso are to the following effect:

"Save as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court."

It is clear from a perusal of the section and the proviso that even after punishment has been awarded to an accused under the Act, he may be discharged or the punishment remitted in case he makes an apology to the satisfaction of the Court. In other words, the proviso gives the Court a power of reviewing its judgment awarding punishment to an accused under the Contempt of Courts Act in a case where the accused offers an apology to the satisfaction of the Court. The above provisions do not appear to have been the subject-matter of decision in any reported ruling; in any case, none was cited before me by the learned counsel. The language of the proviso is however plain, and the conclusion I have arrived at seems to follow clearly from it.

(5) Section 484, Cr. P. Code, is a provision analogous to the proviso to section 3 of the Contempt of Courts Act, 1926, for it also provides that when any Court has adjudged an offender to punishment it may remit the punishment on the offender tendering an apology to the satisfaction of the Court. In —'Kunji Lal v. Emperor', AIR 1935 All 60, while holding that the High Court had no inherent power under section 561A Cr. P. C. to review a judgment already passed in exercise of its revisional jurisdiction, Bennet J. mentioned section 484 of the Code amongst those covered by the words "save as otherwise provided by this Code" in section 369.

The power of review may however be granted not only by the Code but also "by any other law for the time being in force", as further laid down in section 369. The first proviso to section 3 of the Contempt of Courts Act, 1926, is one such other law for the time being in force, within the purview of section 369 of the Code, which permits review. I therefore find support for my view from the just cited 1935 Allahabad ruling relating to an analogous provision and hold that this Court has the power to review the judgment in question dated 20-8-1951.

(6) The power of review is discretionary, and the other contention of the learned Government Advocate was that it should not be exercised in this case regard being had to the conduct of the petitioner in not putting in appearance in this Court on 20-8-1951. His argument was that the petitioner should have applied for adjournment according to law through a counsel or some other duly appointed agent. That is no doubt a counsel of perfection, but I do not think the petitioner should be penalised for not following it in the circumstances of this case. The medical certificate filed by him is to the effect that he had taken ill with amoebic dysentery on 19-8-1951 & was unable to move.

The petitioner therefore fell ill just on the eve of the date of hearing, and it would be putting too hard a construction on his conduct if it were to be held that in the short time at his disposal he should have acted in the ideal manner suggested by the learned Government Advocate. It was suggested that such medical certificates are easily procured. But such medical certificates are also genuine, and there is nothing to show that the one filed by the petitioner was not such. It was granted by the medical officer in charge of the Government Dispensary at Solan and is supported by the petitioner's affidavit.

(7) For the reasons therefore that the petitioner had sufficient cause for non-appearance on 20-8-1951, and that he has tendered an unqualified apology to the satisfaction of this Court, I hold that this is a fit case for reviewing the order dated 20-8-1951 and remitting the punishment awarded by that order. Accordingly, the apology is accepted, the sentence of fine awarded by the said order is set aside and the petitioner is discharged. If the fine has already been paid by the petitioner, it will be refunded to him. The order requiring the petitioner to pay Rs. 20/- as costs will, however, stand.

A./V. R. B. Order accordingly.

A. I. R. 1953 HIMACHAL PRADESH 4

CHOWDHRY J. C.

Mela Ram, Defendant-Appellant v. Mt. Pratibha Devi, Plaintiff-Respondent.

Second Appeal No. 22 of 1952, D/- 11-7-1952.

Court-fees Act (1870), S. 7 (v) (d) and (e) — Suit for possession — Dispute in appeal same as in trial Court — Ad valorem Court-fee in appeal has to be paid.

Where in a suit for possession of a plot of land along with certain constructions put up thereon by the defendant a decree is passed subject to payment of an amount of money as compensation for superstructure and the defendant aggrieved by the decree prefers an appeal and reiterates the contentions put forward by him in the trial Court which, according to him, entitled him to retain possession of not only the land in suit, but also of the building standing thereon and prays that the entire suit be dismissed, the subject-matter of dispute in appeal being the same as it was in the trial Court, the defendant has to pay ad valorem court-fee in respect of both the items of property under S. 7(v)(d) and (e). 4 All 320 (FB), Disting. (Paras 4, 6)

Anno: C. F. Act, S. 7 (v) N. 30.

Tek Chand, for Appellant.

REFERENCE..... Para.

('82) 4 All 320: (1882 All WN 44 FB) 6

ORDER: The case is at the stage of admission, and there is an office report that the court-fee paid is deficient. I have heard learned counsel for the appellant and am of the opinion that the court-fee paid is deficient.

(2) This was a suit for possession of a plot of land along with certain constructions put up thereon by the defendant and for recovery of Rs. 438 as mesne profits. On an objection raised in the trial Court by the defendant, the value of the property in suit was determined. It was found that the market-value of the land (which fell in the category of land described in clause (d) of para (v) of S. 7 of the Court Fees Act) was Rs. 900 and that of the building Rs. 1,750. The plaintiff was therefore made to pay a court-fee on the total of these two figures and the said mesne profits, i.e. on Rs. 3,088 in all. The suit was decreed for possession of the land and for recovery of Rs. 146-2-0 as mesne profits, and the defendant was allowed to remove the superstructure. The defendant went up in appeal to the District Judge, but the appeal was dismissed and the judgment and

decree of the trial Court were maintained. The defendant has now filed this second appeal.

(3) The defendant-appellant has paid court-fee on Rs. 146-2-0 awarded to the plaintiff-respondent as mesne profits. He has also paid court-fee on Rs. 900, the market-value of the land in suit. He has thus paid court-fee on Rs. 1,046-2-0 in all. He however questions his liability for payment of court-fee on Rs. 1,750, the market-value of the building. Now, the determination of the question of the correct court-fee payable on a memorandum of appeal depends on an answer to the question: What is the subject-matter in dispute in the appeal? In other words, so far as the building in question is concerned, whether the defendant-appellant does, or does not, claim any, if so what, right in respect thereto, and whether that right is the same which was litigated in the trial Court, or different?

(4) The plaintiff claimed ownership in the land, and she pleaded that the defendant was in possession of the land, and had built the superstructure, on foot of a lease on condition that the construction will be removed within a month of the expiry of the lease. The lease was terminated by notice, and the plaintiff claimed possession of the superstructure as well as the land on the ground that the defendant had failed to remove the superstructure within the stipulated time. The defendant denied the plaintiff's title, and he pleaded that the lease filed by the plaintiff was a fictitious document. He also pleaded that the structure had been built more than 12 years before the suit and he had acquired title to the land by adverse proprietary possession. Confining the present consideration to the question of the building alone, the defendant-appellant has reiterated his pleas against the injunction whereby he has been directed to remove the material. True, he has also pleaded that the plaintiff-respondent was in any case not entitled to that relief without payment of compensation to the appellant; but that does not take away from the fact that the building in suit is still the subject-matter in dispute in the appeal, as, it may incidentally be stated, it was in the lower appellate Court as well. I therefore hold that the right litigated in respect of the building is the same in the present appeal as it was in the trial Court.

(5) The learned counsel for the defendant-appellant argued that there already exists a decree in favour of his client in regard to the superstructure in that he has been allowed to remove its material. That is no doubt true, but he is not satisfied with that decree. On the contrary, the defendant-appellant has reiterated the contentions put forward by him in the trial Court which, according to him, entitled him to retain possession of not only the land in suit but also of the building standing thereon, and he has prayed that the entire suit of the plaintiff-respondent be dismissed.

(6) The learned counsel for the defendant-appellant further cited the ruling reported as —'Jogal Kishor v. Tale Singh', 4 All. 320. That was a suit for possession of certain land and demolition of building erected thereon by the defendant, and it was held that the value of the building which might have to be demolished should not be taken into account in estimating the value of the suit for purposes of court-fee. The case is clearly distinguishable since, unlike the present suit, that was a suit wherein the plaintiff did not pray for possession of the building as well as the land. In the present case the plaintiff having prayed for possession of both the land and building, she was required, and quite rightly, to pay ad valorem court-fees in respect of both the items of property under S. 7 (v) (d) and (e) of the Court-Fees Act. And since the building as well as the land are, for reasons recorded above, still the subject-matter of dispute in this appeal, the defendant-appellant must pay the same court-fee on the memorandum of appeal filed here. It has further to be stated that the deficiency in the court-fee paid by the appellant in the Court of the District Judge was the same as here.

(7) The total amount on which court-fee is therefore payable on the present memorandum of appeal is Rs. 2,796-2-0. The same court-fee was also payable in the lower appellate Court. The defendant-appellant is, accordingly, directed to make good the deficiencies on both the memoranda of appeal by 11-8-1952. If the court-fee is paid, the appeal will be put up within three days of the payment for admission and for orders on the application for stay of execution after due notice to the learned counsel for the defendant-appellant, otherwise for necessary orders consequent on non-payment of the deficiencies.

B/V.S.B. Ordered accordingly.

A. I. R. 1953 HIMACHAL PRADESH 5

CHOWDHRY J. C.

Dr. Jagat Ram Sud, Claimant v. The State of Himachal Pradesh, Respondent.

Misc. First Appeal No. 25 of 1951, D/- 9-7-1952.

(a) East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948 as amended in 1951) — Validity — (Constitution of India, Art. 31 (2) and Sch. 7, List II, Item 36) — (Punjab Requisitioning of Immovable Property (Amendment and Validation) Act (2 of 1951), Ss. 3, 6).

The Act is not 'ultra vires' of the Legislature on the ground of its not limiting requisitioning for public purposes only as under S. 3 of the Punjab Requisitioning of Immovable Property (Amendment and Validation) Act, 1951, the words "for a public purpose" were inserted, and were deemed always to have been inserted in sub-section (1) of S. 2 of the Requisitioning Act. Furthermore, under S. 6 of the same Act every requisition made before its commencement is, unless the contrary be proved, to be presumed to have been made for a public purpose under the Requisitioning Act as so amended. (Para 5)

(b) East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), S. 5 (1) (e) — Compensation — Determination of — Basis — Principle in S. 73, Contract Act — Applicability — Property subject to Punjab Rent Restriction Act, 1949 — Effect — (Contract Act (1872), S. 73).

The use of the words "shall have regard" and "so far as the same can be made applicable" in S. 5 (1) (e) clearly shows that while the said provisions of the Land Acquisition Act are to serve as a guide, it is open to the Arbitrator to adapt them to the facts and circumstances of the case.

That being so, the Arbitrator is not bound, regardless of other valid considerations, to fix compensation in accordance with the market rental value of the building. A fair guide to the connotation of the word "compensation" is to be found in the terms of S. 73 of the Contract Act, 1872. The measure of compensation should therefore be the loss to the claimant. In other words, the claimant can only claim that amount as compensation which he would have realised as rent if the property had not been requisitioned. Where the requisitioned property is subject to the restrictions imposed by the East Punjab Urban Rent Restriction Act, 1949, the rent fixed under that Act would, in the words of S. 73, Contract Act, therefore, be the compensation for the loss to the claimant which "naturally arose in the usual course of things", or which the claimant should have known as being likely to result in consequence of the requisition: AIR 1952 Punj 116, Rel. on; AIR 1950 Cal 83, Dissent.

(Paras 8 and 10)

Anno: Contract Act, S. 73 N. 4, 19.

B. D. Kashyap, for Claimant; Bakshi Sita Ram Govt.-Advocate, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('38) AIR 1938 PC 67: (ILR (1938) 2 Cal 72) 13

('50) AIR 1950 Assam 133: (ILR (1950) 2 Assam 257) 10

('50) AIR 1950 Cal 83 10

('50) AIR 1950 EP 296: (52 Pun LR 107) 10

('52) AIR 1952 Punj 116 10

JUDGMENT: This is an appeal by one Dr. Jagat Ram Sud, hereinafter referred to as the claimant, under section 5(1)(f) of the East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (XLVIII of 1948).

(2) A three storeyed building, situate in Sanjauli, Simla known as the Jagat Niwas, consisting of two shops in the ground floor and two residential sets in each of the two floors above, was requisitioned by the Himachal Pradesh Government under section 2(1) of the said Act on 1-8-1949 for the Himachal Government Transport. The claimant was actually dispossessed of the building on 8-9-1949. The building was derequisitioned by an order dated 25-1-1950 but possession was actually restored to the claimant on 31-1-1950. The building was thus in possession of the Himachal Pradesh Government for four months and twenty three days from 8-9-1949 to 31-1-1950.

(3)) As the amount of compensation could not be fixed by agreement, Sri H. L. Soni, District and Sessions Judge Mahasu and Sirmur districts, was appointed as arbitrator. The claimant put in a claim for six months at Rs. 7,675/- per annum, which he described as fair rent. The said Government filed a written-statement that Rs. 100/- per mensem would be reasonable compensation for the building inasumch as it was incomplete and only a part of it could for that reason be used by the Transport department.

(4) The Arbitrator by his award dated 29-6-1951 granted compensation to the claimant for only the said period of 4 months and 23 days and at Rs. 900/- per annum for the two shops and at Rs. 800/- per annum for the four residential sets, or at Rs. 1,700/- per annum in all. The claimant has now come up in appeal to this Court.

(5) There was an objection, in the nature of a preliminary objection, raised by the learned Government Advocate on behalf of the respondent, the State of Himachal Pradesh. He contended that the Act was ultra vires of the Legislature as it did not limit requisitioning for public purposes only, and that therefore the award must be set aside in toto. This argument has no force in view of the enactment of the Punjab Requisitioning of Immovable Property (Amendment and Validation) Act, 1951, on 15-9-1951. Under section 3 of this latter Act the words "for a public purpose" were inserted, and were deemed always to have been inserted, in sub-section (1) of section 2 of the Requisitioning Act. Furthermore, under section 6 of the same Act every requisition made before its commencement was, unless the contrary be proved, to be presumed to have been made for a public purpose under the Requisitioning Act as so amended. Neither party seeks to take advantage of the words "unless the contrary is proved" by contending that the present requisition was not made for a public purpose. That being so, the requisition in question will be deemed to have been duly made.

(6) Under section 5(1)(e) of the Requisitioning Act the Arbitrator in making his award is to have regard to the provisions of sub-section (1) of section 23 of the Land Acquisition Act 1894, so far as the same can be made applicable. The only provision of the last mentioned Act under which the Arbitrator could, & in fact did, lay contribution was the first one relating to the market value of the property at the date of the publication of notification. He took into consideration the oral and documentary evidence produced by the claimant in respect of rents of shops and residential buildings in the vicinity. He did not discard that evidence as unreliable. Taking the means of the exemplars produced by the claimant, the rent of the 490 sq. ft. area of the two shops works out at Rs. 2,993/2/- per annum, or Rs. 1,496/9/- for six months, or Rs. 828/9/3 for 4 months and 23 days, and that of the 2000 sq. ft. area of the four residential sets at Rs. 4,000/- per annum, or Rs. 2,000/- for six months, or Rs. 1,508/3/9 for the actual occupational period of 4 months and 23 days. The Arbitrator did not however base his finding on the market rental value of the building thus ascertained. He made a local inspection of the building and ascertained by means of local inquiries from the tenants that Rs. 450/- per annum had been fixed as the fair rent per shop by the Rent Controller under the East Punjab Urban Rent Restriction Act, 1949. Accordingly, he fixed the aforesaid compensation of Rs. 900/- per annum for the two shops. So far as the four residential sets were concerned, he took into consideration the fact that the claimant had claimed compensation in respect of them at a rate which was less than half of that at which he had claimed compensation for the shops. Accordingly, he fixed compensation for the four sets at Rs. 800/- per annum.

(7) There was a good deal of argument before me as to whether the learned Arbitrator was justified in fixing compensation on the basis of local inquiries from tenants. It is, however, unnecessary to go into the question since, on being required to do so, the learned counsel for the claimant has filed the order in question passed by the Rent Controller of Simla. It is dated 10-4-1951 and purports to fix on the statement of the parties Rs. 425/- per annum as fair rent for one of the residential sets and Rs. 400/- per annum as the fair rent for one of the shops in the building in question. The question for determination therefore is whether compensation in respect of the building should be fixed on the basis of its market rental value regardless of the fair rent of the building fixed under section 4 of the East Punjab Urban Rent Restriction Act, 1949.

(8) Now, there are, in my opinion, two reasons for answering the question posed at the end of the last paragraph in the negative. Section 5 of the Requisitioning Act lays down certain principles in accordance with which compensation has to be paid. One of the principles laid down thereunder is that the Arbitrator in making his award shall have regard to the provisions of sub-section (1) of section 33 of the Land Acquisition Act (1 of 1894), so far as the same can be made applicable. The use of the words "shall have regard" and "so far as the same can be made applicable" clearly shows that while the said provisions of the Land Acquisition Act were to serve as a guide, it was open to the Arbitrator to adapt them to the facts and circumstances of the case. That being so, the Arbitrator in the present case was not bound, regardless of other valid considerations, to fix compensation in accordance with the market rental value of the building. The next question that arises is whether restriction of the fair market rental value under the East Punjab Urban Rent Restriction Act, 1949, would be such a valid consideration. And this brings me to the other reason for answering the said question in the negative.

(9) There is no doubt that rent fixed under the East Punjab Urban Rent Restriction Act cannot be accepted on the ground of the existence of the relationship of landlord and tenant between the requisitioning authority and the claimant. Not only is there nothing in the Requisitioning Act justifying any such conclusion, but the use of the word "compensation" in the Act clearly negatives the idea. At the same time, in a case where the market rental value of a building has been, or is capable of being, reduced in accordance with the provisions of the said Restriction Act, it is this reduced rent and not the market rental value which would be the compensation recoverable by the claimant.

(10) A fair guide to the connotation of the word "compensation" is to be found in the terms of section 73 of the Indian Contract Act, 1872. That section prescribes the method of assessing compensation in cases of breach of contract, but that is immaterial. The section lays down that the party who suffers by breach of contract is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. The measure of compensation should, therefore be the loss to the claimant. In other words, the claimant can only claim that amount as compensation which he would have realised as rent if the property had not been requisitioned. Where the requisitioned property is subject to the restrictions imposed by the East Punjab Urban Rent Restriction Act, 1949, the rent fixed under that Act would, in the words of section 73 of the Indian Contract Act, therefore be the compensation for the loss to the claimant which "naturally" arose in the usual course of things", or which the claimant should have known as being likely to result in consequence of the requisition. I am supported in this view by the ruling of the Punjab High Court reported as the — 'Union of India v. Ram Pershad', AIR 1952 Pun, 116. Reliance was placed on behalf of the claimant on the following rulings: — 'Mahammad Ekramal Haque v. Province of Bengal', AIR 1950 Cal, 83; — 'Governor-General-in-Council v. Indar Mani', A. I. R. 1950 E. P. 296; and — 'Lalit Kumar v. Bhagaban Ch. Sarma', A. I. R. 1950 Assam 133. The last two rulings do not consider the specific question decided here. The first ruling does appear to hold a view to the contrary, but for reasons already recorded I respectfully differ from it and find support for my view from the above ruling in 'AIR 1952 Punjab 116'

(11) Applying the above principle to the present case, it has been seen that the Rent Controller of Simla fixed on the statement of the parties Rs. 425/- per annum as fair rent for one of the residential sets and Rs. 400/- per annum as fair rent for one of the shops in the building in question under the provisions of the East Punjab Urban Rent Restriction Act. It may be mentioned here in passing that the learned Arbitrator was not correct in saying that Rs. 450/- per annum per shop was the fair rent fixed by the Rent Controller. The mistake evidently occurred because instead of obtaining a copy of the Rent Controller's order he depended merely upon local inquiries made from the tenants. Had he obtained a copy of the order it would not have been further necessary for him to assess the compensation in respect of the residential portion of the building on the ground that the claimant had prayed for compensation in respect of the residential sets at a rate which was less than half of the rate at which he had claimed compensation for the shops. The copy of the Rent Controller's order, which has now been filed, shows that fair rent in respect of one of the residential sets was fixed at Rs. 425/- per annum. It was contended by the learned counsel for the claimant that as the Rent Controller fixed the said rents on 10-4-1951 those rents should not be made the criteria for assessing compensation in respect of a requisition that had been made on 1-8-1949 and of the consequent dispossession on 8-9-1949. This contention has no force since the rules under section 4 of the East Punjab Urban Rent Restriction Act for determination of fair rent are the same in respect of all buildings constructed after 1-1-1939. The present building was constructed in 1949. I, therefore, hold that the claimant is entitled to compensation at the above rates fixed by the Rent Controller. In fact this assessment errs, if at all, in favour of the claimant since it has come out in evidence that the building was not complete in many small ways (like plastering, fixing of door leaves and electric installation) even upto the time when it was derequisitioned.

(12) A word about the period for which the claimant is entitled to compensation. It was contended on his behalf that the building was derequisitioned at a time when it could not be let out and therefore it remained vacant till 10-3-1950. The claimant, therefore, asks for compensation for six months. There is, however, no evidence in support of the contention. I hold that the claimant is entitled to compensation for only the period during which the property was in possession of the respondent, i. e. 4 months and 23 days. The amount of compensation for this period at the said rates fixed by the Rent Controller comes to Rs. 317/12/5 for the two shops and Rs. 675/4/5 for the four residential sets, or Rs. 993/-/10 in all.

(13) The learned counsel for the claimant further contended that the claimant was entitled to interest and costs. At no stage of the case, however, not even in the grounds of appeal in this Court, did the claimant claim any interest. None of the grounds for granting interest specified in the well-known ruling of their Lordships of the Privy Council, B. N. Rly. Co. Ltd. v. Ruttanji Ramji', AIR 1938 P. C. 67 exists here. This does not however affect the question of future interest which should certainly be granted to the claimant. As regards costs, in view of the fact that both the claimant and the respondent put forward

figures which differed materially from the compensation actually awarded the parties should be left to bear their own.

(14) The appeal is allowed, the award of the Arbitrator is set aside and the claimant is awarded Rs. 993/-/10 (Rupees nine hundred and ninety three and ten pies) as compensation with future interest at six per cent per annum. The parties will bear their own costs throughout.

B/G.M.J. Appeal allowed.

A. I. R. 1953 HIMACHAL PRADESH 8

CHOWDHRY J. C.

Chamba Valley Transport Ltd., Petitioner v. State of Himachal Pradesh, Respondent.

Civil Misc. Petn. No. 16 of 1950, D/- 11-8-1952.

(a) Constitution of India, Arts. 19(1) (g) and 226(1) — Infringement of fundamental right — Right non esse before Constitution — Acquiescence in infringement — Retrospective operation of Art. 19 — (Evidence Act (1872) S. 115).

The petitioner, an incorporated company, was plying transport vehicles on a certain route on 5-year permits, which were to expire on 31-7-1952, until stopped from doing so on and from 30-9-1949 by a notice, dated 10-9-1949, from the Deputy Commissioner prohibiting the company from running the motor service because the administration had decided to nationalise transport in the State. On 1-12-1950 the company basing its title on infringement of its fundamental right under Art. 19(1) (g) of the Constitution filed a petition under Art. 226 for issue to the State of Himachal Pradesh a writ in the nature of mandamus.

Held (1) that the right in question was, prior to the date of the commencement of the Constitution, simply non esse and there could, therefore, be no question of its ante-constitution infringement or petitioner's acquiescence in the infringement. (Para 9)

(2) that for the same reason there could also be no question of retrospective operation of the provisions of Art. 19 of the Constitution. (Para 9)

(3) that the petitioner was seeking to enforce the right for itself and not for anybody else, and it made no difference that it was an incorporated company. (Para 11)

(4) that by ousting the petitioner from its business, in the manner in which it had done it, the respondent had infringed the fundamental right of the petitioner under Art. 19(1) (g) of the Constitution. (Para 12)

(5) that the particular thing for the doing of which a writ of mandamus would issue in the case was in the nature of a public duty for it was a duty which would be required to be performed in the interests of the travelling public, and it no doubt appertained to the respondent's office in its administrative capacity. (Para 16)

Anno: C. P. C., Appendix III; Constitution of India, Art. 226 N. 11, Evidence Act S. 115 N. 5.

(b) Constitution of India, Arts. 19(1), 32 and 226 — Infringement of fundamental right — Another remedy is not open.

There is no other statute but the Constitution which prescribes the remedy of the enforcement of the fundamental rights, and the power of endorsement of those rights has been conferred on only the Supreme Court under Art. 32 and the High Courts under Art. 226. There is therefore no other adequate remedy open to a person whose fundamental right has been infringed. (Para 13)

Anno: C.P.C., Appendix III, Constitution of India, Art. 32 N. 1, Art. 226 N. 8.

Tek Chand, for Petitioner; B. Sita Ram, Government Advocate, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('15) AIR 1915 PC 59: (39 Bom 625 PC) 6
('50) 1950 SCR 759: (AIR 1951 SC 118) 8
('50) 1950 SCR 566: (AIR 1950 SC 163) 8
('50) 1950 SCR 869: (AIR 1951 SC 41) 11
('50) 1950 SCR 594: (AIR 1950 SC 124: 51 Cri LJ 1514) 13
('51) AIR 1951 SC 217: (52 Cri LJ 736) 8
('52) AIR 1952 SC 192: (1952-1 Mad LJ 806) 6
('51) AIR 1951 All 257: (ILR (1951) 1 All 269 FB) 12, 14
('50) AIR 1950 Bom 363: (52 Cri LJ 120 FB) 8
('50) AIR 1950 Madh-B 46 8
('51) AIR 1951 Mad 280: (ILR (1951) Mad 68) 8
(1812) 15 East 117: (13 RR 409) 16

ORDER: This is an application under Article 226 of the Constitution of India by the Chamba Valley Transport Limited for enforcement against the respondent, the State of Himachal Pradesh, of the fundamental right to carry on business guaranteed by Article 19 (g).

(2) The Company came into being before the inauguration of Himachal Pradesh under an agreement with the former Hill State of Chamba, and was plying transport vehicles on hire between Chamba and Bannikhet on 5-year permits, which were to expire on 31-7-1952, until stopped from doing so on and from 30-9-1949 by a notice, dated 10-9-1949, from the Deputy Commissioner of Chamba prohibiting the Company from running the motor service because the administration had decided to nationalise transport in the State.

(3) It will be noticed that the Company carried on its business for about a year and a half after the integration of the Hill States into Himachal Pradesh before it was stopped by the respondent. The respondent was a shareholder in the Company and had two persons, the Deputy Commissioner of Chamba and one Mehta Autar Chand, as its nominees on the directorate of the Company. After stoppage of their business, and in response to an offer contained in the said notice, the petitioner Company sold their stock-in-trade to the respondent, and, at a cost of over a lac of rupees, the latter nationalised transport in the State and began to run vehicles of their own. After several unsuccessful demands, the last dated 8-11-1950, when representatives of the Company are alleged to have waited on the Development Secretary, the present petition was filed on 1-12-1950.

(4) Basing its title on the contract with the respondent's predecessor, the State of Chamba, on the unexpired 5-year permits and on infringement of its aforesaid fundamental right, the petitioner Company prays for issue to the respondent directions, orders or writs in the nature of 'mandamus,' prohibition, 'quo warranto', or any of them, directing the respondent

"(a) to discontinue to ply transport vehicles on hire between Chamba and Bannikhet,

(b) to allow the petitioners to ply their transport vehicles on hire for the period provided in their agreement; and

(c) to compensate the petitioners for the loss of income and damages already sustained by them, and which they will continue to suffer till they are permitted to ply their vehicles, as they had been doing upto 30th September 1949;

and for the grant of such other relief as may be just and expedient.

(5) The petition has been opposed by the respondent on various grounds, to be referred to presently. In the course of arguments the learned counsel for the petitioner gave up his stand on the contract and the 5-year permits and confined himself to the infringement of the fundamental right of the petitioner, and the learned Government Advocate admitted that running of transport by the petitioner Company was not stopped under any provision of the Motor Vehicles Act.

(6) In view of these concessions by learned counsel the disposal of this case lies within a much shorter compass. Only questions relating to the fundamental right arise for determination, but not those relating to contract or permits. Certain arguments put forward by learned counsel, despite the aforesaid concessions, therefore, become irrelevent, and they will not be adjudicated upon. These were: that it was open to the present Government not to recognise the ante-cession right based on contract between the petitioner and the former State of Chamba — ('Secretary of State v. Bai Rajbai', AIR 1915 P. C. 59); that the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right enforceable by issue of a writ under Article 226 of the Constitution — 'G. Veerappa Pillai v. Raman and Raman Ltd., AIR 1952 S. C. 192'; that the grantor of the licence (Chamba State) having transferred the property affected thereby (the Chamba-Bannikhet road), the transferee (the respondent) is not, as such, bound by the licence (the 5-year permits), under section 59 of the Easements Act, 1882; that the petitioner Company having already sold its vehicles to the respondent, it was not entitled to ply transport on unexpired permits relating to those vehicles; and that the permits have in any case now expired on 31-7-1952.

(7) There are two contentions, put forward on behalf of the respondent, which may be taken up first and together. They may be taken up together because the fallacy underlying both proceeds from a single source: misconception of the right propounded by the petitioner. And they may be taken up first, because the removal of that misconception by clarification of the essentials of the said right will also establish the title on which the petitioner seeks redress in this Court. The two contentions are: (1) that by sale, after receipt of the said notice, of its stock-in-trade to the respondent the petitioner has consented to and acquiesced in the situation which it now seeks to unsettle by preferment of the present petition, and (2) that the provisions of Article 19 not being retrospective, they cannot revivify a right which had been put an end to prior to the commencement of the Constitution on 26-1-1950.

(8) The first contention was met by the petitioner by making reference to its correspondence with the respondent which, according to it, showed that the sale was made specifically 'without prejudice' to the future rights of the petitioner. This was countered by the argument that the endorsement 'without prejudice' had reference only to the transaction of sale, and that, so far as the carrying on of the motor transport business is concerned, the petitioner never protested against its stoppage by the said notice of the respondent. As regards the second of the above two contentions, learned counsel for the petitioner pleaded that not the petitioner's right but only its exercise was terminated, and that the respondent only scotched the right, not killed it, and so the right survived the commencement of the Constitution.

And he supported his argument by citation of— 'Harendranath v. State of Madhya Bharat', AIR 1950 Madh. B. 46, and — 'Jeshingbhai v. Emperor', AIR 1950 Bom. 363. The learned Government Advocate cited — 'Janardhan Reddy v. State of Hyderabad', AIR 1951 S. C. 217, and — 'Mahamad Beary v. T. Hassan Kutty', AIR 1951 Mad. 280, as rulings of 'countervailing weight supporting the said contention'. It may be stated here at once that the Madhya Bharat ruling cited by the learned counsel for the petitioner and both of those cited by the learned Government Advocate are irrelevant here since in none of them did the question of retrospective application of a fundamental right arise. The Bombay ruling supports my view, as I shall presently show, though it does not (support?) the arguments as put forward on behalf of the petitioner.

(9) A legal right has been defined by Salmond (Jurisprudence, 1947 edition, page 230) as an interest recognised and protected by a rule of legal justice and by Laski (A Grammar of politics, April 1931 edition, page 90) as a claim recognised by the State. Recognition by the State is therefore a 'sine qua non' of a human claim or interest becoming a legal right. The rights clauses were there in the Constitution of the United States of America since 1791 to be looked up to and be aspired for, but, so far as the people of this country are concerned, they were able to give unto themselves the seven rights to freedom mentioned in Article 19 only with effect from the commencement of our Constitution on 26-1-1950.

Taking for instance the particular right sought to be enforced in the instant case, the right to practise a profession, or to carry on an occupation trade or business, though protected to a certain extent by a system of licenses, was not recognised as a fundamental right an infringement of which could be appealed against on the ground of res-'triction-beyond-constitutional limits. The reliefs which were sought and obtained in cases like — 'Chintamanrao v. the State of Madhya Pradesh', 1950 S. C. R., 759, or in — 'Rashid Ahmad v. Municipal Board Kairana', 1950 S. C. R., 566, were in consequence not possible, in fact undreamt of, prior to that date. In short, the right in question was, prior to that date, simply non esse. There could, therefore, be no question of its ante-Constitution infringement or petitioner's acquiescence in the infringement.

For the same reason, there could also be no question of retrospective application of the provisions of Article 19 of the Constitution. The right in question became exercisable as soon as it assumed the badge of a legal right by being recognised by the State in our Constitution, irrespective of whether the act which gave cause to the exercise of the right was performed before or after the birth of the right. Or, borrowing with respect the reasoning of Chagla, C. J., in the aforesaid ruling, — 'Jeshingbhai v. Emperor', AIR 1950 Bom. 363 (at 366, first column), what the petitioner is doing by the present petition is not so much the challenging of the act of the respondent in stopping the carrying on of the petitioner's business as the assertion of a fundamental right granted to the petitioner since 26-1-1950.

(10) From the arguments had before me the questions that remain to be determined are: (1) Whether the petitioner has the legal right claimed by it? (2) If so, has there been an infringement

of the right? (3) If the answers to the foregoing questions be in the affirmative, whether the petitioner (a) has no right to move this Court for a prerogative writ because it had other adequate remedy available to it, or (b) has lost the right to relief for laches or for not coming with clean hands, or (c) has, in any case, no right to relief because performance of no public duty is sought to be compelled? and (4) If all the above findings be in favour of the petitioner, what is the appropriate relief that can be granted to it?

(11) As regards the first point, admittedly the petitioner is a transport company which was plying buses on hire on the route in question until stopped by the respondent from doing so by a notice dated 10-9-1949. The petitioner is therefore seeking to enforce the right for itself and not for anybody else, and it makes no difference that it is an incorporated Company. —'Charanjitlal v. Union of India', 1950 S. C. R. 869.

(12) Coming to the second point, the respondent's notice dated 10-9-1949 which compelled the petitioner to stop carrying on its business was as follows:

"From

The Deputy Commissioner,
Chamba District Chamba.

To

The Managing Director,
Chamba Valley Transport Co. Ltd.
Chamba.

NOTICE

As the Administration has decided to nationalise transport in Himachal Pradesh, your company cannot now be allowed to run a motor service even between Bani Khet and Chamba. I, therefore, serve you with this notice that the transport on this route is being nationalised and that no private operator or company will be allowed to run stage carriages, contract carriages or public carriers on this route. The General Manager, Transport will arrange to run a regular motor service between Bani Khet and Chamba within a fortnight or so. If your company wants to sell its vehicles or other assets, the Transport Department will be prepared to consider the offer but only on rates laid down in the white paper, extracts from which are enclosed.

You are also informed that until the Transport Department can place new Vehicles, they will also be prepared to obtain the vehicles of private operators on hire on the same terms as are being offered to other operators in Himachal Pradesh. Your company can negotiate to the General Manager Transport and find out the detailed terms.

Sd./-
Deputy Commissioner,
10th September, 1949. Chamba District, Chamba."

It is clear therefore that the Himachal Pradesh administration stopped the petitioner's business because it had decided to nationalise transport. Now, prior to the amendment, amongst others, of the restriction clause (6) of Article 19 by section 3 of the Constitution (First Amendment) Act, 1951, it would have been within the scope of judicial review as to whether a restriction on the exercise of the fundamental right of carrying on a trade or business on the ground of nationalisation of the trade or business in question would be a reasonable restriction in the interests of the general public.

But nationalisation has been put beyond the pale of judicial interference by the said amendment laying down that protection of the right in question does not affect the operation of any existing law, or prevent the State from making any law, relating to the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. At the same time, it is clear that in order that the State might carry on business to the exclusion of citizens it must make a law to that effect.

The amendment had not been made by the time the Full Bench case reported as — 'Moti Lal v. Uttar Pradesh', AIR 1951 All. 257, was decided, but the ruling presaged the amendment in laying down (at page 267, paragraph 49) that nationalisation of any industry was not possible without legisiation. In the present case nationalisation has not been effected by legislation but by an executive fiat; it is therefore unconstitutional and cannot over-ride the fundamental right of the petitioner. My finding on the second point therefore is that by ousting the petitioner from its business, in the manner in which it has done it, the respondent has infringed the fundamental right of the petitioner under Article 19 (1) (g) of the Constitution.

(13) The plea that the petitioner had other adequate remedy open to it has no force. There is no other statute but the Constitution which prescribes the remedy of the enforcement of the fundamental rights, and the power of enforcement of those rights has been conferred on only the Supreme Court under Article 32 and the High Courts under Article 226. The latter is not one of those Articles of Chapter V of Part VI of the Constitution which have been excepted from their applicability to this Court by section 6 of the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950.

So far as the Supreme Court is concerned, that Hon'ble Court has, by reason of Article 32 being included in Part III of the Constitution, been constituted the protector and guarantor of fundamental rights; but, looking at it merely from the narrower view-point of power to issue writs for enforcement of fundamental rights, the jurisdiction is peculiarly and exclusively that of the Supreme Court and the High Courts. —'Romesh Thapper v. State of Madras', 1950 S. C. R. 594, at pp. 596 and 597.

(14) The next question is whether the present petitioner has lost that right. One ground put forward on behalf of the respondent in support of the contention was that of laches on the part of the petitioner in moving this Court. The present petition was filed on 1-12-1950, about ten months after the right asserted by the petitioner came into existence. It would, however, be too much to expect that a people so long steeped in subjection would become conscious of their rights, and so fully conscious as to be able to vindicate them, as soon as the rights were born. To deny his new-won freedom to a citizen of this country on the equitable ground of laches, judged by standards set by seasoned travellers on the path of liberty like the U. K. or the U. S. A., would therefore be nothing but a negation of justice.

The said Allahabad Full Bench case — 'Motilal v. Uttar Pradesh', AIR 1951 All. 257 appears to have been the first one wherein recourse to vindication of their rights by the issue of writs under Article 226 of the Constitution was had by owners of motor buses. That case was decided on 11-5-1950 and published in the January 1951 issue of the AIR. Armed with a typed copy of the judgment in that case, the first case of a like nature in this State was filed on 25-9-1950 by the Baghat Transport Service Limited and others. It was decided, and writs in the nature of mandamus were issued to the State of Himachal Pradesh, by

this Court on 22-1-1951. The present petition was therefore filed whilst the fate of that case still hung in the balance. It cannot, in the circumstances, be said that the present petitioner was guilty of laches.

But if explanation for the so-called delay be necessary, the petitioner has successfully offered it. Sardar Gur Bachan Singh, a Director of the petitioner Company, has sworn an affidavit to the effect that Sri. G. N. Raina, Deputy Commissioner of Chamba, was approached on behalf of the Company in February, 1950, and on several occasions subsequently, with the request to move the respondent to permit the petitioner to resume functioning on the said route, and that the Deputy Commissioner assured the Directors that he had written several letters to the Government and was hopeful of the Company's cause succeeding. It will be remembered that the Deputy Commissioner was a Director of the Company as the respondent's nominee.

Sri Raina has since retired, but the allegation has been supported by the affidavit of the other Government nominated Director, Sri Mehta Autar Chand. There is no doubt that this affidavit was filed at a late stage during the arguments in the case, but delay was the only charge levelled against the affidavit. It was not even suggested that the affidavit of the gentleman in question was not worthy of credence. There is a counter-affidavit that no communication of the kind was received from the Deputy Commissioner. That may be so, but, in view of the said affidavit of Sri Mehta Autar Chand, it appears that the Deputy Commissioner in question kept the petitioner up on hopes held out.

Again, there is affidavit of Sardar Gur Bachan Singh that the Directors of the Company interviewed the Chief Commissioner and the Secretary, Development, for the last time on 8-11-1950, when the former were finally informed that the Central Government were unwilling to accede to the Company's request. The Secretary has filed a counter-affidavit to the effect that there was no correspondence with the Central Government, and that the Directors were not told anything about that. But the factum of the Directors having interviewed the Chief Commissioner and the Secretary on 8-11-1950 was not denied. It appears therefore that at first the petitioner was kept up on hopes by the Deputy Commissioner, and that it was not till 8-11-1950 that the hopes were shattered. In the circumstance, the present petition filed less than a month thereafter cannot be said to have been filed with delay.

(15) The other ground put forward in support of the contention that petitioner had lost its right to any of the reliefs claimed was that the petitioner had not come with clean hands. It was contended that it had not disclosed in its petition the sale of its stock-in-trade to the respondent or the details of explanation for delay. From what has been adverted to already, the former did not constitute material particulars. Their disclosure was therefore unnecessary. As regards the explanation for delay, though the details were given later, it is contained in essence in paragraph 15 of the petition. I hold that there is no conduct of the petitioner by reason of which it could be said to have lost the right to relief which it has otherwise so well established.

(16) The last contention is based on the following well-known dictum of Lord Ellenborough in —'R. v. Canterbury (Archbishop) and London (Bishop), (1812) 15 East, 117', at page 136, as contained in paragraph 1269 of volume IX of Halsbury's Laws of England, the Hailsham second Edition, at page 744:

> "The writ of 'mandamus' is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty."

The requirements of this dictum are easily satisfied. The particular thing for the doing of which a writ of 'mandamus' will issue in this case is in the nature of a public duty, for, it is a duty which will be required to be performed in the interests of the travelling public, and it no doubt appertains to the respondent's office in its administrative capacity.

(17) It only remains now to consider the appropriate relief which should be granted to the petitioner. The first relief cannot be granted because, while the petitioner may be entitled to ply transport vehicles on the route in question, it has no right to prevent the respondent from doing so. True, the respondent is not entitled to carry on the business in question as a monopolistic venture without legislation, but the talisman of monopoly is broken as soon as the petitioner's right to carry on the business, while no such legislation exists, is recognised.

Nor can the second relief be granted because stand on the basis of agreement has been given up on behalf of the petitioner. The third relief is equally out of the question as no data for the working out of compensation have been supplied. In exercise, however, of the wide discretion which this Court has under Article 226, the appropriate relief justified by the circumstances of the case may be given to the petitioner under the general prayer contained in the petition.

(18) A writ in the nature of 'mandamus' shall issue to the respondent to withdraw the notice prohibiting the petitioner Company from plying motor transport on the Chamba-Bannikhet route, and (until the State makes laws relating to the carrying on by the State, or by a corporation owned or controlled by the State, of the motor transport business, whether to the exclusion, complete or partial, of citizens or otherwise) to hear and dispose of according to law the application, if any, which the petitioner might prefer for permitting it to ply motor transport on the said route. The respondent will pay Rs. 50/-/- as costs to the petitioner.

A/VRB

Writ issued.

A.I.R. 1953 HIM. P. 11 (Vol. 40, C. N. 6)

CHOWDHRY J. C.

Padam Chand and others, Defendants-Appellants v. Ram Lal and another, Plaintiffs-Respondents.

First Appeal No. 7 of 1951, D/- 29-5-1952.

(a) Civil P.C. (1908), O. 3, R. 4 — Vakalatnama filed for purpose of appeal — Case remanded to trial Court — Subsequent appeal filed against decision of trial Court under same Vakalatnama is incompetent.

Where a Vakalatnama is filed for the purpose of a particular appeal and the case is remanded by the appellate Court to the trial Court for the trial of the case de novo, the subsequent appeal filed against the judgment and decree of the trial court under the same Vakalatnama is incompetent.

The subsequent appeal cannot be deemed to be a continuation of the previous appeal. (Para 6)

Anno: C.P.C., O. 3 R. 4 N. 17.

(b) Civil P. C. (1908), O. 21, Rules 80 and 77(2) — Sale of pronote in execution of decree — Negotiable Instruments Act (1881) not in force where sale took place — Endorsement under R. 80 or execution of sale-deed not necessary — Sale becomes absolute under R. 77(2) on payment of purchase money — (Negotiable Instruments Act (1881), S. 48).

Where in execution of a decree the sale of a pronote takes place in a State where the Negotiable Instruments Act, 1881 is not in force, and to which the parties belong, the endorsement by the executing Court under R. 80 is not necessary. Nor is the execution of any document like a sale-deed necessary to effect the transfer of the instrument in view of the provisions of S. 2(d) of the T. P. Act. As soon as the purchase money is paid the sale of the pronote becomes absolute under R. 77(2) and the party purchasing becomes entitled to the interest in the pronote. (Para 7)

Anno: C.P.C., O. 21 R. 77 N. 2 R. 80 N. 1.

(c) Civil P.C. (1908), O. 2 R. 2 — Cause of action — Meaning — Subsequent suit with different cause of action not barred.

The cause of action in O. 2, R. 2 means the cause of action for which the suit is brought. Where the cause of action for the subsequent suit is different from that for the previous suit the subsequent suit will not be barred by O. 2, R. 2. (Para 14)

Anno: C.P.C., O. 2 R. 2 N. 7, 23.

(d) Stamp Act (1899), Sch. I, Art. 23 — Applicability.

The Article relates to a conveyance which under S. 2(10) of the Act relates to a transfer inter vivos and therefore not to a sale in execution of a decree. (Para 7)

Anno: Stamp Act, Sch. I, Art. 23, N. 2.

(e) Civil P.C. (1908) O. 8, R. 6 — Omission to claim set-off — Suit for amount of set-off is not barred.

The use of the word 'may' in O. 8, R. 6, however, clearly shows that it is optional with the defendant to claim a set-off and he is not bound to do so. That being so, he is not precluded from subsequently filing a suit in respect of the amount which he might have claimed by way of a set-off in a previous suit. (Para 15)

Anno: C.P.C., O. 8 R. 6 N. 13.

(f) Civil P. C. (1908) O. 8, R. 6 and O. 2 R. 2 — Defendant pleading set-off — He is bound, in view of O. 2 R. 2, to do so in respect of his entire claim. (Para 15)

Anno: Civil P.C., O. 8 R. 6 N. 13.

Thakar Das, for Appellants; Tek Chand Chitkara, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('15) AIR 1915 PC 121: (43 Cal 527) 5
('41) AIR 1941 All 217: (194 Ind Cas 586) 14
('03) 27 Bom 150: (4 Bom LR 951) 7
('35) AIR 1935 Bom 343: (59 Bom 573) 7
('68) 12 WR 79(2): (3 Beng LR AC 265) 14
('14) AIR 1914 Cal 566: (22 Ind Cas 500) 7
('19) AIR 1919 Lah 220: (52 Ind Cas 850) 15
('34) AIR 1934 Lah 973(1): (155 Ind Cas 479) 6
('35) AIR 1935 Lah 321: (158 Ind Cas 378) 14
('95) 18 Mad 214: (5 Mad LJ 39) 6
('06) 16 Mad LJ 554: (30 Mad 75) 7
('33) AIR 1933 Mad 133(1): (138 Ind Cas 262) 7
('41) AIR 1941 Mad 847: (200 Ind Cas 443) 15
('42) AIR 1942 Mad 580: (ILR (1942) Mad 836) 15

JUDGMENT: This is a defendants' first appeal under paragraph 31(b) of the Himachal Pradesh (Courts) Order, 1948, against the judgment and decree of the learned Senior Subordinate Judge of Jubbal, dated 17-1-1951.

(2) In execution of a money decree obtained by Jawahar Singh against Mussadi Ram a pronote dated 18 Bhado 1995 B., for Rs. 3,040/-, carrying interest at 12 per cent per annum, executed by the said Jawahar Singh and Harsukh Das in favour of the said Mussadi Ram, was attached and purchased in a sale by public auction by Ram Lal on 20 Har 2001 B. About two months later, i.e., on 17 Bhado 2001 B., Ram Lal filed the suit giving rise to the present appeal against the aforesaid executants of the pronote, Jawahar Singh and Harsukh Das, for recovery of Rs. 3,040/- principal plus Rs. 2,187/- interest at the said rate, totalling Rs. 5,227/-, impleading Mussadi Ram as a pro forma defendant. Jawahar Singh died during the pendency of the suit and his two widows and four minor sons under the guardianship ad litem of one of the widows were brought on record as his legal representatives. Mussadi Ram also died during the pendency of the suit and his son Jai Lal was substituted in his place.

(3) After a prolonged and chequered career, the suit was ultimately decreed in toto on 17-1-1951 against Harsukh Das personally and against the assets of Jawahar Singh in the hands of his four minor sons. The present appeal has been filed by Harsukh Das and the minor sons of Jawahar Singh and also by the latter's widows although no decree was passed against them.

(4) A preliminary objection was taken on behalf of the plaintiff-respondent that as in the present appeal Sri Thakar Das Advocate appearing for the appellants held no Vakalatnama on behalf of Harsukh Das appellant the appeal was incompetent. It was further contended that the appeal was incompetent as a whole as, according to the learned counsel for the plaintiff-respondent, the decree under appeal was passed jointly against all the appellants. So far as the latter contention is concerned, it has no force because under the decree in question the liability of the various persons against whom it was passed is several. Even if it were joint, the liability of each of the judgment-debtors would, in view of the provisions of section 43 of the Contract Act, be both joint and several. It follows, therefore, that in case, the present appeal be incompetent on behalf of Harsukh Das, it would not be incompetent so far as the other defendants-appellants are concerned. That the appeal is incompetent on behalf of Harsukh Das defendant is, in my opinion, correct, and this for the following reasons.

(5) For purposes of the present appeal a Vakalatnama was filed by the learned counsel for the appellants on behalf of the legal representatives of Jawahar Singh only but not on behalf of Harsukh Das. It appears that the trial Court passed a decree against Jawahar Singh and Harsukh Das on 29-11-1948, and that on an appeal by the defendants the then Judicial Commissioner remanded the case on 4-7-

1949 for a trial of the whole case de novo. It was in this subsequent trial that the decree under appeal dated 17-1-1951 was passed. For purposes of the said appeal in this Court, which resulted in the aforesaid remand dated 4-7-1949, a Vakalatnama was filed by the learned counsel for the appellants on behalf of Jawahar Singh and Harsukh Das on 10-3-1949. The learned counsel for the appellants argued that he had a right to file the present appeal also on behalf of Harsukh Das under that Vakalatnama. Now, where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. — 'Bank of Bengal v. Ramanathan', AIR 1915 P. C. 121. It will have, therefore, to be seen whether on a fair construction of the Vakalatnama dated 10-3-1949, the learned counsel for the present appellants could be held to have the authority either expressly or by necessary implication of filing the present appeal. If no such authority can be deduced, it must be held that the present appeal, so far as it purports to be on behalf of Harsukh Das, is incompetent.

(6) The relevant provision is O. 3, R. 4, C. P. Code. Under that provision a pleader can act for any person in a Court, the filing of an appeal being such an act, provided he is appointed for the purpose by that person by a document in writing signed by him or by a person duly authorised. It has already been seen that no such appointment was made by Harsukh Das "for the purpose" of filing the present appeal. Under sub-rule (2), however, an appointment remains in force until, inter alia, all proceedings in the suit are ended so far as regards the client. The words "proceedings in the suit" have been amplified in sub-rule (3), and the filing of an appeal has been mentioned amongst the various acts which shall be deemed to be proceedings in the suit. It follows, therefore, that if an appointment has been made in the course of the suit, the pleader so appointed would be entitled to file an appeal without any fresh Vakalatnama. The basis for this rule obviously is that an appeal, being a continuation of a suit, is a proceeding in the suit. — 'Pichuvayyangar v. Seshayyangar', 18 Mad 214, and — 'Mt. Balqis Begam v. Shahzada Muhammad Hamdam', AIR 1934 Lah 973(1). It will be noticed that other acts mentioned in sub-rule (3) are likewise clearly proceedings in the suit. The Vakalatnama dated 10-3-1949 relied upon by the learned counsel for the appellants was, however, not filed in the suit but for purposes of the particular appeal which was filed in this Court from the judgment and decree of the trial Court dated 29-11-1948. It has also to be noted that the present appeal cannot be deemed to be a continuation of the said appeal which resulted in the order of remand dated 4-7-1949. The two appeals are from different judgments and decrees, and, therefore, the purpose for which the learned counsel for the appellants was appointed by means of the Vakalatnama dated 10-3-1949 is not the same which underlies the institution of the present appeal. That being so, he had no authority to file the present appeal on behalf of Harsukh Das. It will be deemed therefore that Harsukh Das has not appealed from the judgment and decree dated 17-1-1951, and that the judgment and decree are binding on him. This appeal will, therefore, be deemed to be an appeal on behalf of appellants other than Harsukh Das.

(7) The first point argued by the learned counsel for the appellants was that the plaintiff-respondent had not acquired title to the pronote in suit. The Negotiable Instruments Act, 1881, was not in force in the State of Rampur Bushahr where the parties belong to and the sale of the pronote in execution of a decree was held. The Act was applied to Himachal Pradesh for the first time on and from 25-12-1948 under the Himachal Pradesh (Application of Laws) Order, 1948. It was therefore argued by the learned counsel that the transfer of the instrument in question could have only been effected by a sale deed. It was further argued by him that the endorsement on the back of the pro-note made by the execution Court under O. 21, R. 80, C. P. Code, did not have the effect of such a sale because it did not bear the necessary stamp duty under Article 23 of the Stamp Act. He cited the following rulings: — 'Nandubai v. Gau', 27 Bom 150; — 'Rama Iyen v. Venkatachellam', 16 Mad L J 554; — 'Akhoy Kumar v. Hari Das', AIR 1914 Cal 566; — 'Venkatarama v. Krishnaswami', AIR 1933 Mad 133 (1) and — 'Kamala Kant v. Madhavji', AIR 1935 Bom 343. The last ruling has no application whatsoever for the question decided there, i.e., whether a co-parcener in a joint Hindu family can sue on a negotiable instrument payable to the deceased, does not arise in the present case. The other rulings are not applicable because they relate to cases of passing of title under the Transfer of Property Act or the Negotiable Instruments Acts, neither of which has any application in the present case.

It was in execution of a money decree that the plaintiff purchased the pronote in suit. Rules 51 and 76 of Order 21, C. P. Code, provide for the attachment and sale of negotiable instruments. Rule 80 provides for the execution of a document or the endorsement of the party in whose name a negotiable instrument is standing where that is required to transfer such negotiable instrument. As stated above, an endorsement under this rule was made on the back of the pronote by the execution Court, but this was not necessary since admittedly the provisions of the Negotiable Instruments Act were not applicable. Nor was the execution of any document like a sale deed, as contended by the learned counsel for the appellants, necessary in view of the provisions of section 2(d) of the Transfer of Property Act. As soon as the plaintiff paid the purchase money, the sale became absolute under rule 77(2) of the said Order and he became entitled to the interest of Mussadi Ram in the pronote. The argument that the endorsement on the back of the pronote required stamp duty under Article 23 of the Stamp Act has also no force. Firstly, no endorsement was necessary as just stated. Secondly, Article 23 has no application because it relates to a conveyance which under section 2(10) of that Act relates to a transfer 'inter vivos' and therefore not to a sale in execution of a decree. It may be added that no certificate of sale as mentioned in Article 18 of the Stamp Act was necessary either, since the sale was of movable property. I, therefore, hold that the plaintiff-respondent acquired by purchase in auction sale the right, title and interest of Mussadi Ram in the pronote in suit.

(8) The next point taken by the learned counsel for the defendants-appellants was that the plaintiff-respondent had failed to prove that the pronote in suit was for consideration. The necessity of proving the consideration did not however arise since no issue on that point was framed. It was alleged in paragraph one of the plaint that the pronote had been executed partly in lieu of price of opium purchased by Jawahar Singh and Harsukh Das from Mussadi Ram and partly in lieu of past outstandings. The defendants Jawahar Singh and Harsukh Das pleaded in their written-statement that the aforesaid plaint paragraph was not admitted because they had paid in full the price of the opium purchased by them. They further asked for details of the price and past outstandings from the plaintiff. Now, this plea of full discharge was equally capable of being interpreted as discharge of the amount due on the pronote or of the amount in respect of which the pronote purports to have been executed. It appears that the trial Court interpreted the plea in the former sense and, therefore, framed no issue as to whether the pronote in suit was for consideration but only as to whether it had been discharged. The said plaint allegation not having been denied specifically or by necessary implication, the defendants shall be taken to have admitted it. In his statement under O. 10, R. 2, C. P. Code, also Jawahar Singh did not specifically deny the execution or consideration of the pronote but stated that the amount had been fully repaid. Two witnesses were produced on behalf of the plaintiff who supported the plaint allegation with regard to the consideration of the pronote, Parmanand and Amar Singh, but neither of them was cross-examined on the point. The suit was pending in the trial Court for about nine years but the defendants never moved the Court for adding any issue with regard to the consideration of the pronote. It is manifest therefore that even if it be supposed that denial of consideration could be spelt out of the defence pleas, the omission to frame an issue with regard to consideration was due to the deliberate conduct of the defendants themselves and so they will be deemed to have waived it.

(9) It was next argued by the learned counsel for the appellants that the debt under the pronote had been discharged. In support of this contention he referred to the receipt Ex. P-6 dated 11-1-1996 B. executed by Mussadi Ram in favour of Jawahar Singh and Harsukh Das. This receipt, however, related specifically to a pronote of the year 1994 B, while the pronote in suit was executed on 18 Bhado 1995 B. It could not possibly be suggested that the year 1994 had been entered in the receipt by a mistake for the receipt was executed in duplicate, one in Urdu by Mussadi Ram and the other in Hindi by Jawahar Singh, and in both of them the pronote in respect of which the receipt was executed was described as relating to the year 1994. It is further noteworthy that Jawahar Singh admitted, vide his statement Ex. P-2 dated 26-6-2000 B. in execution proceedings, that he did not take back the pronote in respect of which the receipt was executed because there were several pronotes.

(10) The decree in execution of which the pronote in suit was purchased by the present plaintiff was passed on 4-3-1998 B. in favour of Jawahar Singh against Mussadi Ram for Rs. 3,645/- odd in a suit for partnership accounts. In the written statement filed by Mussadi Ram in that case a set off was claimed, but that was not in respect of the amount under the pronote in suit. It was strenuously argued by the learned counsel for the defendants-appellants that the accounts suit having been filed about eight months after the execution of the aforesaid receipt dated 11-1-1996 B, the omission on the part of Mussadi Ram to claim a set-off in respect of the pronote clearly showed that it had been already paid off. It is however noteworthy, as admitted by the learned counsel for the appellants, that the pronote was in fact filed by Mussadi Ram in that suit although it was subsequently taken back by him. It is also noteworthy that the pronote did not relate to any outstandings under the partnership for admittedly the partnership started towards the end of 1995 B. while the pronote had been executed in the sixth month of that year. It may therefore be that Mussadi Ram first filed the pronote in the accounts suit in order to claim a set-off in respect of it, but subsequently took it back under the correct or wrongful notion that he could not claim a set-off in respect of the amount due under the pronote in the accounts suit because he held two different characters in the two transactions. In these circumstances, the omission on the part of Mussadi Ram to claim a set-off in the aforesaid accounts suit cannot be taken as lending support to the defence contention that the aforesaid receipt Ex. P-6 related to the pronote in suit.

(11) Reference was also made by the learned counsel for the defendants-appellants to an application made on their behalf in the trial Court on 14-7-1950 to summon the pronote for 1994 from Mussadi Ram. The application was infructuous because soon after Mussadi Ram died. It is noteworthy however that it was only after about eight years of the institution of the suit that this application was filed. The appellants are not therefore entitled to any benefit of this belated application.

(12) The learned counsel for the appellants referred to a statement of Mussadi Ram in the execution file in order to show that at the time that the receipt Ex. P-6 was executed there was no pronote present. It was sought to be shown thereby that a mistake had been committed in mentioning the year of the pronote in the receipt. No copy of this statement was however filed in the present suit, and the statement does not appear to have been referred to on behalf of the appellants at any stage before the trial Court. The appellants are, therefore, not entitled (to say?) that the statement in question be referred to in the course of this appeal. Even if it be supposed that no pronote was present at the time that the receipt in question was executed, the possibility of a mistake with regard to the year of the pronote is ruled out by the aforesaid circumstances of Jawahar Singh as well as Mussadi Ram having mentioned the same year in their respective writings, and of Jawahar Singh having executed several pronotes in favour of Mussadi Ram.

(13) Lastly, stress was laid by the learned counsel for the appellants on the fact that the pronote in suit though for a sum of Rs. 3,040/- was purchased by the plaintiff-respondent for the trifling sum of Rs. 52/-, and that this figure of Rs. 52/- tallied with the amount mentioned in the receipt Ex. P-6 as still due. It is however noteworthy that although it was about ten years ago that the plaintiff purchased the pronote he

has not only not been able to realise anything under it but has been faced with a prolonged litigation due to the recalcitrance of its executants. It is not inconceivable that the plaintiff was aware that in purchasing the pronote he was only purchasing litigation. The report of the officer who conducted the sale in execution proceedings shows that there were many bidders, and the sale lasted several days, but the highest bid was that of Rs. 52/- offered by the plaintiff. That this figure tallies with that mentioned in the receipt Ex. P-6 can, therefore, be interpreted as merely a chance coincidence. In the absence of any satisfactory evidence of discharge, therefore, the mere circumstance of the plaintiff having purchased the pronote for Rs. 52/- cannot be taken as substantiating that plea. I agree with the trial Court in holding that the pronote in suit has not been discharged to any extent.

(14) It was next contended by the learned counsel for the defendants-appellants that the present suit was barred by Order 2, Rule 2, C. P. Code, inasmuch as the plaintiff-respondent's predecessor-in-interest Mussadi Ram omitted to claim a set-off in respect of the pronote in question in Jawahar Singh's accounts suit, and he cited two rulings in support of this contention: — 'Radha Kisnoree v. Ram Coomar', 12 W. R. 79; and — Nathu Mal v. Ladli Prasad', AIR 1935 Lah 321. Sub-rule (1) of the said rule however provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The cause of action in this rule means the cause of action for which the suit was brought — 'Radha Kishen v. Ikram-uddin', AIR 1941 All 217. It has already been seen that the pronote in suit had nothing to do with the partnership in respect of which the accounts suit was filed by Jawahar Singh against Mussadi Ram. That being so, it is clear that the cause of action for that suit was quite different from that for the present suit. It follows, therefore, that the present suit is not barred by Order 2, Rule 2, C. P. Code. The rulings cited have no application because they relate to cases wherein the cause of action in the two suits was one and the same.

(15) Another ground taken by the learned counsel for the defendants-appellants was that the present suit was barred by res judicata. This is also based on the plea that Mussadi Ram ought to have made his claim under the pronote in suit a ground of defence by way of set-off in the accounts suit. The use of the word 'may' in O. 8, R. 6, C. P. Code, however, clearly shows that it is optional with the defendant to claim a set-off and he is not bound to do so. That being so, he is not precluded from subsequently filing a suit in respect of the amount which he might have claimed by way of a set-off in a previous suit. — 'Amritsar National Banking Co. Ltd. v. Fazal Ilahi', AIR 1919 Lah 220, and — 'Venugopala v. Thirugnanvalli', AIR 1941 Mad 847. Of course, if a defendant does plead a set-off he is bound, in view of the provisions of Order 2, Rule 2, C. P. Code, to do so in respect of his entire claim. — 'Kathersa Rowther v. Abdul Rahim', AIR 1942 Mad 580. It has however been already seen that the present suit is not barred by O. 2, R. 2, C. P. Code, due to the omission of the plaintiff-respondent's predecessor Mussadi Ram to claim a set-off in respect of the pronote in the accounts suit of Jawahar Singh against him. The present suit is therefore not barred by res judicata.

(16) The appeal fails and it is hereby dismissed with costs, and the judgment and decree of the learned Subordinate Judge are affirmed.

B/G.M.J. Appeal dismissed.

A.I.R. 1953 HIM. P. 15 (Vol. 40, C. N. 7)

CHOWDHRY J. C.

Munshi Ram and another, Defendants-Appellants v. Raghubir Chand, Plaintiff-Respondent.

First Appeal No. 18 of 1951, D/- 31-7-1952.

(a) Limitation Act (1908) Ss. 14, 5 — Proceedings to which section is applicable — Applicability to appeals.

Section 14 of the Limitation Act is not in terms applicable to appeals since it does not speak of an appeal, but exclusion of time of proceeding bona fide taken in Court without jurisdiction being claimed as the reason for condonation of delay, the principle of that section must apply for finding out whether there was sufficient cause for the delay. AIR 1937 PC 276 Relied. (Para 3)

Anno: Limit. Act, S. 14 N. 5 P. 3; S. 5 N. 9.

(b) Limitation Act (1908) S. 14 — 'Due diligence' — Conduct of Counsel — Scrutiny.

Section 14 only speaks of due diligence and good faith of the party and to make the requirements of due diligence and good faith as laid down therein for the party himself applicable when scrutinising the conduct of the Counsel would be to go beyond the terms of the Section. (Para 6)

Anno: Limit. Act, S. 14 N. 11.

(c) Limitation Act (1908), Ss. 14 and 2(7) — 'Due diligence' and 'good faith' — Erroneous conduct of Counsel — Scrutiny of — Standard of good faith — (General Clauses Act (1897), S. 3).

The standard of good faith laid down in the definition under S. 2(7) Limitation Act is much higher than that of the definition under S. 3 of the General Clauses Act. (Para 6)

The interpretation of the Counsel's erroneous conduct based on the mere ground of its being reasonable without taking into consideration whether it was negligent or not is compatible with the application to that conduct of the definition of 'good faith' as given in the General Clauses Act rather than as that contained in the Limitation Act. (Para 6)

Such an interpretation is also in consonance with justice, equity and good conscience. It would be unfair on the face of it to exact a greater degree of good faith from a party who is forced, from the specialised nature of the task, to engage a counsel than if he were acting by himself, specially where he has acted with due care and attention in engaging, a "competent practitioner". Nor does this view do any violence to the provisions of the Limitation Act. Only for judging the conduct of the party himself should therefore the stricter definition of 'good faith' as given in the Act be applied. But in judging of the conduct of his counsel, quite different considerations arise. They are considerations governing the relations of a principal and his agent. And there is no reason why to

such considerations good faith as defined in the General Clauses Act rather than as defined in the Limitation Act should not be applied.

Therefore in a case of mistaken legal advice, good faith can be attributable to the party himself only if he has acted with due care and attention, but it should be attributed to his counsel if he has acted honestly, whether he has acted negligently or not. AIR 1918 PC 135; AIR 1937 PC 276 Relied on. AIR 1922 All 490 (FB); AIR 1921 Bom 302; AIR 1928 Cal 468; AIR 1924 Bom 399; AIR 1927 Rang 20; (1878) 48 LJ Ex 167 Referred but not followed.

(Para 7)

(Held on facts of the case, that in absence of any suggestion that the error of the Counsel in calculating the valuation for jurisdiction, was attributable to any bias and in absence of any doubt as regards his honesty and bona fides, notwithstanding the negligence on his part he would be deemed to have acted in good faith since he acted honestly and there was sufficient cause for condonation of the delay).

Anno: Limit. Act, S. 14 N. 11; S. 2(7) N. 1.

Daulat Ram Manchanda, for Appellants; Tek Chand, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('37) AIR 1937 PC 276: (31 Sind LR 672 PC) 3
('22) 44 All 636: (AIR 1922 All 490 FB) 8
('19) 43 Bom 376: (AIR 1918 PC 135) 3, 6
('21) 45 Bom 607: (AIR 1921 Bom 302) 8
('24) 48 Bom 442: (AIR 1924 Bom 399) 9
('28) AIR 1928 Cal 468: (55 Cal 798) 8
('38) AIR 1938 Pat 413: (17 Pat 507) 6
('27) AIR 1927 Rang 20: (4 Rang 265) 9
(1878) 48 LJ Ex 167: (39 LT 411) 9

JUDGMENT: This is a defendants' first appeal arising out of a suit for recovery of Rs. 8,838/8/3 as price of potatoes, which was decreed by the Senior Subordinate Judge of Mahasu on 2-5-1951 for Rs. 4,496/5/-. Under paragraph 31 of the Himachal Pradesh (Courts) Order, 1948, the appeal being from a decree of a Subordinate Judge in a suit of value exceeding Rs. 5,000/-, it should have been filed in this Court. And the 90-day period of limitation for such an appeal under Article 156 of the Limitation Act, after allowing for the twenty-two days taken by the defendants-appellants in obtaining the necessary copies, expired on 22-8-1951. The present appeal was, however, filed two days too late, i.e., on 24-8-1951. The preliminary question for determination before me at this stage is whether the appeal should be dismissed as time-barred.

(2) There is an application for condonation of delay on behalf of the defendants-appellants under Sections 5 and 14 of the Limitation Act. In order to understand the plea taken in this application it is necessary to set forth certain facts. As already stated, the decree of the trial Court was passed on 2-5-1951. The defendants-appellants applied for the necessary copies on 4-5-1951, and the same were ready and delivered on 25-5-1951. Allowing for these 22 days taken in obtaining the copies, the period of appeal to the District Judge under Article 152 expired on 23-6-1951. Well within that period of limitation, i.e., on 19-6-1951, the defendants-appellants filed an appeal in that Court. An objection as to the maintainability of the appeal in that Court was taken on behalf of the plaintiff-respondent. The objection, as already shown, was well founded, and it was allowed by the District Judge on 24-8-1951. He ordered that the appeal be returned for presentation to the proper Court, and the same day the present appeal was filed in this Court. In the said application for condonation of delay it is alleged by the defendants-appellants that it was on account of the mistaken advice of their counsel that they filed the appeal in the wrong Court. That this was so is apparent from the fact that the appeal in the Court of the District Judge was presented by the appellants' counsel, Sri Amar Chand Sud.

(3) Now section 14 of the Limitation Act is not in terms applicable since it does not speak of an appeal, but exclusion of time of proceeding bona fide taken in Court without jurisdiction being claimed as the reason for condonation of delay, the principle of that section must apply for finding out whether there was sufficient cause for the delay. — 'Rajendra Bahadur v. Rajeshwar Bali', AIR 1937 P C 276 at page 278.

(4) So far as the conduct of the defendants-appellants themselves is concerned, I have no doubt whatsoever with regard to their good faith and due diligence. They applied for necessary copies two days after the decision of the trial Court. They then filed the appeal, though in a wrong Court, long before the expiry of the period of limitation under Art. 152, to say nothing of the longer period to which they were entitled under Article 156. They had engaged Sri Amar Chand Sud Advocate as their counsel in the trial Court, and it was he who presented the appeal first in the Court of the District Judge and then in this Court. Sri Amar Chand Sud is an Advocate of both this Court and the Punjab High Court, and he is an advocate of standing. It is difficult to conceive what more could be expected of the defendants-appellants. So far as they themselves are concerned, therefore, the requirements of due diligence and good faith are fully satisfied.

(5) The learned counsel for the defendants-appellants seemed to argue that having looked into the conduct of the appellants and found it satisfactory, it was not necessary to go further and also look into the conduct of their counsel, Sri Amar Chand Sud. The mistake of the counsel being the excuse put forward for condonation of the delay, such an argument is not open to the appellants. The argument is also contrary to precedents. A large number of rulings were cited by the learned counsel for the parties, but it is sufficient to cite only two Privy Council rulings. The first is — 'Sunderbai v. The Collector of Belgaum', 43 Bom 376 (PC), and the other, the one already cited, — 'Rajendra Bahadur v. Rajeshwar Bali', A. I. R. 1937 P. C. 276. Both were cases, like the present, of the appellant choosing a wrong forum of appeal on the mistaken advice of the counsel. It was laid down in the former ruling as follows:

> "The fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation."

Before laying down the above dictum their Lordships had however taken into consideration the conduct of the Legal Remembrancer (who was the District Judge) due to whose mistaken advice the appeal was filed in a wrong Court beyond the period of limitation, as appears from the following observation:

"The District Judge knowing that the appeal would probably be removed into the High Court may reasonably have preferred (sic) that the High Court should decide the question under section 5 of the Act."

It appears that the word preferred is a misprint for inferred. Again, their Lordships observed in the other ruling as follows:

"Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the section (meaning section 14) though there is certainly no general doctrine which saves parties from the results of wrong advice."

Their Lordships then took the circumstances of that case into consideration and came to the conclusion that it did not appear that the wrong view taken by the appellant's counsel was unreasonable or that he could be deemed to have been negligent in valuing the appeal.

(6) The above 1937 Privy Council ruling was interpreted in — 'Nrisingha Charan v. Trigunand Jha', AIR 1938 Pat 413, and it was observed by Dhavle, J., that the true rule about mistaken advice from a legal practitioner must now be taken to be that the circumstances of each particular case should be examined to see whether such advice gives rise to sufficient cause within section 5 of the Limitation Act. What is the standard of care and diligence required of a counsel in such cases has not been specifically laid down in, but is deducible from, the said Privy Council rulings. This much at least is, however, certain that it has not been laid down that the requirements of due diligence and good faith, as laid down in section 14 in the case of the party himself, would also be applicable when scrutinising the conduct of his counsel. Indeed, to put the onus of such a double test on a party would be to go beyond the terms of Section 14, which only speaks of due diligence and good faith of the party. Good faith has been defined in Section 3 of the General Clauses Act as follows: "A thing shall be deemed to be done in good faith where in fact it is done honestly, whether it is done negligently or not." Section 2 (7) of the Limitation Act however provides that "nothing shall be deemed to be done in good faith which is not done with due care and attention." It is clear that the standard of good faith laid down in the latter definition is much higher. A perusal of the aforesaid 1937 Privy Council ruling will show that it purported specifically to follow the principles laid down in the aforesaid earlier ruling, — 'Sunderbai v. the Collector of Belgaum', 43 Bombay 376. In that case their Lordships condoned the erroneous conduct of the counsel on the mere ground of its being reasonable, without taking into consideration whether it was negligent or not. Likewise, in the 1937 ruling their Lordships observed that it did not appear that the erroneous view taken by the appellant's counsel was unreasonable. No doubt, their Lordships went further and observed that the counsel could not be deemed to have acted negligently; but in following, as their Lordships specifically did, the principle laid down in the earlier ruling, that was unnecessary. The determining factor in judging the conduct of the counsel in such cases appears according to their Lordships of the Judicial Committee to be its reasonableness or otherwise. On the other hand, in judging the conduct of the party himself their Lordships used the term 'good faith' in the said 1937 ruling. It appears to me that such an interpretation of the counsel's conduct is compatible with the application to that conduct of the definition of 'good faith' as given in the General Clauses Act rather than as that contained in the Limitation Act.

(7) Such an interpretation is also in consonance with justice, equity and good conscience. It would be unfair on the face of it to exact a greater degree of good faith from a party who is forced, from the specialised nature of the task, to engage a counsel than if he were acting by himself, specially where he has acted with due care and attention in engaging, in the language of their Lordships in the 1937 Privy Council case, a "competent practitioner". Nor does the above view do any violence to the provisions of the Limitation Act. As already stated, section 14 speaks of only the party. Only for judging the conduct of the party himself should therefore the stricter definition of 'good faith' as given in the Act be applied. But in judging of the conduct of his counsel, quite different considerations arise. They are considerations governing the relations of a principal and his agent. And there is no reason why to such considerations good faith as defined in the General Clauses Act rather than as defined in the Limitation Act should not be applied. I hold that in a case of mistaken legal advice good faith can be attributable to the party himself only if he has acted with due care and attention, but it should be attributed to his counsel if he has acted honestly, whether he has acted negligently or not.

(8) The above view in effect finds support from the following cases. In — 'Shib Dayal v. Jagannath', 44 All 636 (FB), the delay in filing appeal was caused due to the mistaken advice of counsel that copy of the judgment of the Court of first instance was not required. The delay was condoned on the ground that an honest mistake, even though a negligent one, ought not to be allowed to prejudice the client. This view in judging the conduct of the counsel is clearly in accord with the definition of 'good faith' in the General Clauses Act but not with the stricter definition of the Limitation Act. In — 'Dattatraya Sitaram v. Secretary of State', which resulted in the appeal being filed in a 45 Bom 607, the wrong advice of the lawyer which resulted in the appeal being filed in a wrong Court first and eventually in the right Court long after the prescribed time was due, as in the present case, to not taking into consideration correctly the valuation of the suit. The lawyer cannot be said to have acted with due care and attention, nevertheless the delay was condoned. Macleod, C. J., observed: "It may be that the pleader ought to have known that the appeal lay to the District Judge. But then again some questions may appear to be so entirely free from doubt to one person, that only one opinion is possible, and yet another may equally well come to a different

conclusion." In the same case Fawcett, J., recognised the fact that "there was carelessness in the matter". It is clear that good faith of the lawyer was judged in the more lenient sense of that term as defined in the General Clauses Act. In — 'Ambika Ranjan v. Manikganj Loan Office Ltd.', AIR 1928 Cal 468, also the pleader's mistake arose out of misapprehension as to the value of the suit, but delay on the part of the party acting on such a mistaken advice of the lawyer was condoned relying upon the said 1918 Privy Council ruling and the said Allahabad ruling. The conduct of the pleader could not obviously be justified according to the stricter view of "good faith".

(9) I have been referred by the learned counsel for the plaintiff-respondent to the rulings at the other end of the scale, like—'J. N. Surty v. T. S. Chettyar Firm', AIR 1927 Rang 20, where good faith of the lawyer as well as of the party has been judged according to the stricter view. I am also not unaware of the stricter view which has been adopted in some cases on the authority of the English case of — 'Highton v. Treherne', (1878) 48 L. J. Ex. 167. But I prefer to follow the view I have held above and for which I find support from the said Privy Council rulings. I do so because, as remarked by Marten, J., in — 'Nagindas Motilal v. Nilaji Moroba', 48 Bom 442, in India litigants are treated with more indulgence in the matter of time than in England. The reasons for such indulgence are not far to seek, and they appear, with regard to counsel and client alike, in the rulings referred to above. The advent of time for application of the stricter standards is a consummation devoutly to be wished for, but that time is not yet (?)

(10) The conduct of the counsel in the present case may now be judged according to the above test. The question of bias was taken into consideration both in the 1937 Privy Council ruling and in the aforesaid 1938 Patna case. It has however not been suggested that the error of Sri Amar Chand Sud, who advised the appellants to file the appeal in a wrong Court, was attributable to any bias. Another point taken into consideration in both the cases was the question of court-fee. But in the present case also the court-fee payable was the same whether the appeal was filed in the Court of the District Judge or in this Court. The fact that the appeal before the District Judge was filed well within limitation has already been referred to. There could therefore be no doubt as regards the honesty and bona fides of the defendants-appellants' counsel. The head and front of the charge against him is that he filed the appeal in a wrong Court in disregard of the said provisions of the Himachal Pradesh (Courts) Order. As to that, the only possible explanation seems to be that he was led away by the amount for which the suit was decreed Rs. 4,496/5/-. It was no doubt a foolish mistake, and one which a counsel of Sri Amar Chand Sud's standing should not have committed. And yet it is nothing more than an honest mistake. It cannot certainly be gainsaid that he acted in disregard of the simple and daily-occurring provisions of paragraph 31 of the Himachal Pradesh (Courts) Order, 1948, and therefore acted negligently, but, such negligence notwithstanding, he will be deemed to have acted in good faith, according to the standard laid down above, since he acted honestly.

(11) In the result, I hold that there is sufficient cause for condonation of the delay of two days in filing this appeal. The defendants-appellants' application under Sections 5 and 14 of the Limitation Act is therefore allowed. The appeal will now be put up for hearing after preparation of the record in due course.

B/H.G.P. Application allowed.

A. I. R. 1953 H. P. 18 (Vol. 40, C. N. 8)

CHOWDHRY J. C.

The State v. Jorawar, Respondent.

Criminal Ref. No. 61 of 1951, D/- 15-9-1952.

† Constitution of India, Art. 23 — Chamba Paid Forced Labour Act (3 of 2004 B) invalid.

Chamba Paid Forced Labour Act was repugnant to the provisions of Article 23 of the Constitution of India. Conscription for the defence of the country, or for social services, are possible instances of imposition of compulsory service for public purposes under the Article. That cannot however be said of imposition of compulsory service for the purpose of carrying a load of Government property by the Tahasildar or any Government servant in normal times. (Para 3)

B. Sita Ram, Govt. Advocate, for the State; Respondent in Person.

REFERENCE..... Para.
('51) AIR 1951 SC 332: (1951 SCR 747) 3

ORDER: This is a reference by the District Magistrate of Chamba under Section 438, Criminal P. C., recommending that the conviction of Jorawar under Section 2 of the Chamba Paid Forced Labour Act (III of 2004 B) by the Tahsildar of Tahsil Churah be set aside and the fine of Rs. 5/- imposed upon him refunded.

(2) The preamble of the Act states that whereas 'begar' system existed from early days of the Administration, and by its abolition on 10-1-1944 it was experienced that even paid labour on standardized rates was not available for the State duties, it had become necessary to pass the Act in question. Under Section 2 of the Act any adult male tiller of the soil or malguzar, who was not by notification or by reason of ill health or otherwise exempt from rendering forced paid labour, wilfully refused to render it shall be liable to a fine not exceeding Rs. 20/-. Section 3 enabled the person whose services were requisitioned to offer his substitute to do the work. Section 4 provided for the imposition of fine by a revenue Court and for its recovery as an arrear of land revenue. Section 5 provided for an appeal from the order of the fine. Section 6 laid down the special occasions on which alone the said paid forced labour was to be requisitioned. Finally, Section 7 laid down that the payment was to be made in cash at the schedule rates current at the time. This was the entire Act.

(3) As pointed out above, the Act provided for imposition of fine by a revenue Court, and it was, therefore, as an Assistant Collector second grade, and not as a second class Magistrate, as stated by the learned District Magistrate, that the Tahsildar of Churah imposed the said fine of Rs. 5/- on Jorawar on 28-5-1951. The order in question shows that the fine was imposed on Jorawar because the latter refused to carry a load of some Government property on being required to do so by the Tahsildar

on 22-4-1951. The District Magistrate has made the reference on the ground that the said Act had already been repealed on 29-6-1949 by the Himachal Pradesh (Repealing) Order, 1949. That is no doubt correct. The learned Government Advocate did not oppose the reference but stated that in view of the ruling of their Lordships of the Supreme Court in — 'In re the Delhi Laws Act (1912), Etc.', AIR 1951 SC 332, it is doubtful whether the delegation of legislative function to the Central Government whereunder the Act in question was passed, was intra vires the power of the Constituent Assembly.

It is however not necessary to go into the question for the said Chamba Act, under the provisions of which Jorawar was convicted and sentenced, was in any case repugnant to the provisions of Article 23 of the Constitution of India. That Article prohibits 'begar' and other similar forms of forced labour, except for compulsory service for public purposes. Conscription for the defence of the country, or for social services, are possible instances of imposition of compulsory service for public purposes. That cannot however be said of imposition of compulsory service for the purpose of carrying a load of Government property by the Tahsildar or any Government servant in normal times. It is clear, therefore, that the services of Jorawar were requisitioned merely for 'begar', or forced labour.

(4) The reference is accepted and the conviction and sentence of Jorawar are set aside and he is acquitted. The fine, if already realised from him, shall be refunded.

A/D.H. Reference accepted.

A. I. R. 1953 H. P. 19 (Vol. 40, C. N. 9)

CHOWDHRY J. C.

Hari Das minor through Balak Ram as his next friend, Plaintiff-Appellant v. Mt. Lachhmi and others, Defendants-Respondents.

Second Appeal No. 19 of 1951, D/- 1-8-1952.

(a) Himachal Pradesh (Courts) Order (1948), Para 32(1)(b)(ii) — Competency of second appeal — Two alternatives — Proper interpretation — (Civil P. C. (1908), S. 110).

For the competency of a second appeal, Para 32(1)(b)(ii) lays two alternatives. In applying the first alternative, it is the value of the suit, and not the value of the subject-matter of the suit, that should be taken into consideration. The proper interpretation of the said provision is that if the operation of the decision given by the lower Court is confined only to the particular property which is the subject-matter of the suit, it is the condition of the value of the suit, and not that of the decree appealed against involving directly some claim to, or question respecting, property of like value, which will be the determining factor as regards the maintainability of the appeal. If, however, the decision beyond awarding relief in respect of the particular property which is the subject-matter of the suit, affects rights in other properties, or if the matter in dispute is one which is incapable of valuation, the second of the two alternatives, and not the first, would apply: AIR 1916 Mad 985, Foll. AIR 1930 PC 44; AIR 1949 Pat 448, Ref. (Para 9)

Anno: C. P. C., S. 110 N. 11 Pts. 25.

(b) Himachal Pradesh Order (1948), Para 35 — Erroneous finding of fact or law by lower Court — Jurisdiction — (Civil P. C. (1908), S. 115).

The mere fact of the Courts below having arrived at erroneous findings of fact or law does not give rise to any question of jurisdiction within the provisions of Para 35. (Para 11)

Anno: C. P. C., S. 115 N. 12.

Amar Chand Sud, for Appellant; Jaggannath Seth, for (Nos. 1, 2 and 3); and Man Mohan Nath, for (Mt. Lachhmi), for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('30) AIR 1930 PC 44: (53 Mad 166)	7
('32) 54 All 941: (AIR 1933 All 15)	5
('16) AIR 1916 Mad 985: (39 Mad 843)	6, 8, 9
('49) AIR 1949 Pat 448: (27 Pat 237)	8

JUDGMENT: This is a second appeal by the minor plaintiff Hari Das through his natural father Balak Ram as his next friend. Dhani Ram made a gift of his property to Jiwanu and Moti Ram. A report for mutation of this gift was made by the Patwari on 14-7-1948 and, despite the objection of Balak Ram on behalf of the minor, sanctioned on 2-8-1948. The present suit was then filed against the donor and the donees on 18-6-1949 by the minor, claiming to be an adopted son of the donor Dhani Ram, and alleging the property to be ancestral, for a declaration that the gift is invalid and ineffectual against the interests of the plaintiff. The adoption was alleged to have taken place on 28-1-1946.

(2) The plaint mentioned both the Hindu Law and custom. One of the issues framed by the trial Court therefore was: Are the parties governed in the matter of succession and alienation by custom, and if so, what is that custom, and what is its effect on the suit? The matter in respect of which custom had been pleaded was adoption, and therefore the issue was wrong in omitting adoption and mentioning succession and alienation. That is, however, immaterial since in spite of the said mistake the parties produced evidence in regard to adoption. The trial Court came to the conclusion that as no rule of custom prescribing any special ceremonies for adoption different from those laid down by the Hindu Law had been proved, the case must be decided according to the provisions of the Hindu Law. According to the Hindu Law the ceremony of giving and taking was necessary, but there was no evidence to that effect on behalf of the plaintiff. The trial Court held that the oral evidence produced on behalf of the plaintiff was not reliable, but that even if it be held to be reliable the plaintiff had, in the absence of proof of the necessary ceremony of the physical act of giving and receiving, failed to prove that he was the adopted son of Dhani Ram and dismissed the suit. During the pendency of the suit in the trial Court Dhani Ram died and his widow, Mt. Lachchmi was brought on the record as his legal representative. She adopted the joint written statement which her husband had filed along with the donees.

(3) The plaintiff went up in appeal, but the District Judge dismissed the appeal. He did not go into the question of whether custom or the Hindu Law should govern the case, but held that the suit was liable to dismissal in either case since, if it was governed by the Hindu Law, the plaintiff had failed to prove the essential ceremony of giving and receiving, and, if by custom, he had failed to prove

permission of the Koti State which, according to him, was a condition precedent to adoption, in view of the terms of the Wajibul-arz recording the custom.

(4) A preliminary objection was taken by the learned counsel for the defendants-respondents that a second appeal is not competent. This being a land suit, and the lower appellate Court having affirmed the judgment and decree of the trial Court, the relevant provision applicable is para 32(1)(b)(ii) of the Himachal Pradesh (Courts) Order, 1948, which is to the following effect:

> 1. "A second appeal shall lie to the Court of the Judicial Commissioner in any of the following cases from an appellate decree of a District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit, namely:
> (b) in a land suit,
> (ii) if the value of the suit is one thousand rupees or upwards, or the decree of the District Court involves directly some claim to, or question respecting, property of like value."

The property in suit being revenue-paying land, the suit was valued at Rs. 800/10/-, that being thirty times the land revenue. The value of the suit therefore falls short of the prescribed limit of Rs. 1,000/- or upwards within the above provision. An affidavit has however been filed in this appeal on behalf of the plaintiff-appellant that the market-value of the land in suit is more than Rs. 1,500/-. Due notice of this affidavit was given to the defendants-respondents, but no objection or counter-affidavit has been filed on their behalf. It may therefore be taken that the market-value of the land in suit exceeds the said prescribed limit. The question for determination therefore is whether the question of maintainability of the present second appeal should be decided on "the value of the suit being Rs. 1,000/- or upwards" or on "the decree of the District Court involving directly some claim to, or question respecting, property of like value", these being the two alternatives laid down in the said provision. It was argued by the learned counsel for the plaintiff-appellant that if the value of the suit fell short of the prescribed limit of Rs. 1,000/- or upwards, it was still open to the plaintiff to file a second appeal if the value of the property in suit satisfied that pecuniary condition.

(5) The above provision is, except for certain variations which for purposes of the present decision are immaterial, analogous to the provisions of the first two paragraphs of S. 110, Civil P. C., which lay down pecuniary limits for purposes of appeal to the Supreme Court. The first variation is that the section of the Code speaks of the value of the subject-matter of the suit but the said paragraph of the Order, of the value of the suit, a distinction considered in — 'Kishan Chand v. Lachhmi Chand', 54 All 941. That was a case of an application for leave to appeal to the Privy Council where the value of the suit was less, but that of the property which was the subject-matter of the suit more than the then prescribed limit of Rs. 10,000/-. It was held that the condition of the value of the subject-matter of the suit being Rs. 10,000/- or upwards was satisfied under S. 110 of the Code. The result of this difference between the section of the Code and the paragraph of the Order is that, under the first alternative laid down under the paragraph, it is the value of the suit and not the value of the property which is the subject-matter of the suit that can be taken into consideration. The next variation is that there is no mention in the said paragraph of the Order of the additional condition laid down in the first paragraph of S. 110 of the Code as to the amount or value of the subject-matter in dispute on appeal being the same sum or upwards. This is immaterial for it only means that this additional condition does not arise for consideration under the said provision of the Himachal Pradesh (Courts) Order, and therefore it may be disregarded. The only other variation is that whereas the second paragraph of S. 110 mentions "directly or indirectly", the said provision of the Himachal Pradesh (Courts) Order does not contain the word "indirectly" but only "directly". That again is a distinction without a difference for the present purpose of interpretation of the said two alternatives.

(6) The two alternatives, as already stated, are the value of the suit being Rs. 1,000/- or upwards, or the decree of the District Court involving directly some claim to, or question respecting, property of like value. And the question for determination is whether, if the first condition is not satisfied, it is still open to the appellant to take the benefit of the second. This is the argument put forward on behalf of the plaintiff-appellant. To subscribe to this view will however have the effect of rendering the first of the above two alternatives nugatory, for the second alternative of the decree of the District Court involving directly some claim to, or question respecting, property of the value of Rs. 1,000/- or upwards, being wider, will always cover the first one of the value of the suit being Rs. 1,000/- or upwards. The present case is an illustration in point. That was exactly the difficulty felt by their Lordships of the Madras High Court in interpreting the said two corresponding alternative provisions of S. 110 of the Code in — 'A. V. Subramania Aiyar v. Sellammal', AIR 1916 Madras 985, which is the leading case on the point. That was a case where the value of the subject-matter of the suit was less than the prescribed pecuniary limit but the decree of the High Court wherefrom the party wanted to go up in appeal to the Privy Council involved a claim to property of value exceeding that limit. The party in question therefore wanted to have the benefit of the latter position under the second paragraph of S. 110 of the Code, disregarding the provisions of the first paragraph. He was however not allowed to do so.

In order to understand the observations of their Lordships it is necessary to set here incidentally that the condition in the first paragraph of S. 110 as to the amount or value of the subject-matter of the suit in the Court of first instance was first introduced by the Privy Council Appeals Act (VI of 1874), and that the alternative contained in the second paragraph of that section already existed under cl. 39 of the Letters Patent. The question of which provision came first had, however, no bearing upon the decision of their Lordships. Wallis C. J., observed as follows:

> "It is of course necessary to read the whole section together and to give effect to every part of it; and when doing so it becomes necessary in my opinion in order to give effect to the new provision in the first paragraph to put a restrictive construction on the general words of the second paragraph

which are reproduced from clause 39 of the Letters Patent, and to read them in their present collocation as applying only to cases which involve some claim or question to or respecting property additional to the actual subject-matter in dispute in the appeal and to be taken into account therewith in making up the appealable value. Something might be said for this construction of the alternative provision as it stood in clause 39 of the Letters Patent, and I think that it is imperatively required in the present S. 110, Civil Procedure Code, which first appeared as S. 5 of the Act of 1874, if the provision in the earlier part of the section is not to be rendered nugatory. Some difficulty is no doubt occasioned by the retention in the second paragraph of the words "involve directly", but I think my learned brother, in his judgment which I have had the advantage of reading, has shown how effect may be given to the word "directly" consistently with this construction; and in any case I think that in the section as it now stands, the words, "involve directly", cannot be read as including cases which involve nothing but the actual subject-matter in dispute in the appeal. Cases which involve nothing else are in my opinion governed exclusively by the first paragraph."

Discussing the same question Srinivasa Aiyangar J., laid down as follows :

"As to the second point, petitioner contends that, inasmuch as the decree of this Court directs him to surrender possession of the house and pay mesne profits, the decree necessarily involved a claim to property of over the appealable value. This construction renders the whole of the first clause nugatory. It must be remembered that provisions similar to these are to be found in the laws of a large majority of the Colonies (See the table in Burge's Colonial Laws, Volume I, page 362) and it is impossible to construe the second clause of S. 110 of the Code of Civil Procedure so as to render the first perfectly useless. If the second clause stood by itself (See Wheeler's Privy Council Practice, page 694) it would be legitimate to construe it in the manner suggested, as the word "involves" is sufficiently wide to cover direct adjudications in respect of the subject-matter in dispute. In this case, we have to take both the clauses together so as to give a meaning to both. In my judgment, the first clause applies to cases where the decree awards a particular sum, or property of a particular value, or refuses that relief, (i.e.), to cases where the object-matter in dispute is of a particular value. In fact, the words "objects in dispute" are used in the provisions relating to appeals from Guernsey. If the operation of the decision is confined only to the particular object-matter, clause 2 does not apply, and unless the case satisfies the conditions in clause 1, there is no right of appeal. If the decision beyond awarding relief in respect of the particular object-matter of the suit affects rights in other properties, clause 2 would apply; also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause 2 may apply."

(7) The question came up before their Lordships of the Privy Council in connection with a special leave to appeal in — 'Mangamma v. Mahalakshmamma', AIR 1930 PC 44. The said Madras ruling was approved and in that connection it was observed as follows :

"Their Lordships agree with their reasoning which, indeed, treated the question under the first part of the section as completely clear, but considered whether the second part, 'or the decree or final order must involve', etc., made any difference, and held that it did not, for reasons which commend themselves to their Lordships."

(8) The same question cropped up before their Lordships of the Patna High Court in — 'Sati Bala Dasi v. Chota Nagpur Banking Association Ltd.', AIR 1949 Pat 448. The application in that case for leave to appeal to the Privy Council arose from a mortgage suit. The amount which was the subject-matter of the suit, i.e., the mortgage loan, was less than Rs. 10,000/-. The intending appellant sought to get over this difficulty of the provisions of the first paragraph of S. 110 of the Code not being satisfied by seeking to ignore those provisions and bringing the case within the provisions of the second paragraph of that section. It was contended that the latter provision was in any case satisfied since the value of the mortgaged property was more than Rs. 10,000- This contention was repelled on the ground that in a mortgage suit the property in dispute is not the property secured but the loan advanced. It was next contended that as the amount in dispute in the appeal exceeded the limit of Rs. 10,000/- due to its including post litem interest, that should be taken as the value of the property in dispute for the purpose of the second paragraph of section 110. This contention was also repelled on the ground that if that were the proper construction of the section, the fixed requirement of para one would be rendered nugatory, and the said — 'Subramania Aiyar v. Sellammal', A. I. R. 1916 Madras 985 ruling was relied upon.

(9) The above well-settled view must be adopted for the interpretation of the said corresponding provisions of the Himachal Pradesh (Courts) Order also. The only difference between the two provisions worth noting relates to the first alternative: the section of the Code speaks of the value of the subject-matter of the suit and the paragraph of the Order of the value of the suit. I have already noted this distinction and shown that the only result of this distinction is that in applying the first alternative under the provisions of the Order it is the value of the suit, and not the value of the subject-matter of the suit, that should be taken into consideration. It is also clear that the ratio decidendi of the aforesaid basic Madras ruling (AIR 1916 Mad. 985) did not turn on any such distinction. There has been a good deal of confusion in the matter of the interpretation of the said and corresponding provisions appearing in the Himachal Pradesh (Courts) Order, 1948. It is now laid down that if the operation of the decision is confined only to the particular property which is the subject-matter of the suit, it is the condition of the value of the suit, and not that of the decree appealed against involving directly some claim to, or question respecting, property of like value, which will be the determining factor as regards the maintainability of the appeal. If, however, the decision beyond awarding relief in respect of the particular property which is the subject-matter of the suit, affects rights in other properties, or if the matter in dispute is one which is incapable of valuation,

the second of the above two alternatives, and not the first, would apply.

(10) Applying the above principle to the present case, as the decision does not go beyond awarding relief in respect of the land in suit, there would be no right of second appeal unless the value of the suit is Rs. 1,000/- or upwards, which it is not. I therefore hold that a second appeal is not maintainable, and that this appeal should be heard as a revision.

(11) Heard as a revision, however, there is no ground for interference. The trial Court has considered in detail the evidence produced by the parties and arrived at the conclusion that the case must be decided according to the Hindu Law and not according to custom, and that according to the Hindu Law the plaintiff has failed to prove his adoption. The lower appellate Court has agreed with those findings and gone further in holding that even if the case be governed by custom, the plaintiff had failed to prove the permission of the Koti State which in his view was a condition precedent to adoption. The learned counsel for the plaintiff took me through the entire evidence and argued that the aforesaid findings with regard to the applicability of the Hindu Law, the non-performance of the necessary ceremonies and want of permission of the Koti State were erroneous. That would not, however, be any ground for interference in revision, for the mere fact of the Courts below having arrived at erroneous findings of fact or law does not give rise to any question of jurisdiction within the provisions of Para. 35 of the Himachal Pradesh (Courts) Order. From the detailed examination of the evidence, both oral and documentary, it cannot even be said that the Courts below have acted with material irregularity in the exercise of their jurisdiction in the sense of any of the said findings having been arrived at perversely.

It appears from the said mutation record, filed on behalf of the plaintiff himself, that the objection to mutation by Balak Ram on behalf of the minor was resisted by the donor by contending that he no doubt had an intention of adopting the child but Balak Ram did not agree to it and therefore he gave up the idea of adopting Hari Das. Had the child been really adopted, he should have been found living with his adoptive father, but the only evidence with regard to it on behalf of the plaintiff is that one witness speaks of the child being on visiting terms with Dhani Ram and the other of his having lived with Dhani Ram for the first five or six months only. It is also noteworthy that the application to Koti State for permission to adopt the child was, according to the said mutation record, preferred on 2-10-1945, and that the permission was granted on 28-5-1946. The order of permission has not been filed in this case, and the fact that it was passed on 28-5-1946 appears only in the objection which Balak Ram filed in the mutation proceedings. The lower appellate Court was therefore not unjustified in holding that the permission had not been established. What is noteworthy in this connection is that the adoption is alleged to have taken place on 28-1-1946. According to the entry in the Wajbularz permission of the State for adoption was necessary. That it was so considered by the parties themselves appears from the admission that an application for permission was filed on 2-10-1945. As the plaintiff has failed to prove that the required permission was granted, it is incredible that the adoption should have really been made. Even if it be supposed that the admission of Balak Ram in the mutation proceedings as to the permission having been granted on 28-5-1946 was correct, it would still be incredible that adoption should have been made in January 1946 before permission to adopt had been accorded by the State. In these circumstances, I am not prepared to hold that the findings arrived at by the Courts below were erroneous, to say nothing of their being perverse.

(12) The appeal, now disposed of as a revision, is dismissed with costs, and the judgment and decree of the lower appellate Court are affirmed.

B/V.S.B. Appeal (revision) dismissed.

A. I. R. 1953 H. P. 22 (Vol. 40, C. N. 10)

CHOWDHRY, J. C.

Pt. Bal Mukand, Petitioner v. Pt. Har Dev Sharma, Respondent.

Criminal Misc. Pet. No. 13 of 1952, D/- 29-8-1952.

(a) Criminal P. C. (1898), S. 345 — Who can compound — Presiding Officer of court.

It is no part of the business of the presiding officer of any Court to put forward any suggestion to the parties to come to a compromise. That is the look out of the parties themselves, and the only business of the Court is to decide the case on its merits. (Para 8)

Anno: Cr. P. C., S. 345 N. 9.

(b) Criminal P. C. (1898), S. 526 (1) (a) — Fair and impartial inquiry or trial not being possible — Magistrate suo motu making suggestion to parties that they should come to compromise — Families of Magistrate and complainant belonging to same place — Magistrate contributing article to complainant's journal — Complainant referring to above two facts to accused in attempting to make him come to compromise — Accused held would have reasonable apprehension that he would not have impartial trial before Magistrate and, therefore, case should be transferred.

Anno. Cr. P. C. S. 526 N. 5 Pt. 3 (Para 8)

Amarchand Hoshiarpuri, for Petitioner; K. C. Pandit, for Respondent; L. N. Sethi, Govt. Advocate for the State.

ORDER: This is a petition under s. 526, Cr. P. C., by one Pt. Balmukand, for transfer of the case under s. 501, I.P.C., pending against him and his brother Sada Nand on the complaint of one Pt. Har Dev Sharma in the Court of the Magistrate first class Solan. With this petition his aforesaid brother and co-accused has to-day associated himself.

(2) The petition is on the ground that a fair and impartial trial cannot be had in the said Court. The allegations, to be mentioned presently, contained in the application for transfer are supported by the petitioner's affidavit.

(3) The petition has been opposed by the Government Advocate & also by the complainant, but no counter-affidavit has been filed. The Magistrate concerned has submitted his explanation with regard to the allegations made by the petitioner against him. I have heard learned counsel, and am of the opinion that this is a fit case for being transferred.

(4) 7-6-1952 was the first date on which the present petitioner presented himself as an accus-

ed in the case before the learned Magistrate. The allegation of the petitioner is that on that date the Magistrate asked him to come to a compromise with the complainant otherwise he would suffer. The learned Magistrate in his explanation admits that he did suggest that the parties should come to a compromise, and that for that purpose the case was adjourned to a date four days off. But the Magistrate denies the allegation that he intimidated or threatened the petitioner. I see no reason not to accept this denial of the learned Magistrate. At the same time, the fact remains that the learned Magistrate did suggest a compromise to the parties.

(5) The case was adjourned from 7-6-1952 to 9-6-1952 (& not 10-6-1952, as wrongly mentioned by the petitioner) to enable the parties to come to a compromise. The next allegation of the present petitioner relates to something which happened on 8-6-1952. These allegations are not levelled against the Magistrate but against the complainant Har Dev Sharma. It is alleged that on 8-6-1952 the complainant took the petitioner to his house and told him that the Magistrate was a friend of his. In support of this statement he is said to have told the petitioner that he himself and the Magistrate lived at one time at Udaipur and were friends. He further told the petitioner that the Magistrate was a regular contributor to his quarterly journal named Shri Swadhayaya. And in support of this latter fact he showed to the complainant the Kartik Samvat 2008 issue of the journal containing an article by the learned Magistrate.

The complainant is also alleged to have asked the petitioner to come to a compromise with him otherwise he (the petitioner) would suffer heavily. As I have stated above, there is no counter-affidavit filed by the complainant Har Dev Sharma with regard to these allegations as to the happenings on 8-6-1952. I take it therefore that the allegations in the petitioner's application are correct. It is relevant to mention in this connection that the learned Magistrate has in his explanation admitted that the complainant knew the learned Magistrate's father who was a Minister in Udaipur State before he died in 1942, although the learned Magistrate himself met the complainant for the first time in Solan in 1951. The learned Magistrate also admits having contributed an article to the complainant's journal.

(6) The third allegation of the petitioner relates to the happenings in the Court of the learned Magistrate on 9-6-1952. It is alleged that on that date the Magistrate pressed that the petitioner should agree to the arbitration of the Raja Sahib of Solan; that the Magistrate also phoned to the Raja to agree to act as an arbitrator; and that when the petitioner expressed his inability to agree to arbitration the Magistrate compelled him to interview the Raja Sahib in connection with his proposal of arbitration. It is further alleged that the parties thereafter went to the Raja Sahib but that as the petitioner did not agree to the arbitration, the proposal of arbitration fell through.

With regard to these allegations, the learned Magistrate has stated in his explanation that the parties themselves told him that they had approached the Raja Sahib to act as their arbitrator. He has denied that he pressed any party to appoint the Raja Sahib as arbitrator, or that he phoned to the Raja Sahib in that connection. I have no reason not to accept the explanation of the learned Magistrate, so that, so far as the allegations of the petitioner relating to the happenings on 9-6-1952 are concerned, I must reject them as unfounded.

(7) The position therefore boils down to this that on 7-6-1952 the learned Magistrate did suo motu make a suggestion to the parties that they should come to a compromise; that the case was adjourned for the purpose to 9-6-1952; that in between these two dates the complainant Pt. Har Dev Sharma took the petitioner to his house and asked him to come to a compromise otherwise the petitioner would suffer heavily because the Magistrate was friend of his; that in support of his friendship he stated that the complainant and the Magistrate originally belonged to the same place and there were friendly relations between the two families; and that he also showed an article which the Magistrate had contributed to the complainant's journal.

(8) It is no part of the business of the presiding officer of any Court to put forward any suggestion to the parties to come to a compromise. That is the look out of the parties themselves, and the only business of the Court is to decide the case on its merits. Were that, however, the only ground put forward by the petitioner, I might not have been inclined to grant the application. But when the said suggestion for compromise emanating from the Magistrate in this case is taken into consideration along with the other facts, I think there is good ground for holding that the petitioner would have a reasonable apprehension in his mind that he would not have an impartial trial before the Magistrate concerned.

The other facts, as already stated, are that the families of the complainant and the learned Magistrate originally belonged to the same place, that the Magistrate had contributed an article to the complainant's journal, and that the complainant had referred to both these facts to the petitioner in an attempt to make him come to a compromise in the case. So far as the learned Magistrate is concerned, I have no doubt but that he would have done nothing but justice between the parties. It has however to be remembered that it is not so much the bias of the Magistrate as the susceptibilities of the party concerned that have to be taken into consideration. And so far as that is concerned, in view of the facts and circumstances mentioned above, I am of the opinion, as already stated, that the apprehension in the mind of the present petitioner was reasonable.

(9) The petition is allowed and it is directed that the case be transferred from the Court of Sri V. R. Antani, Magistrate, first class, Solan to that of Sri Devki Nandan, Magistrate first class, Kasumpti. The parties are hereby directed to appear before the Magistrate to whom the case is being transferred on 9-9-1952.

B/V.R.B. Petition allowed.

A. I. R. 1953 H. P. 23 (Vol. 40, C. N. 11)

CHOWDHRY J. C.

Kirpa and others, Defendants-Petitioners v. Deviditta and others, Plaintiffs-Respondents.

Civil Revn. No. 28 of 1952, D/- 20-9-1952.

(a) Civil P. C. (1908), S. 115 — Lower appellate Court not complying with O. 41 R. 31 — Power of High Court to interfere in revision.

In a suit by the plaintiff for the demolition of constructions and for an injunction perpetually to restrain the defendants from building on a disputed area, the lower appellate Court granted the reliefs to the

plaintiff without recording any finding on the question of title and right of way on which alone the entire case of the plaintiff was based. It neither stated the points for determination, nor the reasons for the decision, as required by O. 41, R. 31:

Held that the appellate Court's decision was no judgment as required by law, that that Court had committed an error of procedure which was material in that it had affected the ultimate decision and that, therefore, the High Court had power to interfere in exercise of its revisional jurisdiction. AIR 1949 PC 156, Rel. on. (Para 6)
Anno: C.P.C., S. 115 N. 12, 13.

(b) Easements Act (1882), S. 13 — Easement of necessity — Right of way.

Where a passage of way claimed by the plaintiff has not been blocked but only curtailed an easement of necessity will not be granted: AIR 1938 Lah 800, Foll. (Para 8)
Anno: Ease. Act, S. 13 N. 4.

Des Raj Mahajan, for Petitioners; Ved Vyas Mahajan, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('49) AIR 1949 PC 156: (ILR (1950) Mad 1) 4
('44) AIR 1944 All 170: (ILR (1944) All 461 FB) 4
('38) 40 Pun LR 787: (AIR 1938 Lah 800) 8

JUDGMENT: This is a defendants' application in revision against the judgment and decree of the learned District Judge of Chamba, dated 18-1-1952 whereby, allowing the plaintiffs' appeal and setting aside the judgment and decree of the Subordinate Judge of Chamba, dated 29-9-1951, he partially decreed the suit of the plaintiffs-respondents.

(2) The houses of the parties are close to each other and are separated only by a lane. It is common ground that a partition has already taken place between them and each party has been allotted his moiety share. Adjacent to the house of the defendants and to the south of it lies a plot of land 2 marlas in area. The dispute in the present case relates to a portion of the said plot of land nearest to the house of the defendants. The defendants started certain constructions on this area and the plaintiffs filed the present suit for the demolition of the constructions and for an injunction perpetually to restrain the defendants from building on that area. The suit was based on two grounds: (1) that the area in dispute belongs to the plaintiffs as it had been allotted to them in the said partition, and (2) that the strip of the land in suit served as a passage for approach to the plaintiffs' thrashing-floor for plaintiffs themselves and his cattle which had been totally obstructed. The defendants denied the title of the plaintiffs and set up their own title, their contention being that the strip of land in suit had been allotted to them in partition, and they also denied that the disputed land in question was in any way in the use and occupation of the plaintiffs.

(3) The trial Court held against the plaintiffs on both the points, the findings being that there was no evidence that the defendants had encroached upon any land belonging to the plaintiffs but it appeared on the contrary that the defendants had made the constructions on old foundations within the line of demarcation between the respective areas of the parties and that a strip of land one karam in area had been left beyond the area in suit for the plaintiffs' passage. In the result, the trial Court dismissed the suit of the plaintiffs. The learned District Judge on plaintiffs' appeal recorded certain findings, to which I shall refer presently, and allowing the appeal decreed the suit of the pltfs. restraining the defts. from making any further constructions on the land in suit although the defendants were permitted to maintain the constructions which they had already made.

(4) There was a preliminary objection raised by the learned counsel for the plaintiffs-respondents that this Court is not authorised in exercise of its revisional jurisdiction to interfere with the appellate judgment of the District Judge, and in support of this contention he relied upon the ruling of their Lordships of the Privy Council reported as — 'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras', AIR 1949 PC 156, and of a decision of the Allahabad High Court reported as — 'Surya Pal Singh v. Chiranji', AIR 1944 All 170 (FB). The latter ruling only incidentally, and therefore very briefly, dealt with the question of interference in exercise of revisional jurisdiction, but the matter was the main subject of decision in the said ruling of their Lordships of the Privy Council. It was laid down by their Lordships as follows:

"Section 115 applies only to cases in which no appeal lies, and where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters: (a) That the order of the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court upon questions of fact or law. There can be no justification whatsoever for the view that S. 115 (c) was intended to authorise the High Court to interfere and correct gross and palpable errors of Subordinate Courts. It would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured.

Where the High Court interfered on the ground that the subordinate Court had made a serious mistake in the construction of a will:

Held that the order of the High Court was without jurisdiction and must be set aside."

(5) If it were a case of mere wrong decision, this Court would certainly not be authorised to interfere with the decision in exercise of its revisional jurisdiction however gross or palpable might be the error committed by the Court below, but the decision of the lower appellate Court was no judgment at all as required by the law. On the question of title the only relevant passage appearing in the judgment is the following:

"These witnesses (meaning the plaintiffs' witnesses) have further deposed that the disputed area has all along been in possession of the plaintiffs, and according to Ghangho P. W. 1 the same had fallen to the share of the plaintiffs on partition."

The plaintiffs' witnesses were, however, not the only witnesses who deposed with regard to possession, for the defendants' witnesses also made statements supporting defendants' possession on the land in suit. The District Judge did not, however, make any reference whatsoever to the statements of the defendants' witnesses. And even as regards the plaintiffs' witnesses, he only stated what they had deposed without stating what his own inference or finding was. There is thus no finding of the District Judge on the question of title. Indeed, from the fact that the defendants have been allowed to retain the constructions already made by them on the land in suit it would appear that the finding of the District Judge with regard to title of the land in suit was in favour of the defendants.

(6) As regards the other ground on which the plaintiffs claimed the said reliefs, i.e., the alleged right of passage over the land in suit, the only reason for which he has granted the said relief to the plaintiffs-respondents is that if the defendants were allowed to raise the height of the present constructions the passage would be totally blocked. He has, however, recorded no finding on whether the plaintiffs did possess any such right of way in the land in suit. In other words, he has presumed that such a right existed in favour of the plaintiffs without assigning any reasons for making the presumption. It may be stated here in passing that even the finding that the passage would be totally blocked is not warranted by the evidence on the record, for according to the two most important witnesses of the plaintiffs-respondents themselves, Karam Singh Patwari and Sridhar Kanungo, only half the open space which served as a passage, i.e., the half nearest to the house of the defendants, would be covered by the constructions of the defendants-petitioners but the other half to the south of the area covered by the defendants' constructions would still be left. The maps prepared by these witnesses also point to the same conclusion. It is manifest therefore that the lower appellate Court has granted the aforesaid reliefs to the plaintiffs-respondents without recording any finding on either of the two points of title and right of way on which alone the entire case of the plaintiffs was based. That being so, that Court neither stated the points for determination, nor the decision thereon, nor the reasons for the decision, as required by O. 41, R. 31, C.P.C. and, therefore, that Court's decision was no judgment as required by the law. It follows, therefore, that the lower appellate Court has, in the words of their Lordships of the Privy Council in the aforesaid ruling, committed an error of procedure which was material in that it had affected the ultimate decision. On the authority cited by the learned counsel for the plaintiffs-respondents themselves, therefore, this is a fit case wherein the decision of the lower appellate Court must be set aside by this Court in exercise of its revisional jurisdiction.

(7) I have already stated the two grounds on which the plaintiffs-respondents based their right to the aforesaid reliefs of mandatory and prohibitory injunctions. I have also shown that the lower appellate Court's judgment on those points was no judgment at all in the eye of law. Thus we are left with the judgment of the trial Court, and on a perusal of that judgment I find that the suit of the plaintiffs-respondents was dismissed by that Court for good reasons. There were only two witnesses produced by the plaintiffs-respondents with regard to partition, Ghangho P. W. 1 and Chuhroo P. W. 3. The latter admitted his ignorance, as to what respective areas were allotted to the parties in the partition. The former has, no doubt, stated that the area in suit was allotted to the plaintiffs, but a perusal of his entire statement shows that he was a witness hostile to the defendants and therefore unworthy of credence. The trial Court was therefore perfectly justified in holding that the plaintiffs had failed to prove that the area encroached upon belonged to them.

(8) As regards the alleged right of way, evidently it has been claimed as an easement of necessity. But, as already shown, the passage has not been blocked but only curtailed. In fact, the constructions have been made on only half the area and the other half has been left open. As held in — 'Sheo Nath v. Mughla', 40 Punj LR 787,

> "An easement of necessity is not to be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. When there are other ways of ingress and exit, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient."

The plaintiffs-respondents were, therefore, not entitled to the reliefs claimed on this alternative ground either.

(9) In the result, therefore, the revision is allowed, the judgment and decree of the lower appellate Court are set aside and the judgment and decree of the trial Court dismissing the suit of the plaintiffs-respondents are restored. The plaintiffs will bear the costs of the defendants in this Court and in the Court of the District Judge, but the order of the trial Court as to the costs in that Court will remain intact.

B/V.S.B. Revision allowed.

A. I. R. 1953 H. P. 25 (Vol. 40, C. N. 12)

CHOWDHRY J. C.

Bhagwandas, Plaintiff-Appellant v. Debi Ram, Defendant-Respondent.

Second Appeal No. 45 of 1952, D/- 13-10-1952.

(a) Civil P. C. (1908), S. 115 — Decision arrived at after consideration of facts — No interference.

Even if the decision of the lower appellate Court, arrived at on a thorough consideration of the relevant facts and law, be wrong on questions of relinquishment and adverse possession, it cannot be set aside in revision, when the lower appellate Court had jurisdiction to decide the questions. (Para 4)

Anno: Civil P. C., S. 115 N. 13.

(b) Himachal Pradesh (Courts) Order (1948), S. 32 — Second appeal — Maintainability — "Valuation of suit."

In order that the second appeal falling within S. 32(1)(b)(ii) be competent it is necessary either that the value of the suit be Rs. 1000 or upwards, or that the decree appealed from involves directly some claim to, or question respecting, property of like value. (Para 5)

In order that a second appeal may be competent it must satisfy the one or the other of the two alternatives. Furthermore, the property referred to in the

second of the two alternatives is not confined to the subject matter of suit but covers in addition rights in other properties as well which may be affected by the decision appealed from. (Para 6)

The view expressed in — 'Haridas v. Mt. Lachhmi', Second Appeal No. 19 of 1951 (Him. P.) that if the conditions of the first alternative were not satisfied it would not be open to the appellant to take the benefit of the second, because to allow him to do so would be to render the first alternative nugatory, is not correct. Under the aforesaid provisions of the Himachal Pradesh (Courts) Order, 1948, there are two clear-cut alternatives so that the case must fall under the one or the other. That being so, any interpretation which has the effect of rendering the two alternatives identical must necessarily be wrong. That will, however, be the case if the property in the second alternative is interpreted as meaning nothing more than the property which is the subject-matter of the suit. It follows, therefore, that that term in the second alternative must mean any property, and not only the property which is the subject-matter of the suit, a claim, or question respecting, which is involved in the decree appealed from. (Para 6)

The phrase "value of the suit" means the amount or value of the subject-matter of the suit. The words "value of the suit" does not mean value of the suit for jurisdictional purposes. (Paras 6, 8)

Thus the value of the suit, which means the amount of the subject-matter of the suit or the market value of the property which is the subject-matter of the suit, satisfies the condition of the money value under the relevant provision of the said paragraph, the appeal will be maintainable under the first alternative of the value of the suit, and in that case it will not be necessary to call in aid the other alternative of the decree appealed from involving directly some claim to, or question respecting, property of like value. The latter alternative can, however, be availed of where the decision, beyond awarding relief in respect of the particular property which is the subject-matter of the suit, affects rights in other properties as well, and, on the same principle, this alternative may also apply in cases where the matter in dispute is one which is incapable of valuation, as in the case of easements. Second Appeal No. 19 of 1951 (Him. P.), Commented on and not followed in part. (Para 9)

(c) Limitation Act (1908), Arts. 142 and 144 — Adverse possession — Cosharers.

As between cosharers or tenants-in-common, in the absence of ouster possession of one is tantamount to possession of all. Mere length of possession unaccompanied by anything to show ouster does not amount to ouster. (Para 12)

Anno: Limitation Act, Arts. 142 and 144 N. 35.

Hiralal, for Appellant; D. N. Vaidya and Thakur Prasad, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('03) 30 Ind App 139: (30 Cal 738 PC) 11
('24) AIR 1924 All 920: (79 Ind Cas 951) 12
('33) AIR 1933 All 15: (54 All 941) 8
('42) AIR 1942 Bom 44: (ILR (1942) Bom 14) 12
('52) Second Appeal No. 19 of 1951 (Him. P.) 5
('49) AIR 1949 Mad 739: (ILR (1950) Mad 10 FB) 8
('43) AIR 1943 Oudh 54: (203 Ind Cas 391) 12
('41) AIR 1941 Sind 50: (ILR (1940) Kar 534) 12

JUDGMENT: This is a second appeal by the plaintiff Bhagwandas against the judgment and decree of the learned District Judge of Mahasu, dated 15-4-1952, dismissing his appeal and affirming the judgment and decree of the Subordinate Judge whereby his suit for a declaration that he was the sole proprietor of the lands in dispute was dismissed.

(2) The defendant-respondent Debi Ram is plaintiff-appellant's uncle. The land in suit consists of 59 bighas 12 biswas 9 biswansis of cultivatory and 1 bigha 12 biswas and 12 biswansis of pasture land in village Bair in ilaqa Kunhwal, 5 bighas 10 biswas and 6 biswansis of cultivatory land in village Galyanda Behna and 8 bighas 1 biswa and 5 biswansis of cultivatory land in village Ghori Dhar, the two latter villages being in ilaqa Ghasnu. They stand recorded in the names of the parties in equal shares. The defendant applied to the appropriate revenue authority for partition of the land according to the recorded shares. The plaintiff opposed that application on the ground that he was the sole proprietor of the entire land. He was directed to have his title established, and thereupon he filed the present suit for the aforesaid declaration.

(2) It appears that a partition of joint family properties was effected among the defendant Debi Ram, plaintiff's late father Kundan and a third brother of theirs named Bakshi Ram by agreement under a deed of partition dated 14 Bhado Samvat 83 Kham, which year corresponded to Samvat 1963 Bikrami or 1907 A. D. The property partitioned consisted, amongst other properties, of the land in suit. It was allotted in equal shares to Debi Ram and Kundan, the third brother Bakshi Ram having been allotted land elsewhere. The self acquired properties of the brothers were specifically excluded from partition in the deed. About two months later plaintiff's father Kundan wrote a letter to the defendant Debi Ram. He referred to the facts that land in Kunhwal had been allotted to them in the family partition, that one Pir Sahai who used to manage the land was not willing to do it any more, and that for a proper management of their respective shares it was necessary to separate them. Accordingly, he suggested to the addressee that they both go to Kunhwal the following day and divide the land equally tenant-wise and also the existing stock of grain there. Suggestion relating to land in Kunhwal alone was made, but not to that in ilaqa Ghasnu. Debi Ram sent his reply the same day on the back of that very letter, and it was to the following effect:

"The submission of Debi Ram to brother Kundan is as follows: As I submitted the other day, I shall take no share in land. All this has been acquired by you. Therefore my request to you is to go to Kunhwal & take possession of it after securing all the papers from brother. Whatever you think proper act according to that. I shall maintain myself on coarse grain earned by my own hands. This

submission is made by Debi Ram on 16th Katik 83 Kham."

(3) The plaintiff filed the present suit on two grounds: that the defendant had relinquished his share in the land in suit by his said reply, and that, in the alternative, the plaintiff had acquired title to the defendant's share by adverse proprietary possession. Both the Courts below have repelled these contentions, and the plaintiff has now come up in second appeal to this Court.

(4) The learned counsel for the defendant-respondent took the preliminary objection that a second appeal is in this case not maintainable. If this objection be well-founded, there is no doubt that the plaintiff would fail on the mere ground that even if the decision of the lower appellate Court, arrived at on a thorough consideration of the relevant facts and law, be wrong on both the said points, it could not be set aside in revision.

(5) The relevant provision relating to second appeals is paragraph 32 of the Himachal Pradesh (Courts) Order, 1948, which runs as follows:

"(1) A second appeal shall lie to the Court of the Judicial Commissioner in any of the following cases from an appellate decree of a District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit, namely:

(a) in a small cause suit or unclassed suit,

(i) if the value of the suit is one thousand rupees or upwards, or the decree involves directly some claim to, or question respecting, property of like value, and the decree of the District Court varies or reverses, otherwise than as to costs the decree of the Court below, or

(ii) if the value of the suit is two thousand five hundred rupees or upwards, or the decree of the District Court involves directly some claim to, or question respecting, property of like value;

(b) in a land suit,

(i) if the value of the suit is two hundred and fifty rupees or upwards, or the decree involves directly some claim to, or question respecting, property of like value, and the decree of the District Court varies or reverses otherwise than as to costs the decree of the Court below, or

(ii) if the value of the suit is one thousand rupees or upwards, or the decree of the district Court involves directly some claim to, or question respecting property of like value.

(2) The provisions of Order 41 of the Code of Civil Procedure, 1908 (Act 5 of 1908), other than rule 35 of the said Order, shall apply, as far as may be, to a second appeal under this paragraph and to the execution of a decree passed on any such appeal."

The present being a land suit, and the decree appealed from having affirmed the decision of the trial Court, the present appeal falls under sub-para (1) (b) (ii) of the paragraph. In order that the present second appeal be competent it is therefore necessary either that the value of the suit be Rs. 1000 or upwards, or that the decree appealed from involves directly some claim to, or question respecting, property of like value. The suit was valued for jurisdictional purposes at Rs. 250/-, that being thirty times the land revenue of the land. In order to make this second appeal competent the appellant has filed an affidavit that the market value of the land in suit is more than Rs. 1,000/-, and that affidavit has not been challenged. Relying however upon the decision of this Court in — 'Hari Das v. Mt. Lachhmi', Second Appeal No. 19 of 1951, it was argued by the learned counsel for the defendant-respondent that as the decision appealed from confined itself to the particular property which was the subject-matter of the suit and did not affect the appellant's rights in other properties, the first and not the second alternative contained in the said sub-para was applicable, but as the value of the suit was only Rs. 250/- the present appeal did not fall under the first alternative either. I have reconsidered the said decision of this Court and, thanks to the arguments of the learned counsel for the present defendant-appellant, I am able to say that that decision, so far at least as the view expressed therein relating to the first alternative is concerned, was wrong.

(6) The said alternatives, which appear in all the classes of cases enumerated in para 32 of the Himachal Pradesh (Courts) Order, 1948, correspond to the first portion of para 1 and to para 2 of S. 110, Civil P. C. And the said decision of this Court was founded on certain authorities relating to the provisions of that section. A number of rulings were cited by the learned counsel for the plaintiff-appellant in support of the contention that para 2 of S. 110 was an alternative to only the second portion, but not to the whole, of the first paragraph of that section. It is however not necessary to consider the rulings because, so far as the relevant provisions of the Himachal Pradesh (Courts) Order are concerned, there is no provision therein corresponding to the second portion of S. 110 of the Code and therefore there are only two alternative situations, namely, a certain value of the suit or the decree appealed from involving directly some claim to, or question respecting, property of like value. It follows, therefore, as already stated, that in order that a second appeal may be competent it must satisfy the one or the other of the two alternatives. Furthermore, I still adhere to the view, expressed in the former decision, that the property referred to in the second of the two alternatives is not confined to the subject-matter of suit but covers in addition rights in other properties as well which may be affected by the decision appealed from, though I do not adopt the reasoning employed in that case for arriving at that conclusion. The view expressed in that case that if the conditions of the first alternative were not satisfied it would not be open to the appellant to take the benefit of the second, because to allow him to do so would be to render the first alternative nugatory, is not correct. That reasoning was adopted from certain rulings which seem to have proceeded on the view that the condition contained in para 2 of S. 110 of the Code, wherever its applicability was called for, must be satisfied in addition to that contained in the first part of para 1. As already stated, however, it is not necessary to resort to that reasoning here since under the aforesaid provisions of the Himachal Pradesh (Courts) Order, 1948, there are two clear-cut alternatives so that the case must fall under the one or the other. That being so, any interpretation which has the effect of rendering the two alternatives identical must necessarily be wrong. That will, however, be the case if the

property in the second alternative is interpreted as meaning nothing more than the property which is the subject-matter of the suit. It follows, therefore, that that term in the second alternative must mean any property, and not only the property which is the subject-matter of the suit, a claim to, or question respecting, which is involved in the decree appealed from. It may be stated here in passing that the phrase "value of the suit" means the amount or value of the subject-matter of the suit, as I shall show presently.

(7) A hypothetical illustration will elucidate the position. A sues B for recovery of Rs. 100/- as rent of house X on foot of lease-deed relating to houses X and Y. The market value of the two houses is above Rs. 1,000/-. B denies the tenancy. The District Court affirms the trial Court's decree dismissing the suit, holding that the lease-deed created no tenancy. Here a second appeal is not competent under the first alternative since the value of the suit is less than Rs. 1,000, but it would be competent under the other alternative because as a result of the decree A would be debarred from recovering rent from B in respect of both the houses, and therefore the decree involved a claim to, or question respecting, properties valued at more than Rs. 1,000. It follows, therefore, that where the decision appealed from does not go beyond awarding relief in respect of the property which was the subject-matter of the suit by affecting rights in other properties, the appellant will not have the benefit of that alternative, and he will have a right of second appeal only if he can have the benefit of the first alternative.

(8) It was in the interpretation of the first alternative, however, that a mistake was committed in the previous decision. It was held that the words "value of the suit" in the first alternative were not synonymous with the words "value of the subject-matter of the suit" in S. 110 of the Code. It escaped attention of counsel and Court alike in that case that the said words "value of the suit" were defined in para 2(vii) of the Order itself as meaning the amount or value of the subject-matter of the suit. The Court, therefore, fell into the error of interpreting the words "value of the suit" as meaning value of the suit for jurisdictional purposes. That is why it was held that the value of the suit in that case was Rs. 800 odd, that being thirty times the land revenue, and not more than Rs. 1,000, which was stated in the affidavit of the appellant as the market value of the land. The view is well established that under the corresponding provision in S. 110 of the Code, the applicant is not bound by the fiscal standards under the Court-fees and Suits Valuation Acts, by which the suit may have been valued, but is entitled to show the actual market value of the claim. 'Lakshminarasimhacharyulu v. Ratnam', AIR 1949 Mad 739 (FB) and — 'Kishan Chand v. Lachhmi Chand', AIR 1933 All. 15.

(9) The revised view of this Court in regard to maintainability of second appeals under para 32 of the Himachal Pradesh (Courts) Order, 1948, is this. If the value of the suit, which means the amount of the subject-matter of the suit or the market value of the property which is the subject-matter of the suit, satisfies the condition of the money value under the relevant provision of the said paragraph, the appeal will be maintainable under the first alternative of the value of the suit, and in that case it will not be necessary to call in aid the other alternative of the decree appealed from involving directly some claim to, or question respecting, property of like value. The latter alternative can, however, be availed of where the decision, beyond awarding relief in respect of the particular property which is the subject-matter of the suit, affects rights in other properties as well, and, on the same principle, this alternative may also apply in cases where the matter in dispute is one which is incapable of valuation, as in the case of easements.

(10) According to the above interpretation of the provisions, irrespective of the fact that the jurisdictional value of the suit in the present case was only Rs. 250, as the market value of the subject-matter of the suit was more than Rs. 1,000, the present second appeal is clearly competent.

(11) Coming to the merits of the case, I am of the opinion that the findings of the Courts below on both the points were correct. As regards relinquishment, the defendant has come into the witness-box and explained his aforesaid reply to the letter of his brother Kundan by saying that he wrote it only sarcastically due to the partition not having been effected fairly. It can be said that he offers this explanation because now it suits his purpose to do so. But the reply itself does not lend itself to the interpretation sought to be placed on it by the plaintiff. It no doubt said that the defendant would take no share in the land, but the reason which he gave for not taking any share in the land, namely, that it had been acquired by Kundan, was against the terms of the deed of partition. In the partition deed the land excluded from partition on the ground of its being the self-acquired property of one brother or another was some other land, and the land in suit was not so excluded but partitioned as joint family property liable to partition. It is also clear that in describing the land as Kundan's self-acquired property the defendant was stating something which was against his own interests and in favour of the interests of Kundan. The irresistible conclusion, therefore, is that the defendant's remarks that he will take no share in the land as it was Kundan's self-acquisition were nothing but ironical. Furthermore, the defendant also left it to Kundan to do as he thought proper, and as the latter also never treated the defendant's reply as amounting to a relinquishment (for he allowed the defendant's name to continue to be recorded as a co-sharer with him in equal share), it is manifest that the property never changed its true character of property in which shares had been defined by agreement though it had not been divided by metes and bounds, or property held by the parties as tenants-in-common. 'Balkishan Das v. Ram Narain', 30 Ind App 139 (PC). The appellant's plea of relinquishment by the defendant has therefore been rightly rejected by both the Courts below.

(12) His plea of acquisition of title is equally untenable. A plethora of rulings were cited in this case, but the point is so well-settled that I need not discuss them. As between co-sharers or tenants in common, in the absence of ouster possession of one is tantamount to possession of all. If any support for this view be needed, I might refer to — 'Vishnu Janardan v. Mahadev Keshav', AIR 1942 Bom 44 and — 'Usuf Hasan v. Raunaq Ali', AIR 1943 Oudh

54. Now in this case the plaintiff's father Kundan took possession of the defendant's share after the partition and, as already shown, despite the said ironical letter of the defendant, as a tenant-in-common with him and therefore not adversely to him. There is no proof of any ouster thereafter.

It was, however, contended by the learned counsel for the plaintiff-appellant that mere long possession of Kundan and on his death of the plaintiff, which meant possession for forty years, amounted by itself to an ouster of the defendant. In support of this contention the learned counsel cited certain rulings of which two may be cited as typical of all: — 'Khemchand v. Dayaram', AIR 1941 Sind 50 and — 'Basu v. Mt. Nanhi', AIR 1924 All. 920. But long possession had to be coupled with other circumstances to constitute an ouster. And that for the obvious reason that possession of one co-sharer or tenant-in-common being possession of all, unless something happens to alter it, such possession will retain its character during the entire tenure of its existence. In the present case, no such other circumstance has been pointed out. That being so, mere length of possession did not amount to ouster. I find support for this view from the said 1943 Oudh case. Not only was there no ouster in the present case, but about eight years after the partition, in the course of the settlement operations in 1915, although Kundan at first stated in the absence of the defendant that the latter had no share, he admitted on a subsequent date when the defendant put in appearance that the latter had a moiety share. This record relates to the land in village Galyanda Behna only, but the said statement of Kundan was preceded then and there by that of his nephew Jaikishan, son of Bakshi Ram, in which the fact of defendant's share being half was based on the family partition of Samvat 83 Kham, which related to all the property in suit. This statement of Kundan also negatives the theory of relinquishment of eight years before.

(13) In the result, therefore I agree with the Courts below in holding that the defendant-respondent had neither relinquished his share in the land in suit nor lost title to it by adverse possession of Kundan and the plaintiff. The appeal is accordingly dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 H. P. 29 (Vol. 40, C. N. 13)

CHOWDHRY J. C.

Attra, Defendant-Petitioner v. Atma Ram and others, Plaintiffs-Respondents.

Civil Revn. No. 67 of 1952, D/- 31-10-1952.

(a) Civil P. C. (1908), S. 115 — Unregistered document required by law to be registered erroneously admitted and considered — No revision lies — (Evidence Act (1872), S. 90) — (Registration Act (1908), S. 49). AIR 1951 Him. P. 16, Distinguished. (Para 4)

Anno: Civil P. C., S. 115 N. 12; Evid. Act, S. 90 N. 3; Regis. Act, S. 49 N. 39.

(b) Tenancy Laws — Punjab Tenancy Act (16 of 1887), S. 77 (3) (d) — Suit by tenant — No question of establishment of plaintiff's right to occupancy — Suit does not fall under Cl. (d).

Clause (d) of sub-s. (3) of S. 77, contemplates suits by a tenant to establish a claim to a right of occupancy, or by a landlord to prove that a tenant has not such a right. A suit by a tenant, where no question of the establishment of the plaintiff's right of occupancy arises, is not the suit of the nature contemplated by the said clause and is cognisable by Civil Court. (Para 5)

(c) Tenancy Laws — Punjab Tenancy Act (16 of 1887), Ss. 77 (3) (g), 50 and 50 A — Suit not coming within S. 50 but coming within circumstances mentioned in S. 50 A can be filed in civil Court.

Where the plaintiff does not profess to have been dispossessed of his tenancy in execution of a decree or in pursuance of an order under S. 44 or S. 45, he does not also profess to have been ejected from his tenancy in pursuance of an order under S. 45 by reason of having failed to institute a suit under that section, he may file suit for possession in civil Court, specially when he does not recognise the relationship of landlord and tenant between the parties. In fact the newly added S. 50-A clearly shows that in certain circumstances it is open to a person dispossessed to seek his remedy in a civil Court. Those circumstances are that the person should not be one whose ejectment had been ordered by a Revenue Court under S. 45, sub-s. (6), or whose suit had been dismissed under S. 50. (Para 6)

(d) Civil P. C. (1908), S. 115 — Point of want of jurisdiction in lower Court cannot be allowed in revision, to get round the concurrent finding of fact, when substantial justice has been done. (Para 8)

Anno: Civil P. C., S. 115 N. 2, 9.

Labh Singh, for Petitioner; Atma Ram Respondent in person.

REFERENCES: Courtwise/Chronological/ Paras

('18) 28 Cal LJ 220: (AIR 1918 Cal 233(1))	4
('51) AIR 1951 Him P 16	4
('26) AIR 1926 Lah 128: (92 Ind Cas 597)	7
('26) AIR 1926 Lah 613: (96 Ind Cas 479)	7
('37) AIR 1937 Lah 849: (175 Ind Cas 808)	7
('41) AIR 1941 Lah 189: (ILR (1941) Lah 499 FB)	7

ORDER: This is an application in revision by the defendant Attra against the judgment and decree of the learned District Judge of Mahasu and Sirmur, dated 1-3-1952, affirming the judgment and decree of the Senior Subordinate Judge, Nahan, dated 10-12-1951, whereby the suit of the plaintiff-respondent Atma Ram for possession of a certain cultivatory holding was decreed.

(2) The defendant-petitioner was at one time occupancy tenant of the land in suit. The case of the plaintiff-respondent was that Attra had relinquished his occupancy rights in the land in 1993 B., that thereafter the proprietor Jagat Bahadur had let out the land to the plaintiff, and that on 11-7-1949 Attra had wrongfully dispossessed the plaintiff. The present suit was filed on 16-8-1950.

(3) It was held by the trial Court that Attra had in fact relinquished his occupancy rights as alleged by the plaintiff, and that the latter had been let into possession of the land by the proprietor. That Court, therefore, granted the plaintiff-respondent a decree for possession of

the land. The defendant Attra went up in appeal to the District Judge, but his appeal was dismissed, the District Judge agreeing with the findings of the trial Court. The defendant has now come up in revision to this Court.

(4) The plaintiff-respondent Atma Ram was not represented by any counsel, and I have therefore had the benefit of the arguments of the learned counsel for the defendant-petitioner only. He impugned the judgment of the lower appellate Court on merits, his contention being that the petitioner continues to be recorded as an occupancy tenant of the land in question, and that the presumption of correctness that attaches to that record under S. 44, Punjab Land Revenue Act had not been rebutted in this case because the deed of relinquishment Ex. P. 1 relied upon by the Courts below was not admissible in evidence as the document was compulsorily registrable under S. 17 (b), Registration Act.

He also argued that one Bhau, to whom the proprietor is said to have leased out the land after the alleged relinquishment by the petitioner, had not been produced, and that the lower appellate Court had relied upon a ruling — 'Brojonath v. Maheswar', 28 Cal L J 220 which was not applicable to the facts of the case.

Even if it be conceded that all these contentions put forward by the learned counsel for the defendant-petitioner be correct, that would not be a good ground for interference by this Court in exercise of its revisional jurisdiction. The simple reason for this view is that the Court below had the jurisdiction to decide the case erroneously. The learned counsel for the petitioner cited a ruling of this Court reported as — 'Beg Ram v. Charan Das', AIR 1951 H P 16. The present is however not a case where the Court below has omitted to consider a certain piece of evidence, but a case where it is said to have come to a wrong conclusion with regard to the admissibility of a certain document. The Court below did not omit to consider that document; on the contrary, it did consider that document although it arrived at a conclusion which the learned counsel for the petitioner challenges as erroneous. That ruling has therefore no application. I hold that no interference in revision is called for on the merits of the case.

(5) The learned counsel for the defendant-petitioner, however, argued that the decisions of the Courts below should be set aside because they had no jurisdiction to decide the case. The contention was that the suit was cognizable by a revenue Court and not by a civil Court. In support of this contention the learned counsel for the petitioner argued that the case fell within the purview of Cl. (d) of sub-s. (3) of S. 77, Punjab Tenancy Act. That clause contemplates suits by a tenant to establish a claim to a right of occupancy, or by a landlord to prove that a tenant has not such a right. This was not a suit by a landlord but by a tenant, and no question of the establishment of the plaintiff's right of occupancy arose. Clearly therefore the suit was not of the nature contemplated by the said clause.

(6) The learned counsel for the defendant-petitioner then relied upon Cl. (g) of the same sub-section which relates to suits by a tenant under S. 50 for recovery of possession or occupancy, or for compensation, or for both. Under S. 50 a tenant who has either been dispossessed without his consent of his tenancy or any part thereof otherwise than in execution of a decree or than in pursuance of an order under S. 44 or S. 45, or who, not having instituted a suit under S. 45, has been ejected from his tenancy or any part thereof in pursuance of an order under that section, denies his liability to be ejected, may, within one year from the date of his dispossession or ejectment, institute a suit for recovery of possession or occupancy, or for compensation, or for both. The present plaintiff-respondent did not profess to have been dispossessed of his tenancy in execution of a decree or in pursuance of an order under S. 44 or S. 45. He did not also profess to have been ejected from his tenancy in pursuance of an order under S. 45 by reason of having failed to institute a suit under that section. It appears therefore to have been open to him to institute a suit for recovery of possession and other reliefs contemplated by S. 50. From the wordings of the section, however, it appears that a suit may be filed by a tenant under the provisions of that section where the existence of the relationship of tenant and landlord between the parties is not denied. And in that case, if the other conditions of the section are satisfied, as stated above, it is open to a tenant to file a suit in the revenue Court within one year from the date of his dispossession. But that does not appear to me to mean that a suit under S. 50 is the only remedy open to a dispossessed tenant, or, in other words, that a civil suit can in no circumstance be brought.

In fact, the newly added S. 50-A clearly shows that in certain circumstances it is open to a person dispossessed to seek his remedy in a civil Court. Those circumstances are that the person should not be one whose ejectment had been ordered by a revenue Court under S. 45, sub-s. (6), or whose suit had been dismissed under S. 50. It is manifest therefore from the aforesaid provisions of the Punjab Tenancy Act itself that an aggrieved person may also seek his remedy by a civil suit, and it appears to me that he may do so if the circumstances mentioned in S. 50-A do not exist, and if his suit does not come within the four corners of S. 50. In the present case the plaintiff-respondent's ejectment had not been ordered by a revenue Court under S. 45, sub-s. (6), nor had any suit of his been dismissed under S. 50. None of the bars against the institution of a civil suit mentioned in S. 50-A, therefore, existed. As regards S. 50, he did not file the present suit recognising the existence of the relationship of tenant and landlord between himself and the petitioner. On the contrary, he treated the petitioner as a trespasser who had wrongfully dispossessed him of the land in suit. It is also noteworthy that he filed the present suit after the expiry of the period of limitation of one year prescribed by that section. In these circumstances, it was certainly open to him to file the present suit in a civil Court.

(7) The learned counsel for the defendant-petitioner cited two rulings in support of the contention that even after the expiry of one year a suit under S. 50, Punjab Tenancy Act could be filed. These rulings were: — 'Nand Ram v. Ishar', AIR 1926 Lah 128, and — 'Piran Ditta v. Lal', AIR 1926 Lah 613. It may be that a suit under S. 50 is competent even after the expiry of one year (a point upon which I need not express any opinion in this case), but it is to be noticed that they were both cases

in which the person who filed the suit did not repudiate the existence of the relationship of tenant and landlord between himself and the defendant. On the other hand, I find support for the view held by me above in the Full Bench decision of the Lahore High Court reported as — 'Ilam Din v. Mangal Singh', A I R 1941 Lah 189 (FB), where it was laid down that a suit by a person claiming possession of the land under title of ownership or any title other than a title as a tenant could be filed in a civil Court. Likewise, it was held in — 'Maru v. Abdul Rahim', AIR 1937 Lah 349, that a suit for recovery of possession by one who claimed to have acquired title by adverse possession was cognizable by a civil Court. In the present case, the plaintiff claimed recovery of possession of the land in suit otherwise than as a tenant, and it was open to him therefore to have filed the present suit in a civil Court. The argument of the learned counsel for the defendant-petitioner based on want of jurisdiction has therefore no force.

(8) Even if the contention of the learned counsel for the defendant-petitioner with regard to want of jurisdiction were correct, that by itself would not have necessarily been any ground for reversing the decisions of the Courts below. In the first place, this Court could have taken action under S. 100 (3), Punjab Tenancy Act. In the next place, the High Court is not bound to allow a point of jurisdiction to be raised for the first time in revision, especially where, as in the present case, substantial justice has been done. There is a concurrent finding of both the Courts below, based on a document executed by the defendant-petitioner himself, that he had in fact relinquished his occupancy rights in the land in suit. He now wants to get round the relinquishment by urging technical objections. Whether the decisions of the Courts below were right or wrong with regard to those technical objections of the defendant-petitioner, so far as this Court is concerned it will not interfere with those decisions because substantial justice appears to have been done between the parties.

(9) The revision is rejected and the judgment and decree of the lower appellate Court are affirmed.

B/R.G.D. Revision dismissed.

A. I. R. 1953 H. P. 31 (Vol. 40, C. N. 14)

CHOWDHRY J. C.

Ganga Datt and others, Defendants-Petitioners v. Mandir Narayan Deota, Plaintiff-Respondent.

Civil Ref. No. 45 of 1951, D/- 2-6-1952.

(a) Tenancy Laws — Punjab Tenancy Act (3 of 1887), S. 100 (1) — Reference under — Court must submit its opinion along with record — Court not to submit opinion on merits — (High Court Rules and Orders, (H. P.), Chap. 15, Vol. I, Rules 3 and 15) — (Civil P. C. (1908), O. 46, R. 1).

In making a reference under S. 100(1) the Court must fulfil the requirements of R. 3 of Chapter 15 of the High Court Rules and Orders and of R. 1 of O. 46, Civil P. C. Hence, it is incumbent upon the District Judge when making the reference (1) to draw up a statement of the facts of the case, and (2) to state his own opinion showing how it appeared to him that the Court subordinate to his control had determined a suit of a class mentioned in S. 77 which under the provisions of that section should have been heard and determined by a revenue Court. Mere submission of opinion without the records is a mistake. (Para 2)

The Court, however, is not entitled to submit its opinion on the merits of the case. (Para 2)

Anno: C.P.C., O. 46 R. 1 N. 8.

(b) Tenancy Laws — Punjab Tenancy Act (3 of 1887), S. 100 (1) and (2) — Decision by Court of incompetent jurisdiction — Inference of prejudice.

The very fact that a decision has been arrived at by a Court of incompetent jurisdiction is sufficient to justify the inference that the parties have been prejudiced by such a decision. It is difficult to visualise a case where it could justifiably be said that the parties had not been prejudiced by a decision even though it had been arrived at by a Court of incompetent jurisdiction, unless it be a case where in spite of the mistake as to jurisdiction the parties knowingly agree to be bound by such a decision. (Plaint was directed to be returned for presentation to the proper Court). (Para 6)

Bakshi Sita Ram, for Petitioners; Rattan Chand Sud, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('09) 31 All 253: (6 All LJ 145 FB) 6
('01) 13 Pun Re (Rev) 1901: (41 Pun LR 1902) 6
('22) 3 Lah 84: (AIR 1922 Lah 33) 6
Lah LT (Rev) 57 (Sic) 6

JUDGMENT: This is a reference by the learned District Judge of Mahasu and Sirmur under S. 100, Punjab Tenancy Act. The plaintiff Mandir Narayan Deota filed a suit against the defendants for recovery of certain dues for grazing their sheep and goats on a pasturage known as the Kanda Kalga Patan. The defendants denied the plaintiff's right to claim the grazing dues. It appears that there were two previous decisions, one dated 1-4-1994 B. passed by the Raja Sahib of Bushahr and the other dated 21-5-1946 A. D. passed by Sir Dalip Singh as Judicial Committee. The plaintiff relied upon the former and the defendants upon the latter decision. The trial Court, the Subordinate Judge of Rohru, decreed the suit on 25-4-1949 on foot of the judgment of the Raja Sahib without going into any other question. The defendants went up in appeal to the District Judge and there raised for the first time an objection that the suit was not cognizable by a civil Court. The District Judge held that the present was a suit of the class mentioned in S. 77 (3) (o), Punjab Tenancy Act, which under the provisions of that section should have been heard and determined by a revenue Court. He has, therefore, submitted the record of the suit to this Court under S. 100(1) of that Act.

(2) Before entering into the merits of the reference I deem it necessary to refer to the mistakes committed by the learned District Judge in making the reference. I do so in order that similar mistakes may not be made in future in this newly formed State. The initial mistake committed by him will appear from the order which I passed under O. 46, R. 5, Civil

P. C., returning the reference for amendment in the light of the observations made by me in that order. The order is reproduced below:

"The District Judge has stated that on a plain reading of the said section he was not required to submit his opinion along with the records. This is in contravention of Rules 3 and 15, Chapter 15, Volume I, High Court Rules and Orders. It is also in contravention of the provisions of sub-cl. (a) of Cl. (1) of the said section, for the only way in which the High Court can find that it "appeared" to the civil Court making the reference "that a Court under its control had determined a suit of a class mentioned in S. 77 which under the provisions of that section should have been heard and determined by a Revenue Court" is by looking at the reference itself, which it would not be possible for the High Court to do if the reference does not fulfil the requirements of the said Rule 3 and O. 46, Rule 1, Civil P. C. It follows therefore that it was incumbent upon the learned District Judge when making the reference to (1) draw up a statement of the facts of the case, and (2) to state his own opinion showing how it appeared to him that the Court subordinate to his control had determined a suit of a class mentioned in S. 77 which under the provisions of that section should have been heard and determined by a revenue Court. The mere fact that the counsel for the parties conceded that point would not be a compliance with the above rules."

In the amended reference received from him the learned District Judge has not only expressed the opinion called for from him but also his opinion on the merits of the case. He was again in error in doing so. An opinion on the merits of the case was neither asked for from him nor was he entitled to submit under the rules, and it will therefore be disregarded.

(3) Coming to the merits of the reference and to the question of the proper order to be passed by this Court, the suit being by a landowner to recover moneys claimed as due for the enjoyment of right of pasturage, it belongs to the class mentioned in S. 77 (3) (o), Punjab Tenancy Act and so was exclusively cognizable by a revenue Court. The learned counsel for the parties conceded this before the District Judge and also here. They also agreed that the first of the two conditions mentioned in S. 100(2) of the Tenancy Act was satisfied, namely, that the suit had been determined in good faith by the trial Court. This was obviously due to the fact that the plea of the suit being cognizable by a revenue Court was not taken before the Subordinate Judge but, as stated above, for the first time before the District Judge in appeal. The learned counsel were, however, at variance with regard to the other condition mentioned in the said subsection as to whether the parties had, or had not, been prejudiced by the mistake as to jurisdiction committed by the trial Court. The learned counsel for the defendants, who were the appellants before the District Judge, contended that such a prejudice had been caused and therefore this Court should not order that the decree passed by the Subordinate Judge of Rohru be registered as a decree of the appropriate revenue Court. The proper order, according to him, to be passed by this Court is that the plaint be returned for presentation to the appropriate revenue Court. On the other hand, it was argued by the learned counsel for the plaintiff, the respondent in the lower appellate Court, that no such prejudice had been caused, and that the proper order to be passed by this Court is that the decree be registered in the appropriate revenue Court which had jurisdiction and the appeal filed by the defendants before the District Judge be returned to them for presentation to the appropriate appellate revenue Court. It will thus be seen that the attempt of the plaintiff is, subject to the result of any future appeal, to preserve the decree that has already been passed in his favour, whilst the defendants want to get rid of it and to have a trial 'de novo'. It may be further mentioned that the presiding officer at Rohru who decreed this suit as a Subordinate Judge also exercised jurisdiction as the appropriate Assistant Collector on the revenue side.

(4) The sole question for determination before me, therefore, is whether or not the parties have been prejudiced by the mistake as to jurisdiction committed by the trial Court, and what is the proper order that this Court should pass in this reference.

(5) It was urged by the learned counsel for the defendants that his clients had been prejudiced because the presiding officer in the trial Court decided the question of 'res judicata' as a civil and not as a revenue Court, as he should have done, and that if the point had been taken into consideration by that presiding officer as a revenue Court it is possible that he might have arrived at a different conclusion. It was further argued by him that the defendants had also been prejudiced because the trial Court had recorded no finding on the other questions that arose for determination in the suit on the pleadings of the parties. If the plaint is returned for presentation to the appropriate revenue Court, as suggested by him, the appellate revenue Court will have the benefit of that Court's findings on the other issues as well as on the issue of 'res judicata', and, therefore, it will not be necessary for the appellate Court to remand the suit in case it did not agree with the trial Court on the sole question of 'res judicata' so far decided by it. The argument put forward by the learned counsel for the plaintiff was that the decision of the trial Court on the question of 'res judicata' would have been the same whether it decided that issue as a civil or as a revenue Court, and that if the appellate revenue Court concurred with the finding on the said question already recorded by the trial Court the other issues need not be decided. To make the parties go once more to the trial Court would, according to the learned counsel, therefore, lead to an unnecessary harassment of the parties.

(6) The learned counsel for the plaintiff cited the ruling reported as — 'Chuha v. Asa', 3 Lah 84. In that case it appeared to the High Court in second appeal that the Courts below had decided a suit which was exclusively triable by a revenue Court under S. 77 (3) (d), Punjab Tenancy Act, and, acting under section 100 (3) of that Act the High Court directed that the decree of the civil Court of first instance be registered as that of the appropriate revenue Court and that the appeal be returned by the District Judge to the appellants for presentation to the appropriate appellate revenue Court. This order could not have been passed unless it were held that the parties had not been prejudiced

by the mistake as to jurisdiction. The reported decision is, however, quite silent on the point, and it cannot, therefore, serve as a guide for determination of the question that has arisen in this reference. He further cited the following three rulings: — 'Gurdas v. Hassan', 13 Pun Re (Rev.) 1901; — 'Banu Mal v. Ganda Singh', Lah L T (Rev.), 57 (sic); and — 'Bhawani Singh v. Dilawar Khan', 31 All 253 (FB). All that these rulings lay down is that when a matter which has already been decided by a competent civil Court, e.g. the question of title to property, it cannot be reopened by the revenue Court. That is, however, not tantamount to saying that the decision of a civil Court is always binding on a revenue Court, for if the former decision of the civil Court was on a matter which it had no jurisdiction to decide it will not be binding on the revenue Court in a subsequent suit between the parties. Furthermore, in order that a decision in a former suit be binding on the parties in a subsequent suit it is necessary under S. 11, Civil P. C., that the former must have been a Court competent to try the subsequent suit. That being so, the decision on the question of 'res judicata' in the subsequent suit is likely to vary according to the nature of the Court trying the subsequent suit. It follows, therefore, that the finding on the question of 'res judicata' recorded by the presiding officer at Rohru as a Subordinate Judge need not necessarily have coincided with that recorded by him as a revenue Court. What would the finding of the presiding officer have been as a revenue Court cannot of course be surmised, and it cannot, therefore, necessarily be said that the defendants have been prejudiced by the adverse finding already standing against them.

It is, however, not necessary, and in fact not possible, to enter into that question, for, in my opinion, the very fact that a decision has been arrived at by a Court of incompetent jurisdiction is sufficient to justify the inference that the parties have been prejudiced by such a decision. Indeed, I find it difficult to visualise a case where it could justifiably be said that the parties had not been prejudiced by a decision even though it had been arrived at by a Court of incompetent jurisdiction, unless it be a case where in spite of the mistake as to jurisdiction the parties knowingly agree to be bound by such a decision. I hold that due to the mere fact of want of jurisdiction the parties have been prejudiced by the decision of the trial Court, and that therefore the proper order for this Court to pass is, not that the decree passed by the Subordinate Judge of Rohru be registered as that of the appropriate revenue Court, but that the plaint be returned for presentation to the proper revenue Court. As the defendants failed to take the plea of jurisdiction in the trial Court, I would not make any order as to costs.

(7) The reference is accepted, the judgment and decree of the Subordinate Judge at Rohru are set aside and the Subordinate Judge is directed to return the plaint to the plaintiff for presentation to the Court in which the suit should have been instituted.

B/G.M.J. Reference accepted.

A. I. R. 1953 H. P. 33 (Vol. 40, C. N. 15)

CHOWDHRY J. C.

Ranvijai Singh, Petitioner v. Divisional Forest Officer and others, Respondents.

Civil Misc. Petn. No. 18 of 1951 D/-31-10-1952.

(a) Constitution of India, Art. 226 — Laches — Conservator of Forest alleging petitioner's contractor to have cut trees from reserve forest and demanding compensation from petitioner on the risk of being prosecuted — Petitioner denying his liability — Repeated demands and repeated denials — Petitioner's car attached for recovery of compensation — Petition under Art. 226 on the 18th day after attachment — Held that application did not suffer from laches — Held also that application was maintainable since the executive act which gave the cause of action for application under Art. 226, arose after the commencement of the Constitution. (Paras 8, 9)

(b) Constitution of India, Art. 226 — Other remedy open — Petition, maintainability of.

Wherever there is a wrong there is a remedy, but it cannot always be remedy by invocation of the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution. There must be exceptional reasons for asking for the exercise of that extraordinary jurisdiction, for otherwise the ordinary legal remedy by a suit under the general law would be rendered wholly nugatory. Such an exceptional reason must be invariably held to exist where an application for relief under the said Article is based on infringement of one of the fundamental rights guaranteed by the Constitution. Such an exceptional reason would also seem to exist where, though not for enforcement of any of the fundamental rights, such an application is moved for "any other purpose" if that purpose cannot be served by an ordinary suit. It has, therefore, been held that the extraordinary jurisdiction in question may be invoked if the alternative remedy by suit is less convenient, beneficial or effective. (Para 10)

Petitioner's car was attached by the order of the Divisional Forest Officer for recovery of price of trees alleged to have been felled by the petitioner's contractor from the Reserve Forest. Petitioner had denied his liability. The petitioner filed a petition under Art. 226 for appropriate writ:

Held that the petitioner has a remedy by way of a suit for a declaration and injunction which would have been equally convenient, beneficial and effective specially when the Government had undertaken not to proceed with further attachment and sale for a period of notice under S. 80, C. P. C. if petitioner chose to file a suit and that therefore the petition under Art. 226 should be dismissed. (Paras 13, 14)

Mela Ram for Petitioner; L. N. Sethi Govt. Advocate for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('16) AIR 1916 P. C. 78: (43 Cal 694) 13
('30) AIR 1930 Bom 331: (127 Ind Cas 330) 13
('46) AIR 1946 Bom 216: (47 Cri LJ 594) 12
('46) AIR 1946 Bom 407: (ILR (1946) Bom 832) 12

('49) AIR 1949 Bom 229: (ILR (1950) Bom 233) 12
('52) AIR 1952 Cal 112: (88 Cal LJ 137) 11
('37) AIR 1937 Lah 25: (169 Ind Cas 932) 13
('37) AIR 1937 Lah 389: (173 Ind Cas 444) 13
('52) 54 Pun L. R. 426: (AIR 1952 Punj 387) 13

ORDER: This is an application under Art 226 of the Constitution by Maharaj Ranvijai Singh of Nahan for the issue to the respondents, the Divisional Forest Officer Nahan, the State of Himachal Pradesh and the Conservator of Forests at Nahan, of a writ of mandamus or prohibition, or such directions or orders as may be necessary, preventing them from proceeding with the recovery of Rs. 2,907/12/- as value of trees alleged to have been cut by the petitioner's contractors from Government Forest.

(2) The private forest of the petitioner, known as the Bikram Bagh, and the reserved forest belonging to the Government, known as the Pairiwala, adjoin each other. The petitioner sold some trees in the year 2003 B., corresponding roughly to 1946 A. D., to certain contractors, who felled and removed them. The Forester made a report to the Divisional Forest Officer on 4-1-2004 B. that the contractors had cut and converted into charcoal 150 'kokath' and 44 'khair' trees from the said Government forest. The Divisional Forest officer, after personally verifying the correctness of the Forester's report, made a report to the Conservator of Forests on 19-1-2004 B. Both the reports stated that the stumps of the cut trees bore the hammer mark of the petitioner. The Conservator of Forests directed the Divisional Forest Officer by his letter dated 17-3-2004 B. to realise the price of the 'khair' trees at Rs. 50/- per tree and that of the 'kokath' trees at the standard rates from the petitioner.

(3) After the above intra-departmental communications, beginning with the Forester's report and ending with the Conservator's fixation of price of the trees and his direction to the Divisional Forest Officer to realise the same from the petitioner, there ensued an exchange of correspondence between the Divisional Forest Officer and the petitioner consisting of demands by the former for recovery of Rs. 2,907/12/- at the said rates and repudiation of the demands by the latter. The petitioner denied that his contractors had cut any trees from the State forest and insisted on an inquiry on the spot in his presence before he could be made liable. The Divisional Forest Officer rejected the petitioner's request for an inquiry on the ground that the amount had already been fixed by the Conservator and persisted in his demand for recovery of that amount. In more letters than one the Divisional Forest Officer threatened to take the matter to Court if the amount demanded was not paid. In some of these letters of demand he described the claim as price and in others as compensation. There is also a difference between the parties as to whether the first demand was only made on 24-12-1949, as contended by the petitioner, or whether there had been several demands before that commencing with one dated 27-9-2004 B. It is noteworthy that the demand dated 24-12-1949 was sent to the petitioner per registered post acknowledgment due, & that when referred to the earliest demand relied upon by the respondents, i. e. the one dated 27-9-2004 B., the petitioner (in his letter dated 31-7-1950) did not deny having received it but only pleaded that due to the death of his manager, one Ram Kishan, certain papers had been misplaced.

(4) The last demand by the Divisional Forest Officer was made on 12-8-1950. It was described as such and it was stated therein that the petitioner should communicate his final decision by 15-8-1950 otherwise the writer would be compelled to take the matter to Court. To this the petitioner does not appear to have sent any reply. On 19-9-1950 the Divisional Forest Officer addressed a letter to the Deputy Commissioner wherein, after giving a brief history of the case, it was stated that every effort had been made to persuade the petitioner to compound the case on payment of Rs. 2,907/12/- as compensation but without any result, and that the only alternative left was "to chalan the case in the Court". The Deputy Commissioner was asked to exert his influence to recover the compensation, and it was stated in the end that as the case had already been much delayed an early action was requested. A copy of this letter was sent on 30-9-1950 by the Deputy Commissioner to the petitioner with the request to compound the case. About a year later, i. e. on 25-9-1951, the Tahsildar attached the petitioner's car. The petitioner's allegations are that the attachment has been made under directions of respondent 3, the Deputy Commissioner of Sirmur, at the instance of respondent 1, the Divisional Forest Officer Nahan, in order to realise the amount in question as arrears of land revenue, and that the Tahsildar threatened to attach other property of the petitioner also for the realisation of that amount. These allegations have not been denied in the respondents' reply.

(5) On the eighteenth day after the attachment, i. e. on 13-10-1951, the petitioner filed the present application for the aforesaid relief. The grounds on which the application is based are that the question of whether any trees belonging to the Government were sold by the petitioner or cut by his contractors has never been inquired into in the presence of the petitioner or determined by a competent Court; that the compensation claimed was fixed by the Conservator behind the back of the petitioner; that the Conservator was not invested with any power to assess the compensation under the Indian Forests Act, 1927, and it could only be fixed by a competent Court; and that instead of resorting to a Court of law, as respondent 1 admittedly wanted to do, the respondents have adopted a mode of realisation of the amount claimed which is not warranted by law. It is also pleaded that the amount claimed is highly exaggerated.

(6) The respondents in their reply pleaded that the amount claimed was assessed by the Government of the ex-State of Sirmur after complete satisfaction and verification through the revenue department that the trees in question had been cut from the Government forest; that the Conservator of the Sirmur State Government was fully competent to assess the amount, and his orders are binding on the petitioner; that it was not possible to hold any further inquiry in the petitioner's presence after such a long time, nor was it necessary; that what was assessed was not compensation but only price or value of the forest produce in question; and that the mode adopted for its realisation was legal.

It was further pleaded by the respondents that the present petition deserves to be thrown out for the additional reasons that the petitioner has been guilty of laches, that there was no demand for justice or its refusal, and that another remedy by suit has not been availed of. One other plea, namely, that the State of Himachal Pradesh could not be represented by the Chief Conservator of Forests but by the President of India, was given up in the course of arguments before me. It may be stated, however, that the State of Himachal

Pradesh is not sought to be represented, but has only been sued through the Chief Conservator of Forests.

(7) The main question for determination in this case is whether the procedure adopted by the respondents for realising the amount in question is legal and valid. But certain objections, in the nature of preliminary objections to the determination of the said question by this Court in exercise of its extraordinary powers under Art. 226 of the Constitution, were raised on behalf of the respondents. These objections were based on grounds of laches and another remedy already mentioned. To these was added a third one in the course of arguments, and that was that as the amount in question had already become due on 17-3-2004 B. (sometime in 1947 A. D.)when it was assessed by the Conservator of Forests Sirmur State, the petitioner could not seek his remedy by a writ petition as Article 226 was not retrospective. To my mind, the first and third of these grounds are quite untenable, and these may be disposed of summarily.

(8) However long may the question of the petitioner's liability in respect of the trees have hung fire, it was only on 25-9-1951 that his car was attached for realisation of the same. If respondent 1 made repeated demands from him in writing, the petitioner parried them by denying his liability. Such wordy warfare might have continued ad infinitum for all the petitioner cared. It was only when going beyond mere demands, the respondents had the car of the petitioner attached on 25-9-1951 that his rights, as he imagines them, were affected. The present petition was, however, filed on the eighteenth day after the attachment, as adverted to above, and therefore, quite promptly. I hold that the present petition does not suffer from laches.

(9) Nor has the plea based on a retrospective effect, or rather want of effect, of Art. 226 has any force. And this for the same reason that the executive act which has given petitioner cause of action for the institution of the present application accrued to the petitioner after the commencement of the Constitution, i. e. on 25-9-1951, when his car was attached.

(10) The third preliminary objection raised on behalf of the respondents must, however, prevail. There is no doubt that wherever there is a wrong there is a remedy, but it cannot always be remedy by invocation of the extraordinary jurisdiction of this Court under Art. 226 of the Constitution. There must be exceptional reasons for asking for the exercise of that extraordinary jurisdiction, for otherwise the ordinary legal remedy by a suit under the general law, would be rendered wholly nugatory. Such an exceptional reason must in my opinion be invariably held to exist where an application for relief under the said Article is based on infringement of one of the fundamental rights guaranteed by the Constitution. Such an exceptional reason would also seem to exist where, though not for enforcement of any of the fundamental rights, such an application is moved for "any other purpose", if that purpose cannot be served by an ordinary suit. It has, therefore, been held that the extraordinary jurisdiction in question may be invoked if the alternative remedy by suit is less convenient, beneficial or effective. It is on this last-mentioned ground that the petitioner takes his stand in the present patently "any other purpose case".

(11) The first case relied upon by the learned counsel for the petitioner was that reported as — 'Nalini Ranjan v. Annada Shankar', A. I. R. 1952 Cal. 112. That was an application for a writ of certiorari for quashing of orders passed under the Workmen's Compensation Act. The alternative remedy pleaded in that case as a bar to the application was remedy by way of appeal under the Act. It was no doubt held that even though there be an alternative remedy a writ will be granted where the application is by an aggrieved party and it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction. But it was pointed out that an appeal was in fact preferred but as the defendants of the deceased could not be traced and service could not be effected on them the appeal was struck out. It was, therefore, a case of total non-existence of the suggested alternative remedy and not merely of its not being equally convenient, beneficial or effective. Another distinguishing feature is that in that case the absence of jurisdiction was apparent on the face of the proceedings. That cannot, however, be predicated of the proceedings taken in the present case to realise the amount. It is a matter of controversy in this case whether the amount sought to be recovered from the petitioner was compensation or price. If the latter, it was argued on behalf of the respondents that it was realisable as arrears of land revenue under section 82, Indian Forests Act, 1927.

(12) The other cases cited on petitioner's behalf fall in one category and they are: — 'Tan Bug Taim v. Collector of Bombay', A. I. R. 1946 Bom, 216; — 'Lady Dinbai Petit v. M. S. Noronha', AIR 1946 Bom, 407; and — 'Municipal Corporation Bombay v. Govind Laxman', AIR 1949 Bom, 229. They are all cases of petitions under section 45, Specific Relief Act, but the principles dealing with various writs, whether under that section or under Article 226 of the Constitution, are generally identical. I have said that these cases fall in one category for it was held in all of them that the legal remedy by suit could not be held to be an adequate legal remedy within the purview of proviso (d) to the said section where the giving of a notice under some statutory provision (60 days' notice under section 80, C. P. C., in the first two cases and one month's notice under section 521, City of Bombay Municipal Act, in the third) was a condition precedent to the institution of the suit. A scrutiny of the facts of these cases will, however, show that in each of them the mischief sought to be avoided would have been perpetrated while the person wronged awaited the expiry of the period of notice.

In the first case it was the execution of the order of requisition under Rule 75A, Defence of India Rules. The same was the case in the second, and in fact the Government categorically refused to stay proceedings of arbitration for determination of the amount of compensation payable in respect of the requisitioned property in order to enable the owner to give the requisite notice as a preliminary to the filing of suit against the Government.

In the third case if the requisite notice were to be given the rate-payer would not have been able to obtain the injunction he sought to restrain the Municipality from expending municipal fund contrary to the provisions of the City of Bombay Municipal Act. Where, on the other hand, the purpose of the suit is not frustrated by the giving of the requisite notice, it cannot be said that the remedy by suit is not adequate simply because the institution of the suit is conditional on the giving of such a notice. Thus, it is not every suit which must be preceded by a statutory notice, but only a suit the purpose of which will be thwarted by the giving of such a notice, that can properly be described as affording no adequate remedy.

Judged by this standard, it cannot be said that the alternative remedy of a suit would not have afforded equally adequate or efficacious relief to the present petitioner. There is nothing to indicate —indeed, the petitioner himself does not suggest, that the very purpose of the suit would have gone if he awaited the expiry of a notice to the Government under s. 80, C. P. C. To take into account the only mischief to which the petitioner might possibly have fallen a prey, there is no suggestion that, taking advantage of the period of notice, the Government would have sold the attached car. There is also nothing tangible to support the petitioner's contention that further property belonging to him would have been attached. On the contrary, an undertaking was given by the learned Government Advocate in the course of arguments before me that, if the petitioner were minded to file a suit, which must, of course, mean a suit without unreasonable delay, the Government would do nothing further to his detriment by taking advantage of the period of the statutory notice. I, therefore, hold that the alternative remedy of a suit could not in this case be said to be less adequate or efficacious.

(13) The learned counsel for the petitioner argued the same point from another angle. He argued that the suit in the present case would have had to be a suit for a declaration that nothing was due by him to the State as compensation for, or price of, trees cut from State forest, and for an injunction to restrain the respondents from realising the amount. He further argued that he could not have obtained the consequential relief of injunction without establishing his right to the substantive relief of declaration, but that a declaratory relief of that nature which affected only the pecuniary relationship between the parties to a contract could not be granted under s. 42, Specific Relief Act. And he cited the following rulings in support of his contention: — 'Sripatrao v. Shankarrao', AIR 1930 Bom, 331, — 'Nathu Ram v. Mula', AIR 1937 Lah 25 and —'Gopal Das v. Mul Raj', AIR 1937 Lah 389.

The declaration in question in the present case would have nothing to do with any pecuniary relationship between the parties to a contract, but with alleged liability of the petitioner in damages as a tort-feasor. The main distinguishing feature, however, appears to me to lie elsewhere.

The rule enunciated in the above rulings appears to me to be founded, though not so expressed in the rulings, on the principle underlying the proviso to s. 42, namely, that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. If, therefore, A is under any pecuniary liability to B, the latter would not be granted merely a declaration as to the existence of the liability because, being able to seek the further relief of recovery of the amount due under the liability, he omits to do so. It will be noticed that in all the three rulings cited the person claiming declaration was in the position of B in the above illustration who could claim recovery of the amount in respect of which merely a declaration was sought.

The present petition is, however, not in the position of B but of A, so that he could only seek a declaration as to his non-liability since the question of seeking further relief in respect of that liability did not arise. The hypothetical suit suggested by the learned counsel for the petitioner would not consequently come under the ban of the principle underlying the rulings cited by him. It is true, as argued by him further on the authority of — 'Kishori Lal v. Beg Raj', 54 Pun L. R. 426, that S. 42, Specific Relief Act, is exhaustive on the subject of declaratory decrees, and that, therefore, a declaratory decree can be passed only in cases which are covered by that section, but the hypothetical suit in question would not violate that principle either. The ruling just referred to is based on — 'Sheoparsan Singh v. Ramnandan Prasad Singh', AIR 1916 P. C. 78, which lays down:

> "The Court's power to make a declaration without more is derived from section 42 of the Specific Relief Act, and regard must therefore be had to its specific terms."

The hypothetical suit would not, however, be for a declaration 'without more,' for there would also be the consequential relief of injunction.

Finally, all the above difficulties vanish if, instead of praying for a declaration that no amount is due by the petitioner to the respondents in respect of the alleged liability, he prays for the declaration that the trees, if any have been cut by his contractors, belonged to the petitioner, besides praying for the said prohibitory injunction. In that case, the declaratory relief would clearly fall within s. 42 because the declaration would relate to petitioner's legal character as owner of the trees. Furthermore, the petitioner might confine himself merely to seeking the appropriate injunction.

(14) This disposes of all the possible obstacles suggested by the learned counsel for the petitioner to the petitioner claiming relief by the alternative remedy of a suit. I, therefore, hold that the petitioner is not entitled to claim relief by invoking the extraordinary jurisdiction of this Court by a writ petition under Art. 226 of the Constitution. It may be that no trees have in fact been cut by the petitioner's contractors, or that, even if cut, they belong to him, or that the respondents have adopted an illegal procedure for realising what they claim as their dues. But all these, and any other relevant matters can well be agitated by suit, and, if the petitioner succeeds in substantiating his allegations, he can obtain the appropriate relief, including relief of an ad interim injunction restraining the respondents from enforcing their claim pending the suit.

(15) The application is rejected and the rule nisi obtained by the petitioner on 20-10-1951 is discharged. The petitioner will pay the costs of the respondents, which I fix at Rs. 60/- (Rupees sixty).

A/R.G.D. Application dismissed.

A. I. R. 1953 H. P. 36 (Vol. 40, C. N. 16)

CHOWDHRY J. C.

Dasondhi, Petitioner v. The State.

Criminal Revn. No. 13 of 1952, D/- 23-10-52.

(a) Opium Act (1878), S. 9 (b) — There should be finding that accused knew that he was transporting opium.

Mere transport of contraband opium would be no offence. In order that a person be held to have committed the offence under S. 9 (b) there should be a finding that he knew that he was transporting contraband opium. (Para 3)

Anno: Opium Act, S. 9 N. 5.

(b) Criminal P. C. (1898), Ss. 342 and 537 — Accused charged under S. 9 (b), Opium Act — Duty to question about conscious transport — Failure — Effect.

Where the accused is charged under S. 9(b), Opium Act it is the duty of the Magistrate to question the accused in the course of his examination under S. 342 with regard to conscious transport of the opium. At the same time, the omission to question is an irregularity in procedure which is curable under S. 537, Criminal P. C., if it has not been shown that the accused has in any way been prejudiced in his defence or the omission or that the irregularity has occasioned a failure of justice. **(Para 3)**

Anno: Cr. P. C., S. 342 N. 35; S. 537 N. 6.

(c) Evidence Act (1872), S. 3 — Circumstantial evidence.

In order that the conviction of the accused can be justified on circumstantial evidence the evidence in question must be consistent with nothing but his guilt. **(Para 4)**

Anno: Evidence Act, S. 3 N. 6.

(d) Criminal P. C. (1898), S. 439 — Concurrent findings based on circumstantial evidence — (Evidence Act (1872), S. 3).

Where a concurrent finding of fact has been arrived at by the Courts below the High Court should not upset such a finding merely because the evidence and circumstances on record are in the opinion of the High Court capable of leading to a different conclusion. But where, the conviction is based entirely on circumstantial evidence, and the circumstantial evidence is not such as to lead inevitably to the guilt of the accused, it would certainly be necessary for the High Court to interfere with the finding of fact in exercise of its revisional jurisdiction. However suspicious might have been the circumstances appearing against the accused, suspicion is not proof. **(Para 4)**

Anno: Cr. P. C., S. 439 N. 15; Evid. Act, S. 3 N. 6.

Jai Gopal, for Petitioner; Kanwar Dalip Singh, for the State.

ORDER: This is an application in revision by one Dasondhi against his conviction by a first class Magistrate of Nahan for an offence punishable under S. 9 (b), Opium Act, 1878, and the sentence of two months' rigorous imprisonment and Rs. 200/- fine, or further two months' rigorous imprisonment in default of payment of fine, imposed upon him. His appeal has been dismissed by the learned Sessions Judge.

(2) One Tika Ram was also tried along with the present petitioner, and he has been convicted and sentenced under S. 9 (a) of the said Act for having been found in possession of contraband opium. It has been found that he was given a lift by the petitioner in a jeep, of which the petitioner was a driver, on the evening of 22-9-1951 from a place in the outskirts of Nahan to a spot about two furlongs on the Nahan side of the octroi and police barrier at Kala Amb. It has also come in evidence that while travelling in the jeep driven by the petitioner Tika Ram had with him a bag. Tika Ram was apprehended early the following morning near Kala Amb with about nine seers of contraband opium in the said bag. As Tika Ram travelled as aforesaid in the jeep driven by the petitioner, the latter has been convicted under S. 9 (b) of the Act for transporting the said opium.

(3) There can be no doubt that mere transport of contraband opium would be no offence. In order that the petitioner be held to have committed the offence in question there should be a finding that he knew that he was transporting contraband opium. One of the arguments put forward by the learned counsel for the petitioner in this connection was that no question was put to the petitioner under S. 342, Criminal P. C., as to such conscious transport of the opium in question. That is no doubt true, for the only question put to the petitioner in this connection was whether Tika Ram had the bag in question with him when he was being given a lift by the petitioner. No question was put to him as to the contents of the bag. It was the duty of the Magistrate to question the petitioner in the course of his examination under S. 342 with regard to conscious transport of the opium in question. At the same time, that is an irregularity in procedure which was curable under S. 537 of the Code since it has not been shown that the petitioner has in any way been prejudiced in his defence or the omission or irregularity has occasioned a failure of justice. It is noteworthy that the petitioner categorically denied that Tika Ram was at all travelling in his jeep, a denial which has been found to be totally unfounded. The said omission under S. 342 of the Code is therefore immaterial.

(4) It has however been strenuously argued by the learned counsel for the petitioner that there is no evidence worth the name that Tika Ram, whilst he was being given a lift by the petitioner in his jeep, was in possession of the opium with which he was apprehended the following morning, or, in any case, that even if it be conceded that Tika Ram was travelling in the petitioner's jeep in possession of the contraband opium in question, that the petitioner was cognisant of that fact. Both these points have been decided by the two Courts below against the petitioner on foot of certain circumstances.

Before I proceed further it must be remembered that the jeep was stopped at the octroi post at Kala Amb at about 8 p.m. on 22-9-1951, that Tika Ram had alighted from the jeep a short time before at a spot about two furlongs from the octroi post and that it was at about 5 O'clock the following morning that Tika Ram was apprehended by the police with the contraband opium in question somewhere near the spot where he had got down from the jeep. It will also be remembered that the contraband opium found in possession of Tika Ram consisted of nine cakes weighing about nine seers. The circumstances on which the two Courts below have relied for arriving at the said conclusions against the petitioner were that the petitioner gave Tika Ram a lift from a place outside Nahan to a spot just before the police and octroi post, that both took their meals and drank wine in the way, that when one of the prosecution witnesses, Kanhiya Lal, who was a fellow traveller with Tika Ram in the petitioner's jeep, asked the petitioner as to who Tika Ram was, the petitioner wrongly told him that he was a school master, and that the jeep though owned by one Hira Singh was mostly in the use of one Bootinath who has been stated by one of the prosecution witnesses as being a secret partner with one of the opium contractors. In order that the conviction of the petitioner could be justified on circumstantial evidence of this nature the evidence in question must be consistent with nothing but his guilt. That, I am afraid, cannot be pre-

dicated of the aforesaid circumstances relied upon by the two Courts below for the petitioner's conviction.

The said circumstances, whether taken singly or even cumulatively, do not necessarily lead to the conclusion that the petitioner was cognisant of the fact that Tika Ram, while travelling in the petitioner's jeep, was in possession of the opium in question. On the contrary, there is one circumstance which militates against even the theory of opium being in possession of Tika Ram while he was travelling in the petitioner's jeep, and that is that if in fact Tika Ram should have been carrying all that quantity of opium its presence could not have failed to be detected by its smell by the persons inside the jeep. One such person was the said prosecution witness Kanhiya Lal, but he has not given any statement to that effect. It is not inconceivable that it was between the hour of 8 p.m. on 22-9-1951, when Tika Ram got down from the jeep about two furlongs away from the octroi post, and the hour of 5 a.m. on 23-9-1951, when he was apprehended, that he came into possession of the opium in question. There is nothing in the prosecution evidence leading unmistakably to the conclusion that such a contingency was impossible. The learned Government Advocate cited a number of rulings in support of the contention that where a concurrent finding of fact has been arrived at by the Courts below the High Court should not upset such a finding merely because the evidence and circumstances on record are in the opinion of the High Court capable of leading to a different conclusion. That would no doubt be ordinarily true, but where, as in the present case, the conviction is based entirely on circumstantial evidence, and the circumstantial evidence is not such as to lead inevitably to the guilt of the accused, it would certainly be necessary for the High Court to interfere with the finding of fact in exercise of its revisional jurisdiction. However suspicious might have been the circumstances appearing against the petitioner, suspicion is not proof.

(5) The revision is allowed, the conviction and sentence of the petitioner are set aside and he is acquitted. The fine, if already realised from him, shall be refunded. The petitioner is on bail, the bail bonds are discharged and he need not surrender.

C/R.G.D. Revision allowed.

A. I. R. 1953 H. P. 38 (Vol. 40, C. N. 17)

CHOWDHRY J. C.

Guddumal and another, Petitioners v. The State.

Criminal Revn. No. 60 of 1951, D/- 2-7-1952.

Criminal P. C. (1898), S. 195 (1) (b) — Prosecution for forgery — Complaint by proper Court — (Himachal Pradesh (Courts) Order (1948), Para. 15).

In a suit filed against the petitioner for recovery of loan in the Court of the District Judge of Koti, the petitioner pleaded satisfaction and filed a receipt in support of his plea. The suit was decreed on 29-6-1948 and receipt was held to be a forgery. In an appeal filed against the decree, the Judicial Commissioner, acting as a Judicial Committee, recommended on 24-5-1949 to the Chief Commissioner that the appeal be dismissed and the petitioner prosecuted for forgery. According to the said recommendation finally a complaint was filed on 30-8-1949 by the District Judge of Mahasu and its cognizance was taken by a Magistrate. The petitioner contended that the Magistrate had no jurisdiction to do so as the complaint was illegal.

Held after a brief survey of how the State of Himachal Pradesh came to be formed and of the relevant laws in force at various times that the Court of the District Judge of Mahasu superseded the Court of the District Judge of Koti as the effect of Para. 15 of the Himachal Pradesh (Courts) Order, 1948 and that the complaint was therefore competent. (Para 13)

Anno: Cr. P. C., S. 195 N. 16.

M. L. Saxena Advocate, for Petitioners; Bakshi Sita Ram Govt. Advocate, for the State.

REFERENCE..... /Para.

('43) AIR 1943 Nag 36: (44 Cri LJ 237) 9

JUDGMENT: This is an application in revision by Guddumal and Thuniamal against an order of Sri Devaki Nandan Magistrate first class Kasumpti, dated 24-7-1951, passed in the following circumstances.

(2) One Amichand sued the petitioners on 30-11-1946 for recovery of a loan in the Court of the District Judge of Koti. The petitioners pleaded full satisfaction and filed a receipt in support of the contention. The District Judge decreed the suit on 29-6-1948, holding the receipt to be a forgery. The petitioners filed an appeal against the decree on 30-9-1948 before the Judicial Commissioner. Dr. J. N. Bannerji, Judicial Commissioner, who also exercised powers as a Judicial Committee, acting under a notification of the Chief Commissioner dated 14-1-1949, converted the appeal into an appeal to the Judicial Committee on 17-5-1949 and decided it as such on 24-5-1949, recommending to the Chief Commissioner that the appeal be dismissed and the petitioners prosecuted for filing a forged receipt. The Chief Commissioner accepted the recommendation and passed orders accordingly on 8-6-1949, and directed the file to be sent back to the Registrar of the Court of the Judicial Commissioner for necessary action. On 30-8-1949 a complaint was filed by the District Judge of Mahasu against the petitioners according to the said recommendation, and its cognizance was taken by the said Magistrate. The petitioners applied to him on 9-5-1951 that he had no jurisdiction to do so as the complaint was illegal. The Magistrate rejected the application on 24-7-1951. Against that order the petitioners first went up in revision to the Sessions Judge, and, on the latter dismissing the revision on 27-11-1951, they have now filed the present revision.

(3) A brief survey of how this State came to be formed and of the relevant laws in force at various times is necessary for the disposal of this revision.

(4) The Dominion of India was set up on 15-8-1947 by the Indian Independence Act, 1947 (10 and 11 Geo. VI, C. 30). Under this Act, His Majesty's Government in the United Kingdom ceased to have responsibility as respects the government of territories which comprised British India, and which were thenceforward to constitute the territories of the Dominion of India; the suzerainty of His Majesty over the Indian States and all treaties and agreements between them lapsed, leaving it optional with the Indian States to accede to either of the new Dominions; and until the passing of the constitution by the Constituent Assembly provision was made for the government of the

Dominion in accordance with the Government of India Act, 1935. On 24-12-1947 was passed the Extra-Provincial Jurisdiction Act (47 of 1947), empowering the Central Government to exercise in the areas outside the Provinces jurisdiction and powers acquired or that may be acquired by that Government by treaties, agreements etc., or delegate the jurisdiction to any officer or authority.

(5) The twenty-one Punjab Hill States and their nine tributaries, having acceded to the Dominion of India, were formed into this State of Himachal Pradesh and the administration of the State was taken over by the Central Government through a Chief Commissioner by the passing of Himachal Pradesh (Administration) Order, 1948, on 15-4-1948. Under this Order existing laws were to continue until repealed or amended, and the Chief Commissioner was empowered to appoint judges and other functionaries, but, until that was done, the existing officers were to continue to function. One of such existing laws was the State Courts Act, 1943, whereunder the various States had created courts, including a Chief Judicial Officer (equivalent to a High Court in British India) and a Judicial Committee, hearing appeals in civil and criminal matters from the Chief Judicial Officer and making final recommendations to the Durbar concerned. The proviso to Paragraph 5 of the Himachal Pradesh (Administration) Order provided that all powers exercisable under the laws in force in Himachal Pradesh immediately before the commencement of the Order by the Government of the Durbar of a State shall be exercisable by the Chief Commissioner.

(6) Four months later, i.e., on 15-8-1948, the Central Government passed the Himachal Pradesh (Courts) Order, 1948, in order to consolidate and amend the law relating to Courts in Himachal Pradesh. Under it, the Court of the Judicial Commissioner was established as the highest civil and criminal Court of appeal and revision for Himachal Pradesh. It was also provided by Paragraph 15 of the Order that in addition to the Court of the Judicial Commissioner and the Courts of Small Causes established under the Provincial Small Cause Courts Act, 1887, and the Courts established under any other law for the time being in force, there shall also be the civil courts of District Judges and Subordinate Judges. This was an inroad on the functions of the existing officers referred to in the Himachal Pradesh (Administration) Order, and the inroad on the existing laws referred to in that Order came in the shape of the Himachal Pradesh (Application of Laws) Order, 1948, passed on 25-12-1948, followed by the Merged States (Laws) Act, 1949, passed on 1-1-1950. The Himachal Pradesh (Repealing) Order, 1949, passed by the Central Government on 29-6-1949, repealed several enactments in force in the State, including the various State Courts Acts, 1943.

(7) In exercise of the powers conferred by the proviso to Paragraph 5 of the Himachal Pradesh (Administration) Order, 1948, the Chief Commissioner referred to the Judicial Committee, amongst others, all appeals, revisions, references and applications, civil and criminal, pending in the Chief Judicial Officer's Court, Simla Hill States, under S. 35 of the State Courts Act, 1943, Simla Hill States.

(8) The Constituent Assembly amended the Government of India Act, 1935, on 15-1-1949 by means of the Government of India (Amendment) Act, 1949, by insertion in the former Act of S. 290A which empowered the Governor-General by Order to direct the administration of any Indian State or group of States as a Chief Commissioner's Province. In exercise of this power, the Governor-General passed on 1-8-1949 the States Merger (Chief Commissioners' Provinces) Order, 1949, whereunder the States comprising Himachal Pradesh were to be administered as a Chief Commissioner's Province. Thus the Constituent Assembly endorsed the said Orders that had been passed under the Extra-Provincial Jurisdiction Act, 1947, it being provided at the same time by the proviso to Article 4 of the 1949 Order just mentioned that in future no orders were to be made under the said 1947 Act. Finally, the Constituent Assembly enacted the Constitution on 26-11-1949, and, except for some of its provisions which came into force at once, it commenced on and from 26-1-1950, and the Indian Independence Act, 1947, and the Government of India Act, 1935, were repealed.

(9) Against the above background, the arguments put forward on behalf of the petitioners may now be considered. One argument put forward was that on 24-5-1949, when the petitioners' appeal was dismissed by Dr. Bannerji as Judicial Committee, there could validly be no Judicial Committee. The contention was that before that Himachal Pradesh had already been formed and so had come under the jurisdiction of the Federal Court. But the forum of appeal depended on the substantive right of appeal as it existed at the time the action was brought. — 'Sitao Jhalia v. Emperor', AIR 1943 Nag 36. According to the law as it existed on the date when Amichand sued the petitioners the proper appellate authority was the Judicial Committee under the States Courts Act, 1943, and not the Federal Court.

(10) Next it was contended that since the coming into force of the Himachal Pradesh (Administration) Order, 1948, on 15-4-1948, the various Durbars came to end and therefore the Judicial Committee also came to end as it was attached to the Durbars, and therefore the aforesaid recommendation of the Judicial Committee dated 24-5-1949 and the Chief Commissioner's order on its basis dated 8-6-1949 were both ultra vires. With regard to the proviso to Paragraph 5 of the said Order it was argued that under it the Chief Commissioner did not acquire the prerogative which the Durbar had as the highest judicial authority to refer a case to the Judicial Committee under S. 35 of the States Courts Act, 1943. These arguments have, in my opinion, no force. Under Paragraph 5 of the Order existing laws continued in force, the said 1943 Act being one such law. And under the said proviso "all powers exercisable under the said laws by the Government of the Durbar of the State" were exercisable by the Chief Commissioner. These words are comprehensive and therefore included the said power under S. 35 of the 1943 Act. That the delegation of powers by the Central Government to the Chief Commissioner (in exercise of which the latter made the reference under the said notification dated 14-1-1949) was competent under S. 3 of the Extra Provincial Jurisdiction Act, 1947, was not questioned before me.

(11) Another argument on petitioners' behalf was that under S. 35 of the 1943 Act only a case "decided by the Chief Judicial Officer" could be entrusted to the Judicial Committee,

and therefore reference to the Committee of cases "pending in the Chief Judicial Officer's Court" under the notification of 14-1-1949 was unauthorised. This argument disregards the following words of S. 35 of the 1943 Act which come immediately after those quoted above, namely, "or any Court subordinate to Chief Judicial Officer." Therefore, taking the section as a whole, not only cases decided by the Chief Judicial Officer, but also those decided by any Court subordinate to Chief Judicial Officer (which would include cases, like the present, decided by a subordinate Court even though an appeal against the decision be pending in the Court of the Chief Judicial Officer), could be entrusted to the Judicial Committee.

(12) It was also argued that Dr. Bannerji instead of himself converting the appeal into a Judicial Committee appeal on 17-5-1949 should have returned it for presentation to the proper Court. That would have only led to delay and harassment. It was not shown that by the procedure adopted the proceedings subsequent to 17-5-1949 were vitiated.

(13) Lastly, it was argued by the learned counsel for the petitioners that the complaint filed by the District Judge of Mahasu on 30-8-1949 was incompetent. According to him "the complaint in writing of such Court or of some other Court to which such Court is subordinate" in S. 195(1)(b), Criminal P. C., could be the District Judge of Koti or the Chief Judicial Officer, which Courts, according to him, continued to exist in view of the provisions of Paragraph 15 of the Himachal Pradesh (Courts) Order, 1948. There is no doubt that the paragraph speaks of the establishment of the Courts of District Judges and Subordinate Judges in addition to "the Courts established under any other law for the time being in force." But that necessarily means Courts under existing law which did not come in conflict with the newly established Courts. The Court of the District Judge, Koti could not, and in fact did not, co-exist with the Court of the District Judge, Mahasu. The latter superseded the former. That being so, the "such Court" referred to in S. 195(1)(b), Criminal P.C., was the Court of the District Judge, Mahasu which succeeded the Court of the District Judge, Koti. The complaint was therefore quite competent.

(14) The application is rejected and the stay order passed on 26-12-1951 and confirmed on 17-1-1952 is vacated. Let the Magistrate concerned be informed accordingly.

C/V.S.B. Application rejected.

A.I.R. 1953 H. P. 40 (Vol. 40, C. N. 18)

CHOWDHRY J. C.

State v. Jahlu, Respondent.

Criminal Reference No. 6 of 1952, D/-15-9-1952.

Reformatory Schools Act (1897), S. 8(3)(b) — Rules under, Rr. 3, 4 — Youthful offender of 14 years of age at time of conviction — Under R. 3 such offender should be ordered to be sent to a Reformatory School for a period that would expire on his attaining the age of 18 years — A sentence of 3 years in such a case is not according to law. (Para 5)

Anno: Ref. Schools Act, S. 8 N. 1.

Sri B. Sita Ram, Govt. Advocate, for the State.

ORDER: This is a reference under S. 438, Criminal P. C. by the District Magistrate of Chamba recommending that the period of detention of the respondent Jahlu in the Reformatory School be extended from 3 to 4 years. The respondent was notified but is absent. The learned Government Advocate has supported the reference.

(2) It appears that Jahlu was convicted on 25-11-1950 under S. 457, read with S. 75, I.P.C., and sentenced to three years' rigorous imprisonment by the then District Magistrate, Chamba. The respondent being a youthful offender, the District Magistrate in exercise of powers under S. 29B, Criminal P. C., directed under S. 8, Reformatory Schools Act, 1897, that instead of undergoing the sentence he shall be sent to a Reformatory School for the said period of three years. The age of the youthful offender was found by the District Magistrate to be 14 years.

(3) On being moved by the jail authorities the present reference has been made on the ground that under the rules framed by the State Government the respondent should have been sent to the Reformatory School for a period that would expire on his attaining the age of 18 years.

(4) The relevant rules framed by the Punjab Government under S. 8 (3) (b), Reformatory Schools Act, and adopted by our Government, regulating the periods for which youthful offenders may be sent to such schools according to their ages or other considerations are rules 3 to 5, which are to the following effect:

" 3. Every youthful offender sent to a Reformatory School who is found by the Magistrate to be 13 years of age or more at the time of his conviction shall be sent to the School for a period that will expire on his attaining the age of 18 years.

4. Subject to the provisions of R. 5, every youthful offender sent to a Reformatory School who is found by the Magistrate to be under thirteen years of age at the time of his conviction shall be sent to the School for five years.

5. Every youthful offender who is a member of a criminal tribe proclaimed in the Punjab or elsewhere under the Criminal Tribes Act (27 of 1871) shall, if of eleven years of age or under at the time of the conviction, be sent to a Reformatory School for seven years, and if over eleven years of age for a period that will expire on his attaining the age of eighteen."

(5) As already stated, the District Magistrate found the age of the respondent to be 14 years at the time of his conviction. Under R. 3 therefore the District Magistrate should have directed that the respondent be sent to the school for a period that would expire on his attaining the age of 18 years, which he failed to do since the period of three years for which he directed him to be sent to school would expire on his attaining the age of only 17 years.

(6) The reference is accepted, the sentence of three years' rigorous imprisonment imposed upon the respondent Jahlu is enhanced to 4 years and the direction of the District Magistrate under S. 8, Reformatory Schools Act, 1897, is modified so that the respondent shall be kept in the Reformatory School for a period that will expire on his attaining the age of 18 years. Let a copy of this order be sent to the jail authorities concerned.

C/K.S. Reference accepted.

A.I.R. 1953 HIM. P. 41 (Vol. 40, C. N. 19)

CHOUDHRY J. C.

Messrs. Hazari Lal Bhanna Mal, Petitioners v. State of Himachal Pradesh and others, Respondents.

Civil Misc. Petn. No 14 of 1952, D/- 24-11-52.

(a) Constitution of India, Art. 226 — Deliberate misstatement of facts.

Where the petitioner makes a deliberate misstatement of facts, in his writ petition in order to misled the Court and on the basis of unfounded allegations succeeds in obtaining a 'rule nisi' from the Court prohibiting the opposite party from taking certain action, it would by itself be a sufficient ground for rejecting the writ petition. AIR 1952 H P and B 43, Rel. on. (Paras 16, 17)

(b) Constitution of India, Art. 19 (1) (g) — Right to carry on trade or business.

The right to carry on cloth business is a fundamental right guaranteed by Art. 19 (1) (g) of the Constitution though subject to the limitations contained in Cl. (6) of that Article. The mere fact that cloth is a controlled commodity and that a person is carrying on the business only by virtue of licence cannot affect the fundamental character of the right. A. I. R. 1952 Trav-C 260, Criticised. (Para 19)

(c) Constitution of India, Arts. 14, 19 (1) (g) and (6) and 226 — Validity of order directing retail dealers in cloth to carry on business through co-operative societies — (Himachal Pradesh Cotton Cloth Dealers Licencing Order, 1948).

The petitioner was doing cloth business under a retail dealer's licence issued under the Himachal Pradesh Cotton Cloth Dealers Licencing Order. Subsequently, the petitioner and other retail dealers were informed by order of the State Authority concerned that the work of distribution of cloth had been transferred to Co-operative Societies and in future they will not be permitted to do the business unless they joined one of the exis ing co-op rative societies or formed one in accordance with law.

Held (i) that as the right of doing cloth business was still capable of being exercised despite the order, there was no total deprivation of the right but only a restriction in the exercise thereof. (Para 20)

(ii) that the petitioner could not ask the Court to adjudicate upon his rights on the basis that the cloth situation in the country had improved. (Para 21)

(iii) that the order did not contravene Art. 14 and the petitioner was not denied equality before the law. (Para 27)

(iv) that the restriction imposed by the order was both reasonable and in the interest of the general public within the meaning of Art. 19 (6). (Para 29)

(v) that the petitioner was not entitled to any relief under Art. 226 even though the power in exercise of which the restriction was imposed may have been capable of being exercised unconstitutionally, unless it was shown that in fact it was exercised arbitrarily. (Paras 30, 31 and 33)

(d) Constitution of India, Art 14 — Discrimination between citizens in a State and those outside it.

In order to determine whether a particular order is discriminatory it is immaterial that the act produces inequality between the citizens of the State affected by the State action and those outside the State not so affected. The crucial test is that the ambit of the powers possessed by the State Legislature depends upon the proper construction of the statute conferring those powers. Once that test is satisfied it matters not that inequalities of any kind, as a result of comparison of interest of the citizens of the State and of those outside the State, are created. (Para 23)

(e) Evidence Act (1872), Ss. 60 and 78 (2) — Scope.

A newspaper report as to proceedings of a Legislature is only hearsay evidence. Such report is not one of the documents referred to in S. 78 (2) by which such proceedings may be proved. AIR 1925 Lah 299, Ref. (Para 21)

Anno: Evi. Act, S. 60 N. 4; S. 78 N. 1.

R. N. Malhotra and Ved Vyas, for Petitioners; B. Sita Ram, Government-Advocate, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('48) 1948-2 Dom L R (PC) 848: (AIR 1948 PC 118) 22
(50) AIR 1950 SC 27: (51 Cri LJ 1383 SC) 20
('50) AIR 1950 SC 124: (51 Cri LJ 1514 SC) 32
('50) AIR 1950 SC 163: (1950 SCR 566) 32
('51) AIR 1951 SC 41: (ILR (1951) Hyd 461 SC) 25, 31
('51) AIR 1951 SC 118: (ILR (1951) Hyd 221 SC) 28, 32
('51) AIR 1951 SC 332: (1951 SCR 747) 21
('52) AIR 1952 All 61: (1952 All WR (HC) 153) 32
('51) AIR 1951 Cal 90 32
('52) AIR 1952 Him P & B 43 16
('25) AIR 1925 Lah 299: (26 Cri LJ 1078) 21
('50) AIR 1950 Mad 308 (2): (51 Cri LJ 723) 32
('52) AIR 1952 Mad 565: (ILR (1952) Mad 957) 32
('52) AIR 1952 Trav-C 260 19
(1950) 94 Law Ed 381: (338 US 604) 21
(1885) 118 US 356: (30 Law Ed 220) 25
(1909) 216 US 400: (54 Law Ed 536) 25

ORDER: This is a petition under Art. 226 of the Constitution by Messrs. Hazari Lal Bhanna Mal, a firm of cloth merchants at Chamba, for the issue of suitable writs and directions to the respondents, the State of Himachal Pradesh, the District Civil Supplies Officer Chamba, the District Magistrate Chamba and the Director of Civil Supplies Himachal Pradesh, for the enforcement of the fundamental right of carrying on its cloth business, guaranteed by Art. 19(1)(g), which is alleged to have been not only unreasonably restricted but totally prohibited by the respondents.

(2) The impugned acts of the respondents relate to control of supply and distribution of cloth. The relevant controlling law may therefore be briefly set forth, to begin with. The main enactment, hereinafter referred to as the Act, is the Essential Supplies (Temporary Powers) Act, 1946, and it is in force in Himachal Pradesh. In exercise of the powers conferred by S. 3 of that Act, as delegated to him by the Central Government under S. 4 by means of the Ministry of Industry and Supply Notification No. 90/20-Tex. 1/48(1), dated 16-10-1948, the Chief Commissioner of Himachal Pradesh made three orders in relation to cloth, that being one of the essential commodities covered by the Act. These were the Himachal Pradesh Cloth Distribution Order, 1948, the Himachal Pradesh Cotton Cloth Dealers Licencing Order, 1948, and the Himachal Pra-

desh Cotton Cloth and Yarn (Regulation of Movements) Order, 1948, all of which came into force on 15-12-1948.

(3) The requisite control is exercised in three ways by means of these Orders. Under the Licencing Order sale of certain kinds of cotton cloth is prohibited except under and in accordance with the conditions of a licence granted under the Order on payment of a certain fee, which is either a wholesale dealer's licence or a retail dealer's licence. Under the Distribution Order the maximum wholesale and retail prices are fixed and a person or class of persons or the public generally can be prohibited from obtaining cloth except under, and upto the maximum quantity mentioned in, a 'distribution document'. Under the Movements Order both inter-State and intra-State movement of cloth can be prohibited except under a permit issued by a permit issuing authority. For purposes of this case only the other two Orders are relevant.

(4) The Government of India's scheme of distribution of cloth has been that controlled cloth manufactured by the mills is placed under the control of the Textile Commissioner, each State is allotted a quota, and, under orders of release issued by the Textile Commissioner, that quota is lifted by the nominee of the State. The lifted quota would then be passed on to the wholesale dealer, who might himself be the nominee, and then get distriouted to the consumers tnrougn the retail dealers.

(5) The petitioner firm has been doing cloth business at Chamba for about 20 years, and, on the coming into force of the said Orders, it obtained a retail dealer's licence under the Licencing Order on 1-1-1949 which was renewed annually twice, the last renewal being from 1-1-1951 to 31-12-1951. Before the expiry of the last renewal, however, the petitioner firm and the other retail licence-holders were informed by the District Civil Supplies Officer Chamba that the work of distribution of cloth had been transferred to co-operative societies, and that, therefore, in future they will not be permitted to do business unless they joined one of the existing co-operative societies or formed one in accordance with the law.

(6) The above prohibition for the future was conveyed to the petitioner and the other retail licence-holders in pursuance of certain rules framed by the Chief Commissioner, a copy of which has been filed by the respondents. They are superscribed as "Rules in connection with the distribution of Controlled Articles by Co-operative Societies', but described in the opening paragraph, which is a sort of a preamble, as 'directives till further orders.' The opening paragraph, or preamble, also mentions that the directives had been approved by the Chief Commissioner 'in consequence of the transfer of work pertaining to the distribution of controlled articles to co-operative societies.' These rules, or directives, are sub-divided under three headings, Distribution, Price-fixation and Check, with a Note appended at the end that the Chief Commissioner expected all Deputy Commissioners to exercise due vigilance in the prompt compliance with the directives. The gist of provisions relevant for purposes of the present case, and contained in directives 1 and 2 under the heading Distribution, is that, except in exceptional cases of special permits to be issued by the Civil Supplies Officer with the previous approval of the Director of Civil Supplies, there will be one wholesale co-operative society for each district, and it will thenceforth issue controlled articles for retail distribution to co-operative societies only, the allocation to retail societies being made by the Civil Supplies Officer.

(7) The rules, or directives, bear no date, but the Director of Civil Supplies sent copies of them to all the Deputy Commissioners in Himachal Pradesh by his letter dated 22-8-1951 (wrongly typed as 1952 in the copy filed by the respondents). He also wrote to all the Deputy Commissioners on 22-9-1951 that licences issued in favour of private individuals need not be renewed as and when their present terms expired.

(8) Against the said prohibition the retail licence-holders, including the petitioner, made a representation to the Chief Commissioner on 26-10-1951. The representation was turned down and the Director of Civil Supplies by his letter dated 21-11-1951 asked the Deputy Commissioner Chamba to inform the retail dealers that as the previous system had not worked satisfactorily distribution of controlled articles had been transferred to co-operative societies in response to public demand, and that it was open to them to become members of any of the existing co-operative societies or form new ones. This reply was communicated to the retail dealers by the Deputy Commissioner on 1-12-1951.

(9) Inspite of the failure of the representation, the petitioner applied to respondent 2, the District Civil Supplies Officer Chamba, on 26-12-1951 for the renewal of its licence for the ensuing year. The respondent returned the application to the petitioner on the same date with the endorsement that under the orders of the Director of Civil Supplies licences issued in favour of private firms could not be renewed. A fresh application was made to the respondent by the petitioner on 11-1-1952 whereupon, the petitioner alleges, its licence was renewed only for the first quarter from 1-1-1952 to 31-3-1952 although a full year's fee was realised. A little before the expiry of the quarter the petitioner applied once more for renewal of its licence for the rest of the year 1952, but on 14-4-1952 respondent 2 extended it only uptill the end of the next quarter. On 17-4-1952 the respondent informed the petitioner that the extension had been granted only to enable it to dispose of the old stock, and that if it transgressed that condition it would be dealt with according to the law. Thereupon, before the expiry of the second extension, the present writ petition was filed by the petitioner on 12-6-1952. It is supported by the affidavit of Mulkh Raj, a partner of the petitioner firm.

(10) It will thus be seen that respondent 2's order dated 17-4-1952 was the culmination of the State policy whereunder distribution of cloth through private firms was stopped and entrusted to co-operative societies. The petitioner firm has challenged it by means of the present petition in its two aspects: one, the smaller aspect, whereunder the renewal for 1952 was not granted for the entire year, and the other, the larger one, whereunder its business had been stopped until it joined one of the existing licensed co-operative societies or formed a new one.

(11) The aforesaid order, in its more limited aspect, has been challenged on the grounds that

under the Licencing Order the authorities concerned were bound to renew the licence for one year, that having received licencing fee for the whole year respondent 2 had no authority or justification for renewing it for periods of three months only, and that the renewal order dated 14-4-1952 having been unconditional no conditions could be imposed subsequently by the order dated 17-4-1952. In its larger aspect, it has been impugned on the grounds that the cloth situation in the country had improved so much so that the Government had recently permitted mills to sell some cloth to buyers of their own choice, and therefore the restriction imposed by the State was not justified, that it is an encroachment on the fundamental right to carry on its cloth business guaranteed to the petitioner under Art. 19 (1) (g) of the Constitution, and that the restriction, which has brought the petitioner's business to a complete stand-still, is not a reasonable restriction nor a restriction in the interests of the general public. The petitioner further contends that inasmuch as retail dealer's licences are freely available in all the States in India in general, and in the neighbouring places like Dalhousie and Bakloh in the Punjab in particular, the aforesaid restriction involves discrimination between one citizen of the Indian Union and another and therefore denies equality before the law to the petitioner.

(12) The reliefs claimed by the petitioner firm on the above grounds are the issue of a suitable writ of mandamus, or other directions, to the respondents directing them to grant to the petitioner firm annual retail cloth dealer's licence as before, and to lift the ban imposed by the Government against the import of mill-made free sale and power-loom cloth.

(13) The petitioner also prayed that pending the disposal of the petition the operation of the aforesaid order be suspended, the petitioner's licence be ordered to be renewed for the remaining period of 1952, and it may be permitted to continue its business. The second of these interim reliefs was not granted but, on the basis of an affidavit filed by the petitioner that the renewal for the second quarter on 14-4-1952 was unconditional and the licencing fee for the entire year had been realised, a 'rule nisi' was issued by this Court on 17-6-1952 prohibiting respondents 2 to 4 (those being the only respondents against whom the learned counsel for the petitioner wanted the order to be directed) from preventing the petitioner to purchase and sell whatever quota of cloth the petitioner might be entitled to purchase and sell on foot of the existing licence renewed upto the end of June, 1952, without regard to the restrictions contained in the letter dated 17-4-1952 from the District Co-operative and Supplies Officer Chamba to the petitioner. No objection was taken on behalf of the respondents against the above order, presumably because the short-term order had lost its force by the date for which respondents were notified. A further application of the petitioner for extension of the order for the entire pendency of the writ petition was rejected.

(14) The respondents contested the petitioner's writ petition, their written statement being supported by the affidavit of M. R. Chauhan, District Co-operative and Supplies Officer Chamba. The petitioner's allegations regarding the easing of the cloth situation in the country were traversed. Their reply with regard to the main allegation of the petitioner as to the entrustment of the work of distribution of cloth to co-operative societies was that the action had been taken under the aforesaid Cloth Distribution Rules with the object of the business being carried on under closer Government control as distribution of controlled goods through individual dealers had been unsatisfactory and in the past there had been persistent complaints and demand by the public on the ground of black-marketing.

It was further contended that the Chief Commissioner had full and unfettered powers to make the said rules, which were in the nature of a general remedial measure, under the Essential Supplies (Temporary Powers) Act; that these rules superseded or modified the Licencing Order; that the Chief Commissioner had also absolute discretion under the Licencing Order to stop renewal of a licence or to cancel it without assigning any reason; that the restrictions which the Government were forced to impose were for the good of the public; that as the petitioner firm has not agreed to join the co-operative societies and to be content with fair and limited profits, its petition is nothing but an appeal to uphold the continued exploitation of the dumb and illiterate masses of Himachal Pradesh by profiteering and black-marketing. As regards the complaint of the petitioner that its licence had not been renewed for the whole of 1952, it was pleaded that the two renewals had been made, and expressly so, merely to enable the petitioner to dispose of the old stock, and that the fee had been accepted only provisionally.

(15) I shall take up first the grounds on which the action of the State has been challenged in its more limited aspect of non-renewal of the licence for the whole of 1952. The rules or directives framed by the Chief Commissioner, on foot of which action has been taken, were, as pointed out above, distributed to all the Deputy Commissioners by the Director of Civil Supplies on 22-8-1951. To implement these rules he further directed them on 22-9-1951 that licences in favour of private individuals need not be renewed on the expiry of their terms. The carrying out of these directives, however, necessitated not only the non-renewal of licences of private individuals in future, but also the making of some arrangement to enable them to dispose of old stocks left with them at the expiry of their existing licences. Clause 11 of the Licencing Order specifically provides for such a contingency. Certain communications filed by the respondents show that the arrangement was in fact made.

These communications are a letter dated 12-1-1952 from the District Civil Supplies Officer to the Director, and a telegram dated 25-3-1952 from the latter to all the Deputy Commissioners. They show that at the commencement of each of the first two quarters of 1952 directions were issued to grant short term extensions of licences of three months each for the purpose. It must be presumed that these directives were carried out. Indeed, it would be incredible that in the teeth of these directives the two renewals to the petitioner were ordinary and unconditional renewals, as the petitioner would have us believe. That the first part of the directives was carried out stands conceded, for it is admitted that before

the expiry of the year 1951 the petitioner was informed that its licence would not in future be renewed, and that if it wanted to continue its business it should either join one of the existing co-operative societies or form a new one according to law.

As regards the other directive, there is the specific affidavit of respondent 2 that both the renewals were made to enable the petitioner to dispose of the old stock. It is noteworthy that no attempt was made on behalf of the petitioner to rebut this affidavit. In the only affidavit on behalf of the petitioner on record, that of Mulkh Raj, all that is stated is that the renewals, as noted on the petitioner's licence, were unconditional. That is mere quibbling. That the condition was not noted down does not necessarily mean that it was not made known. Indeed, from the very facts that the petitioner had been forewarned that its licence would not be renewed after 1951, and that each of the two renewals in 1952 was made for three months only, I must accept as correct the said affidavit of respondent 2 and reject as incorrect the prevaricative affidavit of the petitioner firm's partner. The aforesaid communication to the petitioner from respondent 2, dated 17-4-1952, was, as it specifically purports to be, merely confirmatory of the conditions subject to which the renewals had been made. The truth of the one and the falsity of the other stand further confirmed by the receipt for the fee filed by the petitioner firm itself, which clearly states that it was received "as deposit", or provisionally, as pleaded by the respondents.

(16) I therefore hold that, having decided not to renew the petitioner's licence for 1951, the Civil Supplies department was not bound to renew it for 1952, and that it granted the two extensions, as it could under the Licencing Order, only to enable it to dispose of its old stock. This finding in respect of the grounds on which the petitioner challenged the action of the State in its more limited aspect shows that the petitioner made a deliberate misstatement of facts in its writ petition in order to mislead the Court. What is more, the petitioner did succeed in misleading the Court for, as adverted to above, it obtained on the basis of the said unfounded allegations a 'rule nisi' on 17-6-1952 prohibiting respondents 2 to 4 from preventing the petitioner to purchase and sell whatever quota of cloth the petitioner might be entitled to purchase and sell on foot of the existing licence renewed upto the end of June, 1952, without regard to the restrictions contained in the letter dated 17-4-1952 from respondent 2 to the petitioner. Where such is the case, that would by itself be sufficient ground for rejecting a writ petition, as pointed out by this Court in — 'Harish Chandra v. Lieutenant-Governor of Himachal Pradesh', AIR 1952 Him P & B 43. To my mind, the requirement of writ petitioners coming with clean hands cannot be too strongly insisted upon. Any falling off from that standard would tend to reduce petitions under Art. 226 for the extraordinary remedy of high prerogative writs to the level of ordinary actions at law where, acting on the theory that if one shoots at the stars one may at least succeed in hitting the tree, parties fire off allegations indiscriminately on the off-chance of some one or the other of them scoring a bull's eye. A typical instance of this gambling spirit in litigation is the plea of a defendant, sued on foot of a bond or a pronote, that the instrument is a forgery but that if the Court comes to a contrary finding an instalment decree be passed. A falling off from the said standard is also likely to result, from the very nature of the extraordinary remedy, in an abuse of the process of the Court, as it has in the present case.

(17) This petition could well be rejected, therefore, on the finding that the petitioner has been guilty of making deliberate misstatement of facts with a view to misleading the Court. Giving the petitioner the benefit of one circumstance, however, namely the circumstance that the misstatements related only to the case in its more limited, and not the larger, aspect, I would pass on to a consideration of the other grounds taken by the petitioner.

(18) Apropos the case in its larger aspect, the following appear to me, on a careful scrutiny of the pleadings of the parties, to be the points that arise for determination. The first point does not arise from the respondents' written reply but from a ruling relied upon by the learned Government Advocate. The points are: (1) Is the right claimed by the petitioner not a fundamental right? (2) If there be a fundamental right, whether there has been restriction or total deprivation in the petitioner's exercise of it? If the latter, does it make any, if so what difference? (3) Is the petitioner entitled that the restriction or deprivation, as the case may be, be ordered to be removed on the mere ground that the cloth situation in the country has, if at all, improved? (4) Should the restriction or deprivation be removed because, if at all, it is discriminatory and denies equality before the law to the petitioner? (5) Is the restriction, or deprivation, as the case may be, not justifiable on the ground of (a) reasonableness, and (b) its being in the interests of the general public? (6) Had the Chief Commissioner full and unfettered discretion to impose the restriction? and (7) To what remedy, if any, is the petitioner entitled by a writ or otherwise?

(19) The ruling relied upon by the learned Government-Advocate in connection with the first point was — 'Sankarasubramony v. State', AIR 1952 Trav-C 260. The facts of that case bear a striking resemblance to those of the present. The petitioner received and distributed yarn as holder of a retail dealer's licence under the Travancore Cotton Yarn Dealers Licencing Officer, 1124, but, as in the present case, his licence was not renewed, although the necessary renewal fee was paid, on the ground that the Government had decided that distribution of yarn shall in future be made entirely through licensed Co-operative Societies. The State professed to have adopted the policy as a step towards the development of hand-loom industry. It was pleaded that Cl. 6 of the said Order gave the authority concerned absolute discretion in the matter, and that the restriction imposed was a reasonable one in public interest. The writ petition was dismissed on the findings that under the said clause the authority concerned had absolute discretion, and it was always expected that the authority would exercise the power with discretion and not arbitrarily, that the object of the Government was a laudable one and the determination of that object was a matter of administrative character and so not amenable to a writ of

certiorari, and that as the petitioner got his right to deal in yarn, a controlled article, under the leave and licence of the authority concerned it was not a fundamental right.

In my opinion, the present petition also deserves to be dismissed, but on different grounds. I shall therefore advert to the views expressed in the ruling only if it becomes necessary to do so. For purposes of the first point, however, I find myself unable, with all respect, to reject the present petition on the ground that the right claimed by the petitioner is not a fundamental right. In the opinion of the learned Judge, it was a fundamental right 'so long as the yarn was a commodity available in the open market', but that as the petitioner 'got the freedom to deal in yarn which was a legally controlled commodity only by virtue of a licence obtained from the officer appointed for the purpose, it was not a fundamental right'. As conceded by the learned Judge, the right to deal in yarn was one of the fundamental rights guaranteed by our Constitution, being the right to carry on any trade or business under Art. 19 (1) (g). The mere fact that, due to certain economic or other exigencies, the scope for the exercise of that right was curtailed by the Central or State Legislature passing certain laws, like the Essential Supplies (Temporary Powers) Act or the various Orders under it, in order to control the production, supply, distribution etc. of the commodity, does not mean that the right ceased to exist or ceased to be fundamental in its character. The fundamental character of the right to carry on any business or trade is guaranteed by the Constitution itself, so that it cannot be deprived of that character although, no doubt, its exercise can be restricted, but only within the limitations prescribed by Cl. (6) of the said Article. Therefore, the restrictive legislation, instead of creating the right, as the ruling under consideration seems to suggest, is itself liable to be held void under Art. 13 (1) of the Constitution if it restricts any of the fundamental rights in excess of the prescribed limitations. I therefore hold that the right to carry on cloth business claimed by the petitioner is a fundamental right guaranteed by Art. 19 (1) (g) of the Constitution though subject to the limitations contained in Cl. (6) of that Article.

(20) The next question is whether there has been restriction, or total deprivation, in the matter of the exercise of the said fundamental right by the petitioner. One restriction there certainly is, and that is that the petitioner's right to trade in cloth is subject to control under the provisions of the Licencing and Distribution Orders. It has had to take a retail dealer's licence under the former Order, and, under pain of criminal liability, it cannot violate the provisions of the Orders or the terms and conditions of its licence. For instance, it cannot sell cloth at a price higher than that fixed under the provisions of the Distribution Order. The petitioner does not, however, question the legality of these Orders or the restrictions imposed thereby. What the petitioner complains against is the order issued by the State through its Civil Supplies department requiring the petitioner, along with the other retail dealers, to stop its business unless it became a member of one of the licensed Co-operative Societies. Now, it is clear that the petitioner's business has not been totally stopped since it is open to it to carry it on if it joins one of the co-operative societies. Total stoppage would result, therefore, due to the petitioner's own decision not to join the societies and not to the said order of the State. It was laid down in — 'Gopalan v. State of Madras', AIR 1950 SC 27, that

> "the use of the word 'restrictions' in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the Article are still capable of being exercised .....though the words 'restriction' and 'deprivation' are sometimes used as interchangeable terms, as restriction may reach a point where it may well amount to deprivation."

In the present case, the right of doing cloth business is still capable of being exercised despite the said order of the State. I therefore hold that the petitioner in this case has not been deprived of its right but only restricted in the exercise thereof. The other question of the effect of the order if it had resulted in total deprivation, therefore, does not arise.

(21) The contention of the petitioner that the restriction in question is liable to be removed by reason of the cloth situation in the country having improved is wholly untenable. The petitioner has cited a report in the Tribune of 20-5-1952 of a statement of the Commerce and Industry Minister in the Parliament on 19-5-1952 in support of its contention. But a report in a newspaper is only hearsay evidence; — 'Bawa Sarup v. Crown', AIR 1925 Lah 299. Moreover, a newspaper is not one of the documents referred to in S. 78 (2), Evidence Act, by which the proceedings of the Legislature may be proved. These considerations apart, whatever may have been said in the Parliament by the Hon'ble Minister on the particular occasion, the fact remains that the operation of control under the provisions of the Essential Supplies (Temporary Powers) Act, 1946, was still in force at the relevant time and has recently been further extended till 26-1-1955 by the Essential Supplies (Temporary Powers) Amendment Act 65 of 1952. Whether the cloth situation in the country was such as to do away with the necessity of controls is a matter of legislative policy, which, as pointed out in — 'In re Art. 143, Constitution of India and Delhi Laws Act, 1912', AIR 1951 SC 332, is one of the essentials of the legislative function. To ask this Court to adjudicate upon the rights of the petitioner on the ground of improvement in the cloth situation of the country would therefore be to require it to do what Frankfurter J. described in — 'Secretary of Agriculture v. Central Roig Refining Co.', (1950) 94 Law Ed 381, as "a singular intrusion of the Judiciary into the legislative process."

(22) The next point relates to the alleged discriminatory nature of the order. The petitioner's allegation is that as retail dealers licences are freely available in all the States in India generally, and particularly in some of the neighbouring places in the State of Punjab, like Dalhousie and Bakloh, the restriction in question involves discrimination between one citizen of the Indian Union and others. It was therefore contended that the petitioner had been denied equality before the law guaranteed by Art. 14 of the Constitution. Before considering it on merits it has to be pointed out that there is over-statement in the

allegation. It is evident from the representations and Government's replies filed by the petitioner firm itself that the restriction in question was imposed, not on the petitioner alone, but on all the retail licence-holders in the State. The allegation of the petitioner that the restriction involves discrimination between one citizen of the Indian Union and others is, therefore, not correct. The discrimination, if any, is between the retail licence-holders of the State of Himachal Pradesh and those in the Indian Union generally and the neighbouring districts in the Punjab particularly.

There is one aspect of the matter which presents some difficulty and no argument was advanced before me to solve the difficulty. The sphere of activity of the State of Himachal Pradesh must needs be confined within the four corners of the State. It is powerless by the very limits to its territorial jurisdiction always to act in such a manner as to obviate discrimination between the citizens of Himachal Pradesh and the citizens of the rest of the country. Is the State of Himachal Pradesh therefore to be precluded from taking a certain action with regard to the citizens of the State, even though the taking of the particular action be in the interests of the citizens of the State, and even though the action be not discriminatory qua those citizens 'inter se', simply because it involves discrimination between them and the citizens of the other States of the Union? To my mind, the answer to the question should be in the negative, for to hold otherwise would be to deny to our constitution its essential character of a federal constitution. There is no doubt that, regard being had to the provisions of Art. 245, which empowers the Parliament to make laws for the whole or any part of the territory of India, our constitution is only quasi-federal in character, and not strictly federal in the sense of the Parliament and the State Legislatures being independent and co-ordinate within their respective spheres. But, subject to that, each State has plenary powers to legislate for those who are actually within its jurisdiction. That being so, it necessarily follows that in doing so each State should, and in fact can, take into consideration only the economic and other considerations obtaining within its own territorial limits and not those prevalent outside those limits. As remarked in — 'Wallace Bros. and Co. Ltd. v. Income-tax Commr. (Bombay)', (1948) 2 Dom LR (PC) 848, in speaking of a subordinate Legislature,

> "The ambit of the powers possessed by it depends upon the proper construction of the Statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature. Concern by a subordinate Legislature with affairs or persons outside its own territory may therefore suggest a query whether the Legislature is in truth minding its own business."

(23) That had reference to the proposition that so long as a State Legislature acts within its own competence it is immaterial what the extra-territorial effect of its action may be. On the same principle, it should be immaterial that the act produces inequality between the citizens of the State affected by the State action and those outside the State not so affected. The crucial test is that the ambit of the powers possessed by the State Legislature depends upon the proper construction of the statute conferring those powers. Once that test is satisfied it matters not that inequalities of any kind, as a result of comparison of interests of the citizens of the State and of those outside the State, are created. In the present case, whatever be the other grounds of attack, it is not suggested that it was not within the ambit of the powers of the Chief Commissioner to impose restrictions on the retail dealers of Himachal Pradesh. He was therefore legitimately minding his own business, and his action cannot be held to be invalid merely because in consequence thereof the particular class of citizens of this State against whom that action was directed, namely, the retail cloth dealers, have been placed in a position which compares unfavourably with retail cloth dealers anywhere outside the State.

(24) But even if it be supposed that a State must act so as not to create inequalities between its citizens and the citizens of the Union outside the State, the petitioner has failed to establish that any such inequality has in fact been created. The principle underlying the guarantee contained in Art. 14 of our Constitution, that the State shall not deny to any person inequality before the law, has been expressed by Jennings in his Law of the Constitution in the following terms:

> "Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike."

(25) The Hon'ble the Supreme Court has laid down in — 'Charanjit Lal v. Union of India', AIR 1951 SC 41, as follows:

> "The guarantee against the denial of equal protection of laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. As has been said by the Supreme Court of America, 'Equal protection of laws is a pledge of the protection of equal laws', see — 'Yick Wo v. Hopkins', (1885) 118 US 356 at p. 369, and this means 'subjection to equal laws applying alike to all in the same situation' vide — 'Southern Rly. Co. v. Greene', (1909) 216 US 400 at p. 412. In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same."

It was further laid down as follows:

> "The Legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection: but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made: and classification made without any substantial basis should be regarded as invalid."

(26) According to the same ruling, the burden of proving that there has been a transgression of constitutional principles is upon him who alleges it. Keeping all the above principles in view, it lay on the petitioner in this case to prove, firstly, that there has been discrimination, and, secondly, that this has

been so despite the position of the retail vendors of cloth in Himachal Pradesh being the same as in the Union of India generally or even in the neighbouring districts of the Punjab particularly.

(27) As regards the factum of discrimination, the petitioner's allegation in para. 17 of the petition is that retail dealers' licences are freely available to everybody in the whole of the remaining States of India and specially in Dalhousie and Bakloh in the Punjab which are quite near to Chamba. The allegation is too bold and sweeping in character to merit ready acceptance. The respondents have not cared, however, in their reply even to traverse the allegation. Strictly and technically speaking, therefore, it may be taken that the allegation is correct. But the second of the above two facts which it was incumbent on the petitioner to prove has not been established, namely, that the discrimination has been made despite the position of the retail dealers of cloth elsewhere being the same as in Himachal Pradesh. In point of fact, the petitioner has not even made an allegation to that effect.

On the other hand, it has been specifically alleged on behalf of the respondents, and the allegation is supported by the affidavit of M. R. Chauhan, District Co-operative and Civil Supplies Officer Chamba, that the basis of the restriction is the general complaint of the public due to mal-distribution and black-marketing of controlled goods by individual retail dealers. True, no instances of black-marketing have been cited, but that from its very nature it was not possible for the respondents to do. And yet, although no such instances may have been cited, it was not impossible for the respondents to have formed a correct opinion on that point from the day-to-day working of the pre-restriction system. Indeed, they were pre-eminently in a position to do so. There is no suggestion that there was some ulterior motive in imposing the restriction. It is incredible that a public body like the State could be actuated by any ulterior motive. After all, the introduction of co-operative system entails some extra work for the State. The State could not therefore have imposed that extra work on itself if it did not really find itself constrained to do so on account of the existence of black-marketing.

It must also be remembered that the consumers of Himachal Pradesh are notoriously much more backward, and therefore likely to fall a prey to black-marketing much more easily, than those in the neighbouring State of the Punjab. The said sworn allegation in the affidavit filed on behalf of the respondent has not been rebutted on behalf of the petitioner. It is also extremely significant that no reason has been suggested why the petitioner is unwilling to join one of the existing co-operative societies or to form a new one according to law. The petitioner is only harping on contentions as regards infringements of rights under the Constitution. One thing is also certain, and that is that, with the work of distribution entrusted to co-operative societies, there will be no scope for profiteering or black-marketing. In view of all these facts and circumstances, the irresistible conclusion is that black-marketing did prevail in Himachal Pradesh and that it was in order to root out the evil that the restriction in question was imposed. The petitioner does not, of course, say that black-marketing prevailed elsewhere also, or, in any case, that it prevailed elsewhere to the same extent as in this State. The conditions prevailing in this State were therefore not the same as elsewhere. That being so, the State were perfectly justified in singling out its retail cloth dealers for the imposition of the restriction in question. The petitioner's allegation that it has been denied equality before the law is therefore untenable.

(28) By the same token, the next point of whether the restriction is not justifiable on the ground of reasonableness and its being in the interests of the general public must be decided against the petitioner. There is no doubt that under Cl. (6) of Art. 19 of the Constitution the restriction has to be both reasonable and in the interests of the general public. That being so, the petitioner would be entitled to avoid the restriction if it can establish non-fulfilment of either, and not necessarily both, of these conditions. In dealing with the question of equality before the law I have held that the contention of the respondents that the backward consumers of Himachal Pradesh were a prey to black-marketing, and that it was with the object of saving them from that evil that the restriction was imposed. There can be no doubt therefore that the restriction was imposed in the interests of the general public. As regards reasonableness, it was held in — 'Chintamanrao v. State of Madhya Pradesh', AIR 1951 SC 118, as follows:

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by Cl. (6) of Art. 19, it must be held to be wanting in that quality."

As a test of whether a particular restriction is arbitrary it was further laid down in that ruling:

> "Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it."

(29) One of the purposes of control of essential commodities, cloth being one of those commodities, under S. 3 of the Act is their equitable distribution and availability at fair prices. The restriction in question would eminently serve that purpose by entrusting the work of distribution of cloth to co-operative societies and thereby obviating the evil of black-marketing. The restriction is therefore not arbitrary. Furthermore, the restriction does not go beyond what is required in the interests of the public, for having achieved the object of securing cloth to the consuming public at controlled price, it leaves it open to the retail dealers to carry on their cloth trade as before. The restriction is therefore not excessive but, on the contrary, it strikes a proper balance between the freedom guaranteed under Art. 19(1)(g) to a particular class of persons and the interests of the general public under cl

(6). I therefore hold that the restriction is unassailable, being both reasonable and in the interests of the general public.

(30) In view of the above findings it is not necessary to go into the question whether the Chief Commissioner had full and unfettered discretion to impose the restriction. It was strenuously argued on behalf of the petitioner that the provisions of the Distribution Order whereby the Chief Commissioner arrogated to himself such unfettered discretion were unconstitutional. It was further argued that the aforesaid rules subsequently framed by him were only departmental directives and lacked the quality of being a 'notified order' under the provisions of S. 3 of the Act. It may be that these contentions are well-founded. But it appears to me that once it has been found that the complaints of the petitioner are untenable inasmuch as it has not been denied equality before the law, and although restricted in the exercise of its fundamental right to carry on cloth business the restriction is both reasonable and in the interests of the general public, the petitioner will not be entitled to any relief simply because the act of the respondents was otherwise unconstitutional. This Court will not, in exercise of its jurisdiction under Art. 226 of the Constitution, undertake a roving commission to adjudicate upon the constitutionality or otherwise of the acts of the executive or the Legislature even though the petitioner may have failed to make out a case for the enforcement of fundamental rights. On the subject of delegation of legislative power without any standard for the guidance of the delegate, there appears the following passage in Willis' Constitutional Law:

"Is it proper classification to put in one class those who get the consent of a board or of an official and into another class those who do not where no standard is set up to control the action of the board or official? Some cases answer this question in the affirmative, while other cases answer it in the negative. Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power but only by its arbitrary exercise by those upon whom conferred."

(31) It would follow therefore that it will avail a petitioner nothing if all that appears is that the power in exercise of which a legislative or executive body has performed an act is capable of being exercised unconstitutionally unless it is also shown that in the particular case that power has in fact been exercised arbitrarily. Again, in speaking of the scope of the corresponding Art. 32 it has been laid down in — 'Charanjit Lal v. Union of India', AIR 1951 S C 41, at p. 52, para. 44, as follows:

"The application before us under Art. 32 of the Constitution is on behalf of an individual shareholder of the Company. Article 32, as its provisions show, is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at, is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for such enforcement arises out of an action of the executive or of the Legislature. To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular Legislature as not being covered by any of the items in the legislative lists, but that it affects or invades his fundamental rights guaranteed by the Constitution, of which he could seek enforcement by an appropriate writ or order."

And again at p. 60, para. 73:

"It is clear, therefore, that Art. 32 can only be invoked for the purpose of the enforcement of the fundamental rights. Article 32 does not permit an application merely for the purpose of agitating the competence of the appropriate Legislature in passing any particular enactment unless the enactment also infringes any of the fundamental rights."

It may therefore be that the action taken by the Chief Commissioner was beyond his legislative competency, but unless it is shown that it affected or invaded the petitioner's fundamental rights guaranteed by the Constitution so as to entitle it to seek enforcement of the same by an appropriate writ or order, the petitioner cannot be said to have made out a case for relief under Art. 226. The sixth point therefore does not arise for determination.

(32) Before I conclude I must briefly discuss the rulings cited by the learned counsel for the petitioner. One was — 'Balakrishnan v. State of Madras', AIR 1952 Mad 565. The provision of the Cotton Textiles (Control) Order impugned in that case not only conferred unfettered discretion on the authority in question, but that discretion was in fact exercised in a discriminatory manner to the prejudice of the petitioner. The discretion has not been exercised in a discriminatory manner in the present case. The next case cited was — 'Chintamanrao v. the State of Madhya Pradesh', AIR 1951 S C 118. That was a case of complete stoppage of business by an arbitrary exercise of power which had no relation to the object which the particular legislation sought to achieve, which, as already shown, is not the case here. I have followed the interpretation put upon the phrase "reasonable restriction" in that case. The case of — 'Anumathi Sadhukhan v. A. K. Chatterjee', AIR 1951 Cal 90, is distinguishable for the same reasons as the Supreme Court ruling just cited. The case of — 'Rashid Ahmed v. Municipal Board, Kairana', AIR 1950 S C 163, has no application for that was a case of unreasonable restriction due to creation of a monopoly. As regards — 'Romesh Thapar v. State of Madras', AIR 1950 S C 124, the principle laid down there that

"so long as the possibility of a law being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void"

does not come in for application in the present case since, unlike the present case, the law in question there was held not saved by the relevant limitation cl. (2) of Art. 19. The case of — 'In re Subrahmanyam', AIR 1950 Mad 308(2), lays down that a notification not published in the official gazette is not valid. But, as adverted to above, the question of determination of the validity of the rules promulgated by the Chief Commissioner on 22-8-1951 does not arise in this case. Cancellation of licence in — 'Dalchand v. Commr. Food and Civil Supplies', AIR 1952 All 61, was held illegal on a circumstance peculiar to that case, namely, that reasons for cancellation were not recorded as required by cl. 12 of the particular Licencing Order. These were all the rulings cited, and it

has been shown that none of them is of any help to the petitioner.

(33) In the result, therefore, I hold that although petitioner's fundamental right of carrying on cloth business under Art. 19(1)(g) has been restricted by its being required to join one of the licensed co-operative societies or to form one according to law, the restriction is a reasonable one in the interests of the general public, and it does not also deny the petitioner equality before the law. I further hold that, in view of the above findings, the petitioner is not entitled to seek enforcement of its said right under Art. 226 of the Constitution, and that therefore the petitioner is entitled to no relief even though the power in exercise of which the restriction has been imposed may have been capable of being exercised unconstitutionally. The petition is accordingly dismissed and the petitioner is ordered to pay Rs. 60/- as costs to the respondents.

(34) It is certified under Art. 132(1) of the Constitution that substantial questions of law as to the interpretation of the Constitution (affecting the interests of a large number of persons belonging to the class of retail cloth dealers in Himachal Pradesh) are involved in this case.

A/K.S. Petition dismissed.

A.I.R. 1953 HIM. P. 49 (Vol. 40, C. N. 20)

CHOWDHRY J. C.

Choudhri, Petitioner v. Ram Saran Das and another, Respondents.

Civil Revn. No. 8 of 1952, D/- 26-8-1952.

Civil P. C. (1908), O. 21 R. 61 — While deciding objection, Court can incidentally go into question of title — Wrong decision — No revision — (Civil P. C. (1908), S. 115).

In order to dismiss the claim of the objector under O. 21 R. 61, it is not sufficient for the Court merely to hold that the property was in possession of the judgment-debtor, but it is further necessary for it to hold that the judgment-debtor was in possession of the property as his own & not on account of any other person. While therefore possession is no doubt the main question for determination, the question of title may have to be gone into in order to ascertain that the nature of the possession was such as contemplated by the rule, i.e. possession of the judgment-debtor as his own property and not on account of any other person. There is nothing in the rule in question debarring the Court deciding an objection under O. 21, R. 58, from going into the question of title, provided it does so only incidentally for determining the main question of possession. Nor would any party be prejudiced thereby, for the question of title being only incidentally, and not directly and substantially, in issue, any decision on that question would not operate as res judicata in any future proceedings between the parties. (Para 3)

So long therefore as the Court deciding the objection has complied with the above provision, even though in doing so he may have arrived at erroneous findings, it cannot be said to have acted with material irregularity in the exercise of its jurisdiction, and there would therefore be no ground for interference by the High Court in revision. AIR 1944 Pat 242, Rel. on. (Para 3)

Anno: Civil P. C., O. 21 R. 58 N 20; O. 21 R. 61 N. 2; S. 115 N. 23.

Indar Singh Karwal, for Petitioner; R. N. Malhotra, for Judgment-debtor (Dharamdas); Ram Saran Das, decree-holder present in person.

REFERENCES: Courtwise/Chronological/ Paras
('39) AIR 1939 All 117: (180 Ind Cas 349) 4
('48) 52 Cal WN 56 4
('44) AIR 1944 Pat 242: (23 Pat 365) 3

ORDER: This is an application by one Choudhri to revise the order of the Senior Subordinate Judge Mahasu, dated 30-11-1951, dismissing his objection under O. 21, R. 58, Civil P. C., against the attachment of certain land in execution of the decree of Ram Saran against Dharam Das.

(2) The attachment was made on 28-10-1950 and the objector laid claim to the property under a sale-deed dated 25-1-1950. The Subordinate Judge dismissed the objection on the findings that the objector was not in possession of the attached property, and that the sale-deed in question passed no title to him. He also overruled the objector's contention that the property had not been validly attached.

(3) It was strenuously contended by the learned counsel for the objector-petitioner that this is a fit case for interference by this Court because the learned Subordinate Judge has acted with material irregularity in exercise of his jurisdiction in going into the question of title. A number of rulings were cited by him in support of his contention, but I do not deem it necessary to consider them. The petitioner's claim has been disallowed under R. 61. The relevant portion of that rule applicable in the present case required a finding that the property was at the time of attachment in the possession of the judgment-debtor as his own property and not on account of any other person. It follows, therefore, that it would not have sufficed for the Court merely to hold that it was in possession of the judgment-debtor, but it was further necessary for it to hold that the judgment-debtor was in possession of the property as his own and not on account of any other person. While, therefore possession is no doubt the main question for determination, the question of title may have to be gone into in order to ascertain that the nature of the possession was such as contemplated by the rule, i.e., possession of the judgment-debtor as his own property and not on account of any other person. So long therefore as the Court deciding the objection has complied with the above provision, even though in doing so he may have arrived at erroneous findings, it cannot be said to have acted with material irregularity in the exercise of its jurisdiction, and there would therefore be no ground for interference by this Court in revision. There is nothing in the rule in question debarring the Court deciding an objection under O. 21, R. 58, Civil P. C., from going into the question of title, provided it does so only incidentally for determining the main question of possession. Indeed, the true nature of possession contemplated by R. 61 may not in certain cases be capable of determination without going into the question of title also. Nor would any party be prejudiced thereby for the question of title being only incidentally, and not directly and substantially, in issue, any decision on that question would not operate as 'res judicata' in any future proceedings between the parties. I find support for this view in — 'Sm. Chunni Debi v. Sm. Annapurna Dai', AIR 1944 Pat 242.

(4) So far as the present case is concerned, the learned Subordinate Judge has not disposed

of the objection merely on a finding of title, as was the case in — 'Protiva v. Reliance Bank Ltd., 52 Cal WN 56, cited by the learned counsel for the petitioner, or in — 'Bachu Lal v. Ram Din', AIR 1939 All 117. He has come to a definite finding that the possession of the attached property was still with the judgment-debtor despite the sale-deed. As to whether that finding, or the finding that there was no illegality or irregularity in the attachment, was erroneous, that would be no ground for interference in revision for the Court below had the jurisdiction to arrive at even erroneous findings on those questions. The application in revision is rejected with costs.

B/R.G.D. Revision dismissed.

A.I.R. 1953 HIM. P. 50 (Vol. 40, C. N. 21)

CHOWDHRY J. C.

Surat Ram, Appellant v. Mt. Nardu and another, Respondents.

Misc. First Appeal No. 37 of 1951, D/- 2-12-1952.

(a) Guardians and Wards Act (1890), S. 25 — Father's right to custody.

Contest between father and mother — Child of tender age — Father marrying for second time and having children from second wife — No allegation by father that child was not properly cared for or educated by mother — It would not be for the welfare of the minor to be removed from the custody of mother and be placed in the custody of father — Time limit for the return of the minor to the father's custody held could not be fixed. 'Case law discussed.' (Paras 5, 6, 11)

Anno: G. and W. Act, S. 25, N. 7, 8.

(b) Evidence Act (1872), Ss. 101 to 103 — Welfare of minor — (Guardians and Wards Act (1890), S. 25).

Where the contest with regard to the custody of a child of tender age lies between its father and mother the welfare of the minor in remaining in custody of the mother is so patent that the onus would really lie upon the father who wishes to take it away from the custody of the mother, especially where the father has married a second time: AIR 1929 Mad 81, Disting. (Para 7)

Anno: Evidence Act, Ss. 101 to 103, N. 1, 6; G. & W. Act, S. 25 N. 1, 7, 8.

K. C. Pandit, for Appellant; Durga Das Khanna, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('22) 44 All 587: (AIR 1922 All 338) 10
('24) 46 All 706: (AIR 1924 All 622) 10
('22) AIR 1922 Bom 405: (68 Ind Cas 518) 8
('41) AIR 1941 Bom 103: (ILR (1941) Bom 455) 8
('42) AIR 1942 Cal 215: (200 Ind Cas 362) 11
('39) AIR 1939 Lah 359: (41 Pun LR 841) 9
('29) AIR 1929 Mad 81: (120 Ind Cas 747) 7
('46) AIR 1946 Mad 110: (223 Ind Cas 464) 9
('50) AIR 1950 Mad 306: (1950-1 Mad LJ 33) 9
('52) AIR 1952 Mad 280 9
('48) AIR 1948 Oudh 266: (1948 Oudh WN 126) 8
('34) AIR 1934 Rang 49(1): (149 Ind Cas 1045) 10

JUDGMENT: This is an appeal under section 47, Guardians and Wards Act against the judgment and order of the Senior Subordinate Judge of Mahasu dated 29-9-1951 dismissing the application of the appellant Surat Ram under section 25 of the Act for the custody of his minor son Balak Ram.

(2) The contest in this case is between the father and the mother of the child, named Mt. Nardu. I have heard learned counsel for the parties and am of the opinion that the decision of the Court below should not be interfered with.

(3) As the wordings of section 25 of the Act themselves show, it is the welfare of the minor which is to be the main factor in deciding the question of its custody. There is no doubt that as between the appellant and the respondent the former has the preferential right not only to his appointment as guardian of the person and property of the minor, wherever any such question arises, but also to the custody of the minor. In some cases the mere fact of his bearing such relation to the minor may by itself lead to the conclusion that it is in the interest of the minor that it should return to his custody. There may be other cases, however, where inspite of that relationship it may not be for the welfare of the minor to return to his custody. And where the contest, as in the present case, is between a father and a mother, the advantage which the former has over the latter by reason of his right as a natural guardian cannot by itself be a determining factor, and in such a case the question of the welfare of the minor assumes much greater importance. The facts and circumstances of this case have to be taken into consideration in order to see whether it is in the interest of the minor Balak Ram to return to the custody of the present appellant.

(4) The facts which are not in dispute in this case are the following. The appellant and the respondent were married about 16 years ago. It appears that there was one other son born of this union, but he died. The minor in question was born on 15th Phagun 2002 B., so that at the time of the filing of the present application he was about 5 years and 7 months old, and his age at the present moment is 6 years and 9 months. There is nothing to show that the relations between the parties were anything but normal until the appellant married a second time. This second marriage appears to have taken place when the minor was about a year and half old, i. e. sometime in the year 1948. Thereafter the relations between the husband and the wife became strained, and this was presumably due to the fact of the second marriage.

The appellant had to file against her a suit for restitution of conjugal rights in December 1950. His allegation is that about 13 months before his filing that suit, i. e. about November 1949, she left him with the child. The suit resulted in a compromise decree and Mt. Nardu returned to the appellant and lived with him for about a month. She however again left him on 5-3-1951, taking the child away with her. She has since been living with her parents and latterly with her mother at Simla. Mt. Nardu has admittedly no independent means of livelihood, but she and the child are being maintained by Mt. Nardu's mother who is carrying on the business of selling milk at Simla. The present application was made on 23-4-1951. The petitioner is a forest-guard getting Rs. 60/- p. m. His parents are alive and they live in the ancestral home in village Hariawan, Tehsil Arki. The appellant's second wife along with four children born of this second marriage live with him.

(5) The Court below has found, and the findings have not been challenged, that the appellant is not a man of immoral character and that he is able to support the minor. That Court has how-

ever dismissed the appellant's application on the ground that it is impossible to find an adequate substitute for a mother for the custody of a child of tender years, and consequently the mother is preferable to the father. That Court has therefore held that it is not for the welfare of the minor Balak Ram that he should return to the custody of the appellant. At the same time, that Court provided that the appellant should be entitled to have access to the minor, the method of regulating access being left to the parties themselves. The Court also laid down that in case the appellant ever found that the minor was not being properly cared for or educated, it would be open to him to make a proper application to the Court. The Court below has however not discussed 'in extenso' the various factors appearing on the record, although the same may have weighed with it in passing the aforesaid order. If it were merely the tender age of the child, I would have found it difficult to uphold the decision of the Court below. There are however the following circumstances which are undisputed, and which, in my opinion, support the finding of the Court below that it would not be for the welfare of the minor, at least at the present stage, that he should be made to return to the appellant.

(6) The first and foremost circumstance is that the appellant has married a second time, and that on account of this second marriage the relations between him and his first wife, Mt. Nardu, became strained. This second marriage took place about four years ago, and except for a short period of about a month or so Mt. Nardu and the minor have been living away from the appellant ever since. In other words, ever since the minor was about 2 years and 9 months old he has not been living under the same roof with his father, the present appellant. On the face of it, therefore it cannot be for the welfare of a minor aged only 6 years and 9 months to be taken away from the tender care of his own mother and placed under the same roof with a step-mother and step-brothers and sisters. There can be no two opinions as to the fact that as between a real mother and a step-mother the welfare of a minor is safer in the hands of the former. In fact, the treatment of a step-mother towards her step-child is notoriously so bad that it might even be said that, unless the circumstances make it otherwise obligatory, the welfare of the minor demands that it should not be placed in her custody. Of course, it is the appellant, the minor's own father, who prays for the custody of the child and not the step-mother. But it goes without saying that to allow the appellant's application would be virtually to place the minor in the custody of the step-mother, for the exigencies of his service would necessitate the appellant's living mostly away from the house, and the looking after of the minor would therefore naturally devolve upon the step-mother.

(7) It is noteworthy that there is no allegation on behalf of the appellant that the child is not being properly looked after by its mother. In this connection the learned counsel for the appellant argued that the onus lay on the respondent to prove that the welfare of the minor will be better served if it is allowed to remain in the custody of the mother. He cited — 'Atchayya v. Kasaraju Narhari', A. I. R. 1929 Mad. 81, in support of this proposition. There is no doubt that in that case also the father, who was the petitioner under section 25, had married a second time, but it is noteworthy that the contest lay between him and the maternal grandfather of the minor, and that the minor's mother was dead. Now, as between a father and a maternal grandfather of a child the position of the former from the point of view of the welfare of the minor is clearly preferential. That cannot however be said to be the case where the contest with regard to the custody of a child of tender age lies between its father and mother, as in the present case. And when that is the case, the welfare of the minor in remaining in custody of the mother is so patent that the onus in question would really lie upon the father who wishes to take it away from the custody of the mother, especially where the father has married a second time.

As observed in this ruling itself, the decision of the question whether it would be for the welfare of the child to return to the custody of its guardian must depend entirely upon the circumstances of each case. In the present case therefore it was for the appellant to show that there existed any circumstance which would lead to the conclusion that it was not for the welfare of the mother that it should be allowed to continue to be in the custody of its mother. That, as I have already stated, the appellant has failed to show. That being so, it would rather go to show that the reason why the appellant wants to obtain the custody of the minor is not so much the welfare of the minor as a desire to spite the minor's mother for not coming back and living under the same roof with him and her co-wife.

(8) In the view that I have taken of the matter I find support from a number of rulings cited by the learned counsel for the respondents. These are — 'Bai Tara v. Mohanlal Lallubhai', A. I. R. 1922 Bombay 405, — 'Sarswathibai v. Shripad', A. I. R. 1941 Bom 103 and — 'Sushila Ganju v. Kunwar Krishna', A. I. R. 1948 Oudh 266. The first two rulings have been referred to and relied upon in the last, and I cannot do better than cite the following observations of Kidwai J. in the last mentioned rulings:

> "In making this choice it is not the right of the two parents that will determine the decision of the Court nor even who is at fault for the present sorry state of affairs but what, in the circumstances of the case as they actually exist, is for the welfare of the minor".

And again:

> "Then we have the fact that the father has married again and the minor consequently has a step-mother. A Hindu may have several wives and, in the circumstances of the present case, Mr. Kunwar Krishna cannot be blamed for having married again after all his attempts to persuade his wife to return had failed & he had waited for her for about four years. It is also true that a step-mother may well look after her step-children better than the real mother. Nevertheless this is the exception rather than the rule."

(9) All these were cases where the contest with regard to the custody of the minor lay between the father and the mother. It is also to be noted that the age of the minor boy in the Oudh case was 13 years and in the Bombay case 7 years. The learned counsel for the appellant, on the other hand, cited the following rulings. The first was — 'Soora Reddi v. Chenna Reddi', AIR 1950 Mad 306. In the first place, that was a case under S. 17 of the Act for appointment of a guardian, and not one under S. 25 for the custody of the minor, in which latter case the only consideration which has to weigh with the Court is the welfare of the ward. Secondly, the contest did not lie between a father and a mother, the latter having died immediately after the birth of the child, but between him and his elder brother and sister's

husband. The advantage therefore lay distinctly with the father from the point of view of the welfare of the minor. The next ruling cited by him was —'Mir Mahomed Bahauddin v. Mujee Bunnisa Begam', AIR 1952 Mad 280. That was again a case of appointment of guardian, and, moreover, the mother of the minor had been divorced and had married a second time thereafter. That being so, the choice lay between a step-father on the one side and a step-mother on the other. The same remarks apply to two other rulings cited by the learned counsel for the appellant, i.e. —'Mt. Basant Kaur v. Gian Singh', AIR 1939 Lah 359 and — 'Abubacker v. Mariyumma', AIR 1946 Mad 110.

(10) Another case cited by the learned counsel for the appellant was — 'Khundi Devi v. Chote Lal', 44 All 587, but, as specifically remarked in that case, there was no circumstance adduced against the father which could show that the welfare of the minor would suffer by its being placed in his custody. In — 'Zaw Maung v. Maung Hla Din', AIR 1934 Rang 49 (1), the contest of the father did not lie with the mother of the minor, she being dead, but with a man with whom she had been living. Here again, the welfare of the minor in being put into the custody of its father was patent on the face of it. In —'Sukhdeo Rai v. Ram Chander Rai', 46 All 706, also the contest lay between the father and two of the mother's father's relations of the minor, and not with the mother who was dead. It is clear therefore that the facts and circumstances of the cases relied upon by the learned counsel for the appellant were clearly different. And even in those cases the guiding factor was always described as the welfare of the minor.

(11) Lastly, it was argued by the learned counsel for the appellant, on the authority of — 'Jwalaprosad v. Bachulal', AIR 1942 Cal 215, that a time limit should be fixed by this Court after which the minor may return to the custody of the appellant. That was however a case where the District Judge had already fixed a period of 1½ years after which he directed that the minor should return to the custody of the father, & this order was maintained by the High Court as a reasonable one. In that case the minor was 8 years old, so that if the same criterion were to be applied here a direction would have to be given that the minor should return to the appellant about 2½ years hence. I do not however think that any particular age can be fixed as the proper one of the return of a minor to the custody of his lawful guardian, for each case must be decided according to its own facts and circumstances. These circumstances may be the health of the minor and his general physical and mental growth, about none of which could anything be said at present with certainty. These are matters which can properly be decided only if and when the present appellant moves the Court again for the custody of the minor. One circumstance which might entitle the appellant to move the Court again for the custody of the minor can be that the minor is not being properly cared for or educated, as already provided for in the decision of the Court below. I am therefore unable to accede to the request of the learned counsel for the appellant that a time limit for the return of the minor to the appellant's custody should be fixed in this case.

(12) The appeal is dismissed with costs and the judgment and order of the Court below are affirmed.

B/D.H. Appeal dismissed.

A.I.R. 1953 HIM. P. 52 (Vol. 40, C. N. 22)

CHOWDHRY J. C.

Budhe Ram, Defendant-Appellant v. Hira and others, Plaintiffs-Respondents.

Second Appeal No. 15 of 1952, D/- 26-12-1952.

(a) Civil P. C. (1908), O. 7 Rr. 14 and 18 — Non-compliance with R. 14.

The mere fact that compliance with the provisions of O. 7, R. 14 was not made does not totally debar the production of the document or its secondary evidence. The Court has the power to allow the production of such a document or secondary evidence relating thereto under Rule 18 of the said Order despite the omission. (Para 4)

Anno: C. P. C., O. 7 R. 14 N. 1; R. 18 N. 1.

(b) Civil P. C. (1908), S. 100 and O. 7, R. 14 — Objection based on O. 7, R. 14 — Objection cannot be raised for first time in second appeal. (Para 4)

Anno: C. P. C., Ss. 100 and 101, N. 56; O. 7, R. 14, N. 1.

(c) Evidence Act (1872), S. 65 — Objection as to admissibility — (Civil P. C. (1908), S. 100).

The objection that the trial Court should have first recorded a finding that the original deed did exist and was in possession of the defendant and only then permitted the plaintiffs to produce secondary evidence as to the contents of the document, cannot be raised for the first time in second appeal. (Para 4)

Anno: Evi. Act, S. 65, N. 13; C. P. C., Ss. 100 and 101, N. 56.

(d) Evidence Act (1872), S. 89 — Plaintiff's allegation that document had been effected and was in defendant's possession found to be correct — Defendant cannot, without producing document, contend that it was not stamped according to law: AIR 1922 Lah 401 (2), 95 Ind Cas 444 (Lah) and AIR 1938 Lah 90, Disting. (Para 7)

Anno: Evi. Act, S. 89 N. 1.

(e) Evidence Act (1872), S. 21 — Admission by 'Mukhtar'.

Where in a suit for a declaration that, a partition having already taken place, the defendant was not entitled to have it repartitioned, the plaintiff files a certified copy of a previous statement made by the defendant's 'mukhtar-e-am' admitting partition and an ample opportunity is given to the defendant to explain the admission but it is not availed of by him, the admission can be used in evidence. (Para 8)

Anno: Evidence Act, S. 21 N. 2.

Hira Lal, for Appellant; Thakur Prasad, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('22) AIR 1922 Lah 401(2): (3 Lah 282) 7
('26) 95 Ind Cas 444: (27 Pun LR 268) 7
('30) AIR 1930 Lah 714: (11 Lah 632) 8
('38) AIR 1938 Lah 90: (181 Ind Cas 642) 7

JUDGMENT: This is a second appeal by the defendant Budhe Ram. One Bhagi had two sons, Dile Ram and Mani Ram. The appellant is the only son of Dile Ram, and the plaintiffs and 'pro forma' defendant belong to the branch of Mani Ram. Budhe Ram applied to the revenue authorities for partition of land in three villages Balaun, Thach & Bahndi. The plaintiffs put in objections that a private partition had already taken place. On their being so directed by the revenue authorities, the plaintiffs filed the present suit for a declaration that by reason of

the joint family property having already been partitioned about 25 years previously, the defendant-appellant was not entitled to have it repartitioned.

Both the Courts below have decreed the plaintiffs' suit, and now Budhe Ram defendant has filed this second appeal. It may be stated 'in limine' that the only point for determination in this appeal is whether the plaintiffs' allegation of private partition is correct. It is not necessary to hold further as to whether the properties were allotted between the two branches as alleged in the plaint. The reason is that this is not a suit for partition but merely for a declaration that, a partition having already taken place, the defendant-appellant was not entitled to have it repartitioned.

(2) It appears that during the pendency of the suit in the trial Court the plaintiffs applied that at the time of partition a partition-deed was executed by the parties and the same had been handed over to the defendant-appellant, and that he be required to file the same. The Court gave notice to the defendant to produce the document or show cause against it. The defendant replied that he had no such document, and in fact no such document had been effected. The trial Court allowed secondary evidence to be produced to prove the contents of the partition-deed.

It was argued by the learned counsel for the defendant-appellant that as there was no partition no such deed was ever executed, and that the trial Court should not have allowed secondary evidence to be produced unless it had first arrived at the conclusion that the original was or appeared to be in the possession or power of the defendant-appellant, as required by S. 65, Evidence Act. He further argued that the plaintiffs-respondents had also to prove that the document was duly stamped before they could prove its contents by secondary evidence.

The testimony of the witnesses Bholu and Premu produced by the plaintiffs as two of the four Panchas who effected the partition and attested the partition-deed was criticised as inadmissible since they were illiterate and could not, therefore, be persons who had themselves seen the document, as required by S. 63 (5), Evidence Act. The learned counsel for the defendant-appellant further referred to various circumstances negativing the theory of partition set up by the plaintiffs. These were that no mutation in the revenue records was ever made in accordance with the alleged allotment of shares, and that there was great disparity in the shares according to the plaintiffs' case, the area of land allotted to the plaintiffs' branch being greatly in excess of that allotted to the defendant.

(3) The last two circumstances are explicable, and the explanation actually offered by the plaintiffs does not appear to have been improperly accepted by the Courts below. The plaintiffs' witnesses have stated that allotment of land was made on the basis of areas actually under cultivation and not on the basis of the total acreage. They have further stated that the defendant was compensated by the allotment of a 'gharat'. It is noteworthy that the defendant had not the courage to go into the witness-box and deny these facts. This omission on the part of the defendant-appellant to come into the witness-box is an important circumstance in this case, and I shall advert to it presently.

As regards the contention that the alleged partition was not followed by any mutation in the revenue records, it is not an unprecedented phenomenon. In my opinion, the most important fact to be considered in the present case is whether or not a deed of partition was effected, for if the plaintiffs' allegation in that behalf be correct, non-production of the document by the defendant raises a strong presumption against the defence contention and in favour of the plaintiffs' case. I, therefore, proceed to take up this important point.

(4) It was strenuously argued by the learned counsel for the defendant-appellant that no mention of the partition-deed was made in the plaint, and that the plaintiffs did not file along with the plaint a list mentioning the partition-deed as a document, whether in their possession or power or not, on which they relied as evidence in support of their claim, as required by O. 7, R. 14, Civil P. C. There can be no doubt about these omissions on the part of the plaintiffs, but the mere fact that compliance with the provisions of O. 7, R. 14 was not made did not totally debar the production of the document or its secondary evidence. The Court had the power to allow the production of such a document or secondary evidence relating thereto under R. 18 of the said Order despite the omission.

And the record shows that when the plaintiffs applied to the Court for an order to the defendant to produce the document, the trial Court passed an order directing the defendant to file the deed or show cause against it after hearing arguments on both sides. The order is a detailed one and dated 26-9-1950. It is noteworthy that no objection was at that stage taken on behalf of the defendant under O. 7, R. 14. Moreover, any objection based on the provision just mentioned is too late at this stage. For the same reason it is now too late for the defendant-appellant to contend that the trial Court should have first recorded a finding that the original deed did exist and was in possession of the defendant and only then permitted the plaintiffs to produce secondary evidence as to the contents of the document.

The parties have produced evidence on the point, and both the Courts below have accepted the evidence produced by the plaintiffs as correct. All that this Court has, therefore, to see is whether the Courts below were right in doing so. That is a privilege, be it noted, which is open to the present defendant-appellant on account of the peculiar provisions of para. 32, Himachal Pradesh (Courts) Order, 1948, for otherwise the concurrent finding of fact of the 2 Courts below would have been conclusive against the appellant.

(5) The two witnesses, Bholu and Premu, produced by the plaintiffs profess to have been amongst the Panches who brought about the partition. The other two 'Panches', according to them, were Prema and Tara, both of whom have since died. Tara is said to have scribed the deed. They have further stated that the deed was handed over to the defendant. True, Bholu at first stated that the deed was handed over to the defendant because he was senior to Maya Ram plaintiff, but he later corrected himself and stated that of the two Maya Ram was the older. The other witness Premu as well as Hira plaintiff have stated that the document was handed over to the defendant because he was the manager of the family.

There is no doubt some force in the argument of the learned counsel for the defendant-appellant that partition-deeds are generally effected in duplicate, each party retaining one copy. It is important to note, however, that the defendant has not come into the witness-box to rebut the statements of the plaintiff Hira and the plaintiffs' witnesses Bholu and Premu. The plaintiffs' case ever since they applied for notice to the defendant to file the partition-deed was that the document was in his possession. Nothing, therefore, could have been easier for the defendant than to come into the witness-box and deny the allegation and in particular the statements of the two witnesses Bholu and Premu who profess to have acted as 'Panches' in bringing about the partition.

If the defendant had come forward and stated that no partition ever took place and no deed of partition was effected, it would have been open to the defendant-appellant to take advantage of the aforesaid circumstances. I mean the circumstances that partition-deeds are generally effected in duplicate, that no mutation pursuant to the partition had been made and that there was apparent disparity in the shares allotted on account of a larger area having gone to the plaintiffs than to the defendant. The non-appearance of the defendant in the witness-box, and that without any explanation whatsoever, however, raises a strong presumption against him, and I would agree with the finding of the Courts below that a deed of partition was in fact effected and that it was in possession of the defendant.

(6) Once it is held that a partition-deed was effected, and that it was in possession of the defendant, there is an end to the matter so far as the present case is concerned. As already stated, it is not necessary in this case to find out what the contents of the partition deed were, for this is not a suit for partition. In order to defeat the defendant-appellant's application for partition before the revenue authorities it is sufficient for the plaintiffs to show that there had already been a partition between the parties. That being so, the argument of the learned counsel for the defendant-appellant that the evidence of the said two witnesses for the plaintiffs, Bholu and Premu, with regard to the contents of the deed of partition being inadmissible under S. 63 (5), Evidence Act, is beside the point. The testimony of those witnesses is in any case not inadmissible for the purpose of proving the factum of partition.

(7) For the same reason, it is quite beside the point to contend, as the learned counsel for the defendant-appellant has done, that secondary evidence could have been offered by the plaintiffs in regard to the contents of the partition-deed only when they proved that the primary evidence itself is admissible by showing that the partition-deed was on a proper stamp. As already stated, it is not necessary at all in this case to go into the question of what the contents of the partition-deed were. Furthermore, under S. 89, Evidence Act, the Court shall presume that the partition-deed called for and not produced by the defendant-appellant after notice to produce was stamped in the manner required by law.

Of course, the presumption is rebuttable, but it cannot be said to have been rebutted by any direct or circumstantial evidence in the present case. For reasons already recorded, I have held that the plaintiffs' allegation about a partition-deed having been effected and about its being in possession of the defendant is correct. Without producing the deed, therefore, it is not open to the defendant to contend that it was not stamped according to law. A number of rulings were cited by the learned counsel for the defendant-appellant in this connection. One was — 'Md. Ayub v. Rahim Bakhsh', AIR 1922 Lah 401 (2).

In that case it was admitted that the primary evidence was unstamped. That being so, no presumption could in that case arise under S. 89, Evidence Act, and secondary evidence was clearly inadmissible. The same remarks apply to — 'Mohd. Din v. Alladitta', 95 Ind Cas. 444 (Lah) and to — 'Ladha Ram v. Hari Chand', AIR 1938 Lah 90. The argument on behalf of the original partition-deed not being stamped according to law is, therefore, irrelevant and not open to the defendant-appellant.

(8) Before I conclude I may as well refer to a few circumstances. One is that the defendant's 'Mukhtar-e-am' admitted in the partition proceedings that a private family partition had already taken place between the parties. True, that partition was stated by him to have taken place only 5 years ago, whereas according to the plaintiffs it was effected about 25 years previously. But in view of the fact that the partition-deed has been suppressed by the defendant the plaintiffs' version of the matter must be accepted as correct. It was argued by the learned counsel for the defendant-appellant that this admission could not be used because it had not been put to the party against whom it was sought to be utilised.

In support of this argument he relied upon — 'Shafiquddin v. Mahbub Elahi', AIR 1930 Lah 714, where it was laid down that admissions cannot be used against a party unless they are put to him and an opportunity is afforded to him to explain them if they are capable of explanation. A certified copy of the statement in question was, however, filed by the plaintiffs soon after the institution of the suit. The suit was instituted on 21-2-1949 and the document was filed on 8-3-1949. The suit took 2 years and 4 months in the trial Court. There was, therefore, ample opportunity afforded to the defendant to explain the admission, but neither the defendant himself came into the witness-box nor did he produce the 'Mukhtar-e-am' in question. This admission by the defendant's own 'Mukhtar-e-am' during partition proceedings as to a previous family partition having already taken place is, therefore, an important circumstance in favour of the plaintiffs' case.

Another circumstance worthy of notice is that the plaintiffs have built a number of houses in village Balaun, where according to them land fell exclusively to their share, and the defendant has likewise built a house of his own in village Thach, where according to the plaintiffs' case land was allotted wholly to the defendant. This is more in consonance with the plaintiffs' version of the case than with that of the defendant. From all the facts and circumstances I agree with the finding concurrently arrived at by the two Courts below. Accordingly, the appeal is dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.

B/V.R.B. **Appeal dismissed.**

A.I.R. 1953 HIM. P. 55 (Vol. 40, C. N. 23)

CHOWDHRY J. C.

Nandu Ram, Petitioner v. M/s. Jagannath Parshotam Das and another, Respondents.

Civil Misc. Petn. Nos. 7 and 8 of 1952, D/- 24-11-1952.

Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), Ss. 6 and 13 (2) (i) — Fixation of fair rent — Date of operation.

Under S. 9, the Controller has merely to fix the fair rent but not from any particular date. Once fair rent has been fixed, the landlord in proceedings of eviction on the said ground cannot, in view of the bar of S. 6, allege or prove non-payment at a rate higher than the fair rent. It follows therefore that he cannot do so for any period. No question of giving a retrospective or a prospective effect to the order of fixation of rent arises. AIR 1952 Him P and B 28 Followed; AIR 1950 Mad 185; AIR 1951 Mad 493 and AIR 1950 Ajmer 36(1), Distinguished. (Para 6)

Tekchand, for Petitioner; R. N. Malhotra, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('51) AIR 1951 SC 115: (1951 SCR 145) 4
('50) AIR 1950 Ajmer 36(1) 8
('52) AIR 1952 Him P & B 28 2, 5, 7
('51) AIR 1951 Cal 138: (56 Cal WN 23) 4
('51) AIR 1951 Cal 193 (SB) 5
('51) AIR 1951 Him P 72 4
('50) AIR 1950 Mad 185: (1949-2 Mad LJ 555) 8
('51) AIR 1951 Mad 493: (1950-2 Mad LJ 810) 8
('52) 54 Pun LR 358: (AIR 1952 Punj 422) 4

JUDGMENT: These are applications in revision under Art. 227 of the Constitution arising out of proceedings in two cases instituted by the applicant Nandu Ram as landlord under S. 13 (2) (i) of the East Punjab Urban Rent Restriction Act (III of 1949), one against Jagannath Parshotam Das, & the other against Hansraj Manoharlal, for their eviction from the shops occupied by them on the ground of non-payment of rents respectively due by them. Both the applications can conveniently be disposed of by one judgment.

(2) The landlord's application was dismissed by the Controller, and so was his appeal by the District Judge as appellate authority under S. 15 of the Act in both the cases. The District Judge agreed with the Controller that there was 'no non-payment of rent' as contemplated by S. 13 of the Act. In the course of his judgment, he also observed that in view of certain observations of this Court in — Lalla Ram v. Naresh Chand', AIR 1952 Him P & B 28, the question of the date from which the order of the Controller fixing fair rent became operative could only be determined in a suit in respect of rent.

(3) There are certain facts with regard to which there is no difference between the parties. Both the tenancies were on an annual basis, the rent payable by the former being Rs. 306/- and that by the latter Rs. 150/-. Rs. 200/- were paid by the one and Rs. 93/2/- by the other as rents in advance. Applications for eviction were filed in both the cases on 26-6-1951. Prior to that, however, i.e., on 25-9-1950, the Controller had fixed Rs. 120/- per annum in one case and Rs. 42/- per annum in the other as fair rents on foot of applications filed on 29-10-1949 by the respective tenants under S. 4 of the Act. After the disposal of these fixation-of-fair-rent cases, but before the institution of the two applications for eviction, each of the two tenants remitted to the landlord by money-orders on 25-11-1950 sums which had been fixed as fair rents in their respective cases, i.e., Rs. 120/- and Rs. 42/-, but the landlord refused to accept the payments. It has been argued by the learned counsel for the petitioner that rents at fair rates were calculable only from the date of the tenant's applications under S. 4 of the Act, that before that the tenants were liable for rent at the contract rates, and that on this basis of calculation both the tenants were in arrears and therefore liable to eviction. On the other hand, it was argued by the learned counsel for the respondents, the tenants, that rents were calculable throughout at the fair rates, since once fair rents had been fixed under S. 4 the landlord was debarred from claiming it at a higher rate.

(4) The learned counsel for the respondents took the preliminary objection that, in view of the concurrent findings of fact of both the Courts below that there was no non-payment of rent on the part of the tenants, these are not fit cases in which this Court should exercise its power of superintendence under Art. 227 of the Constitution. The learned counsel for the petitioner, however, argued on the basis of — 'Bawa Singh v. Kundal Lal', 54 Pun L R 358, — 'Brij Raj Krishna v. S. K. Shaw and Brothers', AIR 1951 S C 115, — 'Narendra Nath v. Binode Behari', AIR 1951 Cal 138 and — 'Pushpa Devi v. Kanshi Ram Nand Kishore', AIR 1951 Him P 72, that this was a fit case for the exercise of the said power because the District Judge had refused to exercise a jurisdiction which did vest in him by erroneously holding that the question as to the date from which fair rent fixed by the Controller became operative could not be determined in the proceedings before him but only by a separate suit.

(5) Now, there is no doubt that the learned District Judge has made the aforesaid observation, and a view somewhat to the same effect appears also to have been expressed by the Controller. But the basis of decision of both the Courts is the concurrent finding of fact that there has been no non-payment of rent. That being so, the present revision petitions can be dismissed on that short ground. But it is not merely the question of correctness or otherwise of the decisions that is involved here. Despite the views expressed by the Court in — 'Lalla Ram v. Naresh Chand', AIR 1952 Him. P and B. 28, there appears still to exist in the subordinate Courts in this State a misconception as regards the effect of fixation of fair rent under S. 4 of the Act. For instance, in these two cases the Courts below have erroneously held that the question of the date from which fair rent becomes operative could not be determined in proceedings under S. 13. I would therefore take this opportunity of examining the relevant provisions and of expressing my views thereon for the guidance of the Courts, for, as held in — 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', A. I. R. 1951 Cal 193 (SB), the High Court's power of superintendence under Art. 227 of the Constitution is a power, inter alia, "to see that they (the Subordinate Courts) do what their duty requires". True, the not doing by the Courts of what their duty required has had no effect in these cases, but there is a danger of the very purpose of the said power of superintend-

ence being negatived if this Court were to postpone its exercise until there arises a case where not only the duty has been transgressed but the transgression has also affected the case.

(6) The Act in question is a short one, and its purpose is to protect the interests of tenants in urban areas in two ways, by fixation of fair rent and imposing restrictions on its increase, and by barring their eviction except on certain specified grounds. Fair rent is determined by the Controller on application by the tenant or the landlord on certain data under S. 4 of the Act, subject to increase in cases of addition, improvement or alteration under S. 5 and of fresh levy of or increase in rate, cess or tax under S. 9. The controller has merely to fix the fair rent but not from any particular date. Certain consequences of fixation of fair rent, however, ensue under the Act, namely, (1) that the landlord shall not claim or receive anything in addition to or in excess of fair rent, vide sections 6, 7 and 9 (2), and (2) that if he has, the tenant can, subject to certain restrictions as to period of limitation, recover the excess by deduction from rent payable by him or otherwise.

Now, when a landlord seeks to evict a tenant under S. 13 (2) (i), he must necessarily allege and prove that the tenant has not paid or tendered the rent due by him. And if the fair rent has already been fixed, the rent the non-payment of which the landlord alleges cannot, in view of the provisions of S. 6, be rent in excess of the fair rent. It may be that the rent for the non-payment of which eviction of the tenant is sought relates to periods both before and after the date of fixation of fair rent, but that makes no difference. Once fair rent has been fixed, the landlord in proceedings of eviction on the said ground cannot, in view of the bar of section 6, allege or prove non-payment at a rate higher than the fair rent. It follows therefore that he cannot do so for any period. No question of giving a retrospective or a prospective effect to the order of fixation of rent thus arises. As already stated, in fixing fair rent the Controller does not state the date from which his order is to operate, and this for the simple reason that the Act does not require him to do so. But certain results follow from the fixation of fair rent, and the question of whether the order will have a retrospective or a prospective effect will depend upon the facts and circumstances of the case in which the question arises. For instance, in the present case since the orders fixing the fair rents had already been passed before the filing of the applications for eviction, the landlord was debarred from alleging and proving non-payment at rates higher than the fair rents. And this applied to the entire period for which non-payments were pleaded, which in the present cases happened to cover periods both before and after the date of the order of fixation of fair rent.

(7) To the same effect was the said view expressed by me in — 'Lalla Ram's case', in AIR 1952 Him P & B 28, which was as follows:

"There is no doubt, that it is not within the province of the Controller to give effect to his order from any particular date, retrospective or prospective, for all that he is required to do under section 4 of the 1949 or the 1947 Act is to determine the fair rent after taking into consideration certain facts mentioned in the section. Once the Controller has determined the fair rent the question of whether that rent is applicable to any particular period of time can only arise for determination in a suit in respect of rent between the landlord and the tenant, and the question will then be decided on a correct application of Sections 6 and 8 to the facts of the case."

"In a suit in respect of rent" meant any suit in which the question of rent might arise. Both the Courts below were clearly wrong in thinking that the landlord had to file a separate suit for determination of the date from which the order of fixation of fair rent was to operate. The effect of the order of fixation of rent should have been ascertained in these cases according to the principles laid down above.

(8) The learned counsel for the petitioner argued that the order of fixation of fair rent is operative from the date of the application for its fixation under S. 4 of the Act. In support of his argument he cited — 'Rajammal v. Chief Judge, Court of Small Causes, Madras', AIR 1950 Mad 185, 'Hari Rowji v. Malabar District Board', AIR 1951 Madras, 493 and — 'Nathirmal v. Sualal', AIR 1950 Ajmer 36 (1). The last-named case should not have been cited for it related to the Delhi and Ajmer-Merwara Rent Control Act, 1947, in which, unlike the Act under consideration, there is a specific provision in S. 7 (5) whereunder the date from which the standard rent is to have effect has to be fixed. As regards the Madras cases, the corresponding provisions of the Madras Act are no doubt in effect the same as those of the Punjab Act under consideration, but in both the cases the fair rents fixed were in excess of the prior agreed rates. In claiming rent at the enhanced rate therefore the landlord did not contravene any provision of the Act but, on the contrary, really acted in compliance with the same. And it was in that circumstance that it was held that the landlord cannot claim rent at the enhanced rate by giving the Act a retrospective effect. None of the rulings has therefore any application in the present cases.

(9) The learned counsel for the petitioner also referred to the provisions of S. 8 of the Act and argued that only by a suit can the tenant recover any amount paid by him in excess of fair rent, and therefore he cannot raise that plea by way of defence in proceedings for eviction instituted by the landlord under S. 13. This argument has no force since, as already shown, the landlord is himself debarred from claiming any sum in excess of fair rent when fair rent has once been determined. If therefore he acts in contravention of that, the tenant can certainly plead the bar in defence.

(10) There is nothing further to say in this case. So far as actual calculation is concerned, both the Courts have rightly done it at the fair rates of rent fixed under S. 4. The basis of calculation being correct, and there being the concurrent finding of both the Courts that, taking into account the sums paid and the sums tendered, there was no non-payment of rent rendering the tenants liable to eviction, this Court will not enter into the correctness or otherwise of that finding in exercise of its power of superintendence under Art. 227 of the Constitution.

(11) Both the revisions are dismissed and the petitioner will pay Rs. 50/- as costs to the respondents in each case.

B/H.G.P. Revisions dismissed.

A. I. R. 1953 HIM-P. 57 (Vol. 40, C. N. 24)

CHOWDHRY J. C.

Hira Singh Bam, Petitioner v. The State of Himachal Pradesh and another, Respondents.

Civil Misc. Petn. No. 20 of 1952, D/- 27-10-1952.

(a) Constitution of India, Art. 31(1) — Infringement of fundamental right.

A purchasing a State house from Government — Government reserving right to repurchase it by specific term in sale deed — Notice by Deputy Commissioner asking A to vacate house within a month — A admitted to be in proprietary possession — Action by Deputy Commissioner amounts to deprivation of A by the State of his property not by authority of Law and thus constitutes breach of Art. 31(1). AIR 1931 PC 248, Rel. on. **(Para 7)**

(b) Constitution of India, Arts. 226, 31(1) — Invasion of fundamental right by executive — Duty of Court.

In cases of invasion of fundamental rights it is not merely a power but a duty of the High Court to grant relief by the issue of prerogative writs under Art. 226. AIR 1951 Pat 434, Rel. on. **(Para 8)**

The High Court will exercise the utmost restraint in interfering with the acts of the executive. But where the High Court is satisfied that the fundamental rights guaranteed by the Constitution have been violated by any act or order of the executive it is the sacred duty of the High Court to set it aside. The High Court has power to do this under Art. 226 by issuing a writ or any appropriate order so that a wrong done by the order of the Government may be remedied. AIR 1952 Hyd 36, Rel. on. **(Para 9)**

K. C. Pandit, for Petitioner; L. N. Sethi, Govt. Advocate, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('31) AIR 1931 PC 248: (132 Ind Cas 739) 8
('51) AIR 1951 Hyd 89: (52 Cri LJ 901 FB) 9
('51) AIR 1951 Hyd 1 (FB) 9
('52) AIR 1952 Hyd 36: (1952 Cri LJ 340) 9
('51) AIR 1951 Pat 434: (30 Pat 21) 8

CHOWDHRY J. C.: The petitioner purchased a house in Nahan, known as the "Rose View", from the ex-Government of Sirmur for Rs. 8,000/- on 28-1-2005 B., corresponding to 9-4-1948, and he has ever since been in possession of the same.

(2) One of the terms of the sale-deed was that in case of need the Ruler will have the right to repurchase the house for Rs. 8,000/- without any objection by the vendee. On 2-7-1952 the Deputy Commissioner, Sirmur at Nahan served the petitioner with a notice. Reference was made to the terms of the petitioner's sale-deed, and he was informed that the house was urgently required by the military authorities. The Deputy Commissioner then went on to say that he had been directed to ask the petitioner to vacate the house before 31-7-1952 and hand over possession of the same to Lt.-Colonel Onkar Chand, Commanding Officer Military Station, Nahan. It was also stated in the communication that after handing over possession the petitioner might make a demand for refund of sale price to the proper authorities.

(3) On 11-7-1952 the petitioner made a representation to the Lieutenant-Governor through the Chief Minister, Himachal Pradesh, contesting his liability to eviction from the house, and prayed that the said communication from the Deputy Commissioner be cancelled and his possession of the house not interfered with. The petitioner has vouchsafed no reply to the representation, and as the time limit for vacating the house was drawing near, he preferred the present application under Art. 226, Constitution of India on 28-7-1952, complaining that the said action of the Government amounted to an infringement of the fundamental right of the petitioner under Art. 31 of the Constitution, and praying for the issue of such directions and orders to the respondents as might be just and expedient to prevent the respondents from interfering with the petitioner's possession and enjoyment of the property in question. By an interim order enforcement of the said order of the Deputy Commissioner was stayed.

(4) The application has been resisted by the respondents, the State of Himachal Pradesh and the Deputy Commissioner of Sirmur at Nahan. Arguments were advanced on both sides on the question of whether the State of Himachal Pradesh, as successor-in-interest of the ex-State of Nahan, was entitled to enforce against the petitioner the said term in the sale-deed relating to the vendor's right of repurchase. In the view that I take of the matter, however, it is not necessary to express any opinion on the point. Indeed, in view of a possible litigation between the parties any such expression of opinion will be improper. The only question that calls for determination in this case is whether any fundamental right of the petitioner guaranteed to him under the Constitution has been infringed by the manner in which he was required by the respondents to vacate the house in dispute, and, if so, whether the petitioner is entitled to any, if so what, relief.

(5) It was argued by the learned Government Advocate on behalf of the respondents that the mere fact that the petitioner claims the right to undisturbed proprietary possession of the house in dispute does not amount to any fundamental right. That is however a misinterpretation of the petitioner's claim. The petitioner seeks to enforce the fundamental right contained in Art. 31(1) of the Constitution, which lays down that no person shall be deprived of his property save by authority of law. Subject to whether the State of Himachal Pradesh has, or has not, a right of repurchase under the said clause of the sale-deed, it is conceded that the petitioner is in proprietary possession of the house in dispute. That being so, the said Article of the Constitution guarantees to the petitioner the fundamental right of not being deprived of the property save by authority of law.

(6) The next question that arises, therefore, is whether the said fundamental right is being threatened, or, in other words, whether the petitioner is threatened with deprivation of the property save by authority of law. The learned Government Advocate argued that due merely to the issue of the said communication by the Deputy Commissioner to the petitioner it could not be said that the petitioner's right had been threatened. He contended that the said communication by itself, without anything more, did not give the petitioner any right to come to this Court and the present petition under Art. 226 of the Constitution was therefore premature. He was

asked what he meant by the words "without anything more." The respondents' written reply is quite silent on the point, and the learned Government Advocate was not prepared to say that the said communication of the Deputy Commissioner was merely a prelude to the institution of a suit by the State against the petitioner. All that the learned Government Advocate stated was that the State sought to enforce the said term of the sale-deed. But he was not prepared to give out what action would the State have taken if the petitioner did not comply with the said communication of the Deputy Commissioner. The only other point specifically urged by the learned Government Advocate was that it was for the petitioner, and not for the State, to go to Court, and that, if the petitioner agreed to do so, the State would not dispossess him of the house in question during the period of notice under S. 80, Civil P. C., and for a reasonable time thereafter uptill the institution of a suit by him to ventilate his so-called right to remain in possession of the house despite the said term of the sale-deed.

(7) Although the point has not been cleared in so many words by the respondents in their reply, or by the Government Advocate in his arguments, the position is quite clear. The respondents do not want to go to Court to enforce the said right of repurchase, but they want the petitioner to do so in order to establish that the State of Himachal Pradesh is not entitled to enforce the said right. Furthermore, should the petitioner choose not to go to Court or to vacate the house in compliance with the said communication of the Deputy Commissioner, he would be dispossessed. The learned Government Advocate did not, as indeed he could not, point out to me any rule or law under which the State could dispossess the petitioner without first having the liability of the petitioner for dispossession adjudicated upon in a Court of law. It is manifest therefore that the respondents want to take the law into their own hands. This they are certainly not entitled to do, and in this respect it makes no difference that this violation of an elementary principle of jurisprudence emanates from the executive rather than from an individual citizen. In this connection I might do worse than quote the following observations of Lord Atkin in — 'Eshugbayi v. Government of Nigeria', AIR 1931 PC 248, which, though used in another connection, are equally appropriate to the facts of the present case:

> "As the executive he (the Governor of Nigeria) can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

In the present case the State of Himachal Pradesh seeks to deprive the petitioner of his property otherwise than by supporting the legality of such an action before a Court of justice and in pursuance of no power given to it by law. In other words, the State is depriving the petitioner of his property save by authority of law, and therefore infringing the fundamental right guaranteed to the petitioner by Art. 31(1) of the Constitution.

(8) The next question that arises is whether, in view of the above finding, the petitioner is entitled to invoke the extraordinary jurisdiction of this Court under Art. 226 of the Constitution. The alternative remedy by an ordinary suit in a Court of law could not have been equally efficacious since such a suit could not have been filed without a prior notice to the State under S. 80, Civil P. C., and the petitioner, who was given less than a month's notice to vacate, would have been dispossessed of the house before the expiry of the period of notice. Apart from that, this being a case where enforcement of a fundamental right under the Constitution was involved, an application to this Court under Art. 226 of the Constitution was the only appropriate remedy open to the petitioner. Had the petitioner filed a suit in a subordinate Court, it would have involved a substantial question of law as to the interpretation of Art. 31(1) of the Constitution the determination of which would have been necessary for the disposal of the case, and therefore it would have been incumbent on this Court, under Art. 228 of the Constitution, to withdraw the case. Indeed, in cases of invasion of fundamental rights it has been held to be not merely a power but a duty of the High Court to grant relief by the issue of prerogative writs under Art. 226. — 'Sayeedah Khatoon v. State of Bihar', AIR 1951 Pat 434 (at p. 436).

(9) The facts of the present case are analogous to those of — 'G. Kistareddy v. Commr. of City Police, Hyderabad', AIR 1952 Hyd. 36. That was a case where the petitioner had been in possession of the property in dispute, which he had purchased in a court sale, but the petitioner was dispossessed of the same under orders of the Commissioner of the City Police of Hyderabad after the issue of a notice to the petitioner to vacate the property by a certain date. The plea of the respondent that possession was taken over by the police with consent was repelled, and their Lordships agreed with the contention put forward on behalf of the petitioner that if the police had any claim to the property the matter should have been litigated in ordinary civil Courts as between party and party instead of recourse being had to forceful dispossession. They held therefore that the action of the police amounted to an infringement of the rights of property guaranteed to the petitioner under Art. 31(1) of the Constitution. It was further held as follows:

> "The duty to abide by the Constitution and to maintain the rule of law is cast upon all the three branches of the State i.e., the legislature, executive and the judiciary, see — 'Gesulal v. State of Hyderabad', AIR 1951 Hyd 89 (FB) at p. 91 column 1 para 9 and if the first two in any way transgress the limits of the Constitution or violate any of the fundamental rights, it is the duty of the Courts to declare it so. Naturally, the High Court will be very reluctant to interfere with an order of the executive unless it is fully satisfied that the action of the executive cannot in any way be supported in view of the provisions of the Constitution. The High Court will exercise the utmost restraint in interfering with the acts of the executive. But where the High Court is satisfied that the fundamental rights gua-

ranteed by the Constitution have been violated by any act or order of the executive it is the sacred duty of the High Court to set it aside, vide — 'Mahbub Begum v. Hyderabad State', AIR 1951 Hyd 1 (FB). This High Court has power to do this under Art. 226 by issuing a writ or any appropriate order so that a wrong done by the order of the Government may be remedied."

(10) The petition is allowed and the respondents are directed not to dispossess the petitioner of the house in dispute in execution of the said communication of the Deputy Commissioner of Sirmur at Nahan dated 2-7-1952, or, in execution of any mere executive order of the State. If the respondents have any claim to the property in dispute, they should first establish their right to the claim by the institution of a suit in the appropriate Court of law. The petitioner will have his costs of the present proceedings from the .State of Himachal Pradesh, which I fix at Rs. 50/- (Rupees fifty).

A/D.R.R. Petition allowed.

A. I. R. 1953 HIM-P. 59 (Vol. 40, C. N. 25)

CHOWDHRY J. C.

Bhajnu, Petitioner v. Raiya, Respondent.

Civil Misc. Petn. No. 12 of 1952, D/- 31-10-52.

Constitution of India, Art. 227 — Power of superintendence — (Punjab Tenancy Act (16 of 1887), Ss. 84, 5 (1) (c) and 8).

The powers of superintendence of the High Court under Art. 227 of the Constitution cannot be invoked merely for the purpose of correcting errors in decision on questions of fact or law in the exercise of their jurisdiction. AIR 1952 All 526 and AIR 1951 Cal 193 (SB), Foll. (Para 7)

Anno: Civil P. C. App. III, Constitution of India, Art. 227 N. 1.

Kr. Dalip Singh, for Petitioner; G. L. Verma, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('52) AIR 1952 All 526: (1952 Cri LJ 1176) 4
('51) AIR 1951 Cal 193 (SB) 4

JUDGMENT: This is an application to this Court by Bhajnu for setting aside the judgment and decree of the Financial Commissioner of Himachal Pradesh, dated 2-2-1952, in exercise of this Court's powers of superintendence under Art. 227 of the Constitution.

(2) The petitioner as landlord applied to the Revenue Officer under section 43, Punjab Tenancy Act, for ejectment of the respondent Raiya from land of which he stood recorded as a tenant-at-will. On the requisite notice of ejectment being served upon him, Raiya instituted a suit to contest his liability to ejectment on the ground that he was an occupancy tenant of the land. That suit was dismissed by the Assistant Collector 1st grade on 15-5-1951 on the ground that although Raiya had been in cultivatory possession of the land for 35 years or more, he had not acquired occupancy rights therein. Raiya was however awarded Rs. 1160/- as compensation under section 70 of the Act.

(3) Raiya then filed an appeal to the Collector under section 80 but the Collector dismissed the appeal on 30-6-1951 affirming the findings of the trial Court on both the points. Thereafter Raiya went up in revision to the Financial Commissioner under section 84 of the Act, and the Financial Commissioner passed the judgment which is now sought to be revised by Bhajnu. The learned Financial Commissioner allowed the revision, set aside the decisions of the Courts below and declared Raiya an occupancy tenant under section 8 of the Punjab Tenancy Act in the land in dispute.

(4) A plethora of rulings was cited by the learned counsel for the petitioner in regard to the powers of this Court under Art. 227 of the Constitution. It is not necessary to refer to all of them and it would be sufficient to cite the observations of Misra J. in — 'Pambhi v. State', A. I. R. 1952 All. 526. This ruling followed amongst others a ruling of the Calcutta High Court cited by the learned counsel for the petitioner himself and reported as — 'Dalmia Jain Airways v. Sukumar Mukherjee', A. I. R. 1951 Cal. 193 (S. B.). It was laid down in the Allahabad ruling as follows:

"The superintendence referred to in Article 227 does not invest the High Court with an unlimited prerogative to interfere in cases where a wrong decision has been arrived at either in fact or in law and the powers contained therein must be restricted to cases of grave dereliction of duty and flagrant abuse of any fundamental principles of law. The right to obtain relief under it depends further on the conditions that no other remedy is available to the applicant and the remedying of the wrong is essential in order to prevent very serious results."

(5) It was argued by the learned counsel for the petitioner that the learned Financial Commissioner had expressed certain views which ran counter to the entire scheme of the Tenancy Act. The views expressed by the learned Financial Commissioner are the following:

"Whenever any land is let out to a tenant on a stipulated rent and it is not specifically stated at the time as to how long the tenancy would last or how it would be determined, there is a considerable room for the natural presumption to arise that at the time of granting the tenancy there was an implied agreement between the landlord and the tenant: that the tenancy would last so long as he paid the stipulated rent."

(6) The learned counsel for the petitioner argued that the learned Financial Commissioner was in error in concluding, as he appears to have done, that it was possible for a tenant to acquire occupancy rights by mere long payment of rent. He contended that mere payment of rent does not exempt even an occupancy tenant or a fixed term tenant from ejectment, as shown by the provisions of Ss. 39 and 40 of the Act. He further contended that under S. 9 of the Act no tenant shall acquire a right of occupancy by mere lapse of time. He therefore argued that the learned Financial Commissioner has laid down law which is totally unwarranted, and that the ruling of the Financial Commissioner is resulting in serious consequences inasmuch as it is being followed by subordinate Courts. It was strenuously argued by him therefore that this was an exceptional case in which this Court should set aside the decision of the Financial Commissioner in exercise of its powers of superintendence under Art. 227 of the Constitution. It is however noteworthy that the decision of the learned Financial Commissioner was not based on the above observations. The decision really proceeded on the following view expressed by him after making the said observations:

"In this case the petitioner tenant settled in this land, built houses, planted trees and made other improvements at considerable cost and labour. The Commissioner assessed the value of those improvements to be Rs. 1160/-. These facts and circumstances appear to show that there was an implied promise not to terminate the

tenancy, so long as the tenant paid his rent." It appears therefore that the learned Financial Commissioner took into consideration certain facts and circumstances in order to arrive at the conclusion that the respondent Raiya had acquired occupancy rights under S. 8, Punjab Tenancy Act. These circumstances were that Raiya settled in the land, built houses, planted trees and made other improvements at considerable cost and labour. Whether those facts and circumstances were, or were not, sufficient to warrant the conclusion is quite another matter. In the circumstance, the aforesaid observations of the learned Financial Commissioner which, according to the learned counsel for the petitioner, run counter to the entire scheme of the Tenancy Act are in the nature of mere obiter dicta. If any of the subordinate Courts are basing their decisions on those observations, and if those observations are contrary to law, the aggrieved party can have the matter set right by going up in appeal or revision as the case may be. The first ground on which the petitioner wants this Court to interfere with the decision of the Financial Commissioner has therefore no force.

(7) It was next argued by the learned counsel for the petitioner that the respondent Raiya claimed to have acquired occupancy rights on allegations which fell under S. 5(1)(c) of the Tenancy Act, and therefore the learned Financial Commissioner was not justified in making out a new case for him by holding that he had acquired the rights of an occupancy tenant under S. 8 of the Act. In this connection he argued that the learned Financial Commissioner had exceeded his jurisdiction under S. 84 of the Act which conferred upon him the power on only those grounds on which a High Court would exercise revisional jurisdiction under the law for the time being in force. His argument in other words, was that the learned Financial Commissioner had no jurisdiction to set aside the decision of the Collector since the Collector had neither exercised a jurisdiction not vested in it by law, nor failed to exercise a jurisdiction so vested, nor acted in the exercise of its jurisdicton illegally or with material irregularity. The argument is however a little fallacious. The correct position is that the learned Financial Commissioner did certainly have the jurisdiction under S. 84, Punjab Tenancy Act, to hear the revision, but that he had committed an error in the exercise of that jurisdiction. That being so, according to the Allahabad and Calcutta rulings cited above, the powers of superintendence of this Court under Art. 227 of the Constitution cannot be invoked merely for the purpose of correcting errors in decision on questions of fact or law. The application is misconceived and it is hereby rejected with costs.

A/H.G.P. Application dismissed.

A. I. R. 1953 HIM-P. 60 (Vol. 40, C. N. 26)

CHOWDHRY J. C.

Indira Debi Petitioner v. Ganga Ram Munshi Ram and another, Respondents.

Civil Misc. Petn. No. 21 of 1952, D/- 27-11-52.

(a) Constitution of India (1950), Art. 227 — Scope.

Article is meant to keep subordinate Courts within bounds of their jurisdiction and not to correct errors of decision on questions of law or questions of fact. (Para 4)

Anno: C.P.C., App. III; Constitution of India, Art. 227 N. 1.

(b) Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (ii) (a) — Eviction of sub-tenant.

Person to whom house is sublet without consent of landlord is trespasser and can be impleaded in proceedings against tenant for eviction and ordered to put landlord into possession. (Para 5)

(c) Constitution of India (1950), Art. 227 — Limitation — (Limitation Act (1908), S. 3).

Revision under Article 227 will also be subject to the 90 days rule of limitation as are ordinary applications in revision: AIR 1951 Him P 16, Foll. (Para 7)

Anno: C.P.C., App. III; Const. of India, Art. 227 N. 1; Lim. Act, S. 3 N. 26 Pt. 10.

K. C. Pandit, for Petitioner; Chandan Lal, for Respondents.

REFERENCE..... Para

('51) AIR 1951 Him P 16 6

ORDER: This is an application in revision by one Indira Debi under Art. 227 of the Constitution against the decision of the District Judge of Mahasu and Sirmur dated 17-4-1952 as an appellate authority under S. 15 of the East Punjab Urban Rent Restriction Act, 1949.

(2) The landlords Ganga Ram Munshi Ram filed an application under S. 13(2)(ii)(a) of the Act for eviction of the petitioner & one other named Mai Rewati. The residential house in question was let out by the landlords to Mai Rewati. The appellate authority has found that Mai Rewati left the house a considerable time ago and put the petitioner into the house without landlords' consent. A decree for eviction of the petitioner has therefore been passed by him.

(3) On behalf of the petitioner, it is not denied that the house was let out to Mai Rewati, nor is it pleaded that there is any privity of contract between the petitioner and the landlord. What was argued before me was that under the said Act the landlord could be granted a decree of eviction against the tenant but not against a sub-tenant.

(4) Even if it be supposed that the proposition of law propounded on behalf of the petitioner be correct, the mere fact that the lower appellate Court committed an error in deciding that point of law would not be a good ground for this Court to interfere with its decision in exercise of the power of superintendence under Art. 227 of the Constitution. That Article, it is well established, is meant to keep the subordinate Courts within the bounds of their jurisdiction & not to correct errors of decision on questions of law or questions of fact. The lower appellate Court had the jurisdiction to record a finding on the said question of law, and the mere fact that it may have committed an error in recording that finding does not mean that it had no jurisdiction to do so.

(5) It may however be stated that the proposition of law propounded by the learned counsel for the petitioner does not appear to be correct. Both the tenant and the sub-tenant have been impleaded in this case. The former did become liable to eviction by reason of her having sublet the house to the petitioner without the consent of the landlord. The position of the sub-tenant in the circumstance being that of a trespasser, she became equally liable to eviction. There is nothing in the Act against the impleading of such a trespasser in a proceeding of eviction against the tenant. To subscribe to the view propounded by the learned counsel for the petitioner would be to make for multiplicity of suits. I therefore hold that the sub-tenant was rightly impleaded as a party in this case, and that she has been rightly ordered to put the landlord into possession of the house in question.

(6) There is an office report that the present petition is time-barred by nine days, applying the 90-day rule of limitation as in the case of ordinary revisions. The learned counsel for the petitioner contended that there is no limitation prescribed for an application under Art. 227 of the Constitution, nor has any rule been prescribed by this Court in respect of such petitions. That is no doubt true, and that is why I have not dismissed this petition on the mere ground of its being time-barred. It is however hereby laid down that in future applications in revision under Art. 227 of the Constitution will also be subject to the 90-day rule of limitation as are ordinary applications in revision, as laid down by this Court in — 'Beg Ram v. Charan Das', AIR 1951 Him. P. 16.

(7) The application in revision is rejected with costs Rs. 30 (Rupees thirty) and the order of the lower appellate Court is affirmed.

A/M.K.S. Application rejected.

A. I. R. 1953 HIM-P. 61 (Vol. 40, C. N. 27)

CHOWDHRY J. C.

Daulat Ram, Petitioner v. The State.

Criminal Misc. Petn. No. 11 of 1952, D/- 20-8-1952.

Criminal P. C. (1898), S. 526(1)(a) — Fair trial not possible.

Magistrate writing letter to Chief Conservator of Forests to file sanction of Chief Commissioner under S. 197, Criminal P.C. without which case could not proceed — Documents proved by prosecution witnesses and exhibited but allowed to remain in police custody — Disposal of objection to such custody put off — Magistrate allowing case to hang on for 7 months on mere ground that P. S. I. stated that expert opinion had not been received — Cumulative effect held was to raise reasonable apprehension in mind of accused that a fair and impartial trial could not be had. AIR 1930 All 737; AIR 1948 Oudh 103 and AIR 1936 Rang 114, Rel. on. (Para 7)

Anno: Cr. P. C., S. 526 N. 5.

Bhagat Singh Chawla, for Petitioner; L. N. Sethi, Govt. Advocate, for the State.

CASES CITED:

(A) ('30) AIR 1930 All 737: 31 Cri LJ 555
(B) ('48) AIR 1948 Oudh 103: 49 Cri LJ 126
(C) ('36) AIR 1936 Rang 114: 37 Cri LJ 436

ORDER: This is an application by one Daulat Ram under S. 526, Criminal P. C., for the transfer of a case pending against him under S. 409, Penal Code, in the Court of Sri A. S. Bhatnagar, Magistrate, first class, Rampur Bushahr, district Mahasu, on the ground that a fair and impartial trial cannot be had in that Court. The petitioner has stated at the end of his application that if the case is transferred he will not claim a trial de novo.

(2) The first information report consists of a letter dated 2-1-1951 addressed by the Chief Conservator of Forests Himachal Pradesh to the Senior Superintendent of Police Kasumpti. The Senior Superintendent of Police entrusted the investigation to a certain Inspector of Police and a charge-sheet against the petitioner was in due course submitted to the said Magistrate on 7-3-1951. The Magistrate summoned prosecution evidence for 6-4-1951, and between the latter date and 22-6-1951 nine prosecution witnesses were examined. Thereafter, leaving out of account two adjournments occasioned by the unavoidable absence of the presiding officer, there were as many as ten adjournments during a period of seven months until 23-1-1952 at the instance of the prosecution on the ground that the opinion of the handwriting expert had not been received. On the last mentioned date the opinion in question was not filed (although it is dated 30-11-1951), but at the request of the P.S.I. prosecution evidence was ordered to be summoned for 7-2-1952. On 7-2-1952 the prosecution witnesses did not appear, and thereafter the presiding officer proceeded on six weeks leave on 11-2-1952. Before the prosecution could proceed any further the present application for transfer was filed on 3-7-1952 and the proceedings were stayed.

(3) In the letter dated 2-1-1951 from the Chief Conservator of Forests to the Senior Superintendent of Police, referred to above as the first information report, it was mentioned that the permission of the Chief Commissioner had been obtained. No such permission was, however, filed in Court. As already stated, the charge-sheet was submitted to the Magistrate on 7-3-1951 and prosecution evidence was summoned for 6-4-1951. In between these dates the Magistrate addressed a letter on 27-3-1951 to the Chief Conservator of Forests, drawing his attention to the fact that sanction of the Chief Commissioner under S. 197, Criminal P. C., was necessary and that, although referred to in the first information report, the same had not been filed either by the addressee or by the police, and requesting the addressee to file the requisite sanction before 6-4-1951 as the case could not proceed unless it was on the file. In response to this letter the Secretary to the Chief Commissioner in the Forest Department sent a communication to the Magistrate on 30-3-1951, and enclosed therewith the requisite sanction of the Chief Commissioner under S. 197, Criminal P. C. It is noteworthy that this sanction is dated 30-3-1951 although it had been mentioned in the first information report dated 2-1-1951 that the permission of the Chief Commissioner had already been obtained. The first ground urged on behalf of the petitioner relates to this action taken by the Magistrate in securing the sanction of the Chief Commissioner.

It may be stated in passing that the question of the necessity or legality of the sanction in question is quite irrelevant for the disposal of the present application. The argument put forward by the learned counsel for the petitioner was that in acting, as the learned Magistrate did, in order to secure the sanction he arrogated to himself the functions of a prosecutor. The explanation of the Magistrate is that since the evidence had already been summoned and the case could not proceed unless the sanction was on the file, he addressed the said letter to the Chief Conservator of Forests to avoid unnecessary harassment of the prosecution witnesses and the accused. And it was further argued in this connection by the learned Government Advocate that the objection taken on behalf of the petitioner is not tenable since there was already a reference to the sanction in the first information report. It was, however, conceded that the letter in question was sent by the Magistrate at his own instance and without any request in that behalf having been made to him by the prosecution. If the Magistrate considered the sanction necessary, the only proper course for him to adopt as a Court was not to take

cognizance of the offence, as laid down in S. 197 of the Code. It was no business of his to try to fill up that lacuna in the prosecution.

It is noteworthy that, although an incorrect allegation to the contrary had been made in the first information report, no sanction had in fact been obtained by the prosecution, and, for all one knows, it might not have been forthcoming but for the said action taken by the Magistrate himself. It may be that this action of the learned Magistrate is attributable to a misapprehension on his part of the proper functions of a Court rather than to any bias in favour of the prosecution or against the accused. It may also be that no apprehensions of the accused were for the time being roused as regards the impartiality of the Court, for it was only a year and three months later that the present application for transfer was filed by him, but, when this action of the Magistrate is taken into consideration along with certain others, to be mentioned presently, the cumulative effect of them all was no doubt such as to raise a reasonable apprehension in his mind that a fair and impartial trial could not be had before the Magistrate in question.

(4) The next ground relates to the way in which the documents filed in the case were dealt with by the Magistrate. They were filed in Court and proved by the prosecution witnesses and exhibited but allowed to remain in the custody of the police. The explanation of the Magistrate is that there was no provision for safe custody of the documents in Court, and that if the documents were kept in the courtroom he would have had to engage a police guard. An objection in regard to this matter was taken in writing by the accused before the Magistrate on 7-2-1952. The Magistrate did not dispose of this application then and there, as indeed he should have done, but ordered it to be put up for disposal on 22-2-1952. As stated above, the Magistrate proceeded on six weeks leave from 11-2-1952. It is incredible, therefore, that he did not know on 7-2-1952 that he was proceeding on this long leave only four days later. In spite of that however he ordered that the application be put up for disposal on 22-2-1952. After his return from leave the application was disposed of on 11-6-1952 when, by common consent, it was ordered by the Magistrate that the documents be kept in sealed bundles or boxes in the custody of the police.

It was argued by the learned Government Advocate that although the documents had commenced to be proved and exhibited since 6-4-1951 it was only on 7-2-1952 that an objection was taken by the accused against the documents being allowed to remain in the custody of the police. This is however not so. The petitioner has stated in his affidavit that he had protested against the practice of allowing the documents to remain with the prosecution on the ground that it was likely to prejudice his case as the documents may be substituted or tampered with by the prosecution, but the Court paid no heed to it and therefore the petitioner was constrained to file a regular petition to that effect on 7-2-1952. The Magistrate says in his explanation that the fact was brought to his notice for the first time on 7-2-1952 "so far as he remembered". If it be a fact that the objection was taken for the first time on 7-2-1952, and not before, there was no question of the Magistrate not being definite about it.

In the circumstance, I must accept the said allegation made by the petitioner in his affidavit. It appears therefore that the said irregular procedure as regards the custody of documents during trial (and these documents have been described by the Magistrate as very precious) was persisted in despite the accused's protests, and that when the accused filed a written objection in regard thereto on 7-2-1952 the learned Magistrate put off its disposal to a date on which he was presumably aware that the matter could not be disposed of.

(5) The third ground relates to one other prayer made by the petitioner in his said application dated 7-2-1952. Reference was made in the application to the numerous adjournments which had been obtained by the prosecution since June 1951 on the ground of non-receipt of the opinion of the handwriting expert. It was further stated by the accused in that application that production of further prosecution witnesses had been stayed by the prosecution on the same ground, but that on 23-1-1952 the P. S. I. had requested the Court to summon those remaining witnesses. The accused, therefore, prayed that the P. S. I. should be examined to ascertain whether the opinion in question had been received, and that if it had been received he should be asked to file it in Court. The P. S. I. was present on that date, and his statement on the point could have been recorded by the Magistrate then and there, for it needed no previous preparation to supply the information in question; but the disposal of this matter was also put off by the Magistrate in the same way as was the disposal of the question of proper custody of documents. The opinion in question was eventually filed on 11-6-52.

(6) Another ground put forward on behalf of the petitioner relates to the manner in which the Magistrate allowed the case to hang on for seven months from 22-6-1951 to 23-1-1952 on the mere ground that the P. S. I. stated that the expert opinion in question had not been received. The main complaint of the learned counsel for the petitioner was that the examination of the remaining prosecution witnesses should not in any case have been postponed simply on the ground that the expert opinion had not been received. His contention was that the prosecution was withholding the remaining prosecution witnesses simply to fit their evidence in with the expert opinion. The learned Government Advocate replied that the prosecution witnesses were not produced because if the expert opinion turned out to be in favour of the prosecution the testimony of those witnesses would have become unnecessary. This argument was met, and with much reason behind it, by the learned counsel for the petitioner contending that it is most improbable that production of the direct evidence of witnesses should have been attempted to be dispensed with merely because the opinion of the expert witness might be favourable.

(7) To sum up, while, on the one hand, the learned Magistrate went out of his way to procure a piece of evidence, i.e. the Chief Commissioner's sanction under Section 197, Criminal P. C., without which in the opinion of the Magistrate the cognizance of the offence was barred, and which piece of evidence it was the duty of the prosecution to furnish, he, on the other hand, adopted an irregular procedure with regard to the custody of important documents in the case (the accused naturally thinking the

procedure to be prejudicial to his interest), continued to put off the trial at the instance of the prosecution on a ground which on the face of it seemed to afford an opportunity to the prosecution to mould evidence according to the opinion of the expert witness, and finally dealt with the accused's application dated 7-2-1952 with regard to the custody of documents and discovery of facts relating to the expert opinion from the prosecution in a manner which was capable of creating the impression in the mind of the accused that the Magistrate wanted to give such latitude to the prosecution as would nullify the very purpose of that application.

In these circumstances, even though the learned Magistrate may in fact have been actuated by motives other than a bias in any direction, the cumulative effect of his aforesaid behaviour was no doubt such as to have given legitimate ground for fear to the accused, the present petitioner, as laid down in — 'Ghassoo v. Emperor', AIR 1930 All 737 (A). It may be that such an impression might not be created in the mind of a normal person, but in the case of a person who is being tried of a serious offence the behaviour adopted by the Magistrate in the present case throughout was no doubt such as to raise a reasonable, and not a mere fanciful, ground for apprehension in his mind that the Magistrate had a bias in favour of the prosecution. 'Chunni Lal v. Emperor', AIR 1948 Oudh 103 (B), and — 'Ko Ko Gyi v. Emperor', AIR 1936 Rang 114 (C). These are rulings which were cited by the learned Government Advocate himself.

(8) The application is allowed and it is hereby directed that the case against the petitioner at present pending in the Court of Sri A. S. Bhatnagar, Magistrate, first class, Rampur Bushahr be transferred to the Court of the Magistrate first class Theog. The trial shall proceed from the stage where it was left off. The petitioner is directed to present himself before the Magistrate first Class Theog on 8-9-1952 or if the Magistrate be not present in Court on that date for some reason, on the next date after 8-9-52 on which the Magistrate holds Court at Theog. The record must be returned and the two Magistrates informed of this order without delay.

B/D.H. Application allowed.

A. I. R. 1953 HIM-P. 63 (Vol. 40, C. N. 28)

CHOWDHRY J. C.

Barikam and another, Defendants-Petitioners v. Charnu and another, Plaintiffs-Respondents.

Civil Revn. No. 20 of 1950, D/- 6-10-1952.

(a) Custom (Himachal Pradesh) — Legitimacy.

(Former Suket State) — Sons of Mt. D by N without any marriage between two — D in regular keeping of N — Persons are 'sartora' sons of N and not merely chukandu sons of D. (Para 9)

(b) Custom (Himachal Pradesh) — Inheritance — Illegitimate son.

According to the recorded custom of the former State of Suket, in every case of dispute, whether the dispute of the 'sartora' son be with a legitimate son or with any other person laying claim to the property in question by right of inheritance, the share of a 'sartora' son will always be less than to which a legitimate son would have been entitled. (Para 10)

(c) Custom (Himachal Pradesh) — Inheritance — Pleas open to illegitimate son.

It does not lie in the mouth of one illegitimate son to question the right of inheritance of another illegitimate son on a ground which was applicable in his own case when the right of succession opened. (Para 10)

(d) Custom (Himachal Pradesh) — Inheritance — Sartora son.

The custom in the former State of Suket in Himachal Pradesh that a Sartora son is entitled to a share in ancestral property, cannot be disregarded on the ground of immorality or of public policy. AIR 1935 Bom 371, Disting. (Para 11)

Ishwar Das Abrol, for Petitioners; D. N. Vaidya, for Respondents.

CASES CITED:

(A) ('35) AIR 1935 Bom 371: 158 Ind Cas 796
(B) ('27) AIR 1927 Oudh 21: 98 Ind Cas 750

ORDER: This is a defendants' application in revision, and it arises in the following circumstances.

(2) Niku, brother of the plaintiffs-respondents Lachmu and Charnu, died on 15-9-1993 B. He left property in two villages, Bodhal and Jaidevi, and his one-third share in each of the two villages was mutated in favour of the defendants-petitioners, the mutation in respect of the Jaidevi property having taken place on 31-3-1994 B. and that in respect of property in Bodhal on 11-11-1994 B. It appears that the entire property in Bodhal was in possession of the plaintiffs and the entire property in Jaidevi in that of Niku. After the mutations the defendants applied to the revenue authorities for partition of their one-third share in Bodhal. Thereupon the plaintiffs filed two suits on one and the same date, i.e., on 19-11-1948 A.D., one relating to the property in village Jaidevi and the other to that in village Bodhal. As the plaintiffs were in possession of the property in Bodhal, they prayed for merely a declaratory relief in the suit relating to that property, while in the other suit they also prayed for possession.

(3) The pleadings in both the suits were identical. The plaintiffs alleged that the defendants, being only Chukandu sons of Mt. Durgi, were not entitled to inherit the property left by Niku. The defendants, on the other hand, denied that they were Chukandu sons of Mt. Durgi but pleaded that they were the sons of Niku whose legally wedded wife their mother Mt. Durgi was and that therefore they were entitled to inherit his property as legal heirs. They also pleaded that the plaintiffs' suit was time-barred.

(4) The trial Court framed two issues, one with regard to the legitimacy of the defendants as the sons of Niku and the other with regard to limitation. On both these issues the trial Court recorded findings against the plaintiffs and in the result dismissed both the suits. The District Judge on appeals by the plaintiffs in both the cases came to contrary findings on both the said issues and decreed the two suits.

(5) There is no dispute with regard to the material facts in this revision, namely, that Mt. Durgi was a widow of one Guju of village Hawana, that after the death of Guju she continued to reside in his house in Hawana and that there was no Jhangrara or any other ceremony of remarriage performed between the

plaintiffs' late brother Niku and Mt. Durgi but the defendants-petitioners were born of the union between the two at the house of Guju in Hawana. The question for determination is: What right, if any, have the defendants-petitioners in the property left by Niku?

(6) The learned counsel for the defendants-petitioners has referred to an entry relating to inheritance in the Majmua Qawaid-i-mal approved by the Darbar of the former Suket State. The entry runs as follows:

"In this State there is a custom according to which there are three kinds of male issue besides a legitimate son, called Chukandu, Pachhlag and Sartora. A Chukandu son is one whose mother, while residing within the four walls of her house, begets him with the seed of another man and she is unable to name who the father was. When a woman gives up her first husband and takes her abode in the house of another, a son born to her by the first husband whom she takes with her to the house of the other man is called Pachhlag son (presumably a corruption of Puchhlag, or one following like a tail, or an appendage). A Sartora son is one born of a woman other than a married wife. In case of a Chukandu son laying claim by way of inheritance, mutation of such an inheritance should not be sanctioned in favour of such a son but in favour of his mother, but after the death of the mother he will be entitled to the inheritance. A Pachhlag son is not entitled to inheritance except that he is entitled to the property left by his own father; but in case the legal heirs wish to give a share to a Pachhlag son mutation in respect of that share should be sanctioned subject to the approval of the Darbar. A Sartora son cannot be deemed to be entitled equal to a legitimate son, but he is certainly entitled to a share in ancestral property; as compared to a legitimate son a Sartora son will get a lesser share, but any specific share cannot be fixed, the share in case of dispute being liable to be determined by Court in accordance with the custom prevalent in the caste and the family."

(7) The learned counsel for the defendants-petitioners contended that his clients fell in the category of Sartora sons of Niku. He further contended that as Niku left no legitimate son, and as therefore the dispute in this case is not between a legitimate and Sartora sons but between the latter and the brothers of the deceased, there was no question of determination of the reduced share to which the petitioners may be held to be entitled by Court according to the aforesaid entry in the Qawaid. According to the learned counsel, the defendants-petitioners were entitled to the full share left by Niku in the two villages.

(8) The learned counsel for the plaintiffs-respondents challenged both the aforesaid contentions. With regard to the first he argued that no such plea had been specifically taken by the defendants at any time before but only in the course of arguments in this Court. He complained that if such a plea had been taken by the defendants in their written-statement an issue would have been framed on that plea, but as this was not done the plaintiffs' interests will be prejudicially affected if the plea is allowed to be taken for the first time in this revision. I am afraid this contention of the learned counsel for the plaintiffs-respondents is unsustainable. As adverted to above, the plaintiffs described the defendants as Chukandu sons of Mt. Durgi.

Now, the Hindu Law does not recognise a Chukandu son, but a son of that category appears to be peculiar under the custom as prevalent in the former State of Suket and recorded in the said Majmua Qawaid-i-mal. It is manifest therefore that in describing the defendants as Chakandu sons of Mt. Durgi the plaintiffs were referring impliedly, though not in so many words, to the aforesaid recorded custom. The defendants also referred to custom in their written-statement when making the said allegations entitling them to succeed to the property of Niku as his legitimate heirs. It was, therefore, common ground between the parties that the status of the defendants was to be determined in accordance with the custom prevalent in the former State of Suket, and this custom could be none other than the one recorded in the Mujmua & cited in detail above. The necessary facts being common ground between the parties, it would, therefore, serve no useful purpose to remit an issue with regard to custom to any of the Courts below. All that is necessary to determine is whether, on the undisputed facts, the defendants-petitioners come under the one or the other of the aforesaid categories of sons.

(9) Now, as the paternity of the defendants was known they could not possibly be merely Chukandu sons of Mt. Durgi. They are also obviously not Pachhlag sons. But they do clearly fall under the category of Sartora sons of Niku since they were the sons of Mt. Durgi by Niku without any sort of marriage having taken place between Mt. Durgi and Niku. The learned counsel for the plaintiffs-respondents argued that in case of a Sartora son he should be born of a woman who, though not legally married to the man in question, was yet in his regular keeping, and that the status of a Sartora son cannot be claimed by one whose mother was a prostitute or had only a casual connection with the man in question. It is not necessary to express any opinion with regard to the proposition put forward by the learned counsel for the plaintiffs-respondents, and that for the simple reason that the condition which he puts forward is satisfied in the present case. It is admitted that there was an intimacy between Niku and Mt. Durgi, and that the former used to visit the latter at her residence in village Hawana. That being so, it is clear that Mt. Durgi was in the regular keeping of Niku. The defendants-petitioners were, therefore, clearly the Sartora sons of Niku.

(10) The next question that arises is as to the share in Niku's property to which the defendants are entitled. I find myself unable to agree with the argument of the learned counsel for the defendants-petitioners that a reduction of the share of a Sartora son takes place only in the event of dispute arising between him and a legitimate son. The wordings of the aforesaid custom as recorded in the Majmua do not lend support to the argument. The provision commences with the enunciation that although a Sartora son is certainly entitled to a share in the ancestral property, he cannot be deemed to be entitled in equal measure with a legitimate son, but his share shall be less than that of a legitimate son. That only means that the status of a Sartora son is not the same as

that of a legitimate son, and that therefore his share must in all cases be less than that of a legitimate son. There is nothing in the citation justifying the conclusion that this reduction is to take place only where there is a dispute between a Sartora son and a legitimate son. On the contrary, the words "tanaza ki surat men", or in the event of dispute, are general in nature and therefore signify any dispute and not necessarily a dispute between a Sartora son and a legitimate son. I, therefore, hold that according to the said recorded custom of the former State of Suket, in every case of dispute, whether the dispute of the Sartora son be with a legitimate son or with any other person laying claim to the property in question by right of inheritance, the share of a Sartora son will always be less than that to which a legitimate son would have been entitled. It may be stated here in passing that admittedly the plaintiffs' mother was also not a wedded wife of their father. It hardly lies in their mouth, therefore, to question the right of inheritance of the defendants on a ground which was applicable in their own case when the right of succession opened on the death of their father.

It only remains to ascertain, therefore, what the share of the defendants in the present case would be according to the custom prevalent in the caste to which the parties belong or in their family. This latter question cannot certainly be determined in this revision since no issue on that point was framed and the parties were, therefore, not called upon to produce the relevant evidence. In making this omission the Ccurts below will no doubt be deemed to have acted with material irregularity in the exercise of their jurisdiction, although I must say, at the same time, that the parties themselves appear to have been responsible for the omission because the aforesaid recorded custom does not seem to have been cited before any of the Courts below. A remand of this case for determination of the relevant issue with regard to the defendants' share will, therefore, be necessary.

(11) Before I conclude this point it is necessary to dispose of a contention put forward by the learned counsel for the plaintiffs-respondents. He argued that to accept the aforesaid custom relied upon by the defendants-petitioners would be to put a premium on immorality. It is a moot point whether mere absence of the marriage ceremony could be dubbed as immoral even though the woman in question may have been in the regular keeping of the man and the Sartora son was born of such a union. An illegitimate son born of a concubine is not wholly deprived of his rights even under the Hindu Law, for though not entitled to a share of the inheritance he is entitled to maintenance even in the three regenerate castes. And in the case of a Sudra, an illegitimate son is entitled to a share of the inheritance under the Hindu Law provided the concubine was in the continuous and exclusive keeping of his father. The only difference is that what is true of an illegitimate son amongst Sudras under the Hindu Law has been applied in the case of all castes without any distinction under the aforesaid customary law of the former State of Suket. It cannot, in the circumstance, be said that the custom in question can be totally disregarded on the ground of immorality or of public policy. The learned counsel for the plaintiffs-respondents cited — 'S. K. Wodeyar v. Ganapathi Madhuling', AIR 1935 Bom 371 (A). All that has been laid down in that ruling is that before any custom is recognised it must be proved to be definite, ancient, uniform and not illegal in itself or unreasonable. In the present case the custom is a recognised one since it has been recorded in the Majmua Qawaid-i-mal of the former State of Suket. That being so, it must be presumed that it has been so recognised because it satisfies all the said conditions. As regards the conditions of illegality and unreasonableness in particular, the contention of the learned counsel as regards the immorality of the custom has already been disposed of. The ruling in question does not, therefore, stand in the way of the enforcement of the custom propounded on behalf of the defendants-petitioners.

(12) The learned counsel for the defendants-petitioners pressed the point of limitation also but only with regard to the property in village Bodhal. His contention was that the mutation dated 11-11-1994 B. in favour of the petitioners in respect of that property took place in the presence and with the consent of the plaintiff-respondent Charnu, and that, therefore, limitation for the suit in respect of that property began to run under Art. 120, Limitation Act from the date of that mutation, and not, as held by the lower appellate Court, from the date on which the defendants applied for partition of that property. And in support of this argument he cited the ruling reported as — 'Mahabir Pattak v. Jageshar Pattak', AIR 1927 Oudh 21 (B). It is questionable whether the mutation in question was effected at the instance of Charnu plaintiff. Even if it be held for arguments sake that it was so effected, it was not shown how the said conduct of Charnu would also bind the other plaintiff Lachmu. So far at least as Lachmu plaintiff is concerned, therefore, the aforesaid ruling has no application, and the view of the lower appellate Court that the property in Bodhal being in possession of the plaintiffs, time began to run only from the date when the defendants applied for partition of that property is correct.

(13) The revision is allowed, the judgment and decrees of the District Judge of Mandi in both the suits are set aside and the case is remanded to that Court for recording a finding on the following issue after giving an opportunity to the parties to lead evidence on that issue:

"To what share in the property left by Niku are the defendants entitled as his Sartora sons in accordance with the custom prevalent in their caste or family?"

(14) The lower appellate Court will submit the finding on the said issue along with the reasons therefor and the evidence, if any, produced by the parties to this Court within three months of the receipt of this record. On receipt of the finding parties will be given time to file objections, if any, against the same, and thereafter a date will be fixed for the disposal of the objections and the revision.

C/V.B.B. Case remanded.

A. I. R. 1953 HIM-P. 66 (Vol. 40, C. N. 29)

CHOWDHRY J. C.

Thunthi and others, Defendants-Appellants v. Dhani Ram, Plaintiff-Respondent.

Second Appeal No. 4 of 1952, D/- 24-12-1952.

(a) Custom (Himachal Pradesh) — Marriage — Remarriage — Ceremonies — Proof — Presumption — (Hindu Law — Marriage — Ceremonies) — (Evidence Act, S. 114 — Marriage — Presumption — Rebuttal).

The presumption of marriage arising from long and continuous cohabitation between a man and a woman may be rebutted by proving circumstances constituting an insurmountable obstacle to marriage. Where the alleged insurmountable obstacle was that B's marriage in the jhanjharara form had not been performed with Z:

Held that it was impliedly conceded that B, though a widow was entitled to remarry according to local custom and since according to the Hindu Law no religious ceremonies are necessary in the case of remarriage of a widow, it was incumbent upon the party alleging the obstacle to prove not only that B's marriage in the jhanjharara form was not in fact performed with Z, but also that performance of marriage in that form was necessary. (Presumption held was not rebutted). AIR 1952 SC 231, Foll; AIR 1943 Cal 76 and AIR 1921 Lah 20, Ref.

(Paras 7, 8 and 10)

Anno: Evi. Act, S. 114 N. 23.

(b) Evidence Act (1872), S. 48 — General Custom, proof of — (Custom (General) — Proof).

General evidence as to the existence of tribal or family custom is admissible under S. 48, but it must be evidence of opinion of persons who would be likely to know of its existence if it existed. AIR 1934 Lah 351, Ref.; AIR 1925 PC 267, Rel. on. (Para 9)

Anno: Evidence Act, S. 48 N. 2.

Hira Lal, for Appellants; Kirti Ram, for Respondent.

CASES CITED:

(A) ('29) AIR 1929 PC 135: 10 Lah 725 (PC)
(B) ('43) AIR 1943 Cal 76: ILR (1942) 2 Cal 299
(C) ('52) AIR 1952 SC 231: 1952 SCR 825
(D) ('21) AIR 1921 Lah 20: 2 Lah 207
(E) ('09) 32 Mad 512: 3 Ind Cas 541
(F) ('25) AIR 1925 PC 267: 6 Lah 502 (PC)
(G) ('34) AIR 1934 Lah 351: 15 Lah 791
(H) ('26) AIR 1926 Oudh 211: 1 Luck 50

JUDGMENT: This is a second appeal by the defendants Thunthi, Tulsia and Dhani Ram against the judgment and decree of the learned District Judge of Mandi, dated 21-9-1951.

(2) One Zalim died on 14-5-1949, and thereupon his property was mutated in the names of the present parties as his sons. The defendants-appellants' mother was Mt. Basanto, and Mt. Begamu is the mother of the plaintiff-respondent. The plaintiff filed the present suit on 13-5-1950 for a declaration that the defendants are not the sons of Zalim but the plaintiff alone is the son and successor to the estate of Zalim, and for possession of the entire property. The plaintiff's case was that the defendants were not the legitimate sons of Zalim, and in fact could not be his legitimate sons, because their mother Mt. Basanto was not married to him in the jhanjharara form. The defendants traversed this allegation and pleaded that they were entitled to succeed to the property of Zalim as his sons.

(3) The trial Court took a number of circumstances into consideration, especially that of Zalim and Mt. Basanto having lived as husband and wife for about 30 years, and held that the latter was the legally wedded wife of the former. It also held that Mt. Basanto was the widow of a cousin of Zalim, and that the plaintiff had failed to prove that jhanjharara or any other rites were essential for espousing a cousin's widow. In the result, it dismissed the suit.

(4) On the plaintiff's appeal the District Judge accepted as correct the finding of the trial Court that Mt. Basanto & the defts. had lived for about 30 years with Zalim & Zalim had performed marriages of his two daughters by Mt. Basanto, but he was of the opinion that these and other circumstances relied upon by the trial Court were not sufficient to justify the view that Mt. Basanto had acquired the status of a legally wedded wife of Zalim. He was further of the opinion that even if a presumption of marriage arose from the aforesaid circumstances, it had been rebutted by the admitted fact that no jhanjharara of Mt. Basanto was performed with Zalim, his view being that performance of this ceremony was essential to give validity to one's marriage with a cousin's widow. The plaintiff's appeal was allowed by the learned District Judge and his suit was decreed. The defendants have now come up in second appeal, and they are entitled under para 32 of the Himachal Pradesh (Courts) Order, 1948, to treat it to all intents and purposes as a first appeal.

(5) The following facts, which have been established on behalf of the defendants, are not disputed. Mt. Basanto, then a widow, began to live with Zalim about 30 years ago and continued so to live until his death. The present three appellants and two daughters were born of the union of Zalim and Mt. Basanto. Zalim performed the marriages of the two daughters. In fact, the plaintiff-respondent's mother Mt. Begamu herself admitted during the mutation proceedings on the death of Zalim that Mt. Basanto was a widow of a cousin of Zalim, and that she lived with Zalim and the latter begot children by her. It was argued by the learned counsel for the plaintiff-respondent that the certified copy of this statement on the record was not admissible in evidence since it was never put to Mt. Begamu. This argument has no force because it was filed on behalf of the plaintiff-respondent himself. The plaintiff never produced Mt. Begamu to explain it away. The plaintiff is a minor and the statement in question appears to have been made on his behalf by Mt. Begamu as his natural guardian. The statement is therefore admissible as an admission under S. 21, Evidence Act, it having been made against the interests of the plaintiff. In fact, the learned counsel for the plaintiff-respondent did not seriously chalienge the above facts, as stated above. He did not further challenge the correctness of the proposition that the law presumed in favour of marriage & against concubinage when a man and a woman had

cohabited continuously for a number of years. 'Mohabbat Ali v. Muhammad Ibrahim Khan'. AIR 1929 P C 135 (A). What he contended was that this presumption had in the present case been rebutted by the fact that Mt. Basanto's marriage in jhanjharara form had not been performed with Zalim. The only question for determination in the present appeal therefore is whether the undoubted presumption of marriage of Mt. Basanto with Zalim had in this case been rebutted. It may incidentally be stated here that the view of the learned District Judge that Mt. Basanto could not acquire the status of a legally wedded wife of Zalim due to the existence of the said facts was against the aforesaid well-known presumption and therefore incorrect, and the learned counsel for the plaintiff-respondent has not tried to support that view.

(6) The learned counsel for the plaintiff-respondent having conceded that a presumption of marriage existed in the present case, and his case being that the presumption had been rebutted, it is manifest that the onus of rebutting the presumption lay on the plaintiff. In fact, the plaintiff undertook to discharge the onus by making the aforesaid allegation in the plaint that the defendants could not be the legitimate sons of Zalim because their mother Mt. Basanto was not married to him in the jhanjharara form. It is further well established that the presumption of marriage arising in such circumstances can be repelled only by evidence of the clearest character, and that it would not be displaced by the mere fact of the direct evidence of marriage, if any, being unsatisfactory. 'Chandu Lal v. Bibi Khatemonnessa', AIR 1943 Cal 76 (B). The learned counsel for the plaintiff-respondent cited the ruling of the Hon'ble the Supreme Court reported as—'Gokal Chand v. Parvin Kumari', AIR 1952 S C 231 (C). But in that case also it was held that continuous cohabitation for a number of years raises the presumption of marriage, that the presumption was a rebuttable one, and that if there be circumstances which weaken or destroy the presumption the Court cannot ignore them. It has therefore to be seen whether the admitted presumption has been rebutted in the present case.

(7) The presumption of marriage arising from long and continuous cohabitation between a man and a woman may be rebutted by proving circumstances constituting an insurmountable obstacle to marriage. One such circumstance, for example, might be that the former husband of the woman in question was alive when the cohabitation commenced and was still alive when the offspring whose legitimacy was in issue was born, as was the case in — 'Indar Singh v. Thakar Singh', AIR 1921 Lah 20 (D). The insurmountable obstacle alleged on behalf of the plaintiff-respondent in the present case was that Mt. Basanto's marriage in the jhanjharara form had not been performed with Zalim. It will appear therefore that it is impliedly conceded that Mt. Basanto, though a widow, was entitled to remarry according to local custom. It has however to be remembered that according to the Hindu law no religious ceremonies are necessary in the case of remarriage of a widow. In the neighbouring province of the Punjab the karewa form of marriage, which is a marriage with the brother or some other male relative of the deceased husband of the woman, is contracted without any ceremony at all, as pointed out by Gour in para. 363 of his Hindu Code, Edn. 4, citing — 'Authikesavalu v. Ramanujam', 32 Mad 512 (E). It was incumbent upon the plaintiff-respondent therefore to prove not only that Mt. Basanto's marriage in the jhanjharara form was not in fact performed with Zalim, but also that performance of marriage in that form was necessary.

(8) It may be taken as established in this case that no jhanjharara of Mt. Basanto with Zalim had in fact been performed since, besides the plaintiff's witnesses having deposed to that effect, it has been admitted by the defendants-appellants' own witness Dillu, who is Zalim deceased's own brother. But, as adverted to above, it was further incumbent upon the plaintiff-respondent to establish that in order to confer validity upon the union of Mt. Basanto and Zalim it was necessary that their marriage in the jhanjharara form should have been performed. This onus the plaintiff has, in my opinion, failed to discharge.

(9) The learned counsel for the plaintiff-respondent referred to the statements of opinions as to the existence of this custom made by the plaintiff's witnesses. And in this connection he cited two rulings: — 'Ahmed Khan v. Mt. Channi Bibi', AIR 1925 P C 267 (F) and — 'Mohd. Alam v. Mt. Hafizan', AIR 1934 Lah 351 (G). It was held in these cases that a tribal or family custom may be proved by general evidence as to its existence. There is no doubt that such evidence is admissible under S. 48, Evidence Act, but it must be evidence of opinion of persons who would be likely to know of its existence if it existed. This condition was specifically mentioned in the Privy Council ruling. In the Lahore ruling the mass of oral evidence relied upon consisted of the statements of a large number of lambardars and other residents of the locality who were certainly in a position to know of the existence of the custom. In the present case only seven witnesses were produced on behalf of the plaintiff, and of these one was a formal witness and another plaintiff's own next friend Basant Singh. There were thus only five witnesses who deposed as to the necessity of the performance of jhanjharara ceremony, and there is nothing to show that they were persons who were likely to know of the existence of the custom, if it existed. Of these one, Phuphi P. W. 2, in fact disproved the custom since he admitted in cross-examination that his own mother was a widow when taken as wife by his father, that he had succeeded to the property left by his father, but that he did not know whether jhanjharara of his mother had been performed with his father. The learned counsel for the plaintiff-respondent referred to the statements of the witnesses produced by the defendants in this case, but these witnesses have clearly stated that performance of marriage in this form was a recent innovation in the former State of Suket to which the parties belong. According to the defence witnesses the practice was not older than 7 or 8 years. If so, it did not exist about 30 years ago when Mt. Basanto was taken as his wife by Zalim. Some support is lent to these statements of witnesses of the defendants-appellants by the circumstance that it was only about 11 years ago when on 26-6-1998 B., the Suket State issued a Robkar for registration of such marriages. The evidence of general opinion as to the existence of the alleged custom is therefore insufficient and inconclusive.

(10) The only other evidence in support of the alleged custom relied upon by the learned counsel for the plaintiff-respondent was that of certain instances cited by two of the plaintiff's witnesses, Dumnu and Basant Singh. They were instances of four men named Khundu, Jagta, Thotha and Sewadha. No reason was however assigned for not producing these persons themselves. It was also not clear as to how long ago these instances occurred. The instances are also too few to establish a custom. As held in — 'Rampal Singh v. Bajrang Singh', A I R 1926 Oudh 211 (H), a party relying upon custom must prove it to be ancient, continuous, certain and reasonable, and he must prove it by satisfactory evidence of particular instances so numerous as to justify the Court in finding in favour of its existence. That being so, citation of only four instances, and those too of a dubious character, without disclosing how old those instances were, cannot be said to have proved the alleged custom in the present case. I therefore hold that the plaintiff-respondent failed to prove in this case that performance of jhanjharara ceremony was necessary. That being so, even though in point of fact no jhanjharara ceremony of Mt. Basanto with Zalim may have been performed, the presumption of marriage that clearly arises in the present case has not been rebutted by the plaintiff. In the circumstance, the trial Court was quite correct in arriving at the finding that the defendants were the legitimate sons of Zalim and in dismissing the suit. Accordingly, the appeal is allowed, the judgment and decree of the lower appellate Court are set aside and those of the trial Court dismissing the suit of the plaintiff-respondent are restored. The plaintiff will pay the costs of the defendants in all the Courts.

C/H.G.P. Appeal allowed.

A. I. R. 1953 HIM-P. 68 (Vol. 40, C. N. 30)

CHOWDHRY J. C.

Duni Chand, Petitioner v. Munshi Amar Nath and others, Respondents.

Civil Revn. No. 21 of 1952, D/- 21-10-1952.

(a) Provincial Small Cause Courts Act (1887), Ss. 25 and 3 (c) — Conflict in S. 25 and (Himachal Pradesh (Courts) Order (1948), Para. 35).

Section 25, Provincial Small Cause Courts Act, affords ground for interference within an ambit wider than that provided by Para. 35 of the Himachal Pradesh (Courts) Order. Hence, S. 25 of the Act cannot be said to affect the special law contained in Para. 35 of the Order within the intendment of S. 3 (c) of the Act. (Para 4)

Anno: Pro. Sm. C. C. Act, S. 3 N. 1; S. 25 N. 1.

(b) Evidence Act (1872), S. 34 — Account book extracts — Proof.

Before extracts from books of accounts are admitted in evidence they must be proved. Mere production of the extracts is not tantamount to a proof of those extracts: AIR 1925 Lah 242 (1); AIR 1933 Cal 501, Distinguished. (Para 6)

Anno: Evidence Act, S. 34 N. 3 Pts. 5, 6.

(c) Provincial Small Cause Courts Act (1887), S. 25 — Interference in revision.

Small cause suit — Plaintiff alleging of having supplied ghee to defendant — Defendant not admitting plaintiff's claim — Judge putting plaintiff to proof — Held that relevant issue was framed and that the Judge did consider the issue raised by the pleadings — No interference in revision: AIR 1933 All 339, Ref. (Para 8)

Anno: Pro. Sm. C. C. Act, S. 25 N. 10.

G. L. Verma, for Petitioner; Kanwar Dalip Singh, for Respondents.

CASES CITED:
(A) ('52) AIR 1952 Him P & B 28
(B) ('42) AIR 1942 Oudh 155: 17 Luck 327
(C) ('25) AIR 1925 Lah 242(1): 84 Ind Cas 909
(D) ('46) AIR 1946 All 127: ILR (1945) All 465
(E) ('33) AIR 1933 Cal 501: 144 Ind Cas 740
(F) ('33) AIR 1933 All 339: 145 Ind Cas 579
(G) ('24) AIR 1924 All 691: 78 Ind Cas 434

JUDGMENT: This is a plaintiff's application in revision under S. 25, Provincial Small Cause Courts Act, 1887, against the judgment and decree of the learned Small Cause Court Judge Nahan dated 21-2-1952, dismissing his suit for recovery of Rs. 32/11/-. This amount consisted of Rs. 24/1/-, alleged to be due as price of ghee which the defendant is said to have purchased from the plaintiff on 29 Mangsar 2005, and Rs. 8/10/- as interest thereon at 12 per cent. per annum. No written statement was filed but the defendant's counsel stated that the plaintiff's claim was not admitted. The trial Court thereupon put the plaintiff to the proof of his case. The plaintiff came into the witness-box and he produced extracts from his books of account, but the suit was dismissed "in the absence of any proof."

(2) There is a preliminary objection raised by the learned counsel for the defendant-respondent, namely, that S. 25, Provincial Small Cause Courts Act, is not applicable and therefore the present revision could only lie under para. 35 of the Himachal Pradesh (Courts) Order, 1948. He further argued that if the present revision be under sub-para. (1) (b) of para. 35, the revision is not maintainable because the condition contained in the second proviso as to the value of suit being 1000/- rupees or upwards was not satisfied, and that if sub-para. (1) (a) applied the revision was not competent because no question of jurisdiction was involved.

(3) In support of the contention that S. 25, Provincial Small Cause Courts Act, was not applicable, the learned counsel for the defendant-respondent referred to the provisions of S. 3 (c) of that Act, which lays down that nothing in the Act shall be considered to affect any local law or any special law other than the Code of Civil Procedure. He further argued that the Himachal Pradesh (Courts) Order, 1948, was one such special law, and that therefore the relevant provision for a revision even in the case of a revision from the judgment and decree of a Small Cause Court would be para. 35 of the said Order and not S. 25 of the said Act. Before proceeding further, it may be stated here that the provisions of the Provincial Small Cause Courts Act, 1887, have been applied in Himachal Pradesh under the Himachal Pradesh (Application of Laws) Order, 1948, which came into force on 25-12-1948, and again under the

Merged States (Laws) Act, 1949, which came into force on 28-12-1949.

(4) Now, there is really no conflict between the provisions of S. 25 of the Act and para. 35 of the Order in question. Except for the special provision contained in sub-para. 1 (b) of para. 35 of the Order (authorising the Judicial Commissioner to make such order as he thinks fit where further consideration on an important question of law or custom was involved), the provisions of sub-para. (1) (a) of that paragraph correspond to those of S. 115, Civil P. C. It is well established that S. 25 of the Act is a provision much wider in its scope than S. 115 of the Code, for whereas the latter justifies interference only in cases of failure of exercise of jurisdiction which vested or exercise of jurisdiction which did not vest or of material irregularity in exercise of the same, the former goes beyond that and permits the High Court to interfere with the decision of a Court of Small Causes where the decision was not in accordance with law. That being so, it cannot be said, within the intendment of S. 3 (c) of the Act, that S. 25 of the Act affected the special law contained in para. 35 of the said Order. If any of the grounds mentioned in para. 35 of the Order be present that alone might be sufficient to justify an interference by this Court in exercise of its revisional jurisdiction under that paragraph. If, however, none of those grounds exists but the High Court is satisfied that the decree or order in question passed by a Court of Small Causes was not according to law, there would still be room for interference under S. 25 of the Act. Manifestly therefore since S. 25 of the Act affords ground for interference within an ambit wider than that provided by Para. 35 of the said Order it cannot be said that the former affected the special law embodied in the latter. I therefore hold that the present revision is competent under S. 25, Provincial Small Cause Courts Act, 1887.

(5) In view of what has been stated above, it is not necessary to consider the objections raised by the learned counsel for the defendant-respondent which are based upon the provisions of para. 35 of the Himachal Pradesh (Courts) Order. For the same reason, the ruling of this Court reported as — 'Lalla Ram v. Naresh Chand', AIR 1952 Him P & B 28 (A), which laid down certain principles relating to exercise of jurisdiction under S. 115 (c) of the Code, has no application here.

(6) So far as the present case is concerned, this Court has to be satisfied whether or not the decree in question which is the subject-matter of the present revision was passed according to law within the purview of S. 25, Provincial Small Cause Courts Act. The first contention put forward by the learned counsel for the plaintiff-petitioner was that the Judge below not having held that the books of account filed by the petitioner were not regularly kept, it acted illegally in discarding them from evidence. The contingency of going into the question of whether the books of account were, or were not, regularly kept did not arise in this case for the extracts of day-book and ledger filed by the plaintiff were never proved. The trial Court says that the employee in whose handwriting the entries in question admittedly were had not been produced. It is really not necessary to go into the question whether in order to prove the extracts in question it was incumbent upon the plaintiff to produce the employee, as seems to have been held in — 'Lachmi Narain v. Musaddi Lal', AIR 1942 Oudh 155 (B), for, even the plaintiff himself did not say a word in his deposition by which the extracts in question could be held to have been proved. In fact, the plaintiff made no reference whatsoever to the entries relating to the transaction in suit. Mere production of the extracts was not tantamount to a proof of those extracts. That being so, the trial Court was correct in its finding that the entries in question had not been proved.

(7) It was next contended by the learned counsel for the plaintiff-petitioner that even though the extracts may not have been proved, the suit should have been decreed on the unrebutted oral testimony of the plaintiff. That was however a question of whether in the particular circumstances of the case the Judge below was, or was not, justified in discarding the statement of the plaintiff. He has specifically referred in his judgment to the fact that the plaintiff had gone into the witness-box, and yet he eventually dismissed his suit on the ground of absence of any proof. It appears therefore that it was not merely because the plaintiff had failed to prove the extracts from his books of account, but also because the Judge did not believe the plaintiff's statement in the witness-box, that his suit was thrown out. It may be that the learned Judge discredited the plaintiff's testimony because he had not the courage to prove the extracts in his books of account. It cannot therefore be said that the Court below acted arbitrarily in discarding the testimony of the plaintiff. If in such circumstances the Court below has chosen not to believe the statement of the plaintiff it cannot be said that its decision was not in accordance with law.

(8) The learned counsel for the plaintiff-petitioner cited the following rulings. — 'Firm Jodha Mal Budhu Mal v. Ditta', AIR 1925 Lah 242(1) (C). That was a case where the High Court in exercise of its revisional jurisdiction remanded the case for decision according to law because the Court in question had totally omitted to take into consideration the books of account filed by the plaintiff. There is nothing to show that in that case, as in the present, the entries in question had not been proved. Presumably, the entries had been proved, and if that be so, there is no doubt that the Court below was wrong in not taking them into consideration. As stated already, however, in the present case, the entries were never proved. This ruling has therefore no application. The next case cited was — 'Suraj Prasad v. Mt. Makhna Devi', AIR 1946 All 127 (D). It was laid down there that entries in the account books are not by themselves evidence to attach a liability to the debtor but they can be used to corroborate the evidence given by the creditor, and that a decree can be passed on the basis of such corroborated evidence. There can be no quarrel with that proposition, but the entries must be proved, which, as already shown, has not been done in the present case. The next case cited was — 'Gouri Sankar v. Sashi Bhusan', AIR 1933 Cal 501 (E), which again was a case where entries in books of account had not been taken into consideration. The

same remarks apply to this ruling therefore as to 'AIR 1925 Lah 242(1)' (C) above. The next case relied upon was — 'Ram Nath v. Salig Ram', AIR 1933 All 339 (F). It lays down that there would be good ground for interference under S. 25 of the Act where the decision in question had not been arrived at judicially but arbitrarily. And it was further laid down that a decision will be deemed to have been arrived at arbitrarily where the Judge has not determined all the issues and there is nothing on the record to intimate that the Judge had considered all issues raised by pleadings. There is no doubt that no written statement was filed in this case and no issues were framed, but the defendant's counsel did make the statement that the plaintiff's claim was denied. The Judge below has stated specifically in his judgment that the plaintiff was put to proof, which was the same thing as framing an issue as to whether the plaintiff's allegation of having supplied the ghee in question to the defendant was correct. No other question arose for determination in this case. It cannot therefore be said that the relevant issue was not framed or that the Judge did not consider the issue raised by the pleadings. Finally, the learned counsel for the plaintiff-petitioner cited — 'Mathura Prasad v. B. B. and C. I. Rly. Co.', AIR 1924 All 691 (G), which lays down that gross errors of law are not revisable under S. 115, Civil P.C., though they are revisable under S. 25, Small Cause Courts Act. The question, however, is whether there has been any such grave error of law. For reasons recorded, I hold that no such error of law has been shown to have been committed by the Court below. There is therefore no ground for interference in revision, and the plaintiff's application is dismissed with costs and the judgment and decree of the learned Judge below are affirmed.

B/V.S.B. Revision dismissed.

A. I. R. 1953 HIM-P. 70 (Vol. 40, C. N. 31)

CHOWDHRY J. C.

Kanshi Ram and others, Plaintiffs-Appellants v. Lajju Ram, Defendant-Respondent.

Second Appeal No. 35 of 1952, D/- 13-10-1952.

Mandi Transfer of Immovable Property Regulation (II of 1975 Sm.), S. 3(2) — Retrospective operation.

The provisions of the Regulation are not retrospective so as to affect transactions entered into prior to coming into force of the Regulation.

Though the preamble to the Regulation professes to consolidate and declare the existing law there was no law in existence corresponding to S. 3(2) of the Regulation which rendered alienations without the previous sanction of Darbar void. Hence a benami sale effected prior to the enactment of the Regulation will not come within the mischief of S. 3(2) of the Regulation. 1995 Mandi LR 48, Ref.

(Paras 5, 6)

Hiralal, for Appellants; D. N. Vaidya, for Respondent.

CASES CITED:

(A) 1995 Mandi LR 48

(B) ('33) AIR 1933 Bom 262: 144 Ind Cas 781

JUDGMENT: This is a second appeal by the plaintiffs Kanshi Ram and others against the judgment and decree of the learned District Judge of Mandi, dated 29-4-1952, reversing the decree of the Subordinate Judge (whereby it was declared that the plaintiffs were the owners of a cultivatory holding) and dismissing their suit.

(2) The land in suit, measuring 21 bighas 17 biswas and 4 biswansis of cultivatory and 3 bighas 17 biswas and 10 biswansis of pasture land, situate in village Mundak Gahri Tehsil Sarkaghat, originally belonged to one Gaddi, and he sold it in 1971 B. to Devi Ram, late father of the defendant-respondent Lajju Ram, for a sum of Rs. 425/-. The plaintiffs are heirs of three brothers Naurangu, Lohku and Damru, and one of the allegations made by them in the present suit was that the transaction of sale was a benami one, the real purchasers having been the said three brothers. This allegation was traversed by the defendant in the trial Court, but the finding of that Court on this point was in favour of the plaintiffs, and that finding has not since been challenged by the defendant. It is also common ground that the land in suit has since the sale been in possession of the plaintiffs' predecessors and after them of the plaintiffs themselves. On the defendant getting a notice of ejectment served upon the plaintiffs on 19-8-1949, the latter filed the suit giving rise to the present appeal on 2-3-1950 for a declaration that they were the owners of the land in suit.

(3) The trial Court decreed the suit, but on the defendant appealing from that decision the learned District Judge of Mandi dismissed the suit, as aforesaid. The plaintiffs founded their suit on three grounds in the alternative: that they were the real owners of the land in suit and the defendant was only the benamidar, that they had acquired title to the property by adverse possession and that the defendant had agreed to transfer the land in suit to the plaintiffs. The lower appellate Court arrived at findings against the plaintiffs on all these points. The plaintiffs would be entitled to a decree if they succeed in establishing any of the said three grounds. In my opinion, this suit should be decreed on the first ground, and therefore I propose to take up only that ground.

(4) As adverted to above, it was conceded on behalf of the defendant in the lower appellate Court that the sale was a benami transaction, the real purchasers having been the plaintiffs' predecessors. The lower appellate Court however refused to give effect to the sale in favour of the plaintiffs as heirs of the real purchasers because it was of the opinion that the transaction was void under S. 3 of the Mandi Transfer of Immoveable Property Regulation No. II of Sambat 1975. If this finding of the lower appellate Court be correct, there is no doubt that the said predecessors of the plaintiffs did not acquire any right, title or interest in the land in suit and therefore the plaintiffs would not be entitled to any relief on the first ground. Section 3 of the said Regulation runs as follows:

"(1) No land may be alienated temporarily or permanently by sale, mortgage, gift or

exchange, nor may any tenancy by way of lease be created for a period exceeding five years, without the previous sanction of the Durbar. Provided that the sanction of the Durbar is not required for transfers of land due to direct inheritance, partition, redemption of mortgage or corrections in the Revenue Record.

(2) Every alienation of land made and every tenancy created contrary to the above sub-section without the sanction of the Durbar is null and void and shall not be given effect to by any Court or Revenue Officer."

(5) It was argued by the learned counsel for the plaintiffs-appellants that the sale in question having been made in the year 1971 B., it did not come within the mischief of S. 3(2) of the Regulation, as the Regulation came into force on the first day of Sawan, Sambat 1975. This aspect of the matter was not at all considered by the lower appellate Court. This argument was however met by the learned counsel for the defendant-respondent referring to the preamble of the Regulation which purported

"to consolidate and declare the existing law, custom and rules relating to the transfer of immoveable property within the Mandi State."

It was therefore argued by him that the Regulation did not lay down any new rule or law but only consolidated and declared a pre-existing law. He also referred to a ruling of the Ijlas-i-alia in Civil Revn. No. 1 of 29 Chet 1990, 'Piru v. Jindu', decided on 31-2-1993 and reported in '1995 Mandi LR 48 (A). It appears that the benami transaction which was the subject-matter of that decision also related to a time prior to the coming into force of the Regulation, and yet it was held that it was void under S. 3 of the Regulation and therefore conveyed no title to the real purchasers. In that case also, as in the present, no sanction of the Durbar in respect of the alienation in favour of the real purchasers had been obtained. But the learned counsel for the respondent was unable to point out any pre-existing law whereunder sanction of the Durbar for alienation was necessary. He was, in any case, not able to refer to any pre-existing law corresponding to the penal provisions of S. 3(2) of the Regulation which rendered every alienation without the previous sanction of the Durbar void.

Not every transfer made without sanction of the Durbar was void. For instance, although a transfer of occupancy right without such sanction was forbidden by sub-s. (1) of S. 9 of the Mandi Tenancy Regulation No. IX of Sambat 1975, any transfer made contrary to that provision was under sub-s. (2) of that section, only voidable. It may be that there was a pre-existing law which also required the previous sanction of the Durbar to every alienation of land, and to that extent it may be conceded, as the preamble lays down, that the Regulation consolidated and declared the existing law. It cannot however be presumed that each and every provision of the Regulation found place in the pre-existing law. It would be sufficient to justify the wordings of the preamble if the main provision of the Regulation existed even prior to its coming into force, namely, that no land could be alienated without the previous sanction of the Durbar.

In the circumstance, the learned counsel for the defendant-respondent having failed to point out any pre-existing corresponding provision, I am not prepared to hold on the mere wordings of the preamble that even before the coming into force of the Regulation there was any law which rendered alienations without the previous sanction of the Durbar void. The aforesaid ruling of the Ijlas-i-alia, being the ruling of a Court corresponding to the Judicial Committee, is certainly entitled to be followed as such, but the present aspect of the matter does not at all appear to have been argued or considered in that case. There is no doubt that it was observed in that case that S. 3 of the Regulation incorporated the law which existed before its enactment, but that was done merely in a general way and the question of the application of the Regulation to a transaction which took place before the coming into force of the Regulation did not arise specifically. That ruling is therefore not helpful for the decision of the present case.

(6) It having been held by me above that there was no law before the coming into force of the Regulation which corresponded to the provisions of section 3(2) of the Regulation, and the sale in question having been made four years before the enactment of the Regulation, it is clear that the benami transaction in question does not come within the mischief of the penal provision of the Regulation. According to the ruling reported as — 'Sundrabai v. Manohar', AIR 1933 Bom 262 (B), cited by the learned counsel for the defendant-respondent himself, the relevant provision of the law applicable would be the one which was in force when the transaction was effected. It may also be stated here that there is nothing in the Regulation which made its provisions retrospective, as, for example, were the provisions of the Mandi Limitation of Interest Regulation of Sm. 1975. The ground on which the lower appellate Court refused to give effect to the benami transaction in favour of the plaintiffs-appellants was therefore wholly untenable. I hold that, as real owners of the property in suit, they are entitled to the declaratory decree prayed for by them.

(7) The appeal is allowed, the judgment and decree of the lower appellate Court are reversed and those of the trial Court granting to the plaintiffs-appellants the declaratory relief prayed for by them are restored. The plaintiffs are allowed their costs throughout.

(8) The trial Court had however no jurisdiction to direct the revenue authorities to correct the revenue records according to its decision. It will be for the plaintiffs to move the appropriate revenue authority in that behalf on the basis of the decision in this case, if it be open to them to do so. The direction in the decree of the trial Court for correction of the revenue record is therefore set aside.

B/K.S.

Appeal allowed.

A. I. R. 1953 HIM-P. 72 (Vol. 40, C. N. 32)

CHOWDHRY J. C.

Kanhu, Appellant v. Sangat Ram and another, Respondents.

Second Appeal No. 4 of 1951, D/- 26-12-1952.

Custom (Himachal Pradesh) (Mandi) — Adoption.

Under local custom prevalent in Mandi in the pre-merger times when the Darbar was still in existence no ceremonies for adoption were necessary provided there was sanction of the Darbar to the adoption.

Where no such sanction was taken the adoption, even if made, in any shape or form, was invalid and the surrender of the entire property by the widow in favour of the adopted son fell to the ground. (Para 5)

Hiralal, for Appellant; D. N. Vaidya, for Respondent No. 1.

JUDGMENT: The facts of this case have been set forth in my judgment dated 18-12-1951 whereby the following issue was remitted to the District Judge for a finding:

"Whether the parties are governed, under any local law or custom, by a form of adoption which did not require the ceremony of giving and receiving, and under which an orphan boy could be given in adoption by his brother?"

(2) After taking evidence produced by the parties the learned District Judge has submitted the finding that although in Mandi it was not absolutely necessary to strictly follow the ceremonies which are prescribed by the Hindu law, no such adoption could be made without the sanction of the Darbar.

(3) The learned counsel for the defendant-appellant has challenged the correctness of this finding. His contention was that the evidence produced on behalf of the appellant was not given due consideration by the District Judge, and that in holding that the sanction of the Darbar was necessary he had gone beyond the limits of the issue remitted to him.

(4) The appellant produced seven witnesses, including the defendant, six of whom have deposed about the custom set up by the appellant. It is noteworthy that (with the exception of Hari Singh witness), while they have all stated that performance of ceremonies was not necessary, each and every one of them has admitted that it was essential to obtain the sanction of the Darbar for the validity of the adoption. One witness for the defendant-appellant, Upadhu, made it further clear by stating that the adoption of his brother Goglu by one Maya Purohit fell through because, as a result of an objection filed by the witness, sanction of the Darbar for the adoption was refused. The learned counsel for the defendant-appellant argued that the statements of the appellant's witnesses that no ceremonies were required related to custom, while their statements that sanction of the Darbar was essential amounted to an expression of opinion on a question of law, and that the latter should be discarded and only the former accepted. I am afraid no such argument is open on behalf of the appellant. There is no doubt that the remitted issue spoke of both law and custom, but there was no mention therein of the sanction of the Darbar. It would also be absurd to say that the appellant produced the said witnesses in order to express any opinion on a point of law. Nor do the witnesses themselves profess to do so. On the contrary, each and every one of them speaks of both the non-essentiality of ceremonies and essentiality of the sanction of the Darbar as part and parcel of a single custom. A mere perusal of their depositions makes it abundantly clear. That being so, the so-called two portions of the statements of the appellant's witnesses are inseparable and form components of one single whole. In fact, it was the argument of the learned counsel for the appellant himself that there was no statute law in Mandi which required sanction of the Darbar for an adoption. If so, it becomes clearer still that in saying that no ceremonies were necessary but sanction of the Darbar was essential the witnesses were deposing to what the custom was. It follows therefore that, according to the defendant-appellant's own evidence, the local custom was not the pure and simple one that no ceremonies were necessary, but a conditional custom that no ceremonies were necessary provided sanction of the Darbar be obtained. To the same effect is a decision of the Ijlas-i-alia, the then highest Court in Mandi State, referred to in the finding of the learned District Judge. In the present case, however, it is admitted that no sanction of the Darbar was obtained. In fact, the whole theory of adoption seems to be untrue, as remarked in the original judgment of the lower appellate Court, since at the time of mutation on foot of the gift the donor referred to the appellant as a Bhanja, and not as an adopted son. Furthermore, if the appellant had been an adopted son, he would have succeeded to the property on the death of the adoptive father, and there could be no question of the adoptive father's widow transferring the property to the appellant by means of a gift.

(5) I agree with the finding of the District Judge that under local custom no ceremonies for adoption were necessary provided there was sanction of the Darbar to the adoption. This custom has, no doubt, reference only to the pre-merger times when the Darbar was still in existence. The adoption set up by the appellant also belonged to that time. As, however, no such sanction was taken in the present case, the adoption, even if made in any shape or form, was invalid and the case of surrender of the entire property by the widow in favour of the appellant as an adopted son falls to the ground. The alternative case of gift for legal necessity has already been rejected by me in my judgment dated 18-12-1951. The appeal must therefore fail. It is not necessary to discuss as a separate question as to whether sanction of the Darbar to adoption was, or was not, necessary under the Mandi Transfer of Immoveable Property Regulation No. II of Samvat 1975 B.

(6) The appeal is dismissed with costs, and the judgment and decree of the lower appellate Court decreeing the plaintiff-respondent's suit are affirmed.

C/H.G.P. Appeal dismissed.

A.I.R. 1953 H. P. 73 (Vol. 40, C. N. 33)

CHOWDHRY J. C.

Mt. Brikmu and another, Defendants-Petitioners v. Jodha, Plaintiff-Respondent.

Civil Revn. No. 63 of 1951, D/- 20-12-1952.

(a) Hindu Law — Reversioner — Suit to challenge widow's alienation — (Custom (Punjab)).

A reversioner under Hindu law, is entitled to challenge the alienation by the widow quite irrespective of whether the property in suit is ancestral in relation to him. Therefore, in a case in which the parties by consent have stated that they are governed by Hindu Law and not the Punjab Customary Law it is unnecessary to decide the nature of the property. (Para 4)

(b) Hindu Law — Reversioner — Remote reversioner's suit to declare widow's gift invalid — Contents of plaint — (Civil P. C. (1908), O. 7 R. 1).

Nearest reversioner herself being donee from widow is precluded from challenging validity of gift. Remote reversioner is entitled to challenge validity of same. F. A. No. 8 of 1951 (Him. P.). is held not good law. (Para 5)

It is sufficient if he avers in plaint the factum of gift and need not set out any further circumstance to show how he being a remote reversioner is entitled to sue. AIR 1940 Pat 585 Disting. (Para 6)

Anno: Civ. P. C., O. 7 R. 1 N. 6.

I. D. Abrol, for Petitioners; Kedar Ishwar, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('51) F. A. No. 8 of 1951 (Him. P.) 5

('40) AIR 1940 Pat 585: (190 Ind Cas 736) 6

ORDER: This is an application in revision by the two defendants Mt. Brikmu and her daughter Mt. Shankru against the judgment and decree of the learned Dist. Judge, Mandi, dated 25-7-1951 dismissing their appeal and upholding the judgment and decree of the trial Court granting to the plaintiff-respondent Jodha a declaration that a gift made by Mt. Brikmu in favour of Mt. Shankru would not be valid against the reversionary rights of the plaintiff after the donor's death.

(2) The trial Court held that the parties were governed by custom. It did not decide the question whether a daughter was a preferential heir to a collateral. It further decided that the property was not ancestral qua the plaintiff. It however granted the aforesaid declaratory relief to the plaintiff on the finding that Mt. Brikmu as a Hindu widow was not entitled to make the gift in question.

(3) On the defendants' appeal, the Dist. Judge was of the opinion that it was not necessary to go into the question whether the parties were governed by custom or Hindu Law or the question whether a daughter is a preferential heir. In fact, he went further and remarked that it was conceded by the learned counsel for the parties that neither of these points need be decided. The Dist. Judge then observed that the main question calling for decision was whether Mt. Brikmu was entitled to make the gift of her husband's estate. As to this it was held by him that even under the Hindu Law (which, according to the defendants, was to govern the rights of the parties in the present case) a widow has only a limited estate in property inherited by her from her husband and she is not entitled to make a gift of it, irrespective of nature of the property in the hands of the husband. A new point was urged before the learned District Judge on behalf of the defendants-petitioners, and he allowed it to be taken. That was that the property in suit was a self-acquisition of the widow Mt. Brikmu. This was decided against the appellants. In the result he dismissed the appeal of the defendants, and they have now come up in revision to this Court.

(4) It was contended by the learned counsel for the defendants-petitioners that the Dist. Judge was in error in leaving the aforesaid two questions undecided, namely, the questions relating to custom and the ancestral nature of the property. This argument was really not open to the learned counsel for the petitioners in view of the remark of the learned Dist. Judge that the said two points were left undecided by common consent. Even if it be supposed that the present petitioners are not bound by the said consent, the view of the lower appellate Court that it was not necessary to record any finding on either of the two questions was correct. As regards custom, the learned counsel for the defendants-petitioners urged that the finding of the trial Court on that point was erroneous, his contention being that the parties were governed by the Hindu Law. Let that position be accepted. The only effect of that position would be that, whether the last male-holder of the property was Mt. Brikmu's husband or her son, the plaintiff would be a remoter reversioner as compared with the donee Mt. Shankru. That, as I shall presently show, has however no effect on the merits of the case. As regards the question whether the property was ancestral qua the plaintiff, that is a notion derived from the customary law of the Punjab. It is quite irrelevant in a case like the present under the Hindu Law. As already stated, it was the Hindu Law on which the defendants-petitioners relied. Under the Hindu Law, quite irrespective of whether the property in suit was ancestral qua the plaintiff, he would be entitled, subject to other conditions being fulfilled, to challenge the alienation as a reversioner. It follows therefore that the defendants-petitioners could not validly have any grievance against the said two points having been left undecided by the lower appellate Court.

(5) The next, and the main, point urged by the learned counsel for the defendants-petitioners was that the plaintiff being a remoter reversioner as compared to the donee, Mt. Shankru, was not entitled to impugn the alienation. That, however, is not true in every case. There is no doubt that the right to challenge an unauthorised alienation by a Hindu widow vests in the first instance in the nearest reversioner, but there are circumstances in which a remoter reversioner may challenge the alienation. One such circumstance is that the nearest reversioner has precluded himself or herself from suing by his own act. In the present case, Mt. Shankru, the daughter of the donor and the nearest reversioner to the estate of the last male-holder, has clearly so precluded herself from challenging the alienation by reason of the fact that she herself is the donee. That being so, it is manifest that Jodha plaintiff was fully entitled to challenge the alienation. The learned counsel for the defendants-petitioners cited a contrary view of this Court in — 'Parashottam

Ram v. Mst. Pattu', F. A. No. 8 of 1951 (Him. P.), I must say at once that the view expressed in that case is erroneous.

(6) The learned counsel for the defendants-petitioners further cited a number of rulings. Almost all of them are on the point that in the presence of a nearer reversioner one more remote is not entitled to challenge an alienation. That general proposition admits of no doubt, but I have pointed out that in certain circumstances even a remoter reversioner may challenge an alienation, one such circumstance being that the nearest reversioner has precluded himself or herself from suing by his own act or conduct. This view is well founded and finds expression in S. 207(i) of Mulla's Hindu Law. The said rulings therefore need not be considered. There is one ruling cited by the learned counsel for the defendants-petitioners which however needs being considered, and that is — 'Mt. Bigna Kuer v. Radha Prasad', AIR 1940 Pat 585 (B). That was a case where an alienation by a widow was challenged by a remote reversioner, the nearer reversioners having been impleaded as defendants. The plaintiff however did not describe them as nearer reversioners but as strangers, and he did not allege in the plaint that they had colluded with the widow. In view of these circumstances, it was held that the plaintiff was not entitled to the declaration prayed for by him. It was further held that in view of these circumstances his claim could not be read as being one on the footing that though he was not the reversionary heir he was entitled to sue for a declaration because the nearest reversionary heirs had colluded with the widow. It was therefore argued by the learned counsel for the defendants-petitioners before me that as the plaintiff had not alleged in his plaint any circumstance entitling him to get the declaratory decree in question as a remoter reversioner, his suit should have been thrown out. The factum of the gift by Mt. Brikmu in favour of Mt. Shankru has however been clearly alleged in the plaint. And that is the only circumstance which, as adverted to above, entitled the plaintiff to file the present suit on the view that the nearest reversioner, the donee, had precluded herself from suing. There was nothing further that the plaintiff need have alleged in the plaint. This was not a case of collusion about which any details might have been set forth in the plaint. All that needed averment was merely the making of the gift, and that, as just stated, was clearly alleged.

(7) The revision is dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.

B/M.K.S. Revision dismissed.

A.I.R. 1953 H. P. 74 (Vol. 40, C. N. 34)

CHOWDHRY J. C.

Dhingroo Mall, Petitioner v. The Financial Commr. and another, Respondents.

Civil Misc. Petn. No. 7 of 1951, D/- 10-1-1953.

Constitution of India, Art. 226 — Exercise of discretion — (Punjab Land Revenue Act, (17 of 1887), S. 16).

Article 226 of the Constitution makes the issue of directions, orders or writs discretionary and it cannot be urged that any party has a right to any form of order as a matter of course. The discretion is a judicial one to be exercised according to judicial principles. AIR 1951 All 746 (FB), Rel. on. (Para 5)

The exercise of that jurisdiction would be definitely refused where, the petitioner has admittedly no right in the property in respect of which the extraordinary legal remedy is sought. (Para 5)

R. N. Malhotra, for Petitioner; L. N. Sethi, Govt. Advocate, for Respondents; Shankar Nath, for the Raja of Jubbal.

CASE CITED:

(A) ('51) AIR 1951 All 746: 1951 All LJ 576 (FB)

ORDER: This is a petition by one Dhingroo Mall under Article 226 of the Constitution for issue of writs of certiorari and prohibition restraining the respondents, the Financial Commissioner, Himachal Pradesh and the State of Himachal Pradesh, from dispossessing the petitioner from land measuring 24 bighas and 7 biswas comprising Khewat Khatauni No. 1/1, Khasra Nos. 643, 645 and 649, and house property appurtenant thereto, situate in Chak Nar, Tehsil Chopal, District Mahasu.

(2) The petitioner applied on 14-4-1948 to the Raja of Jubbal for the grant of the said land to him on the ground of subsistence. The application was sent down through the Chief Executive Officer to the Collector for disposal. The Collector asked for a report from the Tehsildar of Chopal. The Tehsildar reported that the land was part of the private Bassa of the Raja, and that the Raja had previously not agreed to its being given for cultivation. The Tehsildar suggested that until final decision of the Raja's claims to private property the land in question be not given to anybody for cultivation. The Collector of Jubbal, disagreeing with the report of the Tehsildar, granted the land to the petitioner by an order dated 18-6-1948. As the period of lease was not specified in the order, he amended it by an order dated 21-6-1948 by fixing the term of lease as ten years.

The Raja appealed against the Collector's order to the Commissioner of Mahasu, but the appeal was dismissed for default on 16-9-1948. A subsequent application of the Raja to set aside the dismissal order was dismissed on 29-3-1950. Thereupon the Raja went up in revision to the Financial Commissioner against the Collector's order dated 21-6-1948. The Financial Commissioner held that the Collector had no authority to grant a lease in respect of the private property of the Raja and that his order was therefore ultra vires. The Financial Commissioner even remarked that the order appeared to be mala fide in view of its having been passed in spite of the Tehsildar's report to the contrary. Two objections raised before the Financial Commissioner on behalf of the present petitioner, one relating to limitation and the other to his power to revise the order in question, were rejected. In the result, the revision was allowed by the Financial Commissioner on 21-2-1951, the orders of the Collector dated 18th and 21st June 1948 were set aside and the land in dispute was ordered to be restored to the Raja. The present petition has been filed to prevent enforcement of this order of the Financial Commissioner. It may be stated here in passing that the present petitioner filed an application to the Financial Commissioner for review

of the order, but the application was rejected on 22-6-1951.

(3) It was argued by the learned counsel for the petitioner that the petitioner was in possession of the property in question either as a tenant on foot of the lease granted by the Collector or as a trespasser if the grant be held to be invalid. He further contended that in the former case the petitioner could only be ejected in accordance with the provisions of the Punjab Tenancy Act and in the latter case by a civil suit, and that the Financial Commissioner had no jurisdiction to order the petitioner's eviction in the revision filed by the Raja. The learned counsel pleaded that the Financial Commissioner's order infringed the fundamental right of the petitioner under Art. 31(1) of the Constitution that he shall not be deprived of his property save by authority of law. It was further argued that the petitioner had made certain improvements for which he could have claimed compensation if the Raja had sought to evict him by a suit, and that therefore the Financial Commissioner's order infringed the further right of the petitioner under Cl. (2) of the said Article which provides that no property shall be taken possession of without compensation.

(4) As adverted to above, the question regarding jurisdiction was raised before the Financial Commissioner. It was held by him that he was empowered to revise the Collector's order under S. 16, Punjab Land Revenue Act. If this view be correct, the petitioner would not be entitled to any relief from this Court because this Court would not sit as a Court of Appeal in order to correct the errors of law or procedure of the Financial Commissioner in exercise of its extraordinary jurisdiction under Art. 226 of the Constitution. This extraordinary jurisdiction could properly be invoked only if the Financial Commissioner had no jurisdiction to pass the order in question. The learned counsel for the petitioner realised it and was therefore constrained to argue that the Collector had no jurisdiction to grant the lease, and that therefore the orders passed by him on the 18th and 21st of June 1948 were illegal. The learned counsel then went on to argue that the Financial Commissioner had no jurisdiction to revise the Collector's orders under S. 16, Punjab Land Revenue Act.

(5) In trying to steer clear of the Scylla of the competency of the Financial Commissioner's order the learned counsel for the petitioner was inevitably caught by the Charybdis of want of right in the petitioner. If the Collector had no authority to grant the lease to the petitioner in respect of the private property of the Raja, the petitioner has acquired no rights in the property in dispute. The petitioner has therefore no right to prefer the present petition under Art. 226 of the Constitution. It is well settled that Art. 226 of the Constitution makes the issue of directions, orders or writs discretionary and it cannot be urged that any party has a right to any form of order as a matter of course. The discretion is a judicial one to be exercised according to judicial principles. 'Asiatic Engineering Co. v. Acchru Ram', AIR 1951 All 746 (A). This judicial discretion would of course be not exercised in favour of a party unless the case of the party seeking the extraordinary legal remedy under Art. 226 is founded on a clear legal right, and the exercise of that jurisdiction would be definitely refused where, as in the present case, the petitioner has admittedly no right in the property in respect of which the extraordinary legal remedy is sought. For the same reason, the contention of the petitioner is untenable that any fundamental right under Art. 31 of the Constitution has been infringed, or that the Financial Commissioner's order is against natural justice. As regards improvements, the contention on behalf of the Raja is that his own material has been used in effecting them. Be that as it may, whatever other remedy the petitioner may, or may not, have in respect of the property in question, this Court would grant him no relief in exercise of its extraordinary jurisdiction under Art. 226 of the Constitution when the Collector's order under which the petitioner holds the property was admittedly illegal. Before I conclude, it has to be stated that, besides the respondents, the petition was opposed by the Raja of Jubbal, who was also allowed to be heard in opposition to the motion as a person directly affected although not impleaded as a respondent.

(6) The petition is dismissed. The petitioner will pay as costs Rs. 50/- to the respondents and Rs. 25/- to the Raja of Jubbal.

A/K.S. Petition dismissed.

A.I.R. 1953 H. P. 75 (Vol. 40, C. N. 35)

CHOWDHRY J. C.

State of Himachal Pradesh v. Lalchand Shahi, Respondent.

Civil Misc. First Appeal No. 46 of 1952, D/- 15-1-1953.

(a) Arbitration Act (1940), S. 34 — "Steps in the proceedings."

No person can be deemed to take any step in a proceeding who is not aware of what the proceedings are. Therefore, the prayer for adjournment of the case made by a counsel who uptill the moment of making the request for adjournment had received no instructions from his clients did not amount to the taking of a step in the proceedings within S. 34 of the Act: AIR 1949 All 611. AIR 1948 Cal 59, AIR 1943 Bom 228, AIR 1935 Sind 62, AIR 1945 All 24, Distinguished. (Paras 4 and 5)

Anno: Arbitration Act, S. 34 N. 16.

(b) Arbitration Act (1940), S. 34 — "Ready and willing".

Before any act of a party in the nature of an application for adjournment can be interpreted as the taking by him of a step in the proceedings it must be the act of a party willing that the suit should proceed. That being so, the act of a counsel for a party in asking for an adjournment before having received any instructions from his client cannot be construed as indicating that he was willing that the suit should proceed: AIR 1925 Cal 801; AIR 1945 All 24, Explained and Relied on. (Para 5)

Kr. Dalip Singh, for the State; Bishan Singh, for Respondent.

CASES CITED:

(A) ('49) AIR 1949 All 611: ILR (1950) All 244

(B) ('48) AIR 1948 Cal 59

(C) ('43) AIR 1943 Bom 228: ILR (1943) Bom 298

(D) ('35) AIR 1935 Sind 62: 28 Sind LR 366
(E) ('45) AIR 1945 All 24: ILR (1944) All 681
(F) ('25) AIR 1925 Cal 801: 52 Cal 453
(G) ('34) AIR 1934 Cal 796: 61 Cal 702
(H) ('37) ILR (1937) 2 Cal 63
(I) ('41) AIR 1941 Lah 64: 193 Ind Cas 167

JUDGMENT: This is a defendant's appeal under S. 39(1)(v), Arbitration Act (10 of 1940) from an order of the Senior Subordinate Judge of Sirmur dated 24-7-1952 refusing to stay legal proceedings on an application to that effect having been made before him by the appellant under S. 34 of the Act.

(2) The plaintiff-respondent filed this suit for recovery of Rs. 7,866/9/6 on account of balance of price of empty tins, refund of security deposit etc., on foot of an agreement. The agreement contained an arbitration clause to the effect that in case of any dispute arising between the parties the matter would be referred to the arbitration of the Conservator of Forests and his decision shall be final.

(3) The suit was filed on 15-12-1951 and summonses were issued to the defendant-appellant fixing 29-2-1952 for settlement of issues. The order-sheet of that date is to the following effect:

"Present: Plaintiff through Sri L. D. Varma, Pleader and Sri Dalip Singh, Advocate for the defendant. Defendant's counsel prays for extension of time to enable him to file the written-statement. Time allowed till 29-4-1952."

On the latter date the presiding officer was absent as he had been transferred, and therefore the case was adjourned to 24-5-1952. It was noted in the order-sheet of 29-4-1952 that no written statement had been filed. On 24-5-1952 the defendant filed an application for stay of the suit under S. 34, Arbitration Act. The application was opposed by the plaintiff, and the learned Judge passed the order in question dated 24-7-1952 against which the defendant has come up in appeal to this court. The learned Subordinate Judge was of the view that, reading the two orders dated 29-2-1952 and 29-4-1952 together, the defendant will be deemed, within the purview of S. 34 of the said Act, to have already taken steps in the proceedings before putting in his aforesaid application dated 24-5-1952. I have heard learned counsel for the parties and am clearly of the opinion that the order of the learned Senior Subordinate Judge was wrong.

(4) The learned Senior Subordinate Judge had before him two affidavits, one by Kr. Dalip Singh, Advocate for the defendant and another by Sri L. D. Varma, Pleader for the plaintiff. It was averred in the former by Kr. Dalip Singh that it was on 29-2-1952 that he was engaged on behalf of the defendant, the State of Himachal Pradesh, to appear in the case, that by the time he appeared before the Court on that date he had not received instructions for the case, and that therefore he verbally requested the Court to adjourn the case to enable him to prepare the defence on behalf of the defendant. The counter-affidavit of the learned pleader for the plaintiff on the other hand is to the effect that Kr. Dalip Singh asked the Court for extension of time to enable him to file a written statement.

It is common ground that no written application was filed but that the request of adjournment made by Kr. Dalip Singh was an oral one. It will be seen that while according to Kr. Dalip Singh he only asked for adjournment for enabling him to prepare the Government's defence, according to Sri L. D. Varma the adjournment was prayed for specifically for filing a written statement. Essentially however there is no difference between the two affidavits, for it may be said that an adjournment to enable the counsel to prepare the Government's defence is the same as one to enable him to file a written statement on behalf of the Government. What is material, however, is that the averment of Kr. Dalip Singh that by the time he appeared before the Court on 29-2-1952 and prayed for adjournment he had received no instructions from the defendant was not controverted on behalf of the plaintiff. I must therefore accept the averment in the affidavit of Kr. Dalip Singh as correct.

The correctness of that averment in Kr. Dalip Singh's affidavit is further supported by a communication on the record of the case from the Deputy Commissioner of Sirmur informing the Court that the counsel in question was being appointed to conduct the case on behalf of the State of Himachal Pradesh, with copies of communication to the counsel and the Conservator of Forests Nahan. The counsel was directed to take the relevant documents and to obtain necessary help for the purpose of conducting the case from the Conservator of Forests, and similar directions were given to the Conservator of Forests. This communication is dated 29-2-1952. There can be no manner of doubt therefore that Kr. Dalip Singh, Advocate was appointed counsel on behalf of the defendant, the State of Himachal Pradesh, on 29-2-1952, and that by the time he put in appearance in Court on that date and asked for adjournment he had received no instructions. Can it be said in such circumstances that by reason of his having requested the Court for time to file written-statement Kr. Dalip Singh should be deemed, within the intendment of S. 34, Arbitration Act, to have taken a step in the proceedings?

The only reasonable answer to this question can be in the negative. And this for the simple reason that no person can be deemed to take any step in a proceeding who is not aware of what the proceedings are. 29-2-1952 was the date for settlement of issues and therefore for filing of written-statement on behalf of the defendant, and so Kr. Dalip Singh on behalf of the defendant naturally asked for adjournment for filing a written statement. He had however received no instructions by that time from the defendant, and therefore he could not possibly have been aware of the agreement on foot of which the suit had been filed or of the arbitration clause in that agreement. It was impossible for him therefore to have filed any application on that date for stay of proceedings under S. 34 of the Act. Later on, when he had taken the necessary instructions, he filed such an application. It cannot in the circumstance be said by any show of reason that before filing the application under S. 34 a step in the proceedings had been taken on behalf of the defendant on 29-2-1952 by reason of the defendant's learned counsel having asked for an adjournment on that date in the circumstances mentioned above.

(5) The learned counsel for the plaintiff-respondent has relied upon the following rulings: — 'U. P. Govt. v. Sri Harnath', AIR 1949 All 611 (A); — 'Sadhan Kumar v. Sunil Kumar', AIR 1948 Cal 59 (B); — 'Edward Radbone v. Jugilal Kamalapat', AIR 1943 Bom 228 (C); — 'Murlimal v. Banarsi Das & Sons.', AIR 1935 Sind 62 (D); and — 'Roop Kishore v. U. P. Govt.', AIR 1945 All 24 (E). In all these cases applications for postponement of the hearing of the suit for filing written statement were held to amount to the

taking of steps in the proceedings within the purview of S. 34 of the said Act. There is this important distinction, however, between these cases and the present, that in none of them was the prayer for adjournment of the case made by a counsel who uptill the moment of making the request for adjournment had received no instructions from his clients. That being so, it goes without saying that if a counsel makes an application for adjournment of the case after having received necessary instructions from his client the application for adjournment must amount to the taking of a step in the proceedings within S. 34 of the Act. These rulings therefore are clearly distinguishable and do not apply to the facts of the present case. On the contrary, there are certain observations appearing in the last two rulings which support the view of the matter which I have taken in the present case. In the Sind ruling reliance was placed on the following observations of Page, J., in — 'Bhowanidas v. Panachand', AIR 1925 Cal 801 (F):

"Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within S. 19, Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if, having regard to the form of the application, the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desires that the matters in dispute should be referred to arbitration."

It would appear therefore that before any act of a party in the nature of an application for adjournment can be interpreted as the taking by him of a step in the proceedings it must be the act of a party willing that the suit should proceed. That being so, the act of a counsel for a party in asking for an adjournment before having received any instructions from his client cannot be construed as indicating that he was willing that the suit should proceed. Again it was laid down by Dar, J., as follows in the — 'AIR 1945 All 24 (E)', case cited above:

"The defendant, however, contends that every application made for adjournment of a case with a view to enable the defendant to file a written-statement cannot be treated as a matter of law 'a step in the proceedings' and the contents of the application or the surrounding circumstances of the case may show that the application was made without prejudice to the rights of the defendant to seek relief under S. 34 of the Act & for this contention reliance is placed upon — 'AIR 1925 Cal 801 (F)', — 'Ramlal Murlidhur v. Hari Bux', AIR 1934 Cal 796 (G), — 'Dwarka Das & Co. v. Chain Roop Singhee', ILR (1937) 2 Cal 63 (H) and — 'Premnath .Pran Nath v Amba Prasad', AIR 1941 Lah 64 (I). It may be possible to hold in some cases that an application for adjournment of a case to enable the defendant to file a written-statement was not a step in the proceedings within the meaning of section 34 of the Act, but prima facie such an application should be treated as a step in the proceedings within the meaning of S. 34 and the whole burden should be upon the defendant to establish the circumstances which will lead to the result that effect should not be given to the prima facie meaning of the application."

It was conceded in this ruling therefore that there may be circumstances in which the filing of an application for adjournment of the case for the purpose of filing a written-statement may not be treated as a step in the proceedings, although no doubt the burden of proving the existence of such circumstances would be upon the party who made the application. This burden, as adverted to above, has been satisfactorily discharged in this case by the unrebutted affidavit of the learned counsel for the defendant that upto the moment of praying for adjournment he had received no instructions on behalf of his client.

(6) In the result, therefore, I hold that the application under S. 34, Arbitration Act, preferred on behalf of the defendant in the trial Court on 24-5-1952 was made before the taking of any step in the proceedings, and that therefore the Court should have allowed the application. Accordingly, the appeal is allowed with costs, the order of the Senior Subordinate Judge dated 24-7-1952 refusing to stay proceedings is set aside and the Court now seised of the case is directed to proceed with the case in accordance with the law in the light of the finding recorded above by this Court.

B/H.G.P. Appeal allowed.

A.I.R. 1953 H. P. 77 (Vol. 40, C. N. 36)

CHOWDHRY J. C.

State of Himachal Pradesh v. Chamba Valley Transport Ltd., Respondent.

Civil Misc. Petn. No. 28 of 1952, D/- 7-1-1953.

(a) Constitution of India, Art. 132(1) — Substantial question of law.

Where neither a provision of the Constitution nor its application to the facts of a case is in any way in controversy, it cannot be said that the case involves a substantial question of law as to the interpretation of the Constitution. (Para 3)

(b) Constitution of India, Arts. 19 and 132 (1) — Substantial question of law.

Where the decision in question relates to whether the provisions of Art. 19 were retrospective in their application, the matter involves a substantial question of law as to the interpretation of the Constitution. (Para 4)

L. N. Sethi, Govt. Advocate, for the State; Tek Chand, for Respondent.

CASES CITED:

(A) ('47) AIR 1947 FC 37: ILR (1947) Kar (FC) 95

(B) ('51) AIR 1951 Mad 969: 1951-2 Mad LJ 222 (FB)

(C) ('53) AIR 1953 Him Pra 8: (Civil Misc. Petn. No. 16 of 1950, D/- 11-8-1952).

ORDER: This Court by its decision dated 11-8-1952* issued, on the application of the Chamba Valley Transport Ltd. under Art. 226 of the Constitution, a writ in the nature of 'mandamus' to the State of Himachal Pradesh to withdraw the notice prohibiting the petitioner from plying motor transport on a certain route until transport business is nationalised by legislation, and to hear and dispose of according to law any application which the petitioner might make for permitting it to ply motor transport on that route. The present application has been filed by the State of Hima-

* Reported as AIR 1953 Him. Pra. 8.

chal Pradesh for a certificate under Art. 132(1) of the Constitution that the case involves a substantial question of law as to the interpretation of the Constitution. The application has been opposed on behalf of the Chamba Valley Transport Limited.

(2) Various grounds have been set forth in the present petition. Some relate to matters which were never adjudicated upon by this Court (e.g. whether it was open to the State not to recognise the ante-cession rights of the Transport Company based on contract), others relate to matters which clearly do not involve any question of law as to the interpretation of the Constitution (e.g. whether the petition under Art. 226 should have been dismissed on the grounds of laches or of other adequate remedy being open to the petitioner). These grounds therefore I shall not deal with. I shall deal with only two grounds urged before me on behalf of the petitioner, the State of Himachal Pradesh, one clearly set forth in the grounds of the petition and another which, though not set forth in the grounds, was argued before me.

(3) The first ground related to the finding of this Court that under cl. (6), Art. 19 of the Constitution, as amended by S. 3 of the Constitution, (First Amendment) Act, 1951, the State could not nationalise transport, as it has done in the present case, without legislation. The contention of the learned counsel for the respondent in this connection was that the law on this matter was so clear that he who runs may read it, and therefore it could not be said that any substantial question of law as to the interpretation of the Constitution was involved. Indeed, it was not pretended on behalf of the petitioner that the law since the amendment was not as I have interpreted it in my decision against which the petitioner seeks to go up in appeal to the Supreme Court. Nor was it suggested on behalf of the petitioner that the State sought to nationalise transport by legislation.

That being so, neither the relevant law nor its application to the facts of the present case was in any way in controversy. And where that is the state of affairs it is clear that it could not be said that the case involved a substantial question of law as to the interpretation of the Constitution. This view is supported by two rulings cited by the learned counsel for the respondent: — 'Krishnaswami v. Governor-General in Council', AIR 1947 FC 37 (A) and — Subba Rao v. Veeraju', AIR 1951 Mad 969 (FB) (B). The first of the two grounds which I proposed to deal with, therefore, is not a good ground for granting the present petition.

(4) The same cannot however be predicated of the other ground. This other ground has reference to the finding recorded by this Court in relation to the contention of the Chamba Valley Transport in the present case that the provisions of Art. 19 not being retrospective they could not revivify a right which had been put an end to prior to the commencement of the Constitution on 26-1-1950. The argument put forward on behalf of the State of Himachal Pradesh was that its act of putting an end to the transport business of the Chamba Valley Transport Limited by a notice dated 10-9-1949 did not come within the mischief of cl. (6) of Art. 19 of the Constitution as amended by S. 3 of the Constitution (First Amendment) Act, 1951, which amendment came into force on 18-6-1951, because that notice was issued, and the agreement on foot of which the Chamba Valley Transport Limited were granted the right of plying buses on the route in question was entered into, prior to the commencement of the Constitution and, in any case, prior to the said amendment of cl. (6) of Art. 19 of the Constitution.

This contention was repelled by this Court on the ground that the right which the Transport Company sought to enforce did not exist prior to the commencement of the Constitution. It was therefore held that there could be no question of its ante-Constitution infringement, or of retrospective application of provisions of Art. 19 of the Constitution. Now there could be no doubt but that the question of law thus decided was a fairly arguable one, and it was dealt with by this Court at some length. It was held in the aforesaid 1951 Madras ruling, cited by the learned counsel for the respondent himself, as follows:

> "When a question of law is fairly arguable, when there is room for difference of opinion on it, then such a question would be a substantial question of law. If the High Court thought it necessary to deal with a question of law at some length, and discuss alternative views which can be taken on the point, then, such a question would be a substantial question."

I would therefore hold that this second ground urged on behalf of the petitioner relates to a matter which involved a substantial question of law. And as the decision in question related to whether the provisions of Art. 19 were retrospective in their application, the matter involved a substantial question of law as to the interpretation of the Constitution. I therefore hold that on this second ground the present application of the State of Himachal Pradesh should be granted.

(5) Before I conclude I have to dispose of an application put in by the State for stay of enforcement of the operative portion of my decision dated 11-8-1952. An interim order of stay was passed on the preferment of the application, and it so happens that notice to the respondent to show cause against the application was also issued for to-day. It is really unnecessary to go at any length into the pros and cons of the application for stay since this Court cannot grant any stay after the disposal to-day of the main application under Art. 132(1). I deem it proper however to refer in passing to an argument put forward by the learned counsel for the respondent in opposing the stay application, namely, that although the writ in question was issued as long ago as 11-8-1952 the State of Himachal Pradesh had neither withdrawn the notice prohibiting the Company from plying motor transport nor disposed of the Company's application for permitting it to ply motor transport on the route in question.

As regards the latter portion of the operative part of my judgment, I am satisfied with the reply made by the Government Advocate on behalf of the State that the application of the Transport Company is being considered. If it has not been disposed of so far, the reason seems to be that disposal of such applications necessarily takes time. It cannot yet be said

that the State has taken an inordinately long time in dealing with the Company's application. As regards the withdrawal of notice, the Government Advocate stated that the notice had not been withdrawn because it was understood that the notice stood withdrawn by the very wordings of the order of this Court. I am surprised at such an interpretation of my order since the order clearly directed the State to withdraw the notice prohibiting the petitioner-Company from plying motor transport on the Chamba-Banikhet route.

The contents of the stay application, however, do lend support to the contention of the Government Advocate, for the only portion of the operative part of my judgment in question against which the stay has been sought is the one relating to the disposal of the Transport Company's application for permitting it to ply transport on the route in question. No stay has been prayed for in connection with the withdrawal of notice. It does appear therefore that although the interpretation which the State has put upon my order dated 11-8-1952 is against the plain meaning of the words of my order, it cannot be said that it has designedly flouted the order of this Court. I am satisfied with the explanation offered by the Government Advocate on behalf of the State, but at the same time I expect, now that the meaning of my order has been clearly understood by the State, that my order will be given effect to without further delay.

(6) The application is allowed and it is hereby certified under Art. 132(1) of the Constitution that the case decided by this Court on 11-8-1952 in the — 'Chamba Valley Transport Ltd. v. The State of Himachal Pradesh', AIR 1953 Him Pra 8 (C) involves a substantial question of law as to the interpretation of the Constitution. In view of the controversial nature of the points involved, and in view especially of the misinterpretation of my order dated 11-8-1952 by the State of Himachal Pradesh, I make no order as to the costs of the present application.

A/V.R.B. Application allowed.

A.I.R. 1953 H.P. 79 (Vol. 40, C. N. 37)

CHOWDHRY J. C.

Chanchal Ram and others, Plaintiffs-Appellants v. Union of India and others, Defendants-Respondents.

First Appeal No. 1 of 1952, D/- 24-3-1953.

(a) Himachal Pradesh (Application of Laws) Order (1948), S. 7(1) — Effect of — (Mandi Land Revenue Regulation (8 of 1975 St.), S. 19) — (General Clauses Act (1897), S. 6).

The effect of S. 7(1), Himachal Pradesh (Application of Laws) Order, 1948, is to repeal the Mandi Land Revenue Regulation (8 of 1975) with effect from 25-12-1948 with the result that succession to malguzari rights was governed by the personal law of the parties and not by S. 19 of the Regulation. But by virtue of the saving clause contained in S. 7(1), the old law contained in S. 19 of the Regulation could not cease to have effect by reason of its repeal, in respect of things done or omitted to be done before the commencement of the Himachal Pradesh (Application of Laws) Order, viz., before 25-12-1948. Hence, where on the death of a Hindu widow, her malguzari rights in certain land are escheated by the State prior to 25-12-48 but the plaintiff brings a suit after 25-12-1948, for declaration that he is entitled to succeed to the property as the collateral of the last male holder, the rights of the parties would be governed by S. 19 of the Regulation despite its repeal and despite the fact that the Hindu Law and not the said Regulation was in force on the date of the institution of the suit. The crucial date for determining the law applicable is not the date of institution of the suit but the date when the cause of action arose. AIR 1934 Cal 80 (2) discussed; AIR 1931 All 635 (FB), distinguished. (Paras 3, 7, 8 and 9)

(b) Evidence Act (1872), Ss. 101 and 102 — Affirmation of fact and onus.

Where on an escheat by the crown the plaintiff brings a suit for declaration that he is entitled to the malguzari in question as reversioner of the last male holder and for possession, the onus lies on him to prove that the malguzari rights in question were held by the common ancestor. It is not for the defendant State to prove that the last proprietor died heirless. Case law Ref. (Para 10)

Anno: Evi. Act, Ss. 101 to 103 N. 6 and 28.

Hira Lal, for Appellants; D. N. Vaidya, Govt. Advocate, for Respondents; Union of India.

CASES CITED:

(A) ('34) AIR 1934 Cal 80(2): 60 Cal 1438
(B) (1916) 85 LJ KB 537: (1916) 1 KB 688
(C) ('31) AIR 1931 All 635: 54 All 299 (FB)
(D) ('67-69) 12 Moo Ind App 448 (PC)
(E) ('16) AIR 1916 Mad 209 (2): 31 Ind Cas 590
(F) ('27) AIR 1927 Bom 456: 51 Bom 784
(G) ('21) AIR 1921 Bom 138: 62 Ind Cas 109
(H) ('41) AIR 1941 Oudh 337: 16 Luck 551

JUDGMENT: This is a plaintiffs' appeal from an order of remand dated 30-8-1951 passed by the District Judge of Mandi.

(2) Mt. Chandi succeeded to malguzari rights in certain land as a Hindu widow on the death of her husband Das. She died on 23-11-1998 B., i.e. sometime in 1941 A.D., and thereupon the then Mandi State took the property by escheat. The plaintiffs made a representation to the ruler of the State, but the latter affirmed the escheat so far as the land in dispute in the present litigation is concerned by an order dated 18-2-2005 B., i.e. sometime in 1948 A.D. The present suit was filed against the State on 29-6-1949 for a declaration that the plaintiffs were entitled to succeed to the property on the death of Mt. Chandi as reversioners to the last male holder Das and for possession of that property.

(3) On the date of the death of Mt. Chandi in 1998 B., and on the date when the said order was passed in 2005 B., the Mandi Land Revenue Regulation No. 8 of S. 1975 was in force. According to the pedigree set up by the plaintiffs, they professed to be collaterals with a common ancestor Bhagirath who was removed more than four generations from the last male holder Das. In order to be entitled to succeed by inheritance to the rights of the deceased malguzar Das it was,

therefore, incumbent on the plaintiffs to prove, under S. 19(1)(a) of the Regulation, that the said common ancestor Bhagirath held the rights. Subsequent to the passing of the said order by the ruler of Mandi but prior to the institution of the present suit, the Central Government passed the Himachal Pradesh (Application of Laws) Order, 1948, which came into force on 25-12-1948. A Schedule of Central and Punjab Acts was appended to this Order. By S. 3 of the Order these enactments were applied to Himachal Pradesh subject to certain modifications. Section 7(1) of the Order laid down as follows:

"Unless otherwise especially provided in the Schedule to this Order, all such laws in force in Himachal Pradesh which correspond to the enactments enumerated in the Schedule and which are continued in force by S. 5, Himachal Pradesh (Administration) Order. 1948, shall cease to have effect save as respects things done or omitted to be done before the commencement of this Order."

One of the Punjab Acts applied to Himachal Pradesh by means of this Order was the Punjab Land Revenue Act 18 of 1887. The corresponding law, as embodied in the said Regulation, therefore, stood repealed from 25-12-1948 under the provisions of S. 7(1) of the Order. The Punjab Land Revenue Act does not contain any provision corresponding to S. 19 of the Regulation relating to succession to malguzari rights. The effect of the said repeal, therefore, was that from 25-12-1948 succession to malguzari rights was governed by the personal law of the party concerned (in this case the Hindu Law).

(4) The trial Court decreed the suit holding that the case was governed by the new law which came into force on 25-12-1948, i.e. by the Hindu Law. On an appeal by the State, however, the learned District Judge was of the view that the case was governed by S. 19 of the said Regulation, and, as the trial Court had framed no issue as to whether the disputed land was held by the common ancestor Bhagirath, he passed the order which is the subject-matter of the present appeal setting aside the judgment and decree of the trial Court and remanding the case for redecision after framing the necessary issue.

(5) The sole question for determination in this Court is whether the case is governed by the aforesaid provisions of the Mandi Land Revenue Regulation of 1975 or by the Hindu Law. The learned counsel for the appellants argued that the case is to be decided according to the Hindu law and not according to the said provisions of the Mandi Regulation. He put forward two reasons in support of this view: (1) that the effect of the repeal was as if the Mandi Regulation never existed, and (2) that the crucial date was the date of the suit, and on that date it was the Hindu law, and not the Mandi Regulation, which was in force. For reasons to be recorded presently, neither of these contentions is sustainable.

(6) The learned counsel cited two rulings in support of his contentions. The first was — 'Digambar Paul v. Tufazuddi', AIR 1934 Cal 80 (2) (A). That was a suit by occupancy raiyats against an under raiyat for recovery of arrears of rent for the years 1333, 1334 and 1335 B.S. During the first two years the old S. 48, Bengal Tenancy Act, was in force which imposed a disability on an occupancy raiyat as regards the rate at which he could recover rent from the underraiyat. Before rent for 1335 B.S. fell due that disability was removed by an amendment of S. 48, Bengal Tenancy Act, by Act 4 of 1928. It was held by Guha and Bartley, JJ., that as the section as amended could not have a retrospective effect, the plaintiff's claim for rent for the years 1333 and 1334 was subject to the disability contained in the old section. As regards rent for 1335, they held that the disability under the previous law was removed because the effect of substitution of the new S. 48 for the old S. 48 under Act 4 of 1928 was that the old section was repealed. In this connection, following the English case of —'Watson v. Winch', (1916) 1 KB 688 (B), they further observed as follows:

"The effect of repeal of a statute, in the absence of saving clauses, is that it has to be considered as if the statute so repealed had never existed. It ceases to be operative, unless there is any clause in the new statute preserving the old statute: the underlying principle being, that there cannot be two inconsistent codes in the same matter, and if the previous statute has to be preserved that must be done expressly."

(7) Far from supporting, the ruling really demolishes the contentions put forward by the learned counsel for the plaintiffs-appellants. Firstly, the date of the institution of the suit was not taken as the crucial date for determining the applicability of the law. On the contrary, the crucial date was the date on which the cause of action for the recovery of rent of a particular year arose. It was accordingly held that as the cause of action for the claim in respect of the years 1333 and 1334 arose when the old S. 48 was in force, the plaintiff's claim in respect of those years was subject to the disability contained in that section. It was further held that as the cause of action for the suit for the recovery of rent for the year 1335 arose after the repeal of the old section, the disability imposed by the previous law had been removed and the plaintiff was entitled to recover rent at the contract rate. It is true that in considering the plaintiff's claim for rent for 1335 both the date of the institution of the suit and the date on which the cause of action for the suit arose were mentioned, but a perusal of the entire ruling shows that the determining factor was not the date of the institution of the suit but the date on which the cause of action arose. This will become further evident from the fact that although the new S. 48 as amended by Act 4 of 1928 had come into force before the institution of the suit, the law held applicable in respect of the claim for the years 1333 and 1334 was the law under the old S. 48. This was done for the specific reason that when cause of action for those two years arose the old law was in force. It is immaterial, therefore, that on the date of the institution of the present suit the Mandi Regulation was no longer in force. The main thing to see, as laid down in the aforesaid ruling cited by the learned counsel for the plaintiffs-appellants himself, is whether there is a saving clause in the repealing enactment. The same view is expressed in The Construction of Deeds and Statutes by Odgers, Third (1952) Edition, at page 262 as follows:

"Similarly rights acquired under a Statute will not be taken away by the repeal of the Statute conferring them. Sometimes a clause to this effect is inserted in the repealing Statute, but this is really unnecessary both by the common law and now by S. 38(2) of the Interpretation Act, 1889."

Section 6 of our General Clauses Act, 1879, corresponds to S. 38 of the English Interpretation Act, 1889. Since the repealing Act in the present case is a Central Act, the repeal would be deemed to be subject to the savings contained S. 6 of the

General Clauses Act, so that the insertion of any saving clause in the repealing Act was unnecessary. The repeal in the present case purports, however, to be specifically subject to a saving clause in view of the occurrence of the words "save as respects things done or omitted to be done before the commencement of this Order" in S. 7(1), Himachal Pradesh (Application of Laws) Order, 1948. It follows, therefore, that the old law as contained in S. 19 of the Mandi Regulation could not cease to have effect by reason of its repeal in respect of things done or omitted to be done before the commencement of the Himachal Pradesh (Application of Laws) Order. The question, therefore, is whether there was anything done or omitted to be done before 25-12-1948.

(8) The question posed at the end of the next preceding paragraph is easily answered. If the common ancestor Bhagirath did not hold the land in question as a malguzar (a matter depending for its decision on the finding of the issue remanded to the trial Court), the plaintiffs acquired no right, title or interest in the property in suit on the death of Mt. Chandi. That was one thing done before 25-12-1948. Another thing done before that date was that the State of Mandi had taken the property in suit by escheat. That being so, under the said saving clause added to S. 7(1), Himachal Pradesh (Application of Laws) Order, 1948, the Mandi Regulation did not cease to have effect as respects these things done despite the repeal of the Mandi Regulation by the Order of 1948. In other words, the legality or otherwise of the said things done continued to be governed by the provisions of S. 19, Mandi Land Revenue Regulation of 1975, despite the repeal and despite the fact that the Hindu law and not the said Regulation was in force on the date of the institution of the present suit.

(9) The other ruling cited by the learned counsel for the plaintiffs-appellants was the Full Bench decision reported as —'Ram Karan Singh v. Ram Das Singh', AIR 1931 All 635 (C). That ruling has, however, no application here since it related to a matter of procedure and not, as here, of substantial right. That being so, the new personal law cannot in the present case be said to have any retrospective effect in respect of the previous rights lost by the plaintiffs and acquired by the defendant State. In the result, therefore, I agree with the view of the lower appellate Court that the present case is governed by S. 19, Mandi Land Revenue Regulation of 1975 B.

(10) In remanding the case it was observed by the learned District Judge that the onus of proving that the disputed land was held by the common ancestor should be placed on the plaintiffs-appellants. It was argued by their learned counsel in this Court that this onus was wrongly placed. His contention was that in every case where the State claims by escheat the onus lies on the State to show that the last proprietor died heirless. This argument is contrary to the clear provisions of S. 101, Evidence Act, which lays down that whoever desires any Court to give judgment as to any legal right or liability dependent upon the existence of facts which he asserts, must prove that those facts exist. The plaintiffs in the present case desire the Court to give judgment that they are entitled to succeed to the malguzari rights in question as reversioners to the last male holder Das. They must, therefore, prove, within the provisions of S. 19(1)(a) of the said Regulation, that the malguzari rights in question were held by the common ancestor Bhagirath. The same result will follow by applying the test contained in S. 102, Evidence Act, namely, that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on their side. If no evidence were given on either side in the present case, it is evidently the plaintiffs who would fail. It is noteworthy that the property has already been taken by the State by escheat, and the plaintiffs are admittedly out of possession. The learned counsel for the plaintiffs-appellants cited the following rulings: —'Girdhari Lall Roy v. the Bengal Government', 12 Moo Ind App 448 (PC) (D); —'Secy of State v. Subraya', AIR 1916 Mad 209 (2) (E); — 'Narayan v. Lakshman', AIR 1927 Bom 456 (F); — 'Ganpat Rama v. Secy. of State', AIR 1921 Bom 138 (G); and — 'Secy. of State v. Kanhaiya Lal', AIR 1941 Oudh 337 (H). It is to be noted, however, that in all these rulings, except the Bombay ruling, the Government was the plaintiff claiming the property by escheat. In the Bombay ruling the Government was not a party but the plaintiff's right of succession was held to be supported by authorities and by the various commentaries on the Mitakshara, and it was, therefore, held that it lay on the defendant to establish the plea set up by him that the property had escheated to the Crown. In none of these rulings, therefore, was the aforesaid rule of onus of proof departed from. I, therefore, hold that the onus of proof has been rightly directed by the learned District Judge to be placed upon the plaintiffs.

(11) The appeal is dismissed with costs and the judgment and order of the learned District Judge are upheld. The parties are directed to appear in the trial Court on 16-4-1953.

B/K.S. Appeal dismissed.

A.I.R. 1953 H. P. 81 (Vol. 40, C. N. 38)

CHOWDHRY J. C.

Saju, Plaintiff-Appellant v. The Union of India, Defendant-Respondent.

Second Appeal No. 7 of 1952, D/- 26/3/53.

(a) Mandi Transfer of Immovable Property Regulation (2 of 1975 Samvat), S. 3(2) — Scope.

A document executed prior to the coming into force of the Regulation does not come within the mischief of S. 3(2). (Para 3)

(b) Mandi Transfer of Immovable Property Regulation (2 of 1975 (Samvat)), S. 3 — Will does not come within mischief of section. (Para 4)

Hira Lal, for Appellant; D. N. Vaidya, Govt. Advocate, for Respondent.

CASE CITED:

(A) ('53) AIR 1953 Him Pra 70: (S. A. No. 35 of 1952, D/- 13-10-1952)

JUDGMENT: This is a plaintiff's second appeal from the judgment and decree of the learned District Judge of Mandi dated 29-10-1951 dismissing his appeal and maintaining the judgment & decree of the trial Court whereby the plaintiff-appellant's suit for a declaration that the property in suit had not escheated to the State had been dismissed.

(2) The property in suit originally belonged to one Kahnu. He executed a document dated 6th 'Katik Samvat 93 Kham', corresponding to 'Bikrami Samvat' 1974. He appointed the plaintiff,

his son-in-law, a Khana-Damad and declared that should he have no issue the plaintiff should be treated as the owner of his property after his death & the death of his widows. Kahnu left more widows than one, & the last of them died 14 or 15 years before the institution of the present suit. The present suit was instituted on 3-1-1950 for the said relief because by an order dated 32-5-2003 the State treated the property as an escheat. The plaintiff's suit has been dismissed by both the Courts below on the ground that the sanction of the Darbar to the appointment of the plaintiff as a 'Khana-Damad' and to the alienation of the property in his favour under the aforesaid deed dated 6th 'Katik' S. 93 'Kham' had not been taken as required by S. 3 of the Mandi Transfer of Immovable Property Regulation No. II of Samvat 1975. This section runs as follows:

"(1) No land may be alienated temporarily or permanently by sale, mortgage, gift or exchange, nor may any tenancy by way of lease be created for a period exceeding five years, without the previous sanction of the Durbar. Provided that the sanction of the Durbar is not required for transfers of land due to direct inheritance, partition, redemption of mortgage or corrections in the Revenue Record.

(2) Every alienation of land made and every tenancy created contrary to the above sub-section without the sanction of the Durbar is null and void and shall not be given effect to by any Court or Revenue Officer."

(3) It will be seen that the document in question had been executed in 1974 B. prior to the coming into force of the said Regulation in 1975. One view expressed by the learned District Judge was that even though the document may have been executed before the Regulation came into force, it will be governed by its provisions because the preamble of the Regulation purported to consolidate and declare the existing law. This view has been held by me to be incorrect in — 'Kanshi Ram v. Lajju Ram', AIR 1953 Him Pra 70 (A). It has been held there that no penal provision corresponding to sub-s. (2) of S. 3 of the Regulation has been shown to exist prior to the coming into force of the Regulation and its existence could not be presumed. The learned District Judge was therefore not right in holding that the transaction in question came within the mischief of the said provision of the Regulation on account of its preamble.

(4) The other ground on which the District Judge held that the sanction of the Durbar according to the said section was necessary was that the document became operative on the death of the last surviving widow of Kahnu which admittedly took place when the Regulation was in force. It is however to be remembered that the penalty imposed by the aforesaid provision was not against devolution of an interest under a will but against alienation. The document in question, so far as it conferred rights upon the plaintiff, did not alienate any property in his favour. It was only a will containing a declaration of the intention of Kahnu with respect to his property which he desired to be carried into effect after his death. A will did not however come within the mischief of S. 3 of the Regulation. The only documents which under that section required the previous sanction of the Durbar were those purporting to alienate land temporarily or permanently by sale, mortgage, gift or exchange, or to create tenancy by way of lease for a period exceeding five years. I therefore hold that the document in question did not suffer for want of a sanction under S. 3 of the Regulation.

(5) The other plea of the plaintiff-appellant as to acquisition by him of title in the property in suit by adverse possession is unfounded, as rightly held by the lower appellate Court. His suit succeeds however on the first ground. The appeal is therefore allowed, the judgments and decrees of the Courts below are set aside and his suit is decreed with costs in all the Courts.

C/V.R.B. Appeal allowed.

A.I.R. 1953 H. P. 82 (Vol. 40, C. N. 39)

CHOWDHRY J. C.

Mt. Santokhu and another, Plaintiffs-Appellants v. The State.

Second Appeal No. 9 of 1952, D/- 1-4-1953.

(a) Civil P. C. (1908), O. 41, R. 2 — Court if can raise suo motu new point of law.

It is certainly open to a Court to suggest a point of law and hear counsel for the parties even though the law in question may not have been pleaded before, provided only that it be a point that could be raised at that stage without prejudice to any party. It is also open to the Court to rehear the appeal on points on which the Court may have already expressed its opinion one way or the other, provided that that opinion had not been transformed into a judgment signed and delivered. (Para 5)

Anno: Civil P. C., O. 41, R. 2 N. 7.

(b) Constitution of India, Pre. — Retrospective operation.

The provisions of the Constitution are wholly prospective and not retrospective in operation. AIR 1953 Punj 30 and AIR 1953 Him Pra 8, Ref. to. (Para 5)

(c) Mandi Land Revenue Regulation (8 of 1975 St.), S. 19 — Scope.

Section 19 is applicable only where the question of succession of collaterals arises by reason of absence of lineal descendants. (Para 8)

K. L. Mehra, for Appellants; D. N. Vaidya, Govt. Advocate, for the State.

CASES CITED:

(A) ('53) AIR 1953 Punj 30
(B) ('53) AIR 1953 Him Pra 8

JUDGMENT: This is a plaintiff's appeal from the judgment and decree of the learned District Judge of Mandi dated 27-11-1951 allowing the appeal of the defendant, the State of Himachal Pradesh, and dismissing the suit of the plaintiffs for possession of certain land.

(2) The land in suit originally belonged to one Fattu and on his death his widow Mt. Ronku succeeded to it with a life interest. Mt. Ronku died on 20th Katik 2001 B. (corresponding roughly 1944 A. D.). On 14-10-1948 the Deputy Commissioner of Mandi passed an order escheating the land to the Government. The present suit was thereupon filed on 9-6-1951 by the three daughters of Mt. Ronku by Fattu for the aforesaid relief.

(3) The trial Court decreed the suit. While holding that the plaintiffs were the daughters of Fattu, and that as such they were not entitled to succeed to the property of their father Fattu under the then State laws, it decreed their suit on the

finding that under the present law there was no bar against the rights of succession of daughters.

(4) On an appeal by the defendant State, the learned District Judge reversed the decision of the trial Court on the finding that the new laws, which came into force on 25-12-1948, were not applicable in the present case, and that under the old law which was applicable daughters had no right to succeed. The lower appellate Court was clearly in error in holding that there was any new law which came into force on 25-12-1948 governing the facts of the present case. That was the date on which the Himachal Pradesh (Application of Laws) Order came into force. A Schedule was appended to this Order containing certain Central and Punjab Acts. By S. 3 of the Order those enactments were applied to Himachal Pradesh. Section 7 laid down that all laws previously in force in Himachal Pradesh corresponding to the said enactments stood repealed. The only enactment which the learned counsel for the defendant-respondent could point out was S. 19 of the Mandi Land Revenue Regulation No. VIII of S. 1975. If that provision be applicable, there is no doubt that it stood repealed since 25-12-1948 because of the enforcement in Himachal Pradesh of the corresponding law as contained in the Punjab Land Revenue Act. The learned Government Advocate however conceded that S. 19 of the said Regulation laid down a rule of succession applicable only in the case of collaterals but not in the case of lineal descendants of the last male holder, as for example a son or daughter. It is manifest therefore that by the passing of the Application of Laws Order there was no old law prevalent in the former State of Mandi which stood repealed. The disposal of the present case by the learned District Judge therefore on the ground of the repeal or otherwise of any old law on 25-12-1948 was erroneous.

(5) On merits I heard learned counsel for the parties twice. At first I was of the opinion that as the custom excluding daughters from inheritance pleaded by the defendant was admitted by the plaintiffs' own witnesses the present appeal should fail. After dictating a judgment to that effect it struck me whether the custom set up by the defendant was not void due to inconsistency with any of the provisions of the Constitution. The appeal was accordingly reheard. When the appeal was reheard the learned counsel for the plaintiffs-appellants argued not only with reference to the provisions of the Constitution but also with reference to the question which had already been argued before. The learned counsel for the defendant-respondent replied to him with reference to both, and he raised no objection that the learned counsel for the plaintiffs-appellants was not entitled to argue the appeal with reference to the provisions of the Constitution because he had not done so previously. He did not also raise any objection as to the rehearing of the appeal on points argued before. Indeed, he could not have validly done so for it is certainly open to a Court to suggest a point of law and hear learned counsel for the parties even though the law in question may not have been pleaded before, provided only that it be a point that could be raised at that stage without prejudice to any party. It was also open to this Court to rehear the appeal on points on which the Court may have already expressed its opinion one way or the other, provided that that opinion had not been transformed into a judgment signed and delivered. The question of Constitution did not prejudice any party even though raised at the said stage, and the previous opinion of this Court in favour of the defendant-respondent had not been transformed into a judgment signed and delivered.

I proceed now to dispose of both the aforesaid matters. So far as the Constitution is concerned, the question whether the custom set up by the defendant-respondent was, or was not, inconsistent with any provision of the Constitution cannot be gone into for I agree with the learned counsel for the respondent that the Constitution is wholly prospective and not retrospective in its operation. In the present case Mt. Ronku died in 2001 B. (corresponding to 1944 A. D.), and the order of escheat was passed on 14-10-1948. On neither of these dates had any of the fundamental rights pleaded by the learned counsel for the plaintiffs-appellants come into existence, for the Constitution came into force on 26-1-1950. 'Raja Harmahendra Singh v. Punjab State', AIR 1953 Punj 30 (A), and — 'Chamba Valley Transport Ltd. v. State of Himachal Pradesh', AIR 1953 Him Pra 8 (B). I therefore hold that the plaintiffs are not entitled to challenge the custom under the Constitution.

(6) On merits the plaintiffs are however entitled to succeed. The relevant issue framed by the trial Court was whether daughters could succeed to their fathers according to the Mandi State laws, placing the onus upon the plaintiffs. It held that according to the State laws male reversioners upto a certain degree only could succeed but daughters were quite out of the picture. What those State laws were was not cleared either in the issue framed by that Court or in the finding recorded by it. Again, the District Judge held that the case was not governed by the new laws which came into force on 25-12-1948 since the order of the Deputy Commissioner had already been passed on 14-10-1948. He further held that the case was governed by the law in force at the time of the death of Mt. Ronku. I have already held that the disposal of the present case by the learned District Judge on the ground of repeal of any old law was erroneous. The question however still remains as to what the old law was which was referred to by the learned District Judge. Like the trial Court he also did not clear the point.

(7) It has been noticed however that the trial Court stated in its judgment that according to the old State laws male reversioners upto a certain degree only could succeed and that daughters were quite out of the picture. This has clearly a reference to S. 19, Mandi Land Revenue Regulation No 8 of S. 1975, which lays down a rule of succession relating to collaterals where there was no mention of lineal descendants. Indeed, the learned counsel for the respondent conceded as much, as adverted to above. The same appears to have been the view of the District Judge because he stated that the new laws came into force on 25-12-1948. This could only refer to the said Regulation because it was replaced by the Punjab Land Revenue Act, on the passing of the Himachal Pradesh (Application of Laws) Order on 25-12-1948. It is manifest therefore that both the Courts decided the rights of the plaintiffs with reference to the said Regulation and not with reference to any custom. No custom was referred to in the judgments of the two Courts below or in the said issue. It is noteworthy that in the grounds of appeal filed on behalf of the present defendant-respondent before the District Judge it was not pleaded that the trial Court had not framed any issue regarding the custom pleaded by the defendant or decided that point. In the circumstance, it must be taken that the defendant-respondent gave up the plea of custom and was content with the decision of the case merely on the application

of the provisions of the said Regulation. That being so, any statement which the plaintiffs' witnesses may have made in the trial Court on the question of custom was wholly irrelevant and should not be looked into for purposes of disposal of the present appeal.

(8) So far as the provisions of the aforesaid Regulation are concerned, they have no application whatsoever to the facts of the present case. Section 19 of that Regulation lays down a rule of succession applicable only in the case of collaterals. It does not lay down any rule with regard to succession of lineal descendants like a daughter. In other words, that section is applicable only where the question of succession of collaterals arises by reason of absence of lineal descendants. The plaintiffs being daughters of the last male holder, their rights cannot be determined by the provisions of S. 19 of the Regulation. The result is that the plaintiffs being entitled to succeed to the property of the last male holder Fattu as his daughters, & the custom pleaded by the defendant-respondent having been waived by it, to say nothing of its having been proved, the present suit should have been decreed. The learned District Judge was wholly in error in holding that according to the old law, i.e., the said provisions of said Regulation, daughters could not be regarded as legal heirs of the deceased and the property in suit had therefore escheated to the Government.

(9) The appeal is allowed, the judgment and decree of the lower appellate Court are set aside and the plaintiffs-appellants' suit is decreed with costs throughout.

B/K.S. Appeal allowed.

A.I.R. 1953 H. P. 84 (Vol. 40, C. N. 40)

CHOWDHRY J. C.

Japhu Plaintiff and others, Defendants-Appellants v. Parshottam Ram and others, Defendants and another, Plaintiff-Respondents.

Second Appeals Nos. 5 and 16 of 1952, D/- 30-3-1953.

(a) Hindu Law — Widows' estate — Alienation — Suit for declaration that alienation was not binding on reversioners — Proper decree.

In a suit by a reversioner for a declaration that a sale by the widow was without legal necessity and was not binding on the reversioner if the sale is found to be justified by legal necessity to a certain extent the proper decree to pass in such a case would be to create a charge on the subject-matter of the sale for the portion of the sale consideration found to be justified by legal necessity. (Para 2)

(b) Hindu Law — Widow's estate — Alienation — Legal necessity.

The performance of the marriage by the widow, of a girl brought up by her husband as his daughter, is a purpose amounting to legal necessity. (Para 5)

D. N. Vaidya, for Plaintiff Appellant; K. L. Mehra, for Defendants Appellants; K. L. Mehra, for Defendants Respondents; D. N. Vaidya, for Plaintiff Respondent.

CASE CITED:
(A) ('22) AIR 1922 PC 356: 1 Pat 741 (PC)

JUDGMENT: These two appeals arise out of the same suit. It was a suit by a reversioner against a Hindu widow and her alienees for a declaration that the alienation was not binding on the reversion. The alienation was a sale of a house for Rs. 2,000/-. There is no dispute with regard to the consideration but only with regard to the legal necessity for the same. The trial Court decreed the suit 'in toto' holding that there was no legal necessity for the sale. The widow and the alienees went up in appeal to the District Judge, and the latter held that the sale was justified by legal necessity to the extent of Rs. 1,100/-. Accordingly, he maintained the declaratory decree passed by the trial Court but made it conditional on the payment of the said Rs. 1,100/- to the defendants-appellants by the plaintiff. Both the parties have come up in appeal to this Court, the plaintiff against the direction for payment of Rs. 1,100/- and the widow and her alienees against a decree having at all been passed in favour of the plaintiff.

(2) It may be stated at once that the condition of payment of Rs. 1,100/- should not have been to the defendants-appellants indiscriminately. Amongst the appellants in the lower appellate Court was the widow also, but surely it could not have been intended by the lower appellate Court that she should also be one of the recipients of the amount in question or any portion thereof. Moreover, such a suit by a reversioner being of a representative character, it would not do to order payment of the amount by only the particular reversionary heirs obtaining the decree. He may not be the person actually to succeed to the estate after termination of the widow's life interest. That being so, the proper decree to pass in such a case would be to create a charge on the subject-matter of the sale for the portion of the sale consideration found to be justified by legal necessity.

(3) The sale is said to have been effected for the following four necessities; (1) Rs. 600/- for performance of 'Chaubarkha' ceremony of the widow's deceased husband, (2) Rs. 500/- for payment to one Dillu, out of which Rs. 300/- represented arrears of his salary and Rs. 200/- price of ghee supplied by Dillu at the marriage of a girl who had been brought up by the deceased husband as his daughter, (3) Rs. 800/- for pilgrimage with the ashes of the deceased husband and (4) Rs. 100/- spent on other household needs.

(4) The last two have been held by both the Courts below as not justified by legal necessity. So far as the fourth item is concerned, the learned counsel for the defendants-appellants in Second Appeal No. 16 of 1952 conceded the correctness of those findings. (As regards the third item of Rs. 800 his Lordship considered the evidence and proceeded): I agree with the Courts below that this part of the consideration was not justified by legal necessity.

(5) As regards the item of Rs.500/-, it is significant that, apart from the evidence produced by the defendants, the plaintiff himself admitted payment of Rs. 500/- by the widow to Dillu. It is also admitted that the widow performed the marriage of a girl whom her deceased husband had brought up as a daughter. The perform-

ance of such a marriage was certainly a purpose amounting to legal necessity. It is also admitted by the plaintiff that the widow performed the 'Chaubarkha' ceremony of her deceased husband. In these circumstances, the lower appellate Court was justified in holding that the sale was justified by legal necessity to the extent of these two items of Rs. 600/- and of Rs. 500/-.

(6) The learned counsel for the plaintiff-appellant in Second Appeal No. 5 of 1952 contended on the authority of — 'Ramsumran Prasad v. Mt. Shyam Kumari', AIR 1922 P. C., 356 (A), that the widow could make the alienation only if there were no other means available to discharge the obligations. There is, however, no evidence worth the name justifying the conclusion that the widow had any other means of meeting these obligations. The plaintiff's witnesses have made exaggerated statements as regards the widow having realised large sums of money from her deceased husband's debtors. These allegations were not substantiated by any documentary evidence. The only amounts admitted by the widow as having been received by her were Rs. 300/- from Thathu and Rs. 150/- from Datt; but receipt of Rs. 450/- during the long period of 11 or 12 years which had elapsed since the death of the widow's husband cannot reasonably be described as possession of means wherefrom the said obligations could have been met.

The widow admits having inherited property yielding an annual income of Rs. 20/- only. The plaintiff has not succeeded in proving that there was any other income. Indeed, even if there were any such income, that could not have stood in the way of the alienation since that income would have been her own property. There is, however, nothing on the record to show that there were means available to the widow to discharge the obligations. The proposition propounded by the learned counsel for the plaintiff on the authority of the aforesaid Privy Council ruling has, therefore, no application in the present case.

(7) The result is that I hold that the findings arrived at by the lower appellate Court were correct. Both the appeals are therefore dismissed, but the decree passed by the lower appellate Court is modified in this way that instead of the sum of Rs. 1,100/- being payable by the plaintiff to the defendants, it is hereby declared that the purchasers are entitled to a charge on the property which was the subject matter of the sale for the said sum of Rs. 1,100/-. Subject to this charge, the declaratory decree passed by the lower appellate Court will stand. I make no order as to the costs of the two appeals in this Court.

B/V.R.B. Appeals dismissed.

A.I.R. 1953 H. P. 85 (Vol. 40, C. N. 41)

CHOWDHRY J. C.

Halayudh and another; Defendants-Appellants v. Tek Chand and others, Plaintiffs-Respondents.

Second Appeals Nos. 39 and 40 of 1952, D/- 2-4-1953.

(a) Civil P. C. (1908), S. 11 — Two appeals tried together — Appeal from decision in one.

Where two cross-appeals arising out of the same suit are disposed of by a single judgment, it is sufficient for the party aggrieved to file but one appeal in the High Court. It is unnecessary to file two appeals as no question of res judicata can arise in such a case. AIR 1939 Sind 329 dist. (Para 7)

Anno: C. P. C. S. 11 N. 29.

(b) Civil P. C. (1908), O. 41 R. 25 — Order of remand, validity.

Where the appellate Court remands the case to the trial Court for re-decision by giving the plaintiff another opportunity to prove his case even though he had failed to do so in the trial Court without any justification and in spite of a clear issue, the order of remand is wholly unjustified. (Para 12)

Anno: C. P. C. O. 41, R. 23 N. 8; R. 25 N. 3.

Thakur Prasad, for Appellants; Kedar Ishwar, for Respondents.

CASES CITED:

(A) ('39) AIR 1939 Sind 329: ILR (1940) Kar 15
(B) ('25) AIR 1925 Oudh 692: 87 Ind Cas 950
(C) ('24) AIR 1924 Lah 362: 76 Ind Cas 496
(D) ('23) AIR 1923 Mad 718: 74 Ind Cas 218
(E) ('27) AIR 1927 Rang 192: 5 Rang 159
(F) ('27) AIR 1927 Mad 1190: 102 Ind Cas 28
(G) ('50) AIR 1950 Mad 356
(H) ('28) AIR 1928 Mad 430: 109 Ind Cas 130

JUDGMENT: These are two appeals by the defendants arising out of a suit of the plaintiffs-respondents for recovery of Rs. 3,000/- as compensation for breach of a contract.

(2) The plaintiffs had taken from the Government a contract for floating sleepers of wood down certain streams, and part of that work was entrusted by them to the defendants under a contract dated 17 Har 2004 B. In order to understand the terms of the contract it is necessary to be clear with regard to the topography of the scene of the defendants' work. The plaintiffs had depots at the upper reaches of four nullahs. The defendants had to launch sleepers at these depots into the four nullahs and float them down the streams until they met at a point known as Khanagi. Thereafter the sleepers were to be floated through a single and a deeper channel, known as Killan Khud two or two and a half miles in length, before this channel joined the main channel called Bakhal Khud at a point known as Killan. After floating the sleepers from the Killan Khud into the Bakhal Khud the defendants had so to arrange the sleepers in the latter Khud that the same should float down the Bakhal Khud in a proper manner. The defendants' work, however finished after they had so arranged the sleepers in the Bakhal Khud. They had nothing to do with the further floating of the sleepers down the Bakhal Khud.

It appears that the plaintiffs were to bring another floatage of sleepers down the Bakhal Khud from a point or points above Killan. No time limit was fixed in the contract between the parties for the defendants carrying out their work, but it was stipulated that they should carry it out as soon as possible and in any case before the

arrival of the plaintiffs' floatage. In other words, the defendants were to float their quota of sleepers down the four nullahs, then along the Killan Khud and finally into the Bakhal Khud at the meeting of the two Khuds at Killan, and thereafter to properly arrange the floatage in the Bakhal Khud before the arrival of the plaintiffs' floatage of sleepers at Killan. The defendants were to employ labour according to need which was in no case to be less than eight men per thousand sleepers. They were to be paid at-/11/- per sleeper of specified dimensions. Payment in respect of sleepers of other dimensions was to be made according to the rates fixed by the Forest Department. This rate, it is common ground, was subsequently raised to -/11/6 per sleeper. In case of stoppage, delay or mismanagement in the carrying out of the work the defendants were to be liable to the plaintiffs in damages for any loss sustained by the latter. The defendants were to be responsible for supply of ration to their labour. Rs. 5,000/- were paid by the plaintiffs to the defendants by way of advance. Rs. 2,000/- were to be paid to the defendants on the collection of the floatage of all the nullahs and on the plaintiffs receiving their instalment of money from the Government. The rest of the money due to the defendants would be recoverable by them on the floatage reaching its destination.

(3) The plaint allegation was that the defendants did go to the work but fled away with the labour employed by them after doing the work for a few days. Debiting the defendants with Rs. 17,000/-, i.e. with the aforesaid advance of Rs. 5,000/- and with a sum of Rs. 12,000/- which, according to the plaint, the plaintiffs had to spend in completing the work, and crediting them with Rs. 13,000/-, i.e. with Rs. 11,500/- as the amount which the plaintiffs would have had to pay to the defendants had the latter completed the work and a further sum of Rs. 1,500/- as due to the defendants on account of the work actually done by them, it was alleged that a sum of Rs. 4,000/- was due and owing by the defendants to the plaintiffs. The plaintiffs gave up Rs. 1,000/- and filed the present suit for recovery of the balance of Rs. 3,000/-.

(4) The defendants pleaded that their coolies continued to work upto the very end, that it was the plaintiffs who broke the contract in that they refused to pay Rs. 2,000/- to the defendants according to the terms of the contract when the defendants collected the sleepers after floating them down the nullahs, and that thereafter when only little work remained to be done the plaintiffs introduced their surplus labour without informing the defendants. The defendants denied their liability for any compensation to the plaintiffs and contended that the plaintiffs themselves were liable to pay them about Rs. 7,000/-.

(5) The trial Court framed the following two issues:

"(1) Whether the defendants did not execute their contract in accordance with the agreement?

(2) If issue No. 1 is proved in favour of the plaintiffs, how much labour they had to employ, and what did they spend on that labour?"

The onus of proving both the issues was placed upon the plaintiffs. The first issue was decided in favour of the plaintiffs, the finding of the Subordinate Judge being that the defendants had failed to fulfil their part of the contract. On issue No. 2 he was of the opinion that a sum of Rs. 1,600/- was payable by the defendants to the plaintiffs, that being the amount which he found the plaintiffs to have spent to complete the work. Accordingly, he passed a decree for Rs. 1,600/- in favour of the plaintiffs and against the defendants.

(6) Both the parties went up in appeal to the District Judge. The District Judge agreed with the finding of the trial Court on issue No. 1. As regards issue No. 2, although he held that the plaintiffs had failed to substantiate their claim by production of their account books and other satisfactory evidence, he remanded the case for re-decision after framing the necessary issue and placing the onus of its proof on the plaintiffs, because, in his opinion, the trial Court had not adopted the proper method to calculate the loss suffered by the plaintiffs on account of the breach committed by the defendants. What the proper method was, was pointed out by the District Judge in his judgment. It is against this order of remand that the defendants have come up in appeal to this Court, and, since the said order of remand disposed of the appeals of both the parties, the defendants have as a measure of abundant caution filed two separate though identical appeals in this Court.

(7) The learned counsel for the defendants-appellants began by justifying the filing of two appeals in this case. The learned counsel for the plaintiffs-respondents advanced no argument in this connection. It may, however, be stated here that it was not necessary for the defendants to have filed two appeals in this case. Their learned counsel justified the filing of two appeals on the authority of — 'Badal Das Jethmul firm v. Gurdinomal Narumal firm', AIR 1939 Sind 329 (A). It was held there that where two suits or two appeals between the same parties and raising the same question are tried together but separate and independent judgments are given in each, or where the two suits or appeals are tried by two different Courts and separate judgments are delivered, and a party appeals from one leaving the other to become final against him, the rule of res judicata will apply and the appeal preferred by him will be barred. In the present case the two appeals were not decided by two different Courts, and the lower appellate Court disposed of both the appeals by a single judgment. The conditions laid down in that ruling were therefore, not satisfied and it would, therefore, have been sufficient for the defendants to file but one appeal in this Court.

(8) The first question argued was that of breach of contract. It may be mentioned here that the present was a suit for recovery of a specific amount as compensation for alleged breach of contract. The defendants no doubt pleaded that breach had emanated from the plaintiffs, and that they (the defendants) were entitled to recover about Rs. 7,000/- from the plaintiffs; but the defendants did not press that plea any further. They paid no court-fee in respect of their counter claim, and at no stage have they questioned the omission of the trial Court to take any action on that plea of theirs. It is manifest, therefore, that there could be no question of going into the accounts without the plaintiffs first substantiating their contention that the defendants had broken the contract. Both the Courts below have, however, given only a cursory attention to this matter, and they seem to have thought that the main thing was the disposal of the second issue. The trial Court recorded a telegraphic finding on this issue. It was as follows:

"The defendants themselves admit in para 2 of their Jawabdawa that they could not fully

execute their part of the contract. The reasons assigned are that the plaintiffs did not pay them the balance money when demanded. Secondly, one of their jamadars with his men fled. The issue is decided in favour of the plaintiffs."

There is no doubt that in para 2 of the written-statement the defendants did say that they had broken the terms of the contract, but, as was conceded by the learned counsel for the plaintiffs-respondents himself in the course of arguments in this Court, a perusal of the entire paragraph shows that the word defendants was inadvertently used for plaintiffs in that sentence. This is abundantly clear to anybody who reads the entire paragraph, and should have been so to the trial Court also. That being so, the trial Court was not justified in deciding this issue on the so-called admission of the defendants themselves. It is against judicial integrity to find such a shortcut to decision on a seeming, but not real, admission of a party. On appeal the learned District Judge stated that he agreed with the finding of the trial Court on the first issue. It should have been apparent to him, however, that, for reasons recorded above, the so-called finding of the trial Court was really no finding. The reasons adopted by the learned District Judge himself for agreeing with the finding of the trial Court on that issue were only a trifle more exhaustive than those given in the trial Court's judgment. The first reason given by the learned District Judge was that the defendants did not employ sufficient labour. Firstly, that was not a plaint allegation. Secondly, the learned District Judge did not show how he arrived at that conclusion. The next reason given by him was that a part of the defendants' labour left the job unfinished and the plaintiffs were forced to employ their own labour under the orders of the Government official in charge of the 'ghal' work. Again, there is only this ipse dixit of the learned District Judge without any attempt on his part to support it by reference to any evidence on the record. After these two sentences follows the finding of the learned District Judge that the plaintiffs were entitled to claim damages from the defendants. It is clear, therefore, that the first issue, which was the primary issue in the case, received scant attention from the two Courts below. I now proceed to dispose of that issue in the light of the evidence on record and the arguments advanced by the learned counsel for the parties before me.

(9) The plaintiffs' allegation in the plaint with regard to breach of contract by the defendants was, as adverted to above, that although the defendants did go to the work they fled away with the labour employed by them after doing the work for only a few days. In his statement under O. 10, R. 2, C. P. C., Hari Singh, one of the plaintiffs, also stated that the defendants' men fled away before finishing the work. In the notice Ex. P. O. which the plaintiffs gave to the defendants before the institution of the present suit it was alleged that the defendants failed at the very launching depots, that the work of the defendants' labour was not satisfactory in any of the nullahs as a result of which the plaintiffs had to send their own labour to those nullahs, that the defendants' men who were only a few in number fled away one after the other and they had no labour at the end, that sleepers were not floated down the nullahs in time and the water of the nullahs dried up with the result that the plaintiffs had to spend a month or a month and a half over work in the nullahs which should have taken only a week or a week and a half, and that the work in question was considerably delayed with the result that the plaintiffs' other work down the Bakhal Khud was also delayed causing considerable loss and damage to them. It will be noticed that no allegation of delay was made in the plaint. From the said allegation specifically made in the plaint, and further cleared by the plaintiffs in their notice, it would appear that the breach alleged against the defendants was that they left the work only a few days at the early stages of launching at the depots without floating the sleepers down any of the four nullahs. The evidence on the record, including admission of the plaintiffs' own witnesses however, shows that these allegations were wholly unfounded.

(10) The defence contention, on the other hand, was that the defendants' coolies continued to do the work upto the very end, that it was the plaintiffs who broke the contract by refusing to pay Rs. 2,000/- to the defendants after the sleepers had been floated down the nullahs, and that thereafter when only a small part of the work remained to be done the plaintiffs introduced labour of their own which had become surplus without informing the defendants. The defendant Sada Nand and the defence witnesses have supported his defence contention. (After discussion of the evidence the judgment proceeds:—) It is impossible in these circumstances to hold that there was any breach of contract on the part of the defendants.

(11) After recording the above finding that the defendants committed no breach of contract, it is really not necessary to go any further. That finding is sufficient for the dismissal of the plaintiffs' suit. It may, however, be stated that the defence contention with regard to the breach having emanated from the plaintiffs is correct. As already stated, Rs. 2,000/- were payable to the defendants on the collection of the floatage of all the four nullahs. It was argued by the learned counsel for the plaintiffs-respondents that the defendants did not become entitled to this amount when the floatage of all the four nullahs had reached the confluence of those nullahs at Khanagi point because, he said, the sleepers of the four nullahs may not collect there but beyond that towards Killan. He further argued that the amount became payable only after all the sleepers had collected beyond Killan in Bakhal Khud. Such an interpretation renders wholly redundant the subsequent clause regarding the balance becoming payable on the arrival of the floatage at its destination. The destination was the Bakhal Khud beyond Killan, so that according to the interpretation of the learned counsel for the plaintiffs-respondents both Rs. 2,000/- and the balance of account would be payable on the arrival of the floatage there. This was certainly not the intention of the contract which clearly sought to make a distinction between the two spots, one where Rs. 2,000/- was to become payable, and the other where the balance of account was to be cleared. The latter was the spot where the defendants' work finished, i. e. the spot in Bakhal Khud immediately beyond Killan point where the entire floatage had to be spread by the defendants in such a way that it may be in a position to float down further.

The spot where Rs. 2,000/- was payable was an earlier one, and that was where the floatage of all the nullahs collected. Of course, from the very nature of the work it was not possible for the entire floatage to collect at one spot, for the sleepers must float down the Killan Khud between Khanagi and Killan in a long procession.

Evidently, therefore, the stress in the phrase "on the collection of the floatage of all the nullahs" was not merely on the word collection but on the entire phrase. In other words, Rs. 2,000/- became payable as soon as the four nullahs were cleared of their contents and the entire floatage had passed the confluence of the nullahs at Khanagi. That this work had been completed by the defendants before the arrival of the plaintiffs' men has been admitted by the plaintiffs' own witnesses, as adverted to above. The plaintiffs, however, never paid this amount to the defendants. This breach on the part of the plaintiffs had an effect upon the alleged breach by the defendants. Although it has been found above that there was no breach of contract by the defendants, the latter would have been perfectly justified in leaving off work after failure of the plaintiffs to pay them Rs. 2,000/- according to the terms of the contract. In view of the above evidence and circumstances, I hold, disagreeing with the two Courts below, that there was no breach of contract by the defendants. The first issue is accordingly decided against the plaintiffs.

(12) The first issue having been decided against the plaintiffs, the second does not arise. It may, however, be stated that even if the finding on the first issue were in favour of the plaintiffs the suit is still liable to dismissal due to their having totally failed to discharge the onus with regard to the second issue. The trial Court discarded the plaintiffs' evidence but gave them a decree for Rs. 1,600/- on the finding that they employed 40 men for 20 days to complete the defendants' part of the job. How that finding was arrived at it is difficult to understand. The learned District Judge rightly remarked that the plaintiffs had to substantiate their allegation that they had to spend Rs. 12,000/- in completing the work. At the same time he remarked that no accounts were either produced or shown to the Court by the plaintiffs to prove the total expenditure incurred by them, and that without that it was not possible to determine the loss which they had suffered on account of the breach committed by the defendants. He again remarked that the plaintiffs had to substantiate their claim for damages by production of their account books and other satisfactory evidence to show the total expenditure incurred by them, and that this had not been done. In spite of these remarks, however, the learned District Judge remanded the case to the trial Court for a redecision. In fact, the reason for remand given by the learned District Judge was that the plaintiffs had failed to substantiate their claim. If the plaintiffs had failed to substantiate their claim, the only proper order that the learned District Judge should have passed was to dismiss their suit. He was not justified in giving the plaintiffs another opportunity of proving their case. The learned counsel for the plaintiffs-respondents sought to justify the action of the learned District Judge by contending that the second issue had not been properly framed. This is not correct. The learned counsel admitted that the plaintiffs had to prove that they had spent Rs. 12,000/- in completing the work. This point has been clearly brought out in the second issue. He cited a number of rulings, e. g. — —'Raghuraj Singh', v. Majid-un-nissa', A. I. R. 1925 Oudh 692 (B); — 'Bhup Singh v. Prem Singh', AIR 1924 Lah 362 (C) — 'Kari Bapanna v. Sunkari Yerramma', AIR 1923 Mad 718 (D); — 'Tin Maung v. Mg. Po Htoo', AIR 1927 Rang 192 (E)', — 'Sundara Rama Iyer v. Sathianathan', AIR 1927 Mad 1190 (E) and — 'Province of Bihar v. Choudhary Balam Singh', AIR 1950 Pat 356 (G). None of these cases, however, justified a remand, as in the present case, where the party was given another opportunity to prove its case although it failed to do so in the trial Court without any justification and in spite of a clear issue. The order of remand in the present case was, therefore wholly unjustified. Furthermore, the learned counsel for the plaintiffs-respondents did not point out any evidence on the record from which it could be said that the plaintiffs had proved any part of their claim for compensation. Their suit was, therefore, liable to dismissal on findings on both the issues.

(13) There was one point argued by the learned counsel for the plaintiffs-respondents which might be briefly dealt with. He did not say that no appeal was competent, but that the defendants should not have filed an appeal at this stage but should have rather come up in second appeal after the case had been decided by the trial Court on remand and also the appeal by the District Judge from that decision of the trial Court. In support of this argument the learned counsel cited — 'Jainul Ahideen Marakayar v. Habibullah Sahib', A. I. R. 1928 Mad 430 (H). That ruling interprets the relevant law, i. e. subsection (2) of Section 105, C. P. C., which lays down that where any party aggrieved by an order of remand made after the commencement of the Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. On the face of it, if the course suggested by the learned counsel for the plaintiffs-respondents had been followed by the defendants they would have been precluded from disputing the correctness of the order of remand. All that the ruling laid down was that under the said provision the correctness of the order of remand could be questioned on only two grounds, i. e. that the remand itself was illegal as the decision of the first Court was not on a preliminary point, or that the decision of the preliminary point by the appellate Court was erroneous. Supposing the order of remand passed by the lower appellate Court in this case was one under Order 41 Rule 23, C. P. C., the present appeals would be competent according to this very ruling because the appeals impeached the correctness of the order of remand on the ground that the decision of the lower appellate Court on the preliminary point which was the subject-matter of the first issue was not correct. The objection raised by the learned counsel for the respondents has, therefore, no force. It may, however, be stated here in passing that the order of remand passed by the learned District Judge was not under Order 41 Rule 23 since the trial Court had not disposed of the suit on a preliminary point but had, on the contrary, decided all the issues that arose for determination. The point need not, however, be laboured any further since from what has been stated above it is clear that the remand was wholly unjustified in that it sought to give the plaintiffs another opportunity of proving their case after they had failed once to do so.

(14) The appeals are allowed, the judgment and decree of the trial Court and the judgment and order of the lower appellate Court are set aside and the plaintiffs' suit is dismissed. The defendants are allowed their costs in all the Courts against the plaintiffs.

C/K.S. Appeals allowed.

A.I.R. 1953 HIM-P. 89 (Vol. 40, C. N. 42)

CHOWDHRY J. C.

Devi Ram and another, Defendants-Petitioners v. Murli, Plaintiff and others, Pro-forma Respondents.

Civil Revn. No. 70 of 1952, D/- 15-1-1953.

(a) Civil P. C. (1908), S. 115 — Interlocutory orders.

The word 'case' in S. 115 is of a very wide import and means any state of facts juridically considered, and therefore an interlocutory order deciding any substantial question in controversy between the parties so as to affect their rights, as distinguished from a purely formal or incidental order, amounts to a case decided within the meaning of S. 115, even though such an order is passed in the course of the trial of a suit. Hence, an erroneous decision on a preliminary issue as to jurisdiction will be open to revision: AIR 1943 Lah 65 Foll. (Para 4)

Anno: Civil P. C., S. 115 N. 5.

(b) Tenancy Laws — Punjab Tenancy Act (16 of 1887), Ss. 77 (3) (n) and 14 — Suit for recovery of mesne profits — Jurisdiction of civil Court — (Civil P. C. (1908), S. 9): 19 Pun Re 1891 and AIR 1918 Lah 185, Dissented from.

Section 14 of the Punjab Tenancy Act covers only cases where the landlord chooses to claim rent against a person in possession of land without his consent, but not cases where his claim against such person is for recovery of mesne profits. Therefore if the landlord sues the person in wrongful possession of the land for recovery of mesne profits, the suit would not be one excepted from the cognizance of a civil Court under S. 77 (3) (n) of the Act. 19 Pun Re 1891 and AIR 1918 Lah 185, Dissented from. (Para 8)

Anno: Civil P. C., S. 9 N. 53.

D. R. Chaudhary, for Petitioners; Kirti Ram, for Plaintiff-Respondent.

CASES CITED:

(A) ('48) AIR 1948 All 288: ILR (1948) All 337
(B) ('48) AIR 1948 Oudh 305: 23 Luck 293
(C) ('43) AIR 1943 Lah 65: ILR (1943) Lah 257 (FB)
(D) ('91) 19 Pun Re 1891
(E) ('18) AIR 1918 Lah 185: 53 Pun Re 1918
(F) ('19) AIR 1919 Lah 237(2): 104 Pun Re 1919
(G) ('94) 82 Pun Re 1894 (1)
(H) ('93) 1 Pun Re 1893 (Rev)

ORDER: This is a defendants' application in revision, and it arises in the following circumstances.

(2) The plaintiff-respondent filed a suit against the defendants-petitioners for recovery of possession of an agricultural holding two bighas in area and Rs. 424/- as mesne profits, being value of produce of the land from Sayar 1950 to Nyah 1952, on the allegations that the land belonged to the plaintiff but was in wrongful possession of the defendants, that the plaintiff accordingly dispossessed them and himself obtained possession of the land, but that the defendants had again usurped possession thereon since Sayar of 1950. The defendants traversed the plaint allegations and set their own title, and they also pleaded that as the relief of recovery of mesne profits could only be granted by a revenue Court the entire suit was liable to be returned for presentation to that Court.

(3) The trial Court framed the preliminary issue as to whether the suit was not triable by a civil Court, and it recorded the finding that the whole suit was within the jurisdiction of the civil Court. The defendants have come up in revision to this Court against that finding.

(4) The learned counsel for the plaintiff-respondent took the preliminary objection that as the mere recording of a finding on a question of jurisdiction did not amount to a case decided, the revision was not competent. In support of his argument he cited — 'Prakash Chand v. Mahendra Kumar', AIR 1948 All 288 (A), where it was held that no revision lay from an order under O. 14, R. 5(2), Civil P. C., striking out issues as being not material to the decision of the case since such an order was an interlocutory order not amounting to a case decided. He also relied upon — 'Ghani v. Mustafa Khan', AIR 1948 Oudh 305 (B). The latter ruling is totally irrelevant, for it related to whether a remand order by an appellate Court was open to appeal or revision. I am quite aware of the conflict of judicial opinion among the various High Courts as to whether an interlocutory order amounted to a case decided within the purview of S. 115, Civil P. C. I however prefer the Full Bench decision of the Lahore High Court in — 'Bibi Gurdevi v. Md. Bakhsh', AIR 1943 Lah 65 (FB) (C), in which it was held that the word 'case' in S. 115 was of a very wide import and meant any state of facts juridically considered, and that therefore an interlocutory order deciding any substantial question in controversy between the parties so as to affect their rights, as distinguished from a purely formal or incidental order, amounts to a case decided within the meaning of S. 115, even though such an order is passed in the course of the trial of a suit. I do so because if a Court which has no jurisdiction at all to try a case proceeds to try it on an erroneous decision on an issue as to jurisdiction, a great deal of time and money will be wasted if the error is patent and yet cannot be rectified till the final decision of the suit. I overrule the preliminary objection and hold that the revision is competent.

(5) It is conceded that if this were a suit merely for recovery of possession of land from the defendants as trespassers it would be triable by a civil Court. The contention on behalf of the defendants-petitioners however is that the addition of the relief of recovery of mesne profits renders the whole suit as triable by a revenue Court because that is a relief for recovery of a sum recoverable u/s. 14, Punjab Tenancy Act, and, as such, falling under S. 77(3)(n) of that Act, which is excepted under sub-section (3) of the latter section from cognizance of any other but the revenue Courts. The point for determination therefore is whether the relief for recovery of mesne profits in the present case does amount to a relief for recovery of a sum recoverable under S. 14 of the Act. Section 14 is in the following terms:

"Any person in possession of land occupied without the consent of the landlord shall be liable to pay for the use or occupation of that land at the rate of rent payable in the preceding agricultural year, or, if rent was not payable in the year, at such rate as the Court may determine to be fair and equitable."

(6) In support of the contention that the mesne profits claimed by the plaintiff-respon-

dent in the present suit were of the nature of payment covered by S. 14 the learned counsel for the defendants-petitioners relied upon the following rulings: — 'Bholanath v. Dana', 19 Pun Re 1891 (D); — 'Rattan v. Battan Singh', AIR 1918 Lah 185 (E) and — 'Ganesha Mal v. Ibrahim', AIR 1919 Lah 237 (2) (F). In the first mentioned case, the allegation in the plaint was that the defendants had taken forcible possession of and cultivated the land for the harvest of Rabi 1946 and appropriated the produce; and that, if the plaintiff had been permitted to cultivate the land, he would have derived a profit of Rs. 200/-. He accordingly sued for recovery of that amount as damages. In these circumstances, it was held by Plowden, J., as follows:

"These persons then were, according to the allegations of the plaintiff, 'in possession of land occupied without the consent of the plaintiff', who is undoubtedly on his allegations 'the landlord' within the meaning of section 14 of the Punjab Tenancy Act. The definition of landlord in clause (6) of section 4 is made subject to the context, by the opening words of section 4. The term 'landlord' in section 14 is not used in relation to 'tenant', the person there spoken of not being a tenant, but it clearly indicates the person who would be landlord if the land had been occupied with his consent, instead of being occupied without it.

Section 14 declares the liability of the person in possession of land thus occupied. Section 77 provides that 'the following suits shall be instituted in and heard and determined by Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted', and includes among such suits in clause (n) 'suits by a landlord for sums recoverable under section 14'.

It follows that this suit was not cognizable by the Civil Court."

(7) The next case cited above was also for recovery of mesne profits of land from a person wrongfully in possession of the same, and, on a reference under S. 99 of the Tenancy Act, it was held by Scott-Smith, J., that the suit was triable by a revenue Court under S. 77(3) (n) of the Act. The learned Judge observed as follows:

"The question is whether the present suit is one for sums recoverable under section 14 of the Punjab Tenancy Act. In — 'Ghuna Mal v. Jhanda Singh', 82 Pun Re 1894 (1) (G) where the plaintiffs-mortgagees sued persons in possession without their consent for mesne profits of the land, it was held that the plaintiffs, who were entitled to possession under their mortgage, were 'the landlord' as regards the defendants who were in possession of the land occupied by them; that section 14 and section 77(3)(n) of the Punjab Tenancy Act, 1887, applied to the case. The plaintiffs in that case had not actually entered into possession under their mortgage, but it was held that they were 'the landlord' as regards the defendants, inasmuch as they were the persons immediately entitled to the use and occupation of the land of which the defendants had deprived them. The same was the view adopted in — 'Thakurdas v. Kanhaya', 1 Pun. Re. 1893 (Rev.) (H). In that case a mortgagee sued to obtain possession of the mortgaged land under a default clause in that behalf in the mortgage deed, and obtained a decree. A second mortgagee was in possession at the time of the suit. The first mortgagee (plaintiff in the first suit) then sued the second mortgagee for payment for the use and occupation of the land during the time that the first suit was pending. It was held that in these circumstances the first mortgagee must be regarded as landlord of the land within the meaning of section 14, Punjab Tenancy Act, 1887, for the period in question, and the second mortgagee as a person in occupation without the landlord's consent. In that case also the plaintiff had not obtained possession of the mortgaged land during the period for which he brought the suit for mesne profits."

(8) The relevant portion in the third ruling is extremely jejune, and, as no details of the sum of Rs. 7/8/- claimed as damages are given, it cannot be said with definiteness whether that amount was claimed as mesne profits or rent. If that sum was claimed as rent, the case clearly fell within the purview of S. 14, and therefore there could be no quarrel with the finding that the plaintiff could not recover that amount in the civil Court. This ruling is therefore not helpful. But I would like at this stage to point out the difference between rent and mesne profits. Rent, as defined in S. 4(3) of the Punjab Tenancy Act, means whatever is payable to a landlord in money, kind or service by a tenant on account of the use or occupation of land held by him. The term mesne profits is defined in S. 2(12), Civil P. C. as meaning profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

Now, there is no doubt that wrongful possession is the foundation for a claim for mesne profits, and that under S. 14, Punjab Tenancy Act, the person liable to make payment to the landlord is also a person in wrongful possession since he is a person in possession of land occupied without the consent of the landlord; but there all that is common between this section and the above definition of mesne profits ends. Under S. 14 what the person in wrongful possession of land is liable to pay to the landlord is rent at a certain rate, which is not the same thing as profits which he actually received or might with ordinary diligence have received from the land of which he is in wrongful possession. Ordinarily, the rent of the land would be less than its mesne profits for the period of the trespasser's wrongful possession. There is no reason why the landlord should be made to limit his claim against a trespasser to the recovery of only rent as distinguished from mesne profits, although, of course, he may in a certain case content himself with a claim for rent only. He may, for instance, do so in the case of a fixed term tenant holding over without his consent beyond the term of tenancy if he choose to continue to treat him as his tenant. It is manifest therefore that S. 14, Punjab Tenancy Act, covers only cases where the landlord chooses to claim rent against a person in possession of land without his consent, but not cases where his claim against the person in wrongful possession is for recovery of mesne profits. It follows therefore that if the landlord sues

the person in wrongful possession of the land for recovery of mesne profits, as the plaintiff has done in the present suit, his claim would not be for recovery of a sum recoverable under S. 14, Punjab Tenancy Act, and consequently the suit in which such a claim is made would not be one excepted from the cognizance of a civil Court under S. 77(3)(n) of the Act.

(9) In the two Punjab rulings of 1891 and 1918 cited by the learned counsel for the defendants-petitioners, stress was laid on merely two ingredients of S. 14: that the person claiming the payment was a landlord, and the person against whom the claim was made was one in possession of land without the consent of the landlord. No attention seems to have been paid to the third ingredient of the section, namely, that the payment in question is rent and not mesne profits. The result was that in spite of the fact that the claims in both the rulings related to payments which were clearly mesne profits, it was held that the suits fell within the purview of S. 14 of the Tenancy Act and were therefore not cognizable by a civil Court. With great respect therefore I am unable to subscribe to the view expressed in these rulings. On the contrary, for reasons recorded above, I hold that the claim in the present suit is not for a payment covered by S. 14 of the Punjab Tenancy Act, and that therefore the findings of the trial Court that the suit was wholly triable by a civil Court was quite correct.

(10) The revision is dismissed with costs, the stay order dated 25-10-1952 is hereby discharged, and the trial Court is directed to proceed with the disposal of the rest of the case according to law.

A/G.M.J. Revision dismissed.

A. I. R. 1953 HIM-P. 91 (Vol. 40, C. N. 43)

CHOWDHRY J. C.

Kundan, Defendant-Petitioner v. Kanahya and others, Plaintiffs-Respondents.

Civil Revn. No. 58 of 1952, D/- 29-4-1953.

(a) Civil P. C. (1908) S. 115 and O. 41, R. 22 — Point waived in lower appellate Court if can be raised in revision.

Where the plaintiff's suit is decreed in the trial Court with an adverse finding against him and in the appeal filed by the defendant the plaintiff fails to support the decree of the lower Court under O. 41, R. 22 on the ground decided against him, and the appeal is dismissed without making reference to such finding, he will be deemed to have waived the objection and will not be allowed to raise it in revision against the appellate decree though he could have done so on the analogy of O. 41, R. 22 if the revision were against the decree of the trial Court. (Para 7)

Anno: C. P. C., S. 115 N. 2; O. 41 R. 22 N. 10.

(b) Civil P. C. (1908), O. 6, R. 2 — Variance between pleading and proof.

The sole object of every system of pleading is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues. If therefore a party is fully alive to the question that is to be argued on behalf of the opposite party by reason of the facts material to the determination of the question being admitted by him or proved beyond controversy, which, of course, means admitted and proved in such a way that the party against whom the question is argued cannot say that he has not had the opportunity of explaining the admission or producing the necessary evidence, the basic object of pleading is fulfilled. When that is the case, a point may be argued though not pleaded and the party against whom it is argued cannot say that he is prejudiced thereby. But as this rule forms an exception to the general law of pleading contained in O. 6, R. 2 the facts and circumstances ought necessarily to be minutely examined before it is applied to a particular case. 22 Cal 324 (PC); 8 Ind Cas 41 (Cal), Rel. on. (Para 9)

Anno: C. P. C. O. 6 R. 2 N. 9.

(c) Limitation Act (1908), Art. 124, Explanation — Adverse possession of right to hold office of a pujari.

Where one of the joint holders of an hereditary office of a pujari is excluded from performing the duties of a pujari by reason of his minority and not by reason of any overt act of the joint holder but he has been throughout receiving part of the profits of the office by cultivating the land of the idol in lieu of service of puja, he must be held to be partially in possession of the office under the explanation to Art. 124 and therefore there can be no adverse possession of the office by the joint holder. (Para 11)

Anno: Lim. Act, Art. 124 N. 8, 9.

(d) Civil P. C. (1908), S. 115 — Error of procedure.

Where the Courts below have committed a material error of procedure affecting the ultimate decision of the case by deciding the question of limitation as to extinguishment of the defendant-petitioner's right under S. 28, Limitation Act, in disregard of the established principle of pleading, it is a fit case for interference in revision. AIR 1949 PC 156, Rel. on. (Para 12)

Anno: C. P. C., S. 115 N. 14.

Tek Chand Chitkara, for Petitioner; Banna Lal Bahl, for Respondents.

CASES CITED:

(A) ('10) 12 Cal LJ 459: 8 Ind Cas 41
(B) ('07) 6 Cal LJ 621
(C) ('95) 22 Cal 324: 22 Ind App 4 (PC)
(D) ('49) AIR 1949 PC 156: ILR (1950) Mad 1 (PC)

ORDER : The defendant-petitioner Kundan on the one hand and the plaintiffs-respondents Kanahya, Nand Ram, Shiv Lal and Mangat Ram and the defendant-respondent Daulat Ram on the other, are rival claimants to the office of pujari of an idol known as the Deota Bathindlu installed in a temple in village Panjyali Sub-Tehsil Suni. Nika Ram and five other defendants are the kardars or managers of the temple, and the Deota has also been impleaded as a defendant.

(2) The cause of action for this suit, instituted on 11-4-1950, was that about two years previously on 14th Jeth 2005 B. the kardars appointed the defendant-petitioner as pujari of the idol. The plaintiffs alleged that the kardars

had no right to do so inasmuch as they (the plaintiffs) and the pro forma defendant Daulat Ram, brother of the plaintiffs Kanahya and Nand Ram, had the exclusive right to hold the office as hereditary pujaris and as the defendant-petitioner was an illegitimate son and therefore unfit to hold the office. The plaintiffs therefore prayed for an injunction perpetually to restrain the defendant-petitioner from officiating, and the six kardar defendants from permitting the defendant-petitioner to officiate, as pujari of the idol, and to restrain all of them from interfering with the plaintiff's right to perform the duties of the office.

(3) There was also an alternative case set up by the plaintiffs-respondents. It was alleged that by an agreement dated 9-4-1924 A. D. between the plaintiffs and Zalim Singh, Tehsildar of the former State of Bhajji (within which the village in question is situate) the former were recognised and accepted as hereditary pujaris of the idol, and that in return for this recognition the plaintiffs, who were proprietors of land measuring 43 bighas and 2 biswas, described in the plaint, agreed to reduce themselves to the position of occupancy tenants of that land. The plaintiffs prayed that if the aforesaid relief relating to the office of pujari be not granted to them, it be declared that they are the proprietors of this land. The plaintiffs also prayed for recovery of mesne profits from the said date 14th Jeth 2005 B. till the date of their reinstatement.

(4) Some of the kardars supported the plaintiffs and others the defendant-petitioner, who was the main contesting defendant. The defence plea was that the two families of the plaintiffs-respondents and the defendant-petitioner held the office jointly until the death of the defendant-petitioner's cousin Ram Saran, that when Ram Saran died the defendant-petitioner was a minor and his own brother Khayali officiated as priest of an idol in another village and that the plaintiffs therefore got an opportunity since then of exercising the right singly. It was further pleaded that by an unanimous decision the kardars and the representatives of the public restored the defendant-petitioner on 14th Jeth 2005 B. to his rightful place as pujari of the idol which had been usurped by the plaintiffs. The plaint allegations with regard to the illegitimacy of the defendant-petitioner and the agreement dated 9-4-1924 A. D. about the land were traversed.

(5) The trial Court held that the office of pujari of the idol in question was a hereditary one, and did not go by election, that it was held jointly by the two families of the plaintiffs-respondents and the defendant-petitioner and that therefore the defendant-petitioner was entitled to hold the office jointly with the plaintiffs. It was also held that the defendant-petitioner was a legitimate son of Ram Nath. The plaintiffs were however granted the aforsaid perpetual injunction on the finding that the plaintiffs had acquired title to the hereditary office by adverse possession under Art. 124, Limitation Act and the defendant-petitioner's right to that office had therefore been extinguished under S. 28 of that Act. The trial Court also passed a preliminary decree declaring that the plaintiffs were entitled to mesne profits and directing an inquiry for determination of the same from 14th Jeth 2005 B. to the date of the institution of the suit. With regard to the alternative case of the plaintiffs, the trial Court held that the land belonged to the idol and the plaintiffs had failed to prove the alleged agreement.

(6) The defendant Kundan appealed, but the learned District Judge dismissed his appeal on 8-4-1952. He agreed with the trial Court that the office in question was a hereditary one, and that it was held by the ancestors of the two families. He also upheld the finding of the trial Court that the plaintiffs had acquired title to hold the office exclusively by adverse possession and the defendant-petitioner's right to that office had been extinguished. With regard to this finding it was urged before him on behalf of the defendant-appellant Kundan that it should not have been recorded in favour of the plaintiffs since there was no allegation in the plaint as to acquisition of title to the office by adverse possession and no issue on that point had been framed. This contention was repelled by the learned District Judge because he held that the finding was based on the admissions of the defendant Kundan himself and of his witnesses and he could not therefore be said to have been taken by surprise. Kundan defendant has now come up in revision to this Court against the judgment and decree of the learned District Judge.

(7) Before I take up the ground put forward on behalf of the defendant-petitioner, I would dispose of a point raised by the learned counsel for the plaintiffs-respondents, namely, that the finding of the trial Court that the petitioner was a legitimate son of Ram Nath was not warranted. Of course, it is open to the learned counsel for the plaintiffs-respondents in this revision to support the decree passed by the Courts below on any ground decided against them on the analogy of O. 41, R. 22, C. P. Code; but the same right existed in their favour in the lower appellate Court also and yet it was not availed of there. There is no discussion of it in the judgment of the learned District Judge, so that it would appear that the point was not raised in that Court on behalf of the plaintiffs. The plaintiffs-respondents will in the circumstance be deemed to have waived their objection, now pressed in revision, before the lower appellate Court. That being so, the point cannot now be allowed to be taken up in the present revision since the revision is directed, not against the judgment and decree of the trial Court but against those of the lower appellate Court.

It may further be stated that the ground on which the finding of the trial Court is assailed has also no force. It appears that the defendant-petitioner's mother was the wife of Ram Saran. The petitioner's case was that his mother remarried Ram Saran's father's first cousin Ram Nath, and that the petitioner was an offspring of this remarriage. The trial Court examined a number of documents extending over a long period, the oral evidence produced by the parties and the admission of the plaintiffs as contained in the superscription of the plaint and arrived at the conclusion that although there was no direct evidence of remarriage the evidence proved that

the petitioner was the son of Ram Nath. The contention of the learned counsel for the respondents was that the trial Court had arrived at the conclusion of the petitioner being the son of Ram Nath without recording any finding that his mother had remarried Ram Nath. From what has been stated above, however, such a contention is unsustainable. By stating that although there was no direct evidence of remarriage the petitioner appeared from the evidence on record to be the son of Ram Nath, the trial Court will be deemed impliedly to have held that the remarriage stood proved circumstantially. The finding of the trial Court that the defendant-petitioner was a legitimate son of Ram Nath cannot therefore be disturbed.

(8) The ground put forward on behalf of the defendant-petitioner was the same as was unsuccessfully taken by him before the lower appellate Court, namely, that the trial Court was not justified in recording the finding that the plaintiffs had acquired title to the hereditary office in question by adverse possession without their having taken any such plea in their plaint and without any issue having been struck on the point. There can be no doubt about the correctness of both these allegations : the plaintiffs did not plead that they had acquired the right to hold the office in question exclusively by adverse possession, and there was no issue framed by the trial Court with regard to it. Both the Courts below have however recorded the finding in question on what they have interpreted as the admissions of the defendant-petitioner himself and his witnesses. For that reason it was held by the lower appellate Court that the defendant could not be said to have been taken by surprise, and that all that remained was to decide the legal effect of facts which stood admitted. The learned counsel for the plaintiffs-respondents supported this view of the lower appellate Court by citing the case of —'Nepen Bala Debi v. Siti-Kanta', 8 Ind Cas 41 (Cal) (A), in which it was observed as follows :

"Where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case. On the other hand, as pointed out by this Court in the case of —'Lilabati Misrain v. Bishun Chobey', 6 Cal LJ 621 at p. 635 (B), when the question reduces itself to one of law upon facts admitted or proved beyond controversy, it is not only competent to the Court but expedient in the interests of justice to entertain the plea of adverse possession if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. The true test, therefore, to be applied to determine whether the plea of title by adverse possession should be allowed to be urged though not explicitly raised in the plaint, is, how far the defendant is likely to be prejudiced if the point is permitted to be taken."

(9) The basic principle of practice, as contained in O. 6, R. 2, C. P. Code, is that every pleading shall contain a statement of the material facts on which the party pleading relies for his claim or defence, and, as observed by Lord Halsbury in —'Sayad Muhammad v. Fatteh Muhammad', 22 Ind App 4 (PC) (C), the sole object of every system of pleading is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues. If therefore a party is fully alive to the question that is to be argued on behalf of the opposite party by reason of the facts material to the determination of the question being admitted by him or proved beyond controversy, which, of course, means admitted and proved in such a way that the party against whom the question is argued cannot say that he has not had the opportunity of explaining the admission or of producing the necessary evidence, the basic object of pleading is fulfilled. When that is the case, a point may be argued though not pleaded and the party against whom it is argued cannot say that he is prejudiced thereby. The same is the rule contained in the aforesaid Calcutta ruling cited by the learned counsel for the plaintiffs-respondents. But as that rule forms an exception to the general law of pleading, the facts and circumstances ought necessarily to be minutely examined before it is applied to a particular case. In the present case, it is said that the necessary facts establishing acquisition of title to the hereditary office by the plaintiffs-respondents under Art. 124, Limitation Act, stand admitted by the defendant-petitioner himself and his witnesses. It is therefore necessary to scrutinise these admissions carefully in order to see whether they establish beyond controversy the said acquisition of title by the plaintiffs.

(10) It is common ground that in or about the year 1924 the defendant-petitioner's cousin Ram Saran, who held the office jointly with the plaintiffs, died, and that the defendant-petitioner was at that time a minor. It is also common ground that on account of his minority the defendant-petitioner was not allowed by the then manager of the temple on behalf of the State of Bhajji, named Laiq Ram, to perform the duties of the office for more than two months. Since then the defendant-petitioner did not perform the duties of the office of the Pujari until he was restored to the office by the kardars on 14 Jeth 2005 B., i.e. for about 23 years. It is manifest therefore that the plaintiffs themselves had no art (act?) or part in the defendant-petitioner's removal from office, and that the removal was on account of the petitioner's minority.

It was argued by the learned counsel for the plaintiffs-respondents that the petitioner was removed from office on account of his illegitimacy. There is however no proof or admission of that fact. There is also no admission or proof of any act of any of the plaintiffs at any time during the said course of 23 years which could be construed as amounting to possession by them of the hereditary office in question adversely to the defendant-petitioner. That being so, the observation of both the Courts below that the plaintiffs had ousted the defendant-petitioner from the office by an overt act was wholly incorrect. Is there any thing in the so-called admissions of the defendant-petitioner or of his witnesses which leads to a contrary conclusion?. So far as the written-statement of the defendant-petitioner is concerned, he pleaded there specifically that the plaintiffs

got an opportunity of exercising the right singly (simply?) due to the petitioner's minority. True, he has described this act of the plaintiffs as usurpation, but if the facts and circumstances, as disclosed above, do not justify the inference in law that the plaintiffs' possession of the office was adverse to the defendant-petitioner at any point of time, the mere fact that the petitioner described it as usurpation would be quite immaterial. In his statement as a witness also all that the defendant-petitioner stated was that he was removed from office because of his minority. The two defence witnesses referred to in the judgments of the Courts below are Narain Das and Narainu. I have gone through the entire statement of the latter but found nothing there which could be interpreted as an admission on this point. The former again only stated that the petitioner was removed from office by Laiq Ram due to his minority. There is therefore nothing in the so-called admissions of the defendant-petitioner or of his witnesses which could by any stretch be interpreted as establishing acquisition of title to the office by the plaintiffs by adverse possession.

(11) There is one other reason for holding that the plaintiffs had not acquired the right to hold the office in question to the exclusion of the defendant-petitioner under Art. 124, Limitation Act. Under the Explanation to that Article, a hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed. The profits of the office in the present case are of two kinds: offerings at the temple and land belonging to the idol held in lieu of performance of the office of pujari. The learned District Judge has held that since his removal from office in 1924 the defendant-petitioner received no share in the offerings of the temple. That is no doubt correct. But he is not correct in saying that the defendant-petitioner has been cultivating land belonging to the idol by way of begar and not in lieu of his office as pujari. The defendant-petitioner has himself deposed that he has been cultivating land belonging to the idol, and that in lieu of cultivation the puja is performed. The argument of the learned counsel for the plaintiffs-respondents that the defendant did not say that he cultivated the land in lieu of puja makes no difference.

He then referred to the statement of the defence witness Amolak Ram where he deposed that those who carried the idol from one place to another had been granted land, but that does not mean that all those who cultivated land belonging to the idol performed this begar. There is nothing in the statement of this witness justifying the conclusion that land belonging to the idol was granted to none else but those who performed the begar. The learned counsel finally referred to the statement of the defence witness Ram Saran. This witness has however clearly stated that land is cultivated by both who serve the idol and do begar for it. In the former category will no doubt come pujaris. The aforesaid statement of the defendant-petitioner does not therefore stand rebutted by the admission of any of his witnesses. On the contrary, it finds corroboration in a former statement of the plaintiffs' own witness Nika Ram. This Nika Ram, it may be added, is one of the kardars of the idol. The statement in question was made by him in the year 1948 before the Executive Officer Suni. In that statement he clearly admitted that the defendant-petitioner cultivated the land in lieu of the service of puja.

That being so, even if the defendant-petitioner may not have performed the duties of the office during the said 23 years, he was partially in possession of the office under the Explanation to Art. 124, Limitation Act, by reason of his having throughout been in receipt of part of the profits of that office. It may be that if there were a question of acquisition of title to the office by the defendant-petitioner by adverse possession, he would not have been entitled to succeed since he only received the profits but did not perform the duties of the office, but the plaintiffs cannot be said to have acquired the right adversely to the defendant-petitioner because, by reason of the defendant-petitioner having been in possession of the office partially in the aforesaid manner, they cannot be said to have ousted him completely from the office.

In the result, therefore, I hold, disagreeing with both the Courts below, that the plaintiffs had not acquired the right to hold the office in question to the exclusion of the defendant-petitioner under Art. 124, Limitation Act, and that therefore the defendant-petitioner's right to hold that office had not been extinguished under S. 28 of the Act. The perpetual injunction granted to the plaintiffs cannot therefore be allowed to stand. Nor is there any justification for granting to the plaintiffs a preliminary decree for mesne profits. There is nothing to show that when the defendant-petitioner was restored to his lawful position as a joint pujari with the plaintiffs the latter were removed from the office. It appears, on the contrary, that the plaintiffs withdrew voluntarily as a protest against the defendant-petitioner's restoration. In the circumstances, if they have received no profits since the defendant-petitioner's restoration they are themselves to blame. There is no allegation, much less proof, that the defendant-petitioner refused to let them have their share of the profits if they chose to exercise their right jointly with him. At the same time, I would not dismiss the plaintiffs' suit in toto, for that might be construed as a denial of their right to hold the office jointly with the defendant-petitioner.

(12) Before I conclude, I must say that in view of what has been held above, it is clear that the Courts below have committed a material error of procedure affecting the ultimate decision of the case by deciding the question of limitation as to extinguishment of the defendant-petitioner's right under S. 28, Limitation Act, in disregard of the established principle of pleading, and that therefore this is a fit case for interference in revision. 'Venkatagiri v. Hindu Religious Endowments Board, Madras', AIR 1949 PC 156 (D).

(13) There was an application filed in this Court by Kama Ram and a number of other persons to be impleaded as parties. They profess to be the 'dashotaran' of the idol. This was too late a stage at which to make such an application. If their rights are in any way jeopardised by the result of this litigation, they may take such action as may be open to them

according to law. The application was rejected.

(14) The revision is allowed, the judgments and decrees of the two Courts below are set aside and it is hereby declared that the plaintiffs and the defendant-respondent Daulat Ram are entitled to hold the office of pujari of the Deota Bhatindlu in question jointly with the defendant-petitioner. The defendant-petitioner will have his costs from the plaintiffs-respondents, and the plaintiffs-respondents will bear their own costs, throughout.

B/K.S.B. Revision allowed.

A. I. R. 1953 HIM-P. 95 (Vol. 40, C. N. 44)

CHOWDHRY J. C.

Shiv Dutt and another, Petitioners v. State of Himachal Pradesh and another, Respondents.

Writ Petns. Nos. 23 and 25 of 1952, D/- 3-6-1953.

(a) Civil P. C. (1908), O. 8, R. 1 and O. 27, R. 1 — Written statement by Government — (Constitution of India, Art. 226).

A written statement filed on behalf of the Government in reply to a writ petition is not exempt from the provisions of R. 1 of O. 27. The filing of a written statement is a responsible task: it is much more so when the party filing it is the State and the proceeding is instituted on a writ petition under Art. 226 of the Constitution. Therefore a responsible officer of the Government acquainted with the facts of the case should be entrusted with the task of signing and verifying a pleading on behalf of the Government, or of at least giving the requisite information to the person signing and verifying the pleading. 9 Cal WN 608, Ref. (Para 11)

Anno: Civil P. C., O. 8, R. 1 N. 1; O. 27, R. 1 N. 1.

(b) Civil P. C. (1908), S. 80 — Scope and object — (Constitution of India, Art. 226).

The mere fact of the petitioners having given notices under S. 80, Civil P. C., does not mean that they had chosen the remedy of filing a suit, or, if they had chosen that remedy, that they were thereby estopped from filing the petitions under Art. 226 of the Constitution, if they were otherwise entitled so to do. Hence where there was no enactment whereunder the petitioners could have pursued their remedy and the infringement of a fundamental right being their grievance the only proper course for them was to file petitions under Art. 226. AIR 1953 Him-P 8, Foll.; AIR 1952 Punj 134, Not foll. (Para 14)

Anno: Civil P. C. S. 80 N. 2.

(c) Constitution of India, Arts. 226 and 19 (1) (f) — Frame of and contents in petition under Art. 226.

Where in the petition under Art. 226 not merely certain Articles of the Constitution have been mentioned, but also specific allegations have been made, which would make out a case of infringement of the fundamental right guaranteed under Art. 19 (1) (f), and also the prayers were specific and precise, the mere fact that mandamus, certiorari or prohibition have not been mentioned is immaterial, for it is for the Court to decide what, in view of the facts and circumstances established, is the proper writ, direction or order that should be issued under Art. 226. AIR 1953 Assam 61; AIR 1953 Madh B 54, Distinguished. (Para 16)

(d) Constitution of India, Art. 226—Laches.

Proprietary land of petitioners taken over by former ruler of Bhagat State on rent for holding fair — Claim of petitioners for restoration of possession—Order of refusal to return land passed by Ruler on 10-4-1948 — Merger of States in Himachal Pradesh — Constitution of India coming into force on 26-1-1950 — Offer of compensation for acquisition of land by Tahsildar on 12-4-1951 — Representations made to Govt. for restoration of land — Final reply of Assistant Secretary (Home and Revenue) by letter D/- 25-6-1952 that land was required for Government purposes — Petitions under Art. 226 filed on 15-9-1952 — Time between dates of letter of Assistant Secretary and preferment of petition under Art. 226 held was the only relevant period to be taken into consideration — There were held no laches. (Para 17)

(e) Constitution of India, Arts. 19 (1) (f) and 31 — Scope.

Persons have the right to hold the land in exercise of the fundamental right guaranteed to them by Art. 19 (1) (f) unless the right has ceased to exist by reason either of their having been deprived of the property by authority of law under Cl. (1), or of the property having been acquired or taken possession of under Cl. (2) of Art. 31 of the Constitution. In other words, if there has been expropriation of property under either of the aforesaid provisions of Art. 31, the question of enforcement of the fundamental right under Art. 19 (1) (f) does not arise.

Where, therefore, the petitioners continued to be recorded as proprietors of the land in the latest Jamabandi prepared before the institution of the petitions by the revenue officials in the employ of the respondent:

Held that it was for the respondent State to prove the alleged acquisition by its predecessor-in-interest. That onus not having been discharged by the respondents the petitioners were not expropriated under Art. 31, and the action of the respondent State in retaining possession of the land without paying any rent since 1938, and on the mere ground that it was needed for a public purpose, without taking any step to acquire it according to law, amounted to a clear infringement of the fundamental right of the petitioners under Art. 19(1)(f).

(Writ of mandamus issued to direct the State to acquire the property according to law; on failure of this public duty for restoration of possession to the petitioners). AIR 1950 SC 27; AIR 1952 Cal 65; AIR 1951 Bom 86, Ref. (Paras 18, 19, 24)

(f) Constitution of India, Art. 226—Scope of.

Proceedings under Art. 226 being of a summary nature, no writ will issue where the right to it depends on proof of complicated questions of fact which are not capable of establishment in such proceed-

ings. But where the disputed questions of fact are easily provable, as for example, by the filing of originals or certified copies of incontrovertible documents, relief will not be disallowed in such proceedings on the mere ground of the facts stated by the petitioner being disputed by the opposite party. AIR 1953 Assam 12; AIR 1953 Cal 172, Ref. (Para 20)

(g) Constitution of India, Art. 226 — Who may apply.

Where it was found that the State has been recording the petitioners and their co-owners as proprietors of the land and thus recognised their right after the merger of the former State of Bhagat, the right to property can be asserted by them in the Courts established by the present Government and the plea that they have no locus standi is not tenable. AIR 1947 PC 1, Disting. (Para 21)

(h) Constitution of India, Art. 226 — Retrospective operation.

No question of retrospective application of the provisions of the Constitution arise when the act of the respondent on account of which relief as claimed by writ petitions continued to be committed even after the coming into force of the Constitution, and what the petitioners did by the petitions was not so much the challenging the act of the respondent as the assertion of a fundamental right granted to them since 26-1-1950. AIR 1953 Punj 16, Distinguished. AIR 1953 Him-P 8, Foll. (Para 22)

C. L. Puri, for Petitioners; A. C. Mehta acting Govt. Advocate, for the State.

CASES CITED:

(A) ('05) 9 Cal WN 608
(B) ('52) AIR 1952 Punj 134: 54 Pun LR 218
(C) ('53) AIR 1953 Him-P 8
(D) ('53) AIR 1953 Assam 61: 1953 Cri LJ 495
(E) ('53) AIR 1953 Madh-B 54
(F) ('50) AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383 (SC)
(G) ('52) AIR 1952 Cal 65: 87 Cal LJ 140
(H) ('51) AIR 1951 Bom 86: ILR (1951) Bom 473
(I) ('53) AIR 1953 Assam 12
(J) ('53) AIR 1953 Cal 172: 55 Cal WN 443
(K) ('47) AIR 1947 PC 1: ILR (1947) Kar PC 38 (PC)
(L) ('15) AIR 1915 PC 59: 42 Ind App 229 (PC)
(M) ('24) AIR 1924 PC 216: 51 Ind App 357 (PC)
(N) ('53) AIR 1953 Punj 16: 55 Pun LR 53
(O) ('50) AIR 1950 Bom 363: 52 Cri LJ 120

JUDGMENT: These are two petitions under Art. 226 of the Constitution to enforce the fundamental right to hold property guaranteed by Art. 19(1)(f), due to an alleged contravention of the provisions of Art. 31, directed against the State of Himachal Pradesh, one by Balaram in respect of 3 bighas and 13 biswas, and the other by Shiv Dutt in respect of 1 bigha 1 biswa and 15 biswansis, the two areas forming one compact piece of land in the town of Solan.

(2) The allegations in the two petitions, except for a slight variation (to be referred to presently), are identical. The petitioners claim, along with their co-owners, to be the proprietors of the respective areas. The co-owners, Krishna Dutt minor in the case of Balaram and Mt. Gangi in that of Shiv Dutt, have been impleaded as pro forma respondents.

(3) The petitioners' case is that the land was originally taken on rent by the ruler of Baghat for holding Solan fair, that no rent had been paid since 1938, that in that year the ruler called upon only Balaram to show cause why the land be not permanently acquired for the said purpose and that Balaram objected to the acquisition. A certified copy of the statement of Balaram, dated 27-4-1938, making the objection has been filed. The petitioners further allege that despite repeated demands the ruler neither paid any rent or compensation nor released the land but continued to use it as aforesaid. The last demand was made by an application dated 22-3-1948 (certified copy filed), but by an order dated 10-4-1948 the ruler refused to release the land, said nothing about payment of compensation and directed the balance due to the Zamindars, which, according to the petitioners, only meant arrears of rent, to be paid.

(4) That was almost on the eve of accession to India of 21 former Punjab Hill States, including Baghat, with their tributaries and the formation of the respondent State of Himachal Pradesh on April 15, 1948. About three years thereafter, viz. on 12-4-1951, the petitioners were summoned, as they allege, by the Tehsildar of Solan and informed that the price of the land had been settled at Rs. 125/- per bigha. The petitioners contend that it was only then that they came to know for the first time that the land was being acquired permanently for a nominal price.

(5) The petitioners contend that they had been making representations to the authorities for the release of their land but to no effect. Finally, the Assistant Secretary (Home and Revenue) informed the petitioners by his letter dated 25-6-1952 (filed in original) that the land in question could not be released "as the same is required for Government purposes". The present petitions were filed on 15-9-1952.

(6) The contentions of the petitioners are that no proceedings under the Land Acquisition Act I of 1894 were ever taken in that no compensation was fixed or paid nor formal possession taken according to law, and that the land is being retained without the consent of the petitioners. It is further alleged that the very object for which the land was originally taken on rent did no longer exist as for the last two years the fair was being held at another place, called the Thodo ground, & the land in question was being used as a jail garden. It is, therefore, alleged that the action of the former ruler of Baghat was arbitrary, illegal and ultra vires, and so also that of his successor, the respondent State of Himachal Pradesh, which is alleged further to have contravened the provision of Art. 31 of the Constitution.

(7) The petitioners, therefore, pray for the issue of the "directions, orders and writs (1) that respondent 1 (the State of Himachal Pradesh) should no longer continue to use the said land as jail garden and should immediately, deliver back possession of the same to the petitioners & their co-owners, & (2) that such other orders & directions as may be deemed fit and proper after taking into consideration the attitude of respondent 1 and its predecessor, the

ruler of Baghat, in arbitrarily withholding payment of rent at the agreed rate of Rs. 30/- per bigha since 1938 and retaining possession of the land in dispute against the express wishes of the petitioners, may kindly be passed."

(8) In the petition of Balaram two other respondents have been impleaded besides his co-owner and the State of Himachal Pradesh, viz. Ram Sukh Dass and Assa Ram, sons of Shiv Ditta Mal, on the allegation that they had constructed a shed on one biswa (described in the petition) out of the 3 bighas and 13 biswas in dispute with the consent of the State of Himachal Pradesh. The petitioner, therefore, prays for the additional relief that these respondents be ordered to demolish the shed and deliver possession of its site to the petitioner and his co-owner. This is the variation in one of the petitions referred to above.

(9) Ram Sukh Dass and Assa Ram did not put in appearance despite service of notices. The State contested both the petitions. It was admitted that the land in question belonged to the petitioners, and that it was taken on rent by the former ruler of Baghat for holding the Solan fair. It was, however, pleaded that the land had been lawfully acquired in the year 1938 by the ruler of Baghat for the public purpose of holding the fair, that the petitioners were duly informed of the same, that suitable compensation at Rs. 125/- was also fixed, but that the petitioners never turned up to receive it. It was, therefore, contended that the efforts of the petitioners for release of the land were misconceived. To the petitioners' allegation of diversion of the property for the last two years to another purpose, viz., to its use as a jail garden, the contesting respondent pleaded ignorance. It was further pleaded that the acquisition of the land by the then ruler of Baghat, who was the executive head of the State and enjoyed sovereign powers, was an act of State which could not be challenged; that the petitioners had no locus standi as the State of Himachal Pradesh, as successor to the ruler, never recognised the alleged right of the petitioners; that the claim of the petitioners for recovery of rent or compensation or of possession of the land is time-barred; and that the petitioners served two notices on the respondent and themselves thus chose a remedy which, however, they did not pursue but have instead invoked the extra-ordinary jurisdiction of this Court by way of petitions under Art. 226 of the Constitution.

(10) I have to say a word here with regard to the written-statement filed on behalf of the State. To the petitioners' allegation that on 12-4-1951 they were summoned by the Tehsildar of Solan and informed that price of land had been settled at Rs. 125/- per bigha, and that it was only then that they came to know for the first time that the land was being acquired permanently for a nominal price, the respondent replied that the petitioners had knowledge of the permanent acquisition of the land, not on 12-4-1951, but on 27-1-1938, when the ruler of Baghat is alleged to have initiated steps to acquire the land, or in any case on 2-5-1938, when he is said to have fixed compensation at Rs. 125/- per bigha. It was not stated whether the allegation as to the Tehsildar having summoned the petitioners on 12-4-1951 and informed them of fixation of price at Rs. 125/- per bigha was admitted or denied. Equally prevaricative were the respondent's replies to the petitioners' averments that they made several abortive representations for return of the land, and that finally they were informed by the Assistant Secretary (Home and Revenue) by a letter dated 25-6-1952 that the land could not be released as the same was required for Government purposes. With regard to the former it was not stated whether the representations had, or had not, been made, but that the efforts of the petitioners were misconceived. With regard to the latter the reply was that the petitioners "may have received the letter", and that despite the fact that the letter in question had been filed in original and purported to have emanated from an officer of the respondent. The respondent pleaded ignorance as to the petitioner Balaram having made a statement before the Ruler on 27-4-1938 that he objected to the acquisition of the land. This is strange, seeing that a copy of the statement certified as true copy on 4-8-1952 by an official of the respondent had been filed by the petitioner. The respondent further pleaded ignorance to the petitioners' allegations of diversion of the land to another use and of construction of a shed on a portion of it by the respondents Ram Sukh Dass & Assa Ram which is extremely strange since the former act was alleged to have been done by the contesting respondent itself and the latter with its consent.

(11) Of course, these evasive replies avail the respondent nothing since, in view of the provisions of rules 3 to 5 of O. 8, Civil P. C., it will be taken to have admitted the allegations in question. But it is regrettable that a written-statement filed on behalf of the State should have laid itself open to the above criticism. The reason for it appears to be that the preparation of the written-statement was entrusted to the Government Advocate. Order 27, R. 1 of the Code makes it obligatory that in any suit by or against the Government the pleadings shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and verified by any person so appointed and acquainted with the facts of the case. A written-statement filed on behalf of the Government in reply to a writ petition instituted in this Court is not exempt from the provisions of this rule. It may be that the State had appointed the Government Advocate to sign and verify the written-statement, but in doing so it obviously contravened that portion of the above mandatory rule which requires such person to be acquainted with the facts of the case. True, "acquainted" in the rule is a wide word and may also mean 'acquainted on the authority of information received from others". —'Port Canning Co. v. Dharnidhar', 9 Cal W N 608 (A). Indeed, the Government Advocate may well take shelter behind this wide interpretation of the word, for he has verified the contents of the written-statement as being true to the best of his instructions. But then the task of imparting instructions to the Government Advocate in this case does not appear to have been entrusted to an officer who was acquainted, or who took the trouble of acquainting himself, with the facts

of the case. Judged by any standard, the filing of a written-statement is a responsible task: it is much more so when the party filing it is the State and the proceeding one instituted on a writ petition under Art. 226 of the Constitution. It is to be hoped therefore that in future a responsible officer of the Government acquainted with the facts of the case is entrusted with the task of signing and verifying a pleading on behalf of the Government, or of at least giving the requisite information to the person signing and verifying the pleading.

(12) From the above pleadings, and from certain additional grounds taken in the course of arguments by the learned acting Government Advocate, the following are the points that arise for determination:

(1) Has the petitioners' fundamental right to hold property under Art. 19(1)(f) of the Constitution been infringed by contravention of the provisions of Art. 31? (2) Whether there has been diversion of property to another purpose, and, if so, what is its effect? (3) Was the property acquired by the then ruler of Baghat State, and if so, did the acquisition constitute an act of State by an executive head with full sovereign powers, and therefore it cannot be challenged? (4) Whether the contesting respondent has not recognised the right of the petitioners, & therefore the latter have no locus standi? (5) Whether the present petitions under Art. 226 of the Constitution are not maintainable because, if at all, the petitioners had, before filing the petitions, chosen another remedy which they did not pursue? (6) Which of the reliefs claimed by the petitioners, if any, are time-barred? (7) Whether the petitions are not properly framed as petitions under Art. 226? (8) Whether the petitioners were guilty of laches and the petitions should therefore be dismissed on that ground? (9) Whether the petitioners seek retrospective operation of Art. 226, and, if so, what is its effect? (10) Whether the petitioners are not entitled to any writ inasmuch as their title is disputed and the same cannot be decided in the present proceedings? (11) To what relief, if any, are the petitioners entitled?

(13) Before I take up the above points I have to dispose of a preliminary objection of the learned counsel for the respondent relating to the affidavit filed by the petitioners in support of their respective petitions. He pointed out various defects in the affidavits: Firstly, the verification was defective in two ways: it did not purport to be on oath or solemn affirmation, as required by rule 15, Chapter 12-B, Volume IV of the Punjab High Court Rules and Orders which have been adopted by this Court, and facts within the petitioners' knowledge were not spoken to directly, as required by Rule 9 (iii) of the said Chapter in conformity with O. 19, R. 3, C. P. C., but indirectly by the use of the words "to the best of my knowledge". Secondly, the documents referred to in the affidavits were not exhibited, as required by R. 12, nor attested in form II-A of the same Chapter. The objections are well founded, and, so far as the first objection is concerned, that would form a good ground for rejection of the affidavits. But that would not affect the disposal of the present cases since it depends on facts which are either admitted, or which have not been substantiated, by the respondent.

(14) Of a preliminary nature are also the contentions of the respondent which gave rise to points 5 to 8. These may therefore be disposed of first. As regards the fifth point, the argument was that the petitioners gave notices to the respondent under S. 80, C. P. C. The notices have not been filed. But the mere fact of the petitioners having given such notices does not mean that they had chosen the remedy of filing a suit, or, if they had chosen that remedy, that they were thereby estopped from filing the present petitions under Art. 226 of the Constitution, if they were otherwise entitled so to do. The ruling, — 'Punjab National Bank Ltd. v. A. N. Sen', AIR 1952 Punj 134 (B), cited by the learned acting Government Advocate, does not support the contention. That was a case relating to an order passed by an Industrial Disputes Tribunal, and the writ petition filed under Art. 226 for quashing the order was dismissed on the ground that as the Industrial Disputes (Appellate Tribunal) Act 48 of 1950 provided a specific and adequate legal remedy for the redress of the injury, if any, the proper course for the aggrieved party was to pursue that remedy before applying to the High Court for relief under Art. 226 when no case of want of jurisdiction or excess of jurisdiction was established. There was no enactment cited in the present case whereunder the petitioners could have pursued their remedy. On the contrary, it was held by this Court in — 'Chamba Valley Transport Ltd. v. State of Himachal Pradesh', AIR 1953 Him-P. 8 (C), as follows:

> ('There is no other statute but the Constitution which prescribes the remedy of the enforcement of the fundamental rights, and the power of enforcement of those rights has been conferred on only the Supreme Court under Art. 32 and the High Courts under Art. 226. There is therefore no other adequate remedy open to a person whose fundamental right has been infringed."

It follows therefore that, infringement of a fundamental right being the grievance of the petitioners, the proper course for them was to file, as they have done, these petitions under Art. 226.

(15) As regards the sixth point, neither arrears of rent nor compensation has been specifically prayed for, and the petitioners' learned counsel stated that these reliefs were not claimed. The relief of restoration of possession is obviously not time-barred since the petitioners' right to it on foot of infringement of a fundamental right came into existence only on the enforcement of the relevant provisions of the Constitution on 26-1-1950.

(16) The contention of the learned counsel for the respondent giving rise to the seventh point was based on two decisions: — 'Dhan Bahadur v. The State', AIR 1953 Assam 61 (D), and — 'Laxman Singh v. Raj Pramukh of Madhya Bharat', AIR 1953 Mad-B. 54 (E). The former was a Criminal Miscellaneous case started on a petition purporting to be one under R. 22 of the Rules for Administration of Justice and Police in the Garo Hills District against an order of expulsion passed against the petitioner by the Deputy Commissioner. The

High Court was of the view that the rule in question did not empower it to hear an appeal or revision from the order. Thereupon the petitioners' counsel contended that the petition may be treated as one under Art. 226 of the Constitution. Repelling this contention, it was held that mere mention of an Article of the Constitution was not enough to make out a case for issue of an appropriate writ. In the present cases, it is not merely that certain Articles of the Constitution have been mentioned, but, on the contrary, specific allegations have been made, as aforesaid, which, if well founded, would make out a case of infringement of the fundamental right guaranteed to the petitioners under Art. 19(1)(f). In the other ruling the practice of couching the prayer in applications under Art. 226 in such general terms as "the Court may be pleased to grant such writs as it may think fit" was condemned. The present petitions do not lay themselves open to such a charge since, as shown the, prayers are specific & precise. The mere fact that mandamus, certiorari or prohibition have not been mentioned is immaterial, for it is for the Court to decide what, in view of the facts and circumstances established, is the proper writ, direction or order that should be issued under Art. 226.

(17) The argument of the learned counsel for the respondent in connection with the eighth point, viz., that of laches, was that although admittedly the ruler of Baghat refused to return the land to the petitioners by an order dated 10-4-1948 it was only on 15-9-1952, more than four years after the order, that the present petitions were filed. According to the learned counsel 10-4-1948 was the crucial date. This argument is devoid of force. The present petitions could not possibly have been filed immediately after 10-4-1948, or at any time before 26-1-1950, when the relevant provisions of the Constitution came into force. Even after that, the petitioners contend that the Tehsildar of Solan called them on 12-4-1951 and offered them Rs. 125/- per bigha as the price of the land, that the petitioners made representations to the authorities for the release of the land but without avail, and that eventually they were informed by the Assistant Secretary (Home and Revenue) by a letter dated 25-6-1952 that the land could not be released as it was required for Government purposes. These allegations were either specifically or, as adverted to above, impliedly admitted by the respondent. The letter of the Assistant Secretary has been filed by the petitioners in original. Less than three months thereafter the present petitions were filed on 15-9-1952. This delay was not so excessive as to be a bar in itself, and therefore the petitions could not be held to be barred on the ground of laches unless there has been acquiescence on the part of the petitioners, or any change of position on the part of the respondent. Halsbury's Laws of England, Hailsham Second Edition, Volume XIII, page 212. Neither of elements is present here. Indeed, the learned counsel for the respondent himself did not refer to the lapse of time between the dates of the letter of the Assistant Secretary and the preferment of the present petitions as delay amounting to laches, although, strictly speaking, this was the only relevant period of time to be taken into consideration in connection with the plea of laches since the time before that was taken up in making representations to the respondent. I hold that the petitions cannot be thrown out on the ground of laches.

(18) The crucial point requiring determination is the first, and interconnected therewith are the third and tenth points. That the land in question originally belonged to the petitioners is admitted. That being so, the petitioners have the right to hold the land in exercise of the fundamental right guaranteed to them by Art. 19 (1)(f) unless the right has ceased to exist by reason either of their having been deprived of the property by authority of law under clause (1), or of the property having been acquired or taken possession of under cl. (2) of Art. 31 of the Constitution. In other words, if there has been expropriation of property under either of the aforesaid provisions of Art. 31, the question of enforcement of the fundamental right under Art. 19 (1)(f) does not arise. —'A. K. Gopalan v. State of Madras', AIR 1950 S.C. 27 at p. 113 (F); —'Sudhindra Nath v. Sailendranath', AIR 1952 Cal 65 (G); —'Dwarkadas v. Sholapur Spg. & Wvg. Co. Ltd.', AIR 1951 Bom 86 (H). There need be no groping in the dark in these cases as to which of the two provisions of Art. 31 is applicable since it is the specific case of the respondent that the land had been lawfully acquired in the year 1938 by the ruler of Baghat for the public purpose of holding the Solan fair on fixation of Rs. 125/- per bigha as compensation — only the petitioners never turned up to receive the compensation. If that be correct, the petitioners' right to enforce their right under Art. 19(1)(f) is barred by cl. (2) of Art. 31. The petitioners, however, continue to be recorded as proprietors of the land in the latest Jamabandi prepared before the institution of the present petitions by the revenue officials in the employ of the respondent. It lay on the respondent, therefore, to prove the alleged acquisition by its predecessor-in-interest, the ruler of Baghat. And this onus could have been easily discharged by the respondent filing certified copies of the two orders of the ruler referred to in the respondent's written-statement, viz., one dated 27-1-1938 by which the acquisition proceedings are alleged to have been initiated, and the other dated 2-5-1938 by which the proceedings are said to have been confirmed and the compensation fixed. It is not the respondent's contention that the relevant documents of the ruler's time relating to the land in question have not come into its possession. The petitioners have filed certified copies of the aforesaid objection of Balaram dated 27-4-1938, and the last demand for release of land made in the ruler's time on 22-3-1948, the originals of which are in possession of the defendant since the copies were issued by officials in the employ of the respondent in 1952. Therefore, if the aforesaid or any orders acquiring the land were passed, they should have been in possession of the respondent. No such orders have been filed by the respondent. The presumption therefore is that no such orders were really passed. And this presumption stands converted into proof that the land was never acquired by a certified copy of the report of the

Tehsildar of Solan filed by the petitioners. It is dated the 10th December, but the year is not given the note of the copying department being that the year was torn out on the original. As however there is reference in it to the Deputy Commissioner of Mahasu, the report appears to have been made after formation of the respondent State. This report is to the following effect :

"In the Court of D. C. Mahasu regarding land for Solan fair.

Forwarded in original to the M.I.C. & A. C. I. Grade for necessary action. The land of the applicant was acquired for public purposes under the order of His Highness the Ruler of Baghat dated 2-5-1938. But it appears that in spite of this order the compensation due to the applicants has not been paid to them so far nor formal possession of the land appears to have been taken.

Now either they should be paid full amount of compensation plus the rent due to them to date and the land may be taken possession of or if considered admissible steps under the Land Acquisition Act may be taken afresh to legalise the proceedings.

Sd/ Jaipal Singh (In English)
T. Solan.
10-12- (torn out)."

(19) This document was specifically referred to in Para 9 of the petitions as supporting the petitioners' contention that the land had not been acquired, but the respondent's written-statement is quite silent with regard to it. True, the report speaks of the land having been acquired for public purposes under an order of the ruler dated 2-5-1938, but, as already stated, the order has not been filed. What is more, the Tehsildar suggests at the end that steps be taken afresh under the Land Acquisition Act to legalize the proceedings. This shows that, whatever the proceedings that were taken in 1938, they were not proceedings taken according to law. The learned counsel for the petitioners drew my attention to a notification in the Baghat State gazette for Baisakh 2002 (corresponding roughly to 1945 A. D.) which published a list of enactments in force in the Punjab and the rest of British India and declared "in order to clarify the position" that those enactments "are applicable mutatis mutandis to the Baghat State". Among these enactments figured also the Land Acquisition Act (1 of 1894). The wordings of the notification show that the enactments, including the Act just mentioned, were already in force in Baghat State before the publication of the notification. The respondent has not shown when exactly this Act was enforced in Baghat State. Presumably, it was in force in 1938 also since it is said that the land was acquired for a public purpose on fixation of compensation. In any case, even if the Act was for the first time promulgated in the State in 1945, there was ample time before merger of the State "to legalise the proceedings", in the language of the Tehsildar's report. In point of fact, all this secretiveness on the part of the respondent in regard to a matter which was easily capable of clarification by the production of necessary documents from the archives of the former Baghat State, which have demonstrably come into its possession, is quite understandable and is reconcilable with only one possibility, namely, that the intention of the ruler to acquire the land was never translated into action. And this possibility is turned to certainty by a perusal of the aforesaid letter of the Assistant Secretary (Home and Revenue) wherein as late as 25-6-1952 it was still stated that the land could not be released, not because it had already been duly acquired, but because it was required for Government purposes. The irresistible conclusion is that the latest Jamabandi represents the true state of affairs: the land was never acquired and the petitioners and their co-owners, the pro forma respondents, continue to be its owners. That being so, the petitioners have not been expropriated under Art. 31, and I hold that the action of the respondent State in retaining possession of the land without paying any rent since 1938, and on the mere ground that it was needed for a public purpose, without taking any step to acquire it according to law, amounts to a clear infringement of the fundamental right of the petitioners to hold their property under Art. 19(1)(f) of the Constitution.

(20) I have stated above that the third and tenth points are interconnected with the first which has just been disposed of. It having been found that the land was never acquired, the question of such an acquisition by the ruler amounting to an unchallengeable act of State does not arise. As regards the tenth point, the learned counsel for respondent cited two cases : —'Mohi Chandra v. Secretary Local Self Government of Assam', AIR 1953 Assam 12 (I) and Samarendra v. The University of Calcutta', AIR 1953 Cal 172 (J). There is no doubt that proceedings under Art. 226 being of a summary nature, no writ will issue where the right to it depends on proof of complicated questions of fact which are not capable of establishment in such proceedings. But where the disputed questions of fact are easily provable, as, for example, by the filing of originals or certified copies of incontrovertible documents, relief will not be disallowed in such proceedings on the mere ground of the facts stated by the petitioner being disputed by the opposite party. In the present cases, as already seen, the dispute raised by the respondent with regard to the petitioners' title to the land was easily capable of being resolved by the respondent filing originals or certified copies of documents relating to acquisition of land which, did they exist, should have been in its possession. The respondent's plea giving rise to the tenth point has also therefore no force.

(21) In support of the plea of the respondent which gave rise to the fourth point the ruling —'Asrar Ahmed v. Durgah Committee Ajmer', AIR 1947 P. C. 1 (K), was cited. That was a case where the plaintiff-appellant claimed the right to office of mutawalli of a Durgah in Ajmer on the grounds of its being hereditary in his family on foot of a sanad granted to a predecessor of his in 1813 by the House of Scindia. In 1818 Ajmer was ceded

to the British by Scindia. And in that connection their Lordships observed as follows :

"From this it follows that the rights, which the inhabitants of that State enjoyed against its former rulers, availed them nothing against the British Government and could not be asserted in the Courts established by that Government except so far as they had been recognised by the new Sovereign Power. Recognition may be by legislation or by agreement express or implied. This well-established rule of law, for which reference may be made to —'Secy. of State v. Bai Rajbai', AIR 1915 PC 59 at p. 62 (L) and —'Vajesinghji Jorawarsinghji v. Secy. of State', AIR 1924 PC 216 at p. 217 (M), appears to their Lordships to be peculiarly applicable to an office, to which material benefits appertain and which, so far as the records show, had consistently been regarded as within the disposition of the Sovereign Power. Their Lordships think that this aspect of the matter has perhaps not received sufficient attention in the Courts of India. The first question then is whether after the cession of 1818 the hereditary right of the appellant's family to the office of Mutawalli was recognized by the British Government. Counsel for the appellant could point to no instrument or act which amounted to an express recognition of such a right. Is it then to be implied from the conduct or mode of dealing with the matter by the British Government? The contrary seems to be established beyond all possible doubt."

The right claimed by the petitioners in the present case is the right of ownership in the land in question. The act of the respondent State which amounts to an express recognition of that right is the mode in which it has been dealing with it. And this, as adverted to already, is that it has been recording the petitioners and their co-owners as proprietors of the land. The State has therefore recognised their right after the merger of the former State of Baghat, and that right can be asserted by them in the Courts established by the present Government.

(22) The respondent's plea on which the ninth point arose is equally devoid of force. There is no doubt that the provisions of the Constitution are not retrospective, so that no writ can be issued under Art. 226 in respect of any act done before the commencement of the Constitution, as laid down in the following case cited by the learned counsel for the respondent : —'Mahabir Parshad v. Commissioner of Income Tax Punjab', AIR 1953 Punj 16 (N). But the act against which the present petitions are directed is one done after the commencement of the Constitution. True, the ruler of the former Baghat State was wrong in not releasing the land although he neither paid rent nor acquired the land, but that was before the Constitution came into force. At that time the fundamental right now sought to be vindicated did not exist. As held by this Court in —'AIR 1953 H. P. 8 (C)',

"In short, the right in question was, prior to that date (meaning 26-1-1950 when the Constitution commenced), simply non esse. There could, therefore, be no question of its ante-Constitution infringement or petitioner's acquiescence in the infringement.

For the same reason, there could also be no question of retrospective application of the provisions of Art. 19 of the Constitution. The right in question became exercisable as soon as it assumed the badge of a legal right by being recognised by the State in our Constitution, irrespective of whether the act which gave cause to the exercise of the right was performed before or after the birth of the right. Or, borrowing with respect the reasoning of Chagla, C. J., in the aforesaid ruling, —'Jeshingbhai v. Emperor', AIR 1950 Bom 363 (O), (at p. 366, first column), what the petitioner is doing by the present petition is not so much the challenging of the act of the respondent in stopping the carrying on of the petitioner's business as the assertion of a fundamental right granted to the petitioner since 26-1-1950."

There is therefore no question in this case of retrospective application of the provisions of the Constitution, since, firstly, whatever may have been done by the ruler, the act of the respondent on account of which relief as claimed by these writ petitions continued to be committed even after the coming into force of the Constitution, and, secondly, in the wordings of Chagla, C. J., what the petitioners are doing by the present petitions is not so much the challenging the act of the respondent as the assertion of a fundamental right granted to them since 26-1-1950.

(23) The second point, which appears to be based on the view that once property has been acquired for one purpose it cannot be diverted to another purpose, does not really arise, even supposing that the view is correct, since the property in this case was never acquired for any purpose.

(24) This disposes of all the points, and in view of the finding on the first point that the action of the respondent in retaining possession of the land without paying rent, and on the mere ground that it was required for a public purpose, without taking any step to acquire it according to law amounts to a clear infringement of the fundamental right of the petitioners under Art. 19(1)(f) of the Constitution, this is a fit case in which a writ of mandamus should issue to direct the respondent State to do that which has clearly been in the nature of a public duty for it to perform, namely, to acquire the property according to law. And if it fails to perform that duty, there should be a further order for restoration of possession of the land to the petitioners.

(25) Accordingly, the petitioners in both the cases are allowed and the contesting respondent, the State of Himachal Pradesh, is hereby ordered, if it wishes to retain possession of the land in question or to acquire it, to do so according to law, and, for the starting of such proceedings according to law, it is hereby given three months time from the date of this judgment; otherwise, it shall restore possession of the land to the petitioners, in which case, if the respondents Ram Sukh Dass and Assa Ram do not remove within two months of the expiry of the aforesaid three months the superstructure of the constructions made by them or a portion of the land which is the subject-matter of Balaram's petition, the petitioner Balaram will be entitled, at his option, either to have

the superstructure removed at the cost of the said Ram Sukh Dass and Assa Ram, or to restoration of possession of the site along with the superstructure. In each of the two cases the aforesaid contesting respondent shall pay Rs. 50/- as costs to the respective petitioners. In 'Balaram's case the petitioner will get further costs of Rs. 20/- from respondents Ram Sukh Dass and Assa Ram.

A/H.G.P. Petitions allowed.

A. I. R. 1953 HIM-P. 102 (Vol. 40, C. N. 45)

CHOWDHRY J. C.

Kanshi Ram, Plaintiff-Petitioner v. Mt. Dharmi and another, Defendants-Respondents.

Civil Misc. Petn. No. 27 of 1952, D/- 20-5-53.

(a) Civil P. C. (1908), S. 151, O. 9, R. 9 and O. 41, R. 19 — Applicability to revision dismissed for default.

As neither O. 9, R. 9 nor O. 41, R. 19, Civil P. C., applies to the application for restoration of a revision petition dismissed for default and as there is no provision in the Code for that purpose, if otherwise the case is a fit one, a dismissed revision petition should be restored by a Court in exercise of its inherent jurisdiction under S. 151. The reason is the well-established principle that the inherent power of the Court is meant to meet those cases which are not covered by the express provisions of the Civil Procedure Code. AIR 1943 Mad 260 (1) and AIR 1945 Mad 103, Not foll. 75 Pun Re 1881, 54 Pun Re 1901 and AIR 1937 Lah 685, Distinguished, AIR 1941 Cal 670, Ref. (Para 4)

Anno: Civil P. C., S. 151 N. 2 Pt. 29d; O. 9, R. 9 N. 6; Order 41, Rule 19 N. 1.

(b) Limitation Act (1908), Arts. 181, 168 — Application for restoring revision dismissed for default.

There being no period of limitation prescribed for a petition for restoring a revision petition dismissed for default the proper Article applicable would seem to be Art. 181.

Held that even if it were a case covered by Art. 168, the time for filing such application would have been 30 days and as the petitioner had exceeded that time by only one day, it could not fairly be held that the petition should be dismissed on the ground of latches. (Para 5)

Anno: Limitation Act, Art. 181 N. 10aa; Art. 168 N. 2.

K. C. Pandit, for Petitioner; Man Mohan Nath, for Respondents.

CASES CITED:

(A) ('81) 75 Pun Re 1881
(B) ('01) 45 Pun LR 1901: 54 Pun Re 1901
(C) ('37) AIR 1937 Lah 685: 173 Ind Cas 488
(D) ('43) AIR 1943 Mad 260(1): 208 Ind Cas 110
(E) ('45) AIR 1945 Mad 103: 1945-1 Mad LJ 4
(F) ('41) AIR 1941 Cal 670: ILR (1941) 1 Cal 490
(G) ('49) Civil Revn. No. 21 of 1949 (Him-P.)

ORDER: This is a plaintiff's application for setting aside the order of this Court dated 2-9-1952 dismissing his revision petition for default of prosecution.

(2) The defendants in the case are Mt. Dharmi and Balak Ram. It appears that Sri Man Mohan Nath Advocate appeared for Balak Ram on 20-8-1952 but the other defendant Mt. Dharmi was absent and she had not been served. The case was therefore adjourned and the plaintiff-petitioner was ordered to take fresh steps against Mt. Dharmi within a week. Steps were however not taken despite a reminder, and, as stated, the revision was dismissed for default on 2-9-1952. The present petition for setting aside the order of dismissal and restoration of the revision was filed on behalf of the plaintiff on 3-10-1952.

(3) There were two preliminary objections taken by the learned counsel for the defendants-respondents: (1) that an application for restoration of revision dismissed for default does not lie, and (2) that the application for restoration is time-barred. With regard to the first objection the learned counsel cited a number of rulings. Of these — 'Court of Wards v. Fatteh Singh', 75 Pun Re 1881 (A); — 'Umar Din v. Ala Bakhsh', 54 Pun Re 1901 (B) and —'Ilachi Ram v. Amir Ali', AIR 1937 Lah 685 (C) have no application. They only say that where the first petition for revision is dismissed for default a second petition for revision can lie. The rulings directly in point cited by the learned counsel for the defendants-respondents are — 'Subbamma v. Venkata Reddi', AIR 1943 Mad 260 (1) (D), and — 'Ramamurthi Iyer v. Meenakshi Sundarammal', AIR 1945 Mad 103 (E), in both of which it was held that a revision petition dismissed for default of appearance cannot be restored. The point was dealt with more elaborately in the later of the two rulings. It was held that the provisions relating to restoration of suits and appeals contained respectively in O. 9, R. 9 and O. 41, R. 19, C. P. Code, did not apply to revisions. It was further held that a revision petition dismissed for default could not also be restored under S. 151, C. P. C., because that section did not confer upon a Court the power to exercise a jurisdiction which it did not otherwise possess.

(4) With great respect, I am unable to agree with the view expressed in the aforesaid ruling that a dismissed revision petition cannot be restored under S. 151, C. P. C. And my reason for thus respectfully differing from that view is based upon the very circumstances referred to in that ruling for holding that an application for restoration of a dismissed revision petition does not lie, namely, that neither O. 9, R. 9 nor O. 41, R. 19, Civil P. C., applied to such petitions. In other words, there is no provision in the Civil Procedure Code for restoration of dismissed revision petitions. If so, if otherwise the case is a fit one, a dismissed revision petition should be restored by a Court in exercise of its inherent jurisdiction under S. 151. The reason for this view is the well-established principle that the inherent power of the Court is meant to meet those cases which are not covered by the express provisions of the Civil Procedure Code. 'Bhagat Singh v. Dewan Jagbir Sawhney', AIR 1941 Cal 670 (F). It is manifest therefore that to apply the provisions of S. 151 to cases not covered by the express provisions of the Code is not tanta-

mount to assuming jurisdiction not conferred upon a Court, as observed in the aforesaid — '1945 Madras case' (E). I therefore hold that in a fit case a dismissed revision petition can and should be restored under S. 151, C. P. C.

(5) As regards the other objection, the learned counsel for the defendants-respondents cites Art. 168 of the Limitation Act. If that Article were applicable, the present petition would certainly be time-barred, for it has been filed one day too late. The Article in question is however applicable to appeals. It is, therefore, not applicable for readmission of a revision dismissed for want of prosecution. The learned counsel for the respondents cited an unreported decision of this Court in — 'Civil Revn. No. 21 of 1949, Mast Ram v. Sundar Singh', (G). That was a case of an application under O. 22 of the Code which was filed about three months and twenty days after the death of the party in whose place the petitioner wanted to be substituted. If it were a case of a deceased plaintiff or deceased appellant, the prescribed limitation would have been 90 days from the date of the death under Art. 176, as pointed out in that ruling. That was however a case of a revision petition, and it was therefore held that Art. 176 did not apply. At the same time, it appears, that keeping that Article in view, it was held that the application for restoration had been made with inordinate delay. It was further found that no reason whatsoever for the delay had been assigned. There was also no application for condonation of delay. In these circumstances, the application in question was disallowed and the revision petition was held to have abated on the ground that the application had been filed with unreasonable delay and not, be it noted, on the ground that it was time-barred under Art. 176 of the Limitation Act. There being no period of limitation prescribed for a petition like the present, the proper Article applicable would seem to be Art. 181, which prescribes a period of three years although it is not necessary to lay this down in this case. In any case, even if the matter were to be disposed of merely on the ground of laches, it cannot fairly be held that the present petition should be dismissed on that ground. If it were a case covered by Art. 168, the time for filing such application would have been 30 days, and the petitioner has exceeded that time by only one day. It is mentioned in the present petition that steps could not be taken earlier since Mt. Dharmi was moving from place to place and her abode was uncertain. True, this allegation in the present petition is not supported by an affidavit, but it is to be noted that the respondents in their reply have not challenged the correctness, but only the sufficiency, of the reason. The reason assigned by the petitioner for the delay must therefore be accepted as correct, & I hold that it is also sufficient. Both the preliminary objections raised by the learned counsel for the defendants-respondents therefore fail. As regards the merits of the application, I have already disposed of the same in holding that the petitioner had succeeded in giving sufficient reason for not having taken steps prior to 3-10-1952.

(6) The petition is allowed, the order of dismissal dated 2-9-1952 is set aside and the revision is restored for rehearing, but, as conceded by the learned counsel for the plaintiff-petitioner, on payment of costs to the defendants-respondents which I fix at Rs. 25/- (Rupees twenty-five).

E/D.R.R. Petition allowed.

A. I. R. 1953 HIM-P. 103 (Vol. 40, C. N. 46)

CHOWDHRY J. C.

Bindraban, Petitioner v. The State of Himachal Pradesh and others, Respondents.

Writ Petn. No. 2 of 1952, D/- 2-6-1953.

(a) Constitution of India, Art. 311—Employee holding civil post under State.

The fact that the majority of the shares of a company are held by a State does not mean that the State owns the company and therefore an employee of that company cannot be described as a person holding a civil post under the State. (Para 2)

(b) Constitution of India, Art. 226 — Conditions of service founded on contract — Benefit of maxim 'audi alteram partem' not given — Issue of writ.

It cannot be laid down that even where the conditions of service of a person are not governed by any statute, but are founded on a contract, he is entitled to the benefit of the maxim 'audi alteram partem'. A writ should not, therefore, issue in favour of such a person even if he has not been given the benefit of the maxim. AIR 1953 Punj 88, Disting. (Para 3)

(c) Constitution of India, Art. 226 — Contract of personal service — Specific performance — Writ petition for reinstatement — (Specific Relief Act (1877), S. 21 (b)).

A contract of personal service is not specifically enforceable and a suit by an employee for the relief of reinstatement is liable to be dismissed. The employee cannot obtain that relief by means of a writ petition for it is one of the cardinal principles governing writ petitions that none will issue where either the party claiming it has not the legal right to it, or there is no corresponding legal duty cast upon the respondent to perform the act for which the writ is claimed. (Para 4)

Anno: Specific Relief Act, S. 21 N. 3.

H. S. Doabia and Amar Chand Sud, for Petitioner; B. Sita Ram, for Respondents Nos. 2 and 3.

CASES CITED:

(A) ('53) AIR 1953 Punj 88: 54 Pun LR 100
(B) (1863) 32 LJCP 185: 8 LT 278
(C) (1906) 75 LJPC 50: (1906) AC 254

ORDER: This is a petition under Art. 226 of the Constitution by one Bindraban directed against the State of Himachal Pradesh, the Director of Industries Himachal Pradesh as liquidator of the Solan Electric Supply Company Ltd. and the Limited Company itself which is under liquidation. The petitioner was employed in 1949 as an accountant in the Company, and it appears that he was also confirmed on that post. After the Company had gone into voluntary liquidation the liquidator by his letter dated 22-10-1951 framed three charges against the petitioner and asked him to show cause within seven days why his services be not terminated. It was added in the letter that it will be open

to the petitioner to submit his explanation and to adduce such evidence in his defence as he may desire.

The petitioner submitted his explanation on 26-10-1951, but the liquidator terminated his services by his communication dated 10-12-1951 on the ground that the explanation submitted by the petitioner was unsatisfactory. The first two charges were with regard to the petitioner having absented himself from duty on two occasions without leave, and the third was a general charge of disobedience and misbehaviour towards his immediate superior, the Engineer-in-charge and Secretary of the Company. It was stated by the liquidator in his aforesaid letter dated 10-12-1951 terminating the petitioner's services that the petitioner had deliberately absented himself without leave, & that he had lodged a false complaint with the police against his immediate superior.

The contention of the learned counsel for the petitioner was that the liquidator had recorded no finding with respect to the third charge, and that he had not given opportunity to the petitioner to adduce evidence in respect of any of the charges. The reliefs claimed in the petition are that the order of termination of the petitioner's services be quashed, the petitioner be reinstated and the respondents be ordered to pay him remuneration for the entire period uptil his reinstatement.

(2) A preliminary objection was taken by Sri B. Sita Ram, the Advocate appearing for respondents 2 and 3. It may be stated here in passing that Sri B. Sita Ram said that he did not represent respondent 1, the State of Himachal Pradesh, and that there was nobody else representing the State. The case therefore proceeded ex parte against the State. The preliminary objection of the learned counsel for the respondents was that the petitioner had no right to claim any relief under Art. 226 of the Constitution since he held no civil post within the intendment of Art. 311, which has been specifically mentioned by the petitioner in his petition as the provision under which he questions his dismissal.

Now, it appears that the majority of the shares of the Limited Company are held by the State of Himachal Pradesh, so that it may be said at the most that the State controls the affairs of the Limited Company. That does not however mean that the State owns the Company, as contended by the learned counsel for the petitioner. It follows therefore that any employee of the Company cannot be described as a person holding a civil post under the State of Himachal Pradesh. It is not open therefore to the petitioner to question his dismissal within the provisions of Art. 311 of the Constitution.

(3) The learned counsel for the petitioner then referred to Para. 5 of the petition wherein the order of termination of the petitioner's services has been characterized as arbitrary and against the principles of natural justice, equity and good conscience. It was therefore argued that even irrespective of Art. 311 the petitioner is entitled to claim relief by invoking the extraordinary jurisdiction of this Court under Art. 226 if the above allegations be true. In support of this contention the learned counsel cited the following observations of Kapur J. in — 'Dr. Mukand Lal v. The Municipal Committee of Simla', AIR 1953 Punj 88 at page 94 (A):

> "Even in the absence of any rules, the principle of natural justice should come into play i.e. the maxim 'audi alteram partem' — no man shall be condemned unheard — would be applicable. It was held in — 'Cooper v. Wandsworth Board of Works', (1863) 8 L T 278 (B) and in a long line of cases where this case was followed that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. If the petitioner was to be discharged which in this case really means removal from service for an alleged misconduct, he should in all fairness have been given an opportunity to clear his character."

These observations were however made in connection with the bye-laws of the Simla Municipality under one of which the Civil Service Rules Punjab were applied in relation to the removal, dismissal etc. of the municipal employees. The observations in question therefore do not support the general proposition propounded by the learned counsel for the petitioner that even where the conditions of service of a person are not governed by any statute he is entitled to the benefit of the maxim 'audi alteram partem'. On the contrary, there is good ground for holding that writ petition should not issue in favour of a party, like the present petitioner, the terms of whose services are founded on a contract.

(4) The terms of the petitioner's services are embodied in his letter of appointment dated 10-6-1949, whereunder he was appointed as an accountant on a certain salary and with certain amenities, and after confirmation either side was to give three months notice or salary in lieu of notice to terminate the service. The Company reserved to itself the right to terminate the services without notice for misconduct, inefficiency and misbehaviour. It is thus manifest that the parties are governed by contract in the matter of the petitioner's services. It is well-established however that a contract of personal service is not specifically enforceable, and this is not because the legal remedy of damages is open to the aggrieved party, but because the Court does not possess the means and ability of enforcing its decrees. 'Frith v. Frith', (1906) A C 254 at p. 261 (C).

That being so, it is clear that if the petitioner had filed a suit against the respondent for the aforesaid relief of reinstatement it would have been dismissed. Can the petitioner then obtain that relief by means of a writ petition under Art. 226? The answer to this question must obviously be in the negative, for it is one of the cardinal principles governing writ petitions that none will issue where either the party claiming it has not the legal right to it, or there is no corresponding legal duty cast upon the respondent to perform the act for which the writ is claimed. From what has been stated above it is clear that in the matter of the petitioner's reinstatement he has neither the right to it nor has the respondent the duty to reinstate him. I therefore hold that this petition, so far as the relief of reinstatement is concerned, is wholly misconceived. As regards the prayer of recovery of arrears of remuneration, that cannot be granted to the petitioner because he has the alternative remedy of claiming it by a suit. The petition is accordingly dismissed, and the petitioner is directed to pay Rs. 40/- as costs of the contesting respondents 2 and 3.

A/V.R.B. Petition dismissed.

A.I.R. 1953 H. P. 105 (Vol. 40, C. N. 47)

CHOWDHRY J. C.

Sant Ram, Appellant v. The State.

Criminal Appeal No. 14 of 1952, D/- 9-3-1953.

(a) Criminal P. C. (1898), S. 225 — Charge under S. 302, Penal Code — (Penal Code (1860), S. 302).

Charge for murder — Charge not containing words "intentionally or knowingly" as given in model charge under S. 302, Penal Code — Charge, however, containing all details of the manner in which murder was alleged to have been committed — These details also put to accused when examined in Court of Committing Magistrate and also in Sessions Court under S. 342, Cr. P. C. — There was held no failure of justice as accused had not been misled in his defence. AIR 1927 Lah 432, Rel. on. (Para 5)

Anno: Cr. P. C., S. 225 N. 3.

(b) Criminal P. C. (1898), Ss. 211(1), 213 and 537 — Compliance with S. 211(1) after order of commitment.

Accused required to give list of witnesses under S. 211(1) after order of commitment had been made under S. 213 — Accused, however, refusing to give any list and stating that he would give such list in Sessions Court — Non-compliance with S. 211(1) before order of commitment held could not be said to be not cured by S. 537. AIR 1953 Cal 10 and AIR 1953 Cal 12, Distinguished. (Para 6)

Anno: Cr. P. C., S. 211 N. 6; S. 537 N. 6.

(c) Criminal P. C. (1898), Ss. 364(2) and S. 533 — Non-compliance with S. 364(2).

Where the record does contain a full and true account of the statement of the accused, the mere absence of a certificate to that effect under S. 364(2) is a defect which is cured under S. 533. (Para 7)

Anno: Cr. P. C., S. 364 N. 10; S. 533 N. 12.

(d) Criminal P. C. (1898), Ss. 289(1) and 537 — Non-compliance with S. 289(1).

Where the failure to comply with provisions of S. 289(1) has not occasioned a failure of justice, the omission is covered by S. 537. AIR 1920 Pat 471, Distinguished; AIR 1918 All 298, Rel. on. (Para 9)

Anno: Cr. P. C., S. 289 N. 11.

(e) Criminal P. C. (1898), S. 164 — Confession must be voluntary.

It is not enough for the Magistrate to record the confession and say that he was satisfied as to its voluntary nature, but the Courts before whom the confession is used must have materials on which they can be satisfied that the confession was in fact voluntary. (Para 10)

Anno: Cr. P. C., S. 164 N. 14.

(f) Criminal P. C. (1898), S. 164 — "Upon questioning the person."

It is not necessary that the Magistrate recording confession should ask the accused as to why he is going to make the confession, and all that is necessary for him to do is to satisfy himself by questioning him that he is making the confession voluntarily. What shape or form the questions are to take, and how closely are the questions to be put to the accused, are matters which must be left to the discretion of the Magistrate according to the facts and circumstances of each case. AIR 1951 Orissa 71 and AIR 1951 Him P 75, Foll. (Para 10)

Anno: Cr. P. C., S. 164 N. 15.

(g) Criminal P. C. (1898), S. 164 — Retracted confessions — (Evidence Act (1872), S. 24).

Even in the case of a nominal retraction, the rule of caution which requires a retracted confession to be corroborated in all its material particulars before forming the basis of conviction must be followed. (Para 12)

Anno: Cr. P. C., S. 164 N. 18; Evidence Act, S. 24 N. 9.

(h) Criminal P. C. (1898), S. 164 — Acceptance of confession — (Evidence Act (1872), S. 24).

A confession, if accepted at all, should be accepted as a whole. (Para 13)

Anno: Cr. P. C., S. 164 N. 7; Evidence Act, S. 24 N. 4.

(i) Penal Code (1860), Ss. 380 and 392 — Robbery or theft in dwelling house.

Being enraged by slight provocation accused, a domestic servant, committing murder of deceased at 9 P. M. — Thereafter accused continued thinking and weeping up to 4 A. M. — After that accused started breaking open boxes and packing stolen articles in trunk — Murder held could not be said to have any connection with theft and offence fell under S. 380 and not S. 392. (Para 14)

Anno: Penal Code, S. 380 N. 1; S. 392 N. 1.

Paras Ram, for Appellant; L. N. Sethi, Govt. Advocate, for the State.

CASES CITED:

(A) ('27) AIR 1927 Lah 432: 28 Cri LJ 419
(B) ('53) AIR 1953 Cal 10: 1953 Cri LJ 128
(C) ('53) AIR 1953 Cal 12: 1953 Cri LJ 160
(D) ('38) AIR 1938 Pesh 5: 39 Cri LJ 448
(E) ('20) AIR 1920 Pat 471: 21 Cri LJ 705
(F) ('18) AIR 1918 All 298: 19 Cri LJ 209
(G) ('38) AIR 1938 Pat 352: 39 Cri LJ 725
(H) ('17) AIR 1917 Pat 475: 18 Cri LJ 623
(I) ('51) AIR 1951 Ori 71
(J) ('51) AIR 1951 Him P 75: 1952 Cri LJ 15
(K) ('31) AIR 1931 All 609: 32 Cri LJ 1052
(L) ('33) AIR 1933 All 31: 34 Cri LJ 489
(M) ('42) AIR 1942 Lah 271: 44 Cri LJ 77

JUDGMENT: This is an appeal by one Sant Ram, aged 22, of village Droh in Kangra district against his conviction by the learned Sessions Judge, Sirmur, for offences punishable under ss. 302 and 392, I. P. C., and the sentences of transportation for life and five years' R. I. imposed upon him under the respective sections, the sentences running concurrently.

(2) The prosecution story, as found established by the learned Sessions Judge, is as follows. The appellant came to Nahan in search of employment and casually met one Jiwanu (P. W. 10). Jiwanu introduced him to his former master Kr. Pratap Singh (P. W. 19), and the latter engaged the appellant on 18-1-1952. Kr. Pratap Singh's wife was already away at Lucknow, and he himself left for Patiala on 19-1-1952. The only inmates of the house left after his departure were his child aged 1½ years, a maid servant Mt.

Sandla who looked after the child, a servant named Chambel Singh (P. W. 25) and the present appellant. Chambel Singh also went away on 21-1-1952 to attend a marriage. That night, i.e. on the night between the 21st and 22nd January 1952, the appellant committed the murder of Mt. Sandla, and after breaking open a number of boxes he stole golden and silver ornaments and Rs. 6,300/- in currency notes. The murder was committed by tying a 'pashmina shawl and a muffler so tightly round the mouth and the neck of Mt. Sandla that, in the opinion of Dr. Nirmala Devichand (P. W. 27), death was caused by strangulation and the consequent asphyxia.

(3) The crime was detected early the following morning by Atma Ram (P. W. 2), a servant of Kr. Pratap Singh's cousin Kr. Jitendra Singh (P. W. 8), when he went as usual to fetch milk from Kr. Pratap Singh's house. Nobody responded to Atma Ram's calls and the only person he found in the house was Kr. Pratap Singh's child who was crying. Atma Ram took the child to his master and the latter along with Mohan Singh (P. W. 1), Mansa Ram (P. W. 3), and Sri Gopal (P. W. 28) went to Kr. Pratap Singh's house and found the dead body of Mt. Sandla lying in a courtyard with her hands and feet tied and also her face and neck, as aforesaid, and locks of boxes broken open and things scattered about. Kr. Jitendra Singh soon lodged the first information report and the police arrived and, sending the dead body to the Civil Hospital at Nahan for post-mortem examination, locked and sealed the house until the arrival of Kr. Pratap Singh the same evening. As the newly appointed servant, the present appellant, was found missing, suspicion naturally fell upon him, and he was eventually arrested in his own village in Kangra district on 4-4-1952. On the same date the stolen property including currency notes worth Rs. 4,000/-, and some articles which the appellant had purchased with the stolen money, were recovered by the police in the same village at the pointing out of the appellant from the houses of the appellant's brother-in-law Mahant (P. W. 26) and his uncle Labhu (P. W. 31) and one other also named Mahant (P. W. 29). The appellant was brought to Nahan on 7-4-1952. The following day he expressed his desire to make a confession and was sent to Ch. Hardayal Magistrate first class (P. W. 9). No Magistrate was, however, in station on that or the following day except Sri C. L. Kapila, who was to hold the inquiry. The confession was accordingly recorded by Ch. Hardayal (P. W. 9) on 10-4-1952.

(4) The appellant was committed to Sessions on 15-5-1952 for the offences for which he was convicted as aforesaid by the learned Sessions Judge on 11-9-1952. There is no direct evidence and the conviction is based on the confession of the appellant and its corroboration in material particulars. I shall first deal with certain arguments of a legal and technical nature of the learned counsel for the appellant, for if some of those arguments are accepted much of the prosecution evidence would be eliminated and that which would be left would be too meagre to sustain the conviction for murder.

(5) The first argument of the learned counsel for the appellant relates to the charge of murder. He contended that the charge did not contain the words "intentionally or knowingly", as given in the model charge under *s.* 302, I. P. C., in Rattan Lal and Dhiraj Lal's Law of Crimes. According to the learned counsel the said words constituted an essential ingredient of the charge of murder, and that therefore their omission from the charge had occasioned a failure of justice which was incurable under s. 537, Cr. P. C. A perusal of the charge, however, shows that it contained all the details of the manner in which the murder was alleged to have been committed. That being so, the appellant must have understood it thoroughly that the charge against him was that he had committed the murder intentionally or knowingly although those words were not actually used. These details were also put to the appellant when he was examined in the Court of the committing Magistrate and again in the Sessions Court under s. 342 of the Code. It is clear, therefore, that the charge did not really suffer from the said defect, and that there had been no failure of justice as the appellant had not been misled in his defence. I am supported in this view by a ruling of the Lahore High Court reported as —'Allah Din v. Emperor', AIR 1927 Lah 432 (A). That was a case where in a charge under s. 498, I. P. C., the words knowledge or reason to believe were missing but it was held that the omission did not affect the case since the accused knew what they were charged with.

(6) The next argument of the learned counsel was that the provisions of s. 211(1) of the Code had not been properly complied with in that he was questioned under that provision after an order of commitment had been made by the Magistrate under s. 213. He cited the two rulings reported as —'Sripati Duley v. State', AIR 1953 Cal 10 (B), and —'Kashinath Das v. Kalipada Das', AIR 1953 Cal 12 (C), where it has been held that the provisions of Ss. 211 and 212 are substantial provisions of procedure the non-compliance with which is not curable by the provisions of s. 537, Cr. P. C. The reasoning behind those rulings was that if the accused is not required under s. 211(1) of the Code to give in orally or in writing a list of the witnesses whom he wishes to be summoned to give evidence on his trial before making an order of commitment, the Magistrate is deprived of the opportunity of exercising his discretion under s. 212 of summoning and examining any of the said witnesses which might conceivably have resulted in the accused being discharged. The two rulings cited by the learned counsel are, however, distinguishable since in one of them the provisions of s. 211(1) were not at all complied with and in the other they were complied with after making the order of commitment and the accused gave a list of witnesses. In the present case even if it be supposed that the appellant was examined under s. 211(1) after the making of the order of commitment, he refused to give any list of witnesses before the committing Magistrate and stated that he would submit such a list in the Court of Session. That being so, there was no question of the Magistrate exercising the discretion under s. 212 of the Code of summoning and examining any of those witnesses and of possibly discharging the accused.

In the next place, it is not borne out that the inquiry from the accused under s. 211(1) was in this case made after the passing of the order of commitment. The learned counsel for the appellant sought to draw that conclusion from the fact that in the order-sheet the writing of the order of commitment preceded the result of the examination of the accused under S. 211 (1). The record of the case, however, shows that the page containing the question and answer of the accused under s. 211(1) precedes the order of commitment, all the pages of the record being duly stitched and serially numbered. This state of the record confirms the presumption that judicial and official acts have been regularly performed. A perusal of the order-sheet relied upon by the learned counsel for the appellant shows that the examination of the accused under s. 211(1) was mentioned at the end by way of an addendum because it had not been mentioned at its proper place in the sequence of events of the day. This is clear from the use of the word 'neez', or also, before the relevant sentence. That this is the correct interpretation to be put upon the order-sheet is further confirmed from the fact that the sentence in question appears after it had been mentioned in the order-sheet that the accused had been sent to the judicial lock up. It could not possibly be suggested that the accused was examined under s. 211(1) after he had been sent to the judicial lock up. The argument of the learned counsel relating to non-compliance with the provisions of s. 211(1) of the Code has, therefore, no force.

(7) The next argument of the learned counsel for the appellant was directed against the examination of the appellant under s. 342 of the Code in the Court of the committing Magistrate. This statement of the accused was tendered in the Sessions Court under s. 287 of the Code and is marked Ex. P. LL. The contention of the learned counsel was that the statement was inadmissible in evidence inasmuch as it did not contain the certificate, as required by s. 364(2) of the Code, that the record contained a full and true account of the statement made by the accused. There is a certificate of the Magistrate appended at the foot of the statement to the effect that the statement of the accused was recorded in his presence and hearing and that the same had been heard and admitted by the accused to be correct, but there is not the further certificate, as required by the said provision, that the record, contained a full and true account of the statement made by the accused. The Magistrate used a rubber stamp for the said certificate, and it appears, therefore, that the said omission existed in other cases of the examination of the accused under s. 342 of the Code also in that Court. It is surprising that a rubber stamp should have been got prepared for the Court in question which failed to comply with one of the important ingredients of s. 364 of the Code. The attention of the District Magistrate in question will be invited to this fact so that the mistake may be rectified in the Court of the Magistrate in question and of any other Court where a similar defective rubber stamp might be in use.

It was further argued by the learned counsel that s. 533 of the Code did not cure the defect because no evidence was taken under that section that the statement in question was a full & true account of the accused, & because the error had injured the accused as to his defence on the merits. In support of his argument he cited the ruling reported as —'Kishan Chand v. Emperor', AIR 1938 Pesh 5 (D). That was a case where the Magistrate had omitted to sign the certificate prescribed by s. 164 of the Code. It was, however, held that the defect was cured since no prejudice had been shown to have been caused to the accused due to the omission. The main thing to see, therefore, is whether the error had injured the accused in this case as to his defence on the merits.

(8) It was stated by the learned counsel for the appellant that he had instructions to say that his client stated before the committing Magistrate when confronted with his confession that he had made the confession at the instance of the police and that it was incorrect. No such statement actually appears in Ex. P. LL, That, it was argued by the learned counsel for the appellant, was immaterial since the Magistrate had failed to certify that the record contained a full and true account of the statement made by the accused. It is, however, noteworthy that no such allegation was made by the accused when he was examined under s. 342 of the Code in the Sessions Court. All that he stated when confronted with Ex. P. LL was that it was incorrect and had been made as a result of tutoring by the police. He did not say that he had made a certain statement which was missing from Ex. P. LL. The aforesaid statement made by the counsel for the appellant in this Court on instructions from his client was, therefore, clearly an afterthought. There is one other important reason for holding that the accused could not possibly have made the said statement before the committing Magistrate under s. 342. A perusal of Ex. P. LL. would show that in that statement under s. 342 before the committing Magistrate the accused virtually reiterated almost every detail of his confession. It is incredible, therefore, that he should have further stated before the committing Magistrate that the confession was incorrect or that it had been made at the instance of the police. The foundation for the argument that the omission in question had injured the accused as to his defence on the merits, therefore, totally vanishes. As to whether in fact the record Ex. P. LL contained a full and true account of the statement of the accused under s. 342 in the Court of the committing Magistrate, there is at least the certificate that the statement was read out to the accused and admitted by him to be correct. Had there been any omission, the accused could not but have pointed it out to the Magistrate then and there. I have no doubt, therefore, that, notwithstanding the absence of a certificate to that effect, the record in question did contain a full and true account of the statement of the appellant. I hold that the defect stands cured under s. 533 of the Code, and that the statement of the appellant Ex. P. LL was admissible in evidence.

(9) It was next argued that the Sessions Judge had failed to comply with the provisions of s. 289(1) of the Code. The accused was examined by the Sessions Judge under s. 342 with a view to enabling him to explain the various circumstances appearing in the

evidence against him, and at the end he was asked generally whether he wished to say anything else. No specific question was, however, put to him as to whether he meant to adduce evidence, as required by s. 289(1). It was, therefore, contended by the learned counsel for the appellant that the conviction and sentence of the appellant should be set aside on the authority of —'Raghu Bhumij v. Emperor', AIR 1920 Pat 471 (E). That case is, however, distinguishable since there was a total omission of the examination of the accused under s. 342. On the other hand, there is a ruling of the Allahabad High Court reported as — Premgir v. Emperor', AIR 1918 All 298 (F), where an omission under s. 289(4) of the Code by reason of the accused not having been called upon to enter on his defence was held to have been covered by the provisions of s. 537 of the Code as it was manifest that the accused was not in any way prejudiced by the omission. One of the circumstances taken into consideration in that case was that the accused was defended by a pleader. In the present case also the appellant was defended by a counsel in the Sessions Court, so that if he did mean to adduce any evidence his counsel could not have failed to make that request before the Sessions Judge. It is noteworthy that in answer to the said general question the accused did say that all the recovered articles had been purchased by him from Nabha and other places and that he was prepared to prove that fact provided he was sent there to find out the names of the persons from whom he had made the purchases. He further stated that he did not know their names and could not furnish any list.

It is manifest, therefore, that the matter of adducing evidence was pointedly in the mind of the accused when he made this statement, and that the only wish expressed by him was to be allowed to go to Nabha to ascertain the names of the persons from whom he had made the alleged purchases. That request of the accused was turned down by the learned Sessions Judge, as his order-sheet shows, and the learned counsel for the appellant did not question that order. The accused did not express any wish to produce any other evidence. It has also been noticed that he refused to give any list of witnesses to the committing Magistrate, adding that he would do so in the Sessions Court. Even in the argument before me the learned counsel for the appellant did not point out the evidence which the accused would have produced had he been interrogated by the Sessions Judge under the provisions of s. 289(1). In these circumstances, I am clearly of the opinion that this omission also occasioned no failure of justice and was, therefore, covered by the provisions of s. 537 of the Code.

(10) Lastly, the learned counsel attacked the admissibility of the confession of the appellant. It was argued by him on the authority of — 'Emperor v. Ramsidh Rai', AIR 1938 Pat 352 (G), that it is not enough for the Magistrate to record the confession and say that he was satisfied as to its voluntary nature, but that the Courts before whom the confession is used must have materials on which they can be satisfied that the confession was in fact voluntary. In that case the record did not show that any such question was asked by the Magistrate. That criticism is, however, not applicable to the confession in the present case. The Magistrate, Ch. Hardayal (P. W. 9), who recorded the confession, did not only state in the Sessions Court that he recorded the confession after fully satisfying himself that the deponent was making it voluntarily, but he has left enough material on the record of the confession in the shape of questions and answers from which the Courts before whom the confession is used can be satisfied that the confession was in fact voluntary. Apart from giving the warning and explanation as required by s 164(3), the Magistrate further asked the appellant whether he was making the statement on the persuasion of the police, whether he was making it of his own free will and why he was making the confession. The appellant was produced before the Magistrate from police custody, but the Magistrate had the handcuffs taken off and removed the police from the court-room. He further assured the appellant that after his statement had been recorded he would not be sent to the police custody but to the judicial lock up, and in point of fact the appellant was sent to the judicial lock up after his statement had been recorded. After observing all these formalities the Magistrate gave the appellant half an hour for deliberation, and it was only after that that he proceeded to record the confession. The Magistrate was, therefore, fully justified in saying that he recorded the confession after fully satisfying himself that it was being made voluntarily. Another ruling cited by the learned counsel was —'Jiubodhan v. Emperor', AIR 1917 Pat 475 (H), but the condition laid down in that ruling, namely, that the Magistrate is bound to question the accused closely as to his motive in making a confession, is also substantially satisfied in the present case, for the Magistrate did ask him as to why he was making the confessional statement. Of course, it cannot be said that the appellant was questioned closely as to his motive, as laid down in this ruling, but that is not absolutely necessary. All that s. 164(3) requires is that no Magistrate shall record a confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. What shape or form the questions are to take, and how closely are the questions to be put to the accused, are matters which must be left to the discretion of the Magistrate according to the facts and circumstances of each case. It may be that in a certain case the Magistrate would not be justified in believing that the confession was being made voluntarily unless he questions the accused closely as to his motive in making the confession. In another case the Magistrate may not have put any question to the accused as to his motive, and yet the precautions taken by him and the other questions put by him to the accused might be sufficient to satisfy him that the confession was being made voluntarily. I am supported in this view by a ruling of the Orissa High Court reported as — 'Suka Misra v. the State', AIR 1951 Ori 71 (I). To the same effect is a ruling of this Court reported as — 'Ranjha v. the State', AIR 1951 Him-P. 75 (J), where it was laid down that it was not necessary that the Magistrate should ask the accused as to why he

was going to make the confession, and that all that was necessary for him to do was to have satisfied himself by questioning him that he was making the confession voluntarily. The satisfaction of the Magistrate on that score in the present case was fully justified, as adverted to above. For the same reason another ruling cited by the learned counsel for the appellant, i.e., — 'Patey Singh v. Emperor' AIR 1931 All 609 (K), which makes it incumbent upon the Magistrate not merely to put the usual formal questions but to direct his attention to the circumstances under which the confession came to be made has no application here.

(11) Stress was laid by the learned counsel for the appellant on other ruling reported as — 'Nazir v. Emperor', AIR 1933 All 31 (L), where it was laid down as follows:

> "It has been stressed over and over again that when a confession is made and subsequently retracted, the committing Magistrate and the Sessions Judge should enquire into all the circumstances in which it was made and those in which it was subsequently retracted."

It cannot, however, be said that this salutary rule was not followed by the Sessions Judge in the present case. Those circumstances may briefly be examined again. Most of the stolen property had already been recovered at the instance of the appellant on 4-4-1952. He must have, therefore, realised that the game was up and that he had better confess the guilt. A perusal of his confession will show that he was smitten with remorse immediately after the commission of the murder. There was nothing strange, therefore, for such a man to have made a clean breast of the whole thing when he realised that there was no escape for him. Furthermore, the appellant was not in police custody for an unduly long time, and there was no undue delay in the police producing him before a Magistrate after he had expressed his desire of making a confession. It is also noteworthy that in the Sessions Court, where the confession was retracted for the first time, no allegation of torture or of pressure of any kind was made by the appellant against the police, for all that he said was that he had been tutored by the police to make the statement. The circumstances immediately attending the making of the confession have been referred to above in speaking of the precautions taken by the Magistrate who recorded the confession and the questions put by him to the appellant. As regards the circumstances in which the confession was retracted, it is significant that the retraction did not take place until after the entire prosecution evidence had been recorded in the Sessions Court, and this despite the fact that the appellant was represented by a counsel from the commencement of the trial. This tardy retraction loses all its force when it is borne in mind, as adverted to above, that the confession was adhered to by the appellant before the committing Magistrate. I, therefore, fully agree with the learned Sessions Judge that the confession in the present case was a voluntary one.

(12) The next question is whether the confession is true. Even in the case of a nominal retraction, as in the present case, the rule of caution which requires a retracted confession to be corroborated in all its material particulars before forming the basis of conviction must be followed. The evidence produced in this case fully satisfied that rule. The confession begins by stating the circumstances in which the appellant secured employment with Kr. Pratap Singh, and these find corroboration from the statements of Jiwanu (P. W. 10), Ram Gopal (P. W. 4), Kr. Pratap Singh (P. W. 19) and Chambel Singh (P. W. 25). The last two of these witnesses further corroborate the confession with regard to the number of days the appellant was in Kr. Pratap Singh's service before he committed the offences and the absence of Kr. Pratap Singh & the other servant Chambel Singh on the crucial night. There is of course no eye-witness to corroborate the details of the murder and theft, but that part of the confession finds ample corroboration in the medical evidence of Dr. Nirmala Devichand (P. W. 17), in the fact of the muffler with which the deceased was strangulated being identified by Jiwanu (P. W. 10), Kr. Pratap Singh (P. W. 19) and Chambel Singh (P. W. 25) as belonging to the appellant, in the recovery of the stolen property at the instance of the appellant from his village on 4-4-1952 and in the identification of that property by Kr. Pratap Singh (P. W. 19) and Abdul Karim (P. W. 32) as belonging to them. It has to be noted here in passing that the ornaments and currency notes in question had been entrusted to Kr. Pratap Singh for safe custody by Abdul Karim. Indeed, the learned counsel for the appellant had no criticism to offer against these recoveries, and he did not advance any argument against the culpability of the appellant for the theft of those articles. On foot of the appellant's confession and the said corroborative evidence, therefore, I have no hesitation in holding that the appellant was responsible for the strangulation of Mt. Sandla which resulted in her death, and that he committed theft in the house of Kr. Pratap Singh on the night in question.

(13) A word about the actual offences committed by the appellant. In this connection, there can be no doubt about the soundness of the proposition propounded by the learned counsel for the appellant on the authority of — 'Ghulam Mohammad v. Emperor', AIR 1942 Lah 271 (M), that a confession, if accepted at all, should be accepted as a whole. The learned counsel contended that all that the confession established was that the appellant had tied the deceased's mouth with his muffler and with the deceased's pashmina shawl, and that this did not prove that he had strangulated her. The medical evidence, however, shows that the mouth and the neck of the deceased were tied first with the woollen muffler and above that with the shawl, and that the skin of the whole neck was blenched due to tight compression by the folds of the muffler and had become hard and parchment like. That evidence is further to the effect that on dissection the soft tissues showed ecchymosis of blood in subcutaneous tissues and adjacent muscles and that the third ring of the trachea was fractured. It is clear, therefore, that strangulation and the consequent asphyxia were the direct result of the appellant having tied the mouth and neck of the deceased with his own muffler and the deceased's pashmina shawl. The learned Sessions Judge was right in holding that the ap-

pellant knew that this act of his was so imminently dangerous that it must, in all probability, cause death, or such bodily injury as was likely to cause death. It is further clear that the appellant committed the act without any excuse for incurring the risk of causing death or such injury as aforesaid since he has admitted in his confession that the only reason why he acted in this manner was that the deceased, whose age has been given in the post-mortem report as between 35 and 40, and whom the appellant has repeatedly described in his confession as an old woman, had abused him for having broken a spoon and threatened to get him imprisoned by reporting the matter to the master when he returned. The act of the appellant, therefore, clearly fell within the purview of para. 4 of S. 300, I. P. C., and amounted to murder.

(14) I am, however, not in agreement with the learned Sessions Judge that the appellant was guilty of the offence of robbery. True, the appellant did commit theft, but theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint, as defined in S. 390, I. P. C. These conditions are not satisfied in the present case since according to his confession the appellant committed the murder at about 9 P. M., being enraged with the deceased's abuses and threat. Thereafter he continued thinking and weeping up to 4 A. M., and during this interval he even heated the milk and gave it to the child to drink. It was only after 4 A. M. that he started breaking open locks of boxes and packing the stolen articles in a trunk. It cannot, therefore, be said, or at least said with certainty, that the murder had any connection with the theft. It appears that the appellant committed the murder on the very slight provocation of having been abused by the deceased for breaking the spoon and threatened to be complained against to the master of the house on his arrival, that he was filled with remorse thereafter and that it was only as an afterthought that he committed theft about seven hours subsequently. I hold, therefore, that it was not the offence of robbery under S. 392 but of theft in a dwelling house under S. 380, I. P. C., that was committed by the appellant. At the same time, I see no reason to reduce the sentence of five years' rigorous imprisonment under this count.

(15) The result is that the appeal is dismissed, the conviction of the appellant & the sentence of transportation for life under S. 302, I. P. C., are maintained, and his conviction under S. 392 is altered to one under S. 380, I. P. C., but the sentence of five years' rigorous imprisonment is maintained. The two sentences will run concurrently.

B/G.M.J. Order accordingly.

A.I.R. 1953 H. P. 110 (Vol. 40, C. N. 48)

CHOWDHRY J. C.

Devi Das, Plaintiff-Appellant v. Bushahr Sangh, Defendant-Respondent.

First Appeal No. 16 of 1951, D/- 18-5-1953.

(a) Limitation Act (1908), Ss. 5, 14 — Applicability of principle of S. 14 to appeals.

The principle of S. 14 is applicable by analogy to appeals also to ascertain sufficiency of cause for extension of period under S. 5. AIR 1953 Him. P. 15, Rel. on. (Para 2)

Anno: Limitation Act, S. 5 N. 9; S. 14 N. 6.

(b) Limitation Act (1908), S. 14 — "In good faith."

Where there are conflicting views on a certain point and a party adopts one of the views, it should be taken to have acted in good faith even though the Court adopts the contrary view. AIR 1941 Pesh 74, Rel. on. (Para 3)

Anno: Limitation Act, S. 14 N. 20.

(c) Limitation Act (1908), S. 14 — 'In good faith.'

Held that the appeal was prosecuted in good faith, though of course wrongly, in the Court of the District Judge. (Para 4)

Anno: Limitation Act, S. 14 N. 20.

(d) Limitation Act (1908), S. 5 — Existence of circumstances contemplated by S. 14.

Though an appellant has to account for every day of the delay in filing an appeal, if by the exclusion of time under S. 14 the appeal be still within limitation, the appellant will be deemed to have explained every day of the delay. Case law discussed. (Paras 6, 15)

Anno: Limitation Act, S. 5 N. 9.

(e) Civil P. C. (1908), O. 20, R. 16; O. 41, R. 1 — Delegation of function by Commissioner to others.

The order passed by the trial Court appointing the Commissioners does not empower them to delegate their function to anybody else. Though this objection is not taken before the trial Court, it cannot for that reason be shut out in the High Court, in appeal when it appears to be well-founded on the very face of the record. (Para 18)

Anno: Civil P. C., O. 20, R. 16 N. 2; O. 41, R. 1 N. 12.

Man Mohan Nath, Labh Singh and K. R. Khosla, for Appellant; Thakar Dass and Rattan Chand Sud, for Respondent.

CASES CITED:

(A) ('53) AIR 1953 Him P 15
(B) ('37) AIR 1937 PC 276: 169 Ind Cas 769 (PC)
(C) ('43) AIR 1943 Mad 685: 211 Ind Cas 10
(D) ('29) AIR 1929 PC 147: 10 Lah 737 (PC)
(E) ('38) AIR 1938 Mad 435: ILR (1938) Mad 598 (FB)
(F) ('41) AIR 1941 Pesh 74: 196 Ind Cas 654
(G) ('40) AIR 1940 Bom 5: 187 Ind Cas 85
(H) ('51) AIR 1951 Simla 170: ILR (1951) Punj 136
(I) ('26) AIR 1926 All 252: 91 Ind Cas 865
(J) ('02) 25 Mad 166
(K) ('88) 183 Pun Re 1888 (FB)
(L) ('83) 1883 All WN 142: 5 All 591
(M) ('82) 89 Pun Re 1882
(N) ('17) AIR 1917 PC 156: 45 Cal 94 (PC)
(O) ('67) Beng LR (Sup) Vol. 728: 7 WR 529 (FB)
(P) ('19) AIR 1919 Pat 238: 52 Ind Cas 959
(Q) ('03) 30 Cal 309: 30 Ind App 20 (PC)
(R) ('18) AIR 1918 All 180: 45 Ind Cas 991

(S) ('29) AIR 1929 Cal 240: 119 Ind Cas 383
(T) ('51) AIR 1951 Simla 209: ILR (1950) Punj 434

JUDGMENT : This is a first appeal by the plaintiff Devi Das Mahajan against the judgment and decree of the learned Subordinate Judge of Rampur Bushahr, dated 28-12-1950, whereby his suit as agent for rendition of accounts and recovery of Rs. 100/-, or whatever be found due on the taking of accounts, was dismissed, and a decree for Rs. 22,081/-/6 was passed against him and in favour of the principal, the defendant Co-operative Society known as the Bushahr Sangh of Rampur.

(2) The appeal, filed on 31-7-1951, being prima facie time barred under Art. 156, Limitation Act (hereinafter referred to as the Act), which prescribes a period of 90 days from the date of the decree appealed from, the plaintiff-appellant filed along with the appeal an application for extension of period under S. 5 read with S. 14 of the Act. It appears that well within the 30-days period prescribed under Art. 152 of the Act the plaintiff filed an appeal against the aforesaid judgment and decree in the Court of the District Judge Mahasu on 22-1-1951. On a preliminary objection taken on behalf of the defendant-respondent that the appeal did not lie in that Court but in the Court of the Judicial Commissioner, the learned District Judge upheld the objection by his judgment and order dated 13-7-1951 and directed that the appeal be returned to the appellant for presentation to the proper Court. The appeal was actually returned on 18-7-1951, and, as adverted to above, it was presented in this Court on 31-7-1951. S. 14 no doubt applies in terms only to suits, but as held in —'Munshi Ram v. Raghubir Chand', AIR 1953 Him P 15 (A), relying upon —'Rajendra Bahadur v. Rajeshwar Bali', AIR 1937 PC 276 (B), the principle of that section is applicable by analogy to appeals also to ascertain sufficiency of cause for extension of period under S. 5 of the Act. The cause of action for the proceeding of appeal before the District Judge was the same as that for the present appeal, and the District Judge was unable to entertain that proceeding for want of jurisdiction. In order that the plaintiff-appellant may be entitled to the benefit of S. 14 all that remains to be seen therefore is whether he prosecuted the appeal before the District Judge with due diligence and in good faith.

(3) Under para 31(b), Himachal Pradesh (Courts) Order, 1948, the appeal being from a decree of a Subordinate Judge valued at more than Rs. 5,000/-, it should have been filed in the Court of the Judicial Commissioner. The contention of the learned counsel for the appellant, however, was that as the suit was valued at Rs. 100/- he filed the appeal in the Court of the District Judge. In support of his contention he relied upon a ruling of the Madras High Court, —'Ramadoss v. Appalanarasayya', AIR 1943 Mad 685 (C). That was a suit for accounts of a dissolved partnership and for possession of the plaintiff's share of the partnership assets. The plaintiff had valued the relief at Rs. 100/-. The suit was dismissed and a decree for Rs. 4,000/- odd was passed against him. He thereupon filed an appeal valuing the relief at Rs. 100/-. Relying upon a ruling of the Privy Council reported as —'Faizullah Khan v. Mauladad Khan', AIR 1929 PC 147 (D), and a Full Bench ruling of the same High Court reported as —'In re Dhanukodi Nayakkar', AIR 1938 Mad 435 (FB) (E), it was held that in the matter of valuation of an appeal under S. 7(iv)(f), Court Fees Act, the plaintiff-appellant had greater freedom than the defendant-appellant and the plaintiff-appellant could value his relief in the manner in which he could value it in the plaint. Reliance was placed on that ruling before the District Judge also, but the contention of the plaintiff-appellant was not accepted. The District Judge referred to a number of rulings, and he held, and quite rightly, that the preponderance of authority was that in an accounts suit it is the value of the amount of decree that determines the Court of Appeal. Now, where there are conflicting views on a certain point and a party adopts one of the views, it should be taken to have acted in good faith even though the Court adopts the contrary view. —'Shivan Ditta v. Radha Kishan', AIR 1941 Pesh 74 (F).

(4) The learned counsel for the defendant-respondent however referred to the notification No. J. 79-22/48, dated 3-11-1948, published in Part II-A of the Gazette of India, dated 13-11-1948, passed by the Judicial Commissioner with the previous sanction of the Chief Commissioner under the proviso to para 31, Himachal Pradesh (Courts) Order, 1948, whereunder appeals from decrees and orders of Subordinate Judges in unclassed suits of value not exceeding Rs. 100/- have to be preferred to the Senior Subordinate Judge. The present is no doubt an unclassed suit, and it was, therefore, argued that, if Rs. 100/- was taken by the appellant as the value of the suit, the appeal should under the said notification have been filed in the Court of the Senior Subordinate Judge and not in that of the District Judge. It was further contended, relying upon —'Brijmohandas v. Sadashiv', AIR 1940 Bom 5 (G), that a proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith under S. 14. The history of the Court at Rampur Bushahr is, however, an extremely chequered one. When the present suit was filed on 7-12-1948 the presiding officer of the Court was Sri Dina Nath, who exercised the powers of a Senior Subordinate Judge. In between that date and 28-12-1950, when the suit was eventually decided, there were many changes of officers and their powers.

Sri Dina Nath remained Senior Subordinate Judge till 8-7-1949 and was succeeded by Sri Om Parkash in the same capacity. Sri Om Prakash was transferred to Jubbal as Senior Subordinate Judge on 29-1-1950 and Sri Harish Chandra succeeded him at Rampur. Sri Harish Chandra had only the powers of a Subordinate Judge upto Rs. 500/- and he held the office till 20-9-1950, when he was succeeded by Sri A. S. Bhatnagar. Sri A. S. Bhatnagar was also a Subordinate Judge, and it was he who decided the present suit as such on 28-12-1950. It appears that after the transfer of Sri Om Prakash from Rampur to Jubbal the present case was transferred to the Court of his successor-in-office, who was a Subordinate Judge, by an order dated 16-2-1950. No notice of this order appears, however, to have been given to any party, and the case continued in

the same Court although after the transfer of Sri Om Prakash the succeeding presiding officers until the decision of the case were invested with only the powers of a Subordinate Judge and not of a Senior Subordinate Judge. It also appears that on 22-1-1951, when the appeal was filed in the Court of the District Judge, Sri Om Parkash was holding the office of a Senior Subordinate Judge at Jubbal. Strictly speaking, therefore, if Rs. 100/- was the valuation to be taken into consideration, the appeal should have been filed in the Court of the Senior Subordinate Judge at Jubbal.

From what has been stated above, however, it is manifest that the suit was filed in the Court of a Senior Subordinate Judge, that it remained pending before two successive presiding officers with that power upto 29-1-1951 and that it was transferred to the file of the succeeding presiding officer with only the power of a Subordinate Judge by an order which was not notified to the parties. In the circumstance, it was possible for the plaintiff to have remained under the misapprehension that the suit was instituted before and decided by a Senior Subordinate Judge, and therefore he cannot be blamed for having contravened the said notification. It may be added further that there is nothing to show that there was any public notification with regard to the powers of the presiding officers who succeeded Sri Om Parkash at Rampur. Another noteworthy fact is that when the appeal was filed in the Court of the District Judge no objection was taken by his office as regards the maintainability of the appeal on foot of the said notification. Whether, therefore, the correct valuation for purposes of appeal be taken as Rs. 100/- or Rs. 22,000/- odd, I hold that the appeal was prosecuted in good faith, though of course wrongly, in the Court of the District Judge.

(5) There can also be no doubt with regard to the appeal having been prosecuted with due diligence in the Court of the District Judge. As already noted, it was filed well within the shorter period prescribed by Art. 152, which required greater diligence than if it were to be filed within the longer period prescribed by Art. 156. All the conditions of S. 14 of the Act being thus satisfied, the plaintiff-appellant is entitled under that provision to the exclusion of time during which the appeal was pending in the Court of the District Judge, i.e. to the exclusion of the 178 days from 22-1-1951 to 18-7-1951. He is also entitled under S. 12 to the exclusion of the eight days from 29-12-1950 to 5-1-1951 taken in obtaining a copy of the judgment of the trial Court. Thus he is entitled to the exclusion of a total period of 186 days. The time which passed from 28-12-1950, the date of the judgment and decree of the trial Court, till 31-7-1951, when he filed the present appeal in this Court, amounted to 215 days, which was 125 days in excess of the 90-day period prescribed by Art. 156. This excess of 125 days was, however, far short of the aforesaid period of 186 days which the plaintiff-appellant is entitled under Ss. 12 and 14 of the Act to have excluded in computing the period of limitation prescribed for the filing of the present appeal. The appeal is, therefore, clearly within limitation. It was, however, contended by the learned counsel for the defendant-respondent that the appellant could have the benefit of S. 14 only upto 13-7-1951, when the District Judge delivered his judgment directing the appeal to be presented to the proper Court, or at the most upto 18-7-1951 when the appeal was actually returned to the appellant, but not thereafter. According to him it was still incumbent upon the plaintiff-appellant to account for the remaining period of 18 or 13 days, as the case may be, until the institution of the present appeal on 31-7-1951, and as no explanation has been offered for this delay (which is no doubt a fact) the present appeal is still liable to be dismissed as time-barred.

(6) The above contention of the learned counsel for the defendant-respondent has, in my opinion, no force. There can be no gainsaying the proposition of law, as enunciated in —'Karora Singh v. Kartar Singh', AIR 1951 Simla 170 (H), a ruling cited by the learned counsel for the respondent, that an appellant has to account for every day of the delay in filing an appeal. But the view expressed by me above does not run counter to this proposition, for if by the exclusion of time under S. 14 of the Act the appeal be still within limitation, the appellant will be deemed to have explained every day of the delay. The rule of explanation-for-every-day-of-delay has assumed prominence in cases where sufficiency of cause for not preferring an appeal or making an application within the prescribed period has been considered on an application of the provisions of only S. 5 without any reference to S. 14 of the Act. Take for instance, the aforesaid case of —'Karora Singh in AIR 1951 Simla 170 (H)', where though the appellant reached Simla on 27-6-1948 he filed the appeal on 29-6-1948 and was unable to account for the delay of the intervening two days. In such cases there could be no doubt but that it is incumbent upon an appellant to offer some satisfactory explanation for every day of the delay between the expiry of the period of limitation and the filing of the appeal thereafter, for otherwise he would not be entitled to extension of the period of limitation under S. 5 of the Act.

It is, however, to be remembered that it is not a case of extension, but of exclusion, of time under S. 14. In other words, a party who makes out a case under S. 14 is entitled that the time during which the proceeding in question was pending should be totally disregarded in computing the prescribed period of limitation. So in the present case if the aforesaid 186 days are totally excluded or disregarded in computing the period of limitation, the total delay of 215 days is reduced to a delay of only 29 days, which is less than the 90-day period prescribed under Art. 156. This distinction between cases where only S. 5 has to be applied and those where S. 14 comes in for application has been clearly brought out by Sulaiman, J., (as he then was) in —'Ram Rup v. Naik Ram', AIR 1926 All 252 (I). That was a case where the lower appellate Court had dismissed the subsequent appeal filed on 19-2-1925 as time-barred because the appellants had failed to account for the delay between that date and 12-2-1925 when the previous appeal was dismissed. The provisions of S. 14 do not seem to have been applicable in that case since it appears that the previous appeal was dismissed by the District Judge on account

of a defect in the Vakalatnama filed on behalf of the appellants, and not from defect of jurisdiction or other cause of a like nature, as contemplated by the section. His Lordship, however, was prepared to give the appellants the benefit of that section and was of the opinion that the time during which the previous appeal was pending should be taken into account while exercising the discretion under S. 5 of the Act. He went on, however, to observe that that did not absolve the appellants from their obligation to show that there was sufficient cause for not filing the appeal earlier than 19-2-1925.

It will be observed that the case was decided purely on a consideration of the provisions of S. 5, and therefore it is no authority for the view propounded by the learned counsel for the defendant-respondent that even though an appeal may be within limitation under S. 14 the appellant has still to explain the delay between the dismissal of the infructuous appeal, when he becomes aware of his mistake in filing the appeal in a wrong forum, and the subsequent preferment of appeal in the proper Court. The aforesaid distinction between Ss. 5 and 14 of the Act, though amounting to a mere obiter dictum in view of what has been stated above, serves to explain my point of view, and it has been expressed in the following terms :

"As to the applicability of S. 14 of the Limitation Act, it seems to me that there is a clear distinction between exclusion of the time during which another civil proceeding has been duly prosecuted within the meaning of that section and an extension of time for good cause shown under S. 5. If it were a question of exclusion then the appellant would be entitled to exclude from all calculation the period during which the previous appeal was pending; but if it is merely a matter of extension then he would be entitled to have time extended upto the last date when the previous proceeding terminated. If time were to be excluded then it is not incumbent on him to explain the delay for the subsequent period provided that the appeal comes within time. On the other hand, if it is only a question of extension then it is necessary for him to explain the delay between the 12th of February 1925, when the appeal was dismissed and the 19th of February 1925 when it was filed afresh."

(7) The same view in regard to the essential nature of the provisions of S. 14 was in effect expressed by Sir Arnold White, C. J., in —'Kichilappa Naickar v. Ramanujam Pillai', 25 Mad 166 at p. 178 (J). That view, though again an obiter dictum since that case was also decided only under S. 5 of the Act, was expressed as follows :

"Section 14 deals with the computation of time. It does not confer a discretion on the Court, but gives a right to a party to have a certain period of time excluded from the computation of the period of limitation if the requirements of the section are satisfied."

(8) There is a Full Bench decision of the Punjab High Court which fully supports the view that I have taken of the matter. It is an old ruling of the year 1888, but it does not appear to have been overruled or dissented from in any decision of countervailing weight. On the contrary, it was approved, as I shall presently show, in a subsequent Privy Council decision. That ruling of the Punjab High Court stands reported as —'Karm Bakhsh v. Daulat Ram', 183 Pun Re 1888 (FB) (K). That was a case where the following question was referred to the Full Bench :

"When an appellant has instituted an application for review of judgment in a lower Court, within the period prescribed for appeal, and after such application has been disposed of, presents an appeal from the first judgment after the period prescribed for appeal, is it by law necessary to the admission of the appeal that the appeal should be presented as speedily as may be after the proceedings in review have ended."

Delivering the judgment of the Full Bench Plowden, J., observed as follows :

"We are of opinion that the question referred to the Full Bench must be answered in the negative.

Section 5 of the Limitation Act directs that any appeal may be admitted after the period of limitation provided therefor, when the appellant satisfies the court that he had sufficient cause for not presenting the appeal within such period.

It seems important to observe the concluding words. All that the section requires in express terms, as a condition for the exercise of the discretionary power of admission of an appeal presented after time is "sufficient cause for not presenting the appeal within the prescribed period".

If such cause is shown, the Court may in its discretion, which is of course a judicial and not an arbitrary discretion admit the appeal.

We think the true guide for a Court in the exercise of this discretion, is whether the appellant has acted with reasonable diligence in presenting his appeal, 'and we think, further, that he ought ordinarily to be deemed to have acted with reasonable diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal, does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal'. We also agree with the High Court of Allahabad in the case reported in Indian Law Reports, —'Balwant Singh v. Gumani Ram', 5 All 591 (L), that the circumstances contemplated in section 14 of the Limitation Act should ordinarily constitute sufficient cause within the meaning of Section 5."

The words "as speedily as may be" in the question referred to the Full Bench appear to have been taken from an earlier decision of the same High Court reported as —'Musst. Ganga v. Madho', 89 Pun Re 1882 (M). After referring to that ruling His Lordship went on to observe as follows :

"We think that the words 'as speedily as may be', ought to be interpreted as meaning no more than with such promptitude as may, under the circumstances of the particular case, be reasonably required, 'and that such promptitude may ordinarily be held to exist whenever the appellant has not, after de-

ducting the time properly spent in the review, exceeded the period equal to that prescribed by law for the appeal."

The portions underlined (here in ' ') bring out the point of view which I have taken of the matter. It will be noticed that "the circumstances" considered in determining sufficiency of cause under S. 5 consisted of the provisions of S. 14 of the Act, and it was held that such a cause will be deemed to exist when, as in the present case, the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal. The time between the date of the rejection of the review petition and that of presenting the appeal was not at all taken into consideration, as indeed it could not have been consistently with the view laid down in the case.

(9) The Privy Council decision in which the above Full Bench view of the Punjab High Court was approved is reported as 'Brij Indar Singh v. Kanshi Ram', AIR 1917 PC 156 (N). That was a case where the appeal against a decision of the District Judge dated 16-3-1908 was filed in the High Court on 21-4-1909, & the appellant sought to exclude the time taken by him in review proceedings before the District Judge from 20-3-1908 to 24-4-1908 and in an appeal to the High Court upto 6-4-1909 under S.14 of the Act. Observing that although S.14 did not in terms apply to appeals its relevance should be considered, their Lordships referred to the aforesaid Full Bench decision of the Punjab High Court as laying down a general rule as to the exercise of discretion. They further observed that the authority for that Full Bench decision was much wider, and in that connection they cited with approval the following from the Full Bench decision of the Calcutta High Court in In re 'Brojender Coomar Roy, (1867) 7 WR 529 (FB) (O) :

"If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period will be received as put in within time."

It will be noticed that the view expressed in the aforesaid Full Bench decision of the Calcutta High Court was in effect the same as that held in the 1888 Full Bench decision of the Punjab High Court. Their Lordships of the Privy Council were of the view that the general rule laid down in the Full Bench decision of the Punjab High Court applied to the facts of the case. They further held that the proceedings in question were reasonably prosecuted and in good faith. In other words, they held that the appellant was entitled to the benefit of S. 14. Thereafter they went on to observe as follows:

"The question of what he did in the fifteen days is neither here nor there. For, accepting the general rule as stated above, the period for appealing being ninety days, the dates stand thus: The District Judge Sanford's order was made on the 16th March 1908. That order was set aside on the 8th April 1908. Thus only twenty-three days out of the ninety had expired. That left forty-seven days. And after the proceedings for review terminated only fifteen days were consumed before the appeal was presented."

It will be observed that after deducting the time taken over review-proceeding the appeal in the High Court was filed within the 90-days period, and it was held that it was immaterial that fifteen days had elapsed between the termination of those proceedings and the filing of the appeal in the High Court. Thus, their Lordships of the Privy Council gave full effect to the aforesaid 183 Pun Re 1888 (FB) (K) decision of the Punjab High Court.

(10) The same view was taken in a decision of the Patna High Court reported as 'Ramchrita Sahu v. Ram Narain Sahu, AIR 1919 Pat, 238 (P)'. The appellant filed an appeal in the High Court on 26-6-1919 against an order in execution proceedings passed on 7-12-1918 dismissing his application under O.21, R.90, C. P.C. The appeal was prima facie time-barred, and therefore the appellant filed an application for extension of time under S.5 of the Act by exclusion of the time taken by the appellant from 8-12-1918 to 17-5-1919 in endeavouring to have his case reinstated under O.9,R.9,C.P.C. The application under O.9,R.9 was rejected because the lower Court held, on foot of a recent decision of the High Court, that it had no jurisdiction in the matter. Their Lordships excluded the time from the total period allowed for filing the appeal, and, relying upon the aforesaid Privy Council ruling of 'AIR 1917 P. C. 156(N), they held that it did not matter that the appellant had assigned no real reason for having waited from 17-5-1919 to 26-6-1919 for filing his appeal in the High Court.

(11) The learned counsel for the defendant-respondent cited a number of rulings in support of what he contended was the opposite view. The first was the Privy Council ruling reported as 'Ram Narain Joshi v. Parmeswar Narain Mahta', 30 Ind App 20 (PC) (Q). The plaintiff in that case filed two suits against different defendants in respect of the same property under S.283, C. P. C, 1882, corresponding to O. 21, R.63 of the present Code. The suits were tried together and dismissed by the trial Court on 25-6-1894. In one suit he valued the appeal as above Rs.5,000/- and filed it in the High Court, while in the other he valued it at less than Rs.5,000/- and filed it before the District Judge on 3-9-1894. The appellant applied to the High Court for transfer to that Court of the appeal pending before the District Judge so that both the appeals might be disposed of together by the High Court. This application was allowed on 9-8-1895, but in the course of its disposal it was pointed out by the pleader for the respondent that the appeal had been wrongly preferred to the District Judge since the property in both the suits being the same the proper valuation of the appeal should have been above Rs.5,000/-. Thereafter on 16-9-1895 the appellant applied to the High Court conceding that the District Judge had no jurisdiction to hear the appeal that was filed before him and praying that it be treated as an appeal filed in the High Court. The High Court dismissed that application and also the appeal for want of jurisdiction.

In doing so the following facts were taken into consideration by the High Court: (1) that there was no fresh memorandum of appeal filed in the High Court, (2) that the application dated 16-9-1895 was not an application for the admission of a time-barred appeal, (3) that even if it be supposed that a fresh memorandum of appeal had been presented with an application for condonation of delay, it had not been shown that there was sufficient cause for not presenting the appeal before, (4) that the mistake as to valuation was inexcusable since the same property was in dispute in both the suits, and (5) that even supposing that the mistake could be overlooked and treated as sufficient cause for the appeal not having been filed within time, it was not till 16-9-1895 that the party in question filed the said application in the High Court although he had become aware of his mistake more than five weeks earlier on 9-8-1895 in the course of disposal of his application for transfer of the appeal. Their Lordships of the Privy Council reviewed the aforesaid reasons given in the judgment of the High Court and held that they could not properly interfere in the case as they were not satisfied that the refusal by the High Court to admit the appellant's appeal after date was wrong.

It will thus be seen that their Lordships of the Privy Council dismissed the appeal on the broad ground that the High Court did not appear to have exercised its discretion properly in not admitting the appellant's appeal after date. They did not uphold specifically the view of the High Court that it was incumbent upon the appellant to explain the delay between 9-8-1895 and 16-9-1895. It will also be noticed that the just mentioned reason was only one of the various circumstances taken into consideration by the High Court in rejecting the appellant's prayer. This decision of the Privy Council is therefore of no help to the respondent.

(12) The next case relied upon by the learned counsel for the defendant-respondent was that of —'Hamida Bibi v. Fatima Bibi,' AIR 1918 All 180(R). A decree for rent was passed against two co-tenants and satisfied by one of them. The latter filed a suit for contribution against the other co-tenant on 20-5-1913 in the Small Cause Court, which returned the plaint for presentation to the proper Court on 27-11-1913 on the finding that it had no jurisdiction to try the suit. The plaintiff refused to take back the plaint and filed a revision in the High Court on 19-2-1914, which was dismissed on 16-3-1915. On 15-6-1915 the plaintiff applied for the return of the plaint which was actually returned & presented in the Court of the Munsif on 30-6-1915. It was held that even if it be assumed that the plaintiff was entitled to exclude the period from 20-5-1913 to 16-3-1915, she could not in any case be allowed to exclude the period between 16-3-1915 and 30-6-1915 under S. 14 inasmuch as she did not prosecute her suit with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint and that, therefore, the suit was barred by time.

It will be noticed that the view held was that the suit itself was not prosecuted with due diligence by the plaintiff. If so, the plaintiff was clearly not entitled to the exclusion of any time under S. 14, to say nothing of the subsequent period from 16-3-1915 to the institution of the suit on 30-6-1915. The ratio of this decision was, therefore, quite different from that propounded on behalf of the respondent in this case. In any case, if it purported to hold that even if the suit was within time by virtue of the provisions of S. 14 the plaintiff had still to account for the period immediately before the institution of the suit, I would respectfully differ from that opinion in view of what I have held above on the basis of '183 Pun Re 1888 (FB) (K)', decision of the Punjab High Court and 'AIR 1917 PC 156 (N)' ruling.

(13) Another case apparently holding the opposite view is that of the Calcutta High Court reported as — 'Kamiruddin v. Sm. Bishupriya', AIR 1929 Cal 240 (S). The question in that case was whether an appeal filed in the lower appellate Court on 18-11-1925 against an order dated 18-4-1925 was time-barred. The appellant sought to exclude the time from 18-5-1925 to 31-10-1925 taken by him in prosecuting another appeal which had been dismissed as incompetent. The previous appeal was held incompetent because it had not been filed against the proper order of the trial Court. The District Judge dismissed the subsequent appeal from the proper order filed on 18-11-1925 as time-barred. On appeal the High Court held that in view of the pronouncement of the Judicial Committee in the aforesaid — 'Brij Indar Singh's case (N)' the provisions of both Ss. 5 and 14 had to be looked into, that looking at it from the point of view of S. 14 all that the appellant was entitled to get as deduction of the amount of time taken by him in preferring the appeal was the period during which he was prosecuting with due diligence the previous appeal, that S. 14 was, however, not exhaustive of all the circumstances that may go to constitute sufficient cause within the meaning of S. 5, and that from the point of view of S. 5 the appellant had still to explain the delay of 17 or 18 days between the dismissal of the first appeal on 31-10-1925 and institution of the second on 18-11-1925. It was found that the delay of 9 or 10 days had been sufficiently explained but not for the remaining eight days. In spite of that the delay was condoned on the ground that too exacting a standard should not be applied in making the calculations for purposes of exercising the discretion under S. 5 of the Act.

It will thus be seen that although purporting to apply the opposite view propounded in this case by the learned counsel for the defendant-respondent, their Lordships decided in effect in favour of the appellant on the view of the matter which I have expressed above. It will also be noted that although their Lordships referred to the Privy Council ruling in 'Brij Indar Singh's case (N)', they went on to decide the case partly under S. 14 and partly under S. 5 of the Act. On a strict interpretation of that 'Privy Council ruling', there would be no question of passing on to S. 5 for dealing with a part of the case on the view that S. 14 was not exhaustive of all the circumstances that may go to constitute sufficient cause, for, if after exclusion of time under S. 14 the appeal is within limitation, that fact would by itself constitute sufficient cause within the purview of S. 5 of the Act.

(14) Lastly, the learned counsel for the respondent relied upon — 'Raj Maiik v. Dr. Susanta Sen', AIR 1951 Simla 209 (T). The plaintiff's suit for ejectment was decreed ex parte in that case on 31-8-1948. The defendant filed an appeal to the District Judge on 27-1-1949 along with an application for extension of time under S. 5 of the Act as the appeal was on the face of it time-barred. Holding that the appeal was within time the District Judge set aside the ex parte decree and remanded the case for a fresh trial. The plaintiff went up in appeal to the High Court. Relying upon the aforesaid Full Bench decision in 'Karim Bakhsh's case (K)', the District Judge was of the view that it was sufficient for the appellant to explain why the appeal had not been filed within the prescribed 30 days. Their Lordships differed from this view and held that the appellant had also to explain the subsequent delay upto the very moment of the filing of the appeal. It is manifest that it was a pure case of ascertainment of sufficiency of cause under S. 5 so that the appellant had to explain every day of the delay after the expiry of the prescribed 30 days from 31-8-1948 and uptill the institution of the appeal on 27-1-1949. There was no proceeding pending in between those dates, and, therefore, no question of the application of S. 14 arose. That being so, the ruling in 'Karm Baksh's case (K)' did not at all come in for application. The learned District Judge was, therefore, clearly in error, and for the same reason this ruling has no application to the facts of the present case.

(15) It will thus appear that the learned counsel for the defendant-respondent has not been able to displace the view which I have expressed above, and which finds support from the 'Full Bench decision in 183 Pun Re 1888 (K)' and the Privy Council ruling of 'AIR 1917 PC 156 (N)'. I, therefore, hold that the present appeal is not time barred.

(16) Coming to the merits of the appeal its decision lies within a short compass. But before I proceed further I have to remark that this is a somewhat strange case. The plaintiff's agent came forward with a claim against the defendant principal for Rs. 100/- or whatever be found due on the taking of accounts, the defendant definitely pleaded, and several of the defence witnesses clearly deposed, that the accounts had been adjusted and the specific sum of Rs. 13,000/- was admitted by the plaintiff to be due by him to the defendant, but the Commissioners appointed by the trial Court for going into the accounts found that as much as Rs. 22,081/0/6 was due from the plaintiff and the trial Court has in a summary judgment accepted the Commissioners' report and passed a decree for that amount in favour of the defendant. At no stage during the lengthy arguments had in this case was it suggested on behalf of the defendant-respondent that the amount of Rs. 13,000/- had been pleaded in the written-statement and deposed to by the defence witnesses by some mistake. It may be that on the accounts being properly gone into the defendant may still be found to be entitled to the said, or even a larger, amount, but so far as the present decree is concerned it cannot stand.

(17) The learned counsel for the parties took me through a good deal of the accounts, and it was apparent that the accounts were not simple but complicated. This was, therefore, pre-eminently a fit case in which the trial Court should have passed a preliminary decree under O. 20, R. 16, C. P. C. The plaintiff alleged in the plaint that he was entitled to a certain commission and travelling allowance, and that the defendant was liable to render account. Directions on these points should have been given to the Commissioner under R. 17. The trial Court recorded a finding with regard to the commission but none with regard to travelling allowance or the alleged liability of the defendant to render account. Even with regard to the commission, it was strenuously argued before me on behalf of the plaintiff-appellant that on a strict interpretation of the pleadings no issue on that point should have been framed because the defendant should have been held to have admitted the plaint allegation. The written-statement was no doubt vague, and therefore the trial Court would have been well advised to clarify the point by examining the parties under O. 10, R. 2, C. P. C. or by asking them to file the necessary particulars. Even though no preliminary decree was passed, the trial Court should have given the said directions for the guidance of the Commissioners when passing the order of their appointment, for without the said directions it was not possible for the Commissioners to arrive at a correct finding.

(18) The fatal defect in the present case however is that instead of going into the accounts themselves the Commissioners delegated the task to others. This is quite apparent from a perusal of the Commissioners' report where they have stated that Gopi Ram Inspector and Sundar Lal Sub-Inspector had laboured hard in preparing the account of Sangh. The Commissioners further stated that it was these officials who had verified the accounts. They further remarked that the plaintiff did not show his accounts to the said officials when they prepared the accounts. Nowhere in their report have the Commissioners stated that they themselves went through the accounts. There is no doubt that at one place they do say that the statements of the parties were recorded and the accounts of the Sangh were examined; but they do not say who examined the accounts. From the mere fact that the statements of the parties were recorded by the Commissioners it cannot necessarily be concluded that the accounts were also examined by them, especially in view of the aforesaid passages wherefrom it clearly appears that the examination of accounts was left to the said two officials. The learned counsel for the defendant-respondent referred to the statement of Th. Hardayal Singh President of the defendant Sangh before the Commissioners to the effect that the basis on which the parchas Exs. D. 4 and D. 3 were prepared had been shown to the Commissioners in the presence of the plaintiff. What the basis of those parchas was has however not been clarified. Moreover, even if it be supposed that the word "basis" meant the books of account of the defendant, the mere fact that they were shown to the Commissioners would not necessarily mean, especially in view of the aforesaid portions of the Commissioners' report, that the Commissioners had themselves gone through the accounts for the purpose of arriving at their finding.

The order passed by the trial Court on 16-8-1950 appointing the Commissioners did not empower them to delegate their function to anybody else. True, this objection was not taken before the trial Court, but it cannot for that reason be shut out in this Court when it appears to be well-founded on the very face of the record. I am of the opinion that on this ground alone the judgment and decree of the trial Court should be set aside and the case remanded for a fresh trial. In view of what has been stated above the question of the terms of the agency, including that of commission, will have to be redetermined. The question of whether the defendant was liable to render account, as alleged by the plaintiff, will also have to be decided. After deciding all the necessary facts in order to enable it to give the requisite directions to the Commissioner for going into the accounts, the trial Court will pass a preliminary decree appointing a Commissioner and incorporating the directions. On receipt of the Commissioner's report in pursuance of the preliminary decree, the trial Court will give parties time to file objections, if any, against his report, and thereafter proceed to pass a final decree according to the law. It was pointed out to me in the course of the arguments that the President and the Vice-President through whom the defendant Sangh has been sued have been replaced. The Court will ascertain the fact and pass necessary orders in that connection also.

(19) A word about the costs of this appeal. Considering that the disposal of the appeal from the decision of the trial Court has been considerably delayed on account of the plaintiff having first filed his appeal in a wrong Court, although he did so bona fide, and considering that the ground on which the Commissioners' report and the trial Court's judgment thereon have been set aside was not taken by him in the trial Court, I would grant him only half the costs of the present appeal.

(20) The appeal is allowed, the judgment and decree of the trial Court are set aside and the suit is remanded to the trial Court for being readmitted at its original number in the Register of Civil Suits and disposed of afresh in the light of the above observations. The plaintiff is awarded half the costs of the present appeal against the defendant Sangh, which will bear its own costs of the present appeal. The past and future costs in the trial Court will abide the result and will be in the discretion of that Court.

B/D.H.Z. Appeal allowed.

A.I.R. 1953 H. P. 117 (Vol. 40, C. N. 49)

CHOWDHRY J. C.

Satya Dev Bushehari, Petitioner v. Ghanshiam, Respondent.

Criminal Revn. No. 13 of 1953, D/-21-5-1953.

(a) Criminal P. C. (1898), S. 195(1)(c) — Document produced.

Section 195(1)(c) requires that the offence in question should be alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding; but it does not say that the offence should have been committed by the party with the intention of its being produced in the said proceeding. (Para 2)

Anno: Cr. P. C., S. 195 N. 13.

(b) Representation of the People Act (1951), S. 36 — Returning Officer is not Court — (Criminal P. C. (1898), S. 195).

Under S. 36, it is open to the Returning Officer to refuse any nomination "after such summary inquiry, if any, as he thinks necessary". It is thus open to him to refuse a nomination even without any inquiry. That being so, one of the essential attributes of a Court, that in arriving at its decision it must follow rules of procedure defined by Statute or recognised by law, is missing. Hence, the Returning Officer acting under S. 36 is not a Court. AIR 1926 Rang 25 (FB); AIR 1950 SC 222, Rel. on. (Para 3)

Anno: Cr. P. C., S. 195 N. 17.

(c) Representation of the People Act (1951), S. 86 — Election Tribunal is Court — (Criminal P. C. (1898), S. 195).

An Election Tribunal possesses all the necessary attributes of a Court and it is, therefore, a Court. AIR 1950 EP 181 (FB), Rel. on. (Para 4)

Anno: Cr. P. C., S. 195 N. 17 Pt. 11.

(d) Criminal P. C. (1898), S. 195(1)(c) — "Produced".

Filing of a forged document in a proceeding before a Court amounts to production within the intendment of S. 195(1)(c) of the Code, for 'produced' does not mean produced in evidence. AIR 1942 Sind 62, Rel. on. (Para 5)

Anno: Cr. P. C., S. 195 N. 13.

(e) Criminal P. C. (1898), S. 195(1)(c) — "By a party to any proceeding in any Court".

In order to attract S. 195(1)(c), it is not necessary that the offence should have been committed in a proceeding by a party as such. Under S. 195 (1)(c) the relevant date which has to be considered by the Court is the date the Court is invited to take cognizance of the complaint, and all that the Court has to see is whether the offence in respect of which it is asked to take cognizance is alleged to have been committed by a party to any proceeding in any Court and in respect of a document produced or given in evidence in such proceeding. It is immaterial that the offence has been committed by the party before the proceedings are taken. AIR 1936 Bom 221, Foll. AIR 1931 All 443 (SB), Not Foll. (Para 6)

Anno: Cr. P. C., S. 195 N. 12 Pt. 18.

(f) Criminal P. C. (1898), S. 195(1)(c) — "To any proceeding." AIR 1936 Bom 221; AIR 1937 Bom 14, Dissented from.

It is not necessary that, at the time that a Magistrate takes cognizance of a complaint, the proceedings in or in relation to which the offence is alleged to have been committed must be still pending. AIR 1916 All 299, Expl. (Para 7)

Anno: Cr. P. C. S. 195 N. 12 Pt. 19.

(g) Criminal P. C. (1898), S. 195(1)(c) — Document produced or given in evidence. AIR 1920 Pat 147, Dissented from.

All that clause (c) requires is that the document in question should have been produced or given in evidence in the proceeding in question, it does not say who should have produced the document or given it in evidence. The phrase "a document produced or given in evidence" means a document produced or given in evidence either by the party who is alleged to have committed the offence or by any one else. AIR 1925 Bom 433; AIR 1942 Sind 62, Rel. on. (Para 8)

Anno: Cr. P. C., S. 195 N. 13 Pts. 14, 15.

(h) Criminal P. C. (1898), S. 195(1)(c) — Forgery committed in respect of proceeding before Election Tribunal — Necessity of complaint.

Where an alleged forged document has been produced before the Election Tribunal, which is a Court under the purview of S. 195, Cr. P. C. a Magistrate is not entitled to take cognizance of the offence otherwise than on a complaint in writing of the said Court. (Para 9)

Anno: Cr. P. C., S. 195 N. 3 Pt. 4.

(i) Criminal P. C. (1898), S. 195(1)(c) — Section 465, Penal Code, is included under the comprehensive S. 463, Penal Code. AIR 1925 Lah 266, Foll. (Para 9)

Anno: Cr. P. C., S. 195 N. 15.

Bhagat Singh Chawala, for Petitioner; Panna Lal Bahl, for Respondent; A. C. Mehta, Ag. Govt. Advocate, for the State.

CASES CITED:

(A) ('26) AIR 1926 Rang 25: 3 Rang 560 (FB)
(B) ('50) AIR 1950 SC 222: 1950 SCR 621 (SC)
(C) ('50) AIR 1950 EP 181: 52 Pun LR 1 (FB)
(D) ('42) AIR 1942 Sind 62: 43 Cri LJ 612
(E) ('31) AIR 1931 All 443: 32 Cri LJ 1105 (SB)
(F) ('36) AIR 1936 Bom 221: 37 Cri LJ 814
(G) ('10) 11 Cri LJ 280: 14 Cal WN 479
(H) ('26) AIR 1926 All 30: 48 All 60: 26 Cri LJ 1485
(I) ('18) AIR 1918 Cal 792: 44 Cal 1002: 18 Cri LJ 522
(J) ('25) AIR 1925 Lah 266: 5 Lah 550: 26 Cri LJ 537
(K) ('16) AIR 1916 All 299: 38 All 169: 17 Cri LJ 289
(L) ('30) AIR 1930 Mad 869: 32 Cri LJ 219
(M) ('32) AIR 1932 Sind 90: 33 Cri LJ 452
(N) ('43) AIR 1943 Nag 327: 45 Cri LJ 175
(O) ('37) AIR 1937 Bom 14: 38 Cri LJ 149
(P) ('20) AIR 1920 Pat 147: 21 Cri LJ 272
(Q) ('25) AIR 1925 Bom 433: 49 Bom 608: 27 Cri LJ 69

JUDGMENT: This is an application in revision against the order of the Magistrate first class Kasumpti, dated 11-3-1953, taking cognizance of a complaint filed against the petitioner by the respondent. The offences alleged against the petitioner are forgery under section 465 and using as genuine a forged document under S. 471, I. P. C., in respect of a nomination paper filed by him before the Returning Officer on 12-10-1951 under S. 33 of the Representation of the People Act, 1951. There was a quadrangular fight to fill a seat in the Himachal Pradesh Legislative Assembly from the Rajgarh constituency, the present petitioner Satya Dev Bushahari and respondent Ghanshiam being two of the contestants. The nomination paper delivered by the petitioner to the Returning Officer on 12-10-1951 mentioned one Sudarshan Das as the proposer. On 17-10-1951, the date fixed for the scrutiny of nominations, it was objected that the signature of Sudarshan Das on the nomination paper had been forged. The Returning Officer rejected the objection and accepted the nomination paper. The polling took place on 19 and 20-11-1951, & on the 30th of that month the Returning Officer declared the respondent Ghanshiam as the successful candidate. On 29-1-1952 the petitioner filed an election petition for a declaration that the election of the respondent Ghanshiam was void and that he, the petitioner himself, had been duly elected. The respondent filed a recriminatory petition before the Election Tribunal on 30-5-1952 under S. 97 of the Act contending that if the petitioner had been the returned candidate his election would have been void because he had committed the aforesaid forgery. Besides other issues, the Election Tribunal also framed an issue on this allegation of the respondent in his recriminatory petition. At the time of the arguments the counsel for the petitioner withdrew his prayer that he himself be declared as having been duly elected. The Tribunal therefore held that the recriminatory petition became redundant and consequently the issues framed on the basis of that petition were not argued on behalf of the parties. Eventually the election petition was dismissed on 6-2-1953. The judgment of the Election Tribunal is published on pages 393 to 407 of Part II S. 3 of the Gazette of India Extraordinary dated 14-2-1953. The following day, i.e., on 7-2-1953, the respondent filed the aforesaid complaint in the said Court against the petitioner.

(2) A preliminary objection was taken before the Magistrate on behalf of the accused, the present petitioner, that as the alleged forged document had been produced before the Returning Officer and subsequently before the Election Tribunal, both of which were Courts under the purview of S. 195, Cr. P. C., the Magistrate was not entitled to take cognizance of the offences otherwise than on a complaint in writing of either of the said Courts. The learned Magistrate repelled the contention & took cognizance of the complaint on the findings that the Returning Officer was not a Court and that, although the Election Tribunal was a Court, it could not be said that the alleged forgery had been committed with the intention of using the forged document as evidence before that Tribunal. This last finding is on the face of it erroneous and was not supported by the learned counsel for the respondent. All that S. 195(1)(c) requires is that the offence in question should be alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, but not that the offence should have been committed by the party with the intention of its being produced in the said proceeding.

(3) The learned counsel for the petitioner argued that the Returning Officer was a Court under the provisions of S. 195 of the Code.

Under S. 36 of the Representation of the People Act, which provides for scrutiny of nominations, it is open to the Returning Officer to refuse any nomination "after such summary inquiry, if any, as he thinks necessary." In other words, it is open to him to refuse a nomination even without any inquiry. That being so, one of the essential attributes of a Court, that in arriving at its decision it must follow rules of procedure defined by Statute or recognised by law, is missing : — 'the 'Municipal Corporation of Rangoon v. M. A. Shakur', AIR 1926 Rang 25 (FB) (A). It was laid down in — Province of Bombay v. Khusaldas S. Advani, AIR 1950 SC 222 at p. 225 (B), that a decision will be quasi-judicial if the law under which the authority is making a decision itself requires a judicial approach. That could not be predicated of the decision of a Returning Officer in scrutinizing nomination papers under S. 36 of the said Act because the law required no judicial approach but a decision even without inquiry. The decision of a Returning Officer could not therefore be described even as quasi-judicial. I hold, agreeing with the Magistrate, that the Returning Officer was not a Court.

(4) There could be no doubt however that the Election Tribunal is a Court. Its members are not appointed as persona designata, but the Tribunal is appointed by the Election Commission for the trial of election petitions under S. 86 of the said Act. Judicial duties are thus entrusted to the Tribunal by operation of law and not by voluntary submission of the parties. The dispute upon which it adjudicates is a dispute of a civil nature concerning, as it does, the right of a party to be elected to a certain Legislature. The Tribunal also does not act merely as an advisory body, as was the case under the Indian Elections Offences and Inquiries Act (39 of 1920), but gives a definitive decision which is final under S. 105 of the present Act. Not only is it expected to conduct its proceedings with fairness and impartiality, but it must come to its decision according to the law laid down in the said Act. Finally, the rules of procedure which the Tribunal must follow are not arbitrary but as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure 1908, to the trial of suits, as provided by S. 90 of the Act. Under this last mentioned section and S. 92 the Tribunal has power to summon and examine witnesses on oath and the provisions of the Indian Evidence Act, 1872, apply in all respects to the trial of an election petition. An Election Tribunal therefore possesses all the necessary attributes of a Court, for as laid down in — 'Pitman's Shorthand Academy v. B. Lila Ram & Sons', AIR 1950 EP 181 (FB) (C):

> "A Court of law may be defined as a Tribunal dealing with and adjudicating upon civil disputes by operation of law in a judicial manner untroubled by ulterior considerations or matters of executive policy and observing certain definite rules of procedure which are either defined by Statute or recognized by practice."

Indeed, it was conceded by the learned counsel for the respondent that an Election Tribunal is a civil Court. He contended however that the provisions of S. 195(1)(c), Cr. P. C., were not applicable, and he gave several reasons in support of this contention.

(5) The first point urged by the learned counsel for the respondent was that, as the said sub-clause refers to a document produced or given in evidence in the proceeding it could not apply to a document, like the nomination paper in the present case, with which the proceedings started, as do the proceedings of a civil suit by the filing of a plaint. Firstly, the proceedings before the Election Tribunal did not start with the filing of the nomination paper in question but when the filing of an election petition under S. 81 of the Representation of the People Act, 1951. Even that portion of the proceedings before the Tribunal in which the alleged forgery became relevant started, not with the filing of the nomination paper in question, but with the institution of a recriminatory petition by the respondent under S. 97 of the Act. Secondly, even if the proceedings in question had started with the filing of the nomination paper, that would have amounted to production within the intendment of Cl. (c) of Sub-s. (1) of S. 195 of the Code, for 'produced' does not mean produced in evidence. 'Gobindram v. Emperor', AIR 1942 Sind 62 at p. 64, Col. 2 (D).

(6) The next argument put forward was that Cl. (c) applied only to cases where an offence is committed by a party, as such, to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceedings. This argument was based on a Full Bench decision of the Allahabad High Court reported as — 'Emperor v. Kushal Pal Singh', AIR 1931 All 443 (SB) (E). This view has been dissented from in — 'Emperor v. Rachappa', AIR 1936 Bom 221 (F), wherein it was laid down as follows:

> "Under S. 195(1)(c) the relevant date which has to be considered by the Court is the date the Court is invited to take cognizance of the complaint, and all that the Court has to see is whether the offence in respect of which it is asked to take cognizance is alleged to have been committed by a party to any proceeding in any Court and in respect of a document produced or given in evidence in such proceeding. It is immaterial that the offence has been committed by the party before the proceedings are taken."

The above view of the Bombay High Court represents the preponderance of authority in other High Courts also, including the Allahabad High Court. 'Tenishah v. Bolahishah', 14 Cal W N 479 (G); — 'Kanahiya Lal v. Bhagwandas', AIR 1926 All 30 (H); — 'Nalini Kanta v. Anukul Chandra', AIR 1918 Cal 792 (I); — 'Khairati Ram v. Malawa Ram', AIR 1925 Lah 266 (J); — 'Emperor v. Bhawanidas', AIR 1916 All 299 (K); — 'Thadi Subbi v. Emperor', AIR 1930 Mad 869 (L); — 'Hayat Khan v. Emperor', AIR 1932 Sind 90 (M) and — 'Hariram Onkar v. Mt. Radha', AIR 1943 Nag 327 (N). The contention of the learned counsel for the respondent that the offence in question should have been committed by a party, as such, to the proceeding has therefore no force.

(7) It was next argued by him that for the application of S. 195(1)(c) of the Code it is necessary that, at the time that a Magistrate takes cognizance of a complaint, the proceedings in or in relation to which the offence is alleged to have been committed must be still pending. He based this argument on a ruling of the Bombay High Court reported as — 'Emperor v. Mallappa Tejappa', AIR 1937 Bom

14 (O). There is no doubt that this is the view expressed in that ruling, which purported to follow the aforesaid earlier decision of that High Court in — AIR 1936 Bom 221 (F)'. Now, there is nothing in S. 195(1)(c) of the Code which could even remotely be said to support this view. The earlier Bombay ruling was adjudicating upon the question whether it was necessary that the alleged offence must have been committed by a person who was a party to the proceedings in a Court at the date of the commission of the offence. And in repelling that contention, and in arriving at the view which has been cited above in extenso, it followed the aforesaid ruling of the Allahabad High Court reported as — 'AIR 1916 All 299 (K). That ruling, it may be stated here incidentally, is the locus classicus on the subject and has been followed in most of the above cited rulings laying down the view which I have respectfully adopted. In that ruling, in repelling the argument that an offence could not with propriety be said to have been committed by a party to a proceeding on a date anterior to the institution of such proceeding, Piggott J. observed as follows:

> "At any rate, I am decidedly of opinion that the Legislature employed the words 'an offence committed by a party to any proceeding' with reference not to the date of the commission of the alleged offence, but with reference to the date on which the cognizance of the Criminal Court was invited."

And again:

> "To my mind the provisions of the sub-section under consideration require to be interpreted as applying to the case of any person who, at the time when a Criminal Court is invited to take cognizance of the matter, can rightly be described as 'a party to any proceeding in any Court' in which the document in question has been produced or given in evidence, that is to say, who is or has been a party to such proceeding."

It is manifest that emphasis was laid on the date on which the cognizance of the Criminal Court was invited for interpreting the words "an offence committed by a party to any proceeding" in order to show that the offence need not have been committed in the course of the proceeding. It is not therefore permissible to deduce as, if I may respectfully say so, the learned Judges of the Bombay High Court purport to have done in the aforesaid two cases, that in referring to the date of the Magistrate taking cognizance of the offence in question Piggott J. purported to lay down that the proceeding in or in relation to which the offence is alleged to have been committed should still be pending at the aforesaid date. I hold that it was not necessary that the proceedings in the Election Tribunal should have been still pending when the present complaint was filed on 7-2-1953. It was also contended in this connection that as the Tribunal had become functus officio after dismissing the election petition on 6-2-1953, it could not have filed a complaint under S. 195 of the Code. This argument also has no force. The particular election petition was no doubt disposed of on 6-2-1953, but the Tribunal continued to function as it had other petitions to decide.

(8) Finally, it was contended that the record containing the nomination paper in question was summoned before the Election Tribunal at the instance of the respondent in connection with his recriminatory petition, and that therefore the party who is alleged to have committed the offence, i.e. the petitioner, could not be said to have produced the document before the Tribunal. In other words, the contention of the learned counsel for the respondent was that the document in respect of which the offence is alleged to have been committed by a party to a proceeding in any Court should have been produced in that Court by that party. In support of his argument the learned counsel cited — 'Janardhan Thakur v. Baldeo Prasad Singh', AIR 1920 Pat 147 (P). This ruling does support the view propounded by the learned counsel, but I am unable, if I may say so respectfully, to agree with that view. All that cl. (c) requires is that the document in question should have been produced or given in evidence in the proceeding in question, it does not say who should have produced the document or given it in evidence. The Patna ruling relied upon by the learned counsel for the respondent based its decision on three rulings which have already been cited, i.e. — 'AIR 1918 Cal 792' (I), — '14 Cal WN 479' (G) and — 'AIR 1916 All 299' (K). In none of those rulings however has it been laid down that the document in question should have been filed by the party against whom it is sought to file a complaint under S. 195 of the Code. On the other hand, it has been laid down — 'In re Bhau Vyankatesh', AIR 1925 Bom 433 (Q) that in S. 195 (c), Cr. P. C. the phrase "a document produced or given in evidence" means a document produced or given in evidence either by the party who is alleged to have committed the offence or by any one else. To the same effect was the view expressed in the aforesaid ruling in — 'AIR 1942 Sind 62' (D).

(9) This disposes of all the objections raised by the learned counsel for the respondent. On the other hand, all the necessary conditions of S. 195 (1) (c) of the Code are satisfied. The offences alleged to have been committed by the petitioner fall within the clause, that under S. 471 being specifically mentioned there, and the other one under S. 465 being included under the comprehensive S. 463. 'AIR 1925 Lah 266' (J). The offences are also alleged to have been committed by a party to the proceeding in a Court, i.e. by the present petitioner in the Election Tribunal. Furthermore, the offence is alleged to have been committed in respect of a document, i.e. the nomination paper, both produced and given in evidence in the proceeding before the Election Tribunal in support of the respondent's recriminatory petition. It is immaterial that the contingency of deciding the recriminatory petition did not arise by reason of the petitioner having withdrawn the prayer that he himself be declared to have been duly elected. I therefore hold that a private complaint by the respondent against the petitioner in respect of the aforesaid offences was barred, and that the Magistrate had no jurisdiction to take cognizance of that complaint. Accordingly, the revision is allowed, the order of the Magistrate taking cognizance of the respondent's complaint is set aside and the proceedings in that Court based on the complaint are quashed.

A/V.S.B. Revision allowed.

A. I. R. 1953 HIM. P. 121 (Vol. 40, C. N. 50)

CHOWDHRY J. C.

Sadh Ram, Petitioner v. State.

Criminal Reference No. 1 of 1953, D/- 10-6-1953.

(a) Arms Act (1878), S. 22—Possession.

Temporary possession of a fire-arm on behalf of the license-holder without any intention that it be used as such does not amount to possession. (Para 4)

Anno: Arms Act, S. 22 N. 1.

(b) Criminal P. C. (1898), Ss. 241, 254, 255, 256 and 537 — Non-compliance with Ss. 254 to 256 — Illegality — Acquittal.

Where a summons case is tried as a warrant case the Magistrate should follow the procedure of a warrant case to the end. If he omits to comply with the provisions of Ss. 254, 255 and 256, the omission amounts to illegality which is not cured by S. 537 and the proper order to pass is one of acquittal and not of re-trial. 25 Mad 61 (PC), Foll. AIR 1915 Lah 259 (1) and AIR 1914 Lah 556, Not foll. (Para 6)

Anno: Criminal P. C., S. 241 N. 4; S. 254 N. 5 Pts. 2 and 3; S. 255 N. 11; S. 256 N. 6; S. 537 N. 20 Pts. 3 and 4.

Mohan Lal Aukta, for Petitioner; C. L. Puri acting Govt. Advocate, for the State.

CASES CITED:

(A) ('41) AIR 1941 Pat 209: 42 Cri LJ 97
(B) ('53) AIR 1953 All 353: 1953 Cri LJ 762
(C) ('01) 25 Mad 61: 28 Ind App 257 (PC)
(D) ('15) AIR 1915 Lah 259(1): 28 Ind Cas 107: 16 Cri LJ 251
(E) ('14) AIR 1914 Lah 556: 1914 Pun Re 11 (Cr): 16 Cri LJ 146
(F) ('15) AIR 1915 Bom 14: 16 Cri LJ 538

ORDER: This is a reference under S. 438, Cr. P. C., by the learned Sessions Judge of Mahasu and Sirmur, recommending that the conviction of Sadh Ram for an offence under S. 22, Arms Act, 1878, be set aside and he be acquitted.

(2) The facts of the case are not in dispute. Sadh Ram holds a license for a gun. The gun was at the time out of repair, and he was taking it for repairs to a gun-maker at Kot Khai. On his way to Kot Khai he came to know at village Dim that the gun-maker was not at Kot Khai. Sadh Ram thereupon deposited the gun with one Jiwan Ram, promising to return the following day and take it back from him. He however told Jiwan Ram that in case he was unable to return the following day, the gun should be taken by him (Jiwan Ram) to the Police Station along with the license, which was also handed over to Jiwan Ram by Sadh Ram, for inspection. The following day, before Jiwan Ram could take the gun to the Police Station for its inspection, it was recovered from his possession by the Police and Sadh Ram was prosecuted for the offence under S. 22 of the Act.

(3) The learned Sessions Judge has made the aforesaid recommendation on two grounds: firstly, that in the above circumstances the gun in question should be deemed to have remained in possession of Sadh Ram and he should not be deemed to have delivered it into the possession of another without previously ascertaining that such person is legally authorized to possess the same within the intendment of para 2 of S. 22 of the said Act, and, secondly, that the trying Magistrate had not complied with the provisions of S. 256, Cr. P. C.

(4) It is well settled that temporary possession of a fire-arm on behalf of the license-holder without any intention that it be used as such does not amount to possession within the various provisions of the Arms Act under which possession of a fire-arm has been penalized. A number of decisions on this point have been referred to in — 'Kedar Nath v. Emperor', AIR 1941 Pat 209 (A). In this Patna case itself one of the persons convicted was the license-holder of the gun. It appears that on returning from a shooting expedition he left the gun with a friend with the intention of returning shortly afterwards and taking it back from him. The license-holder was convicted for breach of condition No. 2 of his license, which stated that the license covered only the persons named and the arms and ammunition described therein and such retainers, if any, as might be entered in Column 5. The friend of the license-holder was not such a retainer.

It is manifest that on the above facts breach of the condition of the license was also punishable under S. 22 of the Act, as in the present case. It was however held that the possession of the gun must be deemed to have remained with the license-holder though it was not actually in his physical possession, and that his friend must be deemed to have been in possession of the gun on behalf of the license-holder. The circumstances which were taken into consideration in arriving at this finding were that the gun was not left with the friend in order that it might be used by him, and that the gun was left with the friend only temporarily. The same is the case here.

(5) One of the circumstances taken into consideration by the learned Sessions Judge was that the gun was out of repair. The learned acting Government Advocate has cited in this connection — 'Swami Dayal v. State', AIR 1953 All 353 (B), where it was held that possession of even a broken pistol in an unworkable condition is punishable under S. 19 (f), Arms Act. That may be so, but that is not the point which arises in the present case. The fact that the gun in the present case was in an unworkable condition was a circumstance taken into consideration in support of the existence of one of the aforesaid two conditions in which possession of a fire-arm will in law be deemed to be with the license-holder even though its physical possession may for the time being be with another, namely, that in leaving the gun with Jiwan Ram there could possibly have been no intention of its being used by him as such. I therefore agree with the learned Sessions Judge that no offence under S. 22 of the Arms Act has been made out against Sadh Ram.

(6) In view of the above finding it is hardly necessary to consider the other ground put forward by the learned Sessions Judge in support of his recommendation. The point has really not been sufficiently elaborated by the learned Sessions Judge. The record shows that although this was a case which was triable as a summons case, the trying Magistrate commenced the trial as if it were a warrant case. In the circumstance, he should have followed the procedure of a warrant case to the end. He omitted however to comply with the provisions of Ss. 254, 255 and 256, Cr.

P. C.: after the close of prosecution evidence the Magistrate framed no charge, and he did not put any question to the accused to find out if he wanted to cross-examine any of the prosecution witnesses whose evidence had been recorded.

This was therefore clearly a case covered by the ruling of their Lordships in — 'Subrahmania Ayyar v. Emperor', 28 Ind App 257 (PC) (C), in which it was held that where an express provision as to the mode of trial has been contravened it amounts to illegality which vitiates the trial and is not cured by S. 537 of the Code. The learned acting Government Advocate cited two rulings, — 'Ladha Singh v. Emperor', AIR 1915 Lah 259 (1) (D) and — 'Moola v. Emperor', AIR 1914 Lah 556 (E), in support of the view that in such a case the proper order to pass is a remand for retrial. The question is one of mere academic interest in the present case since on the first ground, in any case, Sadh Ram must be acquitted and not be retried. It may however be stated that, in view of the aforesaid decision of their Lordships of the Privy Council, acquittal and not retrial would be the proper order. This view is also supported by — 'Dosabhai v. Emperor', AIR 1915 Bom 14 (F).

(7) The reference is accepted, the conviction and sentence passed on Sadh Ram are set aside and he is acquitted of the charge under S. 22 of the Arms Act. If the fine has already been realized, it shall be refunded to him.

B/V.R.B. Reference accepted.

A. I. R. 1953 HIM. P. 122 (Vol. 40, C. N. 51)

CHOWDHRY J. C.

Narotam, Objector-Appellant v. Sardaru and another, Decree-holders-Respondents.

Second Appeal No. 32 of 1952, D/- 28-3-1953.

Civil P. C. (1908), O. 21, R. 100 — Objection of third party challenging right of decree-holder to eject him.

Where on foot of his decree the decree-holder puts in a prayer against the judgment-debtor for being put in possession of the property, and even before a warrant of dakhal for putting the decree-holder into possession is issued, a third person puts in an objection challenging the right of the decree-holder to eject him on the ground that he is a tenant of the previous holder, the objection is premature and the Court cannot go into the merits of the objection. (Para 3)

Anno: C. P. C., O. 21, R. 100 N. 3.

D. N. Vaidya, for Appellant; D. R. Chaudhary, for Respondents.

JUDGMENT: This is an appeal by one Narotam who filed an objection in the course of execution proceedings instituted by Sardaru decree-holder against the State of Himachal Pradesh as judgment-debtor. His objection was dismissed by the execution Court and so was his appeal by the District Judge.

(2) I need not go into the question whether a revision rather than an appeal was the proper remedy, for even if the proper remedy was by a petition in revision, this would be a clear case for interference due, as I shall presently show, to the Courts below having exercised jurisdiction which did not really vest in them.

(3) One Sudama left an estate totalling 28 bighas and 15 biswas. He owned malguzari rights in 22 bighas and 12 biswansis out of the said area and the rights of a tenant-at-will in the remaining 6 bighas 14 biswas and 8 biswansis which was grass land. The State took the property by escheat on the death of Sudama. Thereupon Sardaru, claiming to be a reversioner, filed a suit against the State for recovery of possession of the property left by Sudama, and he obtained a decree on 10-12-1948. After obtaining the decree Sardaru put it into execution against the State and prayed for recovery of possession of the said land. In that execution Narotam filed an objection on 21-4-1950 challenging the right of Sardaru decree-holder to eject him. Narotam based his objection on two grounds: (1) that he had been holding the cultivated land of 22 bighas and 12 biswansis as a tenant, and been in possession of the remaining grass land as a sub-tenant, of Sudama, and (2) that pending the said litigation between Sardaru and the State the latter had settled half the area of the agricultural land with him on payment of 'nazrana'. Both the Courts below have gone into the merits of the objection and dismissed it. In doing so they have done something which they were not called upon to do.

(4) By the date on which the objection was filed not even a warrant of 'dakhal' for putting the decree-holder into possession had been issued. The decree-holder had simply prayed to be put in possession of the property, and this prayer was made only against the judgment-debtor, the State of Himachal Pradesh. The decree-holder was certainly entitled to do so on foot of the aforesaid decree. He never prayed that Narotam or anybody be ejected from any portion of the land. Narotam had therefore no cause of action whatsoever for filing the aforesaid objection on 21-4-1950, as he did. Of course, if he were actually dispossessed of the land in question, or any portion of that land, it would have been open to him to come forward with an application to the execution Court under O. 21, R. 100, C. P. Code. His application would then have been enquired into, and, if it were decided against him, he would have had a right of suit under R. 103. It was not even obligatory on him to file an application under rule 100, for, independently of any such application, he could also have brought a suit against the person dispossessing him, i.e., against Sardaru.

It is said that subsequent to the institution of the present appeal the warrant of 'dakhal' has been executed, it being a matter of controversy between the learned counsel for the parties whether actual 'dakhal' has or has not been obtained by the decree-holder. With this however I am not concerned because that is something which has happened long after the institution of the objection dated 21-4-1950. From what has been stated above, therefore, it is manifest that Narotam had no cause of action whatsoever for filing the aforesaid objection on 21-4-1950: the objection was premature. Narotam's objection should have therefore been dismissed on that ground alone, and the Courts below were not justified in going into the merits of the objection. In the circumstances, whatever the Courts below have adjudged on the merits of the objection is mere obiter dictum and will not affect the rights of the parties in any possible future litigation between them. I maintain the orders of the Courts below on the short ground that Narotam's objection was premature and without going into merits of the allegations contained in that objection.

(5) In the light of the above observations, the present appeal is dismissed, but I make no order as to the costs of this appeal.

B/G.M.J. Appeal dismissed.

A. I. R. 1953 HIM. P. 123 (Vol. 40, C. N. 52)

CHOWDHRY J. C.

Sabhu and others, Plaintiffs-Petitioners v. Ramsa and another, Defendants-Respondents.

Civil Revn. No. 79 of 1952, D/- 28-5-1953.

(a) Evidence Act (1872), S. 115 — Estoppel by conduct.

By reason merely of an application which they filed for extension of time to file the amended plaint in accordance with the finding of the Court the plaintiffs would not be estopped from coming up in revision against the order of the Court. AIR 1927 Mad 1009 (2); AIR 1928 Lah 813 (2) and AIR 1934 Lah 979, Distinguished. (Para 2)

Anno: Evidence Act, S. 115 N. 3.

(b) Civil P. C. (1908), S. 115 — "Exercised a jurisdiction not vested in it by law."

If the trial Court was wrong in holding that the State of Himachal Pradesh was a necessary party, it will be deemed to have assumed jurisdiction 'qua' the party ordered to be impleaded which it otherwise did not possess. (Para 3)

Anno: C. P. C., S. 115 N. 10.

(c) Civil P. C. (1908), O. 1, R. 10 — Necessary party and proper party.

Suit for possession by plaintiffs as reversioners to last male-holder on death of widow — Defendants contending that property was taken by escheat by State and granted to them on receipt of 'nazrana' — Held Government was only a proper and not a necessary party to suit — Held it would be a proper exercise of discretion in the present suit not to force the plaintiffs to implead a party the result of which would only be the rejection of the plaint. Case law discussed. (Paras 5, 7, 8, 9)

Anno: C. P. C., O. 1, R. 10 N. 13, 14, 25.

(d) Civil P. C. (1908), S. 80 — Notice after amendment of plaint.

Notice under S. 80 should be given before the institution of the suit. It cannot be given after the institution of the suit where the State is to be added as defendant to the suit. (Para 9)

Anno: C. P. C., S. 80 N. 10, 16.

Thakar Dass, for Petitioners; A. C. Hoshiarpuri, for Respondents.

CASES CITED:

(A) ('27) AIR 1927 Mad 1009 (2): 105 Ind Cas 620
(B) ('28) AIR 1928 Lah 813 (2)
(C) ('34) AIR 1934 Lah 979: 151 Ind Cas 172
(D) ('41) AIR 1941 FC 16: ILR (1941) Kar FC 72 (FC)
(E) ('51) AIR 1951 Punj 352: 52 Pun LR 88
(F) ('49) AIR 1949 Mad 369: 1948-2 Mad LJ 362
(G) ('40) AIR 1940 Mad 225: 1939-2 Mad LJ 872
(H) ('48) AIR 1948 Oudh 44: 1947 All WR CC 167
(I) ('26) AIR 1926 All 585: 96 Ind Cas 351
(J) ('43) AIR 1943 Mad 341: 211 Ind Cas 113
(K) ('28) AIR 1928 Mad 1201: 52 Mad 465
(L) ('37) AIR 1937 Mad 641: 170 Ind Cas 919

ORDER: This is a plaintiffs' application in revision against the order of the learned Subordinate Judge, Theog dated 13-10-1952 whereby the plaintiffs were directed to file an amended plaint impleading the State of Himachal Pradesh as a defendant. This order was passed after the disposal of the preliminary issue whether the said State was a necessary party to the suit. The Court held that the State was a necessary party.

(2) There are two preliminary objections raised by the learned counsel for the defendants-respondents. The first is that the plaintiffs are estopped from filing their revision because of an application which they filed on 23-10-1952 for extension of time to file the amended plaint in accordance with the aforesaid finding. There is no doubt that extension of time was in fact prayed for by the plaintiffs, but I do not think that by reason merely of having put in such an application the plaintiffs would be estopped from coming up in revision against the order in question. The learned counsel for the respondents cited — 'Ramaswami Chettiar v. Chindambaram Chettiar', AIR 1927 Mad 1009 (2) (A); — 'Sohan Lal v. Dhan Mal Ishar Das', AIR 1928 Lah 813 (2) (B), — 'Bahadur v. Mohammad Din', AIR 1934 Lah 979 (C). All these were cases where a party sought to challenge an order after having accepted a certain benefit on condition of which the order was passed. In the present case no such benefit was accepted by the plaintiffs-petitioners. The mere fact that the plaintiffs asked for an extension of time could not be said to be tantamount to their having accepted any benefit. It appears that under the order in question the Court ordered the plaintiffs to pay certain costs; but no time for payment of costs had been fixed. Moreover, if the said order remains the costs will certainly be payable. In the result therefore I disallow the first preliminary objection and hold that the plaintiffs are not estopped from filing the present revision.

(3) The next preliminary objection taken by the learned counsel for the respondents was that no question of jurisdiction is involved and therefore a revision petition is incompetent. If however the trial Court was wrong in holding that the State of Himachal Pradesh was a necessary party, it will be deemed to have assumed jurisdiction 'qua' the party ordered to be impleaded which it otherwise did not possess. As I shall presently show, the finding of the trial Court was erroneous. That being so, this was a case of the trial Court seeking to exercise jurisdiction not vested in it. The revision is therefore competent.

(4) Coming to the merits of the issue, it appears that the plaintiffs filed the suit treating the defendants as trespassers. Their case was that the property in suit originally belonged to one Magni and that on his death his widow Mt. Khanki succeeded to it with life interest of a Hindu widow. Mt. Khanki is said to have died in or about 1944 and the present suit was filed in January 1950. The plaint allegation was that since the death of Mt. Khanki the defendants had been in wrongful possession. It was also pleaded that in case the defendants' possession was on foot of any alienation by Mt. Khanki, the possession would be illegal since she had no right to make the alienation. The plaintiffs set up their title to the property as reversioners to the last male-holder. The defendants on the other hand contended that the property was taken by escheat by the Balsan State

and thereafter granted to them by that State on receipt of certain 'nazrana.' It is not necessary for disposal of the present issue to consider other pleas taken in defence. It may incidentally be stated further that one of the points taken up in the written statement was that the plaintiffs were aware of this escheat. The question is whether on these pleadings the State of Himachal Pradesh was, or was not, a necessary party.

(5) I do not wish to express any final opinion on the question of whether the plaintiffs were, or were not, aware of the escheat, because that might prejudice the disposal of the case eventually. But even if it be supposed that this defence allegation be correct, that would not affect the disposal of the present issue. Irrespective of whether the plaintiffs did or did not know of the escheat, and irrespective even of the fact whether an escheat had in fact taken place, the question for determination is whether, in view of the defence plea in question with regard to escheat, the Government is a necessary party. I am not taking into consideration the argument of the learned counsel for the plaintiffs-petitioners that for the disposal of the present issue only the allegations in the plaint should be taken into consideration. I say that even if the pleas contained in the written-statement of the defendants can validly be taken into consideration for the disposal of the issue, it cannot be held that the Government is a necessary party.

(6) The distinction between a necessary and a proper party has been made in O. 1, R. 10(2), C. P. C. The former is a party who ought to have been joined, whether as plaintiff or defendant, and the latter one whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The same point has been laid down in the following words by their Lordships of the then Federal Court of India in — 'United Provinces v. Mt. Atiqa Begum', AIR 1941 F. C. 16 (D):

> "A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. He would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication."

(7) Now, so far as the litigation between the present parties is concerned, it cannot be said that no effective decree can be passed in the absence of the State of Himachal Pradesh. There is no doubt that, in its paramount capacity as the State entitled to the land revenue in respect of the property in suit, the State of Himachal Pradesh would be interested in the result of the present litigation. There is also no doubt that in case the plaintiffs succeed, but the State of Himachal Pradesh do not wish that they should hold the land in suit, there may be further litigation between them. In that case it might be said that the present litigation would not effectually or completely dispose of the points in issue in this case. But that would only mean that the State of Himachal Pradesh is a proper, but not a necessary, party to this litigation.

(8) The learned counsel for the defendants respondents contended that the matter of escheat cannot be fully disposed of without the State being a party to the litigation. That is not so. So far as the present parties are concerned, the matter can be finally disposed of, although not between the plaintiffs and the State of Himachal Pradesh. It was also contended that if the plaintiffs' suit succeeds the defendants would be entitled to a refund of 'nazrana' and the costs of improvements alleged to have been effected by them on the land in suit. That may be so, but if the defendants can validly claim these amounts from the plaintiffs they will get that relief in the present suit. If on the other hand such a claim of theirs lies against the Government, the mere fact that the Government is not a party would not prevent them from claiming the said sums from the Government by another suit.

(9) The learned counsel for the respondents cited a number of rulings: — 'Indar Singh v. Hazara Singh', AIR 1951 Punj 352 (E); — 'Lakshmidevamma v. Nagayya', AIR 1949 Mad 369 (F); — 'Mangacharyulu v. Balarama Krishnamacharyulu', AIR 1940 Mad 225 (G); — 'Shri Nath v. Nand Lal', AIR 1948 Oudh 44 (H). All of them were cases where the trial Court had exercised its discretion in favour of adding a proper party and it was held that the discretion could not be deemed to have been exercised improperly. The High Court did not therefore interfere. In the present case also the party sought to be impleaded is a proper, and not a necessary, party; but there is one important distinction. The distinction is that if the finding of the trial Court is allowed to remain the result of the suit would be its rejection by reason of the State of Himachal Pradesh being impleaded without a previous notice under S. 80, C. P. C. The learned counsel for the respondents argued that such a notice could be given even at this stage. That does not however seem to be correct because S. 80 provides that such a notice should be given before the institution of the suit. To give effect to the finding recorded by the trial Court would therefore be to foredoom the plaintiffs' suit to rejection, as already stated. Of course, this Court should not be swayed by any consideration as to what the result of the suit would be if it were a fact that the State of Himachal Pradesh were a necessary party. In that case the State must be impleaded irrespective of whether the result of the State being impleaded would be rejection of the plaintiffs' suit for want of a notice under S. 80, C. P. C. But, as I have stated, the State of Himachal Pradesh is not a necessary party, though it may be a proper party, for the disposal of the present suit. That being so, it would be a proper exercise of discretion in the present suit not to force the plaintiffs to implead a party the result of which would only be the rejection of the plaint.

(10) While I had proceeded so far the learned counsel for the respondents wanted time to show that if the State of Himachal Pradesh is ordered to be impleaded under O. 1, R. 10, C. P. C., no notice to it u/s. 80 of the Code will be necessary. The case was therefore adjourned. On the adjourned date the learned counsel cited two rulings in support of the above contention. One was — 'G. I. P. Railway Company v. Mahadeo Ram', AIR 1926 All 585 (I). That was a suit instituted against the G. I. P. Railway while it was a private company. During the pendency of the suit the line was taken over by the Government, and the Secretary of State for India in Council was substituted as defendant. It was held that there was no question of instituting the suit against the newly impleaded defendant within the intendment of S. 80 because the suit had already been instituted, and the original defendant's interests had devolved upon the Government during its pendency, so that the matter was governed by O. 22, R. 10, and that therefore no notice as prescribed by S. 80 was necessary. In the present case, however, there is no question of devolution or assignment of interest during the pendency of the suit under O. 22, R. 10

of the Code. This ruling has therefore no application.

The other ruling cited was — 'Mahomed Yusuf Sahib v. Province of Madras', AIR 1943 Mad 341 (J). That was a suit under O. 21, R. 63 of the Code, and it was held that as such a suit is a continuation of the claim proceeding under O. 21, R. 58 no notice under S. 80 was necessary. Reliance was placed on — 'S. A. Rajamier v. Subramaniam Chettiar', AIR 1928 Mad 1201 (K), and the passage cited therefrom referred to "fresh notice". Presumably therefore a notice under S. 80 had already been given before institution of the claim proceeding under O. 21, R. 58. It appears therefore to have been held that no fresh notice was necessary before the institution of a suit under O. 21, R. 63 since such a suit is merely a continuation of the claim proceedings. The ruling therefore does not do away with the necessity of the notice in question. It has also no application to the facts of the present case which is not a continuation of any previous proceeding. I therefore hold that the possibility of the present suit being rejected for want of a notice under S. 80 is not ruled out in case the plaintiffs are ordered to implead the State of Himachal Pradesh. That being so, it would be just and proper not to exercise the discretionary power under O. 1, R. 10(2) of the Code in favour of the addition of the State of Himachal Pradesh as a proper, as distinguished from a necessary, party.

(11) Before I close I have to refer to an additional ruling cited by the learned counsel for the defendants-respondents in connection with the question of whether the State of Himachal Pradesh is a necessary or only a proper party, viz., —'Krishnaswami Naidu v. Municipal Council Bellary', AIR 1937 Mad 641 (L). This ruling was cited by him on the adjourned date. The ruling does not however support him, for it lays down that the question whether the Government is a necessary party or not would depend upon the facts of each case and no general rule can be laid down. It was further held that in cases where the plea of jus tertii is set up, it is generally considered desirable to make the person whose title is set up a party to the suit to avoid multiplicity of litigation. It would appear therefore that in fact the Government was ordered to be impleaded in that case because it was considered to be a proper party although, no doubt, the expression used was that it was a necessary party. Moreover, in view of the important circumstance considered above, namely, that to order the addition of the State of Himachal Pradesh would be to foredoom the present suit to its rejection for want of a notice under S. 80 of the Code, it would not be just to hold, according to this ruling, that the Government was a necessary party. It has already been seen that, so far as the present parties are concerned, an effective decree can be passed between them, one way or the other, even in the absence of the State of Himachal Pradesh. Allowing the revision petition therefore, the finding of the trial Court that the State is a necessary party and the order passed by it directing the plaintiffs to file an amended plaint impleading the State as a defendant are set aside and the Court is directed to dispose of the rest of the issues arising on the pledings of the parties without impleading the State of Himachal Pradesh. In view of the peculiar circumstances of the case, I make no order as to the costs of this revision. The parties will appear before the trial Court on 20-6-1953.

B/D.H.Z. Revision allowed.

A. I. R. 1953 HIM. P. 125 (Vol. 40, C. N. 53)

CHOWDHRY J. C.

R. N. Mohindra; Petitioner v. State of Himachal Pradesh.

Civil Writ Petn. No. 1 of 1952, D/- 28-5-1953.

(a) Constitution of India, Art. 311 — Civil Service (Classification Control and Appeal) Rules, R. 55 — Termination of service — Resignation — No enquiry.

If a person's services have been terminated in contravention of the provisions of R. 55 of the Civil (Classification Control and Appeal) Rules and Art. 311 he has a legal right to come to the High Court for appropriate relief under Art. 226 of the Constitution, and the mere facts that he has the alternative remedy of a suit, or that the action taken by him in this Court was a delayed one, would by themselves be no ground for denying him that relief. But it is essential that the alleged legal right should have been actually violated. That cannot be said to have happened where he instead of showing cause against the action proposed against him in pursuance of the notice, he tenders his resignation. In such a case the contingency of holding an inquiry never arises and the authority concerned is left with no alternative but to terminate his services. It is not open to him to contend that his services were wrongly terminated.

(Paras 5, 6)

(b) Constitution of India, Art. 226 — Applicant concealing facts — Application will be dismissed. (Para 5)

K. C. Pandit, for Petitioner; C. L. Puri, Ag. Govt. Advocate, for the State.

CASES CITED:

(A) ('52) AIR 1952 Pat 194
(B) ('52) AIR 1952 Him P 43
(C) ('53) AIR 1953 Nag 69: ILR (1952) Nag 955

ORDER: This is a petition under Art. 226 of the Constitution by one R. N. Mohindra, one time employee of the respondent, the State of Himachal Pradesh, in the medical department, whose services were terminated by an order of the Director of Health Services dated 26-3-1951, for a writ of mandamus and such other directions as may be deemed fit to the respondent for restoration of the petitioner to the office of the Head Clerk in the medical department of the State and for payment to him of arrears of his emoluments till the date of his reinstatement. The application has been opposed on behalf of the State.

(2) It appears that the petitioner was appointed a Head Clerk in the medical department of the former Sirmur State on six months probation in June 1944 and confirmed on that post on 6-3-1945. After formation of Himachal Pradesh, which took place on 15-4-1948, the petitioner's services were continued in the medical department by the respondent. One of the points urged by the petitioner is that the respondent will be deemed to have retained his services as a permanent Head Clerk in the medical department. It is however not necessary to go into that question since it would be material only if his reinstatement were to be ordered.

(3) After certain charges had been levelled against the petitioner, with the reasonability or otherwise of which charges this Court is not concerned, the petitioner was reduced in rank with

effect from 1-6-1950 by an order dated 14-5-1950. Subsequently, he was suspended by an order dated 27-1-1951, and on 9-2-1951 a notice was issued to him to show cause why his services be not terminated within a week of the receipt of the notice. Reference was made in this notice to the allegedly past improper conduct of the petitioner leading to his reduction in rank and to his subsequent misconduct in October 1950 and immediately before the issue of notice. At the end it was stated that as in spite of previous warnings the petitioner had not taken care to reform himself it was proposed to terminate his services, but that before such action was taken he was being given an opportunity of showing cause against it. As already stated, the services of the petitioner were terminated by an order dated 26-3-1951.

(4) The contention of the learned counsel for the petitioner was that the removal of his client from service was wrongful in that the provisions of R. 55 of the Civil Services (Classification, Control and Appeal) Rules and of Art. 311 of the Constitution had not been complied with. The two provisions just cited require the official concerned to be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him before he is either dismissed, removed or reduced in rank. The learned counsel also argued that the aforesaid notice dated 9-2-1951 was defective since the petitioner was not only asked thereby to show cause but it even mentioned the punishment sought to be imposed upon him. He also argued that there was no mention in the notice whether the petitioner desired to be heard in person, as required by R. 55. It was also contended that the aforesaid order of termination of services was passed without holding any inquiry.

(5) Now, there is no doubt that if the present petitioner's services have been terminated in contravention of the said provisions, he has a legal right to come to this Court for appropriate relief under Art. 226 of the Constitution, and the mere facts that he has the alternative remedy of a suit, or that the action taken by him in this Court was a delayed one, would by themselves be no ground for denying him that relief. But, as held in a ruling cited by the learned counsel for the petitioner himself, i.e., in — 'Ram Prasad v. State of Bihar', AIR 1952 Pat 194 (A), it is essential that the alleged legal right should have been actually violated. That cannot be said to have happened in the present case. And this appears from facts disclosed in the respondent's reply in this case. Incidentally, it may be stated here that these facts were not stated in the petitioner's application, and as these were material facts, this concealment alone would be a sufficient ground for throwing out the present petition. 'Harish Chandra v. Lt.-Governor of Himachal Pradesh', AIR 1952 Him P 43 (B). I would however not throw out the present petition on that short ground but would refer to the material facts just mentioned in order to show that there has really been no violation of the petitioner's rights.

(6) It appears that in reply to the aforesaid notice dated 9-2-1951, which notice was admittedly received by the petitioner, the petitioner, within the week allowed by the notice, instead of making any attempt to show cause against the action proposed to be taken against him, submitted his resignation on 15-2-1951. This letter of resignation is strongly worded, but that is not a matter which need be considered. What is material is that, instead of availing himself of the opportunity granted to him by the authority concerned to show cause against the proposed action, the petitioner tendered his resignation. That being so, the contingency of holding an inquiry never arose and the authority concerned was left with no alternative but to terminate his services. The right which is alleged by the petitioner to have been violated in the matter of the termination of his services is that his services were terminated without his having been given an opportunity to show cause against that action. But by sending in his resignation the petitioner made it impossible for the authority concerned to do anything else but to terminate his services. It is not open to the petitioner therefore to contend that his removal was wrongful.

On the contrary, this is a case like the one reported as — 'Waman v. State of Madhya Pradesh', AIR 1953 Nag 69 (C), where no attempt was made by the applicant to show cause against his dismissal, and therefore it was held that the notice which had been given to him complied with the provisions of Art. 311(2) of the Constitution. In fact, the present is a stronger case since it is not only that no attempt was made by the petitioner to show cause against the termination of his services, but he actually tendered his resignation in reply to the notice. In the circumstance, if the petitioner had any right, he himself cut the ground from under it and it cannot be said that the respondent was responsible for its violation. The present petition is accordingly dismissed. I make no order as to the costs of the petition since admittedly certain costs awarded to the petitioner on a previous date have not yet been paid.

A/R.G.D. Petition dismissed.

A. I. R. 1953 HIM. P. 126 (Vol. 40, C. N. 54)

CHOWDHRY J. C.

Nirma and others, Petitioners v. The State.

Criminal Misc. Petn. No. 4 of 1953, D/- 1-7-1953.

(a) Criminal P. C. (1898), S. 526 — Magistrate's explanation.

A Magistrate who is asked to submit his explanation is not expected to make comments on the application for transfer, nor is he required to produce evidence in support of his explanation unless specifically called for. (Paras 3 and 4)

Anno: Cr. P. C., S. 526 N. 9.

(b) Criminal P. C. (1898), S. 526 (1) (a) — Taking up case after closing hours of Court.

Taking up a case after the closing hours of the Court, if such is not the usual practice of the Magistrate, is by itself sufficient to raise an apprehension in the mind of the accused that he may not get a fair and impartial trial. (Para 5)

Anno: Cr. P. C., S. 526 N. 5.

(c) Criminal P. C. (1898), S. 526 (1) (a) — No opportunity given to accused to know what case against him was — Transfer should be ordered. (Para 6)

Anno: Cr. P. C., S. 526 N. 5.

(d) Criminal P. C. (1898), S. 526 (1) (a) — Magistrate making up his mind to frame charges even before knowing what accused's statement would be — Circumstance is such as likely to raise reasonable apprehension in mind of accused that he cannot get fair trial. (Paras 7, 8a)

Anno: Cr. P. C., S. 526 N. 5.

K. C. Pandit, for Petitioners; L. N. Sethi, Govt. Advocate, for the State.

ORDER: This is an application by three men, Nirma, Jango and Phurkhu, under Section 526, Cr. P. Code, for the transfer of a case pending against them for an offence under Section 435, I. P. C., in the Court of the Magistrate, 1st Class at Theog on the ground that they do not expect a fair and impartial trial at the hands of the said Magistrate.

(2) The allegations of the petitioners are that the Challan was submitted before the Court at about 6.15 p. m. on 11-5-1953, that the Magistrate took up the case immediately at that late hour despite the request of the petitioners to adjourn the case so as to have the opportunity of calling from Simla Sri K. C. Pandit Advocate to defend them; that a local pleader Sri B. D. Suri, whom the petitioners had to engage at the spur of the moment, did not have the requisite opportunity of preparing himself before the production of the prosecution evidence on that evening, and his oral request for a copy of the first information report, which he had had no opportunity of looking into, was rejected; that the case was adjourned late that evening to the following day in spite of protests of the petitioners that the aforesaid Advocate would not be able to attend owing to being engaged in a case in this Court; and that on 12-5-1953 again the Magistrate framed a charge against them after turning down their request for the postponement of the case in order that they may have the opportunity of the aforesaid advocate addressing the Court before the framing of the charge.

(3) The learned Magistrate has in his explanation denied that a prayer for adjournment at any stage was made by or on behalf of the petitioners, although he admits that he was apprised by Sri B. D. Suri on the evening of 11-5-1953 that Sri K. C. Pandit, the counsel engaged by the accused, could not be present in person for certain reasons. It is admitted by the learned Magistrate that the case was taken up at 5.30 p. m. on 11-5-1952 and continued till 7.35 p. m. In reply to the specific allegation that the Magistrate took up the case immediately after receiving the challan, the learned Magistrate replies that the challan had been presented "sometime previously on that day". He makes no reply to the allegation that the oral request of Sri B. D. Suri pleader for a copy of the first information report was not accepted by him.

While denying the allegation that the petitioners requested him to give them an opportunity for the said Advocate appearing on their behalf to address him before framing the charge, the learned Magistrate remarks that he had already informed the accused at the close of the case on 11-5-1953 that on the following day the statement of the accused will be recorded and charges framed against them. While submitting his explanation, the learned Magistrate has also sent a statement on oath of Sri B. D. Suri pleader Theog wherein the lawyer has denied the petitioners' allegation regarding prayer for adjournment.

There are two observations which I would like to make before dealing with the present application on merits. Firstly, the learned Magistrate was asked to submit his explanation with regard to the allegations contained in the petitioners' application for transfer. In reply he professes to make comments on that application. He must however remember that a comment is not the same thing as an explanation. Comment connotes criticism while explanation means giving account of one's conduct. Regard being had to the fact that in making an application for transfer of a case from the Court of a Magistrate the accused make, as they have done in the present case, allegations regarding the conduct of the Magistrate, it is an explanation, and not a comment, that is demanded from a Magistrate and that a Magistrate is expected to offer. The attention of the learned Magistrate is invited in this connection to Rule 9 in Chapter 1-A (b) of Vol. V of the Punjab High Court Rules and Orders, which have been made applicable in this State also, where there is reference to

> "explanations called for by the High Court from himself (meaning District Magistrate) or the Magistrate concerned with regard to the allegations contained in the petitions for transfer".

It is hoped that in future in similar circumstances the learned Magistrate will offer explanation and not comment on an application for transfer.

(4) Secondly, all that the learned Magistrate was required to do was to offer an explanation and not to produce evidence in support of the same. He was therefore not justified in sending along with his explanation a statement on oath of Sri B. D. Suri pleader Theog. It is not possible moreover to attach any value to the said statement of Sri B. D. Suri since it was recorded by the learned Magistrate in absence of the present petitioners. In future, the learned Magistrate should only submit his explanation and not oral evidence in support of his explanation unless specifically called for.

(5) Coming to the merits of the application, this much is in any case admitted by the learned Magistrate that he took up the case against the petitioners late in the evening of 11-5-1953 at least an hour after the close of Court hours, and that it continued till 7.35 p. m. In doing so he clearly transgressed Rule 8 of Chapter 1-A of Vol. III of the aforesaid Rules and Orders, which lays down that the hearing of a case taken up before 4 p. m. or whatever may be the closing hours of the Court may, if necessary, be continued for a short time after that hour; but no new case should be taken up after the hour when the Court is timed to rise. The learned Magistrate did not therefore act properly in taking up the case at 5.30 p. m. and continuing it till 7.35 p. m. The learned Government Advocate was not prepared to say that such is the usual practice of this learned Magistrate. If so, the course adopted by the learned Magistrate in the present case was by itself sufficient to raise an apprehension in the minds of the petitioners; for they would naturally have been unable to find any reason for the Magistrate making an exception in their case and taking up the case in such hot haste at such a late hour of the day.

(6) Again, as adverted to above, the learned Magistrate has replied only indefinitely to the allegation of the petitioners that the case was taken up at a late hour on the evening of 11-5-1953 immediately after the presentation of the challan. That being so, the petitioners' allegation must be accepted as correct, and it follows therefore that neither the petitioners nor their counsel knew what the accusation against the petitioners was before their counsel was suddenly required to cross-examine the prosecution witnesses. There is, of course, nothing in the Criminal Procedure Code against the procedure adopted in this case by the learned Magistrate, but a trial in which such a procedure is adopted cannot on the face of it be said to be a fair trial since it does not afford the accused necessary opportunity to defend themselves properly.

It is for this reason that Rules 5 and 6 of Chapter 1-A of Vol. III of the said Rules & Orders stand in effect superseded by the instructions contained in Notification No. III-G/XII-Z. 10, dated 5-1-1948, issued by the Punjab High Court and published in East Punjab Gazette Part III, dated 9-1-1948,

which lays down, 'inter alia', that witnesses should not be produced on the date of presentation of the chalan but should be bound over by the police under S. 170, Criminal P. C. to appear three or four days later, an exception being made in cases the trial of which should be completed forthwith and should not be delayed even for three or four days, as for instance, the case of a pick-pocket caught red-handed in a fair. Obviously, the present case does not come under that exception.

It has been pointed out by the learned Magistrate, and the learned Government Advocate also argued, that the petitioners had already been served with summonses for 11-5-53. That is no doubt true, but all that was stated therein was that they were to be prosecuted for an offence under S. 435, I. P. C. That did not give the petitioners any indication as to what actually the prosecution case was. In the circumstances, even though the petitioners or their counsel may not have asked for an adjournment, it is manifest that the case was taken up at a late hour on the evening of 11-5-1953 immediately after the presentation of the chalan and therefore without giving them any opportunity of knowing what the case against the petitioners was.

(7) The above are however not the only circumstances. Another circumstance which would raise a reasonable apprehension in the mind of any accused against his having a fair trial appears in the aforesaid reply which the learned Magistrate has made to the allegation that they were not allowed an opportunity that Sri K. C. Pandit Advocate might address the Court before the framing of the charge. The learned Magistrate has no doubt denied the allegation that any such request was made to him, but, at the same time, he has admitted that at the close of the case on 11-5-1953 he informed the accused not only that their statements would be recorded on the following day but also that the charges would be framed against them. It would appear therefore that, even before knowing what the statements of the accused would be, the learned Magistrate had already made up his mind to frame charges against them.

(8) Before I conclude, I would refer to one other fact although that may not affect the present application on its merits, and that is the fact of the learned Magistrate having denied the allegation of the petitioners that an application for inspection of the record had been made by their Advocate, Sri K. C. Pandit, on 9-5-1953. That allegation was made in support of the contention that even on 9-5-1953 the petitioners were not in a position to know what the case against them was. This allegation really loses its force in the teeth of the subsequent allegation (which has been found to be correct) that the chalan was presented before the Court immediately before the case being taken up late in the evening of 11-5-1953.

What I wish to say here is that the learned Magistrate's denial with regard to the presentation of the application for inspection has, in any case, been rashly made. He says that there was no record available in his office to indicate that the application in question had been made on 9-5-1953. Sri K. C. Pandit for the petitioner has however showed to me the said application in original which appears to have been returned to him after endorsement thereon of the learned Magistrate's order of the said date. I think that the application should not have been returned to the party or his counsel but consigned to the proper record. What is germane to the point under consideration is however that the learned Magistrate himself endorsed the order on the application that it be registered. A record was therefore available in the office of the learned Magistrate, i.e., the register in question, from which he could have ascertained that the application had been preferred before him on 9-5-1953. He should not therefore have given the said reply without consulting the register.

(8a) While I do not doubt that the learned Magistrate had no bias of any kind against the petitioners, the circumstances pointed out above are such as were likely to raise a reasonable apprehension in the minds of the petitioners that they cannot have a fair trial. The application is therefore allowed, and it is hereby ordered that the case pending against the petitioners in the Court of the Magistrate 1st class Theog be transferred to the Court of the District Magistrate with the direction that the District Magistrate should either himself try the case or transfer it for trial to any other competent Magistrate subordinate to him at Kasumpti. The petitioners are hereby directed to appear before the Distirct Magistrate for hearing necessary orders on 21-7-1953.

B/V.R.B. Application allowed.

END

THE

ALL INDIA REPORTER

1953

[Vol. 40]

HYDERABAD SECTION

WITH COMPARATIVE TABLE FOR

I. L. R. (1952) HYDERABAD

CITATION : A. I. R. (40) 1953 HYDERABAD

PUBLISHERS
THE ALL INDIA REPORTER LTD.,
NAGPUR, M. P.
1953

Printed by L. MELA RAM, at the All India Reporter Press, Nagpur, and Published by D. V. CHITALEY, B.A., LL.B., Advocate, for the All India Reporter Ltd., at Congress Nagar, Nagpur.

(All Rights Reserved.)

HYDERABAD HIGH COURT

1953

CHIEF JUSTICE :

The Hon'ble Shri L. S. Misra, M.A., LL.B. (Cantab.), Bar-at-law.

PUISNE JUDGES :

The Hon'ble Shri Syed Qamar Hasan, M.A., LL.B.
" " Sripat Rao Palnitkar, B.A. (Hons.), LL.B.
" " Rai Manohar Persad, B.A., LL B.
" " Mohammad Ahmed Ansari, B.A., B.C.L., Barrister-at-law.
" " Mir Siadat Ali Khan, M.A., LL.B., D. Phil., B.C.L., Moulvi Fazil, Bar-at-law.
" " A. Srinivasachari, B.A., B.L.
" " Vithal Rao Deshpande, B.A., LL.B.
" " Pingal Jagan Mohan Reddy, Bar-at-law.

ADVOCATE-GENERAL :

Shri V. Rajarama Iyer, M.A. (Hons.), B L.

GOVERNMENT ADVOCATES :

Shri Mahomed Mirza, B.A., LL.B. (Senior).
" K. Srinivasa Raghavachari, B.A., B.L. (Senior).
" B. Narhari Sastri, B.A., B.L.
" G. N. Tuljapurkar, B.A., LL.B.
" S. M. Moholkar, B.A., LL.B.
" Trimbak Rao Deshmukh, B.Sc., LL.M.
" M. L. Ramakrishna Rao, LL.B.
" A. S. Chowdhary, B.A., LL.B.

REPORTER :

Shri Maruthirao Joshi, B.A., LL.B., Advocate.

EDITORIAL COMMITTEE :

DR. SIR M. V. JOSHI, KT., K. C. I. E., LL.D., Ex.-Law Member, C. P. Govt., Nagpur.
SHRI V. V. CHITALEY, B.A., LL.B., Senior Advocate, Supreme Court of India, Bombay.

EDITORIAL STAFF :

SHRI S. APPU RAO, B.A., B.L., Advocate (Madras), *Chief Editor*.
" D. V. CHITALEY, B.A., LL.B., Advocate, *Joint Editor*.
" V. S. BALKUNDI, B.A., LL.B., *Assistant Editor*.
" V. B. BAKHALE, M.A., LL.B., *Assistant Editor*.
" R. K. MANOHAR, B.A., LL.B., Advocate, Supreme Court of India, Nagpur.
" M. D. RAO, Advocate (Bombay).
" D. W. CHITALEY, B.A., LL.B., Pleader.

NOMINAL INDEX

Abdul Ali v. Rupchand 111
Abdul Aziz v. State 5
Abdul Fatah Khan v. The Government of Hyderabad 100
Abdullah v. Hanmanthappa 286
Abdullah v. Saleha Bi 234
Abdul Munim Khan v. State of Hyderabad 145
Abugunda v. Devgunda 253
Addu Achiar v. The Custodian Evacuee Property, Hyd Deccan 14
Afzal Begum v. Gulam Samdani 136
Ahamad Mohiuddin v. Abdurrahman 62
Ahmad-un-Nissa Begum v. State (FB) 21
Ameenuddin v. Mohammad Khader Ali 129
Amir Khan v. Abdullah Khan 20
Ananthramiah v. Venkat Ratnam 228
Ankush Rao v. The Collector, Bhir 183
Anwar Khan v. Munim Khan 229
Arugoba Reddi v. Maniklal Gupta 251
Arvindam, R. v. Mariam Venderman 205
Azam Gori v. Salahuddin 156

Babu Rao v. State of Hyderabad 120
Bagiriti v. Laxmibai 121
Baji Rao v. Ganaji 137
Balaram C. J. v. Rukmannamma 209
Balawa v. Kadappa 24
Balwant Rao v. Kerba 187
Bansilal Singh v. Benjamin Paul 206
Barket Lal v. Devidas 29
Bhawandas v. Kishenrao 237
Bikri Narayana v. State of Hyderabad 288
Bua Bi v. Khadija Begum 263

Central Bank of India Ltd. v. Badey 32
Chanda Kantiah v. Commr. E. P. T. Hyderabad 238
Chandrappa v. Gyanamma (FB) 275

Dantam Rangiah v. Banday Narsimlu 123
Dayaram Surajmal v. Commr. E. P. T., Hyderabad 254
Dhondi Ram v. Sukka Ram 13
Digambar Rao v. Dhondu 4
Dost Mohammad v. Hyderabad Government 223
Dyna Craft Machine Co. v. Syed Jahangir Ali 19

Ganga Bishan v. Mohd. Abdul Aziz 297
Gopal Rao v Shiv Ramiah (FB) 1
Gopinath v. Sayed Pathru 166
Govardhan Das v. Ahmadi Begam 181
Goverdhan Bang v. Govt. of the Union of India 212
Gundappa v. Collector of Gulbarga 135

Hanmantha v. Hanifabi 185
Hansari Sabaiah v. Bhalchander Rao 243
Harikishen v. Ramchander 56
Hiranand Ramsukh v. The State of Hyderabad 65
Hussain v. Salah 195
Hyderabad Deccan Cigarette Factory v. Commr. of Income-tax, Hyderabad 264
Hyderabad State v. Mukund Reddy 272

Italia D. D. v. Commissioner, Excess Profits Tax 244
Jahandarunnissa Begum v. Mohd. Moinuddin 117
Jaikishen v. Thotaram 160
Janardhan Reddy v. State 218
Jeevan Khatoon v. Mehtab Khatoon 77
Joint family business of Ramchendera Srinavas v. Shahdara Sharanpur Light Railway 274

Kalaporla Saidulu v. Hyderabad Government 249
Kayani & Co. v. Commr. of Sales Tax 252
Khaja Mian v. State of Hyderabad 204
Kharka v. Yelappa 28
Kishen Rao v. Mahboob Ali 235
Kishorilal v. Raja Rameshwardas (FB) 67
Kodanda Ramma Reddy v. J. K. Ram Rao 215
Komrusetti Agayya v. Sub-judge, Secunderabad 190
Kondiba v. Moti Ram 167
Kondiba v. Tatayya 208

Lakshmamma v. Someswar Rao 170
Lakshmibai v. Bhoja 114
Laxminarayan Bhayya v. Praga Tools Corporation Ltd. 126
Laxminiwas Ganeriwal v. The Election Commissioner, Delhi 240

Madho Rao v. Patelba 225
Mahadoo v. State of Hyderabad 303
Mahomed Akbar Khan v. Jaswant Rao 194
Mahomed Athar v. Narsingh Das Jaju 127
Mahomed Binsalim v. Fakira Mohommed 239
Mahomed Habibuddin v. Government of Hyderabad 157
Mahomed Hussain v. State of Hyderabad 293
Mahomed Hydar v. State of Hyderabad (FB) 33
Mahomed Ismail v. Sakina Begum 55
Mahomed Jamaluddin v. Zainab Begum 18
Mahomed Kasim v. Mohd. Munawar Khan 178
Mahomed Khaja v. Monappa 280
Mahomed Razack Ali v. Hyderabad Bank 192
Mahomed Sadruddin Khan v. Gulam Mohiuddin 97
Mangani Ram v. Government of India 139
Manohar v. Dattaji 176
Maruthi v. Saheb Rao 53
Mir Ahmed Ali Khan v. State of Hyderabad 188
Mukunda v. Birdychand 271
Mumtajuddin v. Fatima Begum (FB) 52
Muzafaruddin Mohammad v. State of Hyderabad (FB) 219
Nageschandra v. State of Hyderabad 125
Naimullah Khan v. State of Hyderabad 233
Nankoo Nathia v. Parmeshwaramma 130
Narayan v. State 161
Narsappa v. State of Hyderabad 60
Narsimgeer v. Satyanarayan 193
Narsing Rao v. Veerayya Rajanna 186
Noor Mohammad v. Sedmal 177

Oswald Hugh Pedro v. State of Hyderabad 98

Papayya v. Revenue Minister 242

Radhabai v. Gango Bai 173
Raj Bahadur Goud v. State of Hyderabad 277
Rama Ambaji v State of Hyderabad 283
Ramanna v. Venkatram Reddi 132
Ramchander K. Gulrani v. Sugra Begum 66
Ramchandra Rao v. Government of India 201
Ramchandra Reddy v. Shankaramma 131
Ramgopal Shrikishen v. Commissioner, E. P. T., Hyderabad 57
Ramulu v. Ganga Ram 138
Ranba v. Bansilal 231
Ranga Reddi v. State of Hyderabad 26
Rashid Ohenoy v. Raja Pratapgirji 168
Ratanlal Kesarachand v. Bandulal Radhakishen 174

Sadat Jahan v. State of Hyderabad 295
Sailum Eshwarayya v. Devi Singh (FB) 289
Samrat Mul v. Indar Mul 154
Santoba v. Madhavarao (FB) 276
Sarsothamma v. Amrithamma 258
Shabbir Ali v. Janaba Sartaj Jaha Begum 128
Shankeramma v. Government 79
Shankeramma v. Ramchandra Reddy 73
Shazada Qanum v. Fakher Jung 6
Shivamma v. Abdur Rahman 25
Shripathy v. State 12
Sketna Dev Padmiah v. Firm of Srigiri Venkiah 142
State v. Mumtaz Ali 257
—— v. Prabhu Dayal 273
—— v. Tadlapalli Kishtiah (FB) 267
—— v. Ahmed Mohiuddin 59
—— v. Annantha Reddy 133
—— v. Bhimaraya 63
—— v. Kaneez Fatema 155
State v. Murahari Rao 9
—— v. Siddappa 207
Subbarao S. V. v. State 123
Sultan Husain Khan v. Satnarain Lal 191

Tahira Begum v. State of Hyderabad (FB) 105
Thatha Rao v. Jummarlal Dhanji 179

Vanket Rajam v. Gundla Rajiah 241
Veeresham v. Vajrama 227
Venkat Babaiah v. Venkat Ratnayya 256
Vijay Rao v. State 285
Vishnu v. Jawaher Mall 230
Vishnu Das v. Dr. Krishna Kumar 144
Vishwanath v. Custodian Evacuee Property 64
Vithal Reddy v. Hyd. Govt. 250
Waman Rao v. Daulat Rao 3

Yakub Ali v. Addl. Collector, Hyderabad 184
Yavarunnisa Begum v. Ahmed Ali Khan 268

SUBJECT INDEX

Administration of Evacuee Property Act *(31 of 1950)*—*See* Constitution of India, Art. 14 157*b*

——*S. 1*—Scope—(Interpretation of Statutes—Hardship)—(Civil P. C., Pre.) 157*e*

——*S. 40* — *See* Constitution of India, Art. 226 157*a*

——*S. 40* — Validity — (Constitution of India, Art. 19 (1) (f) and (5)) 157*c*

——*S. 40* — If contrary to Art. 31 of the Constitution—(Constitution of India, Art. 31) 157*d*

——*S. 40*—Scope 157*f*

Arms Act *(11 of 1878), S. 14*—*See* Hyderabad Arms Regulation (13 of 1358 Fasli), S. 10 204

——*S. 15* — *See* Hyderabad Arms Regulation (13 of 1358 Fasli), S. 10 204

——*S. 16* — *See* Hyderabad Arms Regulation (13 of 1358 Fasli), S. 10 204

——*S. 18 (a)*—Reasons for cancellation 183

——*S. 19 (f)*—*See* Hyderabad Arms Regulation (13 of 1358 Fasli), S. 10 204

Certiorari — *See* under Constitution of India, Art. 226.

Civil Procedure Code *(5 of 1908), Preamble*
See (1) Administration of Evacuee Property Act (1950), S. 1 157*e*
(2) Precedents **(FB)** 289*a*

——*S. 2 (5)*—*See* Constitution of India, Article 261 (3) 19

——*S. 9*
See also (1) Constitution of India, Art. 226 235*b and e*
(2) Tenancy Laws — (Hyderabad) Jagir Abolition Regulation (1358F), S. 21, cl. 2, Proviso 79*e*

†——*S. 9* — Suit for declaration of plaintiff's exclusive right to perform purohitgiri does not lie —(Constitution of India, Art. 19 (g)) **(FB)** 1

——*S. 9*—Administrative bodies — Jurisdiction 79*i*

——*Ss. 10 and 151* — Suit for arrears of rent pending in Civil Court—Application by tenant for determination of fair rent to Rent Controller — Civil suit should not be stayed—(Houses and Rents — Hyderabad House Rent Control Order (1353 F), S. 6) 55

——*S. 11*—*See also* Suits Valuation Act (1887), S. 11 237

——*S. 11*—"Heard and finally decided" 79*a*

——*Ss. 13 and 14* — Suit on foreign judgment 29

Civil P. C. *(contd.)*

——*S. 14*—*See* ibid, S. 13 29

——*S. 20 (c)* — Suits on negotiable instruments —(Negotiable Instruments Act (1881), Ss. 78, 81 and 70) — (Hyderabad Negotiable Instruments Act, Ss. 77, 81, 80 and 69) **(FB)** 289*b*

——*S. 24*—Applicability and scope—Case pending before Atiyat Court 105*f*, 110*f (f)*

——*S. 47*—*See* ibid, S. 145 111*a, c*

——*S. 80*—Suit against Railway—Notice—Suit filed when Hyderabad Civil P. C. was in force at the place—No provision in Hyderabad Civil P. C. corresponding to S. 80, Civil P. C.—Notice is not necessary 139*a*

——*Ss. 96 and 154* — Vested right of appeal—Subsequent enactment affecting right of appeal —Effect — (Civil P. C. (Amendment) Act (2 of 1951), S. 20) 258*a*

——*S. 100* — *See also* Constitution of India, Art. 226 64*b*

——*S. 100 and O. 41, R. 31* — Perusal of evidence in second appeal 179*a*

——*S. 107*—Appreciation of evidence by appellate Court 181*a*

——*S. 110*—*See* Constitution of India, Art. 133 (1) (a) 177*a*

——*S. 110 (c)* — *See* Constitution of India, Art. 133 (1) (c) 177*c*

——*S. 113, Proviso* — Reference under—Necessary conditions for validity **(FB)** 52

——*S. 115* — *See also* Provincial Small Cause Courts Act (1887), S. 25 212*e*

——*Ss. 115 and 151*—Judicious discretion—No interference 130*b*

——*S. 115* — Wrongly casting of issues and burden of proof is not irregular exercise of jurisdiction 194

——*S. 115*—No revision lies against a mere finding of the Court below 227*a*

——*S. 115*—Other remedy open 297*a*

——*Ss. 145, 47 and O. 41, R. 5* — Surety's liability—Nature and extent of — Surety is not party to decree — Execution against him—Stay does not operate 111*a*

——*S. 145* — Surety's liability — Bond—Construction of — Judgment-debtor applying under Hyderabad Money-Lenders' Act, S. 12—Execution against surety held premature 111*b*

——*Ss. 145 and 47*—Surety—Execution against —Appeal 111*c*

——*S. 148*—*See* ibid, O. 11, R. 21 33

——*S. 151*
See also (1) ibid, S. 10 55
(2) ibid, S. 115 130*b*

Civil P. C. *(contd.)*
——*S. 151, O. 21, R. 97* — Decree in suit for permanent injunction — Right to put in claim petition 4
——*S. 151* — Inherent power — Power of High Court to stay its own orders—Nature of order — (Constitution of India (1950), Art. 226) 73*b*
——*S. 151 and O. 23, R. 3* — Mode of setting aside compromise decree — Compromise decree obtained by practising fraud on Court—Inherent power to set aside 127
——*S. 151* — Ends of justice—Consolidation of suits which are not cross-suits—(Hyderabad Civil P. C., Ss. 648 and 644) 130*a*
——*S. 151*—Application for fair rent before Rent Controller—Stay of suit 144
——*S. 152* — Who can apply for amendment—Person not party to suit or decree has no right—Proper remedy of third party is by way of suit 3
——*S. 154*—*See also* ibid, S. 96 258*a*
——*S. 154*—Interpretation of 258*b*
——*O. 1, R. 10*—*See also* ibid, O. 6, R. 17 192
——*O. 1, R. 10* — Suit for injunction by Hindu widow—Proper parties 24
——*O. 1, R. 10*—Appeal—Distinction between a case where party's name is struck out on ground of misjoinder and case where suit is withdrawn or abandoned at last hearing 170*a*
——*O. 1, R. 10* — "Whose presence before the Court may be necessary" 170*b*
——*O. 1, R. 10*—Partition suits — (Hyderabad Law of Partition (1352 F.)—Rules under—R. 3) 187*a*
——*O. 2, R. 2* — Relinquishment of claim for jurisdiction 230
——*O. 6, R, 17; O. 1, R. 10* — Amendment not altering nature of suit or adding new cause of action 192
——*O. 6, R. 17* — Discretion of Court to allow amendment of pleadings 212*a*
——*O. 6, R. 17*—Amendment taking away right accrued to a party by a lapse of time 212*b*
——*O. 6, R. 17*—Amendment to be refused when application is not in good faith 212*c*
——*O. 6, R. 17*—Amendment affecting jurisdiction 212d
——*O. 6, R. 17*—Amendment of plaint 212*f*
——*O. 7, Rr. 17 and 18* — Non-production of document 227*b*
——*O. 7, R. 18*—*See* ibid, O. 7, R. 17 227*b*
——*O. 8, R. 5* — Failure to file written statement does not amount to admitting plaintiff's case—(Hyderabad Civil P. C., S. 109) 166*a*
——*O. 8, R. 5*—Admission in evidence 179*b*
——*O. 8, R. 6* — Legal and equitable set off — Distinction 186*a*
——*O. 8, R. 6*—Equitable set off—Essential conditions for claim 186*b*
——*O. 9, R. 13*—Ex parte decree against several defendants—One alone applying to set it aside—Competency 191
Civil P. C. *(contd.)*
——*O. 11, R. 21, O. 43 R. 1(f) and S. 148* — Order to give inspection of documents — Non-compliance—Effect 32
——*O. 14, R. 1* — Issues between co-defendants 170*c*
——*O. 17, Rr. 2 and 3*—"Hearing", meaning of 251
——*O. 17, R. 3*—*See* ibid, O. 17, R. 2 251
——*O. 20, R. 4*—*See also* Constitution of India, Art. 227 190
——*O. 20, R. 4*—Appreciation of evidence 6b
——*O. 20, R. 5* — Decision of each issue necessary 227*c*
——*O. 21, R. 2*—*See* ibid, O. 21, R. 15 53
——*O. 21, R. 15 and R. 2*—Joint decree-holder—Discharge by one—Effect 53
——*O. 21, R. 31*—Hyderabad Civil P. C., S. 58 — Decree for specific movable property — Non-mention of money value to be paid as alternative relief—Executing Court cannot fix value 173
——*O. 21, Rr. 59 and 60*—Person when entitled to lead evidence 193
——*O. 21, R. 60*—*See* ibid, O. 21, R. 59 193
——*O. 21, R. 97*—*See also* ibid, S. 151 4
——*O. 21, R. 97* — Application under, without applying for delivery of possession under O. 21, R. 35—Maintainability **(FB)** 276
——*O. 22, R. 9* — Setting aside abatement — Sufficient cause — Limitation — Limitation Act (1908), S. 5 167
——*O. 23, R. 3*—*See also* ibid, S. 151 127
——*O. 23, R. 3* — Compromise petition filed by both parties — Subsequent application for setting it aside— Separate suit is necessary — (Contract Act (1872), S. 19A) 62
——*O. 32, R. 7*—Sanction by Court—Decree — Effect 20
——*O. 39, R. 1 and O. 43, R. 1 (r)* — Order granting temporary injunction — Appeal—Maintainability 138
——*O. 41, R. 5*—*See* ibid, S. 145 111*a*
——*O. 41, Rr. 27, 28* — Remand in second appeal to allow appellant to tender further evidence should not be ordered 166*b*
——*O. 41, R. 28*—*See* ibid, O. 41, R. 27 166*b*
——*O. 41, R. 31*
See (1) ibid, S. 100 179*a*
(2) Constitution of India, Art. 227 190
——*O. 43, R. 1 (f)*—*See* ibid, O. 11, R. 21 32
——*O. 43, R. 1 (r)*—*See* ibid, O. 39, R. 1 138
——*O. 46, R. 1*—Statement of facts and Court's opinion 271
——*O. 47, R. 1*—Review—Grounds for 239

Civil Procedure Code (Amendment) Act *(2 of 1951), S. 20* — *See* Civil P. C. (1908), S. 96 258*a*

Companies Act *(7 of 1913), S. 4 (2)*—Members less than 20—Association not compulsorily registrable as Company 142*a*
——*S. 38*—Power of Court 126

Constitution of India *(1950), Pre., Arts. 14, 226 and 311* — Retrospective operation 93*a*

——*Art. 14*

See also (1) Tenancy Laws — Hyderabad (Abolition of Jagirs) Regulation (69 of 1358F), S. 21 (2), Proviso 100

(2) Hyderabad Special Tribunals Regulation (5 of 1358 Fasli) 145*a*

——*Art. 14*—Firman by H. E. H. Nizam appointing Commission to enquire into succession of late Nawab Salar Jung, III — Classification on consideration of status and wealth — Classification resulting in more than one procedure — No right of appeal — Classification held discriminating — Proviso to S. 21 (2), Hyderabad Jagir (Arbitration) Regulation held *ultra vires* — Constitution of India, Sch. III, item 18 — Scope of —Powers of executive — Constitution of India, Art. 220 — High Court Judges cannot do any other work — Commission held invalid **(FB)** 105*a*

——*Art. 14*—Test of infringement of — (Administration of Evacuee Property Act (1951)) 157*b*

——*Art. 14*—Rational classification 298*d*

——*Art. 16*—Scope 298*c*

——*Art. 19* — *See* Public Safety — Preventive Detention Act (1950), S. 3 295

——*Art. 19 (f)*—Appointment of Commission to inquire into succession — No breach of fundamental rights of claimants 105*d*, 140*fd*

——*Art. 19 (g)*—*See* Civil P. C. (1908), S. 9 **(FB)** 1

——*Art. 19 (1) (f)*—*See* Administration of Evacuee Property Act (1950), S. 40 157*c*

——*Art. 19 (5)* — *See* Administration of Evacuee Property Act (1950), S. 40 157*c*

——*Art. 21* — *See* Hyderabad Special Tribunals Regulation (5 of 1358 Fasli) 145*a*

——*Art. 22* — *See* Public Safety Preventive Detention Act (1950), S. 7 277*a*

——*Art. 22 (5)* — *See* Public Safety — Preventive Detention Act (1950), S. 7 277*d*

——*Art. 31* — *See* Administration of Evacuee Property Act (1950), S. 40 157*d*

——*Art. 31B, Sch. IX* — Hyderabad Regulations included in Sch. IX—Validity of: **(FB)** 21*d*

——*Arts. 132 and 134 (1) (c)* — No substantial question of law as to interpretation of the Constitution involved — No special ground made out under Arts. 132 and 134 (1) (c)—Leave to appeal to Supreme Court refused 218*b*

——*Art. 132 (1)*—Substantial question of law—Interpretation of Constitution involved — Certificate could be granted 131*a*

——*Art. 133*— Civil proceeding — (Constitution of India, Art. 226) — (Hyderabad (Abolition of Jagirs) Regulation (69 of 1358 F), S. 21 (2)):131*b*

——*Art. 133 (1) (a)* — Applicability — (Civil P. C. (1908), S. 110) 177*a*

Constitution of India *(contd.)*

——*Art. 133 (1) (c)*—Substantial question of law —(Civil P. C. (1908), S. 110 (c)) 177*c*

——*Art. 134 (1) (c)* — *See* ibid, Art. 132: 218*b*

——*Art. 166* —Memorandum of State appeal—Signature of Rajpramukh — Necessity of — (Criminal P. C. (1898), S. 417) 59*a*

——*Art. 226*

See also (1) ibid, Art. 14 98*a*

(2) ibid, Art. 133 131*b*

(3) Civil P. C. (1908), S. 151 73*b*

(4) Houses and Rents —Hyderabad Rent Control Order (1353-F), S. 8 66

——*Art. 226* — Certiorari — Writ of — Death of Nawab — Special Commission by Nizam to enquire into question of succession — Hyderabad Atiyat Enquiries Act (10 of 1952) **(FB)** 21*a*

——*Art. 226*—Certiorari —Usurpation or excess of jurisdiction of inferior tribunal should be proved **(FB)** 21*b*

——*Art. 226* — Certiorari — Error apparent on face of record — Impugned orders set aside 56

——*Art. 226*— Finding of fact — Evidence not considered at all—(Civil P. C. (1908), S. 100) 64*b*

——*Arts. 226 and 227*—Order of Rent Controller — Jurisdiction of High Court before Constitution —Position after Constitution— (Hyderabad High Courts Act, S. 17) **(FB)** 67

——*Art. 226* — Scope — Nature of jurisdiction 73*a*

——*Art. 226* — Writ of certiorari — Failure to exercise jurisdiction 79*d*

——*Art. 226* — Jurisdiction under — Nature 79*j*

——*Art. 226*—Scope—Hyderabad Atiyat Enquiries Act (10 of 1952), S. 13, Cl. 2 79*l*

——*Art. 226* — Mandamus and Prohibition — Writs of 79*m*

——*Arts. 226 and 311* — Order of reversion of Civil servant — Administrative or quasi-judicial 98*b*

——*Art. 226*—Other remedy available—Hyderabad Tenancy and Agricultural Lands Act (21 of 1950)—Order passed by Tahsildar under S. 32 (4) against petitioner — Remedy by way of appeal, second appeal and revision provided in Ss. 90 and 91 of the Act — Writ cannot be issued 120

——*Art. 226*—Certiorari — (Administration of Evacuee Property Act (1950), S. 40) 157*a*

——*Art. 226* — Writ of Certiorari 201*a*

——*Art. 226* — Scope 209*c*

——*Art. 226* — Nature and scope of proceedings 209*d*

——*Art. 226*—Writ of certiorari 222*c*

——*Art. 226*—Writ of mandamus 222*d*

——*Art. 226*—Writ of Prohibition 222*e*

——*Art. 226*—"For any other purpose" 228*a*

——*Art. 226*—Mere volunteer cannot apply 228*b*

Constitution of India *(contd.)*
——*Art. 226*—Jurisdiction of High Court 228*c*
——*Art. 226*—Jurisdiction under Art. 226 228*d*
——*Art. 226*—Writ of certiorari when issued 235*a*
——*Art. 226*— Judicial or quasi-judicial order—(Civil P. C., S. 9) 235*b*
——*Art. 226*—Writ of Certiorari 235*c*
——*Art. 226*—Issue of Writ of Certiorari 235*d*
——*Art. 226* — Conferment of jurisdiction — (Civil P. C. (1908), S. 9) 235*e*
——*Art. 226*—Habeas Corpus— (Criminal P. C. (1898), S. 491) 277*f*
——*Art. 226*—Certiorari 298*a*
——*Arts. 226, 309 and 310*—Mandamus — Circular No. 1864/1887, D/- 19.5.1950 of the Director of Public Instructions, Hyderabad 298*b*
——*Art. 227*—*See also* ibid, Art. 226 **(FB)** 67
——*Art. 227*— Power of High Court to transfer case 105 *e*; 110 *f e*
——*Art. 227*—Superintendence—Restrictions 135*a*
——*Art. 227*—Rectification of dereliction of duty —(Civil P. C., O. 20, R. 4 and O. 41, R. 31) 190
——*Art. 245*— *See* Hyderabad Special Tribunals Regulation (5 of 1358 Fasli) 145*a*
——*Art. 261 (3)* — Ex parte decree passed by Bombay High Court against resident of former Hyderabad State — Execution in Hyderabad — Civil P. C. (1908), S. 2 (5) 19
——*Art. 309*—*See* ibid, Art. 226 298*b*
——*Art. 310*—*See* ibid, Art. 226 298*b*
——*Art. 311*
See also (1) ibid, Art. 14 98*a*
(2) ibid, Art. 226 98*b*
——*Art. 311 (1) and (2)*—Employee reduced in rank—Provisions of Sub-Arts. (1) and (2) cannot be invoked 201*b*
——*Art. 311 (2)*—*See* ibid, Art. 311 (1) 201*b*
——*Sch. IX*—*See* ibid, Art. 31-B **(FB)** 21*d*

Contract Act *(9 of 1872), S. 19A — See* Civil P. C. (1908), O. 23, R. 3 62
——*S. 72, Illustration (b)* — Payment made under mistake as to rates—Mistake is one of fact 274*a*

Court-fees Act *(7 of 1870), S. 7 (IV) (b)* — Suit for partition of joint family property—Plaintiff out of possession—Valuation — (Suits Valuation Act (1887), S. 8) 256
——*S. 7 (v)*—Panmalla (land where betel leaves are cultivated) is land paying revenue and not a garden —(Hyderabad Court-fees Act (1870), S. 4 (5) (a)) 28
——*S. 7 (xi) (cc) and (v)* — Suit by landlord against tenant for ejectment — Denial of title of landlord by tenant—Suit is governed by S. 7 (xi) (cc) and not by S. 7 (v) — (Hyderabad Court-fees Act, Ss. 4 (9) (D) and 7 (4)) 234

Court-fees Act *(contd.)*
——*S. 17*— Hyderabad Court-fees Act, S. 13 — Relief for possession and mesne profits 156

Criminal Procedure Code *(5 of 1898), S. 32*— Sentence of fine — Matters to be taken into account 155*b*
——*S. 145*—*See also* ibid, S. 146 253
——*S. 145*—No likelihood of breach of peace — Order regarding possession 185*a*
——*S. 145*—Plea in lower Court that there was apprehension of breach of peace — Contrary plea in revision should not be allowed except in fare cases 185*b*
——*S. 145*— Likely to cause breach of the peace 286*a*
——*S. 145*—"Parties concerned" 286*b*
——*S. 145 (3)* — Omission to serve or publish the order 286*c*
——*S. 145 (5)*— Cancellation of the preliminary order 263*a*
—— *S. 145 (5)*—Cancellation of the preliminary order 263*b*
——*S. 145 (6)*—Existence of likelihood of breach of peace—Further enquiry 185*c*
——*Ss. 146, 145* — Scope (Hyderabad Criminal P. C., S. 148) 253
——*S. 154*—Inconsistency between F. I. R. and evidence of informant— Evidence held would not be rejected 161*a*
——*S. 155* — Powers and duties of Police — (Hyderabad Criminal P. C., Ss. 156, 157 (2)) 273
——*Ss. 162 and 288* — Previous statement of witness—Admissibility— Extent of — (Evidence Act (1872), S. 145) 133*b*
——*S. 162*—Statements of witnesses to police—Admissibility—Duty of Court 133*d*
——*S. 164* — *See also* Evidence Act (1872), S. 24 145*f*
——*S. 164* — Mode of recording confession and procedure 145*g*
——*S. 172*—Use of police diary — Admissibility in evidence 145*h*
——*S. 193* — *See* Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 5 (1) (b) and (2) 9
——*S. 200, Proviso (aa)* — *See* ibid, S. 247, Proviso 272
——*S. 208*—Duty of prosecution 283*a*
——*S. 223*—*See* Penal Code (1860), S. 34 161*e*
——*Ss. 227, 237, 423* — Retrial on amendment of charge 233*a*
——*S. 237*—*See* ibid, S. 227 233*a*
——*Ss. 247, Proviso and 200, Proviso (aa)*—Complaint by public servant 272
——*S. 260*—*See* Essential Supplies (Temporary Powers) Act (1946), S. 12 12
——*S. 288*—*See* ibid, S. 162 133*b*
——S. 337—*See also* Hyderabad Criminal P. C., S. 268 257*c*

Criminal P. C. *(contd.)*
——*S. 337*—Evidence of an accomplice—Credibility of—Evidence Act (1872), Ss. 114 and 133 145*c*
——*S. 340*—*See* ibid, S. 496 **(FB)** 219
——*S. 367*—*See also* Criminal trial 283*b*
——*S. 367*—Appreciation of evidence — Credibility of witnesses—Eye witnesses—In considering their evidence, it is necessary to see whether they are independent witnesses or have interest in any of the parties — (Evidence Act (1872), S. 1) 133*a*
——*Ss. 367, 424*—Contempt of judgment 233*b*
——*Ss. 375, 428 and 540*—Additional evidence —Power of appellate Court 145*i*
——*Ss. 413, 480, 486* — Conviction under S. 228, Penal Code 285*c*
——*S. 417*—*See* Constitution of India, Art. 166 59*a*
——*S. 423*—*See* ibid, S. 227 233*a*
——*S. 423 (1) (b)*—Enhancement of sentence 303*b*
——*S. 424*—*See* ibid, S. 367 233*b*
——*S. 428*—*See* ibid, S. 375 145*i*
——*S. 439*—Concurrent finding of fact — (Evidence Act (1872), S. 114, ill. (a)) 303*a*
——*S. 480*—*See* ibid, S. 413 285*c*
——*S. 486*—*See* ibid, S. 413 285*c*
——*S. 491*—*See* Constitution of India, Art. 226 277*f*
——*S. 492 (1)*—Number of Public Prosecutors for particular area 59*b*
†——*Ss. 496, 497, 498 and 340*—Bail when can be granted through a pleader without personal appearance **(FB)** 219
——*S. 497*—*See* ibid, S. 496 **(FB)** 219
——*S. 498*—*See* ibid, S. 496 **(FB)** 219
——*S. 512* — Scope of — Evidence Act (1872), S. 33 63*a*
——*S. 512*—Evidence against co-accused 63*b*
——*S. 526* — Principles governing cases for transfer 188*c*
——*S. 526 (8) (before amendment of 1923)*—Hyderabad Criminal P. C., S. 494 (8) — Hearing —Meaning 188*a*
——*S. 526 (8) and 9 (before amendment of 1923)*—Hyderabad Criminal P. C., S. 494 (8) 188*b*
——*S. 526 (9)*—*See* ibid, S. 526 (8) 188*b*
——*S. 535*—*See* Penal Code (1860), S. 34 161*e*
——*S. 540*—*See* ibid, S. 375 145*i*

Criminal Trial—Evidence—Benefit of doubt—Trial for murder—Criminal P. C. (1898), S. 367 283*b*

DEBT LAWS

Hyderabad Debt Conciliation Act *(1 of 1349F), S. 14*—Requirements of 132

Debt Laws *(contd.)*
Hyderabad Jagirdars' Debt Settlement Act *(12 of 1952), S. 2 (e)* — Stranger auction-purchaser is not debtor 268*d*
——*S. 6 (2)*—Party to proceeding 268*b*
——*S. 25* — Divesting of jurisdiction of executing Court 268*a*
——*S. 25*—Proceedings in respect of debt 268*c*

Hyderabad Money-lenders Act *(5 of 1349F), S. 2, Exemption (E)* — Applicability — Amount not advanced on any negotiable instrument other than a pronote 142*d*
——*S. 2, Exemption (B)*—Association of lender not registered as stake holder — Exemption does not apply 142*e*
——*Ss. 2, 9* — Organizers of Chit Fund held money-lenders — Their suit for loan held could not be decreed, if they had no license 142*f*
——*S. 9*—*See* ibid, S. 2 142*f*

Hyderabad Prevention of Agricultural Land Alienation Act — Retrospective 160

Essential Supplies (Temporary Powers) Act *(24 of 1946), S. 3*—No notification fixing prices of articles — No charge can be framed under Act for contravention of notification under Supply and Prices of Goods Ordinance (1950) 125*b*
——*S. 12* — Trial of offences under — Trial in summary manner, in the absence of an application in that behalf by the prosecution is vitiated — (Criminal P. C. (1898), S. 260) 12

Evidence Act *(1 of 1872), S. 1* — *See* Criminal P. C. (1898), S. 367 133*a*
——*S. 9*—Identification parade—Duty of Magistrate — Identification of accused how far can be basis of conviction 145*e*
——*S. 24*—Probative value of confession—Duty of Court — Criminal P. C. (1898), S. 164 145*f*
——*S. 27* — Scope — Recovery should be made as a consequence of information furnished by accused 133*c*
——*S. 27* — Statement connecting fact discovered with offence charged is not admissible — Fact discovered in consequence of information given by several accused 161*b*
——*S. 33* — *See* Criminal P. C. (1898), S. 512 63*a*
——*Ss. 45, 67* —Handwriting expert — Testimony 181*b*
——*S. 45* — Handwriting expert — Facts to be taken into consideration before expressing final opinion 181*c*
——*S. 45* — Handwriting expert—Necessity of other evidence 181*d*
——*S. 45* — Expert opinion and proof 209*b*
——*S. 67* — *See also* ibid, S. 45 181*b*
—— *S. 67* — Circumstantial evidence 181*e*
——*S. 91* — *See* T. P. Act (1882), S. 53A 97*b*

Evidence Act *(contd.)*
—— *S. 92*
See (1) Registration Act (1908), S. 17: 174*a*
(2) Registration Act (1908), S. 49: 174*b*
—— *Ss. 101 to 103* — *See also* T. P. Act (1882), S. 39 77
—— *Ss. 101-103*—Plaintiff a blind and illiterate woman—A heavy burden is laid on the defendant to prove that plaintiff had not only agreed to sell but she knew what was being written — When plaintiff is admittedly blind, her signature on the sale-deed cannot have any force 25
—— *S 108* — Presumption 187*b*
—— *S. 114*
See (1) Criminal P. C. (1898), S. 337: 145*c*
(2) Criminal P. C. (1898), S. 439: 303*a*
(3) Hyderabad Gambling Act (2 of 1305 F.), S. 7 60*c*
—— *S. 116* — Possession by tenant and estoppel 241
—— *S. 133* — *See also* Criminal P. C. (1898), S. 337 145*c*
—— *S. 133* — Accomplice, who is 145*d*
—— *S. 133* — Witnesses witnessing murder but remaining inactive — Accomplices after fact — Value of evidence 161*c*
—— *S. 145* — *See* Criminal P. C. (1898), S. 162 133*b*

Excess Profits Tax Act *(15 of 1940), S. 2 (5)* —*See* ibid, S. 4 234
—— *S. 4* — How different from Income-tax Act (1922), S. 4 238*b*
—— *Ss. 4 and 2 (5)* — Dividends accruing from shares of Company 254
—— *S. 21*—*See* Income-tax Act (1922), S. 13:57
—— *Sch. 1, R. 1* — *See* Income-tax Act (1922), S. 10 (2) (xv) 244

Gashti *(10 of 1338 F.), S. 13*—Proceedings not inherently administrative 79*g*
—— *S. 13* — Administrative proceedings 79*h*

General Clauses Act *(10 of 1897), S. 3 (25)* — *See* Registration Act (1908), S. 2 (6) 14*a*

Hindu Law — Adoption — Widow—Authority to adopt — Adoption under authority of Nizam 79*b*
—— Adoption — Effect 79*c*
—— Adoption — Widow—Consent of Gnaties — (Words and Phrases — Gnati) — (Hindu Law—Widow — Adoption) **(FB)** 275
—— Widow — Adoption — *See* Hindu Law — Adoption **(FB)** 275

HOUSES AND RENTS

†**Hyderabad House Rent Control Order** *(1353 F.)* — Tenancy for fixed period — Landlord can evict tenant after expiry of tenancy 13
—— *Cls. 4, 5* — Determination of fair rent — Principles 206

Houses and Rents — Hyderabad House Rent Control Order *(contd.)*
—— *Cl. 5* — *See* ibid, Cl. 4 206
—— *Cl. 6* — *See* Civil P. C. (1908), S. 10 55
—— *Cl. 6 (c)* — Reclaiming amounts paid in excess of fair rent 18
—— *Cl. 6 (c)* — Excess rent amount with landlord to credit of tenant—Suit for arrears of rent by landlord — Adjustment of rent 128
—— *Cl. 8* — Order of eviction based on personal knowledge and without due regard to interests of parties—Writ of certiorari held lay—(Constitution of India, Art. 226) 66
—— *Cl. 8*—Tenant from usufructuary mortgagee —Redemption — Effect — Application under the Order not necessary — (T. P. Act (1882), S. 111 (c)) 129*b*
—— *Cl. 8 (e)*—Grounds of eviction — Considerations involved 184
—— *Cl. 8 (2) (f)* — "Sufficient or reasonable grounds"—(Words and Phrases) 209*a*
—— *Cl. 8 (3) (a)*— "Amaada" or "Tayyar" — Meaning 136

(Hyderabad) House Rent Control Order, *Cl. 9* —Power of review 243
—— *Cl. 10*—Use of rent for charitable purposes 135*b*

(Hyderabad) Abolition of Jagir Regulation *(69 of 1358F)*—*See* under TENANCY LAWS

Hyderabad Arms Regulation *(13 of 1358 Fasli), Ss. 10, 11 and 14* — Possession of spear-head without licence is no offence — Arms Act (1878), Ss. 14, 15, 16 and 19 (f) 204
—— *S. 11*—*See* ibid, S. 10 204
—— *S. 14*—*See* ibid, S. 10 204

Hyderabad Asami Shikmi Act *(1 of 1354F)*— *See* under TENANCY LAWS

Hyderabad Atiyat Enquiries Act *(10 of 1952)* —*See* Constitution of India, Art. 226 **(FB)** 21*a*
—— *S. 13*—Atiyat Court or Special Commission —Recommendations made by—Sanction given by authority other than Nizam—Validity of **(FB)** 21*c*
—— *S. 13, Cl. 2*—*See also* Constitution of India, Art. 226 79*l*
—— *S. 13, Cl. 2*—Order in excess of jurisdiction 79*k*
—— *S. 15 (b)* — Atiyat Committee — Fact that the Atiyat Committee consisted of persons who were not members of the Bab-e-Hukmat does not render the opinion given by the Committee invaild in law 222*a*
—— *S. 15 (b)*—Party not heard by Atiyat Committee 222*b*

Hyderabad Civil Procedure Code, *S. 58*— *See* Civil P. C. (1908), O. 21, R. 31 173
——*S. 109*—*See* Civil P. C. (1908), O. 8, R. 5 166*a*
——*S. 198* — *See* Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 5 (1) (b) and (2) 9
——*S. 644* — *See* Civil P. C. (1908), S. 151 130*a*
——*S. 648*—*See* Civil P.C. (1908), S. 151 130*a*

Hyderabad Court-fees Act *(1324F)*, *S. 4*—*See* Court-fees Act (1870), S. 7 (xi) (cc) 234
——*S. 4 (5) (a)* — *See* Court-fees Act (1870), S. 7 (v) 28
——*S. 7 (4)*—*See* Court-fees Act (1870), S. 7 (xi) (cc) 234
——*S. 9 (D)* — *See* Court-fees Act (1870), S. 7 (xi) (cc) 234
——*S. 13* — *See* Court-fees Act (1870), S. 17 156

Hyderabad Criminal Procedure Code, *S. 148* —*See* Criminal P. C. (1898), S. 146 253
——*S. 156*—Criminal P. C. (1898), S. 155 273
——*S. 157 (2)*—Criminal P. C. (1898), S. 155 273
——*S. 268* — Necessity of committing case to Sessions Court — Criminal P. C. (1898), S. 337 257*c*
——*S. 432* — Question regarding validity of an Act— Reference when can be made — (Public Safety — Hyderabad Public Security Act (12 of 1348 F), S. 13 (2)) **(FB)** 267
——*S. 494 (8)* — *See* Criminal P. C. (1898), S. 526 (8) 188*a*, *b*
——*Sch. II* — Special Magistrate trying offence under S. 333, Hyderabad Penal Code 257*b*

Hyderabad Debt Conciliation Act *(1 of 1349F)*—*See* under DEBT LAWS.

Hyderabad Evidence Act, *S. 76 (6)*—*See* Registration Act (1903), S. 17 174*a*
——*S. 91* — *See* Hyderabad Gambling Act (2 of 1305F), S. 7 60*c*

Hyderabad Excess Profits Tax Act *(1355F)*, *S. 5 (2) (c)*—Intention of Cl. (c) — (Income-tax Act (1922), S. 4 (3) (ia)) 238*a*
——*Sch. 1, R. 1 (1) (x)* — *See* Income-tax Act (1922), S. 10 (2) (xv) 244
——*S. 9*—*See* Income-tax Act (1922), S. 13 250*a*
——*S. 48 (3)*—*See* Income-tax Act (1922), S. 66 (2) 250*b*

Hyderabad Gambling Act *(2 of 1305F)*, *S. 5* —Essential condition for framing charge—(Public Gambling Act (1867), S. 4) 60*a*
——*S. 6*—Credible information—(Public Gambling Act (1867), S. 5) 60*d*

Hyderabad Gambling Act *(contd.)*
——*S. 7* — Proof of due search is necessary to invoke presumption—(Public Gambling Act (1867), S. 6) 60*b*
——*S. 7*—Presumption under S 91, Hyderabad Evidence Act — Reliance upon, to support presumption under S. 7 of Act — (Public Gambling Act (1867), S. 6) — (Hyderabad Evidence Act S. 91)—(Evidence Act (1872), S. 114) 60*c*
——*S. 7*— Scope— Strict interpretation is necessary—(Public Gambling Act (1867), S. 6) 60*e*

Hyderabad General Sales Tax Act *(14 of 1950)* *See* under SALES TAX

Hyderabad High Court Act *(3 of 1337F)*, *S. 4 Cl. 3* — Order of Admission Judge under S. 4, Cl. (3) is not appealable 218*a*
——*S. 17*—*See* Constitution of India, Art. 226 **(FB)** 67

Hyderabad House Rent Control Order (1353F) *See* under HOUSES AND RENTS

Hyderabad Jagirdars' Debt Settlements Act *(12 of 1952)* *See* under DEBT LAWS

Hyderabad Land Acquisition Act *(9 of 1309F)*, *S. 30* — *See* Land Acquisition Act (1894), S. 35 26

Hyderabad Law of Partition (1352F)—*Rules under*—*R. 3*—*See* Civil P. C. 1908), O. 1, R. 10 187*a*

Hyderabad Limitation Act *(2 of 1322F)*, *Art. 26*—*See* Limitation Act (1908), S. 9 139*d*
——*Art. 118* — *See* Limitation Act (1908), Art. 132 137
——*Art. 133* — *See* Limitation Act (1908), Art. 132 137
——*Art. 155* — *See* Limitation Act (1908), Art. 177 208

Hyderabad Money-Lenders Act *(5 of 1349F)* *See* under DEBT LAWS

Hyderabad Municipal Corporation Act *(36 of 1950)* *See* under MUNICIPALITIES

Hyderabad Negotiable Instruments Act, *S. 69* —*See* Civil P. C. (1908), S. 20 (c) **(FB)** 289*b*
——*S. 77*—*See* Civil P. C. (1908), S. 20 (c) **(FB)** 289*b*
——*S. 80*—*See* Civil P. C. (1908), S. 20 (c) **(FB)** 289*b*
——*S. 81*—*See* Civil P. C. (1908), S. 20 (c) **(FB)** 289*b*

Hyderabad Paper Currency Act *(2 of 1327F)*, *S. 15*—Suit on bearer pronote does not lie : 142*c*

Hyderabad Penal Code, *S. 7*— *See* Penal Code (1860), S. 34 161*e*

Hyderabad Prevention of Agricultural Land Alienation Act
See under DEBT LAWS

Hyderabad Public Security Act *(12 of 1348F)*
See under PUBLIC SAFETY

Hyderabad Railways Act, *S. 46*—*See* Railways Act (1890), S. 77 139*b*

Hyderabad Registration Act *(3 of 1346F), S. 10 (5)* — *See* Registration Act (1908), S. 17 (v) 225*b*

—— *S. 43* — *See* Registration Act (1908), S. 49 225*a*

Hyderabad Small Cause Courts Act *(6 of 1330F), S. 12* — *See* Provincial Small Cause Courts Act (1887), S. 25 212*e*

(Hyderabad) Special Tribunals Regulation *(5 of 1358 Fasli)*—Validity—Regulation is not unconstitutional—Constitution of India, Arts. 14, 21, 245 145*a*

Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation *(10 of 1359F)* — Discriminatory procedure — Regulation is ultra vires of Constitution of India, Art. 14 : I L R (1951) Hyd 1 : A I R 1951 Hyd 11: 52 Cri L J 1333(FB), OVERRULED **(FB)** 33

——*S. 5 (1) (b) and (2)*—Special Judge can take cognisance of case, only when it is transferred to him by Chief Minister — Case validly transferred —Subsequent transfer by Chief Minister to Sessions Judge without order of committal—Sessions Judge has no jurisdiction—(Criminal P. C. (1898), S. 193)—(Hyderabad Cr. P. C., S. 198) 9

(Hyderabad) Special Tribunals (Validation of Proceedings) Regulation (1948), *S. 3*—Validity 145*b*

Hyderabad Specific Relief Act *(7 of 1317F), S. 22B* — *See* Specific Relief Act (1877), S. 27 (b) 121

Hyderabad Stamp Act *(4 of 1331F), S. 2 (9)* —*See* Stamp Act (1899), S. 2 (10) 14*b*

——*(as amended by Hyderabad Stamp Act (Amendment) Regulation No. 15 of 1357F), Sch , Art. 9*—*See* ibid, Art. 37 297*c*

——*Art. 16* — *See* Stamp Act (1899), S. 2 (10) 14*b*

——*Sch., Arts. 37 and 9*—Promissory note payable on demand—(Stamp Act (1899), Art. 13 as amended by S. 5, Finance Act (5 of 1927) and Art. 49) 297*c*

Hyderabad Stamp Act (Amendment) Regulation *(15 of 1357F)* — Regulation promulgated from 6 Aban 1357F—Promissory note payable on demand of value of Rs. 2,000/- of date 10th Khurdad 1358F—Amending Regulation applies 297*b*

Hyderabad Stamp Act (Amendment) Regulation *(contd.)*

Hyderabad Suits against Government Act *(5 of 1320F)*—*See* Limitation Act (1908), S. 9 : 139*d*

Hyderabad Tenancy and Agricultural Lands Act *(21 of 1950)*
See under TENANCY LAWS

Hyderabad Transfer of Property Act *(1 of 1336F), S. 130*—Acceptance of rent after notice —Effect—(T. P. Act (1882), S. 112) 97*a*

Income-tax Act *(11 of 1922), S. 4 (3) (ia)*—*See* Hyderabad Excess Profits tax Act, S. 5 (2) (c) 238*a*

——*S. 10 (2) (XV)*—Capital expenditure—Test —(Excess Profits Tax Act (1940), Sch. 1, R. 1) —(Hyderabad Excess Profits Tax Act (1355F.), Sch. 1, R. 1 (1) (x)) 244

——*S. 10 (2) (XV)*—Expenditure for business 264

——*S. 13*—Rejection of accounts and assessment at flat rate—Assessee should be allowed to rebut the rate fixed — Excess Profits Tax Act (1940), S. 21 57

——*S. 13* — Method of accounting — Value of closing stock — (Hyderabad Excess Profits Tax Regulation (1355 F.), S. 9) 250*a*

——*S. 66 (1) and (3)*—Application for reference presented at Hyderabad — Registrar of Bombay Tribunal receiving it after 60 days—High Court could not condone delay 65

——*S. 66 (2)*—Order for stating case—(Hyderabad Excess Profits Tax Regulation (1355 F.), S. 48 (3)) 250*b*

Influx from Pakistan (Control) Act *(23 of 1949)*—Accused, a woman, obtaining a permit to visit her parents in Hyderabad City — Accused without obtaining fresh permit directly going to Gulbarga where her parents had gone — Accused held guilty of a technical offence—Sentence of fine of Rs. 100 held adequate in the circumstances of the case 155*a*

Interpretation of Statutes — Hardship — *See* Administration of Evacuee Property Act (1950), S. 1 157*e*

——Intention of Legislature — *See* Sales Tax — Hyderabad General Sales Tax Act (14 of 1950), Sch. I, Item 3 252*i*

——Retrospective operation—Rule as to, stated 177*b*

Land Acquisition Act *(1 of 1894), S. 35*—Arable land—Land covered with guinea grass—(Hyderabad Land Acquisition Act (IX (9) of 1309F), S. 30) 26

Limitation Act *(9 of 1908), S. 5* — *See* Civil P. C. (1908), O. 22, R. 9 167
——*S. 9 and Art. 31* — Hyderabad Limitation Act, Art. 26 — Suit against railway for compensation for non-delivery — Absence of forum — Effect—Starting point of limitation — (Hyderabad) Suits against Government Act (5 of 1320F) 139*d*
——*Art. 31*—*See* ibid, S. 9 139*d*
——*Arts. 62 and 96* — Consignor of goods paying higher rate under mistake — Suit to recover money paid in excess — Payment cannot come under heading "money had and received"—Art. 96 and not Art. 62 applies 274*c*
——*Art. 96*—*See* ibid, Art. 62 274*c*
——*Art. 131* — Hyderabad Limitation Act, Art. 117 — Suit to recover share in emolument of watan 229
——*Arts. 132 and 147* — (Hyderabad) Limitation Act (2 of 1322 Fasli), Arts. 118 and 133—Applicability—T. P. Act (1882), S. 67 137
——*Arts. 135 and 139*—Applicability 231*a*
——*Art. 139*—*See* ibid, Art. 135 231*a*
——*Art. 147*—*See* ibid, S. 132 137
——*Art. 177*—Hyderabad Limitation Act, Art. 155—Death of defendant — Application for substitution of legal representative filed after two years held barred 208

Muhammadan Law — Custom — Hyderabad Custom in variance or derogation of Mahomedan law 117
——Marriage—Shias—Muta—Period not specified—Nikah Marriage results 6*a*
——Marriage — Shias — Muta — In a muta marriage no witnesses necessary among Shias 6*c*
——Marriage — Attestation — In Moslem Law when a marriage is attested, it is always attested by two witnesses 6*d*
——Pre-emption—*See* Pre-emption 176
——Wakf—Shafei School 195*a*
——Wakf—Shafei School — Acceptance of wakf by beneficiaries 195*b*
——Wakf—Shafei School—Wakf contingent on death of wakif—Validity 195*c*

MUNICIPALITIES

Hyderabad Municipal Corporation Act *(36 of 1950), S. 31 (1)* (f) — Disqualification under — Nature of 5

Negotiable Instruments Act *(26 of 1881), S. 70*—*See* Civil P.C. (1908), S.20(c) **(FB)** 289*b*
——*S. 78*—*See* Civil P. C. (1908), S. 20 (c) **(FB)** 289*b*
——*S. 81*—*See* Civil P. C. (1908), S. 20 (c) **(FB)** 289*b*
Part B States (Laws) Act *(3 of 1951), Ss. 6, 25 (3)*—Scope 257*d*
——*S. 6 Proviso (d)*—Applicability 257*a*
——*S. 25 (3)*—*See* ibid, S. 6 257*d*

Penal Code *(45 of 1860), S. 34* — Common intention — Proof of — (Hyderabad Penal Code, S. 7)—(Criminal P. C. (1898), Ss. 223 and 535) 161*e*
——*S. 97*—Accused when may counter-attack ending in death 207
——*S. 228*—Judicial proceedings 285*a*
——*S. 228*—Insult or interruption 285*b*
——*S. 302*—Criminal trial—Motive—Proof of, necessity of 161*d*
——*S. 302*—Sentence—Mitigation—Murder by hired assassins 161*f*
——*S. 304-A*—Rash or negligent driving—Test 123
——*S. 364*—Abducting in order to murder 249

Precedents—Obiter dicta — Obiter dicta of previous Full Bench is not binding in subsequent Full Bench though the latter be a smaller Bench **(FB)** 105*b*
——Obiter dicta—(Civil P. C. (1908), Pre.) **(FB)** 289*a*
Pre-emption—Suit for—Suit based on Hyderabad Revenue Law—Death of pre-emptor pending suit — Ordinary rules and not provisions of Muhammadan law apply—Legal representatives of pre-emptor can be brought on record — (Muhammadan Law—Pre-emption) 176

Preventive Detention Act *(4 of 1950)*
See under PUBLIC SAFETY

Promissory note—Suit based not solely on pro-note but also on transaction resulting in pro-note —Pro-note inadmissible — Plaintiff can prove transaction and arrears on that account 142*b*

Provincial Small Cause Courts Act *(9 of 1887), S. 25*—High Court's power of revision—(Civil P. C. (1908), S. 115) — (Hyderabad Small Cause Courts Act (6 of 1330F), S. 12) 212*e*

Public Gambling Act *(3 of 1867), S. 4*—*See* Hyderabad Gambling Act (2 of 1305F) 60*a*
——*S. 5* — *See* Hyderabad Gambling Act (2 of 1305F), S. 6 60*d*
——*S. 6* — *See* Hyderabad Gambling Act (2 of 1305F), S. 7 60*b*; *c*; *e*

PUBLIC SAFETY

Hyderabad Public Security Act *(12 of 1348F), S. 13 (2)* — *See* Hyderabad Criminal P. C., S. 432 **(FB)** 267

Preventive Detention Act *(4 of 1950), S. 3*—Mala fides of authority 277*b*
——*S. 3*—Mala fides of authority, onus 277*c*
——*S. 3*—A. I. R. 1951 All. 357, Dissent from 288
——*S. 3*—Criticism of Government—(Constitution of India, Art. 19) 295

Public Safety — Preventive Detention Act *(contd.)*
——*S. 7*—'As soon as may be', meaning of— (Constitution of India, Art. 22) 277*a*
——*S. 7*—Vagueness of grounds — (Constitution of India, Art. 22 (5)) 277*d*
——*S. 7*—Grounds, sufficiency of 277*e*

Railways Act *(9 of 1890), S. 47 (1)*—Consignor paying at higher rate 274*b*
——*S. 77* — Hyderabad Railways Act, S. 46 — Word 'Loss' in S. 77 does not include non-delivery—Suit against Railway for compensation for non-delivery—Notice under S. 77 is not necessary — Notice expressly claiming compensation but not specifying any fixed and certain sum as compensation — Notice is in sufficient compliance of S. 77 139*b*
——*S. 80*—Scope — Suit for compensation for loss of consignment carried by more than one railway — All Railways could be made parties 139*c*

Registration Act *(16 of 1908), Ss. 2 (6) and 17* —General Clauses Act (1897), S. 3 (25) — T. P. Act (1882), S. 3—Immovable property—Machinery attached to earth, when immovable property —Tests — English Law of fixtures—Transfer of machinery erected by tenant — *Held*, did not require registration 14*a*
——*S. 17*—*See also* ibid, S. 2 (6) 14*a*
——*S. 17* —Declare or extinguish — Subsequent agreement reciting that consideration for sale was returned and vendee had no right in property is provable and does not require registration—(Evidence Act (1872), S. 92)—(Hyderabad Evidence Act, S. 76 (6)) 174*a*
——*Ss. 17 (1) (b) and 49*—Ekrarnamas creating and extinguishing rights in immovable property 114*a*
——*S. 17 (b)*—Award re-written on stamp paper after signing by arbitrators and parties and then registered—Validity of registration 122
——*S. 17 (2)*—Explanation—Earnest money 64*a*
——*S. 17 (v)* — Hyderabad Registration Act, S. 10 (5)—Document held to be sale deed 225*b*
——*S. 28*—Burden of proof 280*a*
——*Ss. 28 and 49* — Fictitious inclusion of property—Effect 280*b*
——*S. 49*
See also (1) ibid, S. 17 (1) (b) 114*a*
(2) ibid, S. 28 280*b*
——*S. 49*—Unregistered deed, though requiring registration does not prevent evidence being let in to show the sham or nominal nature of the sale transaction—(Evidence Act, S. 92) 174*b*
——*S. 49* — Hyderabad Registration Act, S. 43 (as amended in 1346F.) — Admissibility in evidence of unregistered sale deed 225*a*
——*S. 87* — Defect in procedure — Document presented to Registrar having jurisdiction — Registration done by officer appointed by Registrar — Officer appointed not having jurisdiction by himself still validity of registration cannot be disputed 168

Representation of the People Act *(43 of 1951), S. 100 (c)* —Improper rejection of nomination 240*a*
——*S. 100 (c)* — For purposes of cl. (c) Election Tribunal has merely to give '*prima facie*' finding 240*b*

Salar Jung Estate (Administration) Regulation No. 34 of 1358F and Nawab Salar Jung Bahadur (Administration of Assets) Act *(39 of 1950)*—Validity **(FB)** 105*c*

SALES TAX

Hyderabad General Sales Tax Act *(14 of 1950), Sch. I, Item 1* — 'Form' meaning of — (Words and Phrases—Form) 252*b*
——*Sch. I, Item 3* — 'Bread,' meaning of — (Interpretation of Statutes — Intention of Legislature)—(Words and Phrases—Bread) 252*a*

Special Marriage Act *(3 of 1872), S. 2 (3)* — Effect of want of consent of father 205

*__Specific Relief Act__ *(1 of 1877), Ss. 12 and 22* —Duty of buyer 225*c*
——*S. 22*—*See* ibid, S. 12 225*c*
——*S. 27 (b)*—(Hyderabad) Specific Relief Act, S. 22B—Notice and burden of proof 121

Stamp Act *(2 of 1899), S. 2 (5), (22) and Sch. 1, Art. 1* — Bond, promissory-note and acknowledgment of debt 154
——*S. 2 (10), Sch. I, Art. 23*—Deed held transferred ownership and was liable to be stamped as conveyance — (Hyderabad Stamp Act, S. 2 (9) and Art. 16) 14*b*
——*S. 2 (22)*—*See* ibid, S. 2 (5) 154
——*Ss. 33 and 61* — Lower Court admitting document in evidence — High Court can declare nature of document and impound the same 14*c*
——*S. 61*—*See* ibid, S. 33 14*c*
——*Art. 13 (as amended by S. 5, Finance Act (5 of 1927))* — *See* Hyderabad Stamp Act (4 of 1331F.) as amended by Hyderabad Stamp Act (Amendment) Regulation No. 15 of 1357 F.), Sch., Art. 37 297*c*
——*Art. 49*—*See* Hyderabad Stamp Act (4 of 1331F., as amended by Hyderabad Stamp Act. (Amendment) Regulation No. 15 of 1357F.), Sch., Art. 37 297*c*
——*Sch. I, Art. 1*—*See* ibid, S. 2 (5) 154
——*Sch. I, Art. 23*—*See* ibid, S. 2 (10) 14*b*

Suits Valuation Act *(7 of 1887), S. 8* — *See* Court-fees Act (1870), S. 7 (iv) (b) 256
——*S. 11*—Hyderabad Suits Valuation Act, S. 6 —Objection to jurisdiction in respect of previous

Suits Valuation Act *(contd.)*
suit raised in subsequent suit — *Ex parte* decree in previous suit operates as *res judicata* — Civil P. C. (1908), S. 11 237

Supply and Prices of Goods Act *(70 of 1950)*, *S. 17*—Charge under Act—No sanction as required by S. 17 obtained — Prosecution is vitiated 125c

——*S. 27 (2)*—Notifications fixing prices issued under replaced Ordinance are saved—Act coming into force — Prosecution for contravention of notification — Mention of Ordinance in charge—Trial not vitiated 125a

TENANCY LAWS

Hyderabad Abolition of Jagirs Regulation *(69 of 1358F), S. 21 (2)*—*See also* Constitution of India, Art. 133 131b

——*S. 21, Cl. 2, Proviso*—Pending proceedings—Civil P. C. (1908), S. 9 79e

——*S. 21, Cl. 2, Proviso* — Pending proceedings—Petition for rehearing 79f

——*S. 21 (2) Proviso* —Pending proceedings — Meaning of—Continuance of Commission after the Constitution—Constitution of India, Art. 14: 100

Hyderabad Asami Shikmi Act *(1 of 1354F), S. 7* — *See also* Tenancy Laws — Hyderabad Tenancy and Agricultural Lands Act (21 of 1950), S. 44 242a

——*S. 7*—"Giving notice" 242c

——*S. 24* — Application for ejectment — Time for applying 242b

Hyderabad Tenancy and Agricultural Lands Act *(21 of 1950)* — *See* Constitution of India, Art. 226 120

——*Ss. 44 and 103*—Notice issued under Asami Shikmi Act — Saving of — (Tenancy Laws — Hyderabad Assami Shikmi Act (1 of 1354F.), S. 7) 242a

——*S. 103*—*See* ibid, S. 44 242a

Tort

——Malicious prosecution—Essentials —Absence of reasonable cause is not necessarily malice: 215a

Tort *(contd.)*

——Malicious prosecution — Malice — Anger is not malice 215b

——Malicious prosecution — Burden of proof — Magistrate's finding in favour of defendant — Effect 215c

Transfer of Property Act *(4 of 1882), S. 3* — *See* Registration Act (1908), S. 2 (6) 14a

——*Ss. 39 and 53* — Advancement — Benami transaction — (Evidence Act (1872), Ss. 101 to 103) 77

——*S. 53*—*See* ibid, S. 39 77

——*S. 53A*—Applicability — Contract to transfer — Leases — Unregistered deed — Evidence of possession in pursuance of document—Admissibility — (Evidence Act (1872), S. 91) — (Registration Act (1908), S. 49) 97b

——*S. 53A*—Relinquishment—"In part performance of the contract" 114b

——*S. 67*—*See* Limitation Act (1908), Art. 132 137

——*S. 68 (d)*—Failure to deliver possession: 231b

——*S. 111 (c)* — *See also* Houses and Rents — Hyderabad Rent Control Order (1353F), S. 8 129b

——*S. 111 (c)* — Lease by usufructuary mortgagee —Duration —Redemption by mortgagor—Effect 129a

——*S. 112*—*See* Hyderabad T. P. Act, S. 130 97a

Trusts Act *(2 of 1882), S. 1* — Rules regulating trusts—Applicability to Muhammadan wakfs 195d

Words and Phrases—*See* Houses and Rents — Hyderabad House Rent Control Order (1353 F), S. 8 (2) (f) 209a

——Bread—*See* Sales Tax—Hyderabad General Sales Tax Act (14 of 1950), Sch. I, Item 3; 252a

——Form—*See* Sales Tax— Hyderabad General Sales Tax Act (14 of 1950), Sch. I, Item 1 : 252b

——Gnati—*See* Hindu Law—Adoption: **(FB)** 275

Workmen's Compensation Act *(8 of 1923), S. 22*—Additional District Collector not appointed Commissioner—Power to hear application 178

COMPARATIVE TABLE

I. L. R. (1952) Hyderabad=A. I. R.

ILR	AIR	ILR	AIR	ILR	AIR	ILR	AIR	ILR	AIR
1	1953 Hyd 208	122	1953 Hyd 112	341	1952 Hyd 79	550	1953 Hyd 28	763	1953 Hyd 55
4	1952 " 76	146	" " 150	346	1953 " 185	554	1952 " 148	770	1952 " 186
7	" " 3	152	" " 78	351	1952 " 5	558	1953 " 195	775	1953 " 219
17	" " 98	157	" " 57	354	1953 " 283	581	" " 9	791	" " 79
19	" " 44	160	" " 1	359	" " 6	595	1952 " 163	854	" " 67
23	1951 " 167	166	" " 54	373	" " 179	668	1953 " 25	877	" " 33
28	1952 " 142	169	" " 33	383	1952 " 135	677	" " 206	953	" " 100
36	" " 15	171	" " 137	390	1953 " 20	679	" " 184	976	" " 98
41	1953 " 26	176	" " 149	392	1952 " 120	681	" " 13	983	" " 139
47	1952 " 45	180	" " 36	445	" " 147	684	1952 " 187	995	" " 66
52	1953 " 207	184	1951 " 81	449	1953 " 114	695	1953 " 65	998	" " 12
57	" " 237	188	1952 " 95	460	1952 " 97	700	" " 60	1001	" " 130
60	1952 " 53	196	" " 80	463	" " 144	706	" " 62	1007	" " 53
62	" " 77	233	1953 " 29	473	1953 " 4	709	" " 215	1012	" " 129
64	" " 157	244	" " 239	479	" " 21	725	" " 128	1017	" " 18
71	1951 " 94	245	1952 " 99	481	" " 1	728	" " 57	1018	" " 167
74	1952 " 23	292	" " 91	490	" " 122	738	" " 3	1021	" " 32
78	1953 " 218	306	" " 152	495	" " 14	739	" " 68	1024	" " 176
80	" " 188	319	" " 151	511	" " 243	744	" " 5	1026	" " 125
85	1952 " 155	322	" " 49	512	" " 133	745	" " 168	1030	" " 19
91	1951 " 95	326	" " 50	525	1952 " 146	757	1952 " 191	1036	" " 64
95	1952 " 68	331	" " 141	526	1953 " 155			1039	" " 52
		334	" " 38	528	1952 " 159			1041	" " 186
				542	" " 139				

NOTE

For Comparative Table of 1953 Other Journals=All India Reporter, *See* next year's Index.

HYDERABAD CASES OVERRULED IN A. I. R. 1953

('51) A. I. R. 1951 Hyd. 11 =52 Cri. L. J. 1333=I. L. R. (1951) Hyd. 1 (F. B.), Abdur Rahim v. Pinto	Overruled in A. I. R. 1953 Hyd. 33 (F. B.)
10 Deccan L. R. 28, Sana Ahmed v. State	Held overruled by App. No. 1 of 1355F. (Hyd.) (F. B.) in A. I. R. 1953 Hyd. 273.
17 Deccan L. R. 224, Mohammed Turabuddin v. Yasin Begum	Overruled in A. I. R. 1953 S. C. 413.
35 Deccan L. R. 216, Abdul Ali Khan v. State	Held overruled by App. No. 1 of 1355F. (Hyd.) (F. B.) in A. I. R. 1953 Hyd. 273.

THE

ALL INDIA REPORTER

1953

Hyderabad High Court

A. I. R. 1953 HYDERABAD 1

FULL BENCH

PALNITKAR, MD. AHMED ANSARI AND SRINIVASACHARI JJ.

Holloor Gopal Rao and others, Appellants v. War Nasi Shiv Ramiah, Respondent.

Civil Appeal No. 3/4 of 1352 F, D/- 25-3-1952.

† **Civil P. C. (1908), S. 9 — Suit for declaration of plaintiff's exclusive right to perform purohitgiri does not lie — (Constitution of India, Art. 19 (g)).**

No suit for a declaration of a right to perform 'purohitgiri' in a particular village to the exclusion of others can lie. Whatever might have been the trend of the decisions of the Courts in India or in Hyderabad prior to the coming into force of the Constitution, such a suit after the 26th of January 1950, would clearly offend Art. 19 (g) of the Constitution, for among the fundamental rights conferred by the Constitution, the right to practise freely any profession or to take up any calling without any hindrance, is one which has to be protected. If the Court were to give a decree in favour of an individual declaring him alone to be entitled to practise the profession of 'purohitgiri' to the exclusion of others, it would amount to laying a restraint upon the others to carry on the same profession in the village. It would decidedly offend the fundamental rights and as such cannot be countenanced. Case law reviewed.

(Paras 5, 6)

Anno: Civil P. C., S. 9 N. 47.

Gopal Rao, for Appellants; Shahabuddin, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('51) AIR 1951 SC 118: (ILR (1951) Hyd 221)	5
('12) 36 Bom 94: (12 Ind Cas 928)	3
('18) AIR 1918 Bom 99: (43 Bom 277)	4
1348 Nazair-e-Haidarabad 211	3, 4
('84) 7 Mad 424	3, 4
('14) 24 Ind Cas 204: (AIR 1915 Mad 597)	4
('27) AIR 1927 Mad 131: (98 Ind Cas 229)	4
('37) AIR 1937 Mad 403: (171 Ind Cas 684)	4

JUDGMENT : Appeal from the judgment and decree of the Court of the District Judge, Karimnagar, dated the 26th Behaman 1350 F in Appeal No. 10/4 of 1350F. on the file of that Court.

(2) The Respondent in this case filed a suit for a declaration of his right to perform the duties of a purohit in the village of Vankapur and Kachapur. He also prayed for a perpetual injunction restraining the appellants from performing those duties in the aforesaid villages on the allegation that his ancestors had been performing these duties since a long time and as such he alone was entitled to officiate as purohit and to perform those duties in those villages. The Defendants denied that the 'purohitgiri' in those villages belonged to the ancestors of the Plaintiff. They also objected to the maintainability of the suit. On the evidence led by both the parties the trial court came to the conclusion that the plaintiff had established that his ancestors discharged the duties of purohit and therefore held that he was entitled to a decree for a declaration of his right to 'purohitgiri' in the villages. The Defendants appealed to the District Court, and the lower appellate Court modified the decree by providing that the Defendants shall not be prevented from getting the services of the purohit rendered by persons other than the Plaintiff. The Defendants filed an appeal to this Court against the above Judgment and Decree.

(2a) The main objection that was raised at the Bar before this Court was that a suit of this nature was not maintainable under Section 5 of the Civil Procedure Code. Other arguments depending upon the evidence in the case were also raised by the appellants, but as the decision of the first point went to the root of the case, arguments were heard by the Division Bench on the question about the maintainability of the suit, and having regard to the fact that there was a conflict of judicial opinion in this regard the Division Bench referred the whole case to the Full Bench.

(3) The short point now before the Full Bench is as to whether it is open to a party to seek for a declaration that he is entitled to perform the functions of a purohit in a village or in a particular family and that no other person could discharge the same functions, can the Court award a decree so as to restrain other persons from performing the same functions as purohit in any particular village or in an any particular family. It was contended by the learned Advocate for the Appellants that however long a person might have been performing the functions of a purohit or might have been acting as a 'joshi', no declaration of

a right to perform these duties to the exclusion of others could be passed. The learned Advocate relied upon the decision of the Madras High Court, reported in — 'Ramakristna v. Ranga', 7 Mad. 424, wherein it was held that a suit of a nature of this kind was not maintainable having regard to the provisions of Section 9 of the Indian Civil Procedure Code. It was observed in that case that this runs counter to the principles of Hindu Law and no person could acquire a right to perform these duties merely by virtue of inheritance, because the performance of these duties is dependant upon the personal qualifications, capacity and the attainments of a particular individual.

The Counsel appearing on behalf of the Respondent relied upon a Judgment of the Bombay High Court, reported in — 'Ghelabhai v. Hargovan', 36 Bom 94, and contended that these rights could always be the subject matter of a suit and a Court is competent to award a decree in a proper case. The learned Counsel for the Respondent also relied upon a decision of this High Court in the case of — 'Venkata Sastri v. Sanap Joshi', 1348 Nazair-e-Haidarabad, 211. Inasmuch as there was a decision of this High Court following the Bombay High Court ruling and as the consensus of opinion so far as the other High Courts were concerned was against the view expressed by the Bombay High Court, it was thought advisable to refer the case to a Full Bench.

(4) In deciding about this question as to whether a suit (lies?) for the enforcement of a right to 'purohitgiri' to the exclusion of others, the following matters have to be borne in mind :

(a) A right to hold a particular office such as that of a purohit is dependent on the particular and special qualifications and the attainments of a particular individual; the son of a purohit cannot necessarily be regarded as one possessing the requisite qualifications.

(b) There can be no exclusive monopoly or privilege in regard to the exercise of this right of 'purohitgiri', that is to say, no right can be enforced so as to exclude other people from following the same calling.

(c) Above all it would be absurd to compel any person to avail himself of the services of a particular person as the purohit for it should always be open to any person to utilise the services of any purohit, for the matter of that, one whom he likes to officiate at any ceremonial function. To pass a decree directing that the inhabitants of a particular village shall utilise the services of a particular individual alone and shall not be entitled to requisition the services of any other would offend against all well-established and accepted notions of freedom of public life.

(d) The emoluments that a purohit receives are only voluntary being dependent on the pleasure of the individual, engaging his services and therefore no purohit can have any discontent on the ground that a purohit has been deprived of his emoluments that he otherwise would have received, because the emoluments that he would receive are left to the sweet will and pleasure of the engaging party. In short this right to go to the house of an individual for officiating as a purohit during the performance of religious and social functions cannot be regarded as a right, in the nature of a vested right. The fact that a priest has been going to particular individuals to officiate at religious functions on ceremonies does not confer on him a legal character to enable him to obtain a decree for a declaration of such legal status.

In a case which arose before the Madras High Court, the Plaintiff contended that when the town arose the Plaintiff's ancestors were appointed by the Government itself as purohits of the village and they were enjoying the 'Mirasi' with fees and that the Plaintiff's ancestors and later on the Plaintiff had been performing the duties of purohits, and that therefore the Defendants were not entitled to officiate as purohits at the annual ceremony of the first Defendant's brother. In that case it was decided that the grant of the inam by the Government merely secured the services of the purohit to be availed of by the inhabitants, if they chose to do so, and the emoluments and the income from the inam granted by the Government appurtenant to the 'Mirasi' were amounts that were paid by the Government for the presence of a purohit in the village. Under those circumstances the Judges held that the Plaintiff was not entitled to a decree as prayed for, vide case of — 'Ramkristna v. Ranga', 7 Mad. 424.

A similar case came before the same High Court in the case of — 'Saripaka China Madhava v. Muthura Suryaprakasam', 24 Ind. Cas. 204 (Mad.). In that case also it was clearly laid down that it would be contrary to the principles of Hindu Law to recognise any hereditary right in a spiritual office, the right to hold such an office being dependent upon special qualifications. If any 'inam' for performing the duties of a purohit in a particular village has been granted that can only give the right to the individual to claim the emoluments that are appurtenant to the inam and offer his services as purohit. As regards the utilisation of his services as purohit by the public, it would be left to the will of any individual person to requisition his services or not. It merely gives the facility to the inhabitants of the village to seek the aid of the individual for spiritual ministrations.

As regards the view taken by the Bombay High Court that suits of the nature of the suit before us are cognisable by a Civil Court and that a decree could be passed, we are of opinion that it was too late in Bombay to go back upon the long set of precedents which had been established in that High Court recognising such rights. The Bombay cases are clearly distinguishable as being based on the principle of STARE DECISIS.

It was urged by the Counsel for the Respondent relying upon the decisions of the Bombay High Court and the decision of this Court, that the Court is not debarred from awarding a decree for a right to the office of purohit in any particular case. The first case relied upon by the Respondent's Counsel was a case reported in — Savala Tukaram v. Santya Parsha', AIR 1918 Bom. 99. This was a case of village MAHARS, filing a suit for a declaration of their right to take the skins of dead animals. This right being in the nature of a 'Vatan', the Bombay High Court held that there was nothing in law against the decreeing of a suit for a declaration of such right. The other case relied upon by the Counsel for the Respondent was the case of — 'Ramalingachi Reddi v. Elayyaperuma Goudan', AIR 1937 Mad. 403. This was a suit for a decree to declare the right to lead the horse at a festival and the right to hold the 'Kalasam' and receive

the honours on ceremonial occasions of 'Pansupari' at the time of the festival. These, it must be understood, form part of the duty of an office and it was therefore held in that case that where certain duties form part of an office a suit could always lie for a right to perform certain duties appurtenant to that office and that Section 9 of the Civil Procedure Code was no bar. The performing of these duties, as would be clear did not compel any individual to utilise the services of any particular individual to the exclusion of others, as is sought to be done in the case before us. Therefore a decree which did not infringe individual volition could always be given.

To the same effect was the decision of the Madras High Court in the case reported in — 'Rangachariar v. Parthasarthy Iyengar', AIR 1927 Mad. 131. What was decided in these cases was that where the plaintiff's suit was for enforcing a right to hold an office and receive emoluments appertaining to that office by virtue of one being the heir or belonging to a particular class or community, a decree could be passed declaring such right.

The case which was adverted to by the Counsel for the Respondent of this High Court is, in our opinion, not relevant. In the case of — 'Venkata Sastri v. Sanap Joshi', 1343 Nazair-e-Haiderabad 211, it was specifically held that it was not possible to give a decree in favour of the plaintiffs that, without their consent, nobody else could discharge the functions of 'Joshigiri' and that no person could be compelled to engage the services of the Plaintiff alone. These observations appear at page 213 of the report (1348 Nazair-e-Haiderabad page 211). While discussing the point in question the Judges have also clearly expressed that 'vatandari' is one thing while the duties appertaining thereto is quite a different thing.

We are therefore, of opinion that the decision relied upon by the Counsel for the Respondent far from helping his contention is in support of the view held by the majority of the High Courts in India.

(5) Whatever might have been the trend of the decisions of the Courts in India or in Hyderabad prior to the coming into force of the Constitution, the view contended for by the Respondent's Counsel can no longer continue to prevail after the 26th of January 1950 for the reason that it would clearly offend article 19 (g) of the Constitution, for among the fundamental rights conferred by the Constitution, the right to practise freely any profession or to take up any calling without any hindrance, is one of the fundamental rights which has to be protected. If the Court were to give a decree in favour of an individual declaring him alone to be entitled to practise the profession of 'purohitgiri' to the exclusion of others, it would amount to laying a restraint upon the others to carry on the same profession in the village. It would decidedly offend the fundamental rights and as such cannot be countenanced.

It would be advisable to refer in this connection to the observations of Mahajan J., in the case of — 'Chintamanrao v. State of Madhya Pradesh', AIR 1951 SC 118. While considering the reasonableness of restriction placed upon the right of the individual of a particular place to engage himself in a particular business and thus earn his livelihood, His Lordship observed

"The statute prohibits persons who have no connection or relation to agricultural operations from engaging in the business of Bidi making, and thus earning their livelihood. These provisions cannot be said to amount to reasonable restrictions on the right of the applicants and therefore the statute is not in conformity with the provisions of Part III of the Constitution."

(6) For all the above reasons we are of opinion that no suit for a declaration of a right to perform 'purohitgiri' in a particular village to the exclusion of others can lie. This appeal is therefore allowed and the Judgments of the Courts below set aside. Having regard to the fact that the case relates to 'purohitgiri' there is no necessity to award costs and so no order is made as to costs.

A/R.G.D. Appeal allowed.

A. I. R. 1953 HYDERABAD 3

PALNITKAR C. J. & SRINIVASACHARI J.

Waman Rao, Petitioner v. Daulat Rao, Respondent.

Revn. No. 414/4 of 1950, D/- 14-7-1952.

Civil P. C. (1908) S. 152 — Who can apply for amendment — Person not party to suit or decree has no right — Proper remedy of third party is by way of suit.

A person who is not a party to the suit for pre-emption or the decree passed therein has no right to apply for amendment of the decree under S. 152 on the ground that the decree for pre-emption could not be passed in respect of the whole property inasmuch as half of it had been sold to him by the vendor. In such a case the decree cannot be said to be at variance with judgment. The proper remedy of the applicant is to file a separate suit. (Para 2)

Anno: C.P.C., S. 152 N. 11 Pt. 1.

Ram Rao and Prabhakar Rao, for Petitioner; Venkat Rao Deshpande, for Respondent.

ORDER: This is a revision against the order of the lower court amending a decree on the application of a person who was not a party to the original suit or to the decree. The suit was filed by the petitioner for pre-emption of Survey No. 99 as against his vendor and vendee. The suit was decreed and in pursuance of the decree the petitioner was given possession of the property. Subsequently the respondent alleging that half of the land had been conveyed to him by one of the defendants applied to the Court for amendment of the decree on the ground that a decree could not be passed for pre-emption in respect of the whole of the property. The lower court allowed the petitioner to amend the decree. It is against this order that this revision has been filed.

(2) It has to be observed that Section 152 of the Civil Procedure Code contemplates an application for amendment of a decree or judgment by the parties to the suit and to the decree. Admittedly the respondent here was not a party to the suit and much less to the decree and therefore no decree could have been amended on the application of a person who was not a party to the suit. It is argued by the learned vakil for the respondent that

the plaintiff played fraud upon the court by alleging that the whole of the property had been sold to him while only half of the property was sold to him. These are matters which could be agitated in a separate suit and the remedy of the respondent in this case was to file a suit. The decree could not be said to be at variance with the judgment. We, therefore, allow this Revision and set aside the order of the lower Court. The petitioner will be entitled to the costs of this Revision. Advocate's fee Rs. 30/-.

B/K.S. Revision allowed.

A. I. R. 1953 HYDERABAD 4

NAIK C. J. AND JAGANMOHAN REDDY J.

Digambar Rao and another, Appellants v. Dhondu, Respondent.

Revn. Petn. No. 32 of 1951, D/- 10-4-1952.

Civil P.C. (1908) S. 151 — O. 21 R. 97 — Decree in suit for permanent injunction — Right to put in claim petition.

Where a decree in a suit for permanent injunction has been obtained, the mode of execution has been laid down in O. 21 R. 32. Under the above provision decree-holder can only execute his decree, if the judgment-debtor is disobeying it deliberately, by either having her detained or by attaching her property. In neither of these cases can a third person be adversely affected by the execution of the decree, if, in fact, he is in possession of the suit property. At the time of the execution, if his possession is going to be affected by an attachment of his property purporting to be the property of the judgment-debtor, he can always obstruct and resist and the decree-holder will be entitled to apply under Order 21 R. 97. A third party cannot, before he is dispossessed, compel the decree-holder or auction-purchaser to have the fact of his possession investigated. He would only have a right to present a claim petition if he is dispossessed from the land. He has no right to put in a claim petition in the execution of the decree. Where the Civil Procedure Code has provided for a complete procedure under O. 21 relating to the execution of decrees and orders, there is no justification for the application of the residuary S. 151 in favour of a person not a party to the decree for restraining execution of such a decree. Case law discussed.

(Paras 4, 5, 6, 7 & 8)

Anno: C.P.C., S. 151 N. 2; O. 21 R. 97 N. 1.

Laxman Rao Ganu, for Appellants; Govind Rao Ardhapurkar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('24) AIR 1924 All 495: (46 All 693 FB)	8
('33) AIR 1933 Cal 246: (60 Cal 8)	8
('39) AIR 1939 Cal 658: (69 Cal LJ 533)	8
('51) 86 Cal LJ 72: (AIR 1951 Cal 394)	8
12 Deccan LR 251	7
29 Deccan LR 275	7
39 Deccan LR 302	6, 7
40 Deccan LR 275	7
('31) AIR 1931 Lah 686: (132 Ind Cas 844)	8
('35) AIR 1935 Nag 212: (159 Ind Cas 584)	8

JAGANMOHAN REDDY J.: This is a revision petition against an order of the Munsif of Nanded, rejecting the objection of the petitioner-decree-holder on the ground that the claim petition of the respondent is maintainable under Section 372 of the Hyderabad Code of Civil Procedure, corresponding to Order XXI, Rule 97 of the Indian Code of Civil Procedure. The facts for the purposes of this revision petition are that the petitioner had obtained with respect to the suit property a declaration of his right and a permanent injunction against one Raju Bai, the judgment-debtor. The claim petitioner's adoptive father, it is alleged, also had obtained a decree on 29th Amardad, 1348 Fasli against the judgment-debtor and has been in possession of the suit land since last 10 years. The claim petitioner who alleges that he is in possession of the said land after the death of the adoptive father, fearing that the revision petitioner might execute his decree and get him dispossessed, has put in a claim petition which is the subject of this revision application.

(2) The short point to be considered is whether he has any such right to put in a claim petition in the execution of a decree for permanent injunction against the judgment-debtor which proceeds on the assumption that he or she is in possession of the suit land.

(3) The contention of the learned Advocate for the petitioner is that if he is not in possession of the suit property as alleged, but the respondent is in fact in possession of it, then the execution of his decree would be infructuous inasmuch as the execution of a decree for permanent injunction can only be against the person of the judgment-debtor directing him not to interfere with the possession and enjoyment of the land alleged to be in possession of the decree-holder. The respondent on the other hand submits that since he is affected by the decree he has a right to put in a claim petition under Section 372 read with Section 644 of the Hyderabad Code of Civil Procedure, even though he may not be a party to the suit in which the decree is being executed.

(4) Where a decree in a suit for permanent injunction has been obtained, the mode of execution has been laid down in Section 289 of the Hyderabad C. P. C., corresponding generally to Order XXI, Rule 32. Sub-section (1) of the said Section 289 is as follows:

> "Where the party against whom a decree for specific performance or for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison or by attachment of his property or by both."

(5) It will be seen that under the above section the revision petitioner can only execute his decree, if the judgment-debtor is disobeying it deliberately by either having her detained or by attaching her property. In neither of these cases can the respondent-claim-petitioner be adversely affected by the execution of the decree, if, in fact, he is in possession of the suit property. At the time of the execution, if his possession is going to be affected by an attachment of his property purporting to be the property of the judgment-debtor he can always obstruct and resist and the decree-holder will be entitled to apply under Section 372 of the Hyderabad Code corresponding to Order XXI, Rule 97.

The party resisting can then satisfy the court that he is, in good faith, in possession of the property on his own account, whereupon the court is bound to make an order dismissing the execution petition under Section 374 of the Hyderabad C. P. C., Order XXI, Rule 99. It may be observed that the said provisions come into operation in the case of execution of

decrees which are for possession or which are in effect deemed to be for possession as in the case of decrees for partition.

(6) In the case of — 'Sakeena Begum v. Salah', 39 Deccan LR 302, Ganganath C. J. and Mohammad Ahmed Ansari J. held that a third person cannot have the fact of his possession investigated in execution proceedings unless and until he is dispossessed. Once he is dispossessed he can put in a claim petition under Section 375 of the Hyderabad C. P. C. corresponding to Order XXI, Rule 100. A decree-holder or auction-purchaser can always apply for having an obstruction or resistance to the decree set aside, and the Court can then investigate the fact of possession of the third party. But this does not mean that a third party can, before he is dispossessed, compel the decree-holder or auction-purchaser to have the fact of his possession investigated. Their Lordships have, in the above case, considered in extenso the various conflicting rulings and have dealt with the matter in great detail.

(7) In — 'Narain v. Bagayya', 40 Deccan LR 275, Khaliluzzaman and Mir Siadat Ali JJ. have no doubt thought that they were bound by the Full Bench judgment of five judges in — '12 Deccan LR 251, and held that where there appears to be a dispute as to possession between the decree-holder and a person not a party to the decree, the Court is bound to investigate a claim petition, which is itself in the nature of an obstruction or resistance even where the decree-holder has not yet presented an execution petition. It may be noted that Their Lordships have rightly pointed out at page 278, 40 Deccan LR 275, that the two Full Bench judgments which they were discussing, i.e., '12 Deccan LR 251' and '29 Deccan LR 275' were cases in which the execution proceedings in a decree for possession were commenced by the decree-holder and it was in those circumstances that the claim-petitioner put in his petition.

It is therefore evident that, when some of the Judges of the Full Bench went further and stated that even where a decree is not being executed, a third party is entitled to have his right to possession investigated even though he is not a party to the decree, that statement would appear to be 'obiter'. Apart from that a perusal of — '12 Deccan LR 251' would, as pointed out in — 'Sakeena Begum v. Salah', 39 Deccan LR 302, shows that the majority opinion of Nawabs Mirza Yar Jung, Siraj Yar Jung and Zia Yar Jung at page 258 was that a third party under Section 375 of the Hyderabad C. P. C. would only have a right to present a claim petition if he is dispossessed from the land and that was the answer of the Full Bench of the five Judges in the above referred case. With great respect this aspect of the Full Bench judgment appears to have been overlooked in — '40 Deccan LR 275'.

(8) The consensus and the weight of authority in Hyderabad and in India appear to be in favour of the above proposition which is also borne out by the plain language of the provisions referred to above. — 'Jagannath Brijraj v. Khaja Faizuddin', AIR 1935 Nag 212; — 'Milkhi Ram v. Basant Singh', AIR 1931 Lah 686; — 'Kiranshashi Dassee v. Official Assignee, Calcutta', AIR 1933 Cal 246; 'Sobha Ram v. Tursi Ram', AIR 1924 All 495 (FB), are all cases which support the above proposition. At any rate the aforesaid cases do not affect this particular case because, as already observed, there can be no question of any third person being dispossessed, in that the decree, where execution is anticipated, is itself not one for possession but for a declaration of right and permanent injunction. If the claim petitioner is affected by the decree to which he is not a party, he can always file a suit to have the decree under execution set aside.

There is no force in the contention of the respondent's counsel that the inherent powers under Section 644 of the Hyderabad C. P. C. (Section 151 of the Indian C. P. C.) should be utilised in his favour. This has been held to be so in the case of — 'Suresh Chandra v. Jogesh Chandra', AIR 1939 Cal 658 and — 'Narendra Krishna v. Great Eastern Hotel Ltd.', 36 Cal LJ 72. I am also of the view that where the Civil Procedure Code has provided for a complete procedure under Order XXI, relating to the execution of decrees and orders, there is no justification for the application of the residuary section 644 of the Hyderabad C. P. C. (Section 151 of the Indian C. P. C.) in favour of a person not a party to the decree for restraining execution of such a decree.

(9) In the result, the revision petition is allowed with costs and the order of the lower Court is set aside.

(10) NAIK C. J.: I agree.

B/D.H. Revision allowed.

A. I. R. 1953 HYDERABAD 5

MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

Abdul Aziz, Petitioner v. State.

Reference No. 1184/6 of 1951-52, D/- 19-6-1952.

Municipalities — Hyderabad Municipal Corporation Act (36 of 1950), S. 31(1)(f) — Disqualification under — Nature of.

The disqualification referred to in S. 31(1)(f) is not one which prohibits a lawyer to appear for an accused in a case where the Corporation or the Commissioner is interested. There is nothing in the Legal Practitioners' Act or in the Municipal Corporation Act itself to preclude a pleader from appearing for an accused. But if he does so, he will be disqualified from continuing as a municipal counsellor under S. 36(1)(f). It is a choice which is left to the counsellor-pleader to make if he wants to appear for an accused in such a case. It is not open to the Magistrate to refuse him permission to appear for an accused. (Para 1)

Gopal Rao Tuljapurkar, Government Advocate, for the State.

JAGANMOHAN REDDY J.: This is a reference by the District Magistrate, Hyderabad City District moving the High Court to quash the order of the 6th City Magistrate in refusing the counsellor of the Hyderabad Municipality to appear for an accused as in his view Clause (f) of Sub-section (1) of Section 31 of the Hyderabad Municipal Corporation Act (Act XXXVI) of 1950 precludes him from appearing for any accused. The District Magistrate has expressed the view with which we concur that the disqualification referred to by the 6th City Magistrate is not one which prohibits him to appear for the accused, but is one which disqualifies a lawyer who being a municipal counsellor appears for an accused in a professional capacity in connection with any cause or proceedings in which the Commissioner of the Corporation is interested or con-

cerned from being a municipal counsellor which is totally a different thing. There is nothing in the Legal Practitioners' Act or in the Municipal Corporation Act itself to preclude a pleader from appearing for an accused. But if he does so, he will be disqualified from continuing as a municipal counsellor a choice which is left to the counsellor-pleader to make if he wants to appear for an accused in a case where the Corporation or the Commissioner is interested. It is not open to the Magistrate to refuse him permission. In this view of the matter, we accept the reference and set aside the order of the Magistrate.

B/D.R.R. Reference accepted.

A. I. R. 1953 HYDERABAD 6

SIADAT ALI KHAN J.

Shazada Qanum, Petitioner v. Fakher Jung and others, Respondents.

Original Suit No. 19/1 of 1951, D/- 30-8-1951.

(a) Muhammadan Law — Marriage — Shias — Muta — Period not specified — Nikah Marriage results.

There is no difference between 'muta' for an unspecified period and a 'muta' for life. (Para 3)

If in 'muta' a specification of period is omitted, the contract becomes permanent. (Para 3)

The omission to specify period does not affect the contract of marriage. (Para 3)

In Shia Law, a permanent 'Nikah' marriage for life can be contracted by the use of the word 'Muta' also. Specification of the period for which a 'muta' marriage is contracted alone makes a permanent marriage for life a temporary muta marriage for the period specified. Where the specification of period is omitted, whether intentionally or inadvertently, a permanent 'nikah' marriage results with all the legal incidents of a 'nikah' marriage including the right of inheritance between the contracting parties. (Para 3)

(b) Civil P. C. (1908), O. 20 R. 4 — Appreciation of evidence.

In a case where there is oath against oath, it is usual to judge the story of witnesses by certain tests, namely, how far it is consistent with itself; how it has stood the test of cross-examination; how far it fits in with the other circumstances of the case and is in consonance with the facts of human experience. (Para 4)

Anno: C.P.C., O. 20 R. 4 N. 5.

(c) Muhammadan Law — Marriage — Shias — Muta — In a muta marriage no witnesses are necessary among Shias. (Para 4)

(d) Muhammadan Law — Marriage — Attestation — In Moslem Law when a marriage is attested, it is always attested by two witnesses. (Para 4)

Hyder Raza Zaidi, for Petitioner; Laxman Rao Ganu, for Respondents.

JUDGMENT: This partition suit of the estate of Nawab Fakhrul Mulk filed by Safdarunnissa Begum and others v. Nawab Ghazi Jung and others (No. 116/56F.) has been compromised and a decree in terms of the compromise was passed some months ago, except in respect of the claim of Shazada Qanum, the alleged wife of Nawab Fakher Jung. In the compromise deeds the question of her status was expressly left open. She claims by petition dated 25-7-51 A.D. to be a wife by Muta of Nawab Fakher Jung but claims also that her Muta was of such a nature as to confer on her rights of inheritance as wife. In other words, she maintains that her Muta marriage was for an unspecified period, or alternatively, it was for life; and that such a Muta marriage creates rights of inheritance. All heirs of Nawab Fakher Jung except her own issue contest this and allege that her Muta marriage was temporary one; and, consequently, without any right of inheritance. I have reserved her share amounting to Rs. 11889-1-8 in case her status of a wife is established. In support of her contention she has adduced five witnesses and has herself gone into the witness box; in rebuttal two witnesses have been adduced and reliance has been placed on an application dated 10-11-1946 A.D. I have heard arguments of the learned advocates of the parties and record my opinion below.

(2) The learned counsel for the petitioner argued that P. W. 1 Muttahar Hussain has deposed that he attended the Muta ceremony, that the Muta was for an unspecified period & the dower Rs. 500; that P. W. 2 Husan Afruz Buwa has deposed that Nawab Fakher Jung had contracted a five year Muta with Ameera Qanum; that at the end of five years he let her go and said that his Muta with the petitioner and two other Muta wives was for life but with Ameera Qanum was for five years and, therefore, he was releasing her. The learned counsel argued that this statement of Nawab Fakher Jung is relevant under Sec. 32 (5) of the Indian Evidence Act as it is a statement relating to marriage and proves that the Muta with the petitioner was for life. Referring to the deposition of the petitioner the learned counsel argued that she has also deposed that her Muta was for life, and besides her P. W. 4 Karimuddin also has deposed to the statement of Nawab Fakher Jung at the time of release of Ameera Qanum. The learned counsel argued further that the application of the heirs to Nawab Fakher Jung filed in the Atiyat Court dated 10th Meher 1346 Fasli (Ex. A-1) though filed by the defendants is entirely in his client's favour and proves everything which she has to prove; for, in that application the defendants stated that among the legal heirs of Nawab Fakher Jung there were four widows of whom three were widows of Muta marriages and one a widow of a Nikah marriage; that this is a clear admission of the continuance of Muta for life; that besides the defendants spoke of Ameera Qanum and her release after 5 years by the late Nawab and that this indicates very clearly that the Muta with the other three wives was for life.

In reply the learned advocate for the defendants argued that in the application referred to above the defendants stated only that there were three wives by Muta marriage; that the defendants do not deny even now that there were three Muta wives; that that does not imply any admission that they were wives by permanent marriages; that this application bears the signature of the petitioner and that is an admission of her being a Muta wife only. He argued further that in this application maintenance for the widows was prayed on the ground of custom and not because of legal right, establishing quite clearly her admission that she has no legal right for maintenance as a wife.

The learned advocate pointed out further that Safdarunnissa Begum, sister of Nawab Fakher Jung, filed a suit for partition of the estate of her father, Nawab Fakhrul Mulk, in the Darul-Kaza Court; and in that suit the petitioner was not made a party; that this shows that a near relative did not consider her an heir; that her daughter Zuhoorunnissa Begum objected to this and because of her objection she was made a party; but even in the written statement filed by her after she was made a party she did not state that her Muta was for life; that similarly, even in the application dated 20th July 1951, which started this inquiry the Muta was not stated originally to be for life and that all this was significant and entirely refutes her claim. The learned Counsel argued emphatically that when the formula which was read was of a Muta marriage and the intention was to contract a Muta marriage, it was impossible that a Nikah marriage could result; that when the Muta was for an unspecified period it must be deemed void, for in a Muta marriage specification of period is a condition precedent and that as it is not fulfilled, the marriage was void. The learned advocate argued further that in a Muta marriage no rights of inheritance accrue; and if it were intended that such rights should accrue there must be a contract to that effect entered at the time of Muta and not subsequently and here no such contract was either alleged or proved; that the petitioner neither received any insurance money nor any pension on Fakher Jung's death and what is more, she admittedly never took any proceedings to get either the pension or the insurance money; that she has admitted in her deposition that she knew that the Nikah wife, Gouharunnissa Begum, filed a suit for her dower; that it was compromised in her favour and that in spite of this she never claimed or received any dower. The learned advocate concluded that all this indicates clearly that she has proved by her conduct itself that she was not a widow of any permanent marriage.

(3) I have carefully considered the whole record and the arguments of the learned advocates of the parties. It appears to me that there is some confusion about a Muta for an unspecified period or a Muta for life. There is no difference between a Muta for an unspecified period and a Muta for life. The learned Counsel for the petitioner has all along maintained that a Muta for an unspecified period is like a permanent marriage and it confers rights of inheritance on the contracting parties. The following quotation from Jawahar-Ul-Kalam, a work of highest repute and of higher authority than Sharaye-ul-Islam, the most prevalent book among Indian Shias, will bear the learned Counsel out and will also show that there is no difference between a Muta for an unspecified period and a Muta for life:

"By all the texts and the consensus of opinion it is necessary in a Muta marriage to specify the period for which it is contracted; if at the time of reading the marriage formula, the period is not specified either in words or in intention, it will not be a Muta contract, it will be a permanent contract. This is the most approved view among our Jurists and all are agreed upon this. You know that the word 'Muta' applies equally to Nikah (permanent marriage) and Muta (temporary marriage) and that in Muta the specification of period is in addition; hence it is clear that if in Muta a specification of period is omitted, the contract becomes permanent on the following grounds that:

(i) in principle contracts are usually valid, that is, as soon as the proper formula is spoken, a valid contract results;

(ii) The contract will be deemed to be permanent because it is devoid of any period;

(iii) Ibn Bukair has related in his book Muwasak that Imam Jafer-us-Sadek said 'If a period is specified it is Muta and if the period is not stated it is Nikah'; and

(iv) When the conditions of a Muta were related to Abban, son of Taglab, he stated that he feels shy at specifying the period of Muta; thereupon the Imam said: 'This will be harmful to you' and he said 'In what way?'; the Imam replied 'If you do not specify the period, the contract will become permanent. You will be liable for maintenance for the period of Iddat and she will become your heir and you will not be able, to divorce her except according to Talak-us-Sunnat.' In the books Masalik and Kashaf-ul-Lisam, the approved opinion is stated in this way that when the formula does not contain the specification of period, the contract is of a permanent marriage whether the intention was of a marriage for a specified period or not. It is because of this version of the approved opinion that the author of Masalik held that in a Muta where the intention was of marriage for a stated period but was not so expressed in the contract, the contract should be held void; for the words do not conform to intention, and it is necessary that both the words and the intention should be ad idem; and as here the words signify permanence and intention of a temporary marriage, the words and the intention are at variance and as such the contract should be deemed to be void.

In support of the approved opinion stated above there is a tradition related by Samah. He states that he asked the Imam about a person who contracted a Muta marriage with a woman but forgot to specify the period; whether the marriage was unlawful and tantamounted to fornication and he replied 'No. The marriage will be a permanent marriage and the person should ask for forgiveness of God for forgetting to specify the period.' This is supported by another tradition of Hisham who states that he asked the Imam whether he can marry a woman ambiguously without stating the period and he replied 'it will be more harmful to him as it will be a permanent marriage and she will inherit him and he will not be able to divorce her unless during Tuhar (monthly menopause) and before two witnesses.' Hisham relates that he asked 'How then should I marry her' and the Imam replied 'by specifying the period.' This tradition is quite clear and shows that in Muta specification of the period is necessary and only because of this specification of the period that it is taken out of the import and incidences of Nikah. The conclusion is clear that the omission to specify period does not affect the contract of marriage and it throws light upon this fact also that the intention of the man is not relevant, and if it is not expressed in words, it does not affect the validity of the marriage and does not invalidate the Muta.

In a case where a Muta is contracted but no period is specified, if we hold that the

Muta is invalid, we fail to see that the intention of the marriage was present and the marriage should accordingly be deemed to be permanent; but it would be otherwise if we were to hold that in a permanent marriage it is necessary that the intention of marrying permanently should be present and expressed; in that case such a marriage will be invalid for the intention of permanence is not expressed; but the Law-giver has not prescribed that in a permanent marriage the intention of the permanent marriage should be expressed; the Law-giver has prescribed that by a marriage a permanent marriage is meant unless marriage for a specified period is intended in which case the period should be specified and hence when period is not specified, permanent marriage is presumed.

Ibn Idrais has stated that if a Muta marriage is contracted with the word 'Muta' and the period is not specified, then it becomes void. But if Muta marriage is contracted with the words 'Nikah' or 'Tazvij', then, on non-specification of period the marriage becomes permanent. The reason according to him is that the words 'Nikah' and 'Tazvij' indicate a permanent marriage; and non-specification of period does not interfere with their import. On the other hand, Muta implies a temporary marriage and non-specification of period invalidates it. You have seen above that the word 'Muta' can be used for a permanent marriage which can be contracted by the use of the word 'Muta' and, therefore, this distinction by Ibn Idrais is invalid. Similarly, his other distinction, namely, the distinction between a case where the specification of period is left out intentionally and the case when it is omitted inadvertently because of forgetfulness or ignorance is invalid; he has held that if the specification of the period is left out intentionally, the contract of Muta will become a permanent contract of marriage; otherwise it will become void; for intentional omission of specification of period indicates an intention of contracting a permanent marriage as against the omission because of forgetfulness or ignorance, as in that case there can be no intention of contracting any permanent marriage. This distinction is again invalid, for our position is that where there is an intention of contracting a Muta marriage but the specification of period is not made in the marriage formula, whether because of forgetfulness, ignorance, shyness or for any other reason whatsoever, as the intention is not expressed in words, mere intention is not relevant and it does not affect the validity of the marriage or invalidate the Muta. This approved opinion of our Imams has been strengthened by consensus of large bodies of the learned Jurists who hold that if a period is not specified, the contract will become permanent and you have been explained the reasons at length." (1 Vol. 5, P. 138-139, Tehran. ed. of 1312 A.H. To the same effect commentary on Sharaye-ul-Islam p. 185, 1330 A.H. edition; p. 237 of Lucknow edition, date not specified; and Tanbihul Munkireen, p. 4 & 5 Delhi 20 p. 1267).

The above will show that in Shiah law, a permanent Nikah marriage for life can be contracted by the use of the word 'Muta' also; that specification of the period for which a Muta marriage is contracted alone makes a permanent marriage for life, a temporary Muta marriage for the period specified: that where the specification of period is omitted whether intentionally or inadvertently, a permanent Nikah marriage results with all the legal incidents of a Nikah marriage including the right of inheritance between the contracting parties. The question then becomes whether at the Muta marriage under consideration the specification of period was omitted; if so, the marriage will become a Nikah marriage; and similarly, if the period specified was for life, a Nikah marriage will result.

(4) Examining the evidence adduced by both the parties I find that really speaking only Muttahar Hussain and Shazada Qanum and Husan Afruz Buwa are the only three witnesses on behalf of the petitioner who have deposed to her marriage being for an unspecified period or for life. As against them the two defendants' witnesses, Sheik Dawood and Syed Ali Asghar Bilgrami, ex-Subedar and ex-Member, Revenue Board, speak of the petitioner's Muta marriage being a temporary marriage for a period of three years with several renewals. Thus here is oath against oath and in such a case it is usual to judge the story of witnesses by certain tests, namely, how far it is consistent with itself; how it has stood the test of cross-examination; how far it fits in with the other circumstances of the case and is in consonance with the facts of human experience. Keeping these tests in mind, I find Muttahar Hussain's story of witnessing the petitioner's marriage difficult to believe; for, though he admits that in a Muta marriage no witnesses are necessary among Shias, yet he states that he was made a witness. In Moslem Law when a marriage is attested, it is always attested by two witnesses and keeping this rule in mind and his other admission that nothing was reduced to writing he was asked in cross-examination who the other witness was; but he felt annoyed and upset and replied that "How could he know who the other witness was?" This is strange especially as he states that the whole assembly consisted of five to seven persons including the bride and the bridegroom and clearly he should have known who among them was the other witness if he was himself present as a witness. Again the size of the marriage assembly indicates that it was a private affair and not a single member of the bridegroom's family attended it. It is difficult to believe that to such a private celebration witnesses were called especially when Shia Law does not require any witness. His explanation that really speaking he was made a witness not to the Muta marriage but to the appointment as Vakil of the Moulvi who read the formula, is no explanation and is a distinction without difference; for when Shia Law requires no witnesses to the marriage itself, witness to the appointment of the Moulvi as Vakil or agent of the parties to read the marriage formula can hardly be deemed necessary. (After discussing the evidence, the Judgment proceeded) : On all these grounds, I am of opinion that the evidence adduced on her behalf to prove that her Muta marriage was for an unspecified period or for life does not fit in with the other circumstances of the case and is, therefore, discredited. I, therefore, dismiss this suit. I, however, make no order as to costs in the circumstances of the case, especially as her maintenance is admittedly an obligation on the ground of custom at least on some of the defendants themselves.

B/V.B.B. Suit dismissed.

A. I. R. 1953 HYDERABAD 9

DESHPANDE AND
JAGANMOHAN REDDY JJ.

State of Hyderabad, Appellant v. Murahari Rao and others, Respondents.

Confirmation No. 1624/6 of 1951-1952 and Appeals Nos. 137 and 138 of 1951-1952, D/- 6-6-1952.

Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359 F), S. 5 (1) (b) and (2) — Special Judge can take cognisance of case, only when it is transferred to him by chief minister — Case validly transferred — Subsequent transfer by Chief Minister to Sessions Judge without order of committal — Sessions Judge has no jurisdiction — (Criminal P. C. (1898), S. 193) — (Hyderabad Cr. P. C., S. 198).

The accused was charged before the Special Tribunal with offences of murder under various sections of the Hyderabad penal Code, and were convicted & sentenced to death. On appeal the conviction was quashed on ground that they were not afforded an opportunity to engage a lawyer and the case was remanded "to the trial Court for fresh trial". When the order of remand was made, Special Tribunals were abolished and Special Judges were appointed under the Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation X of 1359-F and although there was no specific direction in order of the High Court to remand the case to a Special Judge appointed under the aforesaid Regulation, the file was sent by the office of the High Court to the Special Judge for Medak and Nalgonda holding his Court in the city of Hyderabad. While the case was pending on the file of the Special Judge, Medak and Nalgonda, the Chief Minister purporting to act under Sub-section (2) of Section 5 of the said Regulation transferred it to the Sessions Judge, Medak for "trial in accordance with law", who in turn transferred the case for disposal to the Additional Sessions Judge, Medak. After the case was transferred to the Additional Sessions Judge, Medak the accused put in a petition challenging the jurisdiction of that Court on the ground inter alia that being a Sessions Court it could not take cognizance of the case without an order of commitment by a Magistrate duly empowered in that behalf. The Additional Sessions Judge rejected the petition for the reason that once cognizance was taken by a competent court there was no question of further taking cognizance of the same offence. After the application of the Indian Penal Code and Indian Criminal Procedure Code to all Part B States and the re-allocation of territorial jurisdiction, the file was transferred to the Sessions Judge, Nalgonda. Even before the Sessions Judge, Nalgonda who incidentally happened to be the same Additional Sessions Judge of Medak, a similar petition challenging the jurisdiction of the Sessions Court to take cognizance of the case was presented. This petition was also dismissed. The accused was convicted. In appeal the same objection as to jurisdiction of the Sessions Judge without an order of committal was taken:

Held that before cognizance of the case could be taken by any Special Judge, it was essential that the Chief Minister or a person authorised by the Chief Minister in this behalf should have directed its trial by the Special Judge as required by Clause (b) of Sub-section (1) of Section 5 of the said Regulation. Since no such order was passed the transfer of such a case by the Chief Minister to the Sessions Judge of Medak was ineffective if not otiose. (Para 6)

Even on the assumption that there was a valid order of the Chief Minister directing the trial of this case by the Special Judge under Clause (b) of Sub-section (1) of Section 5, the subsequent transfer by the Chief Minister of the case to the Sessions Judge of Medak would involve the determination of the very same question, viz., whether the Sessions Judge of Medak could take cognizance of a case transferred to his court without a valid order of committal, and that there being no committal order by any Magistrate to the Sessions Court of Medak, that court could not take cognizance of this case. As such the proceedings and the trial by the Sessions Court of Nalgonda to which the case was subsequently transferred were vitiated. Case law reviewed. (Paras 6, 10)

Anno: Cr. P. C., S. 193 N. 3.

Gopal Rao Murumkar, Govt. Pleader, for the State; Gopalkrishnayya, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('45) 'AIR 1945 All 340: (ILR (1945) All 422) 8
('94) 22 Cal 50 7
('92) 15 Mad 352 7
('42) AIR 1942 Sind 161: (44 Cri LJ 137) 7

JAGANMOHAN REDDY J.: Murahari Rao, Danda Krishnamurthy, Goundla Mada Narasimha, Goundla Mada Yellayya and Ambati Narasimha, 5 accused were charged before the Special Tribunal 'A' with offences of murder under Sections 243, 39, 124 and 125 of the Hyderabad Penal Code, alleged to have been committed on 14-10-1948 and were convicted and sentenced to death and various terms of imprisonments. On appeal to the High Court, there was a difference of opinion between Siadat Ali J. and Srinivaschari J. and the case was referred to Manoher Pershad J. who agreeing with Siadat Ali J. quashed the conviction and sentence of the persons accused on the ground that they were not afforded an opportunity to engage a lawyer to defend themselves and ordered as follows on 22-8-50:

"Appeal allowed. Case remanded to the trial court for fresh trial. As the accused are charged for murder, they will remain in Jail during trial. This judgment shall govern the other connecting appeals".

(2) By the time this order of remand was made the Special Tribunals were abolished and Special Judges were appointed under the Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation X of 1359-F and although there was no specific direction in the order of the High Court to remand the case to a Special Judge appointed under the aforesaid Regulation, the file was sent by the office of the High Court with letter No. 1965, dated 25-8-50 to the Special Judge for Medak and Nalgonda holding his Court in the city of Hyderabad. While the case was pending on the file of the Special Judge, Medak and Nalgonda, it appears that the Chief Minister purporting to act under Sub-Section (2) of Sec. 5 of the said Regulation, transferred it to the

Sessions Judge, Medak for "trial in accordance with law" who in turn transferred the case for disposal to the Additional Sessions Judge, Medak.

After the case was transferred to the Additional Sessions Judge, Medak the accused put in a petition challenging the jurisdiction of that Court on the ground 'inter alia' that being a Sessions Court it cannot take cognizance of the case without an order of commitment by a Magistrate duly empowered in that behalf. The Additional Sessions Judge by his order dated 1-3-51 rejected the petition for the reason that once cognizance was taken by a competent court there was no question of further taking cognizance of the same offence.

(3) After the application of the Indian Penal Code and Indian Criminal Procedure Code to all Part-B States and the re-allocation of territorial jurisdiction, the file was transferred to the Sessions Judge, Nalgonda. Even before the Sessions Judge, Nalgonda who incidentally happened to be the Addl. Sessions Judge of Medak who passed the order dated 1-3-51, a similar petition challenging the jurisdiction of the Sessions Court to take cognizance of the case was presented on 24-12-51, on which the Sessions Judge passed the following order dated 26-12-51:

"All the legal points raised in this application have been amply dealt with by me on 1-3-51 disposing of a similar application by the accused. The said order though passed under the Asafia Criminal Procedure Code stands good under the Indian Criminal Procedure Code. The application is rejected."

(4) Thereafter the trial proceeded. Murahari Rao and Ambati Narasimha were convicted and sentenced to death for the offence of murder under Section 243 of the Hyderabad Penal Code and their file sent to the High Court for confirmation. Danda Krishnamurthy, Goundla Mada Narasimha and Goundla Mada Yelliah were all acquitted. Both the accused who were convicted have filed appeals separately which are not only time-barred but the judgments convicting them were not attached with the memorandum of appeal. At the very outset the learned pleader for the accused has raised a preliminary objection challenging the jurisdiction of the Sessions Court at taking cognizance of the case without a committal order as provided for under Section 198 of the Hyderabad Cr. P. C. corresponding to Section 193 of the Indian Cr. P C.; as such he contends that the trial being without jurisdiction the proceedings leading to the conviction and sentence of the persons accused are vitiated and should be quashed.

(5) Before dealing with this objection, it will be necessary to examine the relevant provisions of the Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation X of 1359-F., Sub-Section (2) of Section 3 whereof provides that on the 16th day of December, 1949 every Special Tribunal, except the fourth Special Tribunal shall be deemed to have been dissolved. By Section 5 of the said Regulation, it is laid down as follows:

"(1) Every Special Judge shall try—

(a) such offences of which the trial was immediately before the 15th December, 1949, pending before a Special Tribunal deemed under Sub-Section (2) of Section 3 to have been dissolved on that date as are made over to him for trial by the Chief Minister or by a person authorised by the Chief Minister in this behalf.

(b) such offences as are after the commencement of this Regulation made over to him for trial by the Chief Minister or by a person authorised by the Chief Minister in this behalf.

(2) The Chief Minister or a person authorised by him in this behalf may transfer any case from one Special Judge to another Special Judge or from a Special Judge to a court constituted under the code or from such court to a Special Judge."

(6) Under the aforesaid provisions of the Regulation, a Special Judge can take cognizance of cases mentioned in clauses (a) and (b) of Sub-Section (1) of Section 5 as are made over to him for trial by the Chief Minister or by a person authorised by him in this behalf. It is clear that the judgment of the High Court setting aside the conviction and sentence of the persons accused and remanding the case for a re-trial by the trial Court was subsequet to the 15th of December 1949. Accordingly before cognizance of the case could be taken by any Special Judge, it is essential that the Chief Minister or a person authorised by the Chief Minister in this behalf should have directed its trial by the Special Judge as required by Cl. (b) of Sub-Section (1) of Section 5 of the said Regulation. No such order was produced or could be produced at any stage for the obvious reason that it was not so made. Even the High Court is not empowered under any of the provisions of the Special Judges' Regulation or under the Criminal Procedure Code to direct a remand of this case for re-trial by a Special Judge. If the Special Judge under the Special Judges' Regulation could not take cognizance of this case in the circumstances stated above the transfer of such a case by the Chief Minister to the Sessions Judge of Medak was ineffective if not otiose. The order of the High Court though it might have proceeded on the assumption either that the Special Tribunals were in existence or that the case could be remanded to the Special Judge would in effect be deemed to be an order for a re-trial according to law by a court constituted under the Hyderabad Criminal Procedure Code. It however matters very little for resolving the preliminary objection that the Special Judge could not properly be cognisant of the case, because even on the assumption that there was a valid order of the Chief Minister directing the trial of this case by the Special Judge under Clause (b) of Sub-Section (1) of Section 5, the subsequent transfer by the Chief Minister of the case to the Sessions Judge of Medak would involve the determination of the very same question, viz., whether the Sessions Judge of Medak could take cognizance of a case transferred to his court without a valid order of committal. In short, the objection of the pleader for the accused would be applicable to both the cases, with which I shall now deal.

(6-a) Sub-section (1) of Section 198 of the Hyderabad Criminal Procedure Code relevant for the purposes of this case is as follows:

"Except as otherwise expressly provided by this code or by any other law for the time being in force no court of Session shall take

cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

From the plain language of the Section an order of committal by a Magistrate duly empowered in this behalf is a 'sine qua non' of the Court of Session taking cognizance of any offence as a court of original jurisdiction, subject, however, to any provisions otherwise of the Code or any other law for the time being in force. There are certain other provisions in the Code pertaining to the Court of Session taking cognizance of offences. The Court of Session can under provisions analogous to those in S. 478 of the Indian Cr. P. C. take cognizance of an offence also on an order of committal made by Civil or Revenue Courts which for the purposes of that Section are under Sub-Section (2) of the said Section invested with the powers of a Magistrate. Again under Sections 480 and 485 of the said Code, any court including the Court of Session can take cognizance of any contempt or refusal to produce documents without any sufficient cause and punish the offender. It is further provided by Section 437 of the said Code that where it appears to a Sessions Judge or a District Magistrate on examining a record called under Section 435 that the Magistrate has in a case exclusively triable by a Court of Session has improperly discharged all the accused or any of them, as the case may be, cause the accused to be arrested and instead of directing a fresh enquiry order him to be committed subject to the conditions laid down in the said section.

It will therefore be seen that except under Sections 480 and 485 of the Cr. P. C. which provide for the maintenance of the decorum of the courts and for compelling witnesses to obey orders, a Court of Session can only take cognizance of an offence for trial on its original side on an order of commitment. There is in my view no force in the argument of the Government Advocate that Section 437 provides an exception to the above rule inasmuch as both the Sessions Judge as well as the District Magistrate have revisional powers to direct an order of commitment and only after an order of commitment can the Sessions Judge take cognizance of the case for trial on the original side. The object of Section 198 of the Hyderabad Cr. P. C. (193 of the Indian Cr. P. C.) in prescribing an ordinary enquiry is to afford the accused person an opportunity of knowing the facts and circumstances of the offences with which he is charged in order to facilitate his defence as also to save the time of the Court of Session and avoid exposing the accused to the anxiety of a Sessions trial in the event of there being no 'prima facie' evidence to support a charge. This provision however, is subject to anything expressly provided otherwise by any law for the time being in force as is done by the Special Judges' Regulation, Section 6 whereof provides that

"a Special Judge may take cognizance of an offence without the case being committed to him for trial and in the trial of every offence of which he so takes cognizance shall follow the procedure prescribed in the Code for the trial of warrant cases by Magistrates."

There is, therefore, a clear distinction between a trial by a Sessions Court under the Code and a trial by a Special Judge under the Special Judges' Regulation; in the one case the Court of Sessions cannot take cognizance without an order of committal by a Magistrate and in which the trial has to be conducted in accordance with the procedure prescribed for Sessions trials; in the other case a Special Judge can take cognizance of a case not by an order of committal but by an order of the Chief Minister or by a person authorised by him in this behalf and the trial is to be conducted according to the procedure laid down for trial of warrant cases by Magistrates.

Under Section 5 of the Regulation, the Chief Minister has been empowered either to direct the Special Judge to try any offence or where the case is already pending before the Special Judge, to transfer the same for trial to the ordinary court constituted under the Code. The learned Advocate for the Government submits that once a case has been taken cognizance of by the Special Judge, no order of committal is required for a court of Session to take cognizance of the case on its being transferred to it under Sub-Section (2) of Section 5 of the said Regulation. No authority has been cited in support of his contention nor has any express provision of law been referred to by him which over-rides the mandatory provisions of Section 198 of the Hyderabad Criminal Procedure Code.

(7) In — 'Queen Empress v. Rama Teven', 15 Mad. 352 and — 'Queen Empress v. Jagat Chandra Mali', 22 Cal 50 where approvers to whom pardon was given were, after their evidence before the Court of Sessions, then and there treated as accused and placed on trial with the other accused, it was held that their convictions were bad and the Court of Session had no jurisdiction to try them as they were never committed to that Court by any competent Magistrate.

In — 'Mir Fathe Khan v. Emperor', AIR 1942 Sind 161, the facts were that during the course of trial of four accused persons duly committed by an order of Magistrate to the first Additional Sessions Judge, Hyderabad who purporting to act under Section 351 of the Cr. P. C. directed that one Mir Fathe Khan who was present in Court but against whom no proceedings had hitherto been taken should be joined in the trial as a co-accused on the same charges, Davis C. J. and Weston J. held that the learned Judge had no power to join Fathe Khan as co-accused without an order of commitment made after due enquiry by a Magistrate.

Weston, J. who delivered the judgment of the Bench observed at page 162 as follows:

"The reasoning of the learned Judge by which he justifies his action shortly is that the words 'a Criminal Court' in this section are wide and "should according to all canons of interpretation include a Sessions Court," that S. 351 refers expressly not only to inquiry but also to trial, and that although the powers of a Court of Session to take cognizance of an offence are provided generally by S. 193 of the Code, S. 351 must be considered to be independent of S. 193 in the same manner, as he says, S. 351 is independent of S. 190. It is true that Courts of Session are among the classes of Criminal Courts in British India set out in S. 6 of the Code. But if, by reason of other provisions of the Code, a Court of Session has not power to try any person, save in certain exceptional circumstances such as when contempt is committed before it, unless an order of com-

mitment has been made in respect of such person, then, the generality of the expression 'a Criminal Court' in S. 351 must be held to be limited by those provisions. It is also true that Section 351 refers generally to inquiries and trials, but here again there is no difficulty in limiting the meaning of the word 'trial' if other provisions of the Code so require....." "It would indeed be a surprising result that the accident of a person's presence in Court should operate to deprive him of the safeguard of inquiry by a magistrate into serious charges sought to be brought against him before he can be required to stand his trial in a Court of Session. We do not think such a result is required by Section 351 of the Code, which we think, must be read subject to Section 193".

(8) The question had also arisen in the case of — 'Basdeo v. Emperor', AIR 1945 All 340 when considering the effect of a trial by a Sessions Judge of a case committed to him by a Magistrate who was bound under Section 254 of the Code to try himself, the Allahabad High Court held that the proceedings were only vitiated by an irregularity curable under Sec. 537 and that the Court of Session cannot be said to have no jurisdiction to try the case on such commitment and the conviction of the Sessions Court in such circumstances cannot be impeached as being one without jurisdiction. A distinction was however drawn in that case between the power to take cognizance of a case and jurisdiction over the case. Braund J. held that once a case was committed by the Magistrate to the Sessions Court in accordance with the procedure of the Code, then the Court of Session was placed in a position of taking cognizance of it. He however observed at p. 342,

"There is, I think a great deal of difference between a case in which the Sessions Court is enjoined in certain circumstances not to take cognizance of an offence and a case in which the Sessions Court is not a Court of competent jurisdiction in relation to that offence".

There is no doubt that the decision of the case turned mainly on the question that once a case was committed to a Court of Session by a Magistrate duly authorised in that behalf, the trial by it in the circumstances of the case was a mere irregularity. The authorities which I have examined lay down clearly that a Court of Session can only take cognizance of an offence on an order of committal by a Magistrate, which is also in accord with the plain reading of the section itself, and if there is no order of commitment at all the defect is a substantial one which cannot be cured under Section 537 of the Cr. P. C.

(9) The transfer by the Chief Minister under Sub-Section (2) of Section 5 of the Regulation of an offence which has been taken cognizance of by the Special Judge to a Court constituted under the Code would imply that transfers should be made to such a Court as would under the procedure laid down in the Code be competent to take cognizance of the offence so transferred and does not necessarily refer to transfers of such cases to a Sessions Court only for the reason that the offence which the Special Judge can try would be any offence under the Penal Code triable by any grade of Magistrates or by a Sessions Judge. Once the Chief Minister in exercise of his power under the said Sub-Section transfers a case to an ordinary court from the Special Judge, then the procedure under the Criminal Procedure Code would apply in toto and it cannot be contended that he has the power to transfer the case to a court of such gradation as was not competent to take cognizance of it. This would indicate that the section empowering the Chief Minister to transfer cases, intended to restrict the action to be taken in the matter of such transfers to conform to the general requisites of the Procedure laid down in the Code. If on the other hand the argument of the Government Advocate that the power of the Chief Minister to transfer cases to ordinary courts was unfettered, the validity of which could not be questioned, is accepted, it would then mean that the Chief Minister can transfer a case triable by a Sessions Court to even a second class Magistrate for trial creating an anamoly which is unwarranted. Sub-Section (2) of Section 5 of the said Regulation in effect means that where the Chief Minister decides to transfer a case to ordinary courts under the Criminal Procedure Code, he must transfer the case to a competent court which can take cognizance of it in its initial stage under the particular procedure prescribed by the Code under which it is constituted, i.e., where an offence triable exclusively by a Court of Session is to be transferred to a Special Judge, the Chief Minister should transfer the case from such Special Judge to the Magistrate for enquiry and committal under the provisions of the Hyderabad Criminal Procedure Code analogous to Chapter XVIII of the Indian Criminal Procedure Code and not directly either to a Court of Session or to a Magistrate not competent to make an enquiry in relation to such offences.

(10) The result of the above discussion is that there being no committal order by any Magistrate to the Sessions Court of Medak, that court could not take cognizance of this case. As such the proceedings and the trial by the Sessions Court of Nalgonda to which the case was subsequently transferred are vitiated and will have to be and are hereby quashed and the convictions and sentences of the accused set aside. We direct that the file be sent to the Magistrate having jurisdiction to make an enquiry for disposal according to law.

(11) DESHPANDE J.: I agree.

B/R.G.D. Order accordingly.

A. I. R. 1953 HYDERABAD 12

MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

Shripathy and others, Appellants v. State.

Second Appeals Nos. 1504-1506 of 1952, D/- 8-7-1952.

Essential Supplies (Temporary Powers) Act (1946) S. 12 — Trial of offences under — Trial in summary manner, in the absence of an application in that behalf by the prosecution is vitiated — (Criminal P.C. (1898) S. 260). **(Para 3)**

Anno: Cr. P. C., S. 260 N. 5.

Dattatri Rao Deshmukh, for Appellants; Gopal Rao Tuljapurkar, Government Advocate, for the State.

JAGANMOHAN REDDY J.: This is a second appeal against the finding and judgment of the learned Sessions Judge of Bhir. The facts of the case are that the three appellants who

were caught while transporting coal and edible oils on the night of 21 and 22 February 1951, in contravention of Notifications under the Essential Supplies (Temporary Powers) Act, were charged, convicted and sentenced to 3 months' rigorous imprisonment and a fine of Rs. 100/- each with an alternative sentence in default of the payment of the fine. The learned Sessions Judge to whom the accused have appealed after reviewing the evidence confirmed the convictions, but reduced the sentence to one month's rigorous imprisonment and a fine of Rs. 100/-. Of this sentence, the accused have undergone fifteen days rigorous imprisonment and have been released on bail. Apart from the question whether a second appeal would lie to the High Court after the enforcement of the Indian Criminal Procedure Code, inasmuch as the charge-sheet was filed before it was enforced under the Hyderabad Criminal Procedure Code, we can treat the application as a revision petition. On an examination of the record, we find that no charge has been framed against the accused as the Magistrate was bound to do if it was a trial in which the procedure laid down for warrant cases was being applied. But since this was not done, and for reasons which we will subsequently give, the conclusion at which we have arrived at is that the procedure under which the trial has been conducted is that prescribed for summary cases.

(2) Under Section 12 of the Essential Supplies Act, no doubt all First Class Magistrates, who are empowered to try in a summary way offences specified in sub-section (1) of Section 260 of the Criminal Procedure Code of 1898, may on application in this behalf being made by the prosecution try in accordance with the provisions contained in Sections 262 to 265 of the said Code any offence punishable under this Act. The Essential Supplies Act was enforced in the State of Hyderabad on 17th August 1950; as such it governs this case and any reference in the Act to the Indian Criminal Procedure Code shall under Section 2-A of the said Act be construed as a reference to the corresponding enactment in force in the State, i.e., Hyderabad Criminal Procedure Code.

(3) On going through the records, we find that the trial has been conducted in accordance with the procedure laid down for summary trials, in that a memorandum of evidence has been recorded, a charge was not framed nor any statement of the accused has been recorded. The offence is one which is admittedly punishable with a sentence of 3 years rigorous imprisonment or more and is not ordinarily triable under a summary procedure unless the special provisions of the Code are made applicable. In this case before the procedure prescribed for summary trials was followed the prosecution ought to have made an application in order to warrant the Magistrate in adopting the summary procedure. But no such application has in fact been presented or made to the Court, and as such the prosecution has not in our view conformed with the provisions of Section 12 of the Essential Supplies (Temporary Powers) Act before the Magistrate could try the case in a summary manner. In the absence of such an application, we are of the opinion that the trial in a summary manner by the Magistrate was vitiated not only as being one which was without jurisdiction but also as creating a prejudice to the accused in that he is deprived of the right of appeal. Ordinarily we would have remanded the case for retrial; but having regard to the fact that the accused had already served a part of their sentence, we do not think it in the interest of justice to order a remand of the case for fresh trial. We set aside the conviction and sentence. The fine if any paid is refunded. This judgment will govern all the other connected appeals.

B. R.G.D. Order accordingly.

A. I. R. 1953 HYDERABAD 13

PALNITKAR C. J. AND SRINIVASACHARI J.

Dhondi Ram, Petitioner v. Sukka Ram, Respondent.

Revn. Petn. No. 4/4 of 1951, D/- 30-6-1952.

*** Houses and Rents — Hyderabad House Rent Control Order — Tenancy for fixed period — Landlord can evict tenant after expiry of tenancy.**

It is open to a party to waive and agree to waive the advantage of a temporary and emergency law of the nature of the House Rent Control Order and where the tenant had entered into an agreement of tenancy for a fixed period, the provisions of the House Rent Control Order would not apply and the landlord would be entitled to evict the tenant under the terms of the agreement after the expiry of the term fixed in the agreement of tenancy. In such a case the tenant having expressly waived the benefit that he might be entitled to under the Rent Control Order, the special emergency law would not apply and the case would be governed by the terms of the contract. AIR 1950 Mad. 284; and (1940) 1 Ch. 638, Relied on. (Para 2)

Venkat Rao Deshpande, for Petitioner; Sada Shiv Rao, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('50) AIR 1950 Mad 284: (1949-2 Mad LJ 694) 2

(1940) 1 Ch 638: (1940-2 All ER 601) 2

ORDER: This is an application by way of 'writ of certiorari' directed against the order of the Collector, Bhir District, declining to pass an order of eviction and allowing the appeal of the tenant. The landlord applied to the House Rent Controller for eviction of the tenant on two grounds: firstly, that he entered into an agreement with the landlord to vacate the premises within a period of five months and that that period had expired. Secondly, he also sought eviction on the ground that the malgi was required for his own personal use. The Rent Controller passed an order directing the eviction of the tenant subject to the condition that the tenant was provided with another malgi which also belonged to the landlord. Against this order, the tenant appealed to the Collector, who, while differing from the Rent Controller, dismissed the petition of the landlord. This writ is directed against the above order.

(2) The first contention raised by the learned Vakil for the petitioner is that inasmuch as where the tenant had entered into an agreement of tenancy for a fixed period, the provisions of the House Rent Control Order would not apply and that he was entitled to evict the tenant under the terms of the agreement after the expiry of the term fixed in the agreement of tenancy. We are inclined to agree with this argument of the petitioner and we are of the opinion that it is open to a party to waive and agree to waive the advantage of a temporary

and emergency law of the nature of the House Rent Control Order and in this case we hold that the tenant has expressly waived the benefit that he might be entitled to under the Rent Control Order. In such cases, the special emergency law would not apply and the case would be governed by the terms of the contract. We are supported in this view of ours by a judgment of the Madras High Court in the case of — 'Raja Chetty v. Jagannathadas', AIR 1950 Mad 284, and also by the judgment in the case of — 'Soho Square Syndicate, Ltd. v. E. Pollard and Co.', (1940) 1 Ch 638: (1940-2 All ER 601). Therefore, on this ground that the tenant by an express contract agreed to vacate the premises after a period of five months, we hold that the landlord is entitled to evict the tenant. It is not necessary to go into any other question. We, therefore, set aside the order of the Collector and restore the order of the Rent Controller. We make no order as to costs.

(3) This order will govern the other connected Revision petition.

B/R.G.D. Order accordingly.

A. I. R. 1953 HYDERABAD 14

PALNITKAR AND SRINIVASACHARI JJ.

Addu Achiar, Petitioner v. The Custodian, Evacuee Property, Hyd-Deccan, Respondents.

Writ Petn. No. 887 of 1950, D/- 3-3-1952.

(a) Registration Act (1908), Ss. 2(6) and 17 — General Clauses Act (1897), S. 3(25) — T. P. Act (1882), S. 3 — Immovable Property — Machinery attached to earth, when immovable property — Tests — English Law of fixtures — Transfer of machinery erected by tenant — Held, did not require registration.

If the machinery and other articles pertaining to the factory are in the nature of permanent fixtures then they would be regarded as immovable property. (Para 5)

The test as to whether a thing would be regarded as being imbedded in the earth in order to constitute immovable property is whether it rests by its own weight on earth and whether it can change places and can change hands and can be removed from one place to another. This is based on the principle that whatever is fixed to the soil becomes, in the contemplation of the law, a part of it. The correct test would be to ascertain whether it was to create a permanent improvement to the premises or was it merely a temporary annexation for the enjoyment of the chattel by the tenant. Where, therefore, a tenant running the factory in the premises of another, instals machinery it will always be presumed that he instals the same with the intention of removing the same whenever he chooses to vacate the premises.

The amount of the degree of annexation is also a matter which will be taken into consideration in coming to a conclusion as to whether it is a permanent fixture or not. If the degree of annexation is such that the fixture cannot be taken away without destroying the principle it would be regarded as permanent fixture. (Para 7)

In all these cases intention is a very important factor to be taken into consideration. (English Law of fixtures and its limited application in India discussed.). (Para 7)

Where a tenant of a building who has erected an ice factory in the premises sells the factory with all the movable parts, the machinery is not an immovable property and the sale deed does not require registration. Case law referred. (Para 11)

Anno: Reg. Act, S. 2(6) N. 6; S. 17 N. 23; Gen. Clauses Act, S. 3(25) N. 12; T. P. Act S. 3 N. 9.

(b) Stamp Act (1899), S. 2(10), Sch. I, Art. 23 — Deed held transferred ownership and was liable to be stamped as conveyance — (Hyderabad Stamp Act, S. 2(9) and Art. 16).

In determining what provision of the Stamp Act is applicable to a particular instrument attention should be paid to the real nature of the instrument and not to the title which has been given to the document. (Para 13)

A agreed to sell an Ice Factory to P for a sum of Rs. 80,000/- and the vendee paid the vendor a sum of Rs. 25,000/- as earnest money agreeing to pay the balance at the time of the execution of the sale deed when the possession would be given to the vendee. On 13th December 1948 as per agreement the vendee paid the balance to the vendor and got a letter written by the vendor stating that he had sold to him the Ice Factory. The letter said "I have this day received the full sale price of I. G. Rs. 80,000/- ..... I have delivered to you the contracted Ice Factory as per agreement to sell." It further stated "you are absolute owner of the said property from this day and shall enjoy the same."

Held that the document of the 13th Dec. 1948 which passed the ownership of the property to the vendee was liable to be stamped as a conveyance under Art. 16 of the Hyderabad Stamp Act (Art. 23 of the Indian Act). (Para 13)

Anno: Stamp Act, S. 2(10) N. 3; Sch. I, Art. 23 N. 2.

(c) Stamp Act (1899), Ss. 33 and 61 — Lower Court admitting document in evidence — High Court can declare nature of document and impound the same.

The fact that a document has been admitted by the lower Court, in evidence does not debar the High Court from determining about its liability to stamp duty. The fact that the Court had admitted the document can only mean that its admissibility cannot be called in question at a later stage. For the protection of the revenue, power is always given to the appellate Court under S. 59 (S. 61 of Indian Act) to revise the decision of the lower Court as regards the Stamp duty and if the Court is of opinion that an instrument in question should not have been admitted without payment of stamp duty and penalty a declaration to that effect while at the same time determining the duty payable can be made in impounding the document. (Para 14)

Anno: Stamp Act, S. 33 N. 13, S. 61 N. 8, 9.

Narasimha Aiyengar, for Petitioner; Narhari Sashtri Govt. Advocate, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('01) 26 Bom 1: (28 Ind App 121 PC) 7
('09) 36 Cal 815: (6 Ind Cas 796) 7

('44) AIR 1944 Mad 492: (ILR (1945) Mad 304) 9
(1904) AC 466: (73 LJ KB 946) 7
(1897) 1 Ch 182: (66 LJ Ch 114) 7, 9
(1901) 1 QB 205: (70 LJ KB 225) 7
(1889) 23 QBD 579: (61 LT 332) 13

ORDER: This application for the issue of a writ of CERTIORARI is directed against the order of the Custodian, Evacuee Property, who refused to confirm the sale of an Ice Factory in favour of the Petitioner. The brief facts relating to this case are that Messrs. Jehangir Hormusji, a firm carrying on business in Secunderabad owned premises 106/A Alexandra Road. This firm erected an Ice factory in the premises. Later on this Ice Factory was agreed to be sold by the firm to one Abdul Majeed Paul for a sum of Rs. 1,20,000/- and the vendee paid Rs. 60,000/- as earnest money and this is evidenced by Document No. 7 dated the 23rd February 1947 forming part of the record in this case. It was agreed that the vendee was to pay the balance of a purchase price by 15-8-1947 on which date a regular sale deed was to be executed. The vendor Abdul Majid Paul took the premises on rent and ran the factory there. On the 19th November 1948 Abdul Majeed Paul entered into an agreement with the present petitioner agreeing to sell the Ice factory to the petitioner for a sum of Rs. 80,000/- and received from the petitioner a sum of Rs. 25,000/- as earnest money and the understanding was that the balance of the consideration, namely, the sum of Rs. 55,000/- was to be paid and the sale completed by 5-12-1948. Along with this agreement of sale was attached a list of the properties that were agreed to be sold, and this list contains 33 items. The balance of Rs. 55,000/- was paid on the 13th of December 1948 by the petitioner to the vendor. The vendor, Abdul Majeed Paul, passed a receipt in favour of the petitioner for Rs. 55,000/-. This document is Exhibit 2. On the same day the vendor addressed a letter to the vendee the petitioner stating that he had received Rs. 80,000/- the full sale price of the Ice Factory, and that the 'Ideal Ice Factory' had been sold and delivered to the Petitioner. On the same day Abdul Majeed Paul wrote to Messrs Hormusjee and Co., informing them that he had sold the Ice Factory to Addu Achiah and that thenceforward he would run the factory in their premises and continue to be their tenant herein Majeed Paul also requested that the necessary transfer or change of tenancy might be recorded. Simultaneously with this, the Electricity Department was also addressed by Abdul Majeed Paul stating that the electricity charges which hitherto were being paid by him would be paid by Addu Achiah as he had purchased the ice factory. A similar communication was addressed to the Municipality stating that the business hereafter would be conducted by Addu Achiah. In March 1950 Abdul Majeed Paul left for Pakistan and he was declared an evacuee and all his properties declared evacuee properties.

(2) The present Petitioner, Addu Achiah, filed an application before the Custodian for confirmation of the sale of the Ice Factory in his favour by Abdul Majeed Paul. On the 14th August 1950, the Deputy Custodian confirmed the sale but the Custodian under his revisional jurisdiction issued a notice to the petitioner to show cause why the order of the Deputy Custodian confirming the sale should not be set aside.

(3) After the party appeared, the Custodian inspected the premises and made his inspection notes. The Custodian finally held that the machinery installed there could be regarded only as immovable property having regard to the fact that the factory "consists of two sets of big condensing plant with a number of masonry vats for freezing ice all fixed in the ground", and held that as the document evidencing the sale had not been registered as required by law no title passed to the petitioner and therefore the sale could not be confirmed. It is this order of the Custodian that is being challenged before us.

(4) There can be no doubt that under the provisions of Section 17 of the Registration Act where immovable property of the value of more than Rs. 100/- is conveyed, such sale could only be effected by a document of sale duly registered. So the whole question will not turn upon as to whether it was immovable property that was sold to the Petitioner and as such whether the document evidencing the sale required registration. In order to determine as to whether the property sold was immovable property, it would be necessary to know what the subject matter of the sale was and for this purpose it would be advisable to know that the agreement of sale dated the 19th November 1948 purported to convey. The first paragraph of the agreement reads as under:

"The Vendor will sell and the purchaser will buy the Majeed Paul Ice Factory (formerly known as the Ideal Ice Factory) situate in No. 106, Parklane, Secunderabad with all the rights belonging or appurtenant thereto."

The previous document in favour of Abdul Majeed Paul dated the 23rd February 1947 reads as under:

"The Vendors will sell and the purchaser will purchase the Goodwill and the Ice Plant Machinery situate in 106-A, Alexandra Road, Secunderabad, belonging to the vendors in the condition and the state in which the plant and machinery remain this day and the said plant machinery etc., shall be put in possession of the purchaser on the 1st March 1947 in order to avoid further controversy about the condition of the machinery ....."

A reading of the relevant portions in the aforesaid agreements of the sale to Abdul Majeed Paul and by Paul to the Petitioner would show prima facie that what was conveyed was only the Ice factory located in building No. 106, Alexandra Road (Park Lane) Secunderabad.

(5) It is the case of both the parties that it was only the machinery that was sold and not the bungalow. The schedule to the agreement of sale also makes it clear that it was the machinery relating to the manufacture of ice, and pertaining to the Ice factory that was sold. Section 8 of the Transfer of Property Act indicates what would pass to the vendee on a transfer being effected of a particular kind of property and it says that where the property transferred in machinery attached to the earth, the movable parts thereof pass to the vendee. The whole argument of the learned Advocates centered round the point as to whether the Ice factory that was sold is to be regarded as movable property or not. If the machinery and other articles pertaining to the factory are in the nature of permanent fixtures then certainly they would be regarded as immovable property.

(6) What would be regarded as 'permanent fixture' has been the subject of judicial deci-

sions. The word 'immovable property' has been defined in the General Clauses Act and the Registration Act. 'Immovable property' has been defined negatively in the Transfer of Property Act. In Section 3 of the Act, it has been defined as under: 'Immovable property' does not include standing timber, growing crops or grass." The word 'Immovable property' has been defined in Secion 2, Clause 20 of the Hyderabad General Clauses Act, (for we would be governed only by the Hyderabad General Clauses Act). According to this definition, so long as a thing is attached to the earth and fastened to it, it would be regarded as immovable property. In the Indian Registration Act, 'Immovable property' has been defined in Section 2 Sub-Clause (6) as follows:

"Immovable property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."

We are here concerned with those permanently attached to the earth or permanently fastened to anything which is attached to the earth. Things attached to the earth correspond to what are known as 'fixtures' in English Law.

(7) The law governing fixtures in England is enunciated by the Maxim 'Quicquid plantatur solo, solo cedit', that is to say, whatever is affixed to the soil becomes part of the soil. In India, however, this maxim has been held to have only a limited application. A thing attached to the earth does not necessarily become part of the land to which it is attached, even though it may by virtue of its being attached to the land, be immovable property, thus, for example, a superstructure of land is immovable property no doubt. The land on which it is constructed may belong to a third party and the person who has put up a structure can always remove the structure from the place. A certain person owned certain land. A Railway Company built upon such land before a declaration was made for acquiring it under the Land Acquisition Act. The plaintiff relying upon the English maxim referred to above, that whatever is affixed to the soil becomes part of the soil claimed compensation not only for the land but also for the building which the Railway Company had erected. The Privy Council held that the English Law did not apply to this case and under the Mohammedan Law which applied, the owner of the land on which another constructed a building, was not entitled to the building, vide the case of the — 'Secretary of State for Foreign Affairs v. Charlsworth Pilling and Co.', 26 Bom 1 (PC).

The test as to whether a thing would be regarded as being imbedded in the earth in order to constitute immovable property is whether it rests by its own weight on earth and whether it can change places and can change hands and can be removed from one place to another. The law of Fixtures has received a liberal construction in the case of Trade Fixtures. Thus, for example, if a lessee for years makes a furnace fixed with mortar for his advantage or where a fire engine is erected to work a colliery the pieces of machinery would be regarded only as accessories to the carrying on of the trade, and they would be regarded as fixtures in the nature of trade fixtures. Trade fixtures and fixtures for ornament and convenience have always been regarded as the two exceptions to the general rule that they would go with the land. This is based on the principle that whatever is fixed to the soil becomes, in the contemplation of the law, a part of it. The English doctrine of fixtures did not prevail in India and what the Transfer of Property Act substantially reproduced was what was recognised as the law relating to fixtures by the Hindu and Mahomedan jurisprudence. This has been made very clear by Justice Mukerjee in the case of — 'Mofis Sheikh v. Rasiklal Ghosh', 36 Cal 815, wherein Mukherjee J., observed that the law relating to fixtures in India is the one recognised by the Hindu and the Mohomedan jurisprudence and not the law of England.

The two leading cases in England are the cases of — 'Hobson v. Gorringe', (1897) 1 Ch 182 and — 'Reynolds v. Ashby', (1904) AC 466. Lord Lindley observed in the case of — 'Reynolds v. Ashby' quoted above, that in determining whether that which once has been a chattel has become annexed to the realty, attention should be paid to the nature of the thing itself, the mode of its attachment and the circumstances in which it came to be attached. The correct test would be to ascertain whether it was to create a permanent improvement to the premises or was it merely a temporary annexation for the enjoyment of the chattel by the tenant. Applying the above test to the facts of the present case, it cannot be said that when Abdul Majeed Paul purchased the Ice Factory from Messrs. Jahangir Hormusji, his intention was to make a permanent improvement to the immoveable property, the premises belonging to Jehangir Hormusji, it can only be regarded as Abdul Majeed Paul intending to run the business of an Ice factory for his own profit and instead of buying the necessary machinery and installing the same in some premises he purchased a factory which had already been installed in the premises belonging to Jehangir Hormusji. From the fact that Messrs. Jehangir Hormusji owned the premises as well as the Ice factory it could not be contended that the Ice factory was there with a view to improve the immoveable property, namely, the premises. They owned the premises and ran the Ice factory as a business concern and when they thought that it was not worthwhile running the Ice factory they sold it to Abdul Majeed Paul. Abdul Majeed Paul in his turn sold it to the petitioner, when he found that he could not run the same. Where therefore a tenant running the factory in the premises of another, instals machinery it will always be presumed that he instals the same with the intention of removing the same whenever he chooses to vacate the premises. As has been observed above, the test to be applied in order to determine as to whether they are permanent fixtures or not would be to find out whether those fixtures are for the beneficial enjoyment of the property. Another factor also would be taken into consideration as to what the object of the annexation was.

A. L. Smith M. R. observes:

"There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what would constitute an annexation sufficiently for this purpose. The question which has to be considered in such a case is whether having regard to the character and the circumstances of the particular case the article in question was intended to be annexed to the inheritance or to continue a mere chattel and

not become part of the free-hold — 'Monti v. Barnes', (1901) 1 QB 205. The amount of the degree of annexation is also a matter which will be taken into consideration in coming to a conclusion as to whether it is a permanent fixture or not. If the degree of annexation is such that the fixture cannot be taken away without destroying the principal it would be regarded as permanent fixture. This is on the principle that you cannot destroy the principal thing by taking away the accessories to it. The lessee can always remove the thing if he leaves the property intact.

(8) In all these cases intention is a very important factor to be taken into consideration. Suppose for example a machine is fixed to the earth in an exhibition for demonstration purposes, the idea being only to keep it there till the exhibition is over and to dispose it of, if there is a purchaser. However much it may be imbedded to the earth, it cannot be regarded as a permanent fixture and therefore immoveable property. The Government Advocate was not able to satisfy us nor are we satisfied on the materials before us that the installing of the Ice factory was for the beneficial enjoyment of the house. It is also clear from the document of sale between Messrs. Jehangir Hormusji and Abdul Majeed Paul and the document relating to the sale by Abdul Majeed Paul to Addu Achiah that it was only the Ice factory that was intended to be sold and not the house.

(9) It was urged by the learned Government Advocate that there is a presumption that where any property which is attached to the earth, is immoveable property and the onus is upon the party alleging that it is not and for this he relied upon the case already referred to and reported in — 'Hobson v. Gorringe', (1897) 1 Ch 182. We are unable to agree with this contention of the Government Advocate because the determination of the question as to whether it is a permanent fixture or not, will depend on, as has been pointed out by us before, the intention, the object of the degree of annexation which will have to be decided on the particular facts and circumstances of each case. The learned Government Advocate invited our attention to a decision of the Madras High Court, in the case of — 'Mahomed Ibrahim v. Northern Circars Fibre Trading Co.', Coconada', AIR 1944 Mad 492 and contended that in that case also it was a Bone crushing Mill that was installed and their Lordships regarded that as 'Immovable property'. It would be clear from what has been stated by Their Lordships that the object of 'annexation' was an important factor to be taken into consideration and this had to be determined by the circumstances of each case (Vide p. 495, column 2 and column 1 of Page 496 of the above report). This ruling far from supporting the contention of the learned Government Advocate supports the view that we have taken that the fact whether it is a permanent Fixture or not would depend upon the intention of the party making the annexation. We have come to the conclusion that from the facts and circumstances of this case the intention of Addu Achiah tenant as he is was not to make an annexation so as to be permanently fastened to the earth.

(10) Above all Abdul Majeed Paul was only a tenant and when he purchased the Ice factory from the owners, by no stretch of imagination could it be said that he intended the Ice factory to be a permanent fixture to the house which did not belong to him. That was the case with regard to Abdul Majeed Paul, and Addu Achiah has merely stepped into the shoes of Abdul Majeed Paul continuing to be a tenant of Messrs. Jahangir Hormusji. We find that Addu Achiah has also executed a rental agreement in favour of the owners of the premises.

(11) Having regard to the facts of this case and the evidence on record, we are of opinion that the Ice factory which has been sold to Addu Achiah cannot be regarded as immovable property. As our finding is that it is not immoveable property it does not require Registration. Therefore we hold that the title in the property passed to Addu Achiah by the document of the 13th December 1948. We, therefore, quash the order of the Custodian. We make no order as to costs.

(12) SRINIVASACHARI J.: During the course of the argument the Advocate for the petitioner relied on two documents amidst other documents, in support of his title to the Ice Factory. The first document is dated 19-11-1948 which is an agreement of sale executed by Paul in favour of the petitioner. The next document is a receipt for Rs. 55,000/- dated 13-12-48 executed by Abdul Majeed Paul acknowledging receipt of the balance of purchase price. The third document which is also dated 13th December 1948 purports to be a letter addressed by Abdul Majeed Paul to the petitioner wherein Abdul Majeed Paul says that he has sold that day the Ice Factory to the petitioner. There are other letters addressed by the vendor to the Municipality and the Electricity Department intimating these departments about the transfer of ownership of the factory. Among these documents, the document that is really of importance, so far as the transfer of ownership is concerned, is the letter dated 13-12-1948. Admittedly if that document is the document which solely evidenced the sale transaction it must be stamped as a conveyance under Art. 16 of the Hyderabad Stamp Act, which is in force here. The Advocate for the petitioner contended that that document could not be regarded as a conveyance and at the worst it could be regarded only as an Indemnity bond and was stampable only as a bond of Indemnity. The Government Advocate urged that it was a conveyance. We heard the arguments of the learned Advocate for the petitioner and the Government Advocate on this point.

(13) 'Conveyance' has been defined in S. 2, Clause (9) of the Hyderabad Stamp Act as follows:

> "Conveyance includes every instrument by which any person transfers any property inter vivos and which is not otherwise specifically provided by the annexed schedule."

In determining what provision of the Stamp Act is applicable to a particular instrument, attention should be paid to the real nature of the instrument and not to the title which has been given to the document. We have gone through the letter of 13-12-1948 and after reading the document carefully, we are of opinion that it is by means of this document that the vendor sought to transfer the ownership in the Ice Factory to the petitioner before us. The above conclusion is well supported by the documents filed by the petitioners and on record. Taking the various documents in their order of date the first is an agreement of sale. This agreement of sale was entered into between the parties on the 19th November 1948

by which Abdul Majeed Paul agreed to sell the Ice Factory to the petitioner for a sum of Rs. 80,000/- and the vendee paid the vendor a sum of I. G. Rs. 25,000/- as earnest money agreeing to pay the balance of Rs. 55,000/- at the time of the execution of the sale deed. This document of agreement of sale is on a stamp paper of Re. 1/-. It was stipulated in this document that the sale would be completed by 5th December 1948 and the balance of the purchase money paid then but by the mutual consent of the contracting parties, this period was extended further. On 13th December 1948 as per the subsequent agreement the vendee paid the balance of Rs. 55,000/- to the vendor and got a letter written by the vendor stating that he had sold to him the Ice Factory, known as "The Majid Paul Ice Factory".

The question to be determined now is as to whether this letter is to be regarded as the document evidencing the sale of the property, and as such liable to be stamped as a conveyance. It was argued by the learned Advocate for the petitioner that the document merely recounted a past event and the sale had been effected already and delivery of the property given. He contended that the Ice Factory had been made over to the petitioner long before this letter was written and this letter merely made mention of a sale transaction which had already taken place. No doubt if this letter merely mentioned about a past sale transaction then it could not come within the definition of conveyance under Art. 16: Art. 23 of the Indian Stamp Act. Surely it was open to the contracting parties to have effected the sale without a document, by merely delivering the property to be sold to the vendee; then the arm of the law could not reach them. As was observed by Lord Esher M. R. in — 'Commissioners of Inland Revenue v. G. Angus & Co.', (1889) 23 QB D 579 at p. 589,

> "it is not the transaction of purchase and sale which is struck at, it is the instrument whereby the purchase and sale are effected which is struck at."

We have to consider as to whether it is this letter of the 13th December 1948 by means of which the transfer of ownership has been effected. So far as we can see the first document in this connection is only an agreement to sell property and the property was not conveyed or transferred till this date. The agreement of sale clearly states that when the balance of Rs. 55,000/- is paid at the time of the execution of the sale deed, 'the possession of the factory would be given to the purchaser', because the words therein are:

> "The balance of I. G. Rs. 55,000/- shall be paid at the time of the execution of the sale deed when the possession of the said Majid Paul Ice Factory ..... shall be given to the purchaser."

This is clearly indicative of the fact that at the time when the agreement of sale was executed the possession of the property did not pass to the purchaser. The document of 13th December 1948 now under consideration, says: "I have this day received the full sale price of I. G. Rs. 80,000/- ..... I have delivered to you the contracted Majid Paul Ice Factory situated in 106, Park Lane, Secunderabad, as per agreement to sell." It further states: "'You are absolute owner of the said property from this day' and shall enjoy the same." This also would show that the possession of the property passed to the vendee only on this day. Therefore the argument of the learned Advocate that possession had been given already to the vendee and this letter merely reiterated that fact can have no force. If this document is the document by which ownership passed to the vendee, then it is liable to be stamped as a conveyance under Art. 16 of the Hyderabad Stamp Act.

(14) It was argued by the learned Advocate for the petitioner that the document had already been admitted in evidence by the Deputy Custodian and as such under the provisions of Section 34 of the Stamp Act where a document had been admitted in evidence such admission could not be called in question except as provided for in Section 59 of the Hyderabad Stamp Act. There can be no doubt about this question that the Deputy Custodian was a person who had been authorised by law to receive evidence and this document was produced before him and he admitted the same in evidence. The question is are we debarred from determining about its liability to stamp duty. We must say that there is no legal bar against our declaring about the nature of the document and its liability to stamp duty. The fact that the Deputy Custodian admitted the document can only mean that its admissibility cannot be called in question at a later stage. For the protection of the revenue, power is always given to the appellate Court under Section 59 of the Hyderabad Stamp Act to revise the decision of the lower Court as regards the Stamp duty and act in accordance with the provisions of the aforesaid Section. Under Section 59 Sub-Section (2), if the court is of opinion that an instrument in question should not have been admitted without payment of Stamp duty and penalty a declaration to that effect while at the same time determining the duty payable might be made in impounding the document.

We have come to the conclusion that, the document in question is a conveyance falling within Article 16 of the Hyderabad Stamp Act and the Stamp duty payable on the same at the rate of 2 per cent is Rs. 1,600/-. We therefore, declare that the document dated the 13th December 1948 Ex. No. 3 on the record, the letter addressed by Majeed Paul to Addu Achiah, is a conveyance and requires to be stamped with a stamp of Rs. 1,600/-. The document is impounded and sent to the Collector for collection of the Stamp duty.

(15) PALNITKAR J.: I agree.

B/R.G.D. Orders accordingly.

A.I.R. 1953 HYDERABAD 18 (Vol. 40, C. N. 10)

PALNITKAR C. J. & A. SRINIVASACHARI J.

Mohammed Jamaluddin, Petitioner v. Zainab Begum, Respondent.

Civil Misc. Case No. 233/5 of 1951-52, D/- 30-6-1952.

Houses and Rents — Hyderabad House Rent Control Order (1353 F) Cl. 6(c) — Clause gives benefit to tenant of reclaiming amounts paid in excess of fair rent — Collector has no jurisdiction to hold that tenant is not entitled to that benefit. (Para 2)

Mohd. Abdul Sattar Sab, for Petitioner; Qazi Mohd. Mohiuddin Ali and Mohammed Faiyaz Ali Beg, for Respondent.

ORDER: The tenant applied to the Rent Controller for the determination of a fair rent of the house in which he was living and the Rent Controller on taking into account all the

circumstances of the case, assessed the rent at Rs. 11/- as being a fair and reasonable rent for the premises. After fixing the rent as stated above, he gave a finding to the effect that the tenant was entitled to appropriate towards the future rents payable by him, all sums that he had paid to the landlord on account of rent in excess of the sum of Rs. 11/-. The landlord appealed to the Collector against this order. The Collector while confirming the order of the Rent Controller in so far as it related to the fair rent modified the order of the Rent Controller to this extent, that he held that the tenant was not entitled to appropriate the sum that he had paid in excess of Rs. 11/- in the future rents. Against the above order the tenant has filed this application for the issue of a Writ of Certiorari.

(2) Heard the arguments of the respective vakils. We are of opinion that the order of the Collector should be quashed in so far as it differs from the order of the Rent Controller. Clause VI(c) of the House Rent Control Order clearly specifies that where the Controller has determined the fair rent, any sum paid in excess of such fair rent whether paid before or after commencement of the Rent Control Order shall be refunded to the tenant. In the face of the express provisions of the enactment giving the benefit to the tenant of reclaiming amounts paid in excess of the fair rent, we feel that the Collector had no jurisdiction to hold that the tenant was not entitled to do so. We quash the order of the Collector and restore the order of the Rent Controller. The petition is allowed with costs. Advocate's fee Rs. 30/-.

B/V.R.B. Petition allowed.

A.I.R. 1953 HYDERABAD 19 (Vol. 40, C. N. 11)

PALNITKAR C. J.
AND SRINIVASACHARI J.

Dyna Craft Machine Co. and others, Petitioners v. Syed Jahangir Ali and another, Respondents.

Appeal No. 18 of 1951, D/- 1-8-1952.

Constitution of India, Art. 261 (3) — Ex parte decree passed by Bombay High Court against resident of former Hyderabad State — Decree can now be executed in Hyderabad — Civil P. C. (1908), S. 2 (5).

An ex parte decree passed by the Bombay High Court prior to the commencement of the Constitution against a resident of the Hyderabad State, can no longer be regarded as nullity and therefore incapable of execution in the Hyderabad State in view of the clear provisions of Art. 261 (3). The Bombay High Court has ceased to be a foreign court vis-a-vis the Hyderabad State Courts and the impediment to execution of such decree which was formerly existing has now ceased to exist by reason of Hyderabad having become a part of the territory of India. AIR 1952 Hyd 80 (FB) and AIR 1951 Bom 125 (FB), Foll.; 22 Cal 222 (PC) and AIR 1933 Cal 534, Ref. (Paras 4, 5, 6)

Anno: C.P.C., S. 2 (5) N. 1.

Narasimha Iyengar and Ramkishan Rao Nimbalkar, for Petitioners; Irshad Husain, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('94) 21 Ind App 171: (22 Cal 222 PC) 5
('51) AIR 1951 Bom 125: (53 Bom LR 398 FB) 5
('33) AIR 1933 Cal 534: (60 Cal 685) 6
('51) No. 6 of 1351 F, D/- 24-7-1951 (Hyd) 5
('52) ILR (1952) Hyd 196: (AIR 1952 Hyd 80 FB) 5, 9

SRINIVASACHARI J: This is an appeal under Section 47 of the Civil Procedure Code against the order of the City Civil Judge, dismissing the execution petition of the appellant.

(2) The brief facts relating to this case are that the appellant obtained a decree against the respondent in the Bombay High Court on the 8th December 1949 for a sum of rupees fourteen thousand and odd. This decree was an ex-parte decree. Later, the appellant filed a suit in the City Civil Court based on the foreign judgment of the Bombay High Court. He based his suit alternatively on the original cause of action as well. While the suit was pending in the lower Court, the Constitution came into force and after the coming into force of the Constitution, the appellant filed an execution application seeking to execute the decree that he obtained in the Bombay High Court. Two objections were raised by the respondent: firstly, that the application was barred by limitation, and secondly, that the decree of the Bombay High Court could not be executed. So far as the first objection was concerned, the lower Court negatived the contention and held that the application was within time. As regards the second objection, the Court gave the order that the decree of the Bombay High Court could not be executed for the reason that it was not a decree passed by a Court established in the State.

(3) We heard the learned Advocate for the appellant and the respondent appeared in person.

(4) Reliance is placed by the learned Advocate for the appellant on Article 261, clause (3) of the Constitution of India, which is to the following effect:

"Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory accoring to law".

As the words show, Article 261 (3) clearly allows the execution of a decree passed by any Court in any State within the territory of India in any other State in India. There are no words restricting the operation of the decree in any State within the territory of India. We are one with the learned Judges of the Bombay High Court in that we are of the opinion that a decree passed by the Bombay High Court can no longer be regarded as a nullity and therefore incapable of execution. The idea of an 'ex-parte' decree as against a non-resident foreigner having no operative force according to international law cannot, in our opinion, apply to the facts of this case.

(5) The Bombay High Court was a foreign Court within the meaning of Section 8 of the Hyderabad Civil Procedure Code. No doubt, according to the decision of the Privy Council in the leading case of — 'Gurdayal Singh v. The Raja of Faridkot', 21 Ind App. 171 (P.C.) an 'ex-parte' decree passed by the Bombay High Court against a resident of a native State could not be regarded as a decree passed by a court of competent jurisdiction, capable of being executed by a Court situated in a native State. The question arises whether, by reason of Hyderabad having become part of the territory of India after the Constitution, the impediment, that was subsisting to a decree of a Court situated in erstwhile British India being executed in Hyderabad as a decree of its own Court, has ceased to exist. As was held in the Full Bench case of — 'Bhagwan Shanker v. Rajaram', AIR 1951 Bom 125, the impediment, if any, that was in the execution of a decree of a Court

that was once in British territory in a native State, had been removed by the provisions of Article 261 (3) of the Constitution and once the impediment had been removed, there was nothing to prevent the execution of the decree of one State in another State within the territory of India. The same view has been held in the Full Bench case of — 'Ramdayal v. Sankarlal', reported in ILR (1952) Hyd 196 (F.B.), which followed an unreported case of a Division Bench.—'J. H. Subbiah v. Revachand', No. 6 of 1351 F., D/- 24-7-51 (Hyd). The Bombay High Court has ceased to be a foreign Court; if it has ceased to be a foreign Court its decrees are capable of execution as any other decree passed by any Court in this State.

(6) It may be that prior to the Constitution the judgment-debtor as a citizen of Hyderabad, a native State under the rule of the Nizam, was entitled to resist the execution of a decree that was passed by a court of territory to which he did not owe allegiance. But after the advent of the Constitution Hyderabad became a part of the territory of India, vide Article 1 of the Constitution & the judgment-debtor automatically became a citizen of India under Article 5 of the Constitution of India. When he became a citizen of India and his status changed, it would no longer be open to him to regard the Bombay High Court as a foreign Court. Further by virtue of the provisions of the Code of Civil Procedure Amendment Act, No. II of 1951, Bombay High Court cannot be regarded as a foreign Court for in Section 4(I) of the above Act, 'foreign court' has been defined as "a court situate outside India and not established or continued by the authority of the Central Government". It is well accepted that a Court can take notice of subsequent events and grant proper relief, vide — 'Priyambada Debee v. Bholanath Basu', AIR 1933 Cal 534, & on the day when we are called upon to adjudicate, certain events have happened, which disentitle the judgment-debtor from resisting execution on the ground of the decree of the foreign Court, we can over-rule the objection and order execution.

(7) We, therefore, hold that the decision of the lower Court that the decree is not executable, is erroneous. We allow the appeal, set aside the order and remand the case for disposal according to law.

(8) In view of this order of ours in the appeal, the learned Advocate for the appellant states that he does not press the revision petition that he has filed against an interlocutory order in the suit itself. The revision petition is, therefore, dismissed.

(9) This judgment will govern the revision petition as well.

(10) SHRIPATRAO C. J.:- I agree. The question to be decided is whether the Bombay High Court is a foreign Court as defined in Section 2(5) of the Civil Procedure Code, as amended by Act No. II of 1951, after the establishment of the Republic of India and integration of Hyderabad State and the commencement of the Constitution. In this connection, the provisions of Article 261, clause (3) of the Constitution must also be considered. It is clear that as a question of international law, the Bombay High Court's decree cannot be considered to be a decree of a foreign Court, vis-a-vis the Hyderabad State courts, as this State and the State of Bombay are parts of the same Republic of India. Thus, the rulings, which declare that a decree passed by a foreign Court is a nullity, can no longer be applicable. I have held in the Full Bench case of — 'Ramdayal v. Shankerlal', reported in ILR (1952) Hyd 196 (F.B.), that in such cases the provisions of Article 261(3) will be applicable and I have discussed the question in detail in that case, giving reference to various Indian and other rulings. It is not necessary to repeat the reasonings given therein. I, therefore, agree with the order proposed by my learned colleague.

A/K. S. Case remanded.

A.I.R. 1953 HYDERABAD 20 (Vol. 40, C. N. 12)

SURYANARAYANA RAO J.

Amir Khan and others, Appellants v. Abdullah Khan and others, Respondents.

Appeal No. 928/4 of 1358 F., D/- 4-2-1952.

Civil P. C. (1908) O. 32 R. 7 — Sanction by Court — Decree — Effect.

The object of sanction by the Court, of a compromise on behalf of a minor litigant, proposed to be entered into by minor's guardian representing the minor in the suit, is to ensure that the Court goes into the question as to whether the compromise is or is not for the benefit of the minor and it is only when the Court is satisfied that the proposed compromise is, in the circumstances, for the benefit of the minor, that it permits the compromise to be entered into. That being the position in law until the compromise decree is set aside on the ground of fraud or on grounds analogous to it, the decree is binding on the minor litigant, who is thus a party to the compromise and is effectually represented before the Court. (Para 2)

Anno: C.P.C., O. 32 R. 7 N. 3a, 20.

Zakaullah, for Appellants.

JUDGMENT: Mr. Zakaullah's contention in this second appeal on behalf of the appellants is that the two lower Courts have not given due consideration to his clients' plea that the compromise entered into, in the previous litigation between the parties was not binding on the appellants, since they were minors at the time the compromise was effected by their mother. He contends that in Mohommedan Law the mother is not the natural guardian of the property of her minor children. The contention of the respondents is that by virtue of the compromise decree they were put in possession of the property; that they were subsequently dispossessed and that they should be restored back to the possession. The plea of the respondents has been held proved by the two lower Courts.

(2) As regards the compromise in the earlier litigation I find the court, before which the compromise petition was filed, sanctioned the proposed compromise. The object of sanction by the Court, of a compromise on behalf of a minor litigant, proposed to be entered into by the minor's guardian representing the minor in the suit, is to ensure that the Court goes into the question as to whether the compromise is or is not for the benefit of the minor and it is only when the Court is satisfied that the proposed compromise is, in the circumstances, for the benefit of the minor, that it permits the compromise to be entered into. That being the position in law until that compromise decree is set aside on the ground of fraud or on grounds analogous to it, that decree is binding on the minor litigant, who was thus a party to the compromise and was effectually represented before the Court.

The advocate for the appellants admits that no other proceedings have been instituted to

set aside or to declare the previous decree as not binding on the minors. I am, therefore, unable to uphold the contention of the advocate for the appellants that the compromise decree was not binding on them as against the other party to the compromise decree. As long as that decree stands, it is, therefore, not possible to hold that the decree is not binding on the appellants. This contention, therefore, fails.

(3) As regards the case of the respondents that they were put in possession in pursuance of the compromise, that they were dispossessed and that they should be restored back to the possession, I agree with the concurrent findings of the lower Courts in favour of the respondents, being questions of fact based on evidence on record. In the result the appeal is dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1953 HYDERABAD 21 (Vol. 40, C. N. 13)

FULL BENCH

MOHD. AHMED ANSARI; A. SRINIVASACHARI AND JAGANMOHAN REDDI JJ.

Ahmad-un-Nissa Begum and another, Petitioners v. The State through the Chief Minister and others, Respondents.

Writ Appln. No. 13 of 1950, D/- 30-6-1952.

(a) Constitution of India, Art. 226 — Certiorari — Writ of — Death of Nawab — Appointment of Special Commission by Nizam to enquire into question of succession to his estate — Special Commission whether judicial body — Hyderabad Atiyat Enquiries Act (10 of 1952).

Under the Atiyat Law as prevailed in Hyderabad State whenever a jagirdar died his successors had to appear before a Special Court viz., the Atiyat Court, which enquired into the question of the succession to the estate of the jagirdar and submitted its recommendations to H.E.H. the Nizam. The Nizam was the final authority to sanction or not to sanction the succession in favour of any particular individual. With regard to succession relating to high noble men styled as 'Umarai Uzzam', the Nizam could constitute a Special Commission instead of directing the case to be enquired into by the ordinary Atiyat Court. The Special Commission so constituted is a judicial body whose orders are subject to the Certiorari Jurisdiction of the High Court under Art. 226 of the Constitution. The fact that although it is a judicial body exercising judicial functions its decisions are not final but are only in the nature of recommendations subject to the confirmation of the Nizam does not make the Special Commission to cease to be a judicial body. The law in such a case is that because a proceeding is subject to the confirmation and approval of another authority the proceeding does not cease to be a judicial proceeding. (1926) A.C. 586: AIR 1950 SC 222 and AIR 1950 SC 188 Rel. on. (Paras 4, 5 & 6)

(b) Constitution of India, Art. 226 — Certiorari jurisdiction invoked under Art. 226 — Usurpation or excess of jurisdiction of inferior tribunal should be proved.

In order to invoke the certiorari jurisdiction under Art. 226 of the Constitution, the petitioner has to show that there has been a usurpation of jurisdiction or that there has been an excess of jurisdiction on the part of a judicial body. Excess of or want of jurisdiction arises where it has no authority to entertain an enquiry. The issue of a writ is not to reopen or vacate the judgment of an inferior tribunal as is done in the case of an appeal. The exercise of the writ is regulated and limited by fixed principles. The High Court merely determines the validity or invalidity of the record of such inferior tribunal and confirms or reverses in whole or in part accordingly. (Para 7)

(c) Hyderabad Atiyat Enquiries Act (10 of 1952), S. 13 — Atiyat Court or Special Commission — Recommendations made by — Sanction given by authority other than Nizam — Validity of.

The Hyderabad Atiyat Enquiries Act, 1952 is a curative and validating legislation. The effect of this legislation is that even if under an enactment that was extant, the sanction of the Nizam was necessary in the case of recommendations made by an Atiyat Court or Special Commission and such sanction was not obtained and sanction was accorded by some other individual this Act purported to validate such orders. Therefore, by force of this legislation all the orders passed subsequent to 19th September, 1948 right up to the coming into force of the Act, namely 8-3-1952, would be declared proper and held to be valid. (Para 10)

(d) Constitution of India, Art. 31B, Sch. IX — Hyderabad Regulations included in Sch. IX — Validity of.

It is no longer open to any person to question the validity of any provision of the Hyderabad (Abolition of Jagir) Regulation of 1358F. and the Hyderabad Jagir (Commutation) Regulation 1359 F. after they have been incorporated in the 9th Schedule of the Constitution by the insertion of Art. 31B in the Constitution by the Constitution First Amendment Act of 1951. (Para 11)

Raja Bahadur Bishweshwarnath, for Petitioners; Raja Ram Iyer, Advocate-General & Shanker Rao Baragaonkar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('47) AIR 1947 FC 38: (48 Cri LJ 886)	9
('50) 1950 SCR 459: (AIR 1950 SC 188)	6
('50) AIR 1950 SC 222: (1950 SCR 621)	6
('51) AIR 1951 SC 458: (1952 SCR 89)	11
('52) AIR 1952 SC 181: (1952 Cri LJ 955)	9
(1926) AC 586: (95 LJ KB 730)	6
(1937) Cooper v. Wilson: (1937-2 KB 309)	6

JUDGMENT: Nawab Kamal Yar Jung Bahadur was one of the foremost noble men of Hyderabad who died on the 23rd Isfandar 1353 F. (26th January 1944) leaving him surviving two full sisters and three others who allege that they were the married wives of the late Nawab. The Nawab did not leave any issue by his wives. He was governed by the 'Shia' School of Mohommedan Law. As has been the practice among the noble men of Hyderabad, a number of women were kept in the harem who were called (nick-named) 'Khawasees'. They were allowed to live along with the legally married wives and more or less treated like the married wives. The Nawab had issues by these 'Khawases' and these persons claim that

their mothers were the legally wedded wives of the late Nawab and that, therefore, they are the legitimate children. Immediately after the death of the Nawab, H. E. H. the Nizam, by a firman dated 22nd Safar 1363 Hijri, constituted a special Committee to enquire into the matter of the succession to the estate of the late Nawab and to submit through the council its recommendations to him. This Committee consisted of the then Deputy Prime Minister, the then Revenue Member and the then Chief Justice, but the personnel of the committee changed from time to time and finally it consisted of Shri P. Venkat Ramareddy, the then Deputy Prime Minister, Mr. Amir Ali Khan, a member of the Board of the Revenue and a Judge of the High Court, Shri Shripat Rao. This Committee recommended unanimously that Riasatunnisa Begum who is respondent No. 15 before us and a married wife of the late Nawab Kamal Yar Jung Bahadur be put in possession of the jagirs held by the late Nawab. Before however this report received the sanction of H. E. H. the Nizam the Police Action started. After the Police Action, when the Military Governor took over charge, the Nizam, by means of another Firman dated 22nd Novermber 1948, on the advice of the then existing administration, changed the personnel of the Commission and directed the new members of the Commission to take further evidence and submit their report. The new members did not think it necessary to take any further evidence and without taking any further evidence submitted their recommendations finally on 11th November, 1949. Again before the recommendations of the commission reached H. E. H. the Nizam the administration changed, the Military Governor left and Shri M. K. Vellodi was appointed the Chief Minister. After this, the judgment of the commission which was in Urdu was translated into English and when this judgment was being translated into English and it had not been completed, the Constitution of India came into force on 26th January 1950. The position therefore on the 26th January 1950 was that the Commission had sent its recommendations and it did not reach the competent authority for sanction as it was still in the process of being translated.

(2) Finally on the 3rd April 1950 M. K. Vellodi, as the Chief Minister of the Hyderabad State, passed an order for implementing the recommendation. The order is as follows:-

"*No 1024* *Dated 3rd April 1950*

THE NAZIM ATIYAT, HYDERABAD-DN.

Sir,

Enclosing herewith a copy of the Special Tribunal's decision in the Kamal Yar Jung's succession case along with note of dissent by Mr. Amir Ali Khan. I am directed in inform you that Government have accepted the decision given by the majority members constituting the Special Tribunal according to which the following have been declared the heirs of the late Nawab Kamal Yar Jung Bahadur:-

Tahawar Hussain, son	.. 4 As.
Mohd. Hussain Khan, son	.. 4 As.
Sadiq Hussain Khan, son	.. 4 As.
Khadija Begum, daughter	.. 2 As.
Riasat Unnissa Begum, Azizunnissa Begum, Lal Bi, Wives	.. 2 As.

Sheerin Bua, Paricherabua as the Mamtuva of, the late Nawab have been held entitled to Guzara only. Necessary action may be taken.

Yours faithfully.."

(3) It is this order of the Chief Minister sanctioning the recommendations of the Commission that is sought to be challenged in these proceedings. The main grounds on which this order is being challenged are: (a) that under the Atiyat Law that was extant at the time when the succession opened, the right to sanction succession to a jagir with an income of over Rs.25,000/- vested with the Nizam as the Sovereign and that he exercised this power by virtue of his prerogative and as such any recommendation by a Commission regarding the succession to the jagir should be sanctioned by the Nizam and this recommendation not having received the sanction of the Nizam as required by law was ultra vires the powers of the Chief Minister; (b) alternatively if it be held that the power exercised by the Nizam was not by virtue of any prerogative right or that if any prerogative right existed it was taken away by the coming into force of the Constitution of India inasmuch as there was no authority left behind to exercise that sovereign power which used to be exercised by the Nizam during the preconstitution days, this sanction by the Chief Minister would have no force, as it is only after the requisite sanction as required by law is given that the recommendation could have any force. These in the main were the contentions of the petitioners.

(4) It has to be observed that the properties left by the late Nawab are jagir lands and all matters relating to jagirs in the Hyderabad State were governed by a Special Law known as Atiyat Law or the law relating to land grants. Under the Atiyat Law whenever a jagirdar dies his successors had to appear before the Special Court viz., the Atiyat Court, which would enquire into the question of the succession to the estate of the jagirdar and submit its recommendations to H. E. H. the Nizam and H. E. H. the Nizam was the final authority to sanction or not to sanction the succession in favour of any particular individual. The procedure with regard to these matters has been embodied in Regulation No. 34 of 1331 F. and Regulation No. 10 of 1338 F. which have the force of law. In this particular case the Nizam chose to constitute a Special Commission instead of directing the case to be enquired into by the ordinary Atiyat Court. This was in consonance with the practice in vogue in the Hyderabad State in regard to succession relating to high noble men styled as 'Umrai Uzzam.'

(5) The power of the Nizam to constitute Special Tribunals to enquire into the succession to the estate of jagirs of high noble men has been well recognised and there is no doubt about it. Once the right of the Nizam to constitute the Special Tribunals is recognised then the question that arises for consideration is as to whether the body so constituted would be regarded as a judicial body whose orders are subject to the Certiorari Jurisdiction of the High Court.

(6) There can be no doubt that the Commission that was constituted was a judicial body because it had the necesary ingredients which go to make it a judicial body. It was a body of persons having legal authority to determine questions affecting the rights of subjects within the meaning of the dictum of Lord Atkinson — 'Frome United Breweries Co. Ltd. v. Bath Justices', (1926) A. C. 586. Further this Commission had also been enjoined to act judicially according to well established procedure; therefore according to the definition given by the Supreme Court in the well known case of the — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 S. C. 222, it was a judicial body and its decisions, judicial decisions. The tests laid down by Scot L. J. in — 'Cooper v. Wilson', (1937 -2KB 309) are also satisfied in this case. The point that arises for consideration is that although this is a judicial body exercising judicial functions its decisions are not final but are only in the nature of recommendations subject to the confirmation of the H. E. H. Nizam. The question

arises as to whether it ceases to be a judicial body or whether its decisions could not be regarded as judicial decisions simply because they became enforceable only after the sanction of the Nizam was accorded. So far as this point is concerned it is settled law that because a proceeding is subject to the confirmation and approval of another authority the proceeding does not cease to be a judicial proceeding. Mahajan J. observed as follows in the case of — 'Bharat Bank Ltd. v. The Employees of Bharat Bank Ltd', 1950 S. C. R. 459:

"The fact that the Government has to make a declaration after the final decision of the Tribunal is not in any way inconsistent with the view that the tribunal acts judicially".

Likewise the decisions of military tribunals which are subject to the confirmation of either the Commander-in-Chief or other Military Authorities do not cease to be judgment, of a quasi-judicial body. Therefore, it comes to this that the proceeding should be regarded as a judicial proceeding where the parties have had an opportunity to put forward their cases and after the parties have been heard the authorities looked into the matter with a judicial approach. If it is a judicial proceeding then it is certainly subject to the controlling authority of the High Court by means of a writ of Certiorari. Therefore, the Commission constituted by the Nizam to enquire into the succession to the estate of the late Kamal Yar Jung Bahadur is a judicial body and its proceedings are judicial proceedings.

(7) If the proceedings of the Commission are regarded judicial proceedings and its orders judicial orders then in order to invoke our jurisdiction under Article 226 of the Constitution, unless the petitioners before us show that there has been a usurpation of jurisdiction or that there has been an excess of jurisdiction on the part of this Commission, no rule for a writ of Certiorari would be issued. Excess of or want of jurisdiction would arise where the commission had no authority to entertain an enquiry. The issue of a writ as it generally understood is not to reopen or vacate the judgment of an inferior tribunal as is done in the case of an appeal. The exercise of the writ is regulated & limited by fixed principles. The High Court would merely determine the validity or invalidity of the record of such inferior tribunal and confirm or reverse in whole or in part accordingly.

(8) Inasmuch as the point that arose in this case came up for the first time and in view of the fact that the coming into force of the Constitution made a change in the status and powers of the Nizam, the Full Bench * which initially heard the case referred the following questions to a Fuller Bench of five Judges:

"1. Is the Order of the Government dated 3rd April 1950 an administrative order or a quasi-judicial order and has this Court jurisdiction to quash it?

2. H. E. H. the Nizam still retained the prerogative right to sanction recommendations submitted to him by commissions constituted by him to enquire into cases of succession relating to Jagirs?

3. If the right does not survive has the Executive of the Hyderabad State power to confirm such successions for the purposes of granting commutations to the persons entitled? And if so what form should the order take?

The Full Bench has on the 10th April, 1952, answered the above questions as follows: With regard to the first and second questions, it was unanimously held that the order of the Chief Minister dated 3-4-1950 is a quasi-judicial order and the High Court has jurisdiction to issue an appropriate writ pertaining thereto and that H. E. H. the Nizam has no prerogative after the enforcement of the Indian Constitution on 26th January, 1950 and that even before its enforcement his prerogative right, if any, had lapsed after the Jagir Abolition Regulation. With respect to the third question the majority of the Full Bench (Siadat Ali J. dissenting) held that the executive of the Hyderabad State has power to confer succession for the purposes of granting commutations to the persons entitled.

(9) It would be desirable to advert to the changes that the State underwent in so far as this administration was concerned after the Police Action. Soon after the Police Action, H. E. H. the Nizam issued a Firman whereby he made it known that all the administrative powers that were vested in him were exercisable by the Military Governor, (Vide Firman dated 20th September, 1948). Later on 5th February, 1949 the private domain or the estate of the ruler known as the 'Sarfakas' were merged in the Diwani. This was done by Regulation No. 41 of 1358 F. & later on by another Regulation No. 69 of 1358 F. By the Hyderabad (Abolition of Jagirs) Regulation all jagir tenures were incorporated and merged with the State lands. This Regulation came into force on 15th August, 1949. According to this Regulation no person could after the commencement of this Regulation be appointed or recognised as a Jagirdar whether in succession or otherwise. It was also provided in the Regulation that by a date to be notified the administration of the Jagirs was to be transferred to the Government and the jagirdars were called upon to make over the management of the jagirs to the Jagir Administrator. A most important provision in the aforesaid Regulation is that while this Regulation purported to abolish all jagirs and to pay commutation to the existing jagirdars a provision was made in the Regulation that all proceedings relating to the jagir which were pending at the commencement of the Regulation before an Atiyat Court or before a Commission or any other authority be completed in accordance with the existing law as if the Regulation had not been enacted (Vide proviso to Section 21 of the Regulation). This implied that all pending proceedings would be governed by the law that was extant prior to the coming into force of this Regulation. It was argued by the learned Advocate for the petitioners that the existing law was that a Commission enquired into the succession and made its recommendation on which the Nizam sanctioned the recommendation and made an order for the grant of jagir in favour of a particular individual by virtue of his prerogative right as Sovereign.

So far as this question as to whether the Nizam was according sanction by virtue of his prerogative right is concerned the Full Bench by a majority gave the opinion that the Nizam did not exercise this right by virtue of his prerogative. And even otherwise the question seems to be of no great importance after the advent of the Hyderabad (Abolition of Jagirs) Regulation because after this Regulation the question of determining as to whom a jagir should be granted ceased to have any importance, as Section 4 clearly states that after the commencement of the Regulation no person would be appointed or be recognised as a Jagirdar whether in succession to a deceased jagirdar or otherwise. Therefore the only act that had to be done was to sanction the payment of compensation to the person who had been declared to be entitled to succeed to the deceased jagirdar and this act is done by the head of

*(See AIR 1952 Hyd. 163 F. B.)

the State not by virtue of any prerogative right. If it is conceded that the sanction of the payment of compensation to the heirs of a deceased jagirdar is accorded by the head of State then the Rajpramukh in whom is vested the executive power could accord sanction. So far as this sanction is concerned it was argued that even if it be regarded that the sanction of the Rajpramukh was enough to give effect to the recommendations of the Commission still this being an executive act of the Government, under the provisions of Article 166 of the Constitution the order ought to be expressed to be taken in the name of the Rajpramukh and inasmuch as the order sought to be impugned now does not appear to have been expressly taken in the name of the Rajpramukh the order cannot have any force. So far as this question viz., the provision in Article 166 of the Constitution pertaining to the manner in which an order of the executive had to be made is concerned the Full Bench has held by a majority that that provision is only directory and not mandatory. The Bench relied upon the Federal Court Judgment reported in — 'J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor', AIR 1947 F. C. 38 wherein their Lordships, while discussing a similar provision in the Government of India Act, held that the provision was only directory and it is now well settled that it is only directory by reason of the judgment of the Supreme Court in the case of — 'Dattatreya v. The State of Bombay, AIR 1952 S. C. 181.' So that argument can have no force.

(10) The delay in the hearing of the case has worked to the disadvantage of the petitioners because on the 8th March 1952 an Act called the Hyderabad Atiyat Enquiries Act (Act X of 1952) received the assent of the Rajpramukh. By virtue of Section 13 of the aforesaid Act finality was given to the decisions of the Atiyat Court and other decisions by the Military Governor, the Chief Minister or the Chief Civil Administrator of Hyderabad or the Revenue Minister (by virtue of the powers given to him by the Chief Minister). As such all those orders that were passed in cases relating to Atiyat grants including jagirs on or after 18th September, 1948 up to the date of the coming into force of the Act in question were validated and held to be orders passed by a competent authority under the law in force. This is a curative and validating legislation. The effect of this legislation is that even if under an enactment that was extant, the sanction of the Nizam was necessary and such sanction was not obtained and sanction was accorded by some other individual this Act purported to validate such orders. Therefore by force of this legislation all the orders passed subsequent to 19th September 1948 right up to the coming into force of the Act would be declared proper and held to be valid. The order that is now impugned is an order which comes within the period mentioned in Section 13 of the aforesaid Act. Therefore even if there is any flaw with regard to the competence of the sanctioning authority it has now been cured and validated by this enactment and therefore no question of the order being incompetent or being bad for want of authority can arise.

(11) It was argued at the bar that the provision in the Hyderabad (Abolition of Jagir) Regulation that all pending proceedings relating to Atiyat or crown grants should be completed according to the existing law was bad for the reason that according to the existing law, that is, the law in force before the Hyderabad (Abolition of Jagir) Regulation came into force, sanction had to be given to the recommendation of the Atiyat Court by the Nizam himself and that the Nizam as such exercising his powers as the Sovereign of the State had ceased to exist and he was only the head of the Executive. It was urged that it is not this authority who is called Rajpramukh who could give the sanction. This argument also can have no force for two reasons: (a) that it is no longer open to any person to question the validity of any provision of the Hyderabad (Abolition of Jagir) Regulation of 1358 F. and the Hyderabad Jagir (Commutation) Regulation 1359 F. after they have been incorporated in the 9th Schedule of the Constitution by the insertion of Aricle 31B in the Constitution by the Constitution First Amendment Act of 1951. No objection, on the ground of its being void or its being inconsistent with the rights conferred by the Constitution could be raised. It may incidentally be stated here that the Constitution First Amendment Act itself was questioned as being invalid and this dispute has been set at rest by the judgment of the Supreme Court in the case of — 'Shankeri Pershad v. Union of India', AIR 1951 S. C. 458. (b) As has been observed by us already it would be regarded as proceedings having been completed under the existing law because if it be said that the sanction of the Nizam was required no objection on the ground of want of his sanction could now arise because of his having validated the sanction given by a person to whom he had delegated his powers.

(12) For all these reasons, we hold that the petitioners have not made out a case for the issue of a Writ of Certiorari. We, therefore, dismiss the application with costs of the contesting respondents. Advocate's fee in each case Rs. 500.

B/V.S.B. Application dismissed.

A.I.R. 1953 HYDERABAD 24 (Vol. 40, C. N. 14)

NAIK C. J. AND JAGANMOHAN REDDY J.

Balawa, Appellant v. Kadappa and others, Respondents.

Revn. Petn. No. 70 of 1951, D/- 10-4-1952.

Civil P.C. (1908) O. 1 R. 10 — Suit for injunction by Hindu widow — Proper parties.

A widow filed a suit for an injunction against her own adopted son to restrain him from interfering with her possession with regard to three pieces of land. During the course of the suit, the parties came to a compromise and before a decree could be passed thereon certain reversioners submitted an application stating that they were interested in the suit property as reversioners, and as such they should be impleaded as parties.

Held that the suit of the widow was only for the limited purpose of safeguarding her possession for which every person is entitled in law to go to a Court. The fact that the widow in such a suit admitted the validity of the adoption of a defendant would become extraneous to the issue falling for decision in such a case and cannot be binding upon the reversioners. Any decision in the suit will not affect the rights of the reversioners, nor will it be binding on them. The reversioners were not proper and necessary parties to the suit. (Paras 2 & 3)

Anno: C. P. C., O. 7 R. 10 N. 14, 27.

Gopal Rao Ekbote, for Appellant; Vinayak Rao Vaidya, for Respondents.

REDDY J.: In this case widow Balavva had filed a suit for an injunction against her own adopted son to restrain him from interfering

with her possession with regard to three pieces of land. During the course of the suit, the parties came to a compromise and before a decree could be passed thereon certain reversioners submitted an application stating that they are interested in the suit property as reversioners, and as such they should be impleaded as parties. The lower Court has allowed the petition and ordered that they be made parties. The question for determination in this revision is whether the reversioners are proper and necessary parties.

It is contended by the learned Advocate for the petitioner that the reversioners have no manner of right to the possession of the land until the widow dies, in a suit for injunction which is designed to safeguard her right to maintain the possession by restraining persons interfering therewith, the reversioners have no locus standi inasmuch as it is not the spes successionis that is being determined in the suit, but the question is whether the possession of the widow could be interfered with by any person, even though he is an adopted son. It is further contended that by the time the widow dies, the reversioners may not be living in order to exercise their right to possession of the land and at any rate it is always open to the reversioners to file a declaratory suit if there is any cloud over their rights as reversioners after the death of the widow.

(2) The counsel for the respondents urges that inasmuch as the compromise petition gives a piece of land to the adopted son as an adopted son, they are bound to be affected after the death of the widow and therefore they are proper and necessary parties to the suit. He further contends that if the widow is deemed to represent the Estate of the deceased, any decision or decree against her will be binding on the reversioners. The point at issue, therefore, is whether the question of adoption was at issue in the suit and whether any decision thereon is binding on the reversioners. It appears clear to me that the suit of the widow is only for the limited purpose of safeguarding her possession for which every person is entitled in law to go to a court. The fact that the widow in such a suit admits the validity of the adoption of a defendant would become extraneous to the issue falling for decision in this case and cannot be binding upon the reversioners.

(3) In this view of the matter, the respondents-reversioners are not proper and necessary parties to this suit. I would, however, like to add that any decision in this suit will not affect the rights of the reversioners, nor will it be binding on them. In the result the revision is allowed and the order of the lower Court is set aside. Considering the special circumstances of the case, no order is made as to costs.

(4) NAIK C. J.: I agree.

B/D.H. Revision allowed.

A.I.R. 1953 HYDERABAD 25 (Vol. 40, C. N. 15)

MANOHAR PERSHAD J.

Shivamma, Appellant v. Abdur Rahman, Respondent.

Appeal No. 138 of 1951, D/- 12-4-1952.

Evidence Act (1872), Ss. 101-103 — Plaintiff a blind and illiterate woman — Plaintiff alleging that she relied on defendant and signed paper on faith that it was ikrarnama and not sale deed in favour of defendant — Defendant alleging that plaintiff knew that it was sale deed — In such cases a heavy burden is laid on the defendant to prove that she had not only agreed to sell but she knew what was being written and that the document was executed in accordance with the terms of the agreement — When plaintiff is admittedly blind, her signature on the sale-deed cannot have any force. (1869) 4 CP 704, Relied on. (Paras 13, 14)

Anno: Evid. Act, S. 101-103 N. 31, 33.

Devi Pershad, for Appellant; Virander Bahadur Sahgal, for Respondent.

REFERENCE..... Para.
(1869) 4 CP 704: (38 LJCP 310) 14

JUDGMENT: This is a plff's second appeal which arises out of a suit filed on her behalf for a declaration of title, possession of the land, cancellation of the sale-deed, and for mesne profits. It is alleged in the plaint that plaintiff is the owner of the suit property, plaintiff is blind and she could not cultivate the suit land. The defendant told the plaintiff that if she would execute an 'Ekrarnama' in his favour stating that after her death the defendant would be entitled to the suit property, defendant would maintain her till her lifetime. Relying on the statement of the defendant, the plaintiff agreed to execute an 'Ekrarnama' in favour of the defendant. Accordingly, the defendant took her to Sangareddy and took her signature on some papers. After the execution of the 'Ekrarnama' defendant did not maintain the plaintiff. Suspecting the defendant, the plaintiff started making enquiries and on her enquiry, it appeared that the defendant taking advantage of the blindness of the plaintiff got a sale-deed executed in his favour duly registered instead of an Ekrarnama. As the defendant has got the sale-deed executed in his favour by practising fraud, plaintiff is entitled to a decree.

(2) Defendant in his written statement admitted that plaintiff is blind, and alleged that it is not correct that the defendant got the sale-deed executed in his favour by practising fraud on her, but stated that as the plaintiff wanted some money to start business, she came and pressed the defendant to purchase the property. Defendant agreed but as the sale-deed could not be executed without the permission of the Taluqdar, proceedings had to be taken, so the plaintiff first executed a mortgage-deed, having received Rs. 600/- and later executed the sale-deed. It was further stated that after the sale, the defendant has constructed a house and has spent sufficient money on the property. A legal objection also was raised that the suit is time-barred. On these pleadings, the trial court framed certain issues. Parties led evidence. The trial court, on a consideration of the evidence, dismissed the plaintiff's suit, having held that plaintiff has failed to establish fraud. This judgment was affirmed in appeal. Hence this second appeal on behalf of the plaintiff.

(3) In this appeal, it is urged on behalf of the plaintiff that admittedly plaintiff is blind, and the defendant has failed to prove that the sale-deed in his favour was executed after taking all the necessary precautions, and as there is no evidence in the case, plaintiff's suit should be decreed.

(4) On behalf of the other side it is urged that the evidence produced on behalf of the plaintiff is not sufficient to establish fraud. The only crucial point in this case is whether fraud

as alleged by the plaintiff is proved. Plaintiff has produced four witnesses including herself. Plaintiff in her oral testimony has stated that defendant had promised to maintain her and in lieu of that had asked her to execute an 'Ekrarnama'; relying on his statement she agreed to execute an 'Ekrarnama', but to her surprise she found that taking advantage of her blindness, instead of executing an 'Ekrarnama' he got a sale-deed registered. She denies having received any money.

(5-12) (His Lordship went through the evidence of witnesses on behalf of the plaintiff and also on behalf of the defendant and then continued).

(13) Plaintiff is admittedly blind. Plaintiff alleges that defendant wanted the plaintiff to execute an 'Ekrarnama' and instead of getting the 'Ekrarnama' defendant got the sale-deed executed. In her deposition she has clearly stated that the document was not read over to her and she does not know the contents of the document. She only relied on the statement of the defendant and put her impression on the document. Plaintiff is admittedly not only blind but also illiterate. In such cases a heavy burden is laid on the defendant to prove that she had not only agreed to sell but she knew what was being written and the document was executed in accordance with the terms of the agreement.

(14) After giving a careful consideration to the evidence, I am of the opinion that the evidence is not sufficient to establish that plaintiff had agreed to sell the land to the defendant. Defendant has stated that the talk of purchase of the land was arranged through the plaintiff's brother-in-law, Yenkanna. Yenkanna, who has been produced on behalf of the plaintiff is P. W. 4, and he has totally denied having accompanied the party and having had any talk regarding the same. There is no other evidence on behalf of the defendant that any of the plaintiff's relations or any other man on her behalf was present at the time of the transaction. When plaintiff is admittedly blind, her signature on the sale-deed cannot have any force. This is clearly laid down in the leading case of — 'Foster v. Mackinnon', (1869) 4 CP 704 at p. 711, where it has been observed:

> "It seems plain on principle and on authority that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

There is no evidence that there was any other person present, and plaintiff in her oral testimony has stated that she had agreed to execute an 'Ekrarnama' there is no reason to disbelieve her statement. Thus, in my opinion, the facts alleged on behalf of the plaintiff are sufficient to prove fraud.

(15) On behalf of the respondent it is urged before me that if for any reason it is held that the sale-deed is ineffective, even in that case plaintiff would not be entitled to a decree as previous to the sale she had executed a mortgage-deed having received Rs. 600/-. In this connection, the learned Vakil drew my attention to this fact that the plaintiff has admitted the mortgage.

(16) On behalf of the plaintiff it is contended that plaintiff has denied the fact of the mortgage. From a perusal of the record I find that the plaintiff has endorsed her denial on the mortgage-deed, and in the case there is no evidence regarding the mortgage. Reliance is placed on the following statement of the plaintiff:

> "at the time of the execution of the mortgage deed, Patwari was not present."

and it is urged that from this the fact of the execution of the mortgage is admitted. I am afraid, I cannot accept this contention. Plaintiff has totally denied the execution of the mortgage: plaintiff is an illiterate woman: she was only questioned whether Gunde Rao was present at the time of the execution of the mortgage, and she said that he was not present. Merely on this statement and when she has totally denied, I am not inclined to hold that the fact of the mortgage is admitted. Thus, I see no force in this contention and it fails.

(17) On behalf of the plaintiff it is urged that as the defendant has been in possession and availing of the mango trees, plaintiff is entitled to mesne profits, at the rate of Rs. 200/- per annum. On behalf of the defendant it is urged that plaintiff is not entitled to any mesne profits, and further that plaintiff has not proved the amount of the mesne profits.

(18) From a perusal of the record I find that plaintiff has claimed mesne profits at the rate of Rs. 200/- per annum, and in her oral testimony she has stated that when she was in possession, she used to get Rs. 200/- as mesne profits. Defendant has said nothing about the mesne profits in his statement. But merely on the statement of the plaintiff I am not inclined to give a decree for mesne profits when I find that it is not definite also. Appeal is, therefore allowed, judgments of the courts below are set aside and plaintiff's suit is decreed to the extent of the possession of the suit land, cancellation of the sale-deed and declaration of title and dismissed to the extent of mesne profits. Plaintiff would be entitled to costs all throughout.

B/R.G.D. Appeal allowed.

A.I.R. 1953 HYDERABAD 26 (Vol. 40, C. N. 16)

PALNITKAR AND M. A. ANSARI JJ.

Ranga Reddi, Petitioner v. The State of Hyderabad and another, Respondents.

Writ Appln. No. 99 of 1951, D/- 24-10-1951.

Land Acquisition Act (1894), S. 35 — Arable land — Meaning — Land covered with guinea grass is not arable land — (Hyderabad Land Acquisition Act (IX (9) of 1309 F), S. 30).

'Arable land' is land which can be profitably ploughed. For the application of S. 30, Hyderabad Land Acquisition Act the land in question must be of such a nature that in its present or existing state, it could be profitably used for cultivation. Where the land in dispute is covered by the guinea grass which is a perennial crop it is not

arable land and cannot be temporarily acquired under S. 30. (Paras 5 and 7)

Petitioner in person; B. Narahari Sastri, Government Pleader, for Respondents.

ORDER: The decision of this Writ application depends upon the interpretation of the term 'arable land' in Section 30 of the Hyderabad Land Acquisition Act as amended by S. 14 of the Hyderabad Land Acquisition (Amendment) Regulation (No. LIX of 1358 F.).

(2) The case has been thoroughly and ably argued by the petitioner in person and by Mr. Sastri, the learned Government Pleader and we are indebted to them for the assistance they rendered us.

(3) The broad facts of the case are that the petitioner, B. Rangareddi, has filed an application for a Writ of Certiorari against the State of Hyderabad and the Collector of Hyderabad District, stating that the Collector is compulsorily acquiring about three acres and eight guntas of his land on which there is guinea grass plantation. It appears that another strip of the same land has already been acquired permanently for laying underground drainage pipes and in order to dig the area and lay down the drainage pipes, the Government has found it necessary to occupy temporarily the land, which is situated on either side of the strip already acquired. The Government desire to temporarily acquire the strip for a period of three months under Sec. 30 of the Hyderabad Land Acquisition Act (hereinafter referred to as the Act). The petitioner contends that a notification for the acquisition of the land in dispute was issued and the Collector informed the petitioner by a notice dated 16-5-1951, on which the petitioner protested that the land cannot be temporarily acquired, as it was neither 'waste' nor 'arable land'; on the contrary perennial guinea-grass, was being grown on it and such a land cannot be acquired under Section 30 of the Act.

The petitioner complains that despite his representation, the Government and the Collector were insisting on taking possession of the lands and he has, therefore, prayed for the issue of a Writ of Certiorari or any other appropriate order against them. His main contention is that there is no jurisdiction under Section 30 of the Act to temporarily acquire and occupy the land in dispute. The Government by their counter dated 3-10-1951 have stated that they can temporarily acquire the land in question whether it contains guinea-grass or any other grass and that the land so covered is 'arable land' and the contention of the petitioner that the land so covered by the guinea-grass should be acquired permanently and not temporarily is not correct. (After discussing the documentary evidence, the judgment proceeded:) From the aforesaid documents, it is clear that the guinea-grass plantation on the land in dispute is a perennial crop and the question for decision is whether land bearing such perennial crop can be temporarily acquired under Section 30 of the Act.

(5) It is conceded that the disputed land is not 'waste' land and we have to decide whether it is 'arable land'. The meaning of the term 'arable' as given in the New Standard Dictionary, Volume I, page 143 is: 'Land fit for cultivation'. 'Arable land' is described as opposed to pastural or woodland and its antonyms as given in the Dictionary are 'barren, craggy, precipitous, rocky or waste land'. Universal Dictionary of English language, edited by Cecil Wyld, defines the word 'arable' at page 48 as a derivative of the Latin word 'ARATRUM' meaning plough. 'Arable land' will be land which is 'usually ploughed'. In our opinion 'arable land' is land which can be profitably ploughed. Mr. Sastri, the learned Government pleader, argues that the very fact that there is guinea-grass plantation proves that the land is, in its nature, such that it could have been ploughed. We agree with him so far that prior to the cultivation of the guinea-grass plantation the land could have been regarded as 'arable' and it could have been ploughed for the purpose of raising a crop of corn or other seasonal crop; but after the plantation of the guinea-grass, the land cannot be termed as 'arable land'. It is not now of such a nature that it could be tilled or ploughed for purposes of deriving benefit. If the plough is to be used in the guinea-grass plantation, the result will be destruction of the plantation and no prudent person would use the plough upon such a land. We are, therefore, clear in our mind that the land in dispute in its present state is not 'arable land'. Mr. Sastri vehemently argued that any land which is not rocky or stony must be regarded as arable, though there may be a permanent building on the same, and that it can be temporarily acquired under Section 30 of the Act. We are unable to agree with this contention. For the purpose of the application of Section 30 of the Act, the land in question must be of such a nature that in its present or existing state it could be profitably used for cultivation. Such is not the present state of the land in dispute. We are, therefore, of the opinion that the disputed land is not 'arable land' and cannot be temporarily acquired under S. 30 of the Act.

(6) The petitioner, B. Rangareddi, has cited several executive instructions issued by the various state governments under the Land Acquisition Act. The instructions issued by the Government of Hyderabad at page 5 reveal that the term 'arable land' includes land cultivated with annual or seasonal crops. The suggestion is that cultivable land, which is cultivated with perennial plantation or plantation which is not of the nature of an annual or seasonal crop, is not 'arable land'. The instructions issued by the Government of Bengal show that certain formalities are to be observed for temporary acquisition of land. (Vide page 89). It is mentioned therein that under Section 35 of the Land Acquisition Act, corresponding to Section 30 of the Act, temporary possession can only be taken of waste or arable lands which do not include lands occupied by roads, tanks, buildings, gardens, orchards etc. Similar instructions are to be found in the Land Acquisition Manual of 1894 at page 129 wherein it is stated that only waste or arable land can be acquired for temporary occupation; buildings cannot be acquired. See also Manual of Land Acquisition of the State of Bombay, page 111, wherein it is stated that 'arable or waste land' probably does not cover roads or tanks or any land which is not in use and 'certainly not gardens'. Mr. Sastri has argued that these executive instructions should not be given the force of law while interpreting statutory law. We agree with him that the interpretation contained in those instructions

is not binding upon us; but we can certainly take help from them for arriving at proper interpretation of the word 'arable land'. In Rowland Burrow's Law Dictionary, Vol. I page 23 'arable land' has been described as land fit for cultivation and which will grow crops of grain.

(7) In conclusion, we hold that the land in dispute containing guinea-grass plantation is not 'arable land' and the Government have no jurisdiction to temporarily acquire the same under Section 30 of the Act.

(8) We, therefore, direct the respondents not to take possession of the land in dispute under Section 30 of the Act and issue a writ that their decision to use Section 30 of the Act for the temporary acquisition of the land in dispute is 'ultra vires'.

B/V.B.B. Application allowed.

A.I.R. 1953 HYDERABAD 28 (Vol. 40, C. N. 17)

KHALILUZZAMAN SIDDIQI J.

Kharka and others, Petitioners v. Yellappa, Respondent.

Revn. No. 97/4 of 1951, D/- 4-12-1951.

†**Court-fees Act (1870) S. 7(v) — Panmalla (land where betel leaves are cultivated) is land paying revenue and not a garden — (Hyderabad Court-fees Act (1870), S. 4(5)(a)).**

In the absence of any definite description or definition of a garden, it is a question of fact whether a particular piece of land can be called a garden or not. AIR 1918 Mad 805 Rel. on. (Para 5)

Sub-clause (a) of S. 4 (5) Hyderabad Court-fees Act would only apply if the property under dispute is a land on which revenue is payable without a garden on it. If Panmalla (where betel leaves are grown) is a garden, the valuation must be determined according to the market value; if not the land would be a mere land for purposes of Court-fees Act and if revenue is payable on that land the basis of determining the valuation would be the annual revenue and not the actual value of the land. But there is no reason why a Panmalla should be considered to be a garden and not as any other field—paddy field or a jawar field. Simply because the cultivation of betel leaves is a luxury and not a food crop or other necessity, the cultivation of that luxury does not render that field into garden. A garden would need some kind of construction or some formation of trees where fruit, flowers or other vegetables are grown for purposes of profit, gain or decoration. In any case while it may be very difficult to define the word "garden", certainly it cannot mean the something as a paddy field or a gram-field or a betel field and Panmalla is nothing more than a field. Consequently land on which there is betel cultivation cannot be taken out of the definition of land on which revenue is payable. (Paras 4 & 5)

Anno: Court-fees Act S. 7(v) N. 15, 28.

Fakir Mohammad, for Petitioners; Bhimsenachari, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

3 Deccan LR 549	3
14 Deccan LR 141	3
38 Deccan LR 164	3
40 Deccan LR 242	3
('17) 40 Mad 824: (AIR 1918 Mad 805)	5

ORDER: The learned lawyers for the parties heard. A suit was filed by the respondents against the appellants for possession of a fifth share of the plaintiff in the joint family property belonging to the parties who are brothers. As there are five brothers the plaintiff's share is one fifth. The property was valued by the plaintiff on the basis of market price and he submitted that the value of his one-fifth share fell below Rs. 2,000/- thus enabling the Munsif's Court to hear and dispose of the suit and it is within the competence and pecuniary jurisdiction of that Court. The defendant objected to the valuation on various grounds and submitted that as the value of the one-fifth share would amount to more than Rs. 2,000/- the case can only be heard by a higher court. The trial Court appointed a commissioner for the valuation of the property, except one Panmalla. According to the parties Panmalla means a land on which betel leaves (Pan) are grown. Having received the report of the commissioner about valuation, the trial Court determined the value of the plaintiff's share to be less than Rs. 2,000/- and proceeded to hear the suit. The defendant has, therefore, come up in revision before me.

(2) The manner adopted by the Munsif's Court of determining the valuation of the Panmalla was twenty times the amount of the revenue payable on the land on which those betel leaves are grown. The appellant contends that in view of the first portion of S. 4(5) of the Hyderabad Court-fees Act, the valuation of the plaintiff's share would be one-fifth of the market value of this Panmalla and the plaintiff also valued this Panmalla in his plaint on the same basis. It is, however, contended by the learned lawyer for the respondent that he erred in originally putting the market value on the Panmalla and in fact he can avail of the provisions of Section 4 (5) (a) of the Hyderabad Court Fees Act and therefore the valuation determined by the Trial Court is in accordance with law. He cited — '40 Deccan LR 242'.

(3) There are about two or three rulings of the Divisional Bench of this High Court reported in — '14 Deccan LR 141', — '3 Deccan LR 549' and — '38 Deccan LR 164', on which the learned lawyer for the petitioner-defendant contends that the valuation would be on the market value of this property. In — '38 Deccan LR' abovementioned it was held that where the Court-fee is leviable according to two different provisions of the Act differently the larger of the two would be payable. The correctness of that principle cannot be doubted. The question, therefore, to be determined is whether two different provisions of the Court Fees Act equally apply to the case of a Panmalla or only one particular provision is applicable. It is admitted by the parties that Section 4 (5) applies to this case, but according to the plaintiff sub-clause (a) would apply and according to the defendant sub-clause (a) is inapplicable, because he urges that the property under consideration (i.e., Panmalla) is not a land but a garden and the word used in sub-clause (a) is "land" and not "garden". I have, therefore, to determine whether sub-clause (a) of Section 4 (5) is applicable or not.

(4) It will be observed that clause (5) of Section 4 mentions three kinds of properties and the differentiation of these properties is emphasised by the fact that they appear together in the same clause. The three properties are House (Makan), Garden (Bagh)

and land (Aarazi). The clause lays down that on all these three kinds of properties court-fee will be leviable on the value of the property and the valuation will be determined in the following manner: when the property to be valued is land (Aarazi) on which revenue is payable, the valuation would be twenty times the amount of the revenue payable. It is rightly contended that this condition of the valuation to be twenty times of the revenue applies only to the case of land and not in case of house or garden, although usually a house or a garden is built or constructed on land. A careful reading of this part of the section indicates that sub-clause (a) would only apply if the property under dispute is a land on which revenue is payable without a garden on it. If Panmalla is a garden, the valuation must be determined according to the market value; if not the land would be a mere land for purposes of Court Fees Act and if revenue is payable on that land the basis of determining the valuation would be the annual revenue and not the actual value of the land. It was contended before me that Panmalla is a garden. I am not prepared to accept that view for the simple reason that, there is no reason why a Panmalla should be considered to be a garden and not as any other field — paddy field or a jawar field. Simply because the cultivation of betel leaves is a luxury and not a food crop or other necessity, the cultivation of that luxury does not render that field into garden. To my mind a garden would need some kind of construction or some formation of trees where fruit, flowers or other vegetables are grown for purposes of profit, gain or decoration. In any case while it may be very difficult to define the word "garden", certainly it cannot mean the same thing as a paddy field or a gram-field or a betel field and Panmalla is nothing more than a field.

(5) It has been rightly stated in — 'Kulappa Gowndan v. Abdul Rahim Saheb', 40 Mad 824, that in the absence of any definite description or definition of a garden, perhaps it would be a question of fact whether a particular piece of land can be called a garden or not. The definition given of the word "Bagh" in the Urdu dictionary and of the word "garden" in the English dictionary do not appear to be quite helpful in this case. It cannot be denied that on this land (which is said to be a garden) betel leaves are grown just as paddy or other jawar fields. It is for this reason that I am unable to regard this field as a garden. It would be noted that the word "land" is not distinguished from cultivated land. If it were so I would have extended the definition of the word "garden". A garden is something more or less than a land with a few trees or a land with innumerable trees. Therefore, I am afraid it is difficult to take this land on which there is betel cultivation out of the definition of land on which revenue is payable.

(6) I, therefore, reject this revision. In view of the different rulings of this High Court, I make no order as to the costs of this revision.

B/R.G.D. Revision dismissed.

A.I.R. 1953 HYDERABAD 29 (Vol. 40, C. N. 18)

NAIK C. J. AND MOHAMMAD AHMED ANSARI J.

Barket Lal, Appellant v. Devidas and others, Respondents.

Appeal No. 831/4 of 1350 F., D/- 9-1-1952.

Civil P.C. (1908), Ss. 13 and 14 — Suit on foreign judgment.

The judgment of a foreign court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in Hyderabad are bound to enforce, and consequently anything which negatives the duty or forms a legal excuse for not performing it is a defence to the action. Case law Rel. on. (Para 7)

What is of importance in claims on foreign judgments is that the amount sued upon must be one allowed by judicial process. This means either that the judgments must allow definite sum or that they should contain sufficient particulars by which the amount sued can be ascertained by a simple arithmetical process. (Para 10)

An objection which would mean deciding the correctness or otherwise of the judicial procedure of a foreign court according to the procedure of the Hyderabad State, is not one of the grounds for refusing to recognize the obligation thereby created. (Para 10)

An obligation to pay interest after the institution of the suit created by the foreign judgment, like any other covenant for interest, will not control the court's discretion under S. 236(b) of the repealed Hyderabad Civil P.C. (corresponding to S. 34 of Civil P.C.) and the court is bound to allow interest: AIR 1942 P.C. 61 Rel. on. (Para 12)

Anno: C.P.C., Ss. 13 and 14 N. 19.

Irshad Hussain, for Appellant; Vinayakrao Vaidya, for Respondents.

REFERENCES: Courtwar/Chronological/	Paras
('42) AIR 1942 PC 61: (202 Ind Cas 754)	12
('78-80) 2 Mad 400	8
('97) 20 Mad 112: (7 Mad LJ 76)	9
(1845) 13 M and W 628: 14 LJ Ex 145	6, 7, 8
(1870) 40 LJ QB 73: 6 QB 155	7, 8
(1870) 6 QB 139: (40 LJ QB 62)	6, 7

M. A. ANSARI J.: This appeal by the defendant and cross-objection by the plaintiffs arise from a decree of the Original Side of the High Court, allowing the plaintiffs' suit on the basis of two judgments of the Bombay High Court; but disallowing them interest 'pendente lite'.

(2) The plaintiff-respondents are the sons of one Varadas Ambadas, who with his brother Devidas Vardasa constituted a firm called Devidas Vardasa. This firm had dealings with another firm of Messrs. Prem Raj Pannalal in the course of which they sold cotton to Prem Raj Pannalal. The purchasing firm gave to the seller's firm three hundies of Rs. 2000 each, and on March 6, 1927, the latter posted two of the hundies to their commission agents Ramakaran Ramnath, which is the name of the defendant's firm, to negotiate them and on getting the money either to remit cash or send Hali-coins to the firm at Sailu. The envelope containing these hundies did not reach the agent, whereupon enquiries were made and the Devdas Vardasa firm wired to Madhavdas Jethabhai asking them not to pay hundies when presented. The latter stated that they had the endorsement of Ramkaran Ramnath in favour of one Umarsab who had been paid. It appears that this Umarsab on March 13, 1927, approached the defendant's firm at Hyderabad, and obtained a letter of introduction to their branch at Bombay, in which the

Bombay branch was requested to make purchases as desired by him: but not to give him credit. On March 15, 1927, Umarsab presented the letter to the Munim at Bombay, stated that he had two hundies and requested him to cash them. The Bombay Branch then received the hundies, presented them to Madhavas Jethabhai's firm, who on seeing the signature of the defendant's firm as the last endorsees, paid the two amounts in the afternoon of the March 15, 1927. The defendant's firm at Bombay then purchased gold and delivered it to Umarsab, who since then could not be found. The Devidas Vardasa firm then instituted a suit for the recovery of the two amounts of the hundi against Madhavdas Jethabhai and defendant's firms in the Original Side of the Bombay High Court. The defendant's firm appeared and contested the suit. During the pendency of the suit, the father of the plaintiff-respondents died and all the four plaintiffs were substituted in his place. Kania J., on September 27, 1933, gave a judgment in favour of the plaintiffs and directed the defendants to pay Rs. 4000 with interest till judgment and costs. with further interest at the rate of six per cent on judgment. Madhavdas Jethabhai, it appears, appealed; but the appeal was dismissed. Some of the decretal amount had also been paid; but the costs of the suit together with interest were not discharged. The firm of Devidas Vardasa also instituted another suit No. 892 of 1927 against Jethabhai Duji & the defendant's firm in the Original Side of the Bombay High Court for the recovery of Rs. 1,000 being the amount of another hundi, which was enclosed in the envelope containing the earlier two hundies and sent to the defendant's firm for purposes of realising the amount from the drawee. The endorsement on this hundi was similarly forged by Umarsab, the amount realised through the defendant's firm at Bombay and misappropriated. The defendant's firm contested this suit, which was also decreed on September 27, 1933 with interest from March 15, 1927 till judgment, and cost, with further interest on judgment at six per cent. This entire decretal amount has not been paid.

(3) The four sons of the Vardas Ambadas without joining their uncle Devidas Vardasa as plaintiffs on Amardad 23, 1345 Fasli (June 28, 1936) then instituted a suit in the Original Side of this High Court to recover the amounts due on the two judgments with interest till their realisation. The other defendants to the Bombay suits were not impleaded as they were not residents of this State, and the entire sum due on both the judgments together with interest which comes to Rs. 10367-1-0 has been claimed from the defendant alone. Several pleas have been raised in the written statement; one being that all the parties to the two Bombay suits were necessary and in their absence the suit cannot proceed; another, that the two judgment debts cannot be joined in one action; and a third that the two allocaturs of the Bombay High Court giving interest on the amounts of the costs at six per cent were contrary to the practice prevailing in the Hyderabad State and cannot be decreed. From the Order-sheet of Shehrewar 13, 1346 Fasli (July 19, 1937) it appears that the plaintiffs' Counsel had stated that the suits were based not on the original causes of action; but on the obligations arising from the two judgments of the Original Side of the Bombay High Court alone. After some delay and by a judgment dated Shehrewar 8, 1350 Fasli (July 14, 1941) the entire claim has been decreed without interests 'pendente lite' whereagainst the appeal and cross-objection have been filed.

(4) Before dealing with the objections raised in the written statement, which have also been urged before us, I would clarify the principle on which such foreign judgments are enforced. The necessity has arisen in this case because the two judgments were passed at the time when this State had not been integrated, nor then existed any arrangement under which the judgments of British Indian Courts could be executed.

(5) I shall first quote certain passages in authoritative books on private International Law relating to the principle. Cheshire in his third Edition of Private International Law at page 766 explains the ground as follows:

> "It is unnecessary, however, to consider theory of comity further for it has been supplanted by a far more defensible principle which has been called the doctrine of obligation. This doctrine, which was laid down in 1842, is that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation which may be enforced in this country by action. Once the judgment is proved the burden lies upon the defendant to show why he should not perform the obligation.....
>
> In other words, a new right has been vested in the creditor and a new obligation imposed upon the debtor at the instance of the foreign Court. Lord Esher once said that 'the liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment. This does not mean that the justification for the enforcement of the obligation is an implied contract, but that for procedural purposes the debtor is regarded as having implicitly promised to pay. Historically this is well founded for according to the doctrine of 'SLADE'S case' the mere existence of the debt raises an implied promise to pay the amount due. The creditor sues for the recovery of a simple contract debt, and since this is a liquidated amount he may proceed by way of a specially endorsed writ."

Schmitthoff in his Text-book of the English Conflict of Law at page 417 also observes:

> "Subject to compliance with certain requirements, the decision of a foreign court imposes upon the parties against whom the decision is given a legal duty to obey it. To this legal DUTY corresponds the RIGHT of the person in whose favour the decision has been given that the foreign judgment should be obeyed. That a pronouncement of the sovereign power may impose on private persons a legal duty which gives rise to corresponding vested rights of others is well known from other provinces of English law, e.g., the legislature may create, by statute, a legal duty to take care, and any person belonging to the class of persons for whose benefit and protection the duty has been imposed, may bring an action for statutory negligence against the wrong-doer....."

(6) I need not multiply similar observations of other Text-book writers, for the above two extracts amply justify the conclusion that such judgments are now enforceable on the basis of

their having created obligations. I will now cite two dicta of Blackburn J. in — 'Godard v. Gray', (1870) 6 Q. B. 139, the plaintiffs, who were Frenchmen, sued the defendants, who were Englishmen, on a charter-party. The French Court treating a particular clause as fixing the amount of liquidated damages gave judgment against defendants. On appeal, the superior court reduced the amount, and the persons in whose favour judgment was given sued the defendants in the English Court. In this case, Blackburn J. observes:

"It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless, where there are reciprocal treaties to that effect. But in England and in those States which are governed by the common law, such judgments are enforced, not by virtue of any statute, but upon a principle very well stated by Parke, B., in — 'Williams v. Jones', (1845) 13 M. & W. 628: 14 L. J. Ex 145: "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay the sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced". And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action....."

(7) Again, the same Judge in — 'Schibsy v. Westenholz', (1870) 40 L. J. Q. B. 73; 6 Q. B 155 observes:

"It is unnecessary to repeat again what we have already said in — 'Godard v. Gray', (1870) 6 Q B 139. We think that for the reasons there given the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in 'Russel v. Smyth', and again repeated by him in — 'Williams v. Jones', (1845-13 M & W 628: 14 L J Ex 145), that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce, and consequently that anything which negatives the duty or forms a legal excuse for not performing it is a defence to the action."

(8) No useful purpose will be served by multiplying English authorities. I shall now cite some Indian authorities where the same principles are held as guiding the Indian Courts. In — 'Nallatambi Mudaliar v. Ponnusami Pillai', 2 Mad 400, it is said at page 403:

"The principles on which foreign judgments are enforced in English Courts as stated by Parke, B., in — 'Russel v. Smyth' and repeated by him in — 'Williams v. Jones', (1845-13 M & W 628: 14 L J Ex 145) are declared by Blackburn J. in — 'Schibsby v. Westenholz', (1870-40 LJ QB 73: 6 QB 155). The same principles have been adopted by the Courts of British India, and have been substantially recognised by the Legislature....."

(9) Again in — Nalla Karuppa Settiar v. Mahomed Iburam', 20 Mad 112, at p. 114, the learned Judge observes:

"The Courts of British India will be guided in matter by the same principles as are adopted by the Courts of England. The true principle on which the judgments of foreign Courts are enforced in England is that the judgment of a Court of competent jurisdiction over the defendant imposes a duty, or obligation on the defendant to pay the sum decreed which the English Court is bound to enforce, and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action....."

(9) The principle having been clarified, the several objections have now to be adjudicated as sufficient grounds for discharging the obligation. The first is that all the parties to the suits in the Bombay High Court have not been impleaded in the claim. I do not think this objection is of any substance; for the duty to pay the judgment debts is placed equally on all the defendants to each judgment. So long as the obligations are not fully discharged, it is immaterial from which of the defendants the fulfilments are claimed. This right cannot be defeated by insistence on impleading the persons who are neither residents of the State, nor whose failure to pay results in the defendant being exonerated. The plaintiffs are admittedly entitled to the performance and can claim such performance from any one of those liable to pay. According to the principle explained above, this cannot be a ground to release the defendant from his liability, and therefore, this objection fails.

(10) The next objection raised is that what is now being claimed is largely the amount given by allocaturs of the Bombay High Court and the procedure of allowing interest on costs is not followed in this Court. Were I to sustain this objection, it would mean deciding the correctness or otherwise of the judicial procedure of a foreign Court according to the procedure of this State. That does not appear to be one of the grounds of refusing to recognise the obligation thereby created. Then allowing interest on costs is not against the Hyderabad Law; for Section 245, Sub-section (3) of the repealed Hyderabad Civil Procedure Code authorises Court to award such interest. What is of importance in claims on foreign judgments is that the amount sued upon must be one allowed by judicial process. This means either that the judgments must allow definite sum or that they should contain sufficient particulars by which the amount sued can be ascertained by a simple arithmetical process. The two judgments of the Bombay High Court give costs with interest at six per cent. and that appears to me to satisfy the requirement of the sum being definite.

(11) Another objection raised is that two judgments' obligations cannot be joined in one suit. I do not see much force in this argument. The three hundies were sent in one envelope to the defendant for purposes of collection and the Bombay High Court has held the defendant's firm liable for their conversion. It is obvious that one suit could have been filed on the original causes of action, and I do not see how obligations arising from two judgments in these circumstances are governed by a procedural rule other than that contained in Order

2. Rule 3. The result is that the decision of the Original Side of the High Court on these objections cannot be reversed and the defendant's appeal is dismissed.

(12) I now come to the plaintiffs' cross-objection against disallowing of interests. Two grounds have been urged against the decision of the Original Side. One is that the respondents are entitled to interests from the date of suit in this Court as the Bombay High Court has allowed such interest. This argument cannot be accepted. The Bombay judgments do create obligations to pay interest; but this like any other covenant for interest should not control the court's discretion under Section 236 (b) of the repealed Hyderabad Civil Procedure Code, which is similar to Section 34 of the Civil Procedure Code. It has been held by their Lordships of the Privy Council in — 'Hakim Rai v. Ganga Ram', AIR 1942 PC 61, that the rate of interest to be allowed after the institution of the suit is entirely a matter within the discretion of the Court, and therefore, the learned Judge on the Original Side was not bound to allow interests. Then it was urged that the exercise of the discretion in disallowing interest altogether was wrong. I have gone through the Order-sheet of the Original Side and I am satisfied the long delay in deciding the case was not entirely due to the appellant's conduct. Further the delay in deciding the appeal cannot be attributed to him. In these circumstances, the decision of the Original Side is not such as I would interfere in appeal. The cross-objection is also dismissed.

(13) The appellant shall pay the costs to the respondents and this judgment will govern both the appeal and cross-objections.

(14) NAIK C. J.: I agree.

B/V.B.B. Appeal and cross-objections dismissed.

A.I.R. 1953 HYDERABAD 32 (Vol. 40, C. N. 19)

PALNITKAR C. J. AND A. SRINIVASACHARI J.

Central Bank of India Ltd., Appellant-Petitioner v. Badey and others, Respondents.

Misc. Appeal No. 78/3 of 1950, D/- 9-7-1952.

Civil P.C. (1908) O. 11 R. 21, O. 43 R. 1(f) and S. 148 — Order to give inspection of documents — Non-compliance — Inability of plaintiff to give inspection within time — Extension of time — Dismissal of suit under O. 11 R. 21 — Propriety of.

Where the plaintiff is unable to give inspection of some of the accounts within the time ordered by the Court by reason of their being consigned to the record and on that account asks for further time, the Court is not justified in refusing his request for further time and dismissing the suit straightway under O. 11 R. 21. In such a case the non-compliance, if any, of the order cannot be said to be deliberate or due to wilful neglect on the part of the plaintiff and the Court ought to have extended the time for giving inspection in exercise of its powers under S. 148. Such an order of dismissal would be set aside in appeal. AIR 1935 Rang. 310; AIR 1925 Cal 166 Ref. (Para 2)

Anno: C.P.C., O. 11 R. 21 N. 1, 3; S. 148 N. 6.

Raja Ram Iyer, for Appellant; Sardar Fazal Haq Khan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('25) AIR 1925 Cal 166: (78 Ind Cas 859) 2

('35) AIR 1935 Rang 310: (158 Ind Cas 613) 2

JUDGMENT: This is a miscellaneous appeal under O. 43 R. 1 (f) of the Civil Procedure Code against the order of the District and Sessions Judge, Gulbarga, purporting to act under Order 11, Rule 21. The facts relating to this case are that the appellant filed a suit for the recovery of a sum of Rs. 56,000/- and odd against certain persons on the basis of an account with the plaintiff. The defendants Nos. 1 to 6 were ex parte and defendant No. 7 applied to the court for inspection of the accounts of the appellant and the court directed the plaintiff to give inspection of the accounts. Some of the accounts, it was stated, were given inspection of and as regards the inspection of other documents, inasmuch as they were consigned to the record room, the plaintiff asked for some more time to get them out to offer for inspection to the defendant. The lower court most summarily rejected this application stating that no further time could be granted and on account of the fact that the plaintiff did not comply with the order of the court to give inspection of the accounts within that period, dismissed the suit purporting to act under Order 11 Rule 21, Civil Procedure Code. We are of opinion that this order of the lower court cannot be sustained.

(2) In the first place we fail to see how there is any non-compliance of the order of the Court, for, an order under Order 11, Rule 21 could be passed only when there is non-compliance of the order of the court. In this case we find that the plaintiff asked for further time to be able to give inspection of other accounts. There is always a power vested in the court under S. 148 to extend the period granted by it for the doing of an act. The Court could very well have acted and granted further time under Section 148, especially when the reason given by the plaintiff was that they were not in a position to give inspection, the documents having been consigned to the record room. We cannot help remarking that the Sessions Judge has been very harsh in this case towards the plaintiff and has most summarily rejected the application. He should have taken into consideration that the case related to a Bank where there was no question of any wilful default occurring as we see that the application was a bona fide application asking for extension of time. Under the circumstances the court ought to have granted time to afford the plaintiff an opportunity to get the books. We do not regard this as a deliberate and wilful neglect on the part of the plaintiff and the court could not have exercised this power unless it came to the conclusion that there was a wilful and deliberate neglect on the part of the plaintiff. We might herein refer to the cases of — 'V. R. A. R. M. Chettiyar Firm v. V. C. R. A. C. T. Nachiappa Chettiyar', AIR 1935 Rang 310 and — 'Jagannath Motilal v. Bala Prosad', AIR 1925 Cal 166. We therefore allow this appeal, set aside the order of the lower court and direct that the lower court do allow an opportunity to the plaintiff to give inspection of the documents. The appellant will be entitled to the costs of this appeal. Advocate's fee Rs. 50/-.

B/K.S. Appeal allowed.

*A.I.R. 1953 HYDERABAD 33 (Vol. 40, C.N. 20)
FULL BENCH

PALNITKAR C. J., MOHD. AHMED ANSARI AND SREENIVASACHARI JJ.

Mohamad Hydar and others, Appellants v. The State of Hyderabad.

Criminal Appeals Nos. 8 and 9/6 of 1951-52, D/- 21-7-1952.

* **Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359 F.) — Discriminatory procedure — Regulation is ultra vires of Constitution of India, Art. 14.**

Per Majority (Sreenivasachari J., contra) : Article 14 of the Constitution condemns discrimination not only by substantive law but also by law of procedure. The Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation, No. X of 1359 Fasli, provides certain special procedure different from that laid down in the ordinary law of criminal procedure. There is no object specified in the opening words of the Regulation for which the Regulation was made. There is no understandable basis as to why offences alleged to have been committed by certain persons should be tried under the Regulation by Special Judges and why persons charged under similar offences should be tried in the ordinary courts. The Hyderabad Regulation does not apply to any particular territory of the state. There is, thus, no basis of any territorial classification in it. Moreover, the Regulation lays down a proce dure which is, in some respects, less ad vantageous to the accused. The procedure, therefore, laid down by the Hyderabad Regulation being discriminary is hit by Art. 14 of the Constitution. Hence, the said Hyderabad Regulation is invalid and ultra vires. AIR 1952 SC 75 and AIR 1952 SC 235, Rel. on; AIR 1952 SC 123, Disting. ILR (1951) Hyd 1: AIR 1951 Hyd 11: 52 Cri LJ 1333 (FB) Overruled. Case law Ref. (Paras 7, 28 & 56)

A. A. Peerbhoy, Syed Ziaul Arfain and Murtuza Khan, for Appellants; V. Rajaram Iyer, Advocate General, Mohammad Mirza, Govt. Advocate and Gopal Rao Murumkar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('45) 72 Ind App 57: AIR 1945 PC 48: (46 Cri LJ 589) 13, 26
('38) AIR 1938 FC 1: (ILR (1939) Kar FC 1) 22
('43) AIR 1943 FC 36: (45 Cri LJ 1) 26
('50) AIR 1950 SC 27: (51 Cri J 1383) 12
('50) 1950 SCR 519: (AIR 1950 SC 211: 52 Cri LJ 550) 27
('51) AIR 1951 SC 41: (ILR (1951) Hyd 461) 12
('51) AIR 1951 SC 128: 1951 SCJ 182: (52 Cri LJ 860) 39, 42, 43
('51) AIR 1951 SC 318: (52 Cri LJ 1361) 12, 46
('51) AIR 1951 SC 332: (1951 SCR 747) 26
('52) AIR 1952 SC 75: 1952 SCJ 55: (1952 Cri LJ 510) 2, 4, 15, 16, 26, 31, 41, 45, 46, 52, 54, 55
('52) AIR 1952 SC 123: 1952 SCJ 168: (1952 Cri LJ 805) 2, 3, 13, 16, 19, 24, 25, 26, 31, 45, 46, 52, 57
('52) AIR 1952 SC 235: (1952 Cri LJ 1167) 2, 5, 22, 42, 56
('51) 55 Cal WN 86: (AIR 1951 Cal 258 SB) 22
('52) AIR 1952 Cal 150: (1952 Cri LJ 450 FB) 15, 55
('51) AIR 1951 Hyd 11: (52 Cri LJ 1333 FB) 31, 54
('43) 22 Pat 565: AIR 1943 Pat 346: (44 Cri LJ 809) 24
28 US 499 11
(1880) 101 US 22: (25 Law Ed 989) 13
(1919) 249 US 152: (63 Law Ed 527) 12

PALNITKAR C. J. : I have had the advantage of reading the judgments prepared by my learned colleagues, M. A. Ansari and Srinivasa Chari JJ., which they are about to deliver. After carefully going through both of them, I agree with the conclusion arrived at by Ansari J.

(2) So far as the constitutional question is concerned, the three judgments of the Supreme Court, viz., — 'State of West Bengal v. Anwar Ali', AIR 1952 S. C. 75, — 'Raning Rawat v. State of Saurashtra', AIR 1952 SC 123, and — 'Lachmandas Kewalram v. State of Bombay', AIR 1952 SC 235, declare the final word on the law as regards the validity of such special regulations. It is clear that Article 14 of the Constitution condemns discrimination not only by substantive law but also by law of procedure. The Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation No. X of 1359 Fasli, provides certain special procedure different from that laid down in the ordinary law of criminal procedure and it is to be decided how far that procedure is discriminatory.

(3) Section 5 of that Regulation empowers the Chief Minister to make over such of the cases as were pending before a Special Tribunal for trial to the Special Judge. The word "OFFENCES" in Section 5 (1) (a) is a misnomer, for it is conceded that no specific offences were made over to the Special Tribunals for trial but only cases were made over and many of them were tried and decided by the various Special Tribunals & many more were pending before them on the date of the passing of the Special Judges Regulation. Thus, the position under the Special Judges Regulation was that a murder or dacoity charge against "A" was tried by the Special Tribunal while a similar murder or dacoity charge against "B" was tried by the ordinary criminal Court of the land. There was no understandable basis on which the cases against "A" were to be tried by the Special Tribunal and the cases against "B" to be tried by the ordinary Courts. In fact, there existed parallel Courts for trying cases arising out of the same or similar offences; one, the ordinary courts and the other, the Special Tribunals. In — 'Raning Rawat v. State of Saurashtra', AIR 1952 S C 123, the Special Courts were created because there existed extraordinary circumstances in a particular part of Saurashtra. There was a crime wave there and therefore, it was necessary to issue the Saurashtra State Public Safety Measures Ordinance. The Special Courts were to function in a particular area of the Saurashtra State and with regard to the particular offences mentioned in the notification, no other court except the Special Court could try the cases arising out of the offences. Thus, there were no parallel courts for trying similar offences. There was a clear recital of the definite objective in that Ordinance. That object provided a tangible and rational basis of classification for the State Government to apply the provi-

sions of the Ordinance. It allowed the State Government to choose only such offences or cases as affected public safety, maintenance of public order and preservation of peace and tranquillity. Moreover, while actually applying the provisions of the Ordinance, the State Government issued a notification making over only offences and not cases. It is evident that the making over of a particular case or cases will be discriminatory but not the making over of a particular offence or offences. There is no such objective defined under the Hyderabad Regulation. There is no preamble and if at all we read the opening words, they are:

"Whereas it is expedient to provide for the termination of all save one of the Special Tribunals constituted under the Special Tribunals Regulation (No. V of 1358 F), and consequentially upon such termination to provide for the appointment, power and procedure of Special Judges:

"Now, therefore, in exercise of the authority vested in me for the administration of the Hyderabad State and of all other powers enabling me in this behalf, I hereby make the following Regulation:"

From the above, it is clear that there is no object specified in it, for which the Regulation was made. There is no understandable basis as to why offences alleged to have been committed by certain persons should be tried under the Regulation by Special Judges and why persons charged under similar offences should be tried in the ordinary courts. The Hyderabad Regulation does not apply to any particular territory of the State. Therefore, there is no basis of any territorial classification in it.

(4) Again, looking to the Regulation itself, it lays down a procedure which is, in some respects, less advantageous to the accused. S. 6 of the Regulation provides that a Special Judge may take cognizance of offences without the accused being committed to him for trial. It is clear that no offences have been mentioned in the Regulation or in any other valid notification, which were to be tried by the Special Judge without the accused being committed to him for trial. In fact, only cases which were triable by a Court of Session were made over to the Special Judges without the accused being committed. It is a moot point whether "OFFENCES" means "CASES". As laid down in the case of — 'State of West Bengal v. Anwar Ali', AIR 1952 S C 75, when an accused is tried before a Sessions Judge without his being committed, he loses the advantage of two minds being applied to his case and that is discriminatory and violative of Article 14.

(5) Then there is the question of revision & transfer. The Regulation does not provide for the revision or for the right to apply for the transfer of the case, to the High Court. All that Section 7 of the Regulation provides is that

"Subject to the provisions of Sections 4 and 5, a Special Judge shall have all the powers conferred by the Code on a Court of Session."

That does not empower or entitle the High Court to exercise its powers of revision or transfer which the High Court enjoys under the Code of Criminal Procedure. It is evident that the power of transfer will not generally be available to the High Court in the case of a Special Judge. As observed by His Lordship the Chief Justice of India in — 'Lachmandas Kewalram v. State of Bombay', AIR 1952 S C 235, at page 239, "as regards transfer, it does not, as already pointed out, fit in with the scheme of trial before a Special Judge." But His Lordship was of the opinion that a prohibition of transfer cannot be regarded as falling within the inhibition of Article 14, while the majority of Their Lordships of the Supreme Court came to the conclusion that the right of the accused to apply for the transfer of his case is an important safeguard and if the same is denied, it would violate the provisions of Article 14. It was held in the case that these departures from the ordinary law acted prejudicially to the persons subjected to the procedure prescribed by the special Act and constituted a discrimination against the persons tried by the Special Judge.

(6) I wanted to look at the Special Judges Regulation from a different point of view and see whether it could be saved from being hit by Article 14 of the Constitution. It was pointed out by the learned Advocate-General that the Special Judges were created as a new agency for disposing of cases left unfinished by the Special Tribunals, which were terminated under the Regulation and that the Special Judges' Courts should be regarded as additional Courts established under the ordinary criminal procedure. No doubt, these Special Judges were appointed in consultation with the High Court. But then they have been enjoined to function under the Special Judges Regulation. Moreover, under Section 8 of the Regulation all the provisions of S. 7 of the Special Tribunals Regulation (No. V of 1358 F) have been made applicable and are to have effect in relation to sentences passed by a Special Judge. The said Section 7 (2) (of the Special Tribunals Regulation) runs thus:

"(2) There shall be an appeal to the High Court from any sentence passed by a Special Tribunal which would have been appealable to the High Court under the Hyderabad Criminal Procedure Code if the sentence had been passed by a Court of Sessions. But notwithstanding the provisions of the Hyderabad Criminal Procedure Code or of any other law for the time being in force or of anything having the force of law by whatsoever authority made or done, there shall, save as hereinbefore provided, be no appeal from any order or sentence passed by a Special Tribunal and no Court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal or have any jurisdiction of any kind in respect of any proceedings before a Special Tribunal and no sentence of a Special Tribunal shall be subject to or submitted for confirmation by any authority whatsoever."

(7) Section (2-A) (ii) of the same Regulation provides that any sentence passed by a Special Tribunal and maintained by the High Court on an appeal shall be deemed to be a sentence of the Special Tribunal. Section (2-A) (iii) provides that any sentence passed by the High Court on appeal so preferred in substitution for a sentence passed by a Special Tribunal shall be deemed to be a sentence passed by a Special Tribunal. There seems to be some particular sanctity or extraordinary character assigned to the sentences passed by the Special Tribunals with the result that even the sen-

tences passed by the High Court in its appellate jurisdiction are to be regarded as those passed by the Special Tribunals. Under Clause (3) of Section 7, the Military Governor has been given the power to suspend, remit, reduce or alter the nature of any sentence. Thus, it is clear that the right of transfer or revision has been denied to the accused under the provisions of the Special Judges Regulation read with S. 7 of the Special Tribunals Regulation. It is argued that the words in Section 8 of the Special Judges Regulation which provide that Section 7 of the Special Tribunals Regulation shall have effect in relation to sentences passed by a Special Judge, mean that the provisions of S. 7 of the Special Tribunals Regulation will apply only when the stage of passing a sentence is reached by a Special Judge. It is difficult to agree with this contention. The marginal note given to Section 8 of the Special Judges Regulation reads, "Section 7 of the said Regulation to apply." It clearly means that Section 7 of the Special Tribunals Regulation is to be applicable. The marginal note can be looked into when the provisions of a Section or enactment are ambiguous. Even supposing that the words in the section are ambiguous, that ambiguity is removed, when we read the marginal note which makes the whole of Section 7 of the Special Tribunals Regulation applicable. Thus however much one would like to regard the Special Judges as only additional Judges, it is difficult to regard them so in view of the Special Judges Regulation. I hold that the Hyderabad Regulation is hit by Article 14 of the Constitution.

(8) In the result, therefore, I agree with the order proposed by my learned brother M. A. Ansari, J.

(9) Leave to appeal to the Supreme Court is granted.

(10) SREENIVASACHARI J.: These cases have been referred to the Full Bench because a point was raised in these cases that the trial that took place before the Special Judge under the Special Judge's Regulation was bad. It was sought to impeach the validity of the Special Judge's Regulation No. X of 1359 F on the ground that it flagrantly violated the provisions of Article 14 of the Constitution of India. We have before us the following cases of Mohamed Hyder:

(a) Ten appeals by the accused;
(b) Two appeals by the State against judgments acquitting the accused in certain cases, and
(c) Three Revision Petitions on behalf of the State for enhancement of sentences.

The same objection has been raised in a number of other cases where the accused underwent trial before the Special Judge. The cases in which Hyder is the accused came up before the Special Judge in pursuance of the Order passed by the Chief Civil Administrator of Osmanabad transferring these cases from the file of the District Magistrate, Osmanabad, to that of the Special Sessions Judge. The Chief Civil Administrator of Osmanabad purported to act under the powers delegated to him by the Chief Minister by virtue of Section 5 (1) (b) of the Special Judge's Regulation. The accused in some of these cases has been sentenced to various terms of imprisonment while in other cases he has been acquitted, against which the State of Hyderabad has preferred an appeal which is pending in this Court. Therefore, the proceedings are complete and are over so far as the Special Judge's Court is concerned.

(11) The idea underlying the principle of Art. 14 of the Constitution of India is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. This principle of equality of rights is a principle of republicanism which says that no State shall deny any person within its jurisdiction the equal protection of the laws. Equal protection in legal proceedings is secured: (a) when the Courts are open to every one on the same terms: (b) when it assures to every one the same rules of evidence and the identical modes of procedure. This general principle of equal protection of the laws and equality before the law has been circumscribed and hedged in by certain well established limitations. It has been well recognised that this principle does not prohibit the State from making classifications which rest upon reasonable grounds of distinction. Therefore, whenever reasonable, economic, political or social reasons exist, the State may make a classification putting certain subjects or persons under one category. Obviously all persons within the jurisdiction of a State cannot be treated alike in matters of legislation. There ought to be variation in the administration of the law having regard to the objects for which a legislation is made. It was very artistically put by Mr. Justice Holmes:

> "The machinery of the Government would not work if it were not allowed a little play in its joints" (28 U S 499).

The question to be put when a particular law is impugned on the ground of its denying equal protection of the laws is 'Is the law palpably discriminatory?' Having these broad principles in view we have to consider as to whether there has been a differentiation in the procedure to be adopted in the Courts of the Special Judges different from the established procedure in ordinary courts.

(12) The general principle on which a classification of persons or objects is justifiable has been laid down by the Supreme Court in the leading case of — 'State of Bombay v. F. N. Balsara', AIR 1951 SC 318. The observations of Fazl Ali J. in the above case are important. His Lordship while analysing the principle underlying Article 14 of the Constitution of India observed:

"(a) The Principle does not take away from the State the power of classifying persons for legitimate purposes.
(b) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons often require separate treatment.
(c) A law is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.
(d) While reasonable classification is permissible such classification must be based upon some real and substantial distinction being a reasonable and just relation to the object sought to be obtained."

Before dealing with the question as to how far the impugned legislation, namely, the

Special Judge's Regulation conforms to the principles enunciated in the case of — 'State of Bombay v. F. N. Balsara', it would be desirable to allude to certain well accepted notions of law. There is always a presumption of the constitutionality of an enactment. This presumption is drawn on the basis of the principles enunciated in the case of — 'Middleton v. Texas Power & Light Co.', (1919) 249 U S 152, which is as follows:

> "It must be presumed that a legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds".

Therefore, where any person impeaches the validity of any enactment as offending any principle of law or as being ultra vires the Legislatures or the Constitution, the onus is upon him to establish that it is so. This has been well established by the decisions of the Supreme Court in the cases of — 'Gopalan v. State of Madras', AIR 1950 S C 27, and the case of — 'Charanjitlal v. Union of India', AIR 1951 S C 41. The onus, therefore, is upon the accused-appellants before us to point out and establish how and in what respects the Special Judge's Regulation infringes any right conferred on them by the Constitution.

(13) The power of the State to regulate criminal trials according to the needs of the different parts of its territory has been recognised as part of the police power of the State — 'Bowman v. Lewis', (1880) 101 U S 22. Resort to special laws and recourse to extraordinary remedies would be justified in order to cope with and subdue a crime wave that may be prevailing in the State. The existence of another set of special Courts side by side with the ordinary courts, the right of the Executive to decide what offences or classes of offences shall be tried by the special Courts and not by the ordinary courts has never been looked upon as violating any principle of law or jurisprudence. In this regard the leading case of — 'Emperor v. Benoarilal' decided by the Privy Council would be in point — 72 Ind App 57. With regard to the question that arises as to whether the relegating of particular cases to the special courts amounts to discrimination within the meaning of Art. 14, it must be pointed out straight away that the mere circumstance of one offender being asked to take his trial in the ordinary Courts and subjecting another offender to take his trial in the special courts would not by itself amount to a discrimination. Discrimination means to distinguish unfavourably from others. There ought to be an element of unfavourable bias in order to constitute discrimination. One cannot bring a case within the ambit of Art. 14 of the Constitution and contend that the equal protection of the laws and equality before the law is denied simply because a law seeks to differentiate between persons with regard to the forum. As was observed by Mukherjee J. in — 'the Saurashtra case', 1952 SCJ 168 the party aggrieved would have to establish that there has been a palpable abuse of the power by the Executive in making the differentiation and that there has been a hostile discrimination.

(14) The said Regulation has been attacked on the main ground that it offends Article 14 of the Constitution and the learned Counsel for the petitioners-appellants elaborated this point by pointing out to the various sections of the Regulation and arguing that the test laid down by the Supreme Court for regarding a classification as being reasonable has not been conformed to. He urged that this legislation was a piece of hostile legislation wherein a discrimination was made in so far as the trial of the case was concerned between themselves and other accused similarly placed who had committed like offences.

(15) Although the general principles wherein a classification by a State would be justified have been laid down in the two leading cases referred to above but the actual question as to whether it would amount to a discrimination where a particular accused was tried under a special procedure by a Special Judge constituted for the purpose under a Special Regulation came up for consideration before the Supreme Court in three cases and we have to be guided by the principles enunciated by the Supreme Court in these three cases. The first case was a case which went up to the Supreme Court from a Full Bench Judgment of the Calcutta High Court in what is known as 'The Dum Dum Riot' case.

(a) Anwarali Sircar and 49 others are said to have made a raid on the factory of Messrs. Jessop & Co., Ltd., at Dum Dum in Calcutta. The accused were alleged to have attacked the officials, battered them to death and thrown the corpses into blasting furnaces. They were charged for murder, conspiracy to murder, to commit grievous hurt with deadly weapons, etc. They were also charged under the Explosive Substances Act. The Government of Bengal passed an Ordinance known as "The West Bengal Special Courts Ordinance" in 1949. Later on, this Ordinance was superseded by the West Bengal Special Courts Act which received the assent of the President of India on March 15, 1950. The provisions of this Act were almost similar to those of the provisions of the original Ordinance. A Special Judge had been appointed to try cases under the original Ordinance. After the coming into force of the subsequent Act, a complaint was filed before the Special Judge appointed under the Ordinance. Anwarali Sircar and his co-accused were tried on the charges, convicted and sentenced.

(b) Proceedings were taken in the High Court to quash the conviction and sentences. While Anwarali Sircar and his 49 co-accused had been tried, convicted and sentenced, a set of other accused, Gajen Mali and others, were taking their trial, and proceedings were pending. These accused also invoked the Certiorari Jurisdiction of the High Court to quash the proceedings. These cases were heard together and disposed of by a common judgment. A Full Bench of the Calcutta High Court held that the provisions of Sec. 5 (1) of the West Bengal Special Courts Act were discriminatory in that they empowered the State to direct trial of any case by a Special Judge. It was held that the principles of Article 14 of the Constitution of India were violated. In the result, the conviction and sentences were set aside — 'Anwar Ali v. State of West Bengal', AIR 1952 Cal 150 (FB).

(c) On appeal by the State of West Bengal, the Supreme Court confirmed the above judgment. The Supreme Court held that the West Bengal Special Courts Act was discriminatory

on the face of it because the Act laid down a procedure which was less advantageous to the accused than the ordinary procedure and this fact was the root cause of the discrimination. The reason and motive assigned by the State for such different procedure was that these cases needed a "Speedier Trial". The Supreme Court held that the expression "speedier trial" was too indefinite to form the basis of a reasonable classification. Their Lordships held that the grouping of certain cases and offences, for the purpose of speedier trial was no good basis for a differential treatment — 'State of West Bengal v. Anwarali', AIR 1952 SC 75.

(16) Closely following upon the above cases, another case came up before the Supreme Court wherein the identical question of the validity of the constitution of Special Courts was involved, and the case of — 'State of West Bengal v. Anwarali', AIR 1952 SC 75 referred to above, came to be reviewed by the Supreme Court. This was an appeal against the judgment of the High Court of Saurashtra which confirmed the sentences passed on certain accused who had been tried under the Saurashtra State Public Safety Measures (Third Amendment) Ordinance 1949 (No. 66 of 1949). Under this Ordinance, the State was empowered to constitute special courts for the trial of certain classes of offences in particular areas to be notified by the Government. The procedure in regard to the trial of such cases by the special courts varied from the usual procedure in two matters, viz. (a) there was not to be trial by jury or with the aid of assessors; (b) the preliminary enquiry before a Magistrate and the committal by him to the court of Sessions in Sessions Cases was done away with.

This Ordinance was attacked mainly on the ground that it allowed a discrimination being made between one accused and another, the one being tried by the ordinary courts under the established procedure while the other being subjected to a trial under the Special Procedure enjoined by the Ordinance. Here again the validity of the ordinance was impugned on the ground of its offending the fundamental right of the equal protection of the laws, conferred by the Constitution. This ordinance, it would appear, was promulgated with a view to put an end to the large scale nefarious activities of certain criminal gangs who were committing mass murders, and indulging in wholesale plunder, looting and dacoity. It was found that the ordinary courts established in the land were not enough to cope with this surging wave of crimes in certain parts of Saurashtra. The state of affairs that existed was brought to the notice of Their Lordships of the Supreme Court by an affidavit filed in this regard by an Officer of the Home Department of the Saurashtra State.

In dealing with the above appeal, Their Lordships were impressed with the fact that the exigencies of the situation, and the arising of an extraordinary state of affairs justified the constitution of special courts, different from the established Courts, in order to bring under control the state of riotousness prevailing in some parts of the State. The deviation in certain respects from the normal procedure in the trial of cases was also justified. The classification of cases and offences for being tried by Special Courts was held to be valid and not offending Article 14 of the Constitution. The discrimination, if any was regarded as a 'discrimination with reason' and not one without reason — 'Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 decided on 27th February 1952.

(17) Quite recently after we had heard the arguments 'in extenso' in this case, another case was decided by the Supreme Court. In this case there were appeals against the judgment of the High Court at Bombay. These appeals were on behalf of persons who had been convicted and sentenced by the Special Judge, Ahmedabad, who was appointed under the Bombay Public Security Measures Act, Act VI of 1947. This Act was impugned as being invalid as it sought to lay down a procedure for the trial of cases different from the established procedure under the Criminal Procedure Code.

(a) The accused in the above cases were charged for various offences under Sections 394, 397, 302 and 307 read with Sec. 34 of the Indian Penal Code and Sec. 10(c) of the Arms Act. The Police Department applied to the District Magistrate, Ahmedabad to move the Bombay Government, to constitute a special court for the trial of these cases, and on such a requisition, the Government of Bombay constituted a special court under Sec. 10 of the Bombay Public Security Measures Act. Simultaneously with this Order, the Government of Bombay in exercise of its powers under Sec. 12 of the aforesaid Act directed that Special Judge to try two particular cases, one of such cases being the case in which the appellants before the Supreme Court were charged. The cases were transferred from the file of the City Magistrate to that of the Special Judge. The prosecution evidence started on 19-1-1950 and it continued when the constitution came into force. The Special Judge convicted the accused (appellants before the Supreme Court) and sentenced them to death under Sec. 302/34 and to transportation for life under Sec. 307/34 and to varied terms of imprisonment for other offences for which they were charged. The appellants appealed to the Bombay High Court. The sentences of death were confirmed by appeal to the Supreme Court under Art. 132(1).

(b) On appeal the Supreme Court by a majority (Patanjali Sastri C. J. dissenting) set aside the conviction and ordered a retrial of the accused. Their Lordships held that in important respects the special procedure prescribed by the Bombay Public Security Measures Act constituted a departure from the ordinary procedural law and that was detrimental to the interests of the accused. They further held that it was not shown why the cases of accused had to be subjected to a special procedure. Finally their Lordships came to the conclusion that inasmuch as a discriminatory procedure was adopted by the Special Judge after the coming into force of the Constitution, and inasmuch as such a procedure had become void after the Constitution, the Special Judge had no jurisdiction to try the cases according to the Special Procedure, therefore the trial subsequent to 26-1-1950 was vitiated and hence the conviction could not be sustained.

(c) The guiding principles as to in what circumstances an enactment would be regarded as invalid as violating the equal protection of the laws clause underlying Article 14 of the Constitution, could be deduced from the three decisions of the Supreme Court referred to above.

(18) The learned Counsel for the petitioners drew our attention to those provisions in the Criminal Procedure Code which were absent and wanting in the Special Judges Regulation, and argued that depriving the accused of those privileges amounted to a discrimination being made in the trial. He submitted that (a) there was no provision for committal proceedings, (b) that there was no provision similar to the one in the Criminal Procedure Code for confirmation by the High Court in cases of sentences of death or transportation for life, (c) that no provision had been made for revision to the High Court, (d) and that there was no power of transfer vested in the High Court. Incidentally it was also argued that there was no guarantee of a competent man being appointed as a Special Judge as the power of appointment was left with the Chief Minister.

(19) In the impugned Regulation what procedure has to be adopted by the Special Judges has been mentioned in Sections 6 to 9. Section 10 of the Regulation is an all-comprehensive section and is as follows:

"'Subject to the provisions of this Regulation, the Code shall apply in respect of and in relation to proceedings before a Special Judge and subject as aforesaid a Special Judge shall be deemed to be subordinate to the High Court'."

It would therefore be clear that what is contemplated with regard to the procedure to be followed in the Special Judge's Court is that the procedure prescribed under the Criminal Procedure Code would be followed, subject however to such variations, modifications of the procedure as are mentioned in Sections 6 to 9 of the Regulation.

It would be advisable to refer to the particular provisions of the Special Judges Regulation relating to the procedure to be followed in the cases triable by the Special Judge in order to determine how far those provisions are at variance with the established procedure under the Criminal Procedure Code.

Section 6 enacts that a Special Judge could take cognizance of offences without the case being committed to him for trial and that he shall follow the procedure prescribed for warrant cases. In this connection it has to be pointed out that the provisions in the Hyderabad Criminal Procedure Code relating to the committal of cases to be tried by the Sessions Judge are different from similar provisions in the Indian Criminal Procedure Code. Chapter 9 relates to the procedure to be adopted with regard to cases triable by Sessions Court and Sec. 267 therein states that in a case triable by a Sessions Court if any one of the accused or all the accused apply to the Magistrate before whom committal proceedings are pending, that the case may be committed to the Sessions without any enquiry, the Magistrate shall send the case to the Sessions Court after framing the charge. Again it is open to the Magistrate to commit the case to the Sessions without taking any evidence if he is satisfied that there are sufficient grounds to commit the case to the Sessions Court. There is no such provision in the corresponding section of the Indian Criminal Procedure Code. The existence of such a provision in the Hyderabad Cr. P. Code would imply that it is not necessary that there would be a two-fold enquiry, one before the Magistrate and the other before the Sessions Judge. Under the above circumstances, it could not be said that by reason of the absence or omission of the committal proceedings the accused has been deprived of any right or privilege for the accused could not claim any right or privilege. Further the absence of committal proceedings cannot be regarded as affecting the accused prejudicially in the fair trial of the case. This view is supported by the weighty pronouncements of the Chief Justice of India and Mukherjee J. in 'the Saurashtra Ordinance case'. His Lordship the Chief Justice observed:

"Nor can the commitment proceeding in a Sessions Case be said to be an essential requirement of a fair and impartial trial though its dispensation may involve the deprivation of certain advantages which an accused person may otherwise enjoy. Thus the variations from the normal procedure are by no means calculated to imperil the chances of a fair and impartial trial." — 'AIR 1952 S. C. 123 at p. 125'.

Mukherjee J. in the same case while comparing the provisions of the Saurashtra Ordinance with those of the West Bengal Special Courts Act, observed:

"The Ordinance lacks some of the objectionable features of the West Bengal Act. Thus it has not taken away the power of revision, nor does it expose the accused to his being convicted of a major offence" — 'AIR 1952 S. C. 123 at p. 131.

It would, therefore, be clear from the above observations that the absence of committal procedure was not regarded as such a serious objectionable feature as those specifically enumerated.

(20) Section 7 of the Special Judge's Regulation is innocuous for it reads as under:

"Subject to the provisions of Sections 4 and 5 a Special Judge shall have all the powers conferred by the Code on a Court of Sessions exercising original jurisdiction and in particular may pass any sentence authorised by the law."

(21) Section 8 is as follows:

"All the provisions of Section 7 of the said Regulation shall have effect in relation to sentences passed by a Special Judge as if every reference in the said Regulation to a special Tribunal included a reference to a Special Judge."

The said Regulation referred to in this Section is the Special Tribunals Regulation V of 1358 Fasli. Section 7 of the Special Tribunals Regulation reads as follows:

"7.(1) A Special Tribunal may pass any sentence authorised by law.

(2) There shall be an appeal to the High Court from any sentence passed by a Special Tribunal which would have been appealable to the High Court under the Hyderabad Criminal Procedure Code if the sentence had been passed by a Court of Session. But notwithstanding the provisions of the Hyderabad Cr. Procedure Code or of any other law for the time being in force or of anything having the force of law by whatsoever authority made or done, there shall, save as hereinbefore provided, be no appeal from any order or sentence passed by a Special Tribunal and no court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal or have any jurisdiction of any kind in res-

pect of any proceedings before a Special Tribunal and no sentence of a Special Tribunal shall be subject to or submitted for confirmation by any authority whatsoever.

(2.A) For the purpose of the provision in sub-section (2) that no sentence of a Special Tribunal shall be subject to or submitted for confirmation by any authority whatsoever the following sentences, shall, notwithstanding anything contained in any other law for the time being in force, be deemed to be sentences of a Special Tribunal, namely—

(i) any sentence passed by a Special Tribunal from which no appeal is preferred to the High Court under sub-section (2);

(ii) any sentence passed by a Special Tribunal and maintained by the High Court on an appeal so preferred;

(iii) any sentence passed by the High Court on an appeal so preferred in substitution for a sentence passed by a Special Tribunal.

(2.B) Notwithstanding anything contained in any law for the time being in force—

(i) any sentence of death passed by a Special Tribunal shall be carried into execution by causing the person sentenced to be hanged by the neck until he be dead;

(ii) warrants of commitments under sentence of death, warrants of execution of a sentence of death and any other instruments issued by a Special Tribunal for which a form is provided in Schedule IV to the Hyderabad Criminal Procedure Code shall, subject to any direction which may be made by Government in this behalf, be issued in such form as the Special Tribunal thinks fit."

Section 8 of the Special Judges Regulation says that all the provisions embodied in Section 7 of the Special Tribunals Regulation would come into operation in so far as 'sentences' passed by the Special Judge are concerned. Therefore immediately a sentence is passed by a Special Judge the provisions of Section 7 of the Special Tribunals Regulation would come into operation and further proceedings will be governed by the provisions contained therein. Section 7 of the Special Tribunals Regulation provides for appeals being filed in the High Court against such sentences passed by the Tribunal as could be passed by a Court of Session. Decidedly the Special Judge is invested with all the powers of a Sessions Judge under the Criminal Procedure Code. Therefore if the Special Judge passed any sentence exercising his powers as a Sessions Judge, such a sentence is appealable. While in the preceding portion of Section 7(2) of the Special Judges (Tribunals?) Regulation an appeal is allowed against any sentence of a Special Judge (Tribunal?) the latter portion says that no appeal would lie from any sentence or order passed by a Special Tribunal. It was urged that by this provision the right of appeal had been taken away. On the face of it, it does appear that the power of appeal had been taken away. How could it be that by the same section a right of appeal is conferred and in another portion of the same section the right is expressly barred? It is a well established rule of construction that an enactment should be construed in such a way that each and every one of its parts should be given a meaning so as to lead to harmony and not to mutual conflict. We ought to make out a rational meaning which makes the words sensible. Reading sub-section (2) of Section 7 of the Special Tribunals Regulation as a whole, I would interpret the section as under: There is always a right of appeal to the High Court where the Special Judge (formerly Special Tribunal) passed a sentence which a Sessions Judge could pass from which an appeal was allowed under the Code. But in cases where the Special Judge (Special Tribunal) passed a less severe sentence such as a Magistrate could pass, although under the Criminal Procedure Code, an appeal or revision would lie to the Sessions Judge, such right of appeal had been taken away.

This cannot be a ground of complaint because all the cases are before the High Court. Probably it might be said that by the taking away of the right of appeal to a Sessions Judge, the accused had lost the right of an appeal and a revision thereafter to the High Court. The fact that there is only one right of appeal cannot be a ground for holding the statute to be discriminatory.

(22) Besides the provision relating to appeals to the High Court there is in Section 7 of the Special Tribunals Act a provision which bars a revision against any order or sentence, for the words therein are: "no court shall have authority to revise such order or sentence".

(a) It was argued that this particular provision clearly took away the right of revision, and the deprivation of the right of revision is a material differentiation in procedure which prejudicially affected the accused and as such was hit by the decision of the Supreme Court in the case of — 'Lachmandas Kevalram v. State of Bombay'. AIR 1952 S. C. 235. There is much force in this argument for, while pointing out the departures from the normal procedure in the Bombay Public Security Measures Act, wherein there was no right of revision conferred, the majority of the Judges of the Supreme Court opined that depriving the accused of his right to apply for transfer or for revision caused prejudice to the accused. But reading the Special Judges Regulation as a whole, I am of opinion that the power of revision had not been taken away. Section 10 of the Regulation says that the Special Judge would be deemed to be subordinate to the High Court. When a Judge is subordinate to the High Court, his orders will always be subject to the revisional jurisdiction of the High Court. The provisions of Section 7(2) of the Special Tribunals Regulation would only come into operation when a sentence is passed by a Special Judge. The provisions of Section 7 of the Special Tribunals Regulation have been applied restrictively. I feel that there is no justification for holding that all the provisions of Section 7 of the Regulation have been brought in 'en masse' in the Special Judges Regulation.

(b) It was urged that the right of the accused to move the High Court in revision as against any adverse order passed by the Judge had been withheld. My answer to this objection is that the right to move the High Court in its Revisional Jurisdiction had never been taken away, for as already elaborated by me above, the provisions of Section 7(2) of the Regulation curtail the powers of appeal and revision if any, after a sentence is passed. No question of revision could arise against a sentence passed by the Special Judge under his powers as a Sessions Judge.

(c) Whatever might have been the position of the law before the Constitution, after the Constitution, the High Court has powers of superintendence over subordinate courts under Art. 227 of the Constitution of India. Under Section 107 of the Government of India Act of 1915, the High Court possessed revisional jurisdiction under its power of superintendence over subordinate courts. It did exercise the Revisional Powers where Sec. 115, Civil Procedure Code or Sec. 439, Criminal Procedure Code did not in terms apply. But under Sec. 224, subsec. (2) of the Government of India Act, 1935 (the appellate and) revisional powers of the High Court had been negatived. That the High Court's exercise of the powers of revision & exercising superintendence over subordinate courts had been negatived by Sub-s. (2) of S. 244 of the Govt. of India Act 1935 is well borne out by the Federal Court judgment in the case of — 'Pashupati Bharti v. Secretary of State', AIR 1938 F. C. 1 at p. 3. It would appear that under Art. 227 of the Constitution, there is no provision corresponding to sub-section (2) of Section 224 of the Government of India Act 1935, negativing the right of superintendence and Revision. Therefore the powers which had been negatived under the Government of India Act have been restored. This view of mine is also supported by the decision of the Calcutta High Court in the case of — 'Bimala Prosad v. State of West Bengal', 55 Cal W N 86. Under Section 10 of the Special Judges Regulation the Special Judge is subordinate to the High Court. If the Special Judge is subordinate to us we can always exercise our revisional powers in correcting his orders. In our appellate jurisdiction conferred by Section 7(2) of the Regulation is included the revisional jurisdiction as well.

(23) Much was made of the fact that the accused could not move for transfer of the case. This argument, in my opinion, cannot have much force, for it is only when a Special Judge passes a sentence that Sec. 7(2) of the Special Tribunals Regulation would be invoked and not otherwise. An application for transfer would, I expect, be made when the proceedings are pending before a Judge, and after the sentence has been passed no question of a transfer of the case would arise. My view is that the power given to the High Court to transfer cases under the Criminal Procedure Code is left intact and has not been taken away or curtailed.

(24) It was pointed out that the beneficial provisions in Section 302 of the Hyderabad Criminal Procedure Code relating to a further confirmation of sentences by other authorities had been expressly taken away by virtue of Section 8 of the Special Judges Regulation read with Sec. 7(2) of the Special Tribunals Regulation. S. 7(2) of the Special Tribunals Regulation says: ".....no sentence of a Special Tribunal shall be subject to or submitted for confirmation by any authority whatsoever". Obviously, the state of confirmation of a sentence comes in only after a sentence is passed.

In the first place, the petitioners can have no grievance on this score for the question of confirmation of a sentence would arise only where the sentence passed is of imprisonment of more than 10 years or of transportation for life or of death. Section 20 of the Hyderabad Criminal Procedure Code enacts that where the sentence passed is imprisonment of more than 10 years, such sentence shall not be executed until confirmation by the High Court. Likewise, where the sentence is one of transportation for life, the sentence shall not be executed until confirmed by the Government and where the sentence is one of death, the sentence can be executed only after H. E. H. the Nizam had given the sanction. In all cases where the sentences have been as mentioned above, the file should be submitted to the High Court under Section 302 of the Criminal Procedure Code. Undoubtedly there are safeguards provided for the matter being gone into by more than one authority. But those provisions cannot help the petitioners for in no case have the petitioners been sentenced to more than ten years imprisonment. It is well settled that no party who is not affected by any objectionable procedure can have any ground for complaint. The observations of Das J. in the case of — 'Ranning v. State of Saurashtra', support this view. His Lordship observed: "In my opinion, the appellant can have no right to complain if he has not been aggrieved in any way by any unjust or arbitrary classification." — 'AIR 1952 S. C. 123 at p. 134.

The cases are all before the High Court and they would be reviewed and the object of confirmation is very well fulfilled in these cases. Power of confirmation not having been provided for is therefore of no great consequence. I might herein refer to the observations of Brough J. in the case of — 'Jailal Sahu v. Emperor', reported in 22 Pat 565: AIR 1943 Pat 346 at p. 349.

> "By virtue of Sections 31 (2) and 374 such a sentence so passed is of no effect until confirmed by the High Court. Section 3 makes no reference to confirmation, it might perhaps have been better if it had, but I do not think the omission is material. An appeal or application in revision does not follow automatically from a sentence, and, therefore, the right to appeal and the liability to review had to be expressly conferred. But under the Code what is generally known as "death reference" follows automatically on the passing of a death sentence by a Sessions Judge. I see no reason why the same consequence should not follow from the sentences which are to have effect as if they had been so passed by a Sessions Judge."

(25) The next ground of attack as regards the validity of the Special Judges Regulation is that the selection of the cases to be tried by the Special Judge had been left to the unfettered discretion of the Chief Minister or by a person authorised by him in this behalf (vide Sec. 5 of the Regulation). It was, therefore, argued that this amounted to a delegation of the authority by the Legislature to the executive and such delegation was bad in law. A reading of Section 5 of the Regulation would make it clear that the Special Judge is empowered to try such offences of which the trial was pending before the Special Tribunal, as are made over to him for trial by the Chief Minister or by the Authority authorised by him, and secondly the Special Judge is also empowered to try such offences as may be made over to him by the Chief Minister after the commencement of this Regulation. This classification comes to this that all those cases which were pending before the Special Tribunal, the Special Judge would be empowered to try, on their being transferred to him by the Chief

Minister or one authorised by the Chief Minister in this behalf. In addition to the above class of cases the Special Judge is empowered to try such cases also which are sent to him by the Chief Minister or one authorised by him after the commencement of this Regulation.

The power given to the Government to send particular cases to a Special Court is not peculiar to the Special Judges Regulation now sought to be impugned but identical provisions are to found in similar enactments, viz., the West Bengal Special Courts Act of 1950 and the Saurashtra State Public Safety Measures Ordinance of 1948 (as amended by the third amendment Ordinance of 1949). For a better elucidation and comparison of the particular provisions, I have put the relative sections in parallel columns:

West Bengal Special Courts Act.	Saurashtra Ordinance.	Hyderabad Special Judge's Regulation.
Sec. 5(1) "A special Court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing, direct."	Sec. 11. The Special Judge shall try such offences or classes of offences or such cases or classes of cases as the Government may by general or special order in writing direct.	Section 5(1)—Every Special Judge shall try :— (a) such offences of which the trial was immediately before 14th December 1949, pending before a Special Tribunal deemed under subs. (2) of S. 3 to have been dissolved on that date as are made over to him for trial by the Chief Minister or by a person authorised by the Chief Minister in this behalf ; (b) such offences as are after the commencement of this Regulation made over to him for trial by the Chief Minister or by a person authorised by the Chief Minister in this behalf.

A comparison of the relevant provisions in the akin enactments would show that the words used are identical. So far as the West Bengal Act and the Saurashtra Ordinance are concerned, the words are the same while, in the Hyderabad Special Judges Regulation, the words used are different, "The Chief Minister would transfer offences" and not particular cases. One cannot help remarking that the Regulation has been most inartistically drafted, why—I might say—clumsily worded, but that would not by itself render the provisions of a statute invalid if it does not violate any established principle of law. It is not given to the Chief Minister or his nominee to pick out any individual case. The words of Sec. 5(1)(a) are "Such offences of which the trial was immediately before 15th December 1949 pending before a Special Tribunal". 'Cases' are to be contradistinguished from 'offences'. If one is to go by the actual words used in the Regulation the Regulation cannot be regarded as discriminatory on the face of it. As observed by Das J. in — 'the Saurashtra Ordinance Case', 1952 S C J 168 those words do not contemplate any particular offender or any particular accused in any particular case. "The Classification of offences by itself is not calculated to touch any individual as such", 1952 S. C. J. 168. It therefore follows that in so far as Section 5(b) of the Hyd. Spl. Judges Regulation authorises the Chief Minister or his nominee to direct that certain offences be sent over to the Special Judge for being tried that provision cannot be regarded as being discriminatory and as such offending the principles underlying Art. 14 of the Constitution.

(26) The oft-advanced argument that the vesting of the authority in the executive by the legislature, in the matter as to what classes of offences were to be sent to the Special Judges was also bad, was also put forward by the learned Counsel for the petitioners. This argument, if at all it could be said to have had any force, cannot be sustained now in view of the decisions of the Privy Council and of the Supreme Court making it clear that it is no delegation of the power of the legislature but entrustment of the carrying out of the policy of the legislature. This question came up for decision before the Federal Court in connection with the Special Criminal Courts Ordinance 2 of 1942 and the Federal Court by a majority held that the Ordinance in so far it vested in the Executive, the power to send any case or group of cases to a Special Court, was open to the objection that there was in the executive an absolute and unfettered discretion without the policy or direction of the legislature as regards the way in which the power has to be exercised — 'Emperor v. Banwarilal', AIR 1943 F. C. 36. This view did not find favour with their Lordships of the Privy Council when the case went up in appeal to the Privy Council and while negativing the above objection their Lordships observed:

> "This is not delegated legislation at all. It is merely an example of the not un-common legislative arrangement by which local application of the provision of a statute is determined by the judgment of a local body as to its necessity." — 'Emperor v. Banwarilal AIR 1945 P C 48 at p. 51.

The practical position has been very well pointed out by Rowland J. in the case already referred to — 'Emperor v. Benoarilal', AIR 1943 FC 36, although this view of the learned Judge was the minority view. The learned Judge expresses himself in these terms:

> "If indeed to pass that order under Sec. 5 of the Criminal Courts Ordinance is to legislate and if only the legislature can do it, then to validate such a trial as the trial of the respondents, the Governor-General ought to have passed a special ordinance enacting that Banwarilal Sharma and others be tried by the Special Magistrate for the offences with which they are charged. This is not the usual legislative practice in modern times. Where the legislature normally lays down the principle.....which it is the duty of the executive authorities to carry out by passing the necessary orders."

The Supreme Court has laid down the principles relating to delegation of legislation in the President's reference made to the Supreme Court where their Lordships have held this would not amount to an illegal delegation of legislative power because the executive must be considered

to be acting in a subordinate position. (Vide 'In re Article 143 of the Constitution of India and Delhi Laws Act (1912, etc., AIR 1951 SC 332'.) This view has been further confirmed in a subsequent case of the Supreme Court, namely, the case of — 'Raning Rawat v. The State of Saurashtra', AIR 1952 S. C. 123 decided by the Supreme Court on Feb. 27, 1952 in which case Mukherjea J's. observations may be summarised as follows: The vesting of authority in the State Government by Ordinance to select offences for trial by Special Courts is not in any way unreasonable and does not offend against the equal protection clause in our Constitution '1952 S. C. J. 168'. I might herein quote the words of the Chief Justice of India in the case of the — 'State of West Bengal v. Anwar Ali', AIR 1952 S. C. 75 at p. 78. His Lordship said:

"The discretion vested in the State Government in selecting cases for references to a special Court may not be subject to judicial review and may in that sense be absolute, but that is very different from saying that it was 'intended' to be arbitrary."

(27) I might straightaway say that it is settled law today that the fact that there is likelihood of sometimes the power given to the executive being abused would not make the law itself invalid. As I have already pointed out the Regulation, as it stands, does not empower the Chief Minister or his nominee to single out any particular individual and send his case to the special Judge for trial. The fact that there is a likelihood of the Executive misusing its powers cannot invalidate an enactment fair on the face of it. This proposition if further strengthened by the observations of the late Chief Justice of India (Kania C. J.), in the case of — 'Dr. N. B. Khare v. The State of Delhi'. His Lordships's observations were to the following effect "abuse of the power given by law sometimes occurs but the validity of the law cannot be contested because of such apprehension" — 'Dr. N. B. Khare v. State of Delhi', 1950 S. C. R. 519 at p. 526.

(28) I have already indicated in the foregoing paragraph that the question of the procedure under the Special Judges Regulation being less advantageous than the one prescribed by the Criminal Procedure Code does not arise in these cases at all. It would be clear that none of the objectionable features which were pointed out by the counsel for the petitioners is such as to lead to a conclusion that the petitioners by reason of their having had to take the trial before the Special Judges were in a more disadvantageous position than other offenders who committed similar offences and were placed before the ordinary courts for trial. I would here quote Weaver from his Book on Constitutional Law. The learned author says:

"Class Legislation is that which makes improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted and between whom and the persons not so favoured no reasonable distinction or substantial difference can be found." (Weaver's Constitutional Law page 397).

What is the particular privilege, I ask, which has been conferred on the individual taking his trial before the ordinary court which these petitioners have been deprived of. Could it be said that there has been an intentional or purposeful discrimination?

(29) In the view that I have taken, I hold that there has been no deviation from the established procedure in the trial of the case of the petitioners, and the trial cannot, therefore, be held to be invalid. These cases will now go before the Division Bench for hearing on the merits.

(30) M. A. ANSARI J.: Ten appeals by the accused, two by the State against acquittals and three revision petitions for the enhancement of sentences, in all fifteen cases, have been referred to this Full Bench, because certain common and important legal issues are involved in their decisions. The main question is about the legality of the sentences by the Special Judges after the inauguration of the Constitution in cases transferred to them for trials under Section 5 of the Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (No. 10 of 1359 Fasli), hereinafter referred to as 'the Regulation', before January 25, 1950. The Regulation came into force from the date of its publication in the Jarida on Bahman 13, 1359 Fasli (December 13, 1949) and Section 3 terminates from December 16, 1949, all Special Tribunals except the Fourth, which had earlier been constituted under S. 2 of the Special Tribunals Regulation (No. 5 of 1358 Fasli). Both these enactments provide special procedures for the trials of the offences or cases transferred to these special Courts and omit certain safeguards allowed to the accused under the Hyderabad Criminal Procedure Code. They also authorise delegation of the power of transfer to persons other than the Chief Minister. The Notification (Home Department No. 10) relates to the delegation under Section 5 of the Regulation and was made on Bahman 17, 1359 Fasli (December 17, 1949), whereby all the Civil Administrators of the Districts were within their respective jurisdictions authorised to exercise the powers of the Chief Minister. Under it, the Civil Administrators of Karimnagar and Osmanabad Districts issued orders authorising the Special Judges appointed for the districts to try the cases before us. The relevant orders are not on the records of any of the appeals; nor were they published in the Jarida. The Advocate-General has, however, furnished us with a copy of the order by the Civil Administrator of Karimnagar in the Baquer Hussain's case and the Advocate of the accused has filed a certified copy of the order by the Civil Administrator of Osmanabad in Mohd. Hyder's and Quadri's appeals, which was given to Mohammad Hyder in the lower Court. They purport to have been made on January 20 and 23, 1950.

(31) It is argued on behalf of the accused-appellants, who are six in number, that as the charge-sheets in all the cases from the Osmanabad District were received by the Special Judge after the inauguration of the Constitution of India and the main proceedings in the case before the Special Judge at Karimnagar started after such a date, the Regulation being discriminatory is violative of Article 14 of the Constitution, and void under Clause (1) of Article 13, so that the appellants have been deprived of their liberties according to procedure not established by law. Secondly, it has been argued that Section 5 of the Regulation authorised delegation to persons; but the Notification

(Home Department No. 10) authorises all Civil Administrators and such a delegation to officials cannot be regarded as one to persons, hence it is bad in law. The third argument is that the Chief Minister or the persons authorised by him can under Sub-s. (1) of S. 5 of the Regulation vest the Special Judges with the jurisdiction to try offences whose trials were immediately before December 15, 1949, pending before the Special Tribunals dissolved by Section 3, or such offences as were after the commencement of the Regulation made over to them; but the orders transferred particular cases of the appellants to the Special Judges, who thereby acquired no jurisdiction and the convictions in these circumstances are bad. It is further urged that no question of exercise of power under sub-section (2) of Section 5 of the Regulation arises as the cases were not transferred from the ordinary Courts to the Special Judges. If the word "offences" used in sub-section (1) of Section 5 be construed to mean " cases", as has been urged by the learned Advocate- General, the first and the third arguments referred to above become closely linked and together raise the important constitutional issue as to whether the Regulation is violative of Article 14 of our Constitution. In — 'Abdur Rahim v. Pinto', AIR 1951 Hyd. 11, a Full Bench of this Court, of which two of us were members, dealing with Sections of the Special Tribunals Regulation, had come to the conclusion that some of them were violative of Art. 14; but as they were severabale from the valid provisions of the enactment and did not operate in a manner substantially different to the ordinary Criminal Procedure, the trial of the accused in the case could proceed before the Fourth Special Tribunal. Since then, the Supreme Court has made important pronouncements in cases challenging the constitutionality of enactments relating to the special criminal procedures similar to those contained in the Regulation. In — 'The State of West Bengal v. Anwar Ali', AIR 1952 S. C. 55, certain words in Section 5(1) of the West Bengal Special Courts Act were held by the majority of the Supreme Court to be void as they infringed the guarantee given by Article 14 of the Constitution. Then in the case of — 'Raning Rawat v. The State of Saurashtra', 1952 S. C. J. 168, similar provisions in S. 11 of the Saurashtra State Public Safety Measures (Third Amendment) Ordinance, No. 66 of 1949 were considered by the majority not to be invalid or 'ultra vires'. In the light of these authorities, we have to examine afresh the constitutionality of the Regulation as well as the binding character of the decision in — 'Rahim's case'. If the Regulation be held to be based on no classification or one with no rational relation to its object and discriminatory, the convictions and sentences of the appellants, as well as the acquittals in the cases will have to be set aside.

(32) Before dealing with the legal issues, certain relevant facts in each case should be given. These appeals may be classified according to the accused, who have filed them, and on this basis they can be divided into three sets. The first consists of four appeals by Mohammad Hyder, who was the First Taluqdar (Collector) of the Osmanabad District immediately before the Police Action. In this group can also be included the appeal by the State against his acquittal in what is called the Opla Murder Case, as well as the three revision petitions for the enhancement of his sentences in what is called the Killari Dacoity Cases. The group is thus divisible into two parts: one consisting of the two appeals in the Opla Murder Case and the other of the three appeals and equal number of revision petitions in the Killari Dacoity Cases.

(33) The First Information Report in the Opla Murder Case, dated Isfandar 24, 1358 Fasli (January 24, 1949), was filed before the District Magistrate of Osmanabad and alleges that the accused on April 29, 1948, when he was returning from the village Gadh, caused twelve persons, who were proceeding with three cart loads of groundnuts from the village Opla within the Barsi enclave to Sholapur District through a road in the Hyderabad State territory, to be arrested by the Pathans, accompanying him, took them to Osmanabad town and in the following night had them shot dead. The order-sheet of the Magistrate of Mehir 22, 1358 Fasli (August 22, 1949) mentions that the case shall be heard by the Special Tribunal; but the record does not appear to have been sent there. However, Exhibit 18, which is dated August 9, 1949, and is a copy of the order by the Civil Administrator of Osmanabad, shows that the Officer had, in exercise of the powers vested in him by the Government Notification No. 28 of 7th Ardebehest 1358 Fasli (March 7, 1949), under Section 3 of the Special Tribunals Regulation, directed a list of cases to be sent for trial to the Special Tribunal 'A'. The Opla Murder case is the last but one in the list accompanying the order. No records of the Special Tribunal are available to show whether it ever proceeded with the trial of the cases. There are some initials on the first paper of the record of the case, which gives a list of the documents accompanying the charge-sheet and bears the date of August 29, 1949. The Advocate-General says that they are of the President of the Tribunal 'A'. The Tribunal appears to have proceeded no further when the next order of the transfer was made. There is no order of the authority on the record transferring the case to the Special Judge under the Regulation; but Mr. Peerbhoy in the course of his argument gave us a copy of an order by the Civil Administrator of Osmanabad, which is dated January 23, 1950, and since then the Advocate of the appellant has filed the certified copy of the order which reads as follows:

> "In exercise of the powers vested in me under Government Notification No. 10... I, Capoor, Civil Administrator, Osmanabad, hereby direct that the following cases on the file of the Special Tribunal 'A', which have been withdrawn from that Tribunal, shall be sent to the Court of the Special Judge, Gulbarga and Osmanabad, for trial according to law."

(34) A list of twenty-eight cases follows, the Opla Murder case being No. 15. The Special Judge's order-sheet, however, shows that the records were received by him on February 1, 1950. The offences in the charge-sheet alleged to have been committed are under Sections 66, 243 and 330 of the Hyderabad Penal Code, the one under Sec. 243 being under the Hyderabad Criminal Procedure Code exclusively triable by the Court of Sessions though without jury or the aid of assessors; but on committal to him. The Special Judge, as authorised by Section 6 of the Regulation, took cognizance of the case without any committal proceeding, tried it as a warrant case, and finding the appellant guilty of abducting in order to murder under Section 301 of the Hyderabad Penal Code,

which offence is also exclusively triable by Sessions Court under the Hyderabad Criminal Procedure Code, sentenced him to undergo rigorous imprisonment for ten years, as well as pay a fine of Rs. 5,000/- or in default a further period of two years. He disbelieved the evidence of Ramchander, P. W. 25, about the order of shooting and acquitted the accused of the charge of murder. The accused has under Section 8 of the Regulation, which preserves and incorporates in the Regulation Section 7 of the Special Tribunals Regulation, filed the appeal against the sentence and the State has under Section 9 of the Regulation appealed against the acquittal.

(35) The Killari Dacoity Cases in which Mohammad Hyder has filed three appeals and the State revision petitions comprise of three main cases. The allegations against the appellant in them are that a Police Station hving been burnt, the appellant along with several other police officials visited Killari, a village in Latur Taluqa, within the Osmanabad district, for the purposes of searching it; he posted police pickets round the village, and the party accompanying him entered several houses of the residents; during the search valuables from some of the houses were taken away; and when complaints were made to the appellant he connived. Nine First Information Reports for taking of such valuables were filed on March 10 and 11, 1949 before the District Magistrate of Osmanabad, whose order-sheets of Amardad 23, 1358 Fasli (June 23, 1949) in all the cases show that the Civil Administrator of Osmanabad has written to him about the trials of the cases by the Special Tribunal; but no records were sent to the Tribunal. It appears from the records of the cases that on 5th/7th September, 1949, the Civil Administrator of Osmanabad, had, in exercise of powers under the Notification directed the cases to be sent to the Special Tribunal 'A' for trials; but the records of the Tribunal in the cases also are not available, and on the first papers in each case which contain the lists of the documents accompanying the charge-sheets, there are the same initials dated September 12, 1949, which are said to be that of the President of the Tribunal. After the passing of the Regulation, the Civil Administrator of Osmanabad on January 23, 1950, passed the order, which has been already referred to in connection with the Opla Murder Cases, and the numbers of the nine Killari cases in the list accompanying the order are from 17 to 25. The order-sheets of the Special Judge in all the cases, however, show that the records were received by him on February 1, 1950, and he tried them in three main groups, each consisting of three cases. The offences against the appellant in all the charge-sheets are of abetment of dacoity under Section 66 read with Section 330 of the Hyderabad Penal Code, which were under the Hyderabad Criminal Procedure Code triable by the Sessions Courts, as well as by the Magistrates. The Special Judge tried them as warrant cases and having found the appellant guilty of the abetment sentenced him to two years' rigorous imprisonment and a fine of Rs. 5,000/- in the one, a year and six months in the second, and two years in the third, all the sentences were to run concurrently. Against these, the accused has filed three appeals and the Government the revision petition. The appellant because of the trials by the Special Judge has lost one right of appeal; for had he been tried by ordinary Magistrates he would have under Section 336 of the Hyderabad Criminal Procedure Code a right of appeal to the Sessions Court, and from the Sessions Judgment, a second appeal under Section 338 of the Code to the High Court.

(36) Now, I come to the second group of appeals, which arise from the Apsinga Dacoity cases. It consists of two appeals by one Syed Mohd. Quadri, an ex-Tahsildar of Tuljapur, and three by other persons Revayya, Deoba and Pooniah. The accused have been convicted in two cases of the offence under Section 383 of the Hyderabad Penal Code, which corresponds to Section 454 of the Indian Penal Code and sentenced. Quadri has filed appeals in both the cases; but the others have appealed only in one. Mohd. Hyder was also charged in both the cases; but has been acquitted. Only one appeal in one of the cases has been filed by the State against acquittals of the appellants, as well as of Mohd. Hyder of the offence of dacoity under Section 330 of the Hyderabad Penal Code. Thus this group consists of six appeals. The facts relating to these cases are that Apsinga is a village situated in Tuljapur Tahsil, within Osmanabad District, and on Amardad 20, 1357 Fasli (June 20, 1948), people from the then adjoining Indian territory came to take back their cattle which have been lifted by the Razackars of the village. This caused fright among the residents of the village and about twelve persons fled from the place. The appellant Quadri with Mohd. Hyder and other Police Officers reached the village on June 22, 1948, and houses of some residents were looted on the plea that the properties left by the absent persons were to be removed to the Tahsil at Tuljapur for safe custody. On Farwardi 4, 1358 Fasli (February 4, 1949), six First Information Reports relating to the taking away of such things from the houses of six residents were filed before the District Magistrate of Osmanabad. On the record of each case, there are copies of the order of the Civil Administrator of Osmanabad, dated August 9, 1949, directing these cases to be tried by the Special Tribunal 'A'; but like the earlier case, no records of the Tribunal are available; and on the first papers of each case which mention the charge-sheets and the list of the papers accompanying them are the initials with date of August 29, 1949. After the Regulation and according to the copy furnished to us by the Advocate for the accused, the Civil Administrator of Osmanabad on January 23, 1950, directed the Special Judge to try the cases and their numbers in the list of cases accompanying the order are the first six. The charge-sheets filed in these cases are for the offences under Section 66 read with Section 330 of the Hyderabad Penal Code and were received by the Special Judge on February 1, 1950, and are against seventeen accused, all of them except six being shown as absconding. The six cases were tried under the Regulation in two groups, each consisting of three charge-sheets and in both the Special Judge acquitted all the accused of the offences of dacoity; but held the four accused, who have appealed, guilty of the offence under Section 383 of the Hyderabad Penal Code. He sentenced Quadri in each group to two years' rigorous imprisonment with a fine of Rs. 2000 and in default to a further period of six months imprisonment &

directed the punishments in both the cases to run concurrently. By their trials under the Regulation the appellants have lost one right of appeal. This ends all the cases from the Osmanabad District.

(37) The last main group consists of only one appeal by Baquer Hussain, who is an ex-Tahluqdar of Karimnagar district. The First Information Report in his case is dated Thir 16, 1358 Fasli (May 16, 1949) and alleges that on September 10, 1947, he along with a party of police visited a village in Sircilla Taluq, Karimnagar District, where he compelled the Mali-patel to take down the National Flag from a tree and on his expressing inability to climb caused him to be beaten by persons accompanying him, he further ordered the police to enter several houses in the village for purposes of search, whereupon considerable properties were taken away. The Information was filed before the District Magistrate; but on the record of the case is a copy of an order by the Civil Administrator of Karimnagar, directing the case to be tried in the Court of the Special Tribunal 'A'. There is nothing to show how far the Tribunal proceeded with the case, or by what order the case was transferred to the Special Tribunal IX; for on the charge-sheet in the case, which is for the offences under Sections 270 and 288 of the Hyderabad Penal Code corresponding to Sections 330 and 348 of the Penal Code, there is an endorsement of November 1949, by one Shabbir, who was a Member of the Special Tribunal No. IX, directing the case to be taken on file and posted for November 29, 1949. Again, there is nothing further on the record to show how far this Tribunal proceeded with the case. The next important date is of January 15, 1950, when the order-sheet of the Special Judge for Karimnagar directs the case to be taken on record and posted for January 31, 1950. This date cannot be taken as having begun the proceeding, for according to the copy of the letter of the Civil Administrator of Karimnagar, which the Advocate-General has filed before us and which is dated January 20, 1950, the case along with others was sent from the Special Tribunal IX to the District Magistrate for trials by the Special Judge for Karimnagar and Warangal districts. The order-sheet of the Special Judge for January 31, 1950, says that the list of witnesses is long and the Government Prosecutor is to scrutinise and file a list on February 18, 1950. This date, in my opinion, should be deemed to have begun the proceeding against the accused and it is after the inauguration of the Constitution. The Special Judge convicted the appellant of offences under Sections 270, and 288 read with S. 71 of the Hyderabad Penal Code and sentenced him to rigorous imprisonment for four years and two years. He also found him guilty under Section 430 of the Hyderabad Penal Code and passed a sentence of three years, all these sentences were to run concurrently. The accused has filed the appeal against the aforesaid sentences. I may mention here that the offence under Section 270 of the Hyderabad Penal Code was under the Hyderabad Criminal Procedure Code exclusively triable by the Sessions Court; but the trial under the Regulation has been without any committal.

(38) I will now summarise the important facts which emerge from the above narration:

1. The Civil Administrators of Osmanabad and Karimnagar Districts directed specific cases to be tried by the Special Tribunal 'A'.
2. There is no order of any competent authority vesting the Special Tribunal IX with jurisdiction to try the case of Baquer Hussain.
3. The orders of the Civil Administrators of Karimnagar and Osmanabad of January 20, and 23, 1950, transferred specific cases from the Special Tribunals to the Special Judges without indicating under which sub-sections of Section 5 of the Regulation they were making the orders.
4. The list in the order of January 23, 1950, by the Civil Administrator of Osmanabad contains cases against other accused also whose numbers in the list are 16, 26, 27 and 28 and the grounds for this inclusion with the appellant's cases are not clear.
5. Although, the particular orders are of dates prior to the coming of the Constitution, the proceedings in all the cases began and ended after the inauguration.
6. There is no affidavit by any responsible person showing the circumstances in which the Regulation was passed or the particular orders were made.

(39) Before dealing with the main legal issue, I would consider the argument of the learned Advocate-General that the orders of the Civil Administrators having been made before the coming into force of the Constitution, the proceedings initiated thereupon are not affected by the inauguration. In support of this argument, he relies on the case of — 'Keshavan Madhava Menon v. State of Bombay', AIR 1951 SC 128: 1951 SCJ 182, where the majority of the Judges of the Supreme Court have held that a prosecution started against a person in respect of a pamphlet published in September, 1949, for an offence under Section 18 (1) of the Indian Press (Emergency Powers) Act was not void under Article 13 (1) of the Constitution after the 26th January 1950, and the Article has no retrospective operation. The case in my opinion decides the effect of the Article on the substantive liability of a person; but does not obliterate the demarcation of the statutes that deal with substantive rights from those dealing with procedural matters. It does not reverse the authorities which hold that retrospective construction has no application to the enactments which deal with procedure and practice of the Courts. If the enforcement of a new procedural statute affects pending criminal proceedings, much more should the inauguration of the guarantee safeguarding against discriminatory treatment. I will now cite two passages from the judgments of the Supreme Court in the case to show that their Lordships were dealing with questions of substantive law alone.

(40) Das J. dealing with the prospective operation of the Article observes at page 186:

> "There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned, the law exists notwithstanding that it does not exist with respect to the future exercise of fundamental rights....."

Then Mahajan J. at page 194 says:

> "Besides the rule of construction which applies to repealed statutes or to temporary statutes

our attention was not drawn to any other rule of construction under which a person who commits an offence against an Act during its existence as a law becomes unpunishable on its termination. Both on considerations of convenience and also on grounds of justice and reason, I am inclined to think that penalties incurred under a law in force at the time when the act was committed would survive its extinction so that persons who violate its provisions might afterwards be punished."

(41) These observations do not over-rule the general proposition of there being no vested right in procedural matter or establish a right in the State of depriving a person of his liberty according to procedure repealed by the Constitution as discriminatory. Before the Special Judge took cognizance of the cases or started proceeding in the one from Karimnager, the Constitution had come into force with the guarantee of equal protection of the laws and the appellants before us on those dates could well urge that they have acquired the fundamental rights of not being subjected to discriminatory treatments. I am fortified in this view by the fact that the Notification by the West Bengal State in the — 'Anwar Ali's case', AIR 1952 S C 75 was on January 25, 1950, yet no argument was raised either before the Calcutta High Court or in the Supreme Court about the proceedings in that case being unaffected by the guarantee contained in Art. 14.

(42) It is true that in the majority judgment of — 'Keshavan Madhava Menon's case', AIR 1951 SC 128 it is said that such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution. The learned Advocate-General relying on the above passage has argued that proceedings commenced before the Constitution came into force are in no way affected by the inauguration. But then the Supreme Court in the recent case of — Lachmandas Kewalram v. State of Bombay', A I R 1952 S C 235, have held that further criminal proceedings under the Bombay Public Security Measures Act started prior to the coming into force of the Constitution were bad after the inauguration of the Constitution as they were discriminatory. In the case, charge-sheets for offences under Sections 392, 394, 397, 302 and 307 read with Section 34 of the Indian Penal Code along with Section 19 (e) of the Arms Act and Section 68 (1) of the Bombay District Police Act were tried by the Special Court under a Notification of August 6, 1949, which was made in exercise of the powers conferred on the Government of Bombay by Section 12 of the Act. On January 13, 1950, the Special Judge consolidated the two cases and recorded evidence of seventeen witnesses upto January 25, 1950. Thereafter the hearings of the cases proceeded before the Special Judge and after the conclusion of the arguments, the judgments were on March 13, 1950, delivered holding the appellants in the cases guilty of murders and sentencing them to death. The Bombay High Court rejected their appeals and the cases came to the Supreme Court on the constitutional question of how far the trial was violative of the equal guarantee article and therefore void. Mr. Justice Das delivering the majority judgment of the Supreme Court has held firstly that the provisions of the Act being discriminatory were violative of the guarantee; secondly that the parts of the proceedings under the Act which were after January 26, 1950, were void as they infringed the guarantee and consequently the trials were bad. At page 243 of the report, he rejects the argument about Article 13 not affecting discriminatory proceedings after the Constitution:

"As the act was valid in its entirety before the date of the Constitution, that part of the proceedings before the Special Judge, which, upto that date, had been regulated by this special procedure cannot be questioned, however discriminatory it may have been, but if the discriminatory proceeding is continued after the date of the Constitution surely the accused person may legitimately ask: "Why am I today being treated differently from other persons accused of similar offences in respect of procedure?"

(43) It is stated in Maxwell's Interpretation of Statutes, 9th Edition, page 232:

"No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which he sues, and, if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode."

If in the absence of any such provision to the contrary no person has a vested right in procedure, it must follow as a corollary that nobody has a vested liability in matters of procedure in the absence of any such provision to the contrary. If this is the position when the lower Court's procedure is altered by a Statute, then how the position could be different when the Act prescribing the discriminatory procedure becomes void by reason of its repugnancy to the equal protection Clause of the Constitution? Although the substantive rights and liabilities secured or accrued before the date of the Constitution remained enforcible as held in — 'Keshavan Madhava Menon's case', AIR 1951 S C 128 nobody can claim after that date that those rights and liabilities must be enforced under that particular procedure although it has since that day come into conflict with the fundamental rights of equal protection of laws guaranteed by Article 14. Then, the learned Judge at page 244 says:

"It is, therefore, clear that in this case the discrimination continued after the Constitution came into force and such continuation of the application of the discriminatory procedure to their cases after the date of the Constitution constituted a breach of their fundamental right guaranteed by Art. 14 and being inconsistent with the provisions of that Article the special procedure became void under Art. 13 and as there is no vested right or liability in matters of procedure the appellants are entitled to be tried according to the ordinary procedure after the date of the Constitution."

(44) In view of this authoritative pronouncement by the Supreme Court, the argument of the learned Advocate-General that the inauguration of the Constitution does not affect pending criminal proceedings fails, and I shall now proceed to deal with the provisions of the Regulation in order to see how far they are violative of the guarantee contained in Article 14.

(45) The guarantee contained in Article 14 means that persons in like circumstances must have equal rights and be under similar liabilities; the privileges of some so situated must not be greater; nor the burden of others heavier. The emphasis is on persons in similar situation, for the guarantee does not mean identical laws for all persons however different their circumstances may be. The Article does not exclude classification of persons and things in substantially different circumstances, provided the relation between the classification and the object of the particular enactment be reasonable and just. Whenever any enactment is challenged as infringing the fundamental right of the equality before the laws, a test generally applied to ascertain whether the enactment is constitutional is to find out whether it is based on some rational classification. Judicial opinions have differed on the correctness of applying this test to every enactment or about its being sound. In the two pronouncements of the Supreme Court referred to above, His Lordship the Chief Justice of India has held that the test of reasonableness of classification comes into question only where a special legislation affecting a class of persons is challenged, that an enactment based on discretion for the speedier trial of cases is constitutional and such discretion the State is expected to exercise honestly and reasonably. Mr. Justice Bose has also rejected this test of rational classification for determining whether a particular enactment is violative of the guarantee, and has in both the cases applied the test of differentiation proving unsatisfactory to the social conscience of a sovereign democratic republic. In the case of — 'State of West Bengal v. Anwar Ali', 1952 S C J 55, he has at page 98 observed as follows:

"What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiassed views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be ... What I have to determine is whether the differentiation made offends what I may call the social conscience of a sovereign democratic republic."

The same view he has maintained in the other case of — 'Raning Rawat v. The State of Saurashtra', 1952 S C J 168, where he repeats at page 191:

"As I explained in my judgment in the — 'State of West Bengal v. Anwar Ali', I prefer not to base my decision on the classification test. For the reasons given there I am of opinion that the differentiation here travels beyond bounds which are legitimate. It is true the points of differentiation are not as numerous here as in the other case but the ones which remain are, in my judgment, of a substantial character and cut deep enough to attract the equality clauses in Art. 14..."

(46) The majority of the other learned Judges in both the cases from Bengal and Saurashtra are, however, of the opinion that the test of rational classification is a satisfactory one and should be applied for ascertaining constitutionality of any impugned legislation. I shall now cite passages from their judgments referring to the pages of the Supreme Court Journal.

Mr. Justice Fazl Ali in the — 'West Bengal case', 1952 SCJ 55 at page 66 says:

".....One of these principles is that Article 14 is designed to protect all persons placed in similar circumstances against legislative discrimination, and if the Legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.

"5. There is nothing sacred or sacrosanct about the test of reasonable classification, but it has undoubtedly proved to be a useful basis for meeting attacks on laws and official acts on the ground of infringement of the equality principle.

"6. It follows from the two foregoing paragraphs that one of the ways in which the impugned Act can be saved is to show that it is based on a reasonable classification of the persons to whom or the offences in respect of which the procedure laid down in it is to apply, and hence it is necessary to ascertain whether it is actually based on such a classification".

In the case from Saurashtra he observes at page 175:

"I think that a distinction should be drawn between "discrimination without reason" & "discrimination with reason". The whole doctrine of classification is based on this discrimination and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise as between persons governed by different conditions and different set of circumstances... ....."

In 'the Bengal case', Mr. Justice Mahajan deals with the test at page 70:

"By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis & does not mean herding together of certain persons and classes arbitrarily.....

".....The mere fact of classification is not sufficient to relieve a Statute from the reach of the equality clause of Article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on

some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

In the Saurashtra case, 1952 SCJ 168 he says at p. 177:

"Section 11 of the Ordinance, like section 5 (1) of the West Bengal Act, suggests no reasonable basis or classification either in respect of offences or in respect of cases."

Then, Mr. Justice Mukherjea in the earlier case has held at page 74:

".....This brings in the question of classification. As there is no infringement of the equal protection rule, if the law deals alike with all of a certain class, the Legislature has the undoubted right of classifying persons and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to persons differently situated. It is said that the entire problem under the equal protection clause is one of classification or of drawing lines. In making the classification the Legislature cannot certainly be expected to provide "abstract symmetry". It can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even 'degrees of evil' but the classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made; and classification made without any reasonable basis should be regarded as invalid."

In the later case, he says at page 183:

".....The question is, on what basis is the classification to be made? If it depends entirely upon the pleasure of the State Government to make any classification it likes, without any guiding principle at all, it cannot certainly be a proper classification, which requires that a reasonable relation must exist between the classification and the objective that the legislation has in view. On the other hand, if the Legislature indicates a definite objective and the discretion has been vested in the State Government as a means of achieving that object, the law itself, as I have said above, cannot be held to be discriminatory, though the action of the State Government may be condemned if it offends against the equal protection clause, by making an arbitrary selection....."

In — 'Anwar Ali Sarkar's case' AIR 1952 SC 75, Mr. Justice Das at page 82 deals more elaborately with the test:

"All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment, and, therefore, the protecting clause has been construed as a guarantee against the discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation. This classification may be on different basis. It may be geographical or according to the objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them."

In the other case, he, at page 188, reiterates the necessity of these conditions:

"It is now well-established that while Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

Mr. Justice Chandrasekhara Aiyar in the Bengal case approves the propositions laid down by Mr. Justice Fazl Ali in the earlier case of the — 'State of Bombay v. F. N. Balsara' for at page 90 of the Journal he observes:

"The seven principles formulated by Fazl Ali J. are as follows:

.....(7) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis....."

Later in this judgment, he says at page 91:

".....Whether the classification, if any, is reasonable or arbitrary, or is substantial or unreal, has to be adjudicated upon by the Courts and the decision must turn more on one's commonsense than on over-refined legal distinctions or subtleties....."

In the other case, he holds at page 191:

".....This by itself indicates no classification, as the object is a general one, which has to be kept in view by every enlightened Government or system of administration....."

(47) From the above citations, it is clear that the majority of the learned Judges in both the cases adhere to the test of reasonable classification as a good one for ascertaining whether an impugned Act is obnoxious to the guarantee of the equality before the laws and that the test covers three things: a reasonable differentia between the persons and things governed by the impugned Act and those not covered, a definite objective for enacting the law and a nexus between the two which must be just and reasonable. There is no difference in these judgments of the two cases about the classification being real, or the distinction bearing a

reasonable relation to the object sought to be attained. There is also no difference about the object being definite. Opinions may have differed as to the sources from which the objects of an enactment are to be gathered & in the case from Saurashtra, it has been held by the majority that the preamble, the whole Act and the surrounding circumstances can be looked into for the purpose of ascertaining the object. Thus in the case, Mr. Justice Fazl Ali at page 175 of the Supreme Court Journal observes:

".....It was not disputed before us that the preamble of the original ordinance would govern the amending Ordinance also, and the object of the promulgating the subsequent Ordinance was the same as the object of promulgating the original Ordinance. Once this is appreciated, it is easy to see that there is something in the Ordinance itself to guide the State Government to apply the special procedure not to any and every case but only to those cases or offences which have a rational relation to or connection with the main object and purpose of the Ordinance and which for that reason become a class by themselves requiring to be dealt with on a special footing. The clear recital of a definite objective furnishes a tangible and rational basis of classification to the State Government for the purposes of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquillity....."

In the same case, Mr. Justice Mukherjea at page 182 observes:

"In my opinion, if the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the Statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the Statute itself cannot be condemned..... On the other hand, if the Statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the Statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied....."

Again he observes at page 183:

".....Ordinance is identically the same for which the earlier Ordinance was passed, and the preamble to the later, taken along with the surrounding circumstances, discloses a definite legislative policy which has been sought to be effectuated by the different provisions contained in the enactment....."

Also Mr. Justice Das at page 189 says:

"I have no doubt in my mind that the surrounding circumstances and the special features mentioned in the affidavit referred to above furnish a very cogent and reasonable basis of classification, for they do clearly distinguish these offences from similar or even same species of offences committed elsewhere & under ordinary circumstances."

It is obvious that enactments with similar provisions may be constitutional or otherwise, as the object of the legislation is definite or vague. The Bengal Act was held bad because the object of the speedier trial was considered to be a vague one.

Mr. Justice Fazl Ali explaining the decision in the latter case at page 175 observes:

"The mere mention of speedier trial as the object of the Act did not cure the defect because the expression "speedier trial" standing by itself provided no rational basis of classification".

So also Mr. Justice Mukherjea at page 182 observes:

"I would be inclined to think that the West Bengal case, which we have decided already, comes within the purview of this principle, as the desirability of "speedier trials", which is hinted at in the preamble to the West Bengal Act, is too vague, elusive and uncertain a thing to amount to an enunciation of a definite policy or objective on the basis of which any proper classification could be made."

Mr. Justice Mahajan also held in the Bengal case the "speedier trial" as too vague a ground for classification and so did Mr. Justice Chandrasekhara Aiyer, for at page 91, he observes:

"The Attorney-General argued that if the principle of classification has to be applied as a necessary test, there is a classification in the impugned Act as it says that it is intended to provide for the speedier trial of certain offences; and in the opinion of the Legislature certain offences may require more expeditious trial than other offences and this was a good enough classification. But as speedy administration of justice, especially in the field of the law of crimes, is a necessary characteristic of every civilised Government, there is not much point in stating that there is a class of offences that requires such speedy trial. Of course, there may be certain offences whose trial requires priority over the rest and quick progress, owing to their frequent occurrence, grave danger to public peace or tranquillity, and any other special features that may be prevalent at a particular time in a specified area. And when it is intended to provide that they should be tried more speedily than other offences, requiring in certain respects a departure from the procedure prescribed for the general class of offences, it is but reasonable to expect the legislature to indicate the basis for any such classification. If the Act does not state what exactly are the offences which in its opinion need a speedier trial and why it is so considered, a mere statement in general words of the object sought to be achieved, as we find in this case, is of no avail because the classification, if any, is elusive or evasive."

(48) I am therefore of opinion that speedier trial by itself cannot be a ground for classification, and it has to be ascertained from the provisions of the Regulation as well as the other circumstances what was the object of passing the Regulation and the nexus between the differentia and the object, i.e., whether the nexus is just and reasonable.

(49) At the time of the passing of the Regulation, there existed a general procedure for the trials of criminal cases under the Hyderabad Criminal Procedure Code and a special one for the Special Courts under the Special Tribunals Regulation of 1358 Fasli (1948-1949). According to the former, the trials of offences were grouped like the parent Indian Criminal Procedure Code, into four classes. One set of

provisions related to summary trials, another to summons cases, a third to warrant and a fourth to trial by a Court of Sessions; but without jury except in trials before the High Court or without assessors. The classification was based according to the gravity of the offences. Then the Special Tribunals Regulation (which was passed after the Police Action) authorised constitution of Tribunals consisting of three Members and vested them with jurisdiction of trying offences or class of offences which the Military Governor by general or special order directed. It also vested jurisdiction in them to try any case transferred to them by the Military Governor or persons authorised on his behalf. These Tribunals were authorised to take cognizance of the offence without committal, record only a memorandum of the substance of the deposition of each witness, to follow the procedure for summary trials; but for recorded reasons to adopt that for the trial of warrant cases. Appeals lay against sentences or acquittals to the High Court; but the powers of revision and transfer of the High Court were excluded. The object of passing the Special Tribunals Regulation is not clear, for its preamble just says: Whereas it is expedient to constitute Special Tribunals it is hereby enacted as follows". It may have been to provide for the speedier trials of offences or it may have been for the trials of offences involving the maintenance of public order. There is to my mind no clear indication in the Special Tribunals Regulation itself for what purposes it was enacted. The Advocate-General has referred us to the Notification No. 80 of 1358 Fasli, which specified the offences that were made triable by the Tribunal and also to another Notification No. 86 of 1358 Fasli, which modified the offences so triable; but both were cancelled by another Notification No. 27 of 1358 Fasli, so that there were no offences or class of offences triable by the Special Tribunals to the exclusion of the ordinary Courts on the date of the termination of the Special Tribunals. They were, however, cases which had been directed to be tried by the Special Tribunals, and it may be argued that they formed a class when the Regulation was passed.

(50) But the preamble of the Regulation is extremely unsatisfactory. It reads as follows:

> "Whereas it is expedient to provide for the termination of all save one of the Special Tribunals constituted under the Special Tribunals Regulation (No. V of 1358 Fasli) and consequently upon such termination to provide for the appointment, power and procedure of Special Judges."

From this preamble the object of the Regulation cannot be construed to be one for the trials of cases pending before the abolished Tribunals, for that would not be consistent with the provisions contained in Section 5(1) (b) and (2) of the Regulation, nor with the discretion given to the Chief Minister or persons authorised by him by the use of words "such.....as" in Section 5(1)(a). The entire Section reads as follows:

> "5. (1) Every Special Judge shall try—
>
> (a) such offences of which the trial was immediately before the 15th December, 1949, pending before a Special Tribunal deemed under sub-section (2) of Section 3 to have been dissolved on that date as are made over to him for trial by the Chief Minister or by a person authorised by the Chief Minister in this behalf.
>
> (b) such offences as are after the commencement of this Regulation made over to him for trial by the Chief Minister or by a person authorised by the Chief Minister in this behalf.
>
> (2) The Chief Minister or a person authorised by him in this behalf may transfer any case from one Special Judge to another Special Judge or from a Special Judge to a court constituted under the Code or from such court to a Special Judge."

(51) Although Section 5(1)(a) relates to the offences whose trials were pending before the Tribunals prior to their dissolutions, the fact is that after March 7, 1949, there was no general Notification indicating the offences exclusively triable by the Tribunals. In these circumstances, there existed no distinction between the offences triable by the Tribunals and those by the ordinary Courts. Assuming that offences in this sub-section mean particular offences indicated in the particular orders, still all of them would not be triable by the Special Judges; but only those whose trials were pending before the Tribunals when they were terminated. On what basis has this distinction been made? Not on the ground of the special circumstances which caused the orders for trials by Special Tribunals, for that would include all offences so triable irrespective of whether the trials had begun before the Tribunal. If it be said that offences whose trials had begun before the Special Tribunals formed a class, then the words "such.....as are made by the Chief Minister" etc., would still exclude some of them and the exclusion would be at the uncontrolled discretion of the authority concerned, there being no clear word in the sub-section to guide the exercise of the discretion. The selection may be made for the purposes of speedier trial. Assuming the word "offences" in this sub-section 5(1)(a) means cases, as contended by the Advocate-General, and the object to provide for the Special Judges to try the cases whose trials were pending before the Special Tribunals such cases forming a class by themselves, still the words "such..... .....as are made over to the Special Judges" in the sub-section vest discretion in the Chief Minister or his delegate to select some of them without any indication of the principle on which he was to select them.

(52) Section 5(1)(b) provides for the trial of offences after the commencement of the Regulation as are made over to the Special Judges. If the offences, or cases before the Special Tribunals formed a class by themselves and the object was to provide for their trial, what is the relation of this sub-section to the object of the Regulation? This classification relates to the offences or cases after the commencement of the Regulation and would be without any rational relation to the object of the Regulation providing for pending cases. If the objective of the Regulation be one for speedier trial that would be of no avail, for that is a vague basis of classification according to the decision of the Supreme Court in — 'Anwar Ali's case', AIR 1952 S. C. 75. On what basis would the Civil Administrators exercise the discretion, which is vested in them by the use of the words "such.....as are made over?" Not on the correspondence between the High Court

and the Government at the time when the Regulation was being prepared, for there are no indications of any directive being issued according to them. Indeed, the Regulation before me is of the type of legislation to which Mr. Justice Mukherjea refers in — 'the Saurashtra case', 1952 SCJ 168 at page 182:

".....On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied."

(53) Reading sub-section (1) of Sec. 5 along with the preamble and other sections, I am afraid it is open to the criticism of vesting power of selection of offences or cases in the executive at its pleasure without indication of guiding principle in the Regulation itself. The accused whose cases are transferred to the Special Judges in these circumstances can complain, if the procedure for their trials under the Regulation be substantially different to the ordinary one.

(54) The procedure for trials by the Special Judges are contained in Sections 6, 7, 8 and 10. Section 6 authorises taking of cognizance of offences without the accused being committed for trial and following of the procedure for warrant cases in such trials. The Judge under Section 7 has all the powers of a Sessions Court and then by Section 8, the provisions of Section 7 of the Special Tribunals Regulation which related to the appeal from the Special Tribunals are made part of the Regulation. It is obvious that the procedure under the Regulation is discriminatory. To begin with committal proceedings necessary for every offence triable by Sessions Court under the Hyderabad Criminal Procedure Code are excluded. It was argued before us that the case of — 'Abur Rahim v. Pinto', AIR 1951 Hyd. 11 (FB) is an authority against the view I am now taking, for, in that case, I came to the conclusion that the absence of committal proceedings under the Hyderabad Code did not amount to any substantial variation, and that the sections of the Bengal Special Courts Act are contrasted with the provisions of the Indian Criminal Procedure Code, which are different to the Hyderabad Code. Now, — 'Rahim's case' is still a good authority, so far as it lays that in order to make an enactment obnoxious to Article 14, it must create substantial inequality; but the meaning of substantial inequality has since then been explained in two judgments of — 'the Bengal case', (AIR 1952 S. C. 75). Mr. Justice Mukherjea in his judgment of the case observes at page 77:

"The first difference is that made in Section 6 of the Act which lays down that the Special Court may take cognizance of an offence without the accused being committed to it for trial, and that in trying the accused it has to follow the procedure for trial of warrant cases by Magistrates. It is urged by the Attorney-General that the elimination of the committal proceedings is a matter of no importance and that the warrant procedure, which the Special Court has got to follow, affords a scope for a preliminary examination of the evidence against the accused before a charge is framed. It cannot be denied that there is a difference between the two proceedings. In a warrant case the entire proceeding is before the same Magistrate and the same Officer who frames the charge hears the case finally. In a Sessions case, on the other hand, the trial is actually before another Judge, who was not connected with the earlier proceedings. It is also clear that after the committal and before the Sessions Judge actually hears the case, there is generally a large interval of time which gives the accused ample opportunity of preparing his defence, he being acquainted beforehand with the entire evidence that the prosecution wants to adduce against him. He cannot have the same advantage in a warrant case even if an adjournment is granted by the Magistrate after the charge is framed."

Then Mr. Justice Das at page 84 says:

"The far-reaching effect of the elimination of the committal proceedings cannot possibly be ignored merely by stating that the warrant procedure under the Code in a way also involves a committal by the trial Magistrate namely to himself, for the warrant procedure minimises the chances of the prosecution being thrown out at the preliminary stage, as may be done by the Committing Magistrate, deprives the accused person of the opportunity of knowing well in advance of the actual trial before the Sessions Court, the case sought to be made against him and the evidence in support of it and, what is of the utmost importance of the benefit of a trial before and the decision of a different and independent mind."

(55) I admit that when I held committal proceedings under the Hyderabad Code unimportant, all the reasonings given above were not present to my mind and in view of the observations referred to above, I am now of the opinion that committal proceedings even under the Hyderabad Code are of importance. Indeed, Mr. Justice Das in his judgment of the — 'Bengal case', (AIR 1952 S. C. 75) lays down a general test about what must be regarded as not amounting to material difference. At page 83 he says:

"The difference brought about by a statute may be of such a trivial, unsubstantial and illusory nature that that circumstance alone may be regarded as cogent ground for holding that the statute has not discriminated at all and that no inequality has in fact been created."

Judged by this test, the taking of cognizance of offences without committal proceedings under Section 6 of the Regulation or exclusion of one right of appeal under Section 8 cannot be regarded as trivial or innocuous. The authorities to the contrary cannot now be held as laying down correct law on these points.

(56) Then it was urged that the trial in the Opla Murder Case would not be bad as the subsequent inauguration of the Constitution does not affect the earlier vesting order under Section 6 and the other provisions of the Regulation relating to the procedure are not discriminatory. It was argued that the case of — 'Lachmandas v. State of Bombay', AIR 1952 SC 235, is distinguishable, as the accused were under the Bombay Act deprived of the right of moving for transfer, of revision, of securing the attendance of witnesses, of evidence being recorded in the ordinary manner, none of which

have been taken away by the Regulation. I hold that this argument should not be accepted. The broad proposition laid down by the aforesaid case is that the continuation after the Constitution of any substantial discriminatory procedure without rational classification is obnoxious to the guarantee of the equality before the laws. The absence of the particular provisions in a given case is not of so much importance as the presence of some substantial discriminatory provisions is. The proceeding before the Special Judge in the case began on February 1, 1950, and the warrant procedure has deprived the accused of the benefit of trial and decision by a different and independent mind. Then the chances of the prosecution being thrown out at the preliminary stages have been minimised. Both of these distinctions have been held by the Supreme Court to be important. Again the power of transfer is by sub-section (2) of Section 5 of the Regulation reserved to the Chief Minister or to persons authorised by him, which means that the right to move for transfer under the Hyderabad Criminal Procedure Code has been taken away, especially when that Code has been made subject to the provisions of the Regulation by Section 10. These are substantial discriminatory provisions which render the continuation of the trial in the Opla Murder Case or in the Baquer Hussain's case after the inauguration of the Constitution obnoxious to the guarantee of equality before the laws.

Apart from these, there are cases before us where the accused have lost one right of appeal, because of Section 8 of the Regulation, which incorporates Section 7 of the Special Tribunals Regulation and so excludes the operations of the Section of the Hyderabad Criminal Procedure Code which gives a right of appeal from sentences of Magistrates to the Sessions Courts. This loss of one appeal cannot be regarded as innocuous or trivial. The part of Section 8. which becomes void, is so inextricably woven with the general right of appeal to the accused that it is not severable from the rest and consequently the whole of Section 8 becomes void. Then it cannot be said that the legislator intended the sentences of Special Judges to be appealable to two Courts, or that after its deletion the operation of the Regulation is the same. Therefore, the entire Regulation becomes void. Same is the position when Section 6 which relates to committal is deleted.

(57) The clear preamble and Notification about the offences in the case of — 'Raning Rawat v. State of Saurashtra', AIR 1952 SC 123, make the case distinguishable from those before me. Here neither the preamble is clear, nor there is any general Notification relating to offences or class of cases, nor any affidavit has been filed, nor any indication of the principle according to which the discretion vested in the authorities is to be exercised. Consequently the Regulation is violative of the guarantee given by Article 14 and the trials of the accused cannot be considered to be one according to the procedure established by law and must be set aside.

(58) Had I been of the opinion that the Notification (Home Department No. 10) authorising the Civil Administrators of all the Districts within the area to exercise the powers of the Chief Minister is bad, as it authorised officials instead of persons to exercise the powers, I would not have dealt with the constitutional issue. I am of opinion, however, that the Civil Administrators are, as defined by the Hyderabad General Clauses Act, persons, and I fail to understand why the mere putting of such designations should render the Notification bad as insufficiently complying with the provisions of the Regulation.

(59) I am aware that a large number of cases have been decided by the Special Judges and appeals against such sentences are pending in the High Court. But the guarantee of the equality before the laws is a fundamental one under our Constitution, and is one of the cardinal principles of republicanism. It has to be guarded against becoming a mere rope of sand. More so perhaps in the State where notions of complete legislative supremacy and even of absolute monarchy have prevailed in the not very remote past. Its being upheld cannot, therefore, be subordinated to consideration of inconvenience that may result to a large number of persons. I would, therefore, allow the appeals of the accused and dismiss the revision petitions. The Regulation being void, any judgment of acquittal by the Special Judges would also be unlawful and must be set aside. Consequently the State appeals are also allowed. The fact that several acquittals are set aside has caused considerable difficulty in making the final orders in the cases. The appellants, Baquer Hussain, Mohd. Hyder and Quadri, have been let out on bails after they have been in Jail for considerable time and the other appellants have already served their short sentences. In the circumstances, the proceedings, convictions, sentences and orders of acquittals are set aside. The accused persons are entitled to be tried in accordance with law. they be continued to be bound over pending such further proceedings as the State Government may be advised to pursue. This judgment will govern all the cases.

(60) Leave to appeal to the Supreme Court is granted.

A/V.S.B. Ordered accordingly.

A. I. R. 1953 HYDERABAD 52
(Vol. 40, C. N. 21)
FULL BENCH

PALNITKAR C. J., MIR SIADAT ALI KHAN AND JAGAN MOHAN REDDY JJ.

Mumtajuddin and others, Appellants v. Fatima Begum, Respondent.

Civil Ref. No. 5 of 1952, D/- 19-9-1952.

Civil P. C. (1908), S. 113, Proviso — Reference under — Necessary conditions for validity.

Where the determination of the validity of a particular Act or a section is not necessary for the disposal of the case, no reference can be made under the proviso to S. 113, Civil P. C.

Similarly where the Court making the reference does not express its opinion on the question of the validity of the Act or the section in question, the reference is not properly made. (Para 2)

Shanker Rao Borgaonker, for Appellants; Raja Bahadur Bishweshwarnath, for Respondent.

REFERENCE ..... /Para 2

('52) ILR (1952) Hyd 595: (AIR 1952 Hyd 163 FB)

PALNITKAR, C. J.: This is a reference by the Second Judge of the City Civil Court. The reference is worded as follows:

"The point in issue is whether the provisions of Section 13 of Act X of 1952 preclude the Court from entertaining the suit or not and whether the Atiyat Enquiries Act No. X of 1952 is invalid or inoperative.'

(2) We have heard the arguments of the parties at length. Shri Shankarrao Borgaonkar, the learned Counsel on behalf of the plaintiffs, states that the question of the validity or otherwise of Section 13 of the said Act does not arise at all in this case. His contention is mainly that even conceding that Section 13 is valid, is not applicable to the facts of this case. Raja Bahadur Bishweshwarnath, the learned Advocate on behalf of the defendants argues and submits that Section 13 has been held valid in Kamal Yar Jung's case, vide —'Ahmedunissa Begum v. State of Hyderabad', ILR (1952) Hyd 595 (F.B.). In view of these statements of the learned Counsel of the parties, we have to consider whether the reference in question has been properly made, especially after the amended Section 113 of the Civil Procedure Code, as amended by Act No. 24 of 1951, has come into force. The wording of the proviso to Section 113 of the C. P. C. is as follows:

"Provided that where the court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, 'the determination of which is necessary for the disposal of' the case, and is of opinion that such Act, Ordinance or Regulation or provision is invalid or inoperative, has not been so declared by the High Court, to which the court is subordinate, or by the Supreme Court, the court shall state a case, setting out its opinion and the reasons therefor and refer the same for the opinion of the High Court."

In view of the proviso, several questions arise. The first question to be determined is whether the determination of the validity of the Act in question or the Section thereof in question is necessary for the disposal of the case. In view of the statements of the parties, above referred to, it is clear that the determination of the question is not necessary. This reference is, therefore, infructuous. Moreover under the said Section of C. P. C. the Court should also express its opinion on the question whether in the opinion of the Court, the Act in question is invalid or inoperative. We find from the reference that the lower court has not expressed any opinion in this regard. We are, therefore, of the view that the reference has not been properly made, it does not arise and that it should be rejected. The reference is rejected as above. We make no order as to costs.

A/D.R.R. Reference rejected.

A. I. R. 1953 HYDERABAD 53
(Vol. 40, C. N. 22)

JAGANMOHAN REDDY J.

Maruthi, Appellant v. Saheb Rao and others, Respondents.

Second Appeal No. 95/2 of 1951, D/- 31-7-1952.

Civil P. C. (1908) O. 21 R. 15 and R. 2 — Joint decree-holder — Discharge by one — Does not affect other decree-holder's right to execute decree.

In the case of a joint decree obtained by two or more decree-holders, discharge by one of them does not discharge the decree fully as against the other joint decree-holders. Any statement by the decree-holder or the finding of the Court that such decree-holder has received the decretal property will affect the share of that decree-holder only and will not bind the other decree-holders or bar their right to enforce the decree.

This principle applies also to the cases where there has been a payment under O. 21 R. 2, Civil P.C. Unreported case in File No. 25/2 of 1343 F (Hyd) Foll; AIR 1935 Nag 25 and AIR 1945 Nag 95 Rel. on. AIR 1927 Pat 329 and 36 Mad 544 disting. 28 Deccan LR 995 Diss. (Para 5)

Anno: Civil P.C., O. 21 R. 15 N. 8; O. 21 R. 2 N. 10.

Laxminarayan Somani, for Appellant; Govind Rao Ardhapurkar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('06) 28 All 252 4
File No. 25/2 of 1343-F (Hyd) 5
28 Deccan L R 995 2, 5
('13) 36 Mad 544: (19 Ind Cas 12) 2, 4
('16) 31 Mad L J 93: (AIR 1917 Mad 988) 4
('24) 47 Mad L J 498: (AIR 1925 Mad 230 (2)) 4
('24) 47 Mad 920: (AIR 1925 Mad 78) 4
('34) 57 Mad 696: (AIR 1934 Mad 330) 4
('35) AIR 1935 Nag 25: (31 Nag L R 271) 1, 3, 4
('45) AIR 1945 Nag 95: (ILR (1945) Nag 242) 4
('27) AIR 1927 Pat 329: (103 Ind Cas 75) 3, 4

JUDGMENT:— This is a second appeal against the judgment of the first appellate Court holding that the discharge by one of the joint decree-holders, viz., Lakshmibai, does not discharge the decree fully as against the other joint decree-holder, Sahib Rao, and that any statement of Lakshmibai or finding of the lower Court with respect to Lakshmibai having received the decretal property will be deemed only to affect her share in it and will not bind the right of the other decree-holder Sahib Rao to enforce in execution the decree. The facts as appear from the records are that Lakshmibai had claimed as maintenance for certain produce annually against her husband's brother, Sahib Rao. In order to settle this disptue both parties chose three Patel Patwaris of the village, viz., Narayan, Jujja and Maruthi, with whom Sahib Rao deposited the produce of his land claimed by Laxmibai pending settlement of the dispute between them. After the produce was deposited, it is alleged there was a settlement between Sahib Rao and Lakshmibai. Thereafter both Sahib Rao and Lakshmibai jointly filed a suit against these three Patel Patwaris for the recovery of the produce deposited with them which was decreed ex parte in their favour. Saheb Rao filed an execution petition and the judgment-debtors contended that they had handed over the grain to Lakshmibai one of the decree-holders in accordance with the compromise. Lakshmibai also filed an application on 13th Azur 1359-F. to the same effect. The question whether the grain was handed over was gone into by the execution Court which after taking evidence held that the grain was handed over to Lakshmibai. The other decree-holder denied having received the produce. The original Court after giving a finding that Lakshmibai had received the grain, held that if one of the joint decree-holders receives the decretal property, the decree against both of them is deemed to have been satisfied. The first appellate Court has, as already observed, held that this was not so, and basing its reasons on 'AIR 1935 Nag. 25', in the case of — 'Ramakrishna v. Shanker', had come to the conclusion that the decree in so far as Lakshmibai was concerned was satisfied, but to the extent of the half

share of Sahib Rao there has been no satisfaction and the decree can be executed.

(2) Learned Advocate for the appellant argues on the authority of —'Shiddeshwar Rao v. Sham Rao, 28 Deccan L. R. 995', and —'Annapurnamma v. Akkayya, 36 Mad., 544', that where there is a joint decree and it is shown that the decree was for the benefit of one of them, who has received the decretal amount or property, the decree should be deemed to have been discharged as against both the decree-holders. Where there is a decree passed in favour of several persons jointly any one or more of such persons may unless the decree imposes any condition to the contrary, apply for execution of the whole decree for the benefit of them all under Section 272 of the Hyderabad Civil Procedure Code corresponding to Order 21, Rule 15 and if the Court under Sub-Section (2) thereof sees sufficient cause for the decree to be executed on the sole application of one of the joint decree-holders it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. It is therefore clear that this principle will also be binding in cases where there has been a payment out of Court and where the Court is asked to certify such payments under Section 249 of the Hyderabad Civil Procedure Code coresponding to Order 21, Rule 2 of the Code.

(3) The contention of the learned Advocate for the appellant in my view, both on principle and authority is untenable, because as observed in — 'Ramkrishna v. Shanker', by Grille C. J. AIR 1935 Nag, 25 at p. 27,

> "to hold that a payment by a judgment-debtor to one of several decree-holders is a valid discharge against all would be to render the latter part of Order 21, Rule 15, which gives the Court power on the application of one of several joint decree-holders for execution to make provision for the protection of the others entirely nugatory".

The case of — 'Jhakhri Gope v. Phagu Mahto', AIR 1927, Pat 329 in which Ross, J. had held otherwise namely that "under Order 21, Rule 15, any one of joint decree-holders can execute the whole decree", is distinguishable on the facts of the case inasmuch as one of the joint decree-holders to whom satisfaction was made by the judgment-debtor was the father and manager of the joint family of which the other joint decree-holder was a member and son. At the time when the decree was obtained there was no partition of the joint family and it was only after the decree that a partition is alleged to have taken place. Viewing the judgment in that light, the acceptance of the decretal amount by one of the decree-holders who was the manager of the joint family was held to have satisfied the entire decree.

(4) In — 'Ramakrishna v. Shanker', (AIR 1935 Nag 25) cited above, Grille C. J. observed that if the rule of law as stated in — 'Jhakhri Gope v. Phagu Mahto', AIR 1927, Pat 329,

> "is to be interpreted as being of universal application and not applicable only to the facts of the case as enunciated, I must respectfully record my disagreement since the dictum appears to ignore the provision in Order 21, Rule 15, Civil Procedure Code, particularly enacted for the benefit of joint decree-holders who have taken no part in an application for execution".

In the case of — 'Mûthuswamy Iyer v. Narasimha Iyer', 57 Mad 696, Sundaramchetty and Pakenham Walsh JJ. after discussing with approval the case of — 'Laxmandas Chaturbhujdas', 28 All 252; — 'Lakshmanan Chetty v. Subbiahchetty', 47 Mad 920; — Md. Silar Sahib & Co. v. Nabi Khan Sahib', 31 Mad. L. J. 93 and — 'Pitchakkuttiya Pillai v. Doraiswami Mooppannar', 47 Mad L.J. 498, held that

> "a decree standing in the name of a firm must nevertheless be treated as a decree in favour of all the partners jointly even for the purposes of Order 21, Rule 15 of the Code of Civil Procedure. One of several joint decree-holders though they are partners cannot, by reason of the provisions of Rules 1 and 15 of Order 21 of the Code, give a valid discharge by receiving the decree amount out of Court without the concurrence of the other decree-holders".

A later case of the Nagpur High Court in — 'Fatima Bi v. Mt. Tuka Bai', AIR 1945 Nag 95 also laid down that a payment made to one decree-holder is not binding on the other decree-holders. It was observed by Grille, C. J. and Sen J. at page 97 that "after a decree has been passed in favour of certain persons they have certain rights. They cannot be defeated by the conduct of other decree-holders". The case of — Annapurnamma v. Akkayya', 36 Mad 544 referred to by the appellant's Advocate is not applicable to the facts of this case, because that was a case under Negotiable Instruments Act where one of the joint payees of Negotiable Instruments gave valid discharge of the entire debt without the concurrence of the other payees and this was held by the Full Bench (C. J. dissenting) that it validly discharged the debt. The decision of the case was based entirely under the provisions of the Negotiable Instruments Act and the Contract Act, and in my view inapplicable to the point under consideration.

(5) In the case of — 'Shiddeshwar Rao v. Sham Rao', 28 Deccan L. R. 995 a bench of this High Court consisting of Jeewan Yar Jung and Abu Syed Mirza, JJ. held dissenting with the decision of the Bench of this High Court in the unreported case of — 'Kaduri Nagiah v. Dowlatabad Buchiah etc. File No. 25/2 of 1343-F (Hyd) that as far as the execution of a decree is concerned the relinquishment by one decree-holder of the decretal debt puts an end to the decree, particularly where the decree is a joint decree. No reason whatever has been given for dissenting with the decision in — 'Kaduri Nagiah v. Dowlatabad Buchiah',. I have therefore, sent for that file and it appears on the similar facts as arise in the case under consideration that Mirza Yar Jung C. J. and Siddiq Yar Jung J. after a full discussion of the question involved held that where there is a joint decree in favour of two or more persons, one decree-holder cannot have a decree executed only for his benefit. If he has to execute such a decree for his sole benefit he should proceed under Section 272 of the Hyderabad Civil Procedure Code, and that if he wishes to apply for execution he should do so not for himself but for the benefit of the other joint decree-holders as provided in the said section. They observed that if this is the law in execution proceedings, the decree-holder by settling out of court proceed in a manner so as to adversely affect the rights of the other joint decree-holder which he has under the latter part of Section 272 of the Civil Procedure Code. In view of what has been observed above by me and the weight of the authority not only of the various Courts in India but also of the unreported judgment of a Bench of this High Court referred to above, I hold that the judgment of the appellate Court is correct and the appeal accordingly will be dismissed with costs.

A/D.R.R. Appeal dismissed.

A. I. R. 1953 HYDERABAD 55
(Vol. 40, C. N. 23)

JAGANMOHAN REDDY J.

Mohammad Ismail, Petitioner v. Sakina Begum, Respondent.

Revn. Petition No. 303 of 1951-52, D/- 11-8-1952.

Civil P.C. (1908) Ss. 10 and 151 — Suit for arrears of rent pending in Civil Court — Application by tenant for determination of fair rent to Rent Controller — Civil suit should not be stayed — (Houses and Rents — Hyderabad House Rent Control Order (1353 F.) S. 6).

Where after the institution of a suit for recovery of arrears of rent, the tenant files an application to the Rent Controller for fixation of a fair rent, the tenant cannot ask the civil Court to stay the suit for rent till the decision by Rent Controller, either under S. 10 or under its inherent powers under S. 151 Civil P.C. AIR 1952 Pat 231 Rel. on.; AIR 1950 Madh-B 8 Dist. Revn. Petn. No. 125/4 of 1951 (Hyd) Ref.

The proceedings for fixation of fair rent before the Rent Controller are not covered by the provisions of S. 10, Civil P. C. Although "Court" has not been defined in the Code and might include a tribunal such as is constituted under the Rent Control Law, yet before a suit can be stayed under S. 10 the subject-matter of the suit which is being adjudicated, the relief prayed for, and the power to grant it must substantially be the same in the proceedings before the Rent Controller and the suit in the civil Court. Further, the suit which is sought to be stayed must be filed in the same court or in any other court in India having jurisdiction to grant the relief. Even if the proceedings before the Rent Controller can be deemed to be a suit it cannot be said that the subject-matter of the proceedings before the Rent Controller is before the same court or any other court in India having jurisdiction to grant the relief claimed, in that the Rent Controller has no power under the Rent Control Law to grant a decree for rent. All that the Rent Controller can do is to fix a fair rent and leave it to the tenant either to have the excess adjusted or claim the same by way of a suit. In these circumstances, no suit can be stayed under Sec. 10. (Paras 3 & 4)

If the tenant has allowed arrears of rent to accrue for such a considerable time to force the landlord to have recourse to a suit for the recovery thereof, he cannot, after the suit is filed, invoke the inherent power of the Court by asking for a stay on the ground that he has filed an application for fixation of fair rent before the Rent Controller. There is no justification for allowing the petitioner to utilise his own laches to the disadvantage of the respondent by putting him to unnecessary expense and then asking the Court to exercise its inherent power under S. 151, Civil P.C. as being necessary for the ends of justice. (Paras 5 & 6)

In any case, after a decree has been granted, there is no valid reason for setting it aside, merely on the ground that the suit was not stayed. (Para 7)

Anno: C.P.C., S. 10 N. 2, 4, 7, 11; S. 151 N. 2.

Ahmed Ali Khan, for Petitioner; Md. Azizullah Khan, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('89) 11 All 148: (1889 All WN 42) 4
('51) Revn. Petn. No. 125/4 of 1951, D/- 5-10-1951 (Hyd) 2
('50) AIR 1950 Madh-B 8 1, 4, 5
('51) 6 Dom LR (Pat) 167: (AIR 1952 Pat 231) 2, 5
('35) AIR 1935 Sind 228: (159 Ind Cas 824) 3

ORDER: In this revision the only point that has been pressed is that the Small Causes Court ought to have stayed the suit and not passed a decree when it was brought to its notice that an application for fixation of fair rent was pending before the Rent Controller. The lower court rejected the contention of the applicant on the ground that, since it was admitted by the petitioner that rent was due for sixteen months from July, 1950 to October, 1951, there was no necessity to await the decision of the Rent Controller. The petitioner had taken the leased premises from the respondent on a rent of Rs. 45/- per month with respect to which he had, after the suit was filed in the Small Causes Court, applied to the Rent Controller for fixation of fair rent. The learned Advocate for the revision-petitioner argues on the authority of — 'Dulhanmal Rizumal v. Abdul Kadar', AIR 1950 Madh-B 8, that the Small Causes Court ought to have stayed the suit. In the aforesaid case it was decided that in a suit for recovery of rent in which the quantum of rent recoverable by the landlord is in contest and

> "where a special tribunal is created for the determination of the question the jurisdiction of Civil Courts must be deemed to have been taken away pro tanto, while such tribunal exists; and as the determination of this question is not within the jurisdiction of the Civil Court, there cannot be a 'formal expression of an adjudication which so far as the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit' ".

(2) This judgment was followed by my learned brother Dr. Siadat Ali Khan in an unreported judgment in the case of — 'Mohd. Fakruddin v. Syed Roshan Ali', Revn. Petn. No. 125/4 of 1951 dated the 5th October, 1951 in which he directed the Small Causes Court to write and enforce the judgment after a reasonable rent is fixed by the Rent Controller. As against this judgment there is a judgment of the Patna High Court in — 'P. C. Gangulee v. Smt. Kadhuri Devi', 6 Dom LR (Pat) 167, where it was held that there is no warrant for the proposition that because a proceeding for the fixation of fair rent is pending before the Controller, the suit pending before the Munsif for arrears of rent should be stayed.

(3) It may here be pointed out that under Section 6 of the Hyderabad Rent Control Order any claim for difference due to the tenant after fixation of fair rent can be enforced as against the landlord, either by adjustment by the landlord according to the tenant's will or by a claim for the payment of the excess paid to him in accordance with the fair rent fixed. There is, in my view, a great difference in proceedings under the Rent Control Order for fixation of fair rent and a suit in a Civil Court of competent jurisdiction for recovery of rent due. The Rent Controller has no jurisdiction to give a rent decree. That is the function of the Civil Court. In these circumstances, there appears to be no valid

ground for staying the proceedings of a Civil Court until adjudication by a rent control tribunal. The proceedings for fixation of fair rent before the Rent Controller are, therefore, not covered by the provisions of S. 10 of the Code of Civil Procedure. Although "Court" has not been defined in the Code of Civil Procedure and might include a tribunal such as is constituted under the Rent Control Law, yet before a suit can be stayed under S. 10 of the Code of Civil Procedure, the subject-matter of the suit which is being adjudicated, the relief prayed for, and the power to grant it must substantially be the same in the proceedings before the Rent Controller and the suit in the Small Causes Court. Further, the suit which is sought to be stayed must be filed in the same court or in any other court in India having jurisdiction to grant the relief before it can be stayed under the said section. The section also does not apply to a case where one of the two proceedings is not a suit. In — 'Grahams Trading Co. (India) Ltd. v. Chandulal Parmanand', AIR 1935 Sind 228 at p. 231, where objections to an award were preferred in a court, it was held that no application under Section 10 of the Code of Civil Procedure for stay of proceedings lies on the ground that a suit in respect of the same subject-matter has been instituted in another court by the applicant.

(4) The principle upon which a subsequent suit is stayed under Sec. 10 of the Code of Civil Procedure (corresponding to Section 12 of the Code of Civil Procedure, 1877) is, as observed by Mahmood J. in the case of — 'Balkishan v. Kishan Lal', 11 All 148 (FB) at page 155, as follows:

> "The object of the rule contained in S. 12 of the Code is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more courts in respect of 'the same relief'."

It may be observed here that under Section 12 of the old Code it was essential that both the suits should have prayed for the same relief. Though, under Section 10 of the present Code, identity of relief claimed for is not now necessary, still it is necessary that the entire subject matter of the two suits should be the same. Even if the proceedings before the Rent Controller can be deemed to be a suit it cannot be said that the subject-matter of the proceedings before the Rent Controller is before the same court or any other court in India having jurisdiction to grant the relief claimed, in that the Rent Controller has no power under the Rent Control Law to grant a decree for rent. All that the Rent Controller can do is to fix a fair rent and leave it to the tenant either to have the excess adjusted or claim the same by way of a suit. In these circumstances, no suit can be stayed under Sec. 10 of the Code of Civil Procedure. The cases cited by Rege J. in — 'Dulhanmal Rizumal v. Abdur Kadar', AIR 1950 Madh-B 8. are with respect to a case where either the suit could have been stayed under Section 10 of the Code of Civil Procedure or where the High Court in exercise of its inherent powers under Section 151 of the Code of Civil Procedure stayed the suit before the proceedings in the lower court concluded in a decree.

(5) In the Madhya Bharat case cited above — 'Dulhanmal Rizumal v. Abdul Kadar', AIR 1950 Madh-B 8 the applications were made to the Rent Controller prior to the institution of the suit for the agreed rent. In the Patna case — 'P. C. Gangulee v. Smt. Kadhuri Devi', 6 Dom LR (Pat) 167, the suit was filed after proceedings for eviction had been commenced and on the same day the application for fair rent was presented before the Rent Controller. It appears to me that there is a distinction between a case where the proceedings before the Rent Controller for fixation of fair rent were taken after a suit was filed and a case where the suit was filed after the fair rent proceedings were already pending before the Rent Control Tribunal. Rege J. in the Madhya Bharat case has made it clear that where another tribunal was seized of the matter prior to the institution of the rent suit it should have been stayed pending the determination of the fair rent. The Ratio Decidendi in both the cases was not based on a consideration of Section 10 of the Code of Civil Procedure but appears to have been grounded in the Court's inherent power to stay a suit if the ends of justice required it. Even on that basis, in my view, if the tenant allowed arrears of rent to accrue for such a considerable time as to force the landlord to have recourse to a suit for the recovery thereof, he cannot, after the suit is filed, invoke the inherent power of the Court by asking for a stay on the ground that he has filed an application for fixation of fair rent before the Rent Controller.

(6) In this case, after the suit was filed on 8th November 1951, in the Small Causes Court, the applicant filed a petition for fair rent to be fixed before the Rent Controller on 20th December 1951. There is, in my view, no justification for allowing the petitioner to utilise his own laches to the disadvantage of the respondent by putting him to unnecessary expense and then asking the court to exercise its inherent power under Section 151 of the Code of Civil Procedure as being necessary for the ends of justice.

(7) In any case, after a decree has been granted, there is no valid reason for setting it aside, merely on the ground that the suit was not stayed. It would have been perhaps a different matter had a revision been filed immediately after the lower court refused to stay the suit, in which case having regard to the facts in each case, it may be considered in the interests of justice to stay the suit in exercise of the inherent powers under Section 151 of the Code of Civil Procedure; but that is not the case here.

(8) In the result, the revision is dismissed with costs.

B/K.S. Revision dismissed.

A. I. R. 1953 HYDERABAD 56
(Vol. 40, C. N. 24)

PALNITKAR C. J. AND A. SRINIVASACHARI, J.

Harikishen s/o Ramgopal, Appellant; v. Ramchander s/o Ranganna and others, Respondents.

Civil Misc. 183/5 No. 526/135/2 of 1951-52, D/- 19-9-1952.

Constitution of India (1950), Art. 226 — Certiorari — Error apparent on face of record — Impugned orders set aside.

A finding that a point was proved on the ground that there was an admission is an error apparent on the face of the record when the record only shows a denial of that point by the party who is said to have admitted it. An order based on such a finding must be set aside. (Para 1)

Anno. Civ. P. C. App. III, Const. of India, Art. 226 N 13.

Bhimsenachari Ashrit and Gopalrao Ekbote, for Appellant; R. Vaidyanathan, for Respondent No. 1

ORDER:— This is an application for the issue of a Writ of Certiorari in a rent control matter. After going through the record and hearing the arguments of the learned Advocates of the parties, we are of the opinion that the rent Controller and the appellate authority have palpably erred in holding that the petitioner, being respondent 1 before the rent controller had admitted the allegations of the first party before the Rent Controller namely the owner of the house. The allegation of the owner of the house was that respondent 2 before the rent controller, Srikishen was a Goldsmith to whom the tenant, Harikishen had sublet the house in question. There was no counter before the rent controller. On 2-8-1951 the rent controller recorded a statement of the parties. The statement of respondent 1 Harikishen, the tenant, was that he did not sub-let the house to respondent 2, the alleged sub-tenant; that he was a goldsmith carrying on his profession in the madgi. The petitioner alleged that the said respondent was a sub-tenant and was paying Rs. 15/- as rent. The tenant denied this fact. This is all the record before the Rent Controller. On this record the rent Controller came to the conclusion that the statement of the respondent was sufficient to hold that the house was sublet. The appellate authority also dismissed the appeal on the ground that the statement of the tenant amounted to an admission that he had sub-let the house to the goldsmith Shrikishen. After actually going through the record it is clear that there has been no such admission either by the so-called sub-tenant or the tenant. On the contrary the tenant denied the allegation that he had sub-let the premises. Under the circumstances, we are of the opinion that there was no material before the Rent Controller or the appellate authority to hold that the factum of sub-tenancy was proved. It is an error apparent on the face of the record. We therefore set aside the orders of the lower two tribunals, remand the case to the Rent Controller and direct that the case be tried de novo and disposed of it according to law. We allow costs to the petitioner. Advocate's fee Rs. 25/-.

A/M.K.S. Petition allowed.

A.I.R. 1953 HYDERABAD 57
(Vol. 40, C. N. 25)

MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

Ramgopal Shrikishen, Warangal, Petitioner v. Commissioner, E. P. T., Hyderabad, Respondent.

Ref. No. 14/C of 1359 Fasli, D/- 31-7-1952.

Income Tax Act (1922) S. 13 — Rejection of accounts and assessment at flat rate — Assessee should be allowed to rebut the rate fixed — Excess Profits Tax Act (1940) S. 21.

The question whether the account books are reliable or not is a question of fact to be determined solely by the Income-tax Officer. If, therefore, it is once decided by the Income-tax Officer that the accounts are unreliable, his finding cannot be disturbed unless it is altogether capricious and unjudicial, merely on the ground that the material in support of those reasons is meagre or insufficient. Thus though the question of the Income-tax Officer being unable to compute the income, profits and gains from the account books of the assessee is a question of a fact, the fixation of flat rate after the rejection of accounts should be upon some reasonable considerations and the assessee should be given an opportunity to rebut by evidence the basis which forms the fixation of the flat rate by the Income-tax Officer. AIR 1930 Pat 81 SB; AIR 1933 PC 103 followed. Case law ref. (Paras 1, 2)

Anno: Income Tax Act, S. 13 N. 6, 7, 8.

N. Narsimha Iyengar, for Petitioner; C. Ranga Chari, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('33) 12 Pat 318: 60 Ind App 146: (AIR 1933 PC 103) 2
('33) 60 Ind App 325: (AIR 1933 PC 198(2) 3
('38) 1938 ITR 521: (AIR 1938 PC 232) 1
('44) 1944-12 ITR 441: (AIR 1945 Cal 62) 3
1355 Nazair-e-Osmania, 691 3
1355 Nazair-e-Osmania 512 3
('34) 1934-2 ITR 305: (AIR 1934 Lah 876) 1
('37) 5 ITR 464: (AIR 1937 Lah 721) 1
('44) 1944-12 ITR 393: (AIR 1944 Lah 353 (2) FB) 3
('30) 9 Pat 240: (AIR 1930 Pat 81 SB) 2, 3

JAGANMOHAN REDDY J. The petitioners are a firm consisting of two partners carrying on dealings in ground-nut, oils etc. in Nizamabad, Warangal and Sedam and the business of ginning and pressing of cotton in Bhainsa. They have also a rice mill at Bodhan and ground-nut and cotton business at Madnur. The petitioners had returned a profit of H. S. Rs. 2,73,007/- and showed an excess profit of Rs. 1,08,840/- for the fourth chargeable as counting period (C.A.). and an excess profit of H. S. Rs. 28,636/- for the fifth C.A.P. The Excess Profits Tax Officer computed profits for the fourth C.A.P. at H. S. Rs. 3,91,646/- and assessed excess profits accordingly, but on appeal the Deputy Commissioner granted certain reliefs & reduced the tax and deposit to the extent of Rs. 17,538/-. With respect to the fifth C.A.P. the Excess Profits Tax Officer determined the profits at Rs. 1,26,971/- & assessed the tax at Rs. 50,972/- but the Deputy Commissioner on appeal granted some reliefs & reduced the tax & deposit to the extent of Rs. 18,984/-. On an application under Section 20 of the Excess Profits Tax Regulation, the Commissioner maintained these findings of the Deputy Commissioner with respect to both the fourth and fifth C.A.Ps. and under sub-section (2) of Section 48 of the said Regulation refused to state a case on the points raised in the petition of the assessee on the ground that none of the points involved a question of law. With respect to one of the points in the fifth C.A.P., he was of the opinion that the matter was concluded by a decision of the Privy Council, reported in — 'Commr. of Income Tax, Bombay Presidency & Aden v. M/s. Khem Chand-Ramdas', 1938 ITR 521 (P.C.). As against this order the assessees have filed separate petitions for the fourth and fifth C.A.Ps. under sub-section (3) of Section 48 for directing the Commissioner to state a case. The questions upon which they pray for such direction are as follows:

IV C.A.P.

"Whether the basis of yield of ground-nut oil and cake formulated by the E.P.T. Officer and upheld by the Deputy Nazim, E.P.T. is correct and applicable to this case and whether the said basis is warranted by any evidence on record that was put to the assesses and their explanation obtained?"

V C. A. P.

1. "Whether the basis of yield of ground-nut oil and cake formulated by the E.P.T. Officer & upheld by the Deputy Nazim and Nazim E.P.T. is correct and applicable to this case and whether the said basis is warranted by any evidence on record that was put to the assessees and their explanation obtained?
2. "Whether the finding that the loss in forward and hedging transactions done by Seram Branch at Bombay did not accrue or arise in the Dominions is maintainable in view of the fact that there was no separate business firm at Bombay and such transactions were done and controlled from the Dominions?

It may be observed here that during the course of the argument the petitioner's learned Advocate indicated that he did not intend to press the second question in the fifth C.A.P., as such we do not propose to consider that question. This leaves the first question in the fourth and fifth C.A.Ps., which is common and concerns the fixation of flat rate of yield of oil. There can be no doubt that the findings of the Excess Profits Tax Officer and the Deputy Commissioner with respect to the computation of the income, profits and gains from the books furnished by the assessee are findings of fact, and in our view the Income Tax authorities had sufficient material upon which they could have come to the conclusion that the income, profits and gains could not be computed from the books of account of the assessees. The only question, therefore, is whether the flat rate of 42.5 per cent. fixed by the Deputy Commissioner & maintained by the Commissioner raises any question of law. Generally, whether the Income-tax authorities are not satisfied with the correctness or completeness of the assessee's accounts, they can, taking into consideration the state of affairs and the fact that the yield was low compared to other firms doing similar business, fix a flat rate. The burden of displacing the estimate is upon the assessee.

In — 'Pioneer Sports Ltd., Sialkot v. Commissioner of Income Tax' Punjab & N.W.F.P. (1934) 2 ITR 305 (Lah) where it appeared that the company never used to keep a stock register and the refusal of the Income Tax Officer to accept the accounts was not due to any error in the method of accounting, but because he considered the rate of profits shown to be unreasonably low. it was held that under those circumstances the Income Tax Officer was not justified in making an assessment under the proviso to Section 13 of the Income Tax Act. It was further held that it was a question of law in which the court is entitled to enquire whether there was any evidence on which the Income Tax Officer could have come to the decision that the method of accounting is such that the gains could not be computed except by the arbitrary method contemplated by the proviso. It was also held that the mere fact that the company chose to charge a low rate of profit was no reason for the Income-Tax Officer to reject the total profits, nor was the absence of a stock register, when admittedly the company had never used a stock register a valid reason for rejecting the account.

In — 'Gangaram Balmokand v. Commissioner of Income Tax', Punjab, 5 ITR 464 (Lah), another bench of the same High Court observed at page 478, that the above judgment proceeded on a wrong basis when it criticises adversely the reason of the Income-Tax Officer for rejecting the accounts and held that the question whether the account books are reliable or not is a question of fact to be determined solely by the Income Tax Officer. If, therefore, it is once decided by the Income-Tax Officer that the accounts are unreliable, his finding cannot be disturbed unless it is altogether capricious and unjudicial, merely on the ground that the material in support of those reasons is meagre or insufficient.

(2) Din Mohammad J. in the above case delivered the main judgment with which Coldstream J. agreed. He observed at page 489 with respect to the question of assessing at a flat rate under the proviso to Section 13 of the Income Tax Act, as follows:

"The principal point for consideration before us is, whether the present assessment based on estimate is justified. ..... It only remains to consider whether the estimate is fair. In doing so, we have to examine the basis on which and the manner in which this estimate has been made. The Income-Tax Officer has taken into consideration the state of affairs in general and the fact that the firm has a large business. The firm was given ample opportunity to support its version but it failed to produce any material on the record to enable the Income-Tax Officer to arrive at a definite figure. In these circumstances, as remarked by their Lordships of the Privy Council, in — 'Commr of Income Tax, B&O v. Kameshwar Singh of Darbhanga', 12 Pat 318, the onus lay on the firm to displace the estimate."

It appears from the above decision though (as I have already observed) the question of the Income-Tax Officer being unable to compute the income, profits and gains from the account books of the assessee is a question of fact, the fixation of flat rate also should be upon some reasonable considerations and that the assessee should be given an opportunity to rebut by evidence the basis which forms the fixation of the flat rate by the Income-Tax Officer. The observations of Sir Terrel C. J. in the — 'Maharajadhiraja of Dharbhanga v. Commr. of Income Tax', in 9 pat 240 (S.B.) at pages 270 and 271 with respect to the fixation of flat rate were approved by their Lordships of the Privy Council in appeal from the above judgment in 60 Ind App. 146 (P.C.) at pages 159 and 160. Their Lordships stated:

"In the High Court (Terrel C. J.) after pointing out that the question is one of quantum only says, 'Learned Counsel for the assessee has argued that the officer is not entitled to make a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative. The other judges concurred and their Lordships also agree, adding only that if the assessee wished to displace the taxing officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do".

(3) In — 'Ferozshah v. Commissioner of Income Tax, Punjab and N. W. F. P. Province Lahore', 60 Ind App 325 (P.C.), where the assessee objected to a flat rate of 32½ percent fixed by the Income-Tax Officer taking into consideration that no profit and loss account had been prepared by the

assessee, and the rate of profit could not be deduced from his books, their Lordships dealing with the order of the High Court observed at page 332 as follows:

"As to the assessment at a flat rate of profit to 32½ percent, they pointed out that no objection had been taken by the appellant to the same assessment for the two preceding years, 1924-5- 1925-6, and it had not been shown that the Income-Tax Officer was not well warranted in maintaining the same percentage in respect of the year of assessment. The question was one of the fact for him to decide".

In both these cases, the observations of their Lordships proceeded on the basis that the assessee was given an opportunity to rebut by evidence the fixation of flat rate by the Income-Tax authorities. It appears to us that after the rejection of accounts and before an assessment under the proviso to sub-section 13 fixing a flat rate is made, the assessee should be afforded an opportunity to rebut by evidence the rate to be fixed. It is argued that the yield of oil depends on several factors, namely, that it differs from locality to locality, on the quality of the ground-nuts crushed into oil and the make and condition of the machinery & such other considerations as have been enumerated in his petition. The Advocate for the petitioners submits that he should have been given an opportunity to rebut by evidence that the basis on which the flat rate fixed was not justified. In — 'Gurmukh Singh v. Commissioner of Income-Tax, Lahore', 1944-12 I.T.R. 393 (Lah) —'Lal Mohan Krishna Lal v. Commissioner of Income Tax, Bengal', 1944-12 ITR 441 (Cal) —'Mohanlal v. Commissioner', E.P.T., 1355 Nazair-e-Osmania 691 and Saith Mal v. Commissioner', E.P.T. 1355 Nazair-e-Osmania 512 the Lahore, the Calcutta & the Hyderabad High Court have held that where the Income-tax Officer proposed to make an estimate in disregard of the accounts or other materials produced by the assessee, though he is entitled to rely on materials gathered from other sources, natural justice demands that he should draw the assessee's attention to it before making the order and give him an opportunity to adduce material in rebuttal. These observations are in consonance with the observations of the Privy Council in Maharaja of Darbhanga's case, '(12 Pat 318 P.C.), and Ferozshah's case referred to above.

(4) The question in this case, therefore, would be whether the assessee was given an opportunity to rebut the basis of the fixation of the flat rate. On a persual of the orders of the Excess Profits Tax Officer and the Deputy Commissioner, it appears to us that the assessee's admitted out-turn of 41.0 percent of oil at Warangal, 40.4 percent at Nizamabad & 41.9 percent at Seram were held to be inadmissible in view of the fact that these figures were considerably less than what has been shown by the other traders in similar business which was between 43 and 45 percent. The Excess Profits Tax Officer observed that "even supposing and calculating upon the quantity of ground-nut issued for decorticating that there was no quantity of oil on the date, the percentage of yield works out to 41.8 percent", and since the opening and closing stocks are merely approximate, he fixed the yield at 43 percent. There is no mention in the order that the assessee was given any opportunity to rebut by evidence this conclusion. The Deputy Commissioner observed that the yield percentage shown by the assessee ranges from 40.8 percent to 42.8 percent in the Nizamabad factory & he has given no explanation as to why the percentage of yield come down to 41.4 percent in this branch during the year under appeal. Though the Deputy Commissioner admits that the machinery of the assessee is not in the same condition so as to give results similar to those in the previous years, he utilises this fact only to reduce the maximum of 42.6 percent of the previous years to that of 42.5 percent. There is nothing in his order to show that the assessee was given an opportunity by the Excess Profits Tax Officer to lead evidence to rebut the flat rate fixed by him, nor on what basis he fixed the maximum in the previous years, notwithstanding the fact that the machinery was not in the same condition as in the previous years. It is also not clear from the order whether 42.8 percent yield in the previous years was the yield immediately before the assessment years, nor does it disclose that he has taken the yield of oil in similar trades in Warangal and Sedam into consideration in arriving at the figure of 42.5 percent. Further, when the E.P.T. authorities had accepted the percentage of the yield of the assessee as disclosed by them for the first, second and third C.R.Ps., why similar percentage of yield of oil for the fourth and fifth C.A.Ps. has been rejected is also not evident. In these circumstances, what we have to consider is whether the Income Tax authorities exercised their judgment in arriving at the conclusion and did not act arbitrarily. This is a question of law for us to consider.

(5) For the aforesaid reasons, we think the Commissioner E.P.T. should state a case on the following question which is common to both the fourth and fifth C.A.Ps.

IV & V C. A. Ps.

"Whether the basis of yield of ground-nut oil and cake formulated by the E.P.T. Officer and upheld by the Deputy Nazim and Nazim, E.P.T., is correct and applicable to this case and whether the said basis is warranted by any evidence on record that was put to the assessees and their explanation obtained."

(6) In stating the case, the Commissioner will say what documents and materials were before him at the time when he considered the orders of the E.P.T. Officer and the Deputy Commissioner, and such documents will be annexed to the statement of the case. Time given four weeks. Four copies of the statement of the case and relevant documents will be submitted to the High Court and a copy thereof furnished to the assessees.

B/R.G.D. Petition allowed.

A. I. R. 1953 HYDERABAD 59
(Vol. 40, C. N. 26)

SIADAT ALI KHAN AND DESHPANDE JJ.

State of Hyderabad v. Ahmed Mohiuddin, Respondent.

Criminal Appeal No. 344 of 1951, D/- 26-9-1952.

(a) Constitution of India, Art. 166 — Memorandum of State appeal — Signature of Rajpramukh — Necessity of — (Criminal P. C. (1898) S. 417).

The signature of the Rajpramukh is not necessary under Art. 166 on the memorandum of a State appeal against acquittal; for, in such matters, the direction in that Article is only declaratory and not mandatory and, moreover, that Article refers to executive acts and the filing of an appeal is evidently a judicial and not an executive act. (Para 3)

Anno: Cr. P. C., S. 417 N. 4.

(b) Criminal P. C. (1898), S. 492(1) — Public Prosecutors appointed under sub-S. (1) — Number of Public Prosecutors for particular area.

Under S. 492 a Public Prosecutor who has not worked on the Original Side of the High Court can also be appointed. Further, the appointment of a number of Public Prosecutors for a local area cannot in any way be deemed to be objectionable; and evidently, the needs of the area would be the determining factor. (Para 3)
Anno: Cr. P. C., S. 492 N. 1.

Mohd. Mirza, Government Advocate, for the State; B. N. Chobey, for Respondent.

JUDGMENT: This is a State appeal against acquittal. The Chief City Magistrate, by judgment dated 30-12-1950, has acquitted the accused Ahmed Mohiuddin from a charge of criminal misappropriation under S. 339 of Asafia Penal Code. We have heard the arguments of the learned Advocate for the accused and the learned senior Government Advocate, Shri Mohd. Mirza. We record our opinion below.

(2) The facts alleged by the prosecution are that the accused borrowed from the complainant Sayeed a gold chain weighing a little more than six tolas and of the value of Rs. 400 some time in Ardibehisht 1356 F. stating that it was required for the marriage ceremony of his sister and with the undertaking that he would return it to the complainant within four or five days as soon as the function was over; that instead of returning it, he pledged it with P. W. 10, Sriram Bagirathlal and that as the offence of criminal misappropriation was committed, the accused should be punished for the same and the gold chain returned to the complainant. The prosecution has adduced ten witnesses and the defence 14. We have carefully considered the whole record and put down our opinion below.

(3) A preliminary objection is taken by the learned Advocate, Shri B. N. Chobey. He has argued that the appointment of Shri Gopalrao Tuljapurkar who has signed the memorandum of the State appeal against the acquittal is not valid, and that his signature is invalid in view of Art. 166 of the Constitution. He pointed out that Shri Gopalrao Tuljapurkar was appointed as a Public Prosecutor under S. 364, Hyderabad Criminal P.C. and notified in the Jareeda dated 11-2-1951 along with several other Public Prosecutors; that this is not correct as the appointment of a Public Prosecutor can only be for a local area and so many persons cannot be appointed for one area. We have carefully considered this argument and regret that we do not agree. We do not think that the signature of the Rajpramukh is necessary under Art. 166 of the Constitution, for, in such matters, the direction in that article is only declaratory and not mandatory and, moreover, that article refers to executive acts and the filing of an appeal is evidently a judicial and not an executive act. Hence the article is quite irrelevant.

Regarding the argument that as the Indian Criminal Procedure Code is in force now and under its S. 492 a Public Prosecutor can only be appointed who has worked on the Original Side of the High Court, we are of the opinion that a perusal of the section will show that there are alternatives in the section under which a Public Prosecutor who has not worked on the Original Side of the High Court can also be appointed. We do not think that the appointment of a number of Public Prosecutors for a local area can in any way be deemed to be objectionable; and evidently, the needs of the area would be the determining factor. Thus, we do not think that we can allow the preliminary objection and reject it.

(Their Lordships then considered the merits of the appeal and after considering the evidence dismissed the appeal.)

A/V.R.B. Appeal dismissed.

A. I. R. 1953 HYDERABAD 60
(Vol. 40, C. N. 27)

QAMAR HASSAN AND DESHPANDE JJ.

Narsappa, Petitioner v. State of Hyderabad. Ref. No. 769/6 of 1951-52, D/- 31-3-1952.

(a) Hyderabad Gambling Act (2 of 1305 F), S. 5 — Essential condition for framing charge — (Public Gambling Act (1867), S. 4).

Gambling per se is not an offence under the Act. It is only gambling in a common gaming house, as defined under the Act, that is made an offence under the section. Therefore, a charge cannot be framed under S. 5 unless the prosecution establishes by legal evidence that the accused were found playing or gaming in a common gaming house as defined in S. 3 of the Act. (Para 4)
Anno: Pub. Gam. Act, S. 4 N. 1.

(b) Hyderabad Gambling Act (2 of 1305 F), S. 7 — Proof of due search is necessary to invoke presumption — (Public Gambling Act (1867), S. 6).

The presumption under S. 7 can arise only where search is made in strict compliance with the provisions of S. 6 and if the search is not proved to have been duly made the presumption cannot arise. Therefore, there must be affirmative proof of a due search effected before the prosecution would be entitled to invoke the aid of the presumption. (Para 5)
Anno: Pub. Gam. Act, S. 7 N. 1.

(c) Hyderabad Gambling Act (2 of 1305 F), S. 7 — Presumption under S. 91, Hyderabad Evidence Act — Reliance upon, to support presumption under S. 7 of Act — (Public Gambling Act (1867), S. 6) — (Hyderabad Evidence Act S. 91) — (Evidence Act (1872), S. 114).

Where the search warrant issued is before the Court and is on the face of it regular the presumption under Section 91, Hyderabad Evidence Act arises and the Court may presume that the officer issuing the warrant has acted on credible information. It would follow therefrom that the presumption under S. 7 arise if as a result of the ensuing search the articles indicated in that section are found. But when the warrant is not produced and is not on the file of Court no such presumption can arise.

Further in a case where the entire proceeding which resulted in the issue of the warrant is before the Court it is unnecessary to rely on any presumption under S. 91, Hyderabad Evidence Act to support a presumption under S. 7. (Para 5)
Anno: Pub. Gam. Act, S. 6 N. 1; Evi. Act, S. 114 N. 29.

(d) Hyderabad Gambling Act (2 of 1305 F), S. 6 — Credible information — (Public Gambling Act (1867), S. 5).

The report of the police that a person has allowed gambling in his house is insufficient for the issue of a house search warrant because, in the words of S. 6, it is

not credible information that the house is used as a common gaming house. (Para 6)
Anno: Pub. Gam. Act, S. 5 N. 1.

(e) Hyderabad Gambling Act (2 of 1365 F), S. 7 — Scope — Strict interpretation is necessary — (Public Gambling Act (1867), S. 6).

The section authorises a presumption of guilt against the accused and is a departure from the principle of criminal jurisprudence, that an accused person is presumed to be innocent until the contrary is proved. Under the Act, the onus probandi is shifted from the accuser to accused who has to establish his innocence and therefore, it is necessary that S. 7 should be very strictly construed. (Para 7)
Anno: Pub. Gam. Act, S. 6 N. 1.

Lakshman Rao Ganoo, for Petitioner; Mohd. Mirza and Gopal Rao, Government Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('32) 34 Bom LR 1447: (AIR 1933 Bom 79: 34 Cri LJ 137) 5
('41) 192 Ind Cas 182: (AIR 1940 Cal 586: 42 Cri LJ 253) 6
('41) 195 Ind Cas 7: (AIR 1941 Cal 413: 42 Cri LJ 643) 6
('52) AIR 1952 Hyd 42: (1952 Cri LJ 347) 6
('46) AIR 1946 Lah 26: (47 Cri LJ 368 FB) 5
('45) 1945 Mad WN 771 (1): (AIR 1946 Mad 157: 47 Cri LJ 586) 6

ORDER: These are six references by the learned District Magistrate, Raichur, recommending that the charges framed against the petitioners under Section 5, Hyderabad Gambling Act (hereinafter referred to as the Act) be quashed and they be ordered to be discharged. In order to appreciate the point involved in these references, a few facts and some quotations in extenso need be mentioned and given. It appears that on 5th February, 1951, G. Sunkanna, Sub-Inspector in charge of Police Station at Lingsugur, submitted the following report to the Magistrate.

"I beg to submit that I received information that one Sultan Khan of Kasaivadi of Lingsugur allowed gambling with playing cards and money in his house and so his house was treated as one of the gaming houses for the public. I request the Honourable Court for issuing a house-search warrant for arresting the gamblers and to recover money and cards to maintain law and order."

(2) The Magistrate at Lingsugur passed the following order on the back of the report.

"This is a report of Sub-Inspector, Lingsugur, wherein it is stated and requested that Sultan Khan of Kasaivadi has allowed gambling in his house and now the gamblers are there. Believing this report, I order that a house-search warrant may be urgently issued in the name of the Sub-Inspector, Lingsugur, stating that he is authorised to search the house of Sultan Khan of Kasaivadi, Lingsugur town, and take necessary (action) against him."

(3) In pursuance of this order, a warrant was despatched with a covering letter No. 204 dated 5th February 1951. The Sub-Inspector on receipt of the warrant raided Sultan Khan's house the same day at 4 p.m. There, he found eight persons playing cards with money. He accordingly arrested them and prepared the necessary panchnamas. The accused were thereafter challaned on 6th February 1951. Three witnesses were examined on behalf of the prosecution who deposed as to the mode the raid was effected, the persons found gambling and the property recovered from the house raided. No evidence was adduced to show that Sultan Khan derived any profit or gain from the gambling which according to the Prosecution was being carried on in his house. P. W. 1, the Sub-Inspector, no doubt in his preliminary examination said that the accused used to pay one anna per game to the owner of the house as compensation but in cross-examination admitted that his knowledge in this respect was based on hearsay. In this state of evidence, the charges as stated above were framed against the petitioner.

(4) Mr. Lakshman Rao Ganu contends on behalf of the petitioner that in the absence of proof that Sultan Khan collected one anna per game as profit or gain to himself, his house cannot be brought within the category of common gaming house as defined in S. 3 of the Act. Hence no offence was committed even if the petitioners were found gambling there. The learned Government Advocate feebly attempted to controvert this contention by drawing our attention to the Sub-Inspector's testimony. But that testimony is no evidence as it is based on hearsay. It is a mistake to assume as appears to have been done in this case that gambling per se is an offence under the Gambling Act. It is only gambling in a common gaming house as defined in the Act that is made an offence under Section 5 of the Act. Common gaming house is defined to mean any house, walled enclosure, room or place in which cards, dice or other instruments of gaming are kept or used for the 'profit or gain of the person' owning, occupying, using or keeping such house, enclosure, room or place, whether by way of a charge for the use of instruments of gaming or of the house, the enclosure, room, or place, or otherwise whatsoever. It is thus clear that no charge could be framed under Section 5 of the Act unless the prosecution establishes by legal evidence that the accused were found playing or gaming in a common gaming house.

(5) But it is contended by the learned Government Advocate that the charge can be sustained on the strength of the legal presumption as embodied in Section 7 of the Act. That Section provides that when any cards, dice, gaming tables or other instruments or means of gaming are found in any common gaming house entered or searched under Section 6 or about the person of any of those who are found therein, it shall be evidence until the contrary is made to appear that such house, walled enclosure, room or place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or Police Officer or any of his assistants. It is urged that inasmuch as the search was made under a warrant issued by the Magistrate under Section 6 of the Act, the presumption would apply so as to justify the charges framed and there was no occasion to quash them unless and until the accused rebutted the presumption and adduced evidence in support of their innocence. If the proposition were as simple as propounded by the learned Government Advocate then there would be an end of the matter. From the language of the section, it is clear that the presumption provided for therein can arise only where search is made in strict compliance with the provision of Section 6 of the Act, and if the search is

not proved to have been duly made no such presumption can be made. It follows, therefore, that in order to entitle the prosecution to invoke to aid the presumption under Section 7 of the Act, there must be affirmative proof that search was effected strictly in accordance with the provision of Section 6 of the Act. As already stated, no warrant has been produced in this case nor is it to be found on the file of the court below. This fact distinguishes — 'Emperor v. Mohd. Yusaf', AIR 1946 Lah 26 (FB) and — 'Vallibhai Ibrahim v. Emperor', 34 Bom LR 1447, which have been cited by the learned Government Advocate. In these cases, the warrant was before the court and it was held that provided the warrant issued under section 6 of the Act is on the face of it regular, the presumption under Section 114, Illust. (e), Evidence Act (Section 91 of the Hyderabad Evidence Act) does arise, and the court may presume that the officer issuing the warrant has acted on credible information. And it would follow that the presumption under S. 7 would arise if as a result of ensuing search the articles indicated in Section 7 are found. In the present case, we need not rely on any presumption under Section 91, Hyderabad Evidence Act to support a presumption under Section 7 of the Act because we have the entire proceeding before us which resulted in the issue of the warrant authorising the search.

(6) The Magistrate's order of 5th February 1951 was based on the ground that the Sub-Inspector had reported that Sultan Khan had allowed gambling in his house and the gamblers were there. This ground was quite insufficient for the issue of the warrant because in the words of Section 6 it was not credible information that the house was used as a common gaming house. We will have to presume that the warrant was issued in terms of the order of 5th February 1951. It has been held by the Calcutta High Court in the case of — 'Emperor v. Gobinda Chandra', 192 Ind Cas 182 (Cal), that a common gaming house has a special meaning under the Public Gambling Act and unless that expression is used in a warrant under Section 6, the prosecution cannot avail themselves of the special provision in Section 7. Again the same High Court held in — 'Jitendra Bhusan v. Emperor', 195 Ind Cas 7 (Cal), that a warrant which merely states that the Magistrate has reason to believe that the house is used for gambling is not legal, and if the house is searched under such a warrant, the presumption which is raised under Section 7 of the Act cannot arise from the instruments of gambling being found therein. — 'In re: Thambi Iyengar', 1945 Mad WN 771(1), where the warrant did not show that the officer who had issued it has reason to believe that the house in question was being used as a common gaming house all that it said being that information had been laid before him that gambling was going on in the house, it was held by Chandrasekhara Aiyar J. that there was no compliance with the terms of Section 6 and the presumption under Section 7 of the Act did not arise. This case has been followed by Shripat Rao J. in — 'Yakub Sab v. State of Hyderabad', AIR 1952 Hyd 42, the head-note of which runs as follows:

> "Where a search warrant issued under S. 6 of the Act merely stated that after satisfying on the basis of the affidavit that gambling was going on in a particular hotel, the search warrant was issued but there were no words in the warrant to show that the officer who issued it had reason to believe that the hotel in question was a common gaming house, held, the warrant was not in accordance with Section 6 of the Act, and as such the presumption under Section 7 could not arise."

(7) We are inclined to the view taken in these cases because the section authorises a presumption of guilt against the accused and is a departure from the principle of criminal jurisprudence, that an accused person is presumed to be innocent until the contrary is proved; but under the Act, the onus probandi is shifted from the accuser to accused who has to establish his innocence. Therefore, it is necessary that Section 7 should be very strictly construed.

(8) For these reasons, we accept the reference, quash the charges framed against all the accused and order them to be discharged. The property recovered shall be restored to him from whose possession it was taken.

B/M.K.S. Reference accepted.

A. I. R. 1953 HYDERABAD 62
(Vol. 40, C. N. 28)

PALNITKAR C. J.
AND R. SRINIVASACHARI J.

Ahamad Mohiuddin, Petitioner v. Abdurrahman, Respondent.

Civil Revn. No. 302 of 1952, D/- 15-7-1952.

Civil P. C. (1908), O. 23 R. 3 — Compromise petition filed by both parties — Subsequent application for setting it aside on ground of undue influence — Separate suit is necessary — (Contract Act (1872), S. 19 A).

The words of O. 23, R. 3, Civil P. C. signify that where a suit has been adjusted by lawful agreement it is obligatory on the Court to order such agreement or compromise to be recorded. Where therefore one of the parties applies for setting aside a compromise petition filed by both the parties on the ground that his signature on the petition was obtained by undue influence, his remedy is to file a regular suit for avoiding the compromise which is voidable at his option. He cannot move the Court to set it aside in the same proceedings. AIR 1950 Mad 728 and AIR 1935 All 137, Rel. on. (Para 4)

Anno: Civil P. C., O. 23 R. 3 N. 8 Pt. 4; Contract Act, S. 19 A N. 1.

Zakaulla, for Petitioner; Aliuddin Ansari, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('35) AIR 1935 All 137: (57 All 426) 4
('50) AIR 1950 Mad 728: (1950-1 Mad LJ 524) 4

ORDER: The facts giving rise to this Revision petition are that the petitioner filed a suit against the respondent and applied for an order for attachment before judgment which was granted. Subsequently, there was a compromise between the parties, which was filed in Court. The compromise petition was also verified by the office but when it was presented before the Judge a plea was raised by the respondent that the signature on the compromise petition was obtained by the exercise of undue influence over him, and that he wanted to lead evidence to show that it was by undue influence that the signature on the compromise petition was obtained.

(2) The lower court allowed the respondent to lead evidence with regard to the plea of undue influence. It is against this order that the plaintiff-petitioner has come before us in revision.

(3) It is admitted by the learned advocate for the respondent that the compromise petition bore the signature of his client as well as that of his vakil. Therefore it is clear that the compromise petition was filed by both the parties. It is now sought to resile from the compromise and the ground urged is that the signature of the respondent on the compromise petition was obtained by undue influence. It has to be observed that Order 23, Rule 3 of the Civil Procedure Code which relates to the compromise of suits contemplates that where both the parties have entered into a lawful agreement and pray that a decree be passed in terms of the compromise, the court shall record the compromise and draw up a decree.

(4) It is not urged before us that the agreement that was entered into by the parties was an unlawful agreement, i.e., one against law or public policy, for if it were so the court was not bound to record the compromise. It may refuse to do so. The only objection to the recording of the compromise is that the consent of the respondent to the compromise was obtained by undue influence. Therefore, where the agreement is lawful, but it becomes voidable for the reason that it was obtained by undue influence, the remedy of the party aggrieved is to file a regular suit for avoiding the compromise. He could not move to set aside the compromise in the same proceedings. The words of Order 23, Rule 3 of the Civil P. C. signify that it is obligatory on the court to order such agreement or compromise to be recorded, where a suit has been adjusted by lawful agreement. We might herein refer to the decisions of other courts which have taken the same view. The Madras High Court in the case of — 'Kuppuswami Reddi v. Pavanambal', AIR 1950 Mad 728, and the Allahabad High Court in the case of — 'Husain Yar Beg. v. Radha Kishan', AIR 1935 All 137, have adopted the same view. The aggrieved party may file a regular suit to redress his grievance. We set aside the order of the lower court and direct the lower court to record the compromise and dispose of the case according to law. The petitioner will have his costs of this petition. The advocate's fee is fixed at Rs. 30/-, (Rupees thirty only).

(5) In view of this order, the connected miscellaneous appeal is not pressed and is, therefore, dismissed.

B/D.R.R. Petition allowed.

A. I. R. 1953 HYDERABAD 63
(Vol. 40, C. N. 29)

MOHD. AHMED ANSARI
AND JAGANMOHAN REDDY JJ.

State of Hyderabad v. Bhimaraya, Respondent.

Cri. Ref. No. 1691/6 of 1951-52, D/- 28-7-1952.

(a) Criminal P. C. (1898), S. 512 — Scope of — Evidence Act (1872), S. 33.

The special rule of evidence enacted by S. 512 of the Criminal Procedure Code is an exception to the general rule specified in S. 33 of Evidence Act and the evidence recorded in a previous trial would be treated as evidence subject to the conditions specified against the absconding accused, notwithstanding the fact that he had no opportunity to cross-examine them at the time the evidence was taken. Section 512 of the Criminal Procedure Code, does not authorise the magistrate either to delete the name of an absconding accused which in effect is an acquittal of the accused, or to issue a warrant of arrest. All that he has to do, under S. 512 of the Criminal Procedure Code, is to satisfy himself that the accused are absconding and that there is no likelihood of their apprehension. Once he comes to that conclusion, he may order that the evidence be recorded under S. 512 against the absconding accused. AIR 1917 Lah 292 (2), Rel. on. (Para 2)

Anno: Cr. P. C., S. 512 N. 2; Evidence Act, S. 33 N. 1.

(b) Criminal P. C. (1898), S. 512 — Evidence against co-accused.

The evidence recorded in the case of the trials of a co-accused of the absconder or other persons cannot by ex-post facto operation be treated as evidence recorded under S. 512 for the purpose of utilising it at the trial of the absconder when he is apprehended and tried subsequently. The prosecution should move the Court and prove by evidence before the recording of evidence against the co-accused that certain persons are absconding and that it is not possible to apprehend them. It is for the Court thereafter to give directions that the evidence about to be taken is being taken for the purpose of being used, if necessary, against the absconder under S. 512 of the Criminal Procedure Code, as well as against the persons present and on trial. AIR 1938 Pat 49, Rel. on. (Para 3)

Anno: Cr. P. C., S. 512 N. 7.

Gopal Rao Moroamkar, Government Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('17) 18 Cri LJ 975: (AIR 1917 Lah 292(2)) 2
('38) 39 Cri LJ 281 (2): (AIR 1938 Pat 49) 3

JAGANMOHAN REDDY J.: This is a reference by the District and Sessions Judge, Gulbarga, for quashing the order of the Munsiff-Magistrate, Yadir, purporting to have been made under Section 512 of Criminal Procedure Code with respect to certain absconding accused. The order is as follows:

"As regards the so-called absconding accused there is no sufficient proof of their participation at all, hence I do not find any reason to act under Section 512 of the Criminal Procedure Code and issue any warrant against them, hence their names are worth being deleted."

(2) Section 512, Criminal Procedure Code merely authorises the trial court or the committing court in a case where it is proved that the accused has absconded and that there is no immediate prospect of arresting him to examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the enquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. The object of this Section is to enable the prosecution in the circumstances mentioned above to utilise the depositions under Section 33 of the Evidence

Act which makes the previous depositions of a witness in a judicial proceeding relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceedings the truth of the facts which it states when the witness is dead or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party or his attendance cannot be procured without an amount of delay, expense or inconvenience, which under the circumstances the court considers unreasonable; provided among other things that the adverse party in the first proceeding had the right and opportunity to cross-examine. The special rule of evidence enacted by Section 512 of the Criminal Procedure Code is an exception to the general rule specified in Section 33 of Evidence Act and the evidence recorded in a previous trial would be treated as evidence subject to the conditions specified already against the absconding accused, notwithstanding the fact that he had no opportunity to cross-examine them at the time the evidence was taken.

In — 'Emperor v. Sardar', 13 Cri LJ 975 (Lah), where the Court convicted two of the accused who absconded during the course of the trial, it was held that the Court had no power to convict the accused in those circumstances when they were not present, though no doubt the Court might proceed under Section 512 of the Criminal Procedure Code if the evidence for the prosecution was incomplete. In our view the Magistrate was not right in ordering the deletion of the names of the absconding accused, nor in observing that under Section 512 of the Criminal Procedure Code he will not issue any warrant for the arrest of the absconding accused in view of the sufficiency of evidence. Section 512 of the Criminal Procedure Code, as has been see does not authorise the Magistrate either to delete the name of an absconding accused which in effect is an acquittal of the accused, or to issue a warrant of arrest. All that he has to do, under Section 512 of the Criminal Procedure Code is to satisfy himself that the accused are absconding and that there is no likelihood of their apprehension. Once he comes to that conclusion he may order that the evidence be recorded under Section 512 against the absconding accused.

(3) It also appears to us that the evidence recorded in the case of the trial of a co-accused of the absconder or other persons cannot by 'ex-post facto' operation be treated as evidence recorded under Section 512 for the purpose of utilising it at the trial of the absconder when he is apprehended and tried subsequently. The prosecution should move the Court and prove by evidence before the recording of evidence against the co-accused that certain persons are absconding and that it is not possible to apprehend them. It is for the Court thereafter to give directions that the evidence about to be taken is being taken for the purpose of being used if necessary against the absconder under Section 512 of the Criminal Procedure Code as well as against the persons present and on trial. The above view was also expressed by a Bench of the Patna High Court in — 'Emperor v. Baharuddin', 39 Cri LJ 281 (Pat).

(4) Even though the prosecution has stated in the charge-sheet that the evidence to be recorded against the co-accused should be recorded under Section 512 of the Criminal Procedure Code against the absconding accused, neither the proof relating to the absconding of the accused, nor the fact that there is no immediate prospect of their being apprehended in the near future was given. The direction of the court with respect to the recording of evidence under Section 512 of the Criminal Procedure Code against the alleged absconding accused was also not sought, nor has the court given any such directions. In these circumstances, we cannot order the evidene already recorded as having been deemed to have been recorded under Section 512 of the Criminal Procedure Code. We, however, accept the reference of the learned Sessions Judge and set aside the order contained in the passage of the judgment of the Munsiff-Magistrate, Yadgir dated 31-8-1951 cited above.

B/D.H. Reference accepted.

A. I. R. 1953 HYDERABAD 64
(Vol. 40, C. N. 30)

PALNITKAR C. J. AND SIADAT ALI KHAN J.

Vishwanath, Petitioner v. Custodian Evacuee Property, Respondent.

Writ Case No. 223 of 1951, D/- 12-8-1952.

(a) Registration Act (1908), S. 17(2) — Explanation — Earnest money.

A receipt for the amount of earnest money is covered by the explanation to S. 17(2) and does not require registration. AIR 1952 Hyd 148 Ref. (Para 2)
Anno: Reg. Act, S. 17 N. 72.

(b) Constitution of India, Art. 226 — Finding of fact — Evidence not considered at all — (Civil P. C. (1908), S. 100).

Where the Custodian of Evacuee Property has not at all taken into consideration the evidence and has not weighed the same his finding that payment of certain amount as earnest money has not been proved is not merely a matter of appreciation of evidence and cannot be called a mere finding of fact but is a question of law. AIR 1952 SC 319 Disting. (Para 2)
Anno: C. P. C., S. 100 N. 53.

Govindrao Ardhapurkar, for Petitioner; Narhari Shastry, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('52) AIR 1952 SC 319: (1952 SCR 696) 2
('52) ILR (1952) Hyd 554: (AIR 1952 Hyd 148) 2

ORDER: This is a petition for a writ of certiorari against the order of the Custodian of Evacuee Property directing that the sale can be confirmed only on payment of Rs. 1300 by the petitioner. The brief facts of the case are that the petitioner purchased the property in question from one Mohsin Bin Saleh and a sale-deed dated 24th Farwardy 1358 F. was registered by the vendor in favour of the vendee, the petitioner. It is stated in the sale-deed that in lieu of H. S. Rs. 4000/- the property was sold to the petitioner. Further there is a statement that out of the said amount Rs. 1300 (H. S.) have already been paid as earnest money to the vendor and that Rs. 600 were paid before the Registrar and that Rs. 2100 will be paid within eight days. The petitioner filed a suit on the basis of the sale-deed in the court of the Munsif Court, Basmat, and the defendants put in a written statement admitting the claim. The amount of Rs. 2100 mentioned in the sale-deed

was paid in the court to the defendants and the decree was passed embodying the said admission and the payment of the said Rs. 2100.

(2) The Evacuee Property Regulation came into force on 22nd Meher 1358 F. (corresponding to 22-8-1949 A.D.). The petitioner filed the petition under the provisions of the said Regulation for confirmation of the sale. At one time the petition was held to be time-barred, but, later on, the Custodian came to the conclusion that the question of limitation did not arise as the sale was made prior to the coming into force of the Regulation. It is, therefore, not necessary to decide the question of limitation. The Custodian held further that the payment of Rs. 1300 as mentioned in the sale-deed was not proved and, therefore directed the petitioner to pay that amount so that the sale could be confirmed. Shri Govindrao Ardhapurkar, the learned advocate for the petitioner, argues that the amount of Rs. 1300 was paid as earnest money and he has referred to the case decided by this court in — 'Sarojini Bai v. Custodian, Evacuee Property', ILR (1952) Hyd. 554. In our opinion, the receipt in question is covered by the explanation to S. 17 cl. (2), Registration Act, and does not require registration. Hence the payment of earnest money can be proved.

Three witnesses have been produced in support of the fact of payment. One is Vishwanath, the petitioner himself. He states that he has paid Rs. 1300 as mentioned in the sale-deed. Another witness is Nana who has stated that the vendor, Mohsin, admitted in his presence that Rs. 1300 were paid to him by the vendee. There is a receipt for this amount dated 22nd Farwardy 1358 F. which is signed by the said Mohsin and also by witness Maruti who deposed before the Custodian that Rs. 1300 were paid as earnest money to Mohsin and payment was admitted by Mohsin before the Registrar. He identified the receipt and his own signature on it. There is also the averment in the sale-deed before the Registrar that Rs. 1300 were paid by the plaintiff to the vendor. In view of this evidence we fail to understand how the Custodian can hold that the payment of Rs. 1300 was not proved. The learned advocate for the Custodian argued that the non-payment of Rs. 1300 is a finding of fact and the High Court cannot set aside the said finding and substitute its own judgment as it does not sit as a court of appeal.

He has cited — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi', AIR 1952 SC 319. In our opinion, however, this is not merely a matter of appreciation of evidence, for the learned Custodian has not at all taken into consideration the evidence and has not weighed the same and thus it is a question of law. The Supreme Court case cited by him is not relevant inasmuch as it deals with certain subsidiary matters connected with appeal and not with the question of law. We, therefore, allow this writ petition, hold that Rs. 1300 had been paid to the vendor by the petitioner, direct the Custodian to confirm the sale without the payment of Rs. 1300 and issue a writ of certiorari accordingly. We make no order as to costs.

A/D.H.

Petition allowed.

1953 Hyd/9 & 10

A.I.R. 1953 HYD. 65 (Vol. 40, C. N. 31)

MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

M/s. Hiranand Ramsukh, Petitioner v. The State of Hyderabad, through Commr. of Income Tax, Respondent.

Ref. No. 260/5 of 1951-52, D/- 1-7-1952.

Income Tax Act (1922) S. 66(1) and (3) — Application for reference presented to Registrar, I. T. Commissioner at Hyderabad — Registrar of Bombay Tribunal receiving it after 60 days — Application rejected as time barred — Held, High Court could not condone delay or set aside Tribunal's order which was correct.

An assessee was served with the order of the Appellate Tribunal on 18-4-1951. He presented his application for reference under S. 66 (1) to the Registrar, Income Tax Commissioner, Hyderabad, on 16-6-1951 which was received by the Registrar, Appellate Tribunal of Bombay, on 25-7-1951 and was rejected as time barred. The order was challenged by an application under S. 66(3);

Held that (1) after the Indian Income Tax Act together with the rules and the standing Order No. 1 of 1950 were enforced, the notification of the Hyderabad Government made under the Hyderabad Income Tax Act dated 22-3-1949 will be deemed to have been abrogated and the proper person to whom an appeal should be presented is the Registrar of the Income Tax Tribunal at Bombay and not the Registrar of the Income Tax Commissioner at Hyderabad. (Para 2)

(2) that the act of the assessee either inadvertently or without properly canvassing the true position in filing his applications for reference before a person not authorised to receive them, did not entitle him to claim exclusion of the period which was spent in transmission of the application. (Para 2)

(3) that it was impossible for the High Court to say that in dismissing his application the Tribunal acted otherwise than correctly; nor did the High Court have any power to consider whether there was sufficient cause for delay nor had it any power similar to the power under section 5 of the Indian Limitation Act to condone the delay. AIR 1948 Bom. 431 and 1950-18 ITR 72 (All) Rel. on. (Para 3)

Anno: Income Tax Act, S. 66 N. 17.

Satyanarayana Loya, for Petitioner; N. Narasimha Ivengar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('50) 1950-18 ITR 72 (All) 3

('48) 1948-16 ITR 251: (AIR 1948 Bom 431) 3

('49) 1949-17 ITR 420: (AIR 1949 Ori 53) 2

JAGANMOHAN REDDY J.: This is an application under sub-section (3) of Section 66 of the Indian Income Tax Act alleging that the application filed before the Income Tax Tribunal at Bombay and presented to the Registrar, Commissioner of Income Tax at Hyderabad was presented to a person authorised to receive memoranda of appeals and applications. It appears that the order of the Income Tax Appellate Tribunal was served on the assessee on 18-4-1951. He thereafter filed applications for reference to the High Court which were received by the Registrar of the above Tribunal, Bombay on 25-7-51 from the Registrar, Income Tax Commissioner, Hyderabad to whom

they were presented on 16-6-1951. The Income Tax Tribunal at Bombay has held that the applications were time barred inasmuch as they were not presented within 60 days from the serving of the order. The assessee has now applied under sub-section (3) of Section 66 of the Act challenging the order of the Tribunal. Pleader for the assessee contends that the Registrar, Income Tax Commissioner at Hyderabad was appointed by Notification of the Hyderabad Government dated 22-3-1949 made under the Hyderabad Income Tax Act to (1) receive memoranda of appeals, (2) issue receipts for the money received, and (3) note on the memorandum of appeal the date on which it was received. After the fiscal integration of Hyderabad State with the Union of India, the Indian Income Tax Acts and the rules for governing the procedure of the Appellate Tribunal were made applicable by the Indian Finance Act of 1950 as and from 1st April, 1950. Under the rules governing the procedure of the Income Tax Tribunal, the Central Government is authorised to constitute Benches of the Tribunal and the Registrar of the Tribunal under Clause (1) of Rule 7 of the said rules is authorised to receive memoranda of appeals and application presented to the Tribunal.

After the application of the Indian Income Tax Act to the State of Hyderabad, the President of the Income Tax Tribunal issued Standing Order No. 1 of 1950 made in pursuance of Rule 4 of the Appellate Tribunal Rules, vesting the Bombay Bench with jurisdiction for the State of Hyderabad to hear appeals and applications under the Income Tax Act as and from 1st April, 1950. From the foregoing it is clear that the Registrar at Bombay was authorised to receive applications and memoranda of appeals and the act of the assessee either inadvertently or without properly canvassing the true position in filing his applications for reference before a person not authorised to receive them, cannot entitle him to claim exclusion of the period which is spent in transmission of the application between the date of presentation before the Registrar at Hyderabad and the date of receipt by the Registrar, Appellate Tribunal at Bombay, for purposes of computing limitation. After the Indian Income Tax Act together with the rules and the standing Order No. 1 of 1950 were enforced, the notification of the Hyderabad Government made under the Hyderabad Income Tax Act dated 22-3-1949 will be deemed to have been abrogated and there is no force in the contention of counsel for the assessee that since the assessment was being made under the Hyderabad Income Tax Act, the Registrar appointed thereunder as Registrar for the Income Tax Tribunal should be deemed to be the proper receiving authority. Once jurisdiction has been vested in the Tribunal constituted under the Indian Income Tax Act, the proper person to whom the appeal should have been presented was the Registrar of the Income Tax Tribunal at Bombay and not the Registrar of the Income Tax Commissioner at Hyderabad.

(2) Counsel for the assessee has cited the case — 'Popsing Rice Mills, Bhadrak v. Commissioner of Income Tax, Bihar and Orissa', 1949-17 ITR 420 (Orissa) which is inapplicable to the facts of this case, as it is an authority for the proposition that where an assessee has sent a memorandum of appeal by post, time occupied in transmission of the application should not be computed as part of the period of limitation of 60 days. Rule 7 of the Income Tax Appellate Tribunal Rules itself authorises the sending of memoranda of appeal by post addressed to the Registrar or to such other officer who is authorised by the Registrar to receive such memoranda. The assessee has presented his applications not to an authorised person but to an unauthorised person and he cannot claim to be entitled to the time spent in transmission of his application by the Registrar of the Income Tax Commissioner at Hyderabad to the Registrar of the Income Tax Tribunal at Bombay.

(3) On a plain reading of sub-section (3) of Section 66 of the Income Tax Act, it is clear that there is no authority vested in the High Court, to condone any delay or to give any benefit to the assessee if the order of the Tribunal is in accordance with law. Several cases have been cited before us by the respondent's Advocate, viz., — 'Bansilal Gulabchand v. Commissioner of Income Tax, Bombay, (Mofussil)', 1948-16 ITR 251 (Bom) and — 'Hajee Mahboob Bux Ehhan Illahi v. Commissioner of Income Tax, U.P.', 1950-18 ITR 72 (All) which support this view. In these cases it has been held that the Tribunal has no power to condone any delay in making the application under sub-section (1) of Section 66 and when the assessee applies to the High Court under subsection (3) thereof, it is impossible for the High Court to say that in dismissing his application the Tribunal acted otherwise than correctly; nor has the High Court been given any power to consider whether there was sufficient cause for delay nor has it any power similar to the power under section 5 of the Indian Limitation Act to condone the delay.

(4) In the result, we agree with the observations of the Income Tax Tribunal that the assessee has been ill-advised but nothing can be done. The application is, therefore, rejected.

B/D.R.R. Application rejected.

A.I.R. 1953 HYD. 66 (Vol. 40, C. N. 32)

PALNITKAR C. J.
AND SIADAT ALI KHAN J.

Ramchander K. Gulrani, Petitioner v. Sugra Begum, Respondent.

Writ Petns. Nos. 259 and 261 of 1951, D/-11-8-1952.

Houses and Rents — Hyderabad Rent Control Order (1353 Fasli), S. 8 — Order of eviction based on personal knowledge and without due regard to interests of parties — Writ of certiorari held lay — (Constitution of India, Art. 226).

Where an order of eviction was passed by the appellate authority on grounds which were within its personal knowledge not forming part of the record and without paying due regard to the interests of the parties:

Held (1) that writ of certiorari should issue for, in the first place, errors apparent on the face of the proceedings are always treated as errors of jurisdiction for the purpose of quashing by issue of a Writ of Certiorari. The use of personal knowledge in the order was evidently an error of this kind; AIR 1949 Mad 535, Rel. on. (Para 3)

(2) again even though the Controller or the appellate authority might have jurisdiction, yet in considering the question of reasonableness under R. 8 (e) Court should take into consideration every circumstance that might affect the interests of the landlord or of the tenant and should weigh the hardship with due regard to the needs of

each. As due regard was not paid to the interests of the parties the jurisdiction was wrongly exercised and therefore, a writ of certiorari lay: ILR (1952) Hyderabad 679, Rel. on. (Para 3)

Jaffar Tayabali, N. Narasimha Ayyangar and K. Venkatachari, for Petitioner; K. Ramgopal, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('51) AIR 1951 SC 115: (30 Pat 329) 2
('51) AIR 1951 Bom 303: (53 Bom LR 94) 2
('43) ILR (1943) 2 Cal 272: (AIR 1943 Cal 247) 2
('52) ILR (1952) Hyd 679 3
('48) 1948-2 Mad LJ 559: (AIR 1949 Mad 535) 3
('52) AIR 1952 Pat 255 2

ORDER: These are two petitions for the issue of a writ of certiorari and have been ably and keenly contested. The petitioners are two tenants and they have been directed by the Rent Controller to vacate the ground and the first floor respectively of the house occupied by them. The learned Advocates for the petitioners have emphasized that the grounds on which the Rent Controller directed the vacating of the house are not approved of by the appellate authority and the grounds on which he maintained the order of eviction are contrary to natural justice. These are: that the big house occupied by the respondent, Sugra Begum, has been given on rent by her to the University which is a good cause; that Sugra Begum's sons are minors and that she has to pay a staggering sum of thirteen lakhs of rupees towards arrears of income-tax. The learned advocates argued that these grounds do not justify the order of eviction passed by the appellate authority as they do not come within the meaning of "reasonable cause" of para. 8, Rent Control Order, 1353 F. They argued further that all these grounds were the alleged personal knowledge of the appellate authority; they formed the part of the record and their clients were not given a chance to rebut them; and that, therefore, as no evidence was allowed, they cannot form part of the record and the writ should issue to set aside the order given in such a manner.

(2) In reply the learned Advocate, Mr. Ramgopal, referred to the marginally cited cases * and argued that in his submission no writ of certiorari can lie because both the Controller and the appellate authority have jurisdiction; that there is nothing to show that the jurisdiction was wrongly assumed or exercised and on the authority of these cases this Court should not interfere even though the rules of evidence were not adhered to. He argued further that the Evidence Act applies only to judicial proceedings and it has been held that the Controller and the appellate authority over him are executive and non-judicial officers; that S. 8, Hyderabad Rent Control Order, expressly provides that the Controller should be satisfied after hearing the parties and there is no reference to the recording of evidence; and that omission to record evidence, therefore, does not affect his jurisdiction. The learned Advocate concluded by emphasizing again that jurisdiction of the Controller and the appellate authority being quite clear, this Court should not interfere.

*Brij Raj Krishna v. S. K. Shaw & Brothers, AIR 1951 SC 115; Mohsinali Mahomedali v. State of Bombay, AIR 1951 Bom 303; Bhagwandas v. Janaklal, AIR 1952 Pat 255; Kiron Chandra v. Kalidas Chatterjee, ILR (1943) 2 Cal 272.

(3) We have carefully considered these arguments of the learned advocate for the respondent. We are, however, of the opinion that the writ should issue; for in the first place, errors apparent on the face of the proceedings are always treated as errors of jurisdiction for the purpose of quashing by issue of a writ of certiorari, vide — 'Krishnaswamy Iyer v. Mohan Lal Binjani', 1948-2 Mad LJ 559. The use of personal knowledge in the order is evidently an error of this kind. Again even though the Rent Controller or the Appellate authority may have jurisdiction, yet as held by this Court in — 'Yakub Ali v. The Additional Collector, Hyderabad', ILR (1952) Hyd 679.

> "The Rent Controller while deciding the question of 'reasonableness' under R. 8 (e) should take into consideration every circumstance that might affect the interests of the landlord or of the tenant in the premises. .....The Court should weigh such hardship with due regard to the needs of both the tenant and the landlord."

It appears to us that due regard was not paid to the interests of the parties. Admittedly the respondent is getting a good rent for her house which she has vacated. She wants the house occupied by the petitioners for her own occupation and to save herself from the high rent she is paying for another house, which she has rented in Narayanguda. It is not denied that during the pendency of the proceedings with the Controller, another house of the respondent fell vacant and she did not choose to occupy it. It is denied also that the objects of the Rent Control Order, 1353 F. are that there should neither be unreasonable evictions for profiteering by rent-racketing. In the prevalent scarcity of houses, this cannot be in the public interest. The above circumstances will show that the respondent having one of her houses vacant did not choose to occupy it. This conduct cannot be deemed to be reasonable. Similarly, it is not denied that she has rented her big bungalow on a very good rent and the professed reason why she wants the petitioners to quit is that because of this letting, she needs their house. This also in a way, smacks of rent-racketing. In the circumstances, there does not appear to be good or sufficient reason as contemplated by S 8 of the Rent Control Order. We are loath to prefer our opinion in such cases; but it appears to us that the learned Controller and the appellate authority have wrongly exercised their jurisdiction and, therefore, a writ of certiorari lies. We thus allow these petitions. A copy of this order should be made in the other file. We make no order as to costs.

A/G.M.J.

Petitions allowed.

A.I.R. 1953 HYD. 67 (Vol. 40, C. N. 33)

(FULL BENCH)

A. SRINIVASACHARI,
M. A. ANSARI AND S. Q. HASAN, JJ.

Kishorilal and others. Petitioners v. Raja Rameshwardas, Respondent.

Writ No. 14 to 27 of 1950, D/- 17-7-1952.

Constitution of India, Arts. 226 and 227 — Order of Rent Controller under special enactment was open to certiorari jurisdiction of High Court and not revisional jurisdiction, before Constitution — Position after constitution — (Hyderabad High Courts Act, S. 17).

Per Majority (Qamar Hasan J., Contra): When the Rent Controller enquires into the case before him under the special

enactment, he is exercising the powers as a persona designata and as such his decision is subject only to the Certiorari Jurisdiction of the High Court. Consequently so far as the decision of the Rent Controller and those of the Appellate Authority on appeal thereof prior to the coming into force of the Constitution are concerned, they are only subject to the Certiorari jurisdiction and the remedy of a party is only to apply by way of a writ of certiorari and not revision: Case law reviewed. (Para 6)

Per Qamar Hasan J.: The Rent Controller is subject to the extraordinary jurisdiction of the High Court under S. 17 of the Hyderabad High Court Act. (Para 18)

Per Full Bench: But after the inauguration of the Constitution this question has become purely academic. Article 227 of the Constitution empowers each High Court to exercise superintendence not only over courts but also over tribunals throughout the territories within its jurisdiction. It can further issue writs of certiorari etc., under Article 226. The authorities or Tribunals against which a writ of certiorari can be issued or power of superintendence exercised can be other than mere courts of justice. Therefore after the 26th of January 1950, though not in revision but in the exercise of its powers of superintendence, the High Court can always set right the order passed by a court of a Tribunal or any Authority. The remedy by way of a writ of certiorari is limited in its scope and it is not in all cases that such a remedy would lie, for it is only in cases of excess of jurisdiction or utter want or absence of jurisdiction, that the High Court would exercise its powers for the issue of a writ of certiorari. The powers under the revisional jurisdiction, however, though to a certain extent limited in their scope are wider than the powers under certiorari. (Para 2)

Narsimma Angar, for Petitioners; Laxman Rao Ganu, for Respondent.

A. SRINIVASA CHARI J.: These are a batch of applications in which a common question of law is involved as to whether the remedy of a party aggrieved by the order of the Collector, in his capacity as the Appellate Authority over the House Rent Controller, is by way of a revision or by a writ of certiorari. In these cases applications for the issue of writs of certiorari were originally filed; later it was alternatively prayed that if for any reason a writ of certiorari be not the proper remedy they may be treated as revision applications. The Division Bench hearing these applications in view of the difference of opinion as regards the remedy open to a party aggrieved by such an order thought it advisable to refer the question to a Full Bench for finally setting at rest the conflict. Two divergent views have been expressed in — '38 D.L.R. 357' and — '39 D.L.R. 440'. In — '38 D L R 357', the learned Judges have held that the remedy against the order of a Collector as the appellate authority in Rent Control proceedings is by way of an application for the issue of a writ of certiorari while in the latter decision it has been decided that an application by way of revision would lie to the High Court.

(2) It has to be observed at the outset that after the inauguration of the Constitution, this question has become purely academic. Art. 227 of the Constitution empowers each High Court to exercise superintendence not only over courts but also over tribunals throughout the territories within its jurisdiction. It can further issue writs of certiorari etc., under Article 226. It is clear that the Authorities or Tribunals against which a writ of certiorari can be issued or power of superintendence exercised can be other than mere courts of justice. Therefore after the 26th of January 1950, though not in revision but in the exercise of its powers of superintendence, the High Court can always set right the order passed by a Court of a Tribunal or any Authority. The remedy by way of a writ of certiorari is limited in its scope and it is not in all cases that such a remedy would lie, for, it is only in cases of excess of jurisdiction or utter want or absence of jurisdiction, that the High Court would exercise its powers for the issue of a writ of certiorari. The powers under the revisional jurisdiction, however, though to a certain extent limited in their scope, are wider than the powers under certiorari. If the orders now sought to be attacked were orders passed subsequent to the 26th January 1950, the determination of the question of the remedy would not have arisen. But these orders were passed just three days prior to the coming into force of the Constitution. So we have to determine the question as to what the proper remedy would be having regard to the powers of the High Court prior to the coming into force of the Constitution. Further a conclusive decision is also necessary in order to remove the doubt in the minds of the litigant public as regards the remedy that they have to pursue in view of the conflicting rulings referred to above.

(3) The High Court at Hyderabad used to exercise its revisional jurisdiction under S. 615 of the Hyderabad Civil P. C. read with S. 17 of the High Court Act. It would be desirable at this stage to refer herein to the state of the case law in Hyderabad prior to the coming into force of the Constitution. The first case in this connection which may be referred to is a case reported in — '23 D L R 106'. This was revision against the order of the Land Acquisition Officer. In this case a revision was filed by the aggrieved party and the court after admitting the revision called for the files from the Collector, Land Acquisition. The Collector, Land Acquisition, declined to send the files stating that he was not subordinate to the High Court. The majority of the Judges constituting the Full Bench held that the contention of the Collector, Land Acquisition was wrong and that the highest court was entitled to send for the files and it would be open to the parties to urge before the Court as to whether a revision would lie against the order of the Land Acquisition Officer or not. Having regard to the particular facts of this case, this decision is not of much assistance so far as the point involved in this reference is concerned.

(b) The next case that may be referred to is the case of — 'Vithal v. The Government', reported in 29 D L R 57 (Cr.). A petition was filed before the District Judge, Osmanabad, by Vithal Rao stating that his father as the Manager of a Hindu joint family died possessed of certain promissory notes, that the applicant was the Manager of the joint family now and that the promissory notes be renewed

in the name of the Manager under the provisions of the Securities Act. This application was rejected by the 'Nazim Jilla' on the ground that the applicant should apply for a succession certificate. The applicant filed a revision to the High Court against the aforesaid order. Two questions arose before the Court: (i) whether when exercising the powers vested in him to renew the Government promissory notes in the name of the Manager of a joint family under the Securities Act, the 'Nazim Zilla' was exercising judicial powers and whether therefore he was subordinate to the High Court and (ii) Whether the High Court could interfere in revision against his order. With regard to these points, the Division Bench held that in exercising these powers the 'Nazim Zilla' was doing so as a court and that he was subordinate to the High Court. Secondly they held that the High Court could interfere in revision against an order passed by the 'Nazim Zilla' under Section 10 of the Securities Act. It has to be observed that in this case the reasoning on which the judgment of the High Court appears to have been based is that the 'Nazim Zilla' was already a Judicial Officer, subordinate to the High Court and if he was already subordinate to the High Court any other power given to him under any special enactment which he may exercise would be deemed to be a power exercised by the 'Nazim Zilla' as a Judicial Officer alone and if he exercised those powers as a judicial officer he would be subordinate to the High Court and if he is subordinate to the High Court, S. 615 of the Hyderabad Civil P. C., read with S. 17 of the High Court Act, would come into operation and his orders would be subject to the revisional jurisdiction of the High Court. This decision was in consonance with the decision of the Privy Council in the case of — 'Balakrishna Udayar v. Vasudeva Aiyer', 44 I A 261: AIR 1917 PC 71, which was a case under the Religious Endowments Act. This Act gave the Civil Court special powers to determine certain matters in connection with religious endowments. The Privy Council held that where the Civil Courts acting under the above Act exercised jurisdiction not vested in them by law the High Court could interfere under S. 115, Civil P. C.

(c) The next case that has to be considered is the case of—'Gunderao v. Lingappa', decided by a Full Bench of five Judges and reported in 32 D L R page 27 (Cr.). This was a revision which came up to the High Court against the order of the Additional Sessions Judge, Gulbarga, and the question was whether a revision would lie against the order of the Taluqdar in his capacity as the 'Nazim' under the Cattle Trespass Act and whether he was subordinate to the High Court for the purpose of the exercise of the revisional jurisdiction of the High Court. In this Full Bench case, after referring to certain cases decided in the British Indian High Courts which arose under the Rent Control Act, the learned Judges held (a) that under S. 360 of the Hyderabad Criminal P. C. such officers in so far as they purported to exercise their powers under the Cattle Trespass Act were subject to the revisional jurisdiction of the High Court. The reasoning that their Lordships followed was that although they were Revenue Officers they were invested with the powers of a criminal court under a special enactment, viz., the Cattle Trespass Act, and where judicial powers were exercised such authority was subject to the revisional jurisdiction of the High Court. The question arises as to whether this decision could be regarded as laying down the proposition of law that the order of a non-judicial officer also was amenable to the revisional jurisdiction of the High Court. It has to be observed that under the Criminal P. C. it has been provided for in S. 5 that the procedure with regard to the trial as regards crimes under the Hyderabad Penal Code shall be according to what has been laid down in the Criminal Procedure Code. It has also been stated therein that the investigation and the judgment with regard to offences under special enactments shall also be in accordance with the provisions of the Criminal P. C. Therefore the Taluqdar or the Revenue Official when he purports to investigate and pass orders in a case under the Cattle Trespass Act, he has to follow the procedure laid down under the Criminal P. C. If it is an order passed by him after trial under the Criminal P. C., it would be subject to the revisional jurisdiction of the High Court under S. 360, because S. 360 contemplates revisions being filed against orders passed under the Criminal P. C. For the reasons explained by me above, in that case a revision was competent against the order of the District Judge acting as the 'Nazim' under the Cattle Trespass Act. The Taluqdar was only exercising the judicial powers under the Criminal P. C.

(d) The next case that might be referred to in this connection is the case of — 'Irbadrappa v. Sheikh Abdur Rahim', reported in 33 Deccan Law Report, 413. This was a case which came up before a Full Bench of this Court and the question that arose for consideration was whether the High Court could interfere in revision against the order of the Debt Conciliation Board, as much to say as to whether the Debt Conciliation Board was subordinate to the High Court for purposes of the exercise of Revisional jurisdiction by the High Court. The then Chief Justice, Mr. Alam Ali Khan (as he then was) with whom the ex-Chief Justice Shri Ramchander S. Naik concurred, held that S. 7 of the Charter granted to the High Court read with S. 17 of the High Court Act gave the High Court unlimited powers and jurisdiction which could be exercised by it suo motu without being moved in that direction. They held that under S. 25 of the Debt Conciliation Act, the inferior courts alone were prohibited from entertaining an appeal or revision against the order of the Debt Conciliation Board and that that did not in any way affect the wide powers of the High Court. In that case they held that the powers exercised by the Debt Conciliation Board in deciding cases were judicial and that the law had made an appeal or revision against the order of the Debt Conciliation Board incompetent, but that did not in any way affect the powers of the High Court conferred upon it by the Charter. It would appear from the decision of this case that their Lordships did not hold that the High Court could exercise its revisional powers in dealing with an order passed by the Debt Conciliation Board, but they laid down that the special powers of the High Court vested in it by the sovereign for the administration of justice empowered the High Court to set right any order passed by a tribunal or authority whether it was a court or not.

The separate but concurrent judgment of Khaliluzzaman Siddiqui J. shows that His Lordship relied upon the powers of the High Court as the 'Naib' of the sovereign and the decisions that have been referred to in his judgment are decisions which refer to the exercise of the powers by the High Court under its certiorari jurisdiction. This decision therefore must be regarded as laying down this principle that the High Court can interfere under its extraordinary powers. This decision has been referred to and approved of in the leading case of seven Judges, namely, the case of — 'Raja Pratab Gir v. The Government', reported in 35 D. L. R. page 153, wherein the powers of the High Court as the 'Naib' of the Sovereign were recognised and it was held therein that the High Court could interfere with the order of a Requisitioning Officer on the executive side. That case might be regarded as laying down for the first time the powers of the High Court to issue writs of certiorari.

(e) After the above case the case that is in point is the case of — 'Hasan Bin Yusuf v. Chandbi', reported in 38 D.L.R., page 357. This was a revision filed against the order of the First Taluqdar, Bhaghat who heard an appeal against the order of the Rent Controller. There was also an application for the issue of a writ of certiorari. They held that when the Collector was exercising his functions under the Rent Control Act although they were judicial or quasi-judicial he was exercising the powers not as a Court subordinate to the High Court but as 'persona designata' and therefore they held that inasmuch as he was exercising the powers as persona designata and not as a court his orders were only subject to the certiorari jurisdiction of the High Court and as such an application for a writ of certiorari alone would lie against an order passed by the Collector in his capacity as an appellate authority in Rent Control proceedings. This is the first case wherein a definite ruling had been given to the effect that the Collector in Rent Control Proceedings was acting as persona designata and not as a Court.

(f) Soon after, the same question came up before a Division Bench of the High Court in the case of — 'Syed Mohiuddin Ali Khan v. Avval Taluqdar Bhaghath', reported in 39 D L R 440. In this case their Lordships preferred to follow the decision of the Full Bench of five Judges, reported in — '32 D L R, page 27 (Cr.)', adverted to by me in the foregoing paragraphs and one of the Judges opined that although the latter trend of decisions had been that the Rent Controller or the Appellate Authority was not subordinate to the High Court, still inasmuch as there was a decision of a Full Bench of this High Court he found no reason to deviate from the principle laid down by the Full Bench while the other learned Judge rest content by saying that he was not prepared to follow the decision in — '38 D L R page 357', holding that the Rent Controller was acting as persona designata in view of the Full Bench decision in — '32 D L R, page 27'. It would therefore appear that in this case the learned Judges found themselves bound by the decision of the Full Bench case reported in — '32 D L R 27 (Crl.)' and therefore did not agree with the ratio decidendi of the decision in — '38 D L R, page 352'. It may be mentioned here that one of the Judges, Manoher Pershad J. states in his judgment (at page 443) that although the principle in the original decision of Calcutta High Court in 49 Cal. page 528, wherein it was held that revision would lie on the ground that the Rent Controller was a court of civil jurisdiction, was deviated from in a subsequent ruling of the Calcutta High Court in 1943 Cal. 247, he was not prepared to follow the latter ruling of the Calcutta High Court in the face of the Full Bench decision of the local High Court.

(4) Reference may be made to another case reported in — '12 Nazair Osmania, 396', which followed — '38 D L R 357'. This has been the trend of decisions so far as this High Court is concerned, on the question now under consideration.

(5) It would appear from the decisions referred to by me that this High Court laid down that it had the power to exercise its jurisdiction to correct an excess of jurisdiction by any tribunal or authority, not necessarily a court, under the powers vested in it as the 'Naib' of the Sovereign. As I have already stated the decision in the case of — 'Syed Mohiuddin Khan v. Awal Taluqdar Saheb Bhaghath', Qamar Hasan and Rai Manoher Pershad JJ. regarded that their hands were tied because of the decision in the Full Bench (five Judges) case of — 'Gunderao v. Lingappa', reported in 32 D L R 27, because in that case the Full Bench held that the High Court could exercise its revisional powers against the order of the 'Nazim' under the Cattle Trespass Act. Qamar Hasan and Manohar Pershad JJ., thought that it was not open to them to hold that the power to exercise revisional jurisdiction against an authority, not necessarily a court, was not vested in the High Court. I have already distinguished the Full Bench case in — '32 DLR 27 (Crl.)', (holding?) that the order against which a revision was filed in the High Court was a sentence passed by the 'Nazim' under the Cattle Trespass Act, that is to say, a special Act and where a sentence is passed under a special act by a 'Nazim', that would be subject to the revisional jurisdiction of the High Court under Section 360 of the Hyderabad Criminal P. C. Therefore, if the High Court exercised its revisional powers, in those circumstances, it would be deemed to have exercised such a power under S. 360 read with S. 5 of the Hyderabad Cr. Pro. Code. The result of this discussion is that the decisions of the Hyderabad High Court do not lay down that a revision would lie against an authority or tribunal, otherwise than a court. This is the position so far as the decisions of the Hyderabad High Court are concerned.

(6) So far as the decisions of the High Courts in British India are concerned, the revisional jurisdiction was exercised only in respect of decisions made by courts subordinate to the High Court because the words of S. 115, Civil P. C., which pertain to revision read as follows:

> "The High Court may call for record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto....."

The condition precedent to the exercise of revisional jurisdiction according to the above Section is that the Court whose decision is under consideration must be one subordinate to the High Court. That clearly shows that it can only apply to decisions of such of those courts

which are subordinate to the High Court. The Court therein would not include a person acting in an administrative capacity or a person acting as persona designata. The mere fact that an executive officer was exercising judicial function would not constitute him a Court. This view is supported by the decision of the Full Bench of the Patna High Court, reported in — (1940) 19 Pat. 321 'Jaganath Lall v. Land Acquisition Deputy Collector, Patna', wherein they held that the Collector under the Land Acquisition Act was not subordinate to the High Court. The Judges therein remarked:

"All Courts are not subordinate to the High Court. For example Revenue Courts are subordinate to the Board of Revenue and this Court has no power whatsoever to revise any orders passed by them, yet they act judicially."

In a case which arose under the Oudh Rent Act of 1886, a Full Bench of the Oudh Chief Court held that the District Judge to whom an appeal lay against the order of the Deputy Commissioner under the Oudh Rent Act must be considered only to be a Court of Revenue and as such was not subordinate to the Chief Court: vide — '4 Lucknow 539 F.B.: 1929 Oudh 389 (Gaya Prasad v. Kalap Nath)'. The Madras High Court held that the Board of Revenue when directing the revision of proceedings under S. 172 of the Estates Land Act was not a Civil Court and therefore the High Court cannot interfere either under S. 115, Civil P. C. or S. 107, Government of India Act (— 'Raja of Mandasa v. Jaganayakulu)' — 1932 Madras 612 F.B.).

In a case before the Rangoon High Court viz. — 'Mohideen v. Bukshiram', reported in 3 Rangoon 410, F. B.: 1926 Rangoon 33 F. B., the majority of the Judges, Heald and Rutledge JJ. were of opinion that the Controller of Rents under the Rangoon Rent Act was not a court nor a Civil Court, but an executive officer appointed by the local Government under the provisions of the Act.

But apart from S. 115, Civil P. C., there was a provision in the Government of India Act, namely, Section 107, under which the High Court had powers of superintendence. So cases arose in British India wherein the question was canvassed whether apart from S. 115, Civil P. C., the High Court could exercise its powers under S. 107, Government of India Act. I might herein refer to a case which came up before the Calcutta High Court. This was a case where a person was convicted of an offence against the Arms Act. He was convicted under the Bengal Emergency Powers Ordinance. Under the ordinance an appeal from the order of a Special Magistrate should have been brought within 7 days and that period could not be extended. The accused filed the appeal beyond the period of limitation; but it was argued before the High Court that the High Court could interfere under S. 107, Government of India Act, but the Judges of the Calcutta High Court held that S. 107, Government of India Act, could not apply. They said that the powers of superintendence of the High Court under S. 107, Government of India Act, extended only to the right of the High Court to keep the lower courts which were under its jurisdiction within the bounds of their authority and this right under S. 107 did not involve a responsibility for the correctness of the decisions of the lower courts. They had merely to see whether the lower courts did their work in a legal manner. To this effect were the observations of Rankin C. J. in the above case: see — 'Manmadanath Biswas v. Emperor', reported in 1933 Calcutta, page 132.

The same question was discussed by the Allahabad High Court in the Full Bench case of — 'Mukundmal v. Daya Pershad', wherein, Sulaiman C. J. observed as follows:

"The High Court is not competent in the exercise of this authority to interfere and set right the orders of a subordinate Court on the ground that the order of the subordinate court has proceeded on an error of law or an error of fact." (1935 Allahabad, p. 599).

Thus, it would appear that the powers of the High Court under S. 107, Government of India Act, were regarded as being confined to merely exercising a control over the subordinate courts to see that they discharged their duty in a legal manner and interfering in the decisions of the courts and correcting them was not warranted in the exercise of this power. Therefore where the matter which comes up before a High Court is an order or a decision by a tribunal or an authority not subordinate to the High Court who exercises those powers on the executive side or as persona designata, the High Court could only interfere with it by way of a writ of certiorari. I am, therefore, of opinion that when the Rent Controller enquired into the case before him under the special enactment, he was exercising the powers as a persona designata and as such his decisions were subject only to the certiorari jurisdiction of the High Court. I hold that in so far as the decisions of the Rent Controller and those of the Appellate Authority on appeal therefrom prior to the coming into force of the Constitution are concerned, they are only subject to the certiorari jurisdiction and the remedy of a party is only to apply by way of a writ of certiorari.

The question that has been referred to the Full Bench is answered as follows:

The remedy of a party aggrieved by the order of the Appellate Authority in Rent Control Proceedings is by way of an application for the issue of a writ of certiorari.

The file be sent over to the Division Bench with the above answer for further proceedings in the case. This order will govern all the applications in which the same question was referred to the Full Bench.

(7) MOHOMMED AHMED ANSARI J.: I agree.

(8) QAMAR HASAN J.: It is with great regret that I find myself unable to agree with the view propounded by my learned brother Srinivasachari J. I would have liked to deal with the question in greater detail but as the question has after the advent of the Constitution of India become one of purely academic interest, I would briefly state my reasons for the contrary view which I am going to hold. Before the constitution, the remedy by way of certiorari was not a universal remedy. As pointed out by their Lordships of the Privy Council in — 'Ryots of Garbando v. Zamindar of Parlakimedi', 69 Ind App 129, the power to issue writ of certiorari was limited to the High Court of Bombay, Calcutta, and Madras with this qualification that it could not issue on any one outside Presidency Towns

unless he was a British subject. It was also laid down that the power of superintendence given by S. 15 of the Indian High Courts Act, 1861 and then by S. 107, Government of India Act, 1915, does not include a right to issue a writ of certiorari to individuals or official bodies excepting judicial functions in the mofussil.

(9) So far as our High Court is concerned, the law bearing on the question under consideration may be culled from decided cases. In the case of — 'Muhammad Abdul Aziz Khan v. Sarkar-e-Aali', 23 Deccan Law Report 106 the question arose whether the Collector acting as the Land Acquisition Officer was subject to the revisional jurisdiction of the High Court. A Bench of three judges following — 'Krishna Das Roy v. The Land Acquisition Collector of Patna', 16 Calcutta Weekly Notes 327, and — 'Haridas Pal v. The Municipal Board, Lucknow', 22 Indian Cases 652, by majority held that the Land Acquisition Officer was subject to the extraordinary revisional jurisdiction of the High Court. In the same case decided after the receipt of the record of the case another Bench also consisting of three Judges took a contrary view and following a Full Bench ruling of the Madras High Court, — 'Abdus Sakar Sahib v. The Special Deputy Collector, Vizagapatam, I. L. R. (1947) Madras 357, unanimously held that the High Court has no power to exercise its revisional jurisdiction either under S. 615, Hyderabad Civil P. C. or S. 17, Hyderabad High Court Act inasmuch as the Collector was not a Court subordinate to the High Court. A different note was however struck in — 'Akarab Singh v. Sarkar-e-Aali', 33 Deccan Law Report 515 at p. 517 that the order of the Collector refusing to refer the question of compensation etc., for the determination of the court was revisable by the High Court.

(10) My learned brother has discussed — 'Vithal v. Sarkar-e-Aali', 29 Deccan Law Report 57, and — 'Gunde Rao v. Lingappa', 32 Deccan Law Report 27. I need not cover the same ground again. It is true that the line of reasoning adopted in the former case was that Nazim-e-Zila was acting in his capacity as the District Magistrate under the Hyderabad Government Securities Act and in the latter case that the Collector or Deputy Collector should be deemed to be a Special Magistrate within the meaning of S. 13, Hyderabad Criminal P. C., and as such these officers were subject to the revisional jurisdiction of the High Court. But at the same time the learned Judges who decided those cases based their conclusions on another ground also. At page 34 of Deccan Law Report 27, their Lordships of the Full Bench approving — '29 Deccan Law Report 57, observed:

"Ordinarily when a functionary is bound to take evidence before forming an opinion, such proceedings are judicial proceedings."

(11) In laying this dictum they inter alia made a reference to — 'H. D. Chatterjee v. L. B. Tribedi', ILR 49 Calcutta 528, wherein it has been held that the Rent Controller is a court of civil jurisdiction and the High Court has the power of revision under its general power of superintendence over the Rent Controller's Court under S. 107, Government of India Act.

(12) The question as to the extent of the revisional jurisdiction of the High Court again came up before the High Court in the Full Bench case of — 'Eer Bhadrappa v. Syed Abdur Rahim', 33 Deccan Law Report 413. There the preliminary objection raised was that the High Court has no jurisdiction to interfere in revision with the orders passed by the Debt Conciliation Board inasmuch as S. 25, Hyderabad Debt Conciliation Act, expressly ousted the appellate and revisional jurisdiction of the Civil courts. Mir Alam Ali Khan who delivered the leading judgment repelled this contention and held that the expression 'subordinate court' used in S. 615, Hyderabad Civil P. C. was not confined to courts which were subject to the administrative or appellate jurisdiction of the High Court but included any Government department or official who performed the functions of a court. The learned Judge further observed that S. 17, Hyderabad High Court Act, read with S. 7 of the Charter was wide enough to cover such cases. Khaleeluzzaman J. who wrote a concurring judgment added that under S. 17, Hyderabad High Court Act, the High Court is competent to exercise those powers which were open to the Bombay, Calcutta, and Madras High Courts on an application for writ of certiorari.

(13) The 'locus classicus' on the point under discussion which under some misapprehension is supposed to have incorporated the extraordinary legal remedy by way of certiorari with all its limitation in the law as then obtained in the State of Hyderabad, is to be found in the case of — 'Raja Partebgir v. Sarkar-e-Aali', 35 Deccan Law Report 153. This is a decision of seven judges. I need not discuss this ruling in detail. It would be sufficient to point out that the case of — 'Eer Bhadrappa v. Syed Abdur Rahim' which was approvingly quoted by one of the Judges at page 200 of the report. Abu Sayeed Mirza and Hashim Ali JJ. observed at page 178 that:

* x x x x

and at page 185 the same learned judges said

* x x x x

Abdul Hameed J. at page 188 said:

* x x x x

Shripat Rao J. as he then was observed at page 196:

* x x x x

Ramchander Naik J. as he then was, did not express any opinion on this particular point. Husain Ahmed Beg J. struck a dissentient note and at p. 213 he said:

* x x x x

It would thus be clear that these two Full Bench cases did not lay down that the remedy by way of certiorari was a common law or inherited or codified remedy in so far as the State of Hyderabad was concerned. What these cases decided was that any Government department or official which or who dealt with the rights and obligations of the subject in a judicial and quasi-judicial manner was a court within the meaning of S. 17, Hyderabad High Court Act, and consequently subject to the extraordinary revisional jurisdiction of the High Court.

(14) This view continued to be held in several subsequent cases but in the case of — 'Hasan Bin Yousuf v. Chand Bi', 38 Deccan Law Report 357, Suryanarain and Siadat Ali JJ. drew a distinction between an application for the issue of a writ of certiorari and application for revision and held that inasmuch as the

* Extracts quoted in Urdu.

Rent Controller was a "persona designata and not a court his orders were only subject to the certiorari jurisdiction of the High Court and as such an application for a writ of certiorari alone would lie against an order passed by the Collector in his capacity as an appellate authority." For the first time the concept of persona designata was brought in on the strength of — 'AIR 1943 Caicutta 247', 'AIR 1947 Calcutta 455' and 'AIR 1947 Allahabad 407'. The following quotation from 'AIR 1947 Cal. 455' was extracted by the learned Judges in support of their reasoning:

"In our opinion the District Judge as contemplated in the Calcutta House Rent Control Order is not a District Judge in his ordinary judicial capacity of the presiding officer of the principal court of original jurisdiction in the District but a persona designata. It is noticeable that the District Judge might be excluded altogether by an order of the Provincial Government which is inconsistent with his being contemplated as the court of District Judge to whose existing appellate jurisdiction a new subject matter is added."

And from the Allahabad case the following quotation was cited:

"The Additional District Magistrate has purported to act under the House Rent Control and Eviction Order. It appears that under Sec. 2, Defence of India Act, the power to frame certain rules and orders has been conferred in the first place on the Central Government. The Central Government can however delegate that power to the Provincial Government and the latter again under Sub-sec. 5 of Sec. 2 of the Act can delegate its powers to any officer or authority subordinate to it. The House Rent Control and Eviction Order was passed under the powers so delegated and the Additional District Magistrate has purported to act in the exercise of the power so delegated to him. The simple question for consideration therefore is whether the officer or authority to whom power is delegated by the Provincial Government under Sub-sec. 5 of Sec. 2, Defence of India Act, is a court within the meaning of the Criminal Procedure Code so that this court would be authorised to call for the record of that court under Sec. 435 and to deal with it under Sec. 439, Criminal Procedure Code. In my opinion the answer is obviously in the negative. The officer or authority to whom powers are delegated by the Provincial Government is really a persona designata and not a court."

After referring to these passages the learned Judges observed that this interpretation applied with equal force to the expression 'subordinate court' used in S. 17, Hyderabad High Court Act. This view is in accord with the minority view expressed by Husain Ahmed Beg J. in the Raja Pertabgir's case and divergent from the view taken by the majority. The case of Eer Bhadrappa was distinguished on the ground that the Full Bench purported to hold that the Board of Conciliation under the Hyderabad Debt Conciliation Act was a court within the meaning of S. 17, High Court Act.

I have shown above that what the two Full Bench cases decided, in effect and substance was that a Government functionary, official or authority may not be a court within the meaning of Civil or Criminal Procedure Code but if it performs the functions of a court in deciding upon the rights and obligations of the subject, he would be subject to the extraordinary revisional jurisdiction of the High Court. This view is not the solitary view of our court. Similar view has been adopted by the Nagpur High Court in — 'Srinivas Laxman Rao v. Superintendent, Printing Press, Nagpur', AIR 1945 Nag. 94, — 'Debi Dutt v. Central India Electrical Supply Co., Ltd.', AIR 1945 Nagpur 244, and by the Lahore High Court in — 'Works Manager, Carriages and Wagon Shop v. K. G. Hashmat', AIR 1946 Lahore 316. Similarly a Commissioner acting under Workmen's Compensation Act was held to be a court in — 'Mt. Dirji v. S. M. Gostm', AIR 1942 Patna 33. There is also a decision of the Lahore High Court in — 'Kishen Chand & Co. v. Nur Muhammad', AIR 1949 Lahore 44, where a Division Bench held that a Rent Controller under the Punjab Urban Rent Restriction Act acts as a Civil Court and not as a persona designata.

(15) I have already referred to the fact that the Full Bench had approvingly quoted '49 Calcutta 528' in which it has been held that the Rent Controller is subject to the revisional jurisdiction of the High Court.

(16) If the test adopted in '38 Deccan Law Report 357' were applied to the cases reported in '29 Deccan Law Report 57' and '32 Deccan Law Report 27', the District Magistrate in one and the Collector and Deputy Collector in the other case would be no more than persona designata, which position cannot be maintained unless the whole question is re-opened in a Fuller Bench.

(17) These were the reasons which emboldened me & my learned brother Manohar Pershad J. to differ from the view taken in '38 Deccan Law Report 357', and I still stick to that view unless and until the Full Bench cases to which I have referred above are overruled and the law is brought in consonance with the latter view of Calcutta and Allahabad High Courts.

(18) Therefore my answer to the question is that the Rent Controller is subject to the extraordinary jurisdiction of the High Court under Sec. 17, Hyderabad High Court Act.

A/R.G.D. Answer accordingly.

***A.I.R. 1953 HYD. 73 (Vol. 40, C. N. 34)**

M. A. ANSARI
AND P. JAGANMOHAN REDDY JJ.

Rani Shankeramma, Appellant-Petitioner v. Ramchandra Reddy and another, Respondents.

Misc. Appln. No. 296 of 1951, D/- 11-9-1952.

(a) Constitution of India (1950), Art. 226 — Scope — Nature of jurisdiction.

The exercise of jurisdiction under Article 226 by the High Court is judicial and not administrative. Whatever may be the kind of writ it issues it does so as a Court of law guided by judicial considerations and reaches its conclusions by shifting the materials on record as it does in any other case. The fact that its jurisdiction under the Article is extraordinary does not deprive that jurisdiction of its fundamental character of being judicial. (Para 5)

Anno: C. P. C., App. III; Constitution of India, Art. 226 N. 1.

* **(b) Civil P. C. (1908), S. 151 — Inherent power — Power of High Court to stay its own orders — Order passed in exercise of extra-ordinary jurisdiction — Mandamus — Interim stay of, in expectation of application for leave to appeal — Bench different from that which ordered mandamus can order stay — Nature of order — (Constitution of India (1950), Art. 226).**

There is sufficient authority to show that the High Court has jurisdiction under S. 151, Civil P. C. to stay its own orders with a view to assure the applicant that he can pursue his intention of having his case finally adjudicated by the superior Court without fear of that decision becoming infructuous: 12 Ch. D. 438; 5 C W N 781; 40 Cal 955; A I R 1933 All 18; A I R 1939 Cal 308; 45 CWN 1023, Rel. on; AIR 1934 All 585 and AIR 1935 All 599, Expl. (Para 7)

What all is necessary is that the order in question must have been passed by the High Court in the exercise of its judicial jurisdiction and that it should be appealable to the Supreme Court. When that is so, the nature of the jurisdiction is not very material. Therefore an order of mandamus, which is a judicial order cannot be excluded from the inherent jurisdiction to stay possessed by the High Court. The fact that the rules framed by the High Court do not provide for stay, instead of preventing it from passing an order therefor, leaves its inherent jurisdiction uncontrolled to be exercised, on principle and precedent. (Para 10)

The order can be stayed in expectation of an application for leave to appeal to Supreme Court on the same principle on which a decree is stayed and the mere fact that it is called a writ does not make the position different. (Para 11)

The order for interim stay may be granted by a bench different from the one which passed the order of mandamus and in doing so that bench does not review the order of a co-ordinate bench or cancel such order. All that it does by the interim order, maintaining status quo, is to grant a temporary relief which the courts can give in order that an application for leave to appeal to the Supreme Court may be filed. (Para 11)

Reddy J.: If there is a right of appeal to the Supreme Court, then the inherent powers of the High Court to order the abeyance of its order for a limited time cannot be denied. An interim relief can be granted in aid of and as an ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. Final determination of rights in a suit or proceedings can either relate to the determination by the High Court of such rights limiting its power to the grant of interim relief until the final issue of an appropriate writ or until the filing of an appeal or until its final disposal when filed. In either case the High Court has incidental or ancillary power to grant interim relief. As such the High Court has inherent powers to give interim stay of a mandamus order in expectation of the application for leave to appeal: 12 Ch D 438, Rel. on; AIR 1952 SC 12, Expl. (Para 17)

A writ is issued by the High Court of a State under Art. 226 and consequently any orders of stay of the operation of any writ pending appeal or disposal of a stay petition will also be those of the High Court. Where any Bench which has passed the original order for the issue of a writ cannot be constituted either by reason of one or both of the Judges not being available or where they have directed the petition to be placed before any other Bench, such Bench as may be constituted will have jurisdiction to pass such orders as it thinks fit. To hold otherwise, would be to admit that no relief could be granted to a person aggrieved, who wants to go in appeal, merely because the original Bench cannot be constituted. (Para 18)

Anno: C.P.C., S. 151 N. 2; App. III; Constitution of India, Art. 226 N. 11.

Sadasiva Rao, for the Appellant; Gopalrao Ekbote, for Respondents.

M. A. ANSARI J.: The legal question in this miscellaneous application for the stay of an order of mandamus issued by a Division Bench of this High Court is that this Court has no inherent jurisdiction to stay such an order even for the purposes of facilitating filing of an application for leave to appeal to the Supreme Court and obtaining stay thereupon.

(2) To appreciate the argument, it is necessary to give certain important facts of the case. The applicant is Ramchandra Reddy, who has been adopted by the widow of the last male-holder of Papannapet Samasthan, and the party contesting granting of the stay is the daughter of the last male-holder. She had in her favour the grant of succession by the Revenue authorities to the Samasthan. The grant has, in the course of proceeding on an application by the adopted son been reversed, whereupon she applied to this court for issuing of the writs of Certiorari, Prohibition and Mandamus with a view not only to set aside the judgment against her; but also to have the estate released as it had been under the supervision of the Court of Wards ever since she was the minor and her father died. A Division Bench of this Court consisting of my learned brothers Manohar Pershad and Dr. Siadat Ali Khan JJ. on August 12, 1952, allowed the application and directed the Court of Wards, who was one of the opposite parties to the application to carry out its statutory duties of surrendering the estate to Rani Shankeramma who was no longer a minor. On an application for the stay of this order of Mandamus by Ramchandra Reddy on the grounds that the judgments of the High Court are voluminous and he intends filing application for leave to appeal to the Supreme Court, another Division Bench consisting of my learned brother V. R. Deshpande and P. J. Reddy JJ. passed on August 22, 1952 an interim order directing maintaining of status quo till an absolute order on the application be made. The case was then posted before this Division Bench and the respondent Rani Shankaramma has filed an objection to the interim order. She has, however, filed no counter Affidavit challenging the correctness of the allegations of facts contained in the affidavits in support of the earlier application as well as the supplementary affidavit which has been filed before us. These affidavits being not challenged, the facts mentioned therein can be accepted and only the question of law arises as to how far a Division Bench can pass an order maintaining status quo pending

filing an application for leave to appeal to the Supreme Court, and obtaining of a stay order thereon.

(3) An ancillary question has also arisen whether another Division Bench can pass such a stay as the Bench which passed the Mandamus order is not the one which is hearing this status quo application. We need not deal with the latter question at length for that Bench passed an order before the interim application was granted directing the case to be placed before any other Bench. This order appears to us to be sufficient ground for another Division Bench to hear and dispose of the application according to law.

(4) Coming to the first question in the case, it has been argued by the learned Advocate of Rani Shankaramma that the order of Mandamus is a peremptory order, which involves contempt of Court in cases of disobedience; it cannot be reviewed except by the appellate Court, it is issued in exercise of extraordinary powers and Section 151 of the Civil Procedure Code which alone saves the inherent jurisdiction of the Court does not apply to such proceedings. He argues that the exercise of jurisdiction under Article 226 of the Constitution is administrative and therefore the question of inherent jurisdiction does not arise at all. He further contends that in passing an interim order of status quo this Court was making Mandamus order for a limited purpose which has been held by the Supreme Court in — 'AIR (1952) Supreme Court 12', not to be the proper exercise of jurisdiction under Art. 226, elaborating the argument, he says that the interim order of status quo amounts to the variation of the earlier of Mandamus by another Division Bench and would in effect be interference with the jurisdiction of a Division Bench, a Court of equal jurisdiction.

(5) I would emphasise in the very beginning that the exercise of jurisdiction under Art. 226 of the Constitution by this Court is not administrative. Whether the order be of Certiorari, Prohibition, Mandamus or Habeas Corpus, this Court issues them as a Court of law. When doing so, questions of legal jurisdiction affecting an individual, or enforcement of a legal duty cast by law upon a particular officer or illegal depriving of personal freedom are decided. The Courts are guided by judicial considerations and conclusions are reached by sifting of the materials on record like any other case. The jurisdiction may be ordinary or extraordinary but the mere addition of an epithet does not take away the fundamental character of its being judicial.

(6) The jurisdiction being judicial, the next question that arises is whether the Courts have not certain incidental or inherent powers in matters arising from their decisions. Both the English and our Courts have held that they have for the purposes of final adjudication of the disputes decided by themselves, the power of staying enforcement of their orders. I shall begin by citing the observations of two Judges in — 'Polini v. Gray', (1879) 12 Ch D 438, where Jessel M. R. at page 443 says:

".....An action is brought to determine the rights of claimants to a fund. The plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, 'bona fide', to prosecute an appeal to the Court of ultimate resort. The plaintiffs allege that that appeal will be nugatory if the fund is paid out to the defendants, and that if the plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend, and, assuming the contention to be correct in fact, the question is whether this Court has jurisdiction to prevent such a consequence. It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preserving of property pending litigation is this, that the successful party in the litigation that is the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success....."

Then Cotton L. J. at page 446 observes:

".....The only question we have to consider is, whether or no the Court has jurisdiction in a proper case to stay all dealings with a fund pending an appeal to the House of Lords although the Court has decided against the title of the plaintiff and dismissed the action. I see no difference in principle between staying the distribution of a fund to which the Court has held the plaintiff not to be entitled, and staying the execution of an order by which the Court has decided that a plaintiff is entitled to a fund.....On what principle does it do so. It does so on this ground that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who so far as the litigation has gone, has established his rights. That applies, in my opinion, as much to the case where the action has been dismissed....."

(7) I have quoted these two observations in order to show that the broad principle on which Courts direct stay of their orders is one of administering justice and is acted upon in order to facilitate resorts to the Courts of ultimate appeal so that the decisions of such courts may not prove infructuous. This broad principle appears to me to be applicable not only where ordinary cases are decided, but also where in the case of exercise of extraordinary jurisdiction, orders are passed affecting rights of persons. Section 151, Civil P. C. also appears to be based on this general principle. Several High Courts in this country have referred to this Section when they stayed proceedings pending special appeals to the Privy Council. The above observation of Jessel M. R. has been referred to by a Full Bench of the Calcutta High Court in — '5 CWN 781 at page 797', which case was relied upon by Mookerjee J. in the one reported in — 'ILR 40 Calcutta 955'. In this case, the question arose whether the High Court was competent to make an order for stay of proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee of the Privy Council for special leave to appeal and Mookerjee J. relying on different authorities as well as — '5 CWN 781' came to the conclusion that the Court had jurisdiction under S. 151.

(8) It is argued that this was the view only of one of the Judges constituting the Full Bench. But then this observation has been followed by two later cases of the Calcutta High Court and to which I shall make references

later. A Division Bench of Allahabad High Court in a case reported in — 'AIR (1933) All 18, stayed the order for the suspension of a vakil till his appeal be disposed of by the Privy Council. Then in — 'AIR (1939) Calcutta 308', it was held that the High Court has jurisdiction under S. 151 to stay its order pending application for special leave to the Privy Council. These cases cannot be distinguished on the grounds that they were in litigations where (applications for?) special leave were to be filed before the Privy Council; for in a Division Bench case reported in 45 C. W. N. 1023, execution of the proceedings was stayed pending filing of an application to appeal to the Court itself and it was held that it can be done under S. 151, Civil P. C. There are thus sufficient authorities of High Courts in this country that there is jurisdiction in High Courts to stay their own orders with a view to assure the applicant that his intention to have this case finally adjudicated will be, without fear of the ultimate decision, proving infructuous.

(9) It was argued on behalf of Rani Shankaramma that there are authorities of the Allahabad High Court that new heads cannot be invented for the purposes of exercising powers under Sec. 151, Civil P. C. One is a case reported in AIR (1934) Allahabad 585 and the other is a Full Bench case of the same Court reported in AIR (1935) Allahabad 599. I do not take these authorities as laying down that if an appeal is contemplated by an unsuccessfull litigant against an order of the High Court that cannot be stayed. All that the authorities lay down is that for the purposes of the appeal from an order of the High Court proceedings in some other subordinate Court cannot be stayed. In AIR (1934) Allahabad 585, Sulaiman C. J. was referring to the stay of a suit in a subordinate Court. Even if the view of the Allahabad High Court be that no stay can be given, I am not prepared to agree with the view having regard to the series of authorities of other High Courts which appear to me to be based on sound principles of administration of justice.

(10) Then it is argued before us that the Mandamus order having been made in exercise of an extraordinary jurisdiction the provisions under S. 151 do not apply to it. When it is established that the jurisdiction to grant the order is judicial and the order is appealable to the Supreme Court, the power of staying proceedings with a view to assure final decision by the ultimate Court cannot be excluded for the principle is one of general application to all judicial orders and the nature of the jurisdiction under (sic) the order is made is not very material. If in the course of disciplinary proceedings an order can be stayed, I do not see on what grounds I can exclude the principle when Mandamus is issued. Then it was argued that the High Court having framed rules and there being no rule relating to stay no order can be passed. If there be no rule framed the inherent jurisdiction is thereby uncontrolled and should be exercised on principles and precedents.

(11) It was argued that the order has been varied by the stay. I am of opinion that this argument does not carry much weight. It cannot be disputed that a decree cannot be varied after it is signed and yet in expectation of an application for leave to appeal to the Supreme Court it can be stayed. If such a stay is not variation, I do not see how the position is different when a Mandamus order is made. Any argument on the use of the word "writ" is of no importance, for in England every action is commenced by a writ, which means an order in the name of King to appear and answer a particular claim. One of the arguments of the learned Advocate is that in ordering the stay of Mandamus, we were reviewing the order and staying the decision of the Bench Co-ordinate to us, I am afraid that is not a correct description of the legal position. The interim order of maintaining status quo was not an order of review, nor it was a cancellation of an earlier order. It is a temporary relief which the Courts can give in order that leave to appeal to the Supreme Court be filed. If under S. 151, a Division Bench can stay an order in some judicial matter not partaking the nature of Certiorari, I do not see on what basis a status quo order on similar principle can be treated as variation of a writ for Mandamus. In making the order absolute which was passed on August 22, 1952, I am not varying it. I am doing what I would do in any other case where an appeal is contemplated against a judgment and relief is asked for in order to facilitate filing of such application and obtaining of such order.

(12) Now, coming to the merits of the case in the affidavit it is mentioned that the property involved in the case is large. It appears to have been under the Court of Wards ever since the father of Rani Shankaramma died. It is alleged that she is not experienced and there is fear that the property would not be available should the order of the High Court be reversed. Those allegations are not challenged and therefore I accept them. It is true that the lady has been deprived of managing her estate for a long time which should not be continued. But the order that I am passing is only of a very short duration and it will be without prejudice to any order by the Bench to which leave application is presented and to the conclusion that may be reached at relating to the stay order that may then be given. In these circumstances, this consideration would not weigh with me as it would have done had I been making an order of long duration.

(13) I must add that whatever I have expressed in this judgment is only for the purposes of disposing of this application. I, therefore, agree with my learned brothers Deshpande and Reddy JJ. in the conclusion that they have arrived at and direct stay for a period of ten days from the date of our order of September 4, 1952 given.

(14) P. JAGANMOHAN REDDY J.: I entirely agree with the views expressed by my learned brother and the order made by him. Since I was a member of the Division Bench which gave the interim stay on the 22nd of August 1952, I wish to add a few sentences, particularly in view of the trend of arguments before us challenging the power of a Bench of this High Court to grant an interim stay.

(15) The learned Advocate for the respondent has cited two decisions to which my learned brother has already referred in support of his contention that the High Court has no inherent powers to grant a stay. I wish to add that in the case of — 'Lala Atma Ram v. Beni Prasad', AIR 1934, Allahabad 585, the whole question as later pointed out by Sulaiman C. J. in the Full Bench case of — 'Mukand Lal v. Gaya Prasad', AIR 1935 Allahabad 599, was whether the High Court apart from any revisional powers conferred under Sec. 115 of the C.P.C. had any inherent powers under Sec. 151,

of the C.P.C. to direct the subordinate Courts to do something or not to do something or to act in a particular manner. That in substance was the question before their Lordships of the Allahabad High Court in both the cases and incidentally the question arose whether any such powers have been conferred under Sec. 107, Government of India Act 1915. In the 1934 Allahabad Case, Sulaiman C. J. did not wish to express any definite opinion on that point. A perusal of his judgment in that case would clearly show that he was mostly guided by the merits of the case before him. He says that the facts disclosed no justification for giving a stay to the subordinate Court to stop the trial pending the result of the appeal and proceeds to observe at page 587 that :

"the postponement of the hearing of the case would therefore involve some delay and there is a possibility of some oral evidence being lost in the meantime. The only loss which the defendant can suffer would be the costs incurred by him in defending the case and the time and labour spent. This can be adequately compensated for by an award of costs when the case is finally disposed of."

(16) In the present case, we are not called upon to consider whether we have inherent powers apart from S. 115, C.P.C. to direct any subordinate Court to do or not to do any particular Act. What we have to consider is that pending an appeal can a stay order be given. If there is a right of appeal to the Supreme Court, then the inherent powers of the High Court to order the abeyance of its orders for a limited time cannot be denied.

(17) It has been suggested by the Advocate for the respondent to this petition that the order of 22-8-52 given by Vithal Rao Deshpande J. and myself was in the nature of an interim relief granted by the issue of one of the appropriate writs under Art. 226 of the Constitution. We are aware of the circumstances in which the Supreme Court in the case of — 'State of Orissa v. Madan Gopal', AIR 1952 SC 12 declared the grant of an interim writ of Mandamus under Art. 226 pending the expiry of the period prescribed under Sec. 80 of the C.P.C. for filing a suit, to be invalid and not covered by Art. 226. A perusal of our order of 22-8-52 would make it abundantly clear that no such interim writ was issued nor for that matter intended to be issued amending, abrogating or in any way nullifying the effect of the order for the issue of a writ of Mandamus passed by another Bench of the High Court on 12-8-52. All that was attempted to be done was to hold that order in abeyance temporarily pending the hearing of the arguments by both the parties for the grant of a stay. The circumstances as apparent from the record are that the Bench which issued the original order of 12-8-52 directed, on the presentation of this stay petition, to have it placed before any other Bench. Consequently, a Bench consisting of my brother Vithal Rao Deshpande and myself was constituted and the matter came up before us. In view of the urgency alleged in the affidavit accompanying the petition of the applicant an order for maintaining the status quo was passed by us, although it was our view that such an order generally would best have been passed after hearing both the parties. But as the affidavit alleged that the writ of Mandamus would be given immediate effect to by the Court of Wards by the release of the estate, interests of justice required that a temporary stay should be granted. The Supreme Court in the above referred case of the — 'State of Orissa v. Madan Gopal', AIR 1952 SC 12 at page 14 after discussing the grant of interim relief under Art. 226 of the Constitution observed that :

"An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding."

The words "final determination" of rights in a suit or proceedings can either relate to the determination by the High Court of such rights limiting its power to the grant of interim relief until the final issue of an appropriate writ or until the filing of an appeal or until its final disposal when filed. In either case, there is no warrant for the assumption that the High Court has no incidental or ancillary power to grant interim relief as has been submitted by the respondent's Advocate. In the words of Cotton L. J. in — 'Polini v. Gray', 12 Ch D 438 at 446 :

"When there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution ..... would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who, so far as litigation has gone, has established his rights."

As such the High Court has inherent powers to give interim stay in such circumstances.

(18) There is again the further contention of the respondent's Advocate that since the writ is a peremptory order, it is only the Bench that passed the original order which can stay the writ and no other Bench has jurisdiction to entertain such an application. No authority has been cited for this proposition which appears to me to be merely an 'ipse dixit'. A writ is issued by the High Court of a State under Art. 226 and consequently any orders of stay of the operation of any writ pending appeal or disposal of a stay petition will also be those of the High Court. Such orders of the High Court are passed by any Bench to which such applications are posted by orders of the Chief Justice in accordance with the High Court Act. In these circumstances where any Bench which has passed the original order for the issue of a writ cannot be constituted either by reason of one or both of the learned Judges not being available or as in this case where they have directed the petition to be placed before any other Bench, such Bench as may be constituted will have jurisdiction to pass such orders as it thinks fit. To hold otherwise would be to admit that no relief could be granted to a person aggrieved who wants to go in appeal merely because the original Bench cannot be constituted.

(19) For the aforesaid reasons, I agree with the order proposed by my learned brother.

A/M.K.S.

Order accordingly.

A.I.R. 1953 HYD 77 (Vol. 40, C. N. 35)

PALNITKAR C. J. AND SHRINIVASACHARI J.

Jeevan Khatoon and others, Appellants **v.** Mehtab Khatoon and others, Respondents.

Civil S. A. No. 96/4 of 1357, D/- 7-10-1952.

Transfer of Property Act (1882), Ss. 39 and 53 — Advancement — Benami Transaction — (Evidence Act (1872) Ss. 101 to 103).

There is no presumption of intended advancement in India. No doubt, the burden is upon him who alleges that the property belongs to another other than the person in whose name the property stands, but this onus is easily discharged when the motive or the reason with which the property was purchased in another's name is given. He has merely to show for what rational purpose that was done. The criterion as to whether the property really belongs to the benamidar or any other person, is to find out as to who paid the consideration. The source of consideration will be the most important factor to be taken into consideration. In benami transactions all subsequent proceedings and conduct are always consistent with the original intention of the purchaser and the subordinate parts are notoriously fitted in to correspond with the benami arrangement: Case law Rel. on. (Paras 4, 5)

Anno: T. P. Act, S. 39 N. 6 S. 53 N. 5; Evidence Act, Ss. 101 to 103 N. 20.

Jahangir Ali, for Respondents.

JUDGMENT: This is a second appeal arising out of a suit filed by one Mehtab Khatoon against her daughter-in-law and her issues for her share in the property of Mohammad Khan, her husband, and also her share as the mother in the property of Younus Khan, son of Mohammad Khan, which she had become entitled to after the death of her son. The brief facts relating to this case are that the suit property had been granted to one Hanumantha Rao on ijara and because he failed to pay the ijara amount, the ijara lapsed and Mohammad Khan, the husband of the plaintiff paid the ijara amount that was due, and got the ijara transferred in the name of his son, Rahim Khan, in 1307 Fasli. Rahim Khan died in 1315 Fasli and thereafter, it is stated, Mohammad Khan got the ijara transferred in the name of his younger son, Younus Khan. Mohammad Khan died in 1338 Fasli & Younus Khan died in 1350 Fasli.

(2) The present suit was brought in 1352 Fasli by Mehtab Khatoon claiming her share in the property. The defence was that the property belonged to Younus Khan and the plaintiff was only entitled to one-sixth share alone as the mother and not to any additional share. A good volume of evidence, both documentary and oral, was led by both parties, and on the evidence before the court, the trial Court came to the conclusion that the ijara land was taken in the name of Rahim Khan in the first instance and later in the name of Younus Khan by way of benami and that really the owner of the ijara was Mohammad Khan himself. This finding was upheld by the lower appellate court. It is against this judgment that the defendants come in appeal.

(3) The learned Advocate for the appellants confined his arguments before us only to the extent of the 'ijara' lands, although the suit related to a partition of other properties as well. It was argued by him that originally the 'ijara' was taken in the name of Rahim Khan, the son; that subsequently in 1315 Fasli it was transferred in the name of the other son, Younus Khan; and that the subsequent conduct of Mohammad Khan as revealed in the statement recorded before the Tahsildar at the time of getting the 'ijara' transferred in the name of Younus Khan conclusively proves that the intention of Mohammad Khan was to get this 'ijara' in the name of his sons and for their benefit. His contention is that the proceedings and subsequent conduct of Mohammad Khan are only consistent with this, viz., that Mohammad Khan wanted to benefit his son, Younus Khan. It is argued by the learned Advocate for the respondents that the property was taken in the name of Rahim Khan, as Mohammad Khan happened to be a Government servant, being a Muntazim of Irregular Forces. His argument is that being a Government servant, for fear that a suspicion may be created in Government circles that property had been purchased by him in the area where he was serving as a Government servant, he purchased this property benami in the name of his son.

(4) We have gone through the record in the case and are of the opinion that this appeal should fail. We are in agreement with both the Courts below that the purchase of this property was benami in the names of Rahim Khan and Younus Khan and that the property really belonged to Mohammad Khan. In all such cases, the criterion as to whether the property really belongs to the benamidar or any other person, is to find out as to who paid the consideration. The source of consideration will be the most important factor to be taken into consideration. There can be no doubt that in this case that the consideration came from Mohammad Khan alone. Further, it has also to be borne in mind, as has been held by the Privy Council in the leading case of —'Kerwick v. Kerwick,' 47 Indian Appeals 275, that there is no presumption of intended advancement in India. No doubt, the burden is upon him who alleged that the property belongs to another, other than the person in whose name the property stands, but this onus is easily discharged when the motive or the reason with which the property was purchased in another's name is given. As observed by the Privy Council in the above case, he has merely to show for what rational purpose that was done. The Privy Council has also observed in the case of —'Uman Pershad v. Gandharp Singh', 14 Indian Appeals 127 that "even a slight quantity of evidence to shew that it was a sham transaction will suffice for the purpose." We are satisfied in this case that the reason that we can gather from the evidence easily discharges the burden, it being that he was a Government servant and the rules forbade purchase of property by a Government servant in the area where he was working.

(5) As regards the contention of the learned Advocate for the appellants that the subsequent proceedings and the conduct of Mohammad Khan go to prove that the property was purchased for Younus Khan, we must state that in benami transactions all subsequent proceedings and conduct are always consistent with the original intention of the purchaser and the subordinate parts are notoriously fitted in to correspond with the benami arrangement. That this is always the conduct that is adopted, is supported by a decision of Patna High Court in the case of —'Sahadev Karansingh v. Usman Ali Khan', 1939 Patna 462.

(6) The learned Advocate for the appellant also invited our attention to a decision of Privy Council in the case of —'Nawab Mirza Mohammad Sadiq Ali Khan v. Nawab Faqr Nawaz Begum', 59 Indian Appeals 1. With regard to this case, it must be said that what the Privy Council laid down in that case was that although there was no presumption of benami transactions in India, a slight evidence of intention would be sufficient to turn the evidence. In our opinion, there is not the requisite

evidence in this case to outweigh the evidence led on behalf of the plaintiffs to support the case that the property belonged to Mohammad Khan.

(7) We are, therefore of the opinion that both on facts and on the question of law, the defendants cannot succeed. This appeal is, therefore, dismissed with costs.

B/D.H. Appeal dismissed

A.I.R. 1953 HYD. 79 (Vol. 40, C. N. 36)

MANOHAR PERSHAD
AND MIR SIADAT ALI KHAN JJ.

Rani Shankeramma, Appellant-Petitioner v. Government, Respondent.

Application No. 296 of 1951-52, D/- 12-8-52.

(a) Civil P. C. (1908), S. 11 — "Heard and finally decided".

The order of the Chief Minister regarding the release of the estate from the Court of Wards was not approved by His Exalted Highness and no Firman was issued in that regard.

Held that as the Chief Minister's order did not receive the assent of His Exalted Highness who was the final authority regarding Crown Grants, and as no Firman was issued it cannot be said that the matter became final. It follows, therefore, that in so far as the release of the estate was concerned it cannot be said that the Revenue Minister had no jurisdiction to hear later petitions. (Para 15)

Anno: C.P.C., S. 11 N. 100.

(b) Hindu law — Adoption — Widow — Authority to adopt — Adoption under authority of Nizam.

According to Hindu Law, an adoption by a widow would only be valid if the widow had the requisite authority to adopt. According to the Madras School of Hindu Law, the widow does not have any residuary power to adopt in the absence of the sapindas. A valid adoption according to that law would relate back to the death of the father. Where the adoption has taken place on the authority of His Exalted Highness and not under the authority of the deceased husband, so far as the Atiyat property is concerned, the authority given by the H. E. H. would be deemed to be sufficient but such an adoption is not valid according to Hindu Law and would not entitle the adoptee to the non-atiyat property. Adoption of this type does not relate back to the death of his father. (Paras 25, 26)

(c) Hindu Law —Adoption — Effect.

Mere adoption by itself does not entitle the adoptee or clothe him with any rights to property unless he appears in the virasat proceedings and gets his virasat sanctioned. (Para 26)

(d) Constitution of India, Art. 226 — Writ of certiorari — Failure to exercise jurisdiction.

Failure to exercise jurisdiction has been held to be a good ground for the issue of a Writ of Certiorari: AIR 1951 Bom 353, Rel. on. (Para 27)

(e) Tenancy Laws — (Hyderabad) Jagir Abolition Regulation (1358 F), S. 21. Cl. 2. Proviso — Pending proceedings — Civil P. C. (1908), S. 9.

If the previous petitions had not been dismissed or if after the dismissal some action by way of appeal or review had been taken, and in the meantime, the Jagir Abolition Regulation had come into force, then it could be said that they were pending proceedings started before the Jagir Abolition Regulation came into force and proviso to Section 21, Cl. 2 would have applied. When the proceedings were not pending proceedings, Cl. (2) of S. 21 (and not the proviso thereto) of the Jagir Abolition Regulation would clearly become applicable and so neither the Nizam-e-Atiyat nor the Revenue Minister could dispose of the petition or the appeal and it was only the Civil Court which would be competent. (Para 40)

Anno: C.P.C., S. 9 N. 51.

(f) Tenancy Laws — (Hyderabad) Jagir Abolition Regulation (1358 F), S. 21 Cl. 2 Proviso — Pending proceedings — Petition for rehearing.

A petition for rehearing cannot be said to be a continuation of the proceedings started before. (Para 40)

(g) Gashti (10 of 1338 F.), S. 13 — Proceedings not inherently administrative.

It is true that proceedings of the type mentioned in Section 13 of the Gashti, 10 of 1338 F are administrative in nature and would be dealt with on the intezami side, but it does not follow from this that any proceedings not inherently administrative in nature would also be deemed to be administrative and would be dealt with administratively. (Para 45)

(h) Gashti (10 of 1338-F), S. 13 — Administrative proceedings.

As a general proposition of law, it may be true that once Virasat proceedings terminate, all miscellaneous proceedings which do not relate either to virasat or Inam enquiry would be administrative in nature and would be dealt with according to Gashti 10 of 1338-F and Gashti 19 of 1332 Fasli. The fact whether the nature of the proceedings is administrative or not has to be determined according to the contents and the prayer and not on any general principles. Where in the petitions, the prayer is for the sanction of the Virasat, the argument that as no Virasat proceedings could start in the life-time of the 'mashdar' the petitions may be treated to be for amendment, does not hold good. Merely because in the life-time of the 'mashdar' Virasat cannot be opened the nature of the petitions would not change. The proceedings started before the Nazim-e-Atiyat would be regular virasat proceedings and not for any amendment of the Taqt-e-virasat, that is, administrative and any decision given by the Nazim-e-Atiyat would be subject to an appeal before the Atiyat Committee and not the Revenue Minister. (Paras 48, 49)

(i) Civil P. C. (1908), S. 9 — Administrative bodies — Jurisdiction.

Jurisdiction is not conferred on grounds of natural justice. Jurisdiction has to be specifically conferred by statute and more so in the case of administrative bodies exercising judicial or quasi-judicial functions. Such bodies have to keep themselves strictly within the four corners of juris-

diction that is specifically conferred upon them; otherwise their orders become null and void. (Para 49)
Anno: C. P. C., S. 9 N. 2, 3.

(j) Constitution of India, Art. 226 — Jurisdiction under — Nature.

The jurisdiction which the High Court exercises in issuing Writs is a limited jurisdiction. The Court is not a court of appeal, nor is it a court of revision. It has no power to correct either findings of fact or even errors of law. Its sole function is to correct persons or tribunals exercising judicial or quasi-judicial functions when they assume jurisdiction which they do not possess or when they refuse to exercise jurisdiction which is vested in them by law, or when in the exercise of their jurisdiction they violate the principles of natural justice. (Para 50)

(k) Hyderabad Atiyat Enquiries Act (10 of 1952), S. 13, Cl. 2 — Order in excess of jurisdiction.

Any order passed or any action taken in excess of jurisdiction or in improper exercise thereof would not be an order or action contemplated by Cl. (2) of S. 13. The sanction given by the Chief Minister would not validate an inherently invalid judgment. (Para 60)

(l) Constitution of India, Art. 226 — Scope — Hyderabad Atiyat Enquiries Act (10 of 1952), S. 13, Cl. 2.

To the extent that any legislation seeks to take away the powers of the High Court to issue any writ, direction or order contemplated by Article 226 of the Constitution, that legislation would be ultra vires and, therefore, even if Cl. (2) of S. 13, Atiyat Enquiries Act, No. X of 1952 is construed to bar the jurisdiction of the Civil Court to challenge any order or any action however illegal or without jurisdiction, to the extent that this clause seeks to oust the jurisdiction of the High Court to issue appropriate Writs under Article 226 of the Constitution, that clause must be considered to be ultra vires. (Para 62)

(m) Constitution of India, Art. 226 — Mandamus and Prohibition — Writs of.

The grant of an order or the issue of a writ of mandamus is as a general rule a matter for the discretion of the Court. Some of the essential conditions for the issue of such a writ are: (i) the person applying must show that he has a real and special interest in the subject matter and a specific legal right to enforce; (ii) he must show that there resides in him a legal right to the performance of the legal duty by the party against whom such a Writ is sought, and (iii) that there is no other equally effective, convenient and beneficial remedy.

Prohibition on the other hand is a writ which used to be issued by the King's Bench Division primarily to prevent a Court or Tribunal or a quasi-Tribunal from exceeding the jurisdiction or acting contrary to rules of natural justice. It is well settled that the Writ of Prohibition can only be against a body exercising public functions of a judicial or quasi-judicial character and cannot in the very nature of things be utilised to restrain legislative powers. Held that this was a fit case in which Writ of Mandamus should be issued, and there was no need for issuing a Writ of Prohibition. Case law discussed. (Paras 85, 86, 90)

Akbar Ali Khan and Sadashiva Rao, for Appellant; Anand Swaroop Choudhri and Ramchandra Rao Nandapurkar, for Respondent.

MANOHAR PERSHAD J.: This is an application on behalf of Rani Shankaramma for the issue of Writs of Certiorari, Mandamus and Prohibition under Article 226, Constitution of India, to quash the order of the Revenue Minister, Hyderabad State, dated 19-6-1951, by which he rejected the petition of Rani Shankaramma for the release of the estate and allowed the appeal of Ramchandra Reddy and directed the Nazim-e-Atiyat to prepare an amended succession statement of Raja Durga Reddy declaring Ramchandra Reddy as the successor to Raja Durga Reddy, and for an order against Respondents Nos. 1 to 5 restraining them from enforcing the said order of the Revenue Minister, dated 19-6-1951, and prohibiting them and Respondents Nos. 6 and 7 from taking any proceeding in pursuance of the said order. Notice of this petition was given to the other side to show cause why this petition should not be admitted. After hearing the arguments of the parties, the petition was admitted and the other party was directed to file their counters.

(2) Mr. Vaidya, on behalf of the Respondents Nos. 1-5 and Shri Nandapurkar, Advocate, on behalf of the Respondents Nos. 6 & 7 filed their counters, after which the petition was posted for arguments. We heard the arguments of the learned Advocates.

(3) Shri Sadashiv Rao, Advocate, appearing on behalf of the Petitioner has raised various points:

(1) It is contended first that the nature of the decision of the Revenue Minister is quasi-judicial and as such amenable to the issue of prerogative writ;

(2) that the decision of the Revenue Minister on the point of what is a pending case is absolutely wrong in law and cannot be supported by any precedent. Further he had no jurisdiction to hear and decide the appeal in the matter of virasat:

(3) that the learned Revenue Minister has wrongly decided about the commutation money to be recovered from the Jagir Administrator; the only person legally entitled to get the commutation is the person in whose name Virasat was sanctioned. In flagrant contravention of this final order, he has divided the amount into three equal shares, which is beyond his jurisdiction;

(4) that the virasat sanctioned by His Highness could not have been cancelled by any authority according to the existing laws. The Revenue Minister has gone against the established principles of law and equity and has exercised a jurisdiction which he is not competent to do, that is, cancelling the Firman of the late His Highness passed in 1903;

(5) that the learned Revenue Minister has usurped the functions of the granfor and directed the Inam Commissioner to sanction the succession in favour of Ramchandra Reddy while the petitioner in whose favour the virasat is sanctioned, is alive;

(6) the principle of Hindu Law relating to surrender and other matters have also not been correctly laid down by the Revenue Minister. The decision in question is ultra vires;

(7) that the learned Revenue Minister without sending the application to the Atiyat Court for necessary action has erroneously usurped the functions of the trial Court and decided the case on merits; whereas the trial Court had only dismissed the application of Respondent No. 7 on a preliminary issue;

(8) that the learned Revenue Minister in not deciding the issue of the release of the estate in favour of the petitioner has miserably failed to exercise a jurisdiction vested in him. The decision asking the parties to go to the Court of law in regard to non-Atiyat property so far as this petitioner is concerned, is against the principles of law of the Court of Wards and against natural justice. It was incumbent on the Revenue Minister to release the estate in favour of the petitioner who is admittedly the ward on whose behalf the estate was held under the supervision of the Court of Wards for the last fifty years;

(9) that the finding of the learned Revenue Minister violates the fundamental rights of the petitioner as guaranteed under Articles 13, 14, 19(1) (f) and 31 and the other provisions of the Constitution of India, relating to the functions of judiciary and the superintendence of the High Court according to S. 227;

(10) that the Jagir Abolition Regulation is ultra vires, and if it is held intra vires, then in so far as the present case is concerned, it does not come within the definition of pending proceeding;

(11) that Ramchandra Reddy's adoption which is alleged to have been sanctioned by the Government has not been proved valid according to Hindu Law;

(12) that adoption of this kind does not mean that the succession is also admitted;

(13) that Ramchandra Reddy, does not succeed ipso facto unless virasat proceedings are complete; and,

(14) that the judgment of the Atiyat Appellate Court is final. In view of this, the question cannot be opened again.

(4) On behalf of the Respondents Nos. 1-5 Sri Anand Swarup Choudhury conceded that the nature of the decision of the Revenue Minister is quasi-judicial but contended that the Revenue Minister acted with jurisdiction, and in view of this, this Court ought to be reluctant to go into either the question of law or of fact. Reliance was placed upon the cases, — 'L. H. Sarandas and others v. Mukundani Lal and others', AIR 1951 Allahabad 514; — 'Parry & Co. v. C. E. Assocn.', AIR 1952 Supreme Court 179; '1 All English Reports 449'; Basu on Constitution, 2nd Edition pp. 1, 558 and 561. Following up the contention, it was urged that even if no adequate remedy is open, Writ of Certiorari would not lie. Reliance was placed upon the case of — 'The Province of Bombay v. Khushal Doss S. Advani', 1950 Supreme Court Journal 451.

(5) The second contention is that Cl. 2 of S. 13 of the Atiyat Enquiries Act, No. X of 1952 has been given retrospective effect and as such an order passed cannot be challenged. The third contention is that the decision of the Revenue Court in so far as the adoption is concerned, is res judicata and thus it cannot be questioned at this stage. Reliance was placed upon the case of — 'Harichand v. Mela Ram', AIR 1932 Lahore 523 and '6 Nazair Mal 524'. Lastly, it is argued that this is not a fit case for the issue of a Writ of Certiorari.

(6) On behalf of the Respondents Nos. 6 and 7, it is contended that as the petition before the Nazim Atiyat was not for the Virasat of Raja Durga Reddy, but for an amendment of the 'Takhta Virasat', it cannot be said that the Revenue Minister had no jurisdiction. Relying on the 'Gashti 10 of 1338 F.' and '19 of 1332 F.' and '4 Nazair-Mal 93 and 785', it is contended that two Virasat proceedings in respect of one and the same deceased person are competent on the Intezami side. It is further contended that an application for sanction of Virasat in the name of another heir is permissible and all such proceedings would not only be deemed to be Intezami, but would be valid. Fourthly, it is argued that the judgment of the Atiyat Committee is res judicata in so far as the question of adoption is concerned and the same cannot be agitated again. Lastly, it is contended that as the estate is still in the name of Raja Durga Reddy, whatever accretions are made to the estate, they would be deemed to be of Durga Reddy's.

(7) In order to understand and appreciate the arguments advanced on behalf of the parties, a brief reference to the facts of the case is necessary.

(8) Raja Durga Reddy, the holder of the Papannapet Samasthan died on 2nd April 1900 leaving behind his widow, Rani Venkata Lakshmamma and a daughter Rani Shankaramma. The estate was taken under the supervision of the Court of Wards on 26th April 1900, and both the mother and daughter were placed under its guardianship which continues upto this day. Succession proceedings were started in the Atiyat Department and after a submission of an Arz-e-dasht by the then Madar-ul-Maham (Prime Minister) to the effect that Raja Durga Reddy has left no male issue, and has neither adopted any son, nor has given any permission to adopt, virasat may be sanctioned in the name of the daughter, with provision for the maintenance of Rani Lakshmamma; a Firman was issued by the late His Highness the Nizam on 29th May 1903 sanctioning the succession in the name of Rani Shankaramma, the daughter of late Raja Durga Reddy. This was formally announced in the Gazette Extraordinary No. 35 dated 16th Azur 1313 F.

On 3-9-1903, Rani Lakshmamma sent a letter to the Revenue Secretary thanking him for the sanction of virasat in the name of Shankaramma. On 26-6-1908, Rani Lakshmamma submitted an application to the Revenue Secretary asking permission for the marriage of Rani Shankaramma with Pratap Reddy, according to the wishes of the late Raja Durga Reddy. This application was sanctioned by His Exalted Highness through a Firman dated 15th October, 1909, and accordingly, Rani Shankaramma was married to Pratap Reddy.

(9) On 24-2-1919 Rani Lakshmamma as guardian of Rani Shankaramma started pro-

ceedings for the release of the estate from the Court of Wards. The Joint Secretary, the Revenue Secretary and the Revenue Minister all recommended that the estate should be released in favour of Rani Shankaramma. His Exalted Highness the Nizam refused to sanction the release of the estate. Again on 16th June 1922, a memorial was presented to His Exalted Highness by Rani Lakshmamma for the release of the estate, but this was also rejected. On 5th May 1927, a Commission was appointed to look into the question of the release of the estate. On 13th March 1928, the Commission expressed its opinion for the release of the estate on condition that a man of the rank of a First Talukdar should be appointed. On 19th March 1928, Venkat Pratap Reddy, husband of Rani Shankaramma died. Rani Lakshmamma put in a petition requesting that the estate should not be released in favour of Shankaramma, but should be continued under the supervision of the Court of Wards.

After this, a petition signed by both Rani Lakshmamma and Shankaramma was filed before the Nazim-e-Court on 22-7-1929 requesting that permission be given to adopt. Rani Lakshmamma put a separate application to His Exalted Highness for permission to adopt a son to the late Raja Durga Reddy. Rani Shankaramma objected to this petition, on which a regular enquiry was directed to be made in the Atiyat Department about the right of adoption. On 4-1-1934, the Atiyat Appeals Committee decided in favour of Rani Lakshmamma. On the bais of this, permission was granted by His Exalted Highness and Shri Ramchandra Reddy was adopted on 6th April 1934. The controversy as to the sanction of the adoption continued in the Courts of Subedar, Nazim Atiyat and in the Atiyat Appeals Committee. The final decision in this controversy was given by judgment dated 29th Amardad 1343 F., and a Firman was issued on 28-6-1934 sanctioning the adoption of Ramchandra Reddy by Rani Lakshmamma, the Senior Rani and mother of Rani Shankaramma. Five years after the sanction of the adoption, Ramchandra Reddy appeared in the Inam proceedings and requested that he may be made a party and the 'muntaqab' should be issued in his name. This application was rejected by the Inam Commissioner. An appeal also was dismissed on 28th February 1938.

(10) On 27th August 1941, Rani Shankaramma again put in a petition for the release of the estate. This application was opposed by Rani Lakshmamma and Ramchandra Reddy. The Revenue Minister recommended that the estate be released in favour of Shankaramma which was assented to by Sir Mirza Ismail as Chief Minister. In the meantime, on 22-2-1947, Rani Lakshmamma filed a petition to the Revenue Minister which was rejected. Again, on 29th April 1947, another petition was presented which was heard by Mr. Qureshi, the then Revenue Minister, who gave his opinion against Shankaramma. The then Chief Minister approved of the same. Against this, Shankaramma filed a petition before Mr. Pradhan the then Revenue Minister on 27th October 1948 stating that Mr. Laik Ali, as Chief Minister, had no right to go against the decision of the previous Chief Minister, Sir Mirza Ismail. This application was sent to the Revenue Board by the orders of His Exalted Highness.

(11) After the Jagir Abolition Regulation came into force, the Nazim-e-Court of Wards presented a note to the Director General of Revenue inquiring whether the estate of Rani Shankaramma should be released. This also came up before Shri Ramlal, Member of the Board of Revenue, who after hearing the arguments of the parties decided in favour of Rani Shankaramma. On 13-3-1950 Shri Sheshadri as Revenue Minister agreed with his opinion. Aggrieved by this, both Rani Lakshmamma and Ramchandra Reddy filed a petition which came up for hearing before Shri B. Ramkishen Rao, the then Revenue Minister and now the Chief Minister. In the meantime, on the Atiyat Side, Ramchandra Reddy filed a petition to the Inam Commissioner, on 22nd June 1948, that is, nearly ten years after the previous decision of the Inam Commissioner, to reopen the virasat of Durga Reddy and order the payment of commutation amount to him. This application was rejected. After the enforcement of the Jagir Abolition Regulation, yet another application was filed by him which was also dismissed. Against this decision an appeal was filed before the Revenue Minister. This appeal and the petition of Rani Lakshmamma and Ramchandra Reddy on the Court of Wards' side were both heard by Sri B. Ramkishan Rao, the then Revenue Minister and now the Chief Minister who has passed the order which has given rise to this writ petition.

(12) Before discussing the arguments of the parties, I would like to mention some of the admitted facts: (1) It is admitted that after the death of Raja Durga Reddy, on the recommendation of the Madar-ul-Maham (Prime Minister) Virasat was sanctioned in the name of Rani Shankaramma, the present petitioner. (2) that the estate was taken under the Court of Wards; (3) that Rani Shankaramma was married to one Pratap Reddy with the consent of Rani Lakshmamma; (4) that Pratap Reddy died issueless and till the adoption of Ramchandra Reddi, Rani Lakshmamma, as guardian of Rani Shankaramma, tried to get the estate released in favour of Rani Shankaramma; (5) that the estate is still under the Court of Wards' supervision, and (6) that there were two proceedings; one on the Court of Wards' side and the other on the Atiyat side.

In the light of these admissions, I will consider the arguments of the learned Advocates one by one. Though the learned Advocates have raised many points, in my opinion, they can be grouped under four heads: (1) Whether the Revenue Minister had jurisdiction to hear the appeal as well as the petition filed on behalf of Ramchandra Reddy and Rani Lakshmamma respectively; (2) What is the effect of the judgment of the Atiyat Appeals Committee dated 26th Farwadi, 1347 F. and Cl. (2) of Section 13 of the Atiyat Enquiries Act No. X of 1952; (3) whether the Jagir Abolition Regulation is ultra vires the legislative authority of Hyderabad State; and (4) what is the effect of the adoption of Ramchandra Reddy.

(12A) I would deal with the question of jurisdiction first, for, if it is held that the Revenue Minister had no jurisdiction to hear the appeal or the petitions on the Court of Wards' side, it would be, in my opinion, a fit case for the issue of a writ of certiorari, and if I hold that the Revenue Minister had jurisdiction then in that case, the petition would

be dismissed. Thus, the question of jurisdiction is most crucial in this petition. It is admitted by the parties that there were two proceedings in the Revenue Court: one on the Atiyat side and the other on the Court of Wards' side. The proceedings on the Atiyat side originated first on the application of Rani Shankaramma, dated the 14th Bahman, 1337 F., for the sanction of Inams situated in the jagirs and samasthans. Ramchandra Reddy and Rani Lakshmamma also appeared and claimed that the 'Munthaqab' be issued in their name. On 15th Azur, 1347 F., the Nazim Atiyat decided that so long as Rani Shankaramma is alive, the other party has no locus standi. An appeal was filed before the Committee Atiyat, which upheld the judgment with certain amendments.

(12B) After this, Ramchandra Reddy filed two petitions before the Revenue Minister on 24th March 1949 and 26th April 1949. The petition of 24th March 1949 appears to relate to the question of compensation. On this, the Revenue Secretary, Sethu Madhava Rao, endorsed that "no action is necessary for the present on the Court of Wards' side: we are not competent on the Atiyat Side." The Revenue Secretary and the Revenue Minister, both agreed with this. Accordingly, a Fahmaish was issued to the petitioner to the effect that parties should appear in the Atiyat Court and get their claims decided. The second petition of 26th April 1949 relates to the sanction of the Virasat and the release of the estate. It appears that no action was taken on this petition.

(13) After this on 22nd June 1949, a petition was filed by Ramchandra Reddy before the Nazim Atiyat. This petition was rejected by the Assistant Secretary on 11th Aban 1358 F., on the preliminary issue that virasat cannot be sanctioned when the 'mashdar' (holder) is alive. It was further held that in view of the present Jagir Abolition Regulation, the question of possession does not arise. Shri Ghulam Hyder, the then Nazim agreed with this opinion. The second application of 24th October 1949 which was for re-hearing, was also rejected by Naizim. An appeal was filed before the Revenue Minister which was allowed by order dated 19-6-1951 which is the subject of this petition. On the Court of Wards' side proceedings were first started by Rani Lakshmamma as guardian of Rani Shankaramma for the release of the estate. His Exalted Highness rejected this petition. Again in the year 1922, a memorial was submitted to His Exalted Highness by Rani Lakshmamma as guardian for the release of the estate; this too was rejected. Later, a Commission was appointed to look into the question of release. This Commission recommended that the estate should be released, but a man of the rank of a Taluqdar should be appointed.

In the meantime, Rani Shankaramma's husband, Pratap Reddy died, after which it appears that relations between the mother and the daughter became strained and when Rani Shankaramma applied again for the release of the estate, Rani Lakshmamma opposed this and prayed that the estate should be continued under the supervision of the Court of Wards. In the meantime, Ramchandra Reddy was adopted by Rani Lakshmamma and when Rani Shankaramma again put in a petition for the release of the estate, both Rani Lakshmamma and Ramchandra Reddy opposed the same. The Revenue Minister expressed his opinion that the estate should be released and this was assented to by the then Chief Minister, Sir Mirza Ismail, but before a Firman could be obtained, Rani Lakshmamma put in a petition again before the Revenue Minister against the decision, and the then Revenue Minister decided in favour of Rani Lakshmamma and against Rani Shankaramma; this decision was approved by the then Chief Minister Mir Laik Ali.

After the Police Action, Rani Shankaramma, put in a petition before the Revenue Minister, stating that Mir Laik Ali was not competent to go against the previous decision, on which His Exalted Highness ordered that the case be sent to the Revenue Board for decision. Shri Ramlal, the member of the Revenue Board, decided the case in favour of Rani Shankaramma: the Revenue Minister, Mr. Sheshadri agreed with this opinion. Ramchandra Reddy and Rani Lakshmamma put in a petition again which came up for hearing before the then Revenue Minister, Shri B. Ramkishan Rao, now the Chief Minister.

(14) Shri Sadashiv Rao, Advocate appearing on behalf of the petitioner very candidly conceded before us that so far as the release of the estate is concerned, the Revenue Minister had jurisdiction to hear the petitions, but his objection is that as Sir Mirza Ismail had given his approval to the opinion of the Revenue Secretary for the release of the estate, that question had become 'res judicata' and cannot be agitated over again. Secondly, it was urged that the Revenue Minister has absolutely failed to exercise a jurisdiction vested in him in not deciding the issue of the release of the estate in favour of Rani Shankaramma who is admittedly the ward on whose behalf the estate was being held under the supervision of the Court of Wards.

(15) So far as the first argument is concerned, Shri Sadashiv Rao, however, admits that the order of the Chief Minister was not approved by His Exalted Highness and that no Firman was issued in that regard. Once it is admitted that the Chief Minister's orders did not receive the assent of His Exalted Highness it cannot be said that that matter became final. It was His Exalted Highness at that time that was the final authority regarding Crown Grants, and as no Firman was issued it cannot be said that the matter rested there. It follows, therefore, that in so far as the release of the estate is concerned, it cannot be said that the Revenue Minister had no jurisdiction to hear the later petitions filed on behalf of Ramchandra Reddy and Rani Lakshmamma. It is contended that the Chief Minister had given his approval to the decision of the Revenue Minister, as such it cannot be now questioned.

It should be remembered also that Mir Laik Ali as Chief Minister too had given his assent to the opinion of the then Revenue Minister against Shankaramma. In view of this, the later application of Rani Shankarmma after the Police Action could not be entertained. As discussed above, the final authority was the His Exalted Highness and as there is no Firman either for the release of the estate or for its retention, each party as of right was entitled to agitate the matter till it was finally decided.

(16) With regard to the other contention which refers to the failure of the exercise of jurisdiction, Shri Sadashiv Rao, advocate, contends that as virasat was sanctioned in the name of Rani Shankaramma and she is still alive, any question of succession would be premature; the only person entitled to the release of the estate being Rani Shankaramma. Thus, the Revenue Minister has failed to exercise his jurisdiction in not releasing the estate in her favour.

(17) On behalf of Shri Ramchandra Reddy and Rani Lakshmamma, it is argued that Ramchandra Reddy has been adopted by the authority of His Exalted Highness and the virasat sanctioned in the name of Rani Shankaramma would be cancelled and he would divest her of the estate which had vested in her. The Revenue Minister has held that the decision on the question of the release of the estate and the title to compensation depends upon the fundamental issue as to who was entitled to the succession of the Samasthan & Ramchandra Reddy as the adopted son of Rani Lakshmamma can divest Rani Shankaramma of the estate which came to vest in her as an intermediate heir. Thus, in the opinion of the Revenue Minister, the virasat sanctioned in the name of Rani Shankaramma was not final, but as an intermediate heir, and would automatically be cancelled on the adoption of Ramchandra Reddy or according to him it meant that the virasat sanctioned in the name of Rani Shankaramma was subject to the sanction of adoption.

(18) In order to appreciate this point, I have to consider the question of the adoption of Ramchandra Reddy and its effect. On behalf of the petitioner it is urged in the first place that Raja Durga Reddy had given no authority to Rani Lakshmamma to adopt and as such, Rani Lakshmamma could not adopt at all. His second contention is that if Ramchandra Reddy's adoption is based on the authority of His Exalted Highness, such an adoption would not be valid according to Hindu Law, and would not entitle him to the other property. It is next contended that an adoption of this kind cannot relate back to the death of the father nor can it have the effect of divesting the estate which had vested in her. Fourthly, it is urged that in the very Firman sanctioning the adoption of Ramchandra Reddy, it is stated that Ramchandra Reddy would be entitled to the estate later, which means, after the death of Rani Shankaramma, and therefore, the question of his succeeding in her life-time does not arise. Fifthly, it is contended that Rani Lakshmamma by her own admission and acts had completely surrendered her rights in favour of her daughter which amounts to civil death, thus debarring her from claiming any right to succession. In view of this, she was not entitled to adopt Ramchandra Reddy nor would such an adoption give any right to the adoptee.

(19) On behalf of Respondents Nos. 6 and 7, it is contended that Raja Durga Reddy had given authority to Rani Lakshmamma to adopt and it was on the basis of such authority that Rani Lakshmamma adopted Ramchandra Reddy and the adoption is valid according to Hindu Law. It is further contended that the opposite party cannot raise this point as this question of sanction was not argued before the Revenue Minister, and further it has been finally decided by a competent authority and that judgment is final as between the parties. With regard to the rights of the adopted son, it is contended that it relates back to the death of the adoptive father and as such he would divest Rani Shankaramma of the estate which vested in her. On the question of surrender, it is contended that there was no valid surrender as both the surrenderer and the surrenderee were minors at the time the succession opened. It was further contended that it was not a valid surrender because it was not a voluntary act of Rani Lakshmamma, but a decision given by the ruler on the recommendation of the Government.

(20) I would first take up the question whether Rani Lakshmamma had the requisite authority to adopt. On behalf of the petitioner, our attention was drawn to the Arz-e-dasht of 31st March 1933 presented to His Exalted Highness by the then Madarul-Maham (Prime Minister) and it is urged that the Arz-e-dasht does not state that Raja Durga Reddy had left any male issue or that he adopted a son or gave permission to adopt. In view of this and in the absence of any other evidence the adoption cannot be held to be valid.

(21) On behalf of Ramchandra Reddy it is contended that Rani Lakshmamma had permission to adopt and this fact was not only alleged but evidence was also led, and it has been finally decided by a competent court and cannot be challenged now. Reliance is placed on the case of — 'Rani Shankaramma v. Rani Lakshmamma and others', 6 Nazair page 524.

(22) On behalf of the petitioner, it is urged that the evidence referred to was recorded ex parte and she was not given any opportunity to cross-examine those witnesses; in other words, it is contended that such evidence is not according to law nor can it be used against the petitioner.

(23) In reply it is however urged on behalf of Ramchandra Reddy that even assuming that Raja Durga Reddy had not given any authority to adopt, the permission of the Ruler can be deemed to be sufficient authority and, as His Exalted Highness has given such permission, it cannot be said that the adoption is without any authority. It may be pointed out here that in the Arz-e-dasht of the then Madar-ul-Maham dated 31st March 1933, it is clearly stated that Raja Durga Reddy has not given any authority to his widow. This is a strong piece of evidence both against Rani Lakshmamma and Ramchandra Reddy. Now I have to see whether there is sufficient material on record to rebut the statement of the Madar-ul-Maham in the Arz-e-dasht. The learned Advocate for the other side relied on the evidence led by them. From a perusal of the record, I find that this evidence has been recorded ex parte and the other party was not given any opportunity either to cross-examine those witnesses or produce any evidence.

The learned Advocate for Ramchandra Reddy and Rani Lakshmamma also concede this point. This evidence cannot, therefore, be deemed to be according to law nor can it be used against Rani Shankaramma. This fact is sufficiently borne out by the judgments of Nawab Rahmat Yar Jung the then Nazim Atiyat dated 9-9-1943 and the judgment in the case of — 'Rani Shankaramma v. Rani Lakshmamma', reported in 6 Nazair Mal 540, relied upon by Rani Lak-

shmamma and Ramchandra Reddy. In the later judgment, it has been laid down that so far as the question of the authority to adopt is concerned, the enquiry had not been completed and if the judgment were to be based on this point alone, then in that case, the case would have been remanded to the court below. Thus, it follows that the members constituting the Bench were also of the opinion that there was no sufficient material on record regarding the husband's authority.

(24) The learned Advocate for Rani Lakshmamma and Ramchandra Reddy could not satisfy us whether there was any other sufficient material on record to prove the fact of the husband's authority. I find that the Revenue Minister has also not adverted to this point. It is urged that this point was not raised before the Revenue Minister and it cannot be raised here. I am afraid, I cannot accept this contention, for, Rani Shankaramma's plea all along has been that Rani Lakshmamma had no authority of her husband to adopt. Thus, she cannot be debarred from raising the question before us. In the absence of which (sic) the question could not have been decided without further enquiry. On behalf of Ramchandra Reddy and Rani Lakshmamma, it is contended that the judgment of the Atiyat Committee is final. I am afraid I cannot agree with the contention in toto. What has been decided in the said case is that so far as Jagir was concerned the authority given by the Ruler is sufficient. The question whether Rani Lakshmamma had the requisite authority of her husband has not been decided and so this fact cannot be said to be final.

In the result, on the present material on record, it cannot be held that Rani Lakshmamma had her husband's authority to adopt. This does not however mean that Ramchandra Reddy would be debarred from establishing the validity of his adoption in a proper court of law. After this I have to see whether the authority given by the Ruler would be sufficient and whether such an adoption would relate back to the death of the father.

(25) Shri Sadashiv Rao, Advocate, very candidly conceded that so far as the Atiyat property is concerned, the authority given by the H. E. H. would be deemed to be sufficient but he contends that such an adoption is not valid according to Hindu Law and would not entitle the adoptee to the non-atiyat property. According to Hindu Law, an adoption by a widow would only be valid if the widow had the requisite authority to adopt. Shri Nandapurkar has raised a novel point that there being no agnates of Durga Reddy in existence at the time of the adoption, whose assent could be sought, Rani Lakshmamma had an inherent authority of her own volition. I am afraid I cannot accept this contention. The parties admittedly belong to the Madras School of Hindu Law, and according to that school the widow does not have any residuary power to adopt in the absence of the sapindas. I cannot agree with him that if there are no sapindas in existence, a widow could adopt without any restrictions under the Madras School of Hindu Law. If that were the meaning, then there would be no difference between the Madras School and the Bombay School.

(26) As stated above, the adoption has taken place on the authority of His Exalted Highness and not under the authority of Raja Durga Reddy and as such it cannot be said to be valid according to Hindu Law. A valid adoption according to that law would relate back to the death of the father. The Revenue Minister has held that the adoption of Ramchandra Reddy relates back to the death of his father and that as such he could divest Rani Shankaramma of the estate which came to her. The Revenue Minister has come to this conclusion basing his arguments on the fact that after Raja Durga Reddy, Rani Lakshmamma was the rightful owner, and the object of the authorities in recommending Rani Shankaramma as successor appears to be to save the Samasthan from being resumed by the Ruler, and Rani Shankaramma would be expected to continue the line of Raja Durga Reddy through a son born to her. Thus, this deviation from the personal law was made for continuing the line of Raja Durga Reddy. I regret I cannot agree with the opinion of the Revenue Minister. No authority has been cited on behalf of Ramchandra Reddy to show that adoption of this type relates back to the death of his father.

The question of divesting Rani Shankaramma would only arise if Ramchandra Reddy's adoption was valid according to Hindu Law or if Rani Shankaramma's virasat was sanctioned subject to any adoption by Rani Lakshmamma. At the time of the sanction of the virasat, there was no question of Ramchandra Reddy's adoption. On the contrary, in the very Firman sanctioning the virasat in the name of Rani Shankaramma, there is a positive direction that a son born to Rani Shankaramma would be the next heir. Even in the Arz-e-dasht (subsequently sanctioned by a Firman) relating to the adoption of Ramchandra Reddy it is specifically stated that he would be entitled to the samasthan after the death of Rani Shankaramma. Thus I fail to understand how Ramchandra Reddy could divest Rani Shankaramma of the estate vested in her. The Revenue Minister has held that Rani Shankaramma was an intermediate heir. This is not borne out by the record; on the contrary, the Firman sanctioning the virasat is clear. Admittedly virasat is sanctioned in the name of Rani Shankaramma, and as she is still alive, no question of succession can arise. Further, mere adoption by itself, does not entitle the adoptee or clothe him with any rights to property unless he appears in the virasat proceedings and gets his virasat sanctioned.

(27) The Revenue Minister has held that Ramchandra Reddy as an adopted son can claim the commutation amount of the samasthan as well as the release in his favour, of such non-jagir property of Raja Durga Reddy as is under the supervision of the Court of Wards. I regret I cannot agree with his opinion. Ramchandra Reddy's adoption, on the records now before us, does not appear to be valid according to Hindu Law; virasat stands sanctioned in the name of Rani Shankaramma and during her life-time Ramchandra Reddy can neither be entitled to commutation amount nor the release of the other non-jagir property. The estate was taken under the supervision of the Court of Wards for the benefit of Rani Shankaramma, the Ward and if at all it has to be released it can only be released in her favour as the ward and none else. Thus, in my

opinion, the Revenue Minister has failed to exercise the jurisdiction vested in him in not ordering the estate to be released in her favour. Failure to exercise jurisdiction has been held to be a good ground for the issue of a writ of certiorari, vide — 'Mohsin Ali v. State of Bombay', 1951 Bombay 353. In view of the above findings, I think it is unnecessary to decide the question of the surrender of the estate, though much stress was laid on this point before the Revenue Minister and his judgment deals with this point at considerable length.

(28) Now I turn to the question which relates to the nature of the proceedings on the Atiyat Side: whether they were virasat proceedings or proceedings for an amendment of the 'Muntaqab'. At the outset it may be made clear that the Nazim-e-Atiyat has a two-fold function: on the Intezami (Administrative) side his position is that of a Joint Secretary and against his order an appeal lies to the Revenue Minister (Sadar-ul-Maham). On the regular & original (Iptedayi or Infesali) side, that is, in regard to virasat and Inam enquiries, his position is that of a Nazim against whose decision an appeal lies to the Atiyat Appeals Committee.

(29) The contention of the learned Advocate for the petitioner is that the petition of Ramchandra Reddy dated the 22nd June 1949 before the Nazim-e-Atiyat was for the virasat and therefore, an appeal against the decision of the Nazim ought to go before the Committee Atiyat and not before the Revenue Minister and so the Revenue Minister was not competent to hear the appeal.

(30) Secondly, it is argued that after the Hyderabad Jagir Abolition Regulation of 1358 F. came into force, no proceedings either before the Nazim-e-Atiyat or before the Revenue Minister could go on and it was the civil court that was competent under Cl. (2) of Sec. 21 of the said Regulation. He, therefore, contends that the Revenue Minister had no jurisdiction to hear the petition and his judgment should be quashed.

(31) The learned Advocate for the respondents while conceding that the Nazim-e-Atiyat has a two-fold function, contends that as the petition of Ramchandra Reddy was for the amendment of the 'Muntaqab' the Revenue Minister was competent to hear the appeal. As regards Cl. (2) of S. 21 of the Jagir Abolition Regulation it is replied that as the proceedings had already started before the Regulation came into force, Cl. (2) of S. 21 would not apply but the proviso to that section would govern the case.

(32) It appears that there was a two-fold contention on behalf of Rani Shankaramma before the Revenue Minister. The first contention was that the Nazim-e-Atiyat had no jurisdiction to entertain the application filed by Ramchandra Reddy afer the Jagir Abolition Regulation came into force, and it was only the Civil Court that was competent under Cl. (2) of S. 21 of the Regulation and no appeal could lie against this decision. The second contention was that the order passed by the Nazim-e-Atiyat was on the virasat side and therefore, the Revenue Minister was not competent to hear the appeal and decide it, but only the Atiyat Appeals Committee.

(33) On behalf of Ramchandra Reddy, it was contended there (and before us also) that his petitions were filed respectively on 24-3-1949 and 26-4-1949, while the Jagir Abolition Regulation came into force only on 15-8-1949 and therefore, Cl. (2) of S. 21 of the Jagir Abolition Regulation would not apply, but the proviso to S. 21, Cl. (2) of the said Regulation would apply and according to it all pending cases would be completed in accordance with the existing law "as if this Regulation had not been enacted". The Revenue Minister, agreeing with this contention of Ramchandra Reddy, held that the proceedings out of which the appeal before him arose, were started about four months prior to the date of enforcement of the Jagir Abolition Regulation, they would, therefore, (according to him) be covered by the proviso to Sec. 21, Cl. 2. That being so (he held) the proceedings were pending on the date of the enforcement of the Jagir Abolition Regulation "and there can be no doubt, therefore, that the Atiyat Court as well as he, the Revenue Minister, as the appellate authority, has jurisdiction to hear and dispose of these petitions".

(34) He further held that as the order passed by the Nazim-e-Atiyat is on the Atiyat Intezami (Administrative) side, an appeal lies to the Revenue Minister, and as such, he is competent to hear it. Thus, it would appear from this that the Revenue Minister claims to have jurisdiction on the ground that the proceedings were pending proceedings and also because he thinks that the order passed by the Nazim-e-Atiyat was on the Intezami (Administrative) side.

(35) I would first consider the question whether the proceedings started by Ramchandra Reddy were pending proceedings, having been started before the Jagir Abolition Regulation came into force. The Jagir Abolition Regulation came into force on 15-8-1949. The petition before the Nazim-e-Atiyat is dated 22nd June 1949: the two other petitions before the Revenue Minister were filed on 24-3-1949 and 26-4-1949 and the fourth petition before the Nazim-e-Atiyat for rehearing is dated 24th October.

(36) Clause (2) of Sec. 21 of the Jagir Abolition Regulation runs thus:

> "All claims relating to Jagir or to any share of the income thereto whether arising under the regulation or otherwise shall, subject to this Regulation, but notwithstanding, any existing law, be filed in, and decided by, the appropriate Civil Court: provided that any proceedings pending at the commencement of this Regulation before an Atiyat Court or before a Commission or any other authority shall be completed in accordance with the existing law, as if this regulation had not been enacted."

(37) On the petition of 22nd June 1949, the Assistant Secretary endorsed his opinion on 11th Aban 1358 F. (11th September 1949) to the effect that the petition should be dismissed because virasat cannot be opened when the 'mashdar' is alive. On the same day, Shri Ghulam Hyder, the then Nazim-e-Atiyat, agreeing with the opinion of the Assistant Secretary, dismissed the petition. No action seems to have been taken against this order of the Nazim.

(38) On the petition of 24th March 1949, to the Revenue Minister, the Assistant Secretary,

Sethu Madhava Rao, endorsed: "no action is necessary on the application for the present on the Court of Wards' side: we are not competent on the Atiyat Side". The Revenue Secretary and the Revenue Minister both agreed with this opinion. The Revenue Minister further directed that suitable endorsement be sent to the party. Accordingly, on 19-8-1358 F. a Fah-e-Maish (intimation) was issued stating that parties should go to the law court and get their claims decided.

(39) On the other petition of 26th April 1949, it appears that no action was taken. On the basis of the 'Fah-e-maish' dated 19-8-1358 F., another petition was filed by Ramchandra Reddy on 24th October 1949 to the Nazim-e-Atiyat for rehearing and this was dismissed on 25-1-1949 by Shri Ghulam Hyder, against which an appeal was filed before the Revenue Minister which was allowed on 19-6-1951.

(40) Thus, the petition of 22nd June 1949 to the Nazim-e-Atiyat and the petitions dated 24-3-1949 and 26-4-1949 to the Revenue Minister were, it appears, all filed along before the Jagir Abolition Regulation came into force. The petition of 22nd June 1949 was dismissed on 11th September 1949, and apparently no action was taken against this order, nor does any action seem to have been taken on the petition of 26th April 1949. The Jagir Abolition Regulation came into force on 15-8-1949 as stated already, and though the petition of 22nd June 1949 was dismissed on 11th September 1949, the party did not take any action and under the circumstances it can hardly be said that there was any proceeding pending when the Regulation came into force. No doubt, the second petition before the Nazim-e-Atiyat dated 24th October, 1949 was filed after the Jagir Abolition Regulation, but this petition is neither for the amendment of the Taqt-e-Virasat nor for the Virasat itself, but a mere petition for rehearing. If the previous petitions had not been dismissed or if after the dismissal some action by way of appeal or review had been taken, and in the meantime, the Jagir Abolition Regulation had come into force, then it could be said that they were pending proceedings started before the Jagir Abolition Regulation came into force and proviso to S. 21, Cl. 2 would have applied. The petition of 24th October 1949 is a petition for rehearing and such a petition cannot be said to be a continuation of the proceedings started before. In view of this, I regret I cannot agree with the opinion of the Revenue Minister that the proceedings were pending proceedings. When the proceedings were not pending proceedings, Cl. (2) of Sec. 21 (and not the proviso thereto) of the Jagir Abolition Regulation would clearly become applicable and so neither the Nazim-e-Atiyat nor the Revenue Minister could dispose of the petitions or the appeal and it was only the Civil Court which would be competent.

(41) We have now to consider the nature of the petitions filed by Ramchandra Reddy and for this purpose a glance at their contents becomes necessary.

(a) In Para 1 of the petition of 22nd June 1949, it is stated that the petitioner had filed two petitions to the Revenue Minister; Para IV avers that the petitions may be treated as part of the present petition; Para VI recites that the virasat of the late Raja Durga Reddy was sanctioned in the name of Rani Shankaramma his daughter. In Para VII it is claimed that the effect of the virasat of the late Raja Durga Reddy being sanctioned in the name of Rani Shankaramma was not to make her entitled to possession of any 'mash' in view of the distinct and express opinion contained in the Firman of His Exalted Highness. Para 10 contains the prayer to the effect that the virasat of late Raja Durga Reddy be sanctioned in his name and possession of the same be granted to him.

(b) The petition dated 24th March 1949 is however, for compensation: in this petition also it is admitted that Raja Durga Reddy's virasat was sanctioned in the name of Rani Shankaramma. The prayer is that compensation may be given to him. In this petition also there is no mention of any amendment of the 'muntaqab'.

(c) In the petition of 26th April 1949 also, it is recited and admitted that virasat was sanctioned in the name of Shankaramma while the request is that as he is the adopted son, the virasat of Durga Reddy may be sanctioned in his name.

(d) The petition of 24th October 1949 is a mere petition for rehearing.

(42) In all these petitions there is no prayer at all for the amendment of the 'muntaqab'. On behalf of Ramchandra Reddy, it is contended that though there is no clear prayer for an amendment of the Takhta Virasat, still there is a prayer that possession may be given to him, and as Shankaramma is alive and in her lifetime no virasat proceedings could start, once virasat had been sanctioned, it is argued, all other proceedings either relating to them or arising out of them, would be deemed to be Intezami (administrative) and would be dealt with on the Intezami (Administrative) side. The petition would, therefore, it is urged, be deemed to be a petition for an amendment of the 'muntaqab' on the Intezami (Administrative) side. In this connection our attention was drawn to S. 13 of Gashits (Circular) Nos. 10 of 1338 F., and 19 of 1332 F. and two cases reported in pages 93 and 785 of Nazair Mal, Vol IV.

(43) Clause 1 of S. 13 of Gashti No. 10 of 1338 F. may be rendered in the English version as follows:

> "In Inam and Virasat proceedings the shares of the sharers would be determined and it will be incumbent on the holder of the mash to pay the shares of the respective share-holders, and if he fails to do so, the Taluqdar would be entitled to act according to S. 73 of Gashti 26 F., that is, by confiscating the revenue."

Clause (b) of S. 13 enjoins:

> "If any Hissedar dies and his virasat proceedings are pending before a competent authority and the other 'guzareyab' (maintenance holders) or the sharers complain that they are not receiving the amount of their share, then their complaint would be heard by the said authority."

(44) Clause (c) refers to the payment and sanction of the 'guzara' during the pendency of the Inam and Virasat 'Tahqiqat' (enquiry).

(45) The contention of the learned Advocate for the respondent is that as during the lifetime of Rani Shankaramma no virasat proceedings could be started, any proceeding other than that would be deemed to be administrative and would be dealt with on the adminis-

trative side according to this Gashti. It is true that proceedings of the type mentioned in Section 13 of the Gashti 10 of 1338 F. are administrative in nature and would be dealt with on the Intezami side, but it does not follow from this that any proceedings not inherently administrative in nature would also be deemed to be administrative and would be dealt with administratively. This contention is not brone out by anything contained in S. 13 of Gashti 10 of 1338, Fasli.

(46) The object of Gashti No. 19 of 1332 F. is to show what class of cases would be dealt with by the Nazim-e-Atiyat and the Sadar-ul-Maham. The learned Advocate for the respondent drew our attention to item No. 42 of this Gashti which refers to the amendment of the Taqt-e-virasat and would only apply if the proceedings are for the amendment of the Taqt-e-virasat. The ruling cited in support, namely, — 'Khaja Bi v. Mohd. Shabberali', 4 Nazair Osmania, page 93 is a case where there was no question of any Virasat or Inam enquiry. It was a case of restitution of possession on the basis of a decree of a civil Court. It was, therefore, correctly held in that case that as the proceedings did not relate either to the Virasat or the Inam enquiry, the Nazim-e-Atiyat had no right to hear the appeal. This is not so in the present case and so this ruling does not help the contention of the learned Advocate. The case of — 'Vias Rao v. Riasat Begum', reported in 4 Nazair p. 785 also cited before us is equally of no help to the learned Advocate. This is a case where proceedings were started on a 'muqbarri' (informant proceedings) after virasat proceedings had closed and so it was held that the proceedings were administrative in nature.

(47) The Revenue Minister has held in the present case that the order passed by the Nazim-e-Atiyat to be on the Intezami (Administrative) side. I have gone through the whole judgment but I regret, I could not find any reasons given for such an assumption.

(48) After going through the petitions and after giving a careful consideration to the arguments, I came to the conclusion that proceedings before the Nazim-e-Atiyat could not be held to be either on the Intezami (Administrative) side or for an amendment of the Taqt-e-virasat. The amendment of the Taqt-e-virasat can only be done when there is any mistake in the Taqt-e-virasat, or the taqta has been issued against the sanction. It is not the case of Ramchandra Reddy, that there is any mistake in the Taqt-e-virasat or that the taqta has been issued against any sanction. The petitions of Ramchandra Reddy are to the effect that his adoption has been sanctioned and that therefore, the virasat of Raja Durga Reddy should be sanctioned in his name and that the commutation amount be given to him. In these petitions, it is admitted that Durga Reddy's virasat was sanctioned in the name of Rani Shankaramma. It does not appear that this virasat was sanctioned subject to the right of any adopted son. Thus I cannot hold that the petitions were for the amendment of the Taqt-e-virasat. The contention is that as Rani Shankaramma is alive no virasat proceedings would arise and proceedings after the virasat would be deemed to be miscellaneous and administrative in nature. As a general proposition of law, it may be true that once virasat proceedings terminate, all miscellaneous proceedings which do not relate either to virasat or Inam enquiry would be administrative in nature and would be dealt with according to Gashti 10 of 1338 F. and Gashti 19 of 1332 Fasli.

(49) The fact whether the nature of the proceedings is administrative or not has to be determined according to the contents and the prayer and not on any general principles. In the petitions, the prayer is for the sanction of the Virasat. In view of this the argument that as no Virasat proceedings could start in the life-time of the 'mashdar', the petitions may be treated to be for amendment, does not hold good. It is true that in the lifetime of the 'mashdar' virasat cannot be opened but merely on this account the nature of the petitions would not change. To my mind the proceedings started before the Nazime-Atiyat, were regular virasat proceedings and not for any amendment of the Taqt-e-virasat, that is, administrative and any decision given by the Nazim-e-Atiyat would be subject to an appeal before the Atiyat Committee and not the Revenue Minister. The Revenue Minister is only competent to hear appeals of the Nazim-e-Atiyat on the Intezami (administrative) side and not on the regular side. No specific provision of law was shown to us justifying the assumption of jurisdiction in a case like this. The Gashtis (Circulars) and the cases cited on behalf of Ramchandra Reddy and Rani Lakshmamma are not applicable to the facts of the present case and the Circulars do not confer such jurisdiction. Jurisdiction is not conferred on grounds of natural justice. Jurisdiction has to be specifically conferred by statute and more so in the case of administrative bodies exercising judicial or quasi-judicial functions. Such bodies have to keep themselves strictly within the four corners of jurisdiction that is specifically conferred upon them, otherwise, their orders become null and void. I am, therefore, constrained to hold the order of the Revenue Minister is beyond jurisdiction and that he assumed a jurisdiction not conferred on him by law and passed the order under question.

(50) The next question that I have to consider is whether a writ of certiorari would lie. It has not been disputed that the decision of the Revenue Minister is a quasi-judicial act. The jurisdiction which the High Court exercises in issuing writs is a limited jurisdiction. The Court is not a court of appeal nor is it a court of revision. It has no power to correct either findings of fact or even errors of law. Its sole function is to correct persons or tribunals exercising judicial or quasi-judicial functions when they assume jurisdiction which they do not possess or when they refuse to exercise jurisdiction which is vested in them by law, or when in the exercise of their jurisdiction they violate the principles of natural justice. This is the gist of the rulings cited by Shri Anand Swarup Choudhury and I completely agree with them and these do not need any detailed discussion.

(51) Finally it is urged on behalf of the State by Shri Anand Swarup Choudhury, that the decision of the Revenue Minister has been accepted by the then Chief Minister and is thus final and cannot be questioned in any Court of law, as per Cl. (2) of Sec. 13 of the Hyderabad Atiyat Enquiries Act No. X of 1952 and he

therefore, contends that this is not a fit case for the issue of writ of certiorari.

(52) On behalf of the petitioner it is urged that when the Revenue Minister had inherently no jurisdiction, any amount of sanction by the Chief Minister would not validate it.

(53) It was further urged that according to Gashti 10 of 1338 F. only such orders would be sent to the Chief Minister which need confirmation, and when the contention of the respondents is that the order passed by the Revenue Minister was on the administrative side, no question of confirmation arises at all.

(54) Thirdly, it is contended that the Act does not in any way take away the extraordinary powers of the High Court which are given to it under Article 226 of the Constitution of India. Reliance was placed on Halsbury's Laws of England, Vol. 9 paras 1455, 1458 and 1575 and on the rulings cited in '1951 Bom. 440'; '(1924) 1. K. B. D. 208'; 'AIR 1950 S. C. 222' and 'AIR 1952 All. 99.

(55) Lastly it is contended that the Act was passed after this petition was filed in this Court and after a notice was served on the respondents to show cause and the object in passing the Act seems to be to defeat the object of the petitioner.

(56) Shri Anand Swarup Choudhury, Advocate, on behalf of the Government, very candidly conceded before us that if it is held that the Revenue Minister had no jurisdiction, then in that case, the sanction of the Chief Minister would not be valid.

(57) Shri Nandapurkar, Advocate for Ramchandra Reddy and Lakshmamma, contends that even though the order of the Revenue Minister may not be valid, yet when sanction has been given by the Chief Minister, such sanction must be held to be valid. Following up the contention it is argued that the very object of passing the Act was to validate what was otherwise invalid.

(58) In order to appreciate the view points of the parties, a reference to Cl. (2) of Sec. 13, the Hyderabad Atiyat Enquiries Act, No. X of 1952 is necessary, which runs as follows:

(2) "The orders passed in cases relating to Atiyat Grants including Jagirs on or after the 18th September 1948 and before the commencement of this Act by the Military Governor, the Chief Civil Administrator, or the Chief Minister of Hyderabad or by the Revenue Minister by virtue of powers given or purporting to be given to him by the Chief Minister shall be deemed to be the final orders validly passed by a competent authority under the law in force at the time when the order was passed and shall not be questioned in any court of Law."

(59) According to the above provisions therefore, "the orders of the Military Governor, the Chief Civil Administrator, or the Chief Minister shall be final and will not be questioned", but as regards the Revenue Minister an exception has been made that his orders would be final if they are given by virtue of powers given or purporting to be given to him by the Chief Minister. As the other side has not pressed the point of the finality of this order of the Revenue Minister I do not wish to discuss that point and confine myself to the question of the finality of the order of the Chief Minister.

(60) While discussing the question of the nature of the proceedings it has been held that the orders of the Revenue Minister were without jurisdiction. There is no doubt that the petitioner is challenging the legality of the sanction and it is clear that the jurisdiction of this Court to consider the validity of the sanction would not be barred if the orders passed or the action taken was without jurisdiction. Any order passed or any action taken in excess of jurisdiction or in improper exercise thereof would not be an order or action contemplated by Cl. (2) of Sec. 13 of the said Act. Therefore, if the order passed was in excess of jurisdiction or was passed in violation of the fundamental principle of natural justice then that order would be cancelled by the issue of a writ of certiorari by this Court, exercising its extraordinary jurisdiction. No authority has been cited on behalf of Ramchandra Reddy, to show that, an order passed without jurisdiction would be valid by such a sanction. Thus I do not agree with the contention on behalf of Ramchandra Reddy that the sanction given by the Chief Minister would validate an inherently invalid judgment.

(61) The next point which deserves consideration is whether the said Act has in any way curtailed the powers of the High Court in issuing a writ of certiorari.

(62) In this connection, it is necessary to bear in mind Article 226 of the Constitution of India. That Article not only confers wider powers upon the High Court but also declares the powers already enjoyed by the High Court. Article 226 of the Constitution, while declaring the powers of the High Court, and making those powers part of the Constitution, has placed those powers beyond the challenge of the legislature. Before the Constitution came into force, the powers of the High Court to issue various writs could have been effected or modified by the appropriate legislature. Now inasmuch as these powers form part of the Constitution itself, they cannot be altered or affected by any legislature. These powers of the High Court can in any way be touched by means of the amendment of the Constitution. Thus, to the extent that any legislation seeks to take away the powers of the High Court to issue any writ, direction or order contemplated by Art. 226 of the Constitution, that legislation would be 'ultra vires' and, therefore, even if Cl. (2) of Sec. 13 of the Atiyat Enquiries Act, No. X of 1952 is construed to bar the jurisdiction of the Civil Court to challenge any order or any action however illegal or without jurisdiction, to the extent that this clause seeks to oust the jurisdiction of the High Court to issue appropriate writs under Article 226 of the Constitution, that clause must be considered to be 'ultra vires'. Therefore, the power of the High Court to correct any order made by any executive officer cannot be assailed or challenged by any legislation, and the power of the High Court which now arises under Article 226 of the Constitution must be exercised if the petitioner is entitled to the writ, notwithstanding, any provision in the said Act which seeks to oust the jurisdiction of the Civil Court.

(63) It is urged on behalf of Ramchandra Reddy that an order which is made final by an Act cannot be challenged even though in excess of jurisdiction. This contention seems to me to be contrary to what is now well

established as the ambit, within which the legislature can make orders of officers conclusive and final. As discussed above, that ambit must be restricted to orders passed with jurisdiction, and it cannot be extended to cover orders which are found to be without jurisdiction or in excess of such jurisdiction. I am supported in my view by the case of — 'Abdul Majid v. Haji Mohd.', AIR 1951 Bom. 441, where certain orders passed by the Custodian of Evacuee Property were challenged on the ground that they were in excess of jurisdiction conferred upon the Custodian and also as violating the fundamental principles of natural justice. In this connection a question had arisen whether in view of Section 43 (6) it is open to the Court to question the legality of any action taken by the Custodian under the Ordinance. Chagla C. J. and Tendolkar J. held that Article 226 of the Constitution of India declaring the powers of the High Court and making these powers a part of the Constitution has placed those powers beyond the challenge of the legislature and even if Sec. 43 (C) is construed to bar the jurisdiction of the Civil Court to that extent, the Section must be considered 'ultra vires'.

(64) Similar discussion had arisen in the case of — 'Ravi Pratap v. The Uttar Pradesh State & Others', AIR 1952 All. 99. In that case the contention was that a writ of certiorari could not be issued in view of the provision of Sec. 11 of the U. P. Court of Wards Act 1912 which lays down:

> (11) "No declaration made by the Provincial Government under Section 8 or by the Court of Wards under S. 10 shall be questioned in any civil Court."

Mushtaq Ali and Bhargav JJ. have held that the High Court in exercising its powers of issuing a writ under Art. 226 of the Constitution cannot be said to be a Civil Court. Civil and Criminal jurisdiction of the High Court is exercised by virtue of Art. 225 of the Constitution. Art. 226 gives an additional power which is exercised by virtue of this provision of the Constitution and not by virtue of the High Court being either a Criminal or a Civil Court. There is also the second reason that even if the High Court could be deemed to be a Civil Court. S. 11 of the U. P.Court of Wards Act, 1912, could not take away the power of the High Court to issue a writ under Art. 226 of the Constitution because no law made by State Legislature can in any way curtail the powers granted to the High Court by the Constitution.

(65) In Halsbury's Laws of England (Hailsham Edn.), Vol. 9 there is a reference to this point, vide paras 1455 and 1458. Para 1455 runs thus:

> "Certiorari is said to be 'taken away' by such Statutes. Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior court nor by a proviso, that 'no other court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior court."
>
> "The rule that certiorari can only be taken away by express negative words" is limited to cases in which certiorari is available at common law. It does not apply where certiorari is the creature of Statutes."

(66) Para 1458 reads:

> "Although certiorari is taken away it may be granted even on the application of the defendant where the inferior court has acted without or in excess of jurisdiction: for, in such a case, the court has not brought itself within the terms of the Statute taking away Certiorari. Thus, certiorari will lie, although taken away where the subject-matter of the inquiry was beyond the scope of the authority of the inferior court either by reason of its nature or by reason of the absence of some essential preliminary; and it will also lie where, by reason of interest or prejudice the inferior court was improperly constituted and was therefore, without jurisdiction to entertain the cause."

Thus, I am of the opinion that the powers of the High Court for issuing a writ of certiorari are in no way affected by the said Act and this is a fit case in which a writ of certiorari should be issued.

(67) After this I have to consider the other prayer of the petitioner which relates to the issue of writs of mandamus and prohibition.

(68) Shri Sadashiv Rao, Advocate, appearing on behalf of the petitioner urges that Raja Durga Reddy's virasat has been sanctioned in the name of Rani Shankaramma and this has not been cancelled, and the estate was taken in the supervision of the Court of Wards for the benefit of the ward as she was a minor then. All the authorities, excepting Shri Qureshi (one of the Revenue Board Members), had given their opinion for the release of the estate in favour of Rani Shankaramma. After the abolition of the jagirs, the Nazim-e-Court of Wards, submitted a report to the Director General of Revenue seeking his opinion regarding the release of the estate. Shri Ramlal a member of the Revenue Board on 11-3-1950 recommended that the estate be released in favour of Rani Shankaramma. This was approved by the then Revenue Minister, Shri Seshadri. Thus he contends the previous view of the Government was that the estate should be released and this is in conformity with the provisions of Cl. (a) of Sec. 53 of the Court of Wards Act which enjoins that after the ward attains majority, the estate should be released in her favour. In spite of this, the Revenue Minister did not release the estate in her favour but on the contrary, has held that Ramchandra Reddy, who is legally entitled to be the successor of late Raja Durga Reddy

> "would be entitled to receive commutation of the jagir villages comprising the Samasthan formerly, as well as to be in possession and management of the estate of Raja Durga Reddy minus the jagir villages that have been integrated with the Diwani, and the widow of Raja Durga Reddy and the daughter of Raja Durga Reddy are both entitled to an allowance to the extent of one-third of the net income of the property comprising both the commutation amount, the Maqta and the Rusum which is realised from the different Tahsils including, the ex-jagir and sarf-e-Khas villages and the estate in the supervision of the Court of Wards would be released in favour of Ramchandra Reddy."

As regards the non-atiyat property the Revenue Minister has made a suggestion to the parties to divide the property among themselves in equal proportions.

(69) Shri Sadashiv Rao contends that the Revenue Minister by acting in this manner has failed to discharge an obligation and this would entitle the petitioner to writs of mandamus and prohibition. Following up the contention he urges that in issuing a writ of mandamus, the Court has got to consider two questions: The first question to be considered is whether the petitioner has a right and the second question is whether the officer has any statutary obligation to discharge. His contention is that in so far as the right of the petitioner is concerned, it cannot be disputed as admittedly, till now the virasat of Raja Durga Reddy stands sanctioned in the name of Rani Shankaramma. As regards the obligation of the officer he contends that the Revenue Minister is the Minister-incharge of the Court of Wards, and having regard to the previous view of the Government as well as the provisions of the Court of Wards Act, it was the duty of the Revenue Minister to have released the estate in favour of the petitioner. He, therefore, contends that this is a fit case for the issue of a writ of mandamus and prohibition as well, for, if such writs were not issued, the other party may take proceedings to execute the order of the Revenue Minister and thus defeat her rights.

(70) Reliance is placed on the case of — 'Metropolitan Bank v. Pooley', 1185 A. C. 224; — 'S. N. Karpe v. Returning officer & others', AIR 1952 Bom. 227; — 'Chotelal v. State of U. P.', AIR 1951 All. 228; — 'Makhanlal v. State of U. P.', AIR 1952 All. 437; — 'Calsbad Mineral Water Mfg. Co. v. H. M. Jagtiani', AIR 1952 Cal. 315 Extraordinary Legal Remedies by Ferris, Ss. 212 and 217, '1923 Privy Council', 138, — 'Alcock Ashdown & Co. v. Revenue Authority', and Chowdhury on High Prerogative Writs Vol. I page 469.

(71) On behalf of the Government Shri Anand Swarup Choudhury, conceding the principle that a writ of mandamus could be issued by a High Court when the petitioner has a right and the officer is under an obligation to discharge the duty, contends that a writ of mandamus would not be issued when the title or the right is denied or is under dispute, for title to property would not be tried in mandamus proceedings, and further a writ of mandamus would not be issued when it is necessary to try or decide complicated or extended questions of facts. Thus, he contends, in the present case, as the title of Rani Shankaramma is in dispute, and the questions are complicated questions of facts, a writ of mandamus should not be issued.

(72) Reliance was placed on the case of — 'Keshav Pershad Singh v. The Board of Revenue', ILR 38 Cal. 553; — 'Re Jitendra Mohan Sen Gupta', 40 Cal. L. J. 44 and — 'Surya Praksh Weaving Factory v. The Industrial Court of Bombay', 52 B. L. R. 53.

(73) Before dealing with this question it is necessary to have a clear concept of what is exactly the scope of the writs of mandamus and prohibition, and the conditions which must be fulfilled before they are granted by this Court.

(74) In FERRIS, Extraordinary Legal Remedies paras 207 and 212 to 217 MANDAMUS has been discussed in the following words:

"MANDAMUS may properly be invoked where there is failure or refusal to perform some duty resulting from an office. Mandamus is a supplementary remedy to be used where the party has a clear legal right and no other appropriate redress to prevent the failure of justice. Its use is confined to those occasions where the law has established no specific remedy. The other remedy to supersede Mandamus must be competent to afford relief upon the subject matter of the application and be equally convenient, beneficial and effective."

(75) Chowdhury on High Prerogative Writs in Vol. 1 Chapter 7 at page 465 says:

"A WRIT OF MANDAMUS is, in general a command issuing in the King's name from the Court of King's Bench and directed to any person, corporation or inferior court of jurisdiction within the King's Dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of King's Bench has previously determined or at least supposes to be consonant to right and justice."

"MANDAMUS is an action or judicial proceeding of a civil nature, extraordinary in the sense that it can be maintained only when there is no other adequate remedy, prerogative in its character to the extent that the issue is discretionary to enforce only clear legal rights and to compel a court to take jurisdiction or proceeding, exercise the jurisdiction or to compel officers to exercise their jurisdiction or discretion and to perform ministerial duties which duties result from an office. It is a prerogative WRIT introduced to prevent disorder from a failure of justice and defect of procedure and, therefore, ought to be used on all occasions where the law has established no specific remedy and wherein justice and good government there ought to be one."

(76) In — 'Rex v. Dunsheath', (1950-2 All. E. R. 743) it has been stated similarly:

"MANDAMUS is neither a WRIT of course, nor a WRIT of right but that it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual provided there is no more appropriate remedy."

(77) As the principle of the issue of a writ of mandamus has been accepted by the parties, I do not wish to enter into a detailed discussion as to when a writ of mandamus has to be issued. It would be sufficient for my purpose if I refer to the following rulings:

(78) 'Chotelal v. The State of Uttar Pradesh & others', AIR 1951 All. 228 was a case where the petitioner had challenged the Zamindari Abolition and the Land Reforms Bill which had deprived the petitioner of the property to hold and dispose of, and claimed a writ of mandamus against the State of Uttar Pradesh, the Minister of Revenue and the Chief Minister, restraining them from bringing into existence any law which shall take away or abridge his right.

(79) Sankar Saran and Agarwal JJ. held:

"MANDAMUS is neither a WRIT of course nor a WRIT of right but that it will be granted if the duty is in the nature of public duty and specially affects the rights of an individual provided there is no more appropriate remedy."

(80) 'Makhanlal v. The State of Uttar Pradesh & others', AIR 1952 All. 437, is a case under the Motor Vehicles Act, challenging the

Regional Transport Authority (sic) and praying for the issue of writ of mandamus. The petitioners' case was that they used to ply motor vehicles with permits. On the expiry of the period of the permit, the petitioners made an application for its renewal. Instead of granting a regular permit, the Regional Transport Authority issued a temporary permit, and in the meantime, notice was served on them stating that "M. R. W. is going to take route of Saharanpur Harwar, you are requested to stop plying your vehicles with effect from midnight."

(81) Sapru and V. Bhargav JJ. giving the judgment of the Court held:

"Where the Regional Transport Authority has not been discharging in an independent manner the obligations which the Motor Vehicles Act has cast upon it, in granting permit and has been deliberately following disruptionist or dilatory tactics a WRIT OF MANDAMUS can be issued to the Authority directing it to hear the application for the grant of permit in accordance with law."

(82) In the case of — 'Carlsbad Mineral Water Mfg. Co. Ltd. v. H. M. Jagtiani', AIR 1952 Cal. 315, the petitioner had come for a WRIT OF MANDAMUS to compel the respondent H. M. Jagtiani as General Manager of the East Indian Railway, to issue to the applicant licence or licences for the period 1-6-1950 to 31-3-1951 for sale throughout the railway system of ice, mineral waters and cordials and to direct the Superintendent of Railway to permit the applicant to use the premises thereto used by them and the Depots and Stalls for the sale of their products.

It was held by J. P. Mitra J.:

"The grant of an order or WRIT OF MANDAMUS is on a general rule, a matter in the discretion of the Court. Some of the conditions precedent to the issue of a Mandamus are:

(i) the applicant for a WRIT OF MANDAMUS must show that there resides in him legal right to the performance of a legal duty by the party against whom the Mandamus is sought;

(ii) the Court will not interfere to enforce the law of the land by the extraordinary remedy of a WRIT OF MANDAMUS in case where an action at law will lie at complete satisfaction. In order, therefore, that a Mandamus may issue to compel something to be done, it must be shown that the statute imposes a legal duty;

(iii) the WRIT is only granted to compel the performance of duties of a public nature;

(iv) the Court will as a general rule and in the exercise of its jurisdiction refuse to issue a WRIT OF MANDAMUS when there is an alternative specific remedy at law which is not less convenient, beneficial and effective, and

(v) when MANDAMUS is refused on the ground that there is another special remedy it is a remedy at law that is referred to.

(83) 'In Re Jitendra Mohan Sen Gupta', 40 Cal. L. J. 44, C. C. Bose J. has held:

"The WRIT OF MANDAMUS is a high prerogative WRIT and is granted to ampliate justice and to preserve the right where there is no specific legal remedy. The court in the exercise of this authori., to grant the WRIT OF MANDAMUS will render it as far as it can be the suppletory means of substantial justice in every case where there is no other specific legal remedy, for a legal right will provide as effectively as it can that others exercise their duty wherever the subject-matter is properly within its control. The issue of a WRIT OF MANDAMUS is in the discretion of the court. The person applying must show that he has a real and special interest in the subject-matter and special legal right to enforce. In addition to these conditions precedent to the issue of the WRIT, there must be a sufficient demand to perform the acts sought to be enforced and a refusal to perform it. It is not necessary that the word refuse or any equivalent to it should be used, but that there should be enough to show that the party withholds compliance and distinctly determines not to do what is required of him. Refusal may be inferred from conduct."

(84) In — 'Surya Prakash v. The Industrial Court of Bombay', 1952 Bom. L. R. 52, page 53, Chagla C. J. has held that:

"There must be a specific provision in the Statute making it incumbent upon a person holding the public authority to forbear from doing an act. It is sufficient if the Statute casts the duty upon the person holding the public authority; then it is incumbent upon that person to discharge that duty; if in discharging the duty he acts unauthorisedly or irregularly or improperly then the court will interfere under S. 45 of the Specific Relief Act, because it could be said that it was incumbent upon him to forbear from discharging his duty in any manner other than laid down by the Statute. If that duty is not discharged in the manner provided by the law, then the Court will assume that there is a forbearance cast upon him to act otherwise in the manner laid down in the Statute."

(85) From the above discussion of the case law on the subject it is clear that the grant of an order or the issue of a WRIT OF MANDAMUS is as a general rule a matter for the discretion of the Court. Some of the essential conditions relevant for the present purpose for the issue of such a WRIT are:

(i) the person applying must show that he has a real and special interest in the subject-matter and a specific legal right to enforce;

(ii) he must show that there resides in him a legal right to the performance of the legal duty by the party against whom such a WRIT is sought, and

(iii) that there is no other equally effective, convenient and beneficial remedy.

(86) Prohibition on the other hand was a WRIT which used to be issued by the King's Bench Division primarily to prevent a Court or Tribunal or a quasi-Tribunal from exceeding the jurisdiction or acting contrary to rules of natural justice. It is well settled that the WRIT OF PROHIBITION can only be against a body exercising public functions of a judicial or quasi-judicial character and cannot in the very nature of things be utilised to restrain legislative powers.

(87) Applying the tests laid down in the above rulings I shall consider whether the present case is a fit one for the issue of writs of

mandamus and prohibition. In this connection, I shall have to see first whether the petitioner has got a real and specific interest in the subject-matter and a legal right to enforce. Admittedly virasat was sanctioned in the name of Rani Shankaramma and as she was a minor then, the estate was taken in the supervision of the Court of Wards. Ramchandra Reddy after his adoption, appeared in the Nazamat praying for the Virasat to be sanctioned in his name. Till now the Virasat sanctioned in the name of Shankaramma stands and she continues till today the ward of the Court of Wards. In the Firman dated 6 Zihadji 1352 F. granting permission to Rani Lakshmamma to adopt there is a direction to the effect that Rani Lakshmamma can apply for permission through the Court of Wards for adopting a son to her husband for the spiritual benefit of her husband which would not in any way affect the Atiyat property. The Revenue Minister has also held that Rani Shankaramma would be entitled to one-third share in the income along with Rani Lakshmamma and Ramchandra Reddy. In connection with the adoption of Ramchandra Reddy it has been held earlier that on the material on record, Ramchandra Reddy has failed to establish that Raja Durga Reddy had given authority to his widow to adopt, and his adoption has been held to be not valid according to the Hindu Law. Thus, Ramchandra Reddy could not claim any rights superior to those of Rani Shankaramma. Rani Lakshmamma also cannot claim any right as admittedly, the Virasat of Raja Durga Reddy was sanctioned in the name of Rani Shankaramma with her consent. In view of this, it cannot be said that Rani Shankaramma has no real or specific interest in the property. Thus, I do not agree with the contention of Shri Anand Swarup Choudhury that her title is in dispute.

(88) After this I turn to the other aspect whether the Revenue Minister had any obligation to discharge. Admittedly, the Revenue Minister is in charge of the Court of Wards. As Minister-in-charge of the Court of Wards it is his duty not only to carry out the obligation of the Government but act in accordance with the provisions of the Court of Wards Act. The policy of the Government seems to be quite clear that the estate should be released. The Revenue Minister also has to a certain extent admitted this point. At page 5 of his judgment he has stated that his predecessors and His Excellency the President favoured the release of the Samasthan in favour of Rani Shankaramma.

(89) Clause (2) of Section 53 of the Court of Wards Act also is to the effect that the estate should be released after "the ward" attains majority. Admittedly Rani Shankaramma has not only attained majority but has perhaps even grown old and there is no reason why the estate should be withheld, from her without being released. The Revenue Minister has held that Ramchandra Reddy is entitled to the release of the estate as well as the commutation amount. It has been held earlier that this order of the Revenue Minister is without jurisdiction. Ramchandra Reddy's adoption has been held to be not valid according to Hindu Law. The Revenue Minister ought to have ordered the release of the estate in favour of Rani Shankaramma when it was taken in the supervision of the Court of Wards as she was a minor then and as he has not done so, the order of the Revenue Minister has to be quashed and he has to be directed to effect the release. It may be noted here that these findings would not, in any way, prejudice the right of the parties in any proceedings that may be taken in any court of law.

(90) Thus, after giving a careful consideration to the facts and the authorities cited, I am of the opinion that this is a fit case in which writ of mandamus should also be issued. After this there does not appear to be any need for issuing a writ of prohibition. I, therefore, quash the order of the Revenue Minister dated 19-6-1951 and direct the respondents Nos. 2 and 5 to release the entire estate in favour of Rani Shankaramma. In the result, the respondents Nos. 1 to 7 would be bound and shall abide by the above orders. Having regard to the fact of the case I do not wish to pass any order regarding costs.

(91) M. S. ALI KHAN J.: This is Papannapait Samsthan case. Rani Shankaramma has filed a petition with a prayer that the order of the Hon'ble the Revenue Member (as he then was) dated 19th June 1951 should be set aside by a writ of certiorari, and he should be directed by a mandamus to release the estate in her favour and prohibited from releasing it in that of Ramchandra Reddy. The impugned order rejects the petitioner's petition to release the estate in her favour; allows the appeal of Ramchandra Reddy to recognize him as successor of Raja Durga Reddy and, inter alia, directs that one-third of the commutation amount and other income be paid each to Ramchandra Reddy and to Rani Lakshmamma.

(92) The order under consideration is challenged and the writ of certiorari prayed both on the grounds of want of jurisdiction and excess of jurisdiction. Mandamus and Prohibition are sought on the ground that the execution of the order will deprive the petitioner of her just rights.

(93) This is an incredibly long drawn out case with a span of over half a century and a brief reference to its facts is necessary to make the points at issue intelligible. Raja Durga Reddy, the last male holder of the Samasthan, died on 2nd April 1900 A. D., leaving surviving himself an underteen widow Rani Lakshmamma of 16 years and a daughter, the petitioner Rani Shankaramma of hardly 16 months. Raja Durga Reddy's succession was sanctioned by a Firman of His Late Highness the Nizam on 29th May, 1903 by which Shankaramma was declared to be his heir and this was notified in Jarida No. 25 of 22nd October 1903. As both the petitioner and her mother were minors, the estate was taken under the supervision of the Court of Wards. The Firman allowed the mother to act as guardian of the person of the petitioner and accordingly she brought her up, married her with the sanction of His Late Highness the Nizam to a scion of Damkonda family and prayed several times for the release of the estate to the petitioner unsuccessfully. Unfortunately, the petitioner's husband Raja Venkat Pratap Reddy died without issue on 19th March 1928 A. D.

Both mother and daughter prayed for permission to adopt. His Exalted Highness permitted the mother, but, on a submission of the petnr. directed an inquiry by the Atiyat Appeal Committee as to who was entitled to adopt.

The decision of the Committee went in favour of the mother and Raja Ramchandra Reddy was adopted by her. His adoption was finally sanctioned by Firman dated 28th June 1934 A. D. Sometime after his adoption, Ramchandra Reddy joined his adopted mother in resisting the petitioner's applications on the Court of Wards' Side for the release of the estate to her; and also initiated proceedings before the Inam Commissioner to set aside the grant of succession in the petitioner's name. I will mention these petitions below, as the impugned order is based on two of them and, all the objections of the learned advocate of the petitioner, whether as to jurisdiction or otherwise, are in respect of the impugned order passed on them on 19-6-1951 A. D.

(94) As already stated, the petitioner was for years petitioning for the release of the estate from the Court of Wards. It is not necessary to mention these petitions or the order passed on them; suffice it to say that, though, in spite of opposition most of them were granted by the Revenue Members of the time and once by the President of the Executive Council also, yet no 'arzdasht' was submitted to H. E. H. the Nizam and hence no final orders were passed on them. Only once her application dated 27-10-45 A. D. was brought to the notice of H. E. H. and he referred it to the Board of Revenue. On this reference as well as on a note submitted by the Director, Court of Wards, after the Jagir Abolition Regulation as to whether the Estate along with all other estates under the supervision of the Court of Wards should not be released, Sri Ramlal, Member, Board of Revenue, expressed the opinion that it should be released. Shri Seshadri, the then Revenue Member, disagreed with Shri Ramlal in the petitioner's file, but agreed with him on 13-3-1950 A. D. in the general file. Before orders for the release of the estate could be issued, however, Rani Lakshmamma filed a petition and the Honourable Revenue Member minuted on 12-6-1950 A. D. that this petition should be heard in the presence of the parties. In the meantime, the Congress Ministers joined the Hyderabad administration and Shri B. Ramkishan Rao became Revenue Member. In this way, he came to hear this application and decided it by the order now in dispute along with two other petitions on the Atiyat side which I will presently mention.

(95) After the grant of succession to the Samasthan, the petitioner was taking action for the grant of Inam lands situated in various Jagirs in her name. I have already stated above that in these regular Inam proceedings Ramchandra Reddy and his adopted mother opposed the petitioner. They did not mince matters and the prayer was explicitly stated that, owing to the adoption, the succession of Raja Durga Reddy should not be sanctioned in Ramchandra Reddy's name and the previous sanction in favour of the petitioner should be set aside. The first application in this regard was dated 12-6-1937 A. D. and was nearly five years after the adoption and it was promptly rejected by the Inam Commissioner, who held that as succession has been sanctioned in the name of the petitioner and she was alive, Ramchandra Reddy had no locus standi, as no succession can be opened in the life-time of a holder. An appeal was lodged by Ramchandra Reddy before the Atiyat Committee and it was dismissed on 28th February 1938. Ramchandra Reddy, however, filed a similar application on 22-6-49 A. D., i.e., about ten years of his first application and this again was summarily dismissed by Shri Ghulam Hyder, the then Nazim-e-Atiyat or Inam Commissioner on 11th September 1949.

It should be noted that no appeal was filed in the regular Atiyat side before the Atiyat Appeal Committee against this decision; nor is there any mention of it in the impugned order under consideration. This order, however, takes notice of the two petitions of Ramchandra Reddy dated 24-3-49 and 24-4-49 and states that the first petition contained the prayer that the commutation amount should be given to Ramchandra Reddy and the second prayed that succession of Raja Durga Reddy should be sanctioned in his name. It states further that the petition was dismissed by the Nazim-e-Atiyat, as being contrary to any statutory provisions and an appeal from it was filed before the Honourable the Revenue Member. It is this appeal that has also been disposed of by the impugned order under consideration.

(96) Objection was taken before the Honourable Revenue Member (as he then was) that he had no jurisdiction to entertain the petitions mentioned in paragraphs 4 and 5 above, that is, the petition of Rani Lakshmamma filed after Shri Seshadri's order of 13-3-1950 and the petitions of Ramchandra Reddy dated 24-3-1949 and 24-4-1949; but he held that he had jurisdiction. I cannot hold his decision on the first mentioned petition of Rani Lakshmamma to be erroneous. The petition opposed the release of the estate to Rani Shankaramma and no reference to the standing orders or circulars of the Atiyat Department or to the provisions of the Court of Wards Act is necessary to show that the Honourable the Revenue Member was fully competent. In fact the argument before him was confined to technicalities that as Shri Seshadri's order of 13-3-1950 had become final for want of a regular review or revision petition, the matter could not be reagitated. But evidently as Shri Seshadri himself fixed a date for rehearing, these objections do not hold water. I shall, therefore, now pass on to the petition on the Atiyat side, for that is a more controversial matter.

(97) The objection against hearing Ramchandra Reddy's petitions on the Atiyat side was that owing to the promulgation of the Jagir Abolition Regulation 1358 Fasli all disputes about succession, etc., now pertained to the civil courts and, therefore, under its section 21 (2) neither the Nazim-e-Atiyat nor the Hon'ble the Revenue Member had jurisdiction to entertain them. The Honourable the Revenue Member (as he then was), however, relied on the proviso to sub-section (2) of section 21 of the said Regulation and held that as the petitions of 24-3-49 and 24-4-49 were filed before the promulgation of the Regulation on 15-8-49 A.D., they were pending proceedings and he had jurisdiction. It is not free from doubt whether the proviso is good law vis-a-vis the provisions of the Constitution of India; but assuming it is, it should be noted that it saves the existing law for the pending proceedings. It is for consideration whether any proceeding was really pending and whether even according to the existing law, i.e., the Atiyat Law, a Revenue Member was competent to hear appeals

from the decisions of the Nazim-e-Atiyat given on the regular Atiyat Side. The point need not be laboured that the Nizamat-e-Atiyat has an executive or administrative side also and in that capacity its Nazim is a Joint-Revenue Secretary, and any orders passed by him in the executive capacity are appealable before the Revenue Member.

The question, therefore, comes to whether the orders on Ramchandra Reddy's applications whether of 24th March and 24th April 1949 which were considered in the order under consideration or of 26th June and 24th October 1949 which were not mentioned in it, were of an administrative or executive nature and an appeal therefrom lay to the Revenue Member. Of these four applications which appear to be all the applications filed by Ramchandra Reddy in this regard, those of 26th June, 1949 were for grant of succession of Raja Durga Reddy in his name. I need not summarise them here; for the first mentioned is summarized in the order under consideration and a perusal of it will leave no doubt about the prayer being as stated above. Now whether I look to the provisions of Circular No. 10 of 1338 Fasli or those of No. 19 of 1332 Fasli, proceedings regarding succession pertain to the Atiyat Nazim in his Judicial capacity of an officer on the regular Atiyat side, and not in his executive capacity of a Joint Secretary; and appeals from his decisions on succession proceedings lie to the Atiyat Appeals Committee and not to the Revenue Member. This is so evidently true that I need hardly quote chapter and verse from the above circulars or from the Inam Regulation. Indeed this was admitted at the Bar.

It was, however, argued that the above petitions should be deemed to be for the amendment of succession statement. A perusal of the applications will show that they do not contain any such prayer. Evidently, the nature of a proceeding is determined by the content and prayer of the application: when neither the prayer nor the content of the application showed that what was sought was amendment to the succession statement, it would be out-Heroding the Herod to hold that the applications were for the amendment. Reliance was placed by the Bar on S. 13 of the Circular No. 10 of 1338 Fasli, Circular No. 19 of 1332 Fasli and 4 Naza-er-e-Mal 93 and 785. I have carefully considered these circulars and the authorities. No useful purpose will be served by adverting to them at any great length. Suffice it to say that they do not support the contention that these applications can be deemed to be for the amendment of the succession statement. I repeat that when the applications themselves were not so either in form or content I cannot hold them so. Moreover, even assuming, that the applications were for amendment of succession statement, serial (7) in List A of Circular 19 of 1332 Fasli provides that in case the prayer for amendment is contested, the Revenue Member should send them to the Nazim-e-Atiyat. As the applications were keenly contested, it is evident that the Hon'ble the Revenue Member (as he then was) could have no jurisdiction.

Again, I think, I will have to consider what will be the effect of the granting of these applications: will it only result in amendment of the succession statement granted to the petitioner, Rani Shankaramma, or result in its total abrogation? Obviously, it will be the latter & not the former & though the Hon'ble the Revenue Member (as he then was) has, in the operative portion of his order under consideration. himself used the word 'amendment', yet he has also used the words that Ramchandra Reddy should be recognized in it as successor to Raja Durga Reddy. This, in all conscience, cannot be a mere amendment. It is obviously a 'setting aside', 'cancellation' and 'abrogation' of the succession certificate granted in the name of the petitioner in May 1903, i.e., 48 years ago. If things settled long ago can be upset in this manner, there will be no finality in the affairs of men or solemn proceedings of courts or authorities. The justification for this is sought in the supervening events of the death of Raja Venkat Pratap Reddy without issue and the adoption of Ramchandra Reddy.

I will consider the effect of the adoption presently, but I will state here, that it is evident from the Firman sanctioning the adoption of Ramchandra Reddy that the Grantor himself was alive to the undesirability of reversing the succession of Rani Shankaramma, as he was careful to make it clear that the adoption will not affect the property comprised in the Crown grant. Thus what Ramchandra Reddy initiated was a succession proceeding; it was so understood by the Nazim-e-Atiyat and rejected; the Atiyat Appeal Committee also understood it similarly and dismissed the appeal. Ten years after a mere petition to the same effect and towards the same objection cannot make it an administrative proceeding.

Quite evidently, it remained a succession proceeding and was, as held by the Nazim-e-Atiyat on 1st February 1950, not in accordance with any legal or procedural provision for it was not at all entertainable. A corollary of this is that in the eye of law there were no pending proceedings, with the result that proviso to Section 21 (2) of the Jagir Abolition Regulation cannot be invoked to confer jurisdiction. Section 13 of the Hyderabad Atiyat Enquiries Act 1952 only validates orders of certain persona designata, the Hon'ble the Revenue Member (as he then was) does not come in them, and hence argument from the Act is not relevant. Again, the contents of the order will have to be examined, as already stated, they show lack of jurisdiction. Moreover, it is clear Atiyat Law that a Revenue Member has no jurisdiction to hear appeals from the decision of Nazim-e-Atiyat on the regular or original side. No consideration of natural justice can confer a right of hearing appeal on him. Such a right will have to be conferred by law and it was not so conferred. Hence want of jurisdiction on his part is as clear as anything can be, and I hold accordingly.

(98) I have observed above that it appears to me that considerations of natural justice have been at the back of the impugned order now under consideration. This is evident from what has been said in it about the adoption of Ramchandra Reddy and its effect. It is pointed out that on the death of Raja Durga Reddy, his widow was a preferential heir, but she was passed over in favour of her daughter, as the Government of the time desired that the line of Raja Durga Reddy should be continued by Rani Lakshmamma adopting the son that

would be born to the daughter; that unfortunately this expectation was belied by the untimely death of Raja Venkat Pratap Reddy without leaving any issue; that not only H.E.H. the Nizam but the Atiyat Appeal Committee were of the opinion that Rani Lakshmamma should be permitted to adopt in preference to her daughter, as the heir that would come into existence by daughter adopting a son will be a remote heir when compared to the son adopted by Rani Lakshmamma; that in this context Rani Shankaramma can only be regarded as an interim heir; that there is good authority for holding that owing to the well-established theory of adoption relating back, the adopted son divests the interim heir; that even assuming that Rani Lakshmamma by her several acts of unrestricted renunciation in favour of her daughter in the period before the death of her son-in-law, surrendered her estate, it can only be of her right to succession and cannot be of her right to adoption and that, therefore, the adoption of Ramchandra Reddy approved by the Grantor himself, surely and effectively divests Rani Shankaramma, and invests Ramchandra Reddy with the title to succeed Raja Durga Reddy.

These findings are copiously illustrated with and well supported by references to works of authority and to undisputed record. The only flaw appears to be that they have not taken account of the possibility of the adoption being not in accordance with Hindu Law owing to absence of permission of Raja Durga Reddy to adopt. The Government of the day preferred Rani Shankaramma actuated possibly by the desire to continue the line by a grandson, but that is a matter for conjecture; what appears to be more probable is that they found it as a fact that Raja Durga Reddy had not given permission to adopt and after recording it in the Arzdasht dated 31st March 1903, they had no alternative but to recommend succession in favour of Shankaramma; for had they recommended the widow, the estate would have been in grave danger of escheating after her death. Is this finding in the Arzdasht about lack of permission to adopt correct? It is argued that it is not; for the Nazim-e-Atiyat found on 9th September 1943 that permission to adopt was given, as will be seen by a perusal of his judgment in 6 Nazaer-e-Osmania page 540, and on appeal from this finding the Atiyat Appeal Committee also held the same in 6 Nazaer-e-Osmania 524.

But it is clear that the Nizamat-e-Atiyat's finding was based on evidence which was recorded ex parte: no time was allowed for a regular inquiry in the presence of the parties as H. E. H. wanted a report on the matter in six days. The appellate judgment also mentions this fact and expressed the opinion that a remand for recording evidence in the presence of both the parties would have been necessary if they were not of the opinion that permission of H. E. H. to adopt was sufficient in so far as the Crown grant property was concerned. All this will go to show that it is not proved that Raja Durga Reddy permitted his wife to adopt. It is argued that as there were no sapindas, Rani Lakshmamma did not require any permission and was herself competent to adopt. The parties belong to the Madras school and this proposition is not in accordance with it. The position, therefore, boils down to this that the adoption of Ramchandra Reddy cannot be deemed to be in accordance with Hindu Law. It cannot, therefore, relate back to the death of Raja Durga Reddy and cannot, therefore, divest Rani Shankaramma. It may be asked, however, what then is the effect of the Royal permission and is it wholly infructuous? My reply will be that whatever efficacy it may have, it will not divest the petitioners as H. E. H. the Nizam has himself directed in the Firman dated 12th December 1939 already referred to above, that it will not affect Crown grant; and that Ramchandra Reddy will inherit after the petitioner.

(99) The above will show that the impugned order cannot be supported for want of jurisdiction (a) to hear appeals from orders of the Nazim-e-Atiyat and (b) to divest the petitioner of her succession and because it failed to direct the release of the estate in spite of the provision of Section 53 (a) of the Court of Wards Act (No. 12 of 1350 F.) that an estate should be released on the attaining of majority by the ward. No doubt this very section also enacts that an estate placed in the supervision of the Court of Wards by the orders of H. E. H. can be released on his orders only. But circumstances have changed and it is stated in the impugned order itself that these powers are now exercisable by the Chief Minister. The Hon'ble the Revenue Member (as he then was), therefore, could have recommended the release of the estate but he has not done so. I need quote no authority to show that in such circumstances a writ of certiorari lies for want of jurisdiction and failure to exercise jurisdiction. There appears to be no reason why I should not direct its issue and thus set aside the impugned order under consideration and I, therefore, direct that the same may be issued.

Further the petitioner has prayed for writs of Mandamus and Prohibition also. Generally, a Mandamus does not lie where another legal remedy is available, but that is when that remedy is "equally convenient, beneficial and effective". A law suit for the release of the estate after all these protracted litigations of more than half a century cannot be deemed to be convenient. In my opinion, therefore, a Mandamus for the release of the estate should issue in this case, as under S. 53 of the Hyderabad Court of Wards Act the right and duty to release and get it released are clear and Mandamus is the more effective & more beneficial remedy. After setting aside the impugned order by writ of Certiorari and directing the release of the estate by a Mandamus, there remains no need for prohibiting the enforcement of the impugned order. Moreover, the Writ of Prohibition restrains a tribunal from proceeding further in excess of jurisdiction when it is about to act in excess of jurisdiction.

As the impugned order has been passed more than a year ago, a writ of Prohibition will be obviously useless. With these words, I agree with my learned brother in the order proposed by him. I wish to mention the effect of our order explicitly. It sets aside and quashes the impugned order dated 19-6-1951, and directs respondents Nos. 2 and 5 to release the entire estate in favour of Rani Shankaramma. In the result, the respondents Nos. 1 to 7 would be bound and shall abide by the above orders.

(100) No order as to costs.

B/D.H. Order accordingly.

A. I. R. 1953 HYD. 97 (Vol. 40, C. N. 37)

A. SRINIVASACHARI J.

Mohommed Sadruddin Khan, Appellant v. Gulam Mohiuddin, Respondent.

Appeal No. 394 of 1950, D/- 30-9-1952.

(a) Hyderabad T. P. Act, S. 130 — Acceptance of rent after notice — Effect — (T. P. Act (1882), S. 112).

The mere fact that rent is accepted after a notice of ejectment is given would not amount in law to a waiver of the right of the landlord to eject a tenant. There ought to be evidence of an express intention on the part of the landlord to waive his right to eject a tenant. AIR 1942 Bom 132 and 40 Deccan LR 385, Rel. on. (Para 2)

Anno: T. P. Act S. 112 N. 2.

(b) T. P. Act (1882) S. 53A — Applicability — Contract to transfer — Leases — Unregistered deed — Evidence of possession in pursuance of document — Admissibility — (Evidence Act (1872), S. 91) — (Registration Act (1908), S. 49).

The provisions of S. 53A would apply to a lease also: 1950 S. C. 1 Rel. on. (Para 3)

That section enables the lessee who has been put in possession of a property in pursuance of an agreement to use the possession as a defence in any suit that might be brought to eject him or disturb his possession and therefore the Court should allow evidence to be given of the agreement even though the document containing the agreement itself is not receivable in evidence being unregistered. (Para 3)

Anno: T. P. Act S. 53A N. 6; Reg. Act S. 49 N. 25; Ev. Act S. 91 N. 19.

Venkatrao Desai and Mohd. Sirajuddin, for Appellant; Lakshminarayan Somani, for Respondent.

JUDGMENT: This appeal arises in a suit filed by the respondent for ejectment of the appellant alleging that he took the Chabutra on a lease from the respondent. Among the various defences that were raised the most important defence was that subsequent to the issuing of the notice by the landlord to the tenant to vacate the premises the landlord accepted rent from the tenant and, therefore, this conduct of the landlord amounts to waiver in law and, therefore, it could not be regarded as though the tenancy is terminated. The other objection was that the notice that was given to the tenant did not expire at the end of the month as required by the Transfer of Property Act and, therefore, the notice was bad. The third objection was that the landlord executed an agreement in favour of the tenant stating that he would allow the tenant to continue to be in possession of the Chabutra and further that if at any time the landlord sought to eject the tenant, any additions that the tenant might have made or any construction that he might have built on the Chabutra, he would be entitled to compensation for the constructions and additions. The first court decreed the plaintiff's suit. On appeal by the defendant to the lower appellate court, the lower appellate court accepting the plea of waiver held that inasmuch as landlord had accepted the rent after he had given notice it amounted to waiver within the meaning of S. 130, T. P. Act. The present appeal is by the landlord.

(2) So far as this question of waiver is concerned, I am of opinion that no question of waiver can arise for this reason that the mere fact that rent is accepted after a notice of ejectment is given would not amount in law to a waiver of the right of the landlord to eject a tenant. There ought to be an express intention on the part of the landlord to waive his right to eject a tenant. Acceptance of rent subsequent to the date of sending of the notice does not necessarily amount to waiver if there is no evidence with regard to the same. This view of mine is supported by a decision of the Bombay High Court reported in — 'Navneethlal Chunilal v. Bapulal', AIR 1952 Bom 132, and also by a decision of this Court reported in —'40 Deccan LR 385'. If the tenancy is taken to have terminated, the amount that the landlord accepts would be treated as damages for use and occupation from a tenant holding over. So this plea of waiver has no force.

(3) I should have allowed the appeal having differed from the lower appellate court on the question of waiver. But it was brought to my notice by the advocate for the respondent that the trial court was wrong in not allowing the respondent to lead evidence with regard to an agreement that was executed by the landlord in his favour. This agreement, it would appear, is of the same date as the rental agreement executed by the tenant in favour of the landlord. The trial court forbade the leading of evidence with regard to this document on the ground that it was not registered as required by law. As regards this question I am of opinion that the trial court was wrong because S. 53 A, T. P. Act, enables the defendant who has been put in possession of a property in pursuance of an agreement or in other words where there has been a part performance of the agreement by the defendant having been put in possession of the same, it would be open to the defendant to use the possession as a defence in any suit that might be brought to eject him or disturb his possession. A doubt had arisen as to whether S. 53 A would come into operation only when there is a transfer of immovable property because the words of S. 53 A are

> "where any person contracts to transfer for consideration any immovable property..... and the transferee has in part performance of the contract taken possession of the property.....then notwithstanding that the contract, though required to be registered, has not been registered.....the transferor or any person claiming under him shall be debarred from enforcing against the transferee any right in respect of the property....."

The doubt that arose in this case was whether these provisions would apply to a lease in immovable property or whether it was necessary that in order to invoke the provisions of S. 53 A there ought to be a transfer of immovable property itself. The trend of decisions of all High Courts is to the effect that this would apply to a lease also. The Supreme Court in the case of — 'Maneklal Mansukh Bhai v. Hormusji Jamshedji, reported in AIR 1950 SC 1, held "where in an action to eject the lessee on the ground that he had not registered the deed of lease.....the defendant lessee takes the plea of part performance.....the defendant is entitled to retain possession in spite of absence of a registered deed". Having regard to this decision of the Supreme Court I am of opinion that evidence should be allowed to be led with regard to Ex. A 1 the agreement

alleged to have been executed by the landlord-plaintiff in favour of the defendant. The result of this will be that the case will go back to the trial court and the defendant will be permitted to lead evidence with regard to Ex. A 1. The trial court will also consider the legal effect of the execution of both the documents, one by the landlord in favour of the tenant and another by the tenant in favour of the landlord. After giving an opportunity to both the parties to lead evidence in support of and by way of rebuttal with regard to the document Ex. A 1, the court will decide the case according to law. The judgment of the trial court would no longer stand but this case will again become sub judice. Having regard to the circumstances of this case I make no order as to costs of this appeal. Costs will abide the result.

B/M.K.S. Order accordingly.

A. I. R. 1953 HYD. 98 (Vol. 40, C. N. 38)

SHRIPATRAO PALNITKAR C. J. AND MIR SIADAT ALI KHAN J.

Oswald Hugh Pedro, Petitioner v. State of Hyderabad through (1) Secretary to Government, P.W.D., Hyderabad; (2) Shri S. A. Quader, Chief Engineer.

Writ Petition No. 95/5 of 1952, D/- 4-9-1952.

(a) Constitution of India Pre., Arts. 14, 226 and 311 — Retrospective operation.

The Constitution of India has no retrospective effect. Hence, a Writ application pleading contravention of the provisions of Articles 311 and 14 of the Constitution of India in respect of an order of reversion of a civil servant passed prior to the promulgation of the Constitution is misconceived and wholly untenable and should be thrown out on that very ground. (Para 3)

(b) Constitution of India, Arts. 226 and 311 — Order of reversion of Civil servant — Administrative or quasi-judicial — Certiorari and mandamus against order.

An order of reversion of a civil servant (terminating a temporary or officiating occupancy) is so palpably of an administrative nature that no writ of certiorari can lie to quash it. (Para 3)

Similarly, no mandamus can lie to compel an appointment to an office held at the pleasure of administrative authority. (1892) 2 QB 21, Foll. (Para 3)

(Distinction between quasi-judicial and administrative orders pointed out).

A dismissal, removal or reduction in rank of a civil servant adumbrated in Article 311 is purely an administrative act for the reason that, there is nothing in the language of Article 311 to suggest that in issuing such an order the authority is obliged to act judicially. A reference to Article 310 will show that a civil servant holds office at the pleasure of the administrative authority whether it be President, Governor or the Rajpramukh, as the case may be. They may put an end to his employment any time for any reason stated or unstated if in their opinion the continued employment of the civil servant is detrimental to the interests of the State. No doubt, Article 311(2) prescribes a notice; but sub-article (3) of Article 311 dispenses with the notice, if for some reason to be recorded, it is not reasonably practicable to give to that person the notice or an opportunity to show cause. This very fact makes it clear that the act is an administrative act. AIR 1945 FC 47; AIR 1948 PC 121; AIR 1952 MB 105, Rel. on; AIR 1952 Raj 17, Ref. (Para 3)

Natrajan, for Petitioner; B. N. Shastry, Govt. Advocate, for the State.

ORDER: This is an application for the issue of a writ of certiorari and mandamus. The applicant is a stenographer in the Public Works Department of the State. He started in the third grade but was later on promoted to the second grade and the order of his promotion stated that he is "appointed temporarily vice No. 1 (Venkatramiah) on Rs. 150/- per mensem from 16-6-1357 Fasli till permanent arrangements are made." On 13th November 1948, he was, however, reverted to his substantive post in the third grade. The writ applications are directed against this order of reversion. We have heard the arguments of the learned advocates of the parties and record our opinion below.

(2) The learned advocate for the petitioner argued that Article 311(2) of the Constitution of India is applicable to the case; that no member of a civil service of a State can be 'dismissed or removed or reduced in rank' under it 'until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him'; that the petitioner was reduced in rank without giving him a reasonable opportunity of showing cause as laid down in the abovementioned provisions; and that, therefore, the order should be set aside. He argued further that the order of reversion is discriminating also inasmuch as the Government favoured a so-called refugee who was not really a refugee and the order of reinstating refugees was ultra vires the Central Act in this respect. Thus, it was argued that the order is violative of the equality clause of the Constitution of India and is, therefore, void and should be quashed by a writ of certiorari and the petitioner reinstated by a writ of mandamus.

(3) We have given due consideration to the above argument which, in our opinion, is wholly untenable from whatever angle we may look at it. In the first place, the statement in the writ petition that the order of reversion was dated 13th November 1948 makes it clear that it was prior to the promulgation of the Constitution of India. It is admitted that the Constitution of India has no retrospective effect. Hence, the writ application pleading contravention of the provisions of Articles 311 and 14 of the Constitution of India in respect of an order of reversion of a civil servant passed prior to the promulgation of the Constitution is misconceived and wholly untenable and should be thrown out on that very ground. Again assuming without holding that the Constitution is applicable, order like the one under consideration is so palpably of an administrative nature that no writ of certiorari can lie to quash it. Similarly, as held in — 'Reg v. Bodmin Corporation', 1892 (2) Queen's Bench 21, no mandamus can lie to compel an appointment to an office held at the pleasure of the Crown.

It has been held by the Supreme Court in — 'Province of Bombay v. Kushaldas Advani', AIR 1950 Supreme Court 222 and several other cases that a writ of certiorari only lies when the approach of quasi-judicial bodies is

judicial. The fact that there is a determination of questions which affects the right of the parties does not make the decision a quasi-judicial one and thus amenable to certiorari jurisdiction; for, as explained in this case by Das J., administrative bodies also determine questions of facts which affect the right of the parties, but their approach is not necessarily judicial or after recording and sifting of evidence. The feature that will separate a quasi-judicial enquiry from an administrative one is the mode or manner in which the opinion, on the basis of which an act is done by an administrative authority in the exercise of its discretion, is formed. The decision of the authority is quasi-judicial if in reaching that decision the authority is required first to ascertain facts by means of evidence and is then free to take such action as it may think fit on the facts so ascertained. In such a case, the authority must consider the representation of the parties and give them an opportunity to adduce and examine the evidence. On the other hand, the decision would be purely administrative if in taking the decision the authority has freedom to base its opinion on whatever material it thinks fit, whether obtained in the ordinary course of its executive functions or derived from the evidence at an enquiry, if there is any.

The question, therefore, arises whether dismissal, removal or reduction in rank adumbrated in Article 311 of the Constitution of India is a quasi-judicial act or a purely administrative act. If it is a quasi-judicial act, it will be amenable to certiorari jurisdiction and, on the other hand, if it is an administrative act, it will not be controlled by a writ of certiorari. We are of the opinion that the dismissal, etc., is purely an administrative act for the reason that, there is nothing in the language of Article 311 to suggest that in issuing such an order the authority is obliged to act judicially. A reference to Article 310 will show that a civil servant holds office at the pleasure of the administrative authority whether it be President, Governor or the Rajpramukh, as the case may be. They may put an end to his employment any time for any reason stated or unstated if in their opinion the continued employment of the civil servant is detrimental to the interests of the State. No doubt, Article 311(2) prescribes a notice; but sub-article (3) of Article 311 dispenses with the notice, if for some reason to be recorded, it is not reasonably practicable to give to that person the notice or an opportunity to show cause. This very fact makes it clear that the act is an administrative act.

It should be noted further that Articles 310 and 311 of the Constitution of India reproduce substantially the provisions of Section 240 of the Government of India Act, 1935. Sub-section 3 of Section 240 embodied the same provisions which are contained in Article 311(2). In — 'Secretary of State v. I. M. Lall', AIR 1945 Federal Court 47, the Federal Court explained that S. 240(3) only prescribes that after an administrative authority has decided upon punishment, the punishment may not be enforced before an opportunity is given of showing cause why such punishment should not be imposed. This view of the majority of the Federal Court was approved by the Privy Council in — 'High Commissioner for India v. I. M. Lall', AIR 1948 PC 121, where their Lordships of the Privy Council observed that:

> "No action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision."

These decisions of the Federal Court and the Privy Council make it abundantly clear that the reasonable opportunity of showing cause prescribed whether in Article 240, sub-section (3) of the Government of India Act, 1935 or in the corresponding provisions in Article 311 (2) of the Constitution does not imply that a civil servant can be dismissed, removed or reduced only if certain facts are found against him by a process analogous to judicial process.

> "It does not make the charges against a civil servant and the material in support of it, a matter of issue between the civil servant affected and the competent authority."

It is thus quite evidently an administrative act and as already stated, no writ of certiorari lies to quash an administrative act. We are fortified in our view by the learned judgment of Dixit J. in — 'Lilawati v. State of Madhya Bharat', AIR 1952 Madhya Bharat 105 where on similar facts a similar opinion has been arrived at.

(4) We may also refer to AIR 1952 Rajasthan 17 in which it has been held that a notice under Article 311 (2) is required only when the civil servant is to be dismissed, removed or reduced in rank due to some fault or failure on his part and not when the action is taken against him in public interest or in the interests of State Service. Here, in the case under consideration, the learned Government advocate has admitted handsomely that the work of the petitioner is satisfactory and the reduction in his rank is not due to any fault or failure on his part, but in the ordinary official routine. In our opinion, this fact takes away the very ground from under the feet of the petitioner.

(5) Thus, whether we consider the matter under the articles of the Constitution or otherwise, the same conclusion is reached that the petitioner has no 'locus standi'. We have already explained that as the reversion took place in November 1948, argument from the Constitution of India is wholly untenable, as the Constitution has no retrospective effect. The matter may, therefore, be determined under rules and orders that were applicable in pre-Constitution days. We have considered that similar provisions existed in the Government of India Act, 1935 and though it is a fact that this Act was not applicable to the Hyderabad State, there is no doubt whatsoever, that in this State also rules based on similar provisions were in force and whether they be the rules for hearing appeals of the members of the judicial service or Public Works Department employees, or any other civil servant, they leave no doubt that the decision under which the employees were dismissed, removed or reduced in rank was an administrative act. It is thus evident that the terminating of an officiating or temporary vacancy was fully within the competency of the executive authority and was an administrative act. We are not justified in probing into the reasons of such an act. The petition, therefore, stands dismissed. We have already explained that in

such cases the petition for a writ of mandamus also does not lie. In the circumstances we do not make any order as to costs.

A/V.B.B. Petition dismissed.

A. I. R. 1953 HYD. 100 (Vol. 40, C. N. 39)
(FULL BENCH)

SHRIPATRAO PALNITKAR C. J.
A. SRINIVASA CHARI AND M. A. ANSARI JJ.

Abdul Fatah Khan, Appellant, Petitioner v. The Government of Hyderabad and others, Respondents.

Full Bench Case No. 7/5 of 1951, D/- 19-9-1952.

Hyderabad (Abolition of Jagirs) Regulation (69 of 1358 F), S. 21 (2), Proviso — Pending proceedings — Meaning of — Continuance of Commission after the constitution — Constitution of India, Art. 14.

Nawab Sultan Ulmulk died on 11th March, 1949 and a Firman was issued by H. E. H. the Nizam, constituting a Commission to enquire and report as to who were the heirs of the late Sultan-ul-mulk so far as his jagir was concerned, and also in so far as his personal properties were concerned. After the Firman was issued and before the Commission actually started proceedings in the case, the Hyderabad (Abolition of Jagirs) Regulation LXIX of 1358 F. was passed and it came into force on the 15th of August 1949. The proceedings of the Commission would show that it was not until the 10th of November 1949 that they started their deliberations and the parties made their first appearance.

Held that because of the provisions of the Regulation not only the enquiry by the Commission relating to the appointment of an Amir of the Paigah had become infructuous, but also the entire prerogative of H. E. H., the Nizam relating to the regrants of jagirs or determining of persons who should get shares in them having been converted into statutory powers, the executive could not thereafter claim to do what was not permitted by it. As claims were filed in the Commission after the Regulation had been enforced, the proceeding of the Commission could not be considered to be a pending one for the purposes of the proviso to S. 21. The Commission was not covered by the proviso and there was no power in the executive to sanction the finding of the Commission. The Commission consisting of two High Court Judges was not a civil Court. The Commission not being covered by the Regulation, the proceedings could not, after the inauguration of the Constitution be continued. After the inauguration of the Constitution, which is republican, the privilege enjoyed by persons because of association with a particular family was not reasonable. Past association with the ruling family or conferring of privileges in past can be no reasonable basis of classification and Art. 14 of the Constitution was infringed. The fact that the petitioner himself continued to appear before the Commission and conduct his case for a long time after the inauguration of the Constitution was not material, as submitting to a void jurisdiction was no ground for disallowing application to prohibit continuance of such proceedings. The writs of Certiorari and Prohibition be, therefore, issued: AIR 1952 Bom 235, Foll. (Paras 15, 21, 22, 23, 24)

Mr. Jalil Ahmed, for Petitioner; Mr. Bisambar Dayal, for Respondents.

SHRIPATRAO PALNITKAR, C. J.: I have had the advantage of perusing the judgment prepared by my learned colleague Mohd. Ahmed Ansari, J. and I agree with the conclusions arrived at by him that the Writs of Certiorari and prohibition be issued as prayed for. As the matter involves the determination of questions of some importance, I would like to express my own views in the matter.

(2) The facts of the case have been narrated in sufficient detail in the judgment of my learned brother. The question to be decided is whether in view of the provisions of the Constitution, the Special Commission constituted by H. E. H. the Nizam prior to the commencement of the Constitution can now function.

(3) The Commission was ordained to hold a two-fold enquiry: (1) to make enquiry regarding the distribution of the personal estate of the deceased Nawab Sultan-ul-Mulk, and (2) to make enquiry into the Jagir property. The terms of reference of the Commission are as follows:

1. to determine the persons entitled to inherit Sultan-ul-Mulk's share in the income of the estate and the respective shares of these persons;

2. to submit a recommendation regarding the person (being one of the share-holders in the income from the estate) who should be appointed Amir-i-Paigah;

3. to submit a recommendation on the question whether a special grant from the assets of the estate should be made to Abdul Fateh Khan, the eldest son of Sultan-ul-Mulk to compensate him for the smallness of the allowance hitherto enjoyed by him from the estate in comparison with the allowances awarded to his younger brothers; and

4. to determine the succession to the personal property left by Sultan-ul-Mulk which is said to be extremely valuable.

Thus it is clear from the terms of reference that it was to enquire into and report its recommendations with regard to both the Jagir property and the personal property of the late Nawab Sultan-ul-Mulk. After the constitution of the Commission, the Hyderabad (Abolition of Jagirs) Regulation No. LXIX of 1358 F. came into force by which all the Jagirs in this State were abolished. Section 4 of the Regulation clearly lays down that after its commencement no person shall be appointed or recognised as a jagirdar whether in succession to a deceased jagirdar or otherwise. Thus, clause (2) of the terms of reference which invites recommendations with regard to the person who should be appointed Amir-i-Paigah (jagirdar) has become infructuous as no jagirdar could be appointed or recognised after the above Regulation came into force.

(4) The Commission cannot now function after the commencement of the Constitution for the purposes of determining the succession to the personal property left by the late Sultan-ul-Mulk. The Commission as originally constituted was intended to provide a factual background upon which H. E. H. the Nizam as the absolute monarch of the State could pass such order as he felt proper. He could appoint any person he liked as an heir to the said Nawab and as jagirdar, irrespective of the recommendations of the Commission. Even with regard to the private (property?) he exercised unrestricted powers regardless of the fact whether they were in accordance with the principles of judicial rights or not. That was tolerated

as he was the absolute ruler of the Dominions and could do what he liked, and to that extent the civil courts ceased to function. After the commencement of the Constitution this cannot be allowed, as it is violative of Article 14 of the Constitution and the right of the petitioner to get his claim to succession of the property of the deceased decided in a civil court, which is available to the citizens of the State, cannot be denied.

The Commission is not a civil court: it has no powers to pronounce final judgments and to frame a decree on its basis or to execute the same. It was merely a reporting and recommendatory body which submitted its recommendations for the final sanction of H. E. H. the Nizam. Thus, it is not a civil court. I have stated in the case of —'Mehbub Begum v. Hyderabad State', AIR 1951 Hyderabad 1, that

> "Article 14 means that all persons should have a like access to the courts of the country for the protection of their persons and property, the prevention and redress of their wrongs and the enforcement of contracts".

I have discussed the question in detail in that case and it is not necessary to repeat the reasonings given therein. Thus after the commencement of the Constitution, the Commission is not competent to determine the succession to the personal property of the late Nawab.

(5) After the abolition of the jagirs under the Regulation, the annual net income of the jagir was to be distributed among the jagirdars and 'hissedars' in the proportion to which they were entitled. Section 21, clause (2) of the Regulation provides that all claims to a jagir or to any share in the income thereof, whether arising under the Regulation or otherwise, shall be filed in and decided by the appropriate civil court. Thus, even with regard to the share of income from the jagir of the deceased under the Regulation, a claim by any claimant would be decided by a civil court and in accordance with his personal law. It was argued that the proviso to this Section saves the proceedings before the Commission and to that extent the claimants cannot go to the civil court. The proviso to clause (2), Section 21 reads as follows:

> "Provided that any proceeding pending at the commencement of this Regulation before an Atiyat Court or before a Commission or any other authority, shall be completed in accordance with the existing law as if this Regulation had not been enacted".

I am of the opinion that this proviso is inconsistent with the Constitution and therefore 'ultra vires'. The Regulation, it should be remembered, was enacted before the commencement of the Constitution when the absolute monarchical powers of the Nizam were still in existence. Thus, while making all claims relating to the income of a jagir or to any share thereof subjects of enquiry by the civil court, the Regulation sought to save such cases as were already pending before the Atiyat court or before any of the Commissions and they were to complete the same in accordance with the existing law. "Existing law" has been defined as to include atiyat law, custom or usage having the force of law and the terms of any grant. Atiyat law is the name given to the various 'firmans' and orders of the Nizam, absolute monarch as he then was. The basis of all atiyat law is the 'firman' of the Nizam in Circular No. 17 of 1312 Fasli, printed in Muzmua-i-Gashtiat Malguzari, at page 146, which ordains that his will, will be the absolute and last word on the question as to who should be the next jagirdar after the death of the last holder of the jagir. Thus, really speaking, it was not a law based on any strict legal principles or embodying any particular enactment. Every time he issued any order, that was law. It meant, according to modern idea of jurisprudence, that he did what he willed. After the coming into force of the Constitution, the Nizam is no longer the absolute monarch of the Hyderabad State; he is only the Governor or Raj Pramukh. Hyderabad State is no longer a unit outside the Republic of India but is a part and parcel of it.

(6) The proviso to clause (2) s. 21 of the Regulation maintained intact the absolute and monarchical powers of the Nizam to sanction or to disallow the recommendations of the Commission or to do whatever he liked or to pass any orders that he deemed fit with regard to the subject-matter in dispute regarding which the Commission was to make its recommendations. Such absolute powers are not available to the Raj Pramukh, that H.E.H. the Nizam is at present, nor are such powers claimed. Under Article 154 of the Constitution, the executive power of the State is vested in the Raj Pramukh and shall be exercised by him directly or through officers subordinate to him in accordance with the Constitution. Nowhere in the Constitution has it been laid down that the Governor or Raj Pramukh shall exercise the absolute powers to declare any claimant as the heir to the property of the deceased or to a share in the property of the deceased. That was possible only to an absolute monarch as H.E.H. the Nizam was before the advent of the Constitution, as he was supposed to be the fountain and sourec of all law and justice. Thus, the proviso which tries to restore absolute powers to the Nizam is contrary to the terms of Article 154 of the Constitution and is, therefore, violative of the Constitution.

(7) It was argued that Article 162 defines the limits of the executive powers of the State and lays down that the executive powers of the state shall extend to the matters with respect to which the legislature of the state has powers to make laws. I am of the opinion that the legislature of the state has no power to make a law with regard to the succession of any particular individual. It cannot decide the question by a legislation as to who are the heirs of the late Sultan-ul-Mulk. I have discussed the question in detail in the case of Mehbub Begum, referred to above, (AIR 1951 Hyderabad 1)'. In fact, if it were to be held that the Nizam can exercise absolute monarchical powers with regard to the limited number of cases specified by the proviso to clause 2, Sec. 21 of the Regulation, it would mean to that extent the negation of the Republican Constitution of India and restore to that extent his absolute powers, which is clearly in contravention of the Constitution. The proviso is therefore void.

(8) It was also argued that the Regulation has been validated by Article 31 (B) of the Constitution and therefore the proviso referred to above should not be deemed or declared 'ultra vires'. I do not agree with this contention. Art. 31 (b) validates the Hyderabad (Abolition of Jagirs) Regulation in so far as Part III of the Constitution is concerned. Part III of the Constitution deals with fundamental rights and the purpose of Article 31 (A) and (B) was to validate the Jagir Abolition Regulation in so far as it extinguished the alleged rights of the jagirdars to the jagirs, but the question in this case which is as to the interpretation of the proviso does not relate to the modification or extinguishment of the rights of the jagirdars with regard to their jagirs, but it relates to the method or mode of enquiry regarding the rights of the parties. Even supposing that the Commission is a special body or tribunal, it cannot func-

tion after the commencement of the Constitution in view of the ruling of the Supreme Court in — 'Laxman Das Kavalram v. State of Bombay', AIR 1952 S. C. 235. This question has been discussed in detail by my learned Colleagues.

(9) In the result, I am of the opinion that the Commission cannot function after the Constitution. The Writs of Certiorari and Prohibition should, therefore, be issued to quash the proceedings and to prohibit the Commission from continuing them.

(10) SHRINIVASA CHARI. J.: I agree with my learned brothers that this application for the issue of a Writ of Certiorari and a Writ of Prohibition should be granted and further proceedings before the Commission constituted for enquiring into the succession to the estate of the late Nawab Sultan-ul-mulk be prohibited on the ground that it can no longer continue to function as it violates Article 14 of the Constitution.

(11) As the case has been referred to a Full Bench and the questions involved in the case are of some importance, I desire to add a few words of my own to the judgment of my Lord the Chief Justice and Mohammed Ahmed Ansari, J.

(12) As the sequence of the events show, the Nawab died on 11th March 1949 and a Firman was issued by H.E.H. the Nizam, constituting a Commission to enquire and report as to who were the heirs of the late Sultan-ul-mulk so far as his jagir was concerned and also in so far as his personal properties are concerned. The terms of reference which were sent to the Commission also show that the commission was called upon to enquire and report about the heirs to his jagir as well as to his other property. After the Firman was issued & before the Commission actually started proceedings in the case, the Hyderabad (Abolition of Jagirs) Regulation, Regulation LXIX of 1358 F. was passed and it came into force on the 15th of August 1949. Under this Regulation, all jagirs were abolished and there was no longer any necessity for recognising any person as the holder of the jagir, but such of those persons as were entitled to succeed to the estate of the deceased jagirdar were to be paid compensation according to the share they were entitled to under their personal law. It only came to be a matter of payment of compensation according to the shares of the respective heirs of the late jagirdar. In this Regulation, however, there was a saving clause inserted under which it was provided that such of those proceedings relating to the jagir lands which were pending on the date of the coming into force of the Regulation were to be completed according to the 'existing law.'

Relying upon this provision in the Regulation, the Advocate-General argued that inasmuch as the Firman was issued by H.E.H. the Nizam long before the coming into force of the Regulation, the proceedings in this case must be deemed to have started immediately after the issuing of the Firman and they must be held to have been pending on the date of the coming into force of the Regulation, & as such, in so far as the enquiry into the succession to the jagir property was concerned, they should be completed according to the existing law, that is to say, the Commission would have to continue its enquiry and submit its report to H.E.H. the Nizam, for, the existing law, so far as the atiyat property is concerned, required any report or recommendation of a body constituted for the purpose of enquiring into the succession of a jagirdar to be confirmed and sanctioned by H.E.H. the Nizam.

Straightaway, the argument of the Advocate General may be rejected, because the proceedings of the Commission would show that it was not until the 10th November 1948 that they started their deliberations and the parties made their first appearance. The proceedings would be deemed to have started only where the parties invoke the jurisdiction of the court by filing a statement of their claim 2; in this case admittedly the parties filed their statement of claim after the 15th of August 1949. Therefore, by no stretch of imagination could it be said that the proceedings in this case were pending at the time of the coming into force of the Jagir Abolition Regulation. It would, therefore, follow that the proviso to Section 21(2) under which all pending proceedings had to be completed according to the existing law cannot apply to this case. If the proviso did not apply then the only provision that can apply to this case is Section 21(2) which runs as follows:

> "All claims relating to a jagir or to any share in the income thereof, whether arising under this Regulation or otherwise, shall subject to this Regulation but notwithstanding any existing law, be filed in, and decided by, the appropriate civil Court".

This is so far as the atiyat or jagir property is concerned.

(13) The question arises as to whether the Commission could continue to hold its enquiry. In this connection, it may be observed that besides the statutory law that was prevalent in Hyderabad the Firman that H.E.H. the Nizam usually issued had also the force of law. Therefore if under a law which was validly passed by H.E.H. the Nizam, namely, the issuing of a Firman, this court was constituted, its constitution could not be held to be invalid unless it was inconsistent with any of the provisions of the Constitution or violated any of the principles enunciated in part 3 of the Constitution. In this case, it was urged that there was a flagrant violation of an important principle of Law and Procedure. It was urged that some of the procedural rights, that a person would be entitled to before the ordinary courts, were denied to the parties before the commission. It was said that there was no right of appeal provided against the orders of the tribunal because it was only a recommendatory body. It was also urged that the right to move for transfer which a litigant enjoyed in the ordinary courts was also denied and above all it was stated that this body was not competent to frame a decree which was executable which the parties would be entitled to get in an ordinary Court.

There is much force in this argument. Therefore, even if this Commission could be regarded as a validly constituted court according to the law that was extant then (because the Nizam had always the power to constitute tribunals and commissions for the purpose of enquiry into the succession to the estate of any jagirdar), it cannot survive after the coming into force of the Constitution because it deprived the parties of certain important procedural rights and this amounted to a discrimination between persons before an ordinary Court and the parties now before the Commission; and after the coming into force of the Constitution in view of the provisions of Art. 14 such a discrimination cannot be countenanced. That this is the settled law is well established by the judgment of the Supreme Court in the case of — 'Lakshmandas Kevalram v. The State of Bombay', AIR 1952 S. C. 235. No doubt discrimination could be allowed if such discrimination was made with reason, that is to say, if there was a classification made of persons going before an ordinary court and those going before a special Commission or Tribunal on a reasonable and understandable basis and with an avowed object.

In this connection the observations of Fazl Ali, J. in the case of — 'Kathi Raning v. The State of Saurastra', AIR 1952 S. C. 123 would be in point. It was held by the Supreme Court in the first case referred to viz., the case of — 'Lakshmandas Kevairam v. The State of Bombay', that immediately the Constitution came into force any discriminatory procedure adopted by a tribunal or a commission could not stand and forthwith such commission ceased to have any jurisdiction. The proceedings before the commission is quashed. For all the above reasons, I am of opinion that a writ of Prohibition should issue prohibiting the Commission to continue its proceedings hereafter.

(14) M. A. ANSARI J.: This appln. for the Writs of Certiorari, Prohibition and Mandamus has been filed by one Abdul Fateh Khan to stop continuance of the enquiry by a Special Commission into matters relating to the estate of late Nawab Sultan-Ul-Mulk. The applicant is a son of the deceased, who was the Amir of a big jagir estate known as the Vikar-Ul-Umara-e-Paigah. The late Amir being of unsound mind, the estate was managed by different authorities under the orders of H. E. H. the Nizam till the Amir's death on March 11, 1949, and for the few months prior to the filing of this application, the management has been under the Court of Wards. By a Firman of Shaban 4, 1368 H. (June 2, 1949) a Special Commission consisting of Qumar Hassan J. and Manoher Pershad J. was appointed to make enquiry regarding distribution of the personal estate of the deceased and other matters pertaining to the Paigah. The Government Notification relating to the Commission is No. 4 of Aban 5, 1358 Fasli (Sept. 5, 1949) and was published in the Jarida (Hyderabad Gazette) of Aban 12, 1358 Fasli (September 12, 1949).

The terms of reference of the Commission are:

(i) To determine the persons entitled to inherit Sultan-ul-Mulk's share in the income of the estate and the respective shares of those persons;

(ii) to submit a recommendation regarding the person (being one of the share-holders in the income from the estate) who should be appointed Amir-e-Paigah;

(iii) to submit a recommendation on the question whether a special grant from the assets of the estate should be made to Abdul Fateh Khan, the eldest son of Sultan-ul-Mulk, to compensate him for the smallness of the allowance hitherto enjoyed by him from the income of the estate in comparison with the allowances awarded to his younger brothers; and

(iv) to determine the succession to the personal property left by Sultan-ul-Mulk, which is said to be extremely valuable.

(15) In between the dates of the Firman appointing the Commission and the publication of the Notification in the Jarida, the Jagirs Abolition Regulation (hereinafter referred to as the Regulation) came into force on Mehir 15, 1358 F. (August 15, 1949). Because of the provisions of the Regulation not only the enquiry by the Commission relating to the appointment of an Amir of the Paigah has become infructuous, but also the entire prerogative of H. E. H. the Nizam relating to the re-grants of Jagirs or determining of persons who should get shares in them having been converted into statutory powers, the executive cannot thereafter claim to do what is not permitted by it. I have therefore to ascertain how far the proceedings before the Commission are covered by the Regulation, and if I come to the conclusion that it is not, there remains no authority in the executive of this State to accept recommendations of the Commission or to enforce them.

(16) The period of six weeks from the date of the publication of the Notification expired on October 4, 1949, and the Commission first met on November 10, 1949, when 23 parties filed their claim petitions. On the request of some of the parties, who could not submit their claim, a fortnight's adjournment was allowed and hearing posted to November 24, 1949 when some fresh claim petitions as well as replies were filed. The Commission then adjourned to December 8, 1949, and on this date a further adjournment of fourteen days was on the request of the parties that they could not file replies for want of copies of the claim petitions of other parties allowed. Thereafter, the Commission continued the enquiry and the evidence before it began to be recorded after the inauguration of the Constitution. When the petition in this court was filed on February 10, 1951, praying for the quashing of the proceedings the case was at the argument stage and recommendations have yet to be made. Even on the assumption that H. E. H. the Nizam had some prerogative power to order enquiry by Special Commission about the succession to the personal properties of the deceased it is obvious that the Rajpramukh cannot after January 25, 1950, exercise any kingly powers to sanctioning such recommendation & this enquiry ordered earlier cannot after the Constitution be continued if it infringes the fundamental rights under it.

(17) The grounds for quashing the proceedings given in the application are that the Commission is not vested with judicial powers of finally adjudicating upon the claims of the various parties, for its recommendations to the Government may be accepted or rejected; it has no power of calling witnesses, appointing receivers, issuing interlocutory orders, or directing any other acts to safeguard the claims of the parties, and thereby normal course of law under which ordinary claimant can seek redress has been taken away from him. In paragraph 9, it is claimed that after the inauguration of the Constitution, the Commission appointed under the Royal prerogative of the Nizam has no legal status, nor power to adjudicate upon the private property of the deceased, nor computation (sic) amount of the Paigah, the Government cannot give effect to its recommendations, nor distribute, partition or allot property of any kind; after the Constitution, the continuation of such a Special Commission is violative of Article 14, inasmuch as it deprives the applicant of his right to resort to ordinary Court with general procedure and also of his right of appeal if his claim as an heir is denied by the recommendations of the Commission.

(18) Ten persons have been impleaded as the opposite parties to the application. The State of Hyderabad is No. 1, the next two are the members of the Commission and the remaining seven are other relatives of the applicant. The proceedings of this application as against the members of the Commission, Nos. 2 and 3, Rashid Nawaz Jung No. 9, who was impleaded on grounds of his claim as Amir-e-Paigah on the basis of a Firman, as well as against Nawab Begum No. 10, are ex parte. Musaffar Nawaz Jung, No. 4 and Hassan Yar Jung, No. 8, through the Custodian of Evacuee Property do not oppose the application. Those who seek continuance of the enquiry are the Government No. 1, Farid Nawaz Jung, No. 5, Nazir Jung and Khair Nawaz Jung, Nos. 6 and 7. Their objections are contained in three replies: one is by the Government, another by No. 5 and a third by Nos. 6 and 7.

These objections may be summarised as follows:

(i) Prior to the Constitution, whenever a nobleman, who had been the holder of a Crown Grant died, the Nizam having exclusive jurisdiction over Crown Grants appointed a Special Commission to investigate questions of his succession and the Commission's findings with the approval of the Ruler had force of a decree; Sultan-ul-Mulk being such a nobleman, the Commission appointed to investiage his succession prior to the enforcement of the Constitution is valid.

(ii) Atiyat law is different and a holder of the Atiyat properties had no right to have questions of succession adjudicated by ordinary Civil Court, but only Atiyat Courts constituted by H. E. H. the Nizam can decide them; this existing law has been continued by Article 372 of the Constitution, there is no arbitrary classification inasmuch as all holders of the Atiyat properties are treated alike and no person is deprived of any right or has been discriminated against. As regards non-atiyat properties inasmuch as they grew out of the Atiyat properties, enquiries by Special Tribunals are not without rational classification.

(iii) The petition is not bona fide as the applicant endeavoured to have a special Tribunal appointed and has been guilty of extraordinary delay in taking steps to stop the proceedings; for one year after the Constitution he has submitted to the Commission's jurisdiction.

(iv) Farid Nawaz Jung's reply says that even after the Constitution the Nizam's earlier Firman appointing the Commission, having regard to the past history of the particular estate, was valid.

That history has been given in paragraph 19 of the third statement that after the death of Sir Vicar-ul-Umara, the father of the deceased, on Farwardi 14, 1311 Fasli (February 15, 1902) Sultan ul-Mulk was given temporary charge of the Paigah; when he became mentally deranged in 1316 Fasli (1906-1907) his mother was directed to manage the estate, later it was taken under the direct control of H.E.H. the Nizam and Sir Bryne Egerton was appointed as the Superintendent; in 1336 F. (1926-1927) the deceased was declared Amir-e-Paigah, and being still under mental disability a Committee of Trustees was appointed to manage under the direct supervision of the Nizam; in 1338 Fasli (1928-1929) a Board of Trust was constituted as his guardian which did its work under the supervision of H.E.H. the Nizam; when Sultan-ul-Mulk died, representations were made to H.E.H. the Nizam for handing over of the private properties & for the declaration of the Amirship; thereupon the present Commission was appointed; the Ruler is supposed to hand over the property to the rightful successor and to decide who is such a person; a dispute about the legitimacy of some of the claimants having arisen the Firman was issued.

(19) Obviously, the Commission is an ad-hoc Tribunal enquiring into the rights of the persons who claim to be entitled to the estate of the deceased, and its findings in order to be operative require some sanction either by the Government of this State or of the Centre. Whatever may have been the past legal position neither Government can give effect to the Commission's recommendations unless they are legally authorised to do so. Any appeal to the past practice, as has been made in the reply of the Government, appears to me of no substance. For the executive of this State prior to the inauguration of the Constitution enjoyed large prerogative powers which were specially resorted to in cases of granting jagirs to the heirs of the deceased jagirdars. Such unlimited prerogative powers do not survive the Constitution. Even before the inauguration of the Constitution these powers have been merged in the Regulation and could not exist independently. This view I have taken in Kamal Yar Jung's succession case and I see no reason to change it.

Therefore, after Mehir 15, 1358 Fasli (August 15, 1949) and so far as the compensations to persons interested in jagir tenures or ascertaining of persons entitled to it are concerned, the executive of this State could not claim to do things which are not authorised by the Regulation; unless the power to investigate claims by a Commission or to give effect to its findings be held to be covered by the provisions of the Regulation it cannot exist in the executive of this State. The replies to the application have this one common error, that they pay inadequate attention to the provisions of the Regulation. The fact that the Commission was appointed before the enactment of the Regulation is not material, as its recommendations have yet to be made; the sanction by the Government will certainly take place afterwards, and sub-sec. (2) of Section 21 makes the provision of the Regulation by implication retrospective except in cases covered by its proviso. The proviso in my opinion does not apply to the Commission. Then if this Commission is not under the Regulation, the Firman appointing the Commission must not be discriminatory and the power to sanction its recommendation does not survive the Constitution; for there is no such thing as prerogative rights under our republican Constitution.

(20) The provision of the Regulation relating to enquiries about questions of successions to compensations for jagir tenures is contained in sub-section (2) of Section 21, which reads as follows:

"(2) All claims relating to a jagir or to any share in the income thereof, whether arising under this Regulation or otherwise, shall subject to this Regulation, but notwithstanding any existing law be filed and decided by the appropriate civil Court;

Provided that any proceeding pending at the commencement of this Regulation before any Atiyat Court or before a Commission or any other authority shall be completed in accordance with the existing law as if this Regulation had not been enacted."

(21) It was argued that the proceeding before this Commission is a pending one and covered by the proviso. I think this argument is without substance. Although the Firman appointing the Commission is of June 2, 1949, the Notification asking the claimants to appear was published in the jarida of Aban 12, 1359 Fasli (September 12, 1949) which means that no claimant appeared before the Commission till some days after the coming into force of the Regulation. I have already mentioned in the beginning of this judgment that the Commission met for the first time on November 10, 1949, and the claims before it began to be filed then and after that date. Unless I come to the conclusion that the creation of the Commission amounts to initiating proceedings before it, the proviso to the Regulation obviously does not govern the Commission. Now, creating and invoking of jurisdiction are two different things, and the invoking takes place only where some one appears and prays for the exercise of the particular jurisdiction only when proceedings can generally be said to begin before it. For example, Atiyat Courts were created to determine matters relating to Jagir tenures long before the Regulation was passed and yet the proviso to Sub-section (2) cannot be

construed to save their jurisdiction as regards such claims as were not before them when it became operative.

If such future claims before the general Courts are not saved, much less should future proceedings before the Special Tribunal. All that the proviso means is that such disputes as were begun and were pending before Special Tribunals or Atiyat Courts must be finally adjudicated. As claims were filed in the Commission after the Regulation has been enforced, I hold that the proceeding of the Commission cannot be considered to be a pending one for the purposes of the proviso to Sec. 21.

The result is that Commission is not covered by the proviso and there is no power in the executive to sanction the finding of the Commission.

(22) Then it was argued that the Commission consisting of two High Court Judges is a civil Court. This argument also cannot be accepted. To constitute it as a civil Court, its recommendations must be operative as judgments, it can pass a decree which should be subject of appeal to the High Court, and should be executable. None of these things exists and the result is that it is a court with the peculiar defect of no power of making a decree, of appeal to the High Court and no authority to whom application can be made for the execution of its decree. The application has justifiably claimed that a Court with such defects is not one contemplated by sub-section (2) of Section 21 of the Regulation.

(23) The Commission not being covered by the Regulation, I have next to ascertain whether the proceedings can after the inauguration of the Constitution be continued. In other words, I have to decide whether the object of the Firman was to confer certain privileges on some only and if that be the object, whether it was based on some rational classification; for Article 14 of the Constitution bars creating of special privileges for some, just as it forbids making the liabilities of a few heavier. Respondents Nos. 6 and 7 have given a long history of their family apparently to show that its past history justified special treatment. I do not think that is a rational ground of classification. After the inauguration of the Constitution, which is republican, the privileges enjoyed by persons because of association with a particular family are not reasonable. That would amount to bringing in monarchical notion of privileged classes.

It may well be asked why should the persons who happen to be the heirs of Sultan-ul-Mulk not seek their relief in a Court of Law. Why should two Judges of this High Court determine their disputes in the absolute form of no appeal? The only answer that can be given is that because they happen to belong to a family which had in the past enjoyed special privileges conferred upon by the former Ruler of the State, which means continuance of privileges because of birth. If such privileges be construed as based on rational basis what is the nexus between it and the uncontrolled discretion in the executive about giving or withholding of sanction? I feel that past association with the ruling family or conferring of privileges in past can be reasonable basis of classification and Article 14 of the Constitution is infringed.

(24) I do not think any substantive argument can be built on the fact that the petitioner himself continued to appear before the Commission and conducted his case for a long time after the inauguration of the Constitution. The case of — 'Laxman Kewalram v. The State of Bombay', AIR 1952 Bombay 235 is an authority that discriminatory proceeding after the inauguration of the Constitution is void, and therefore, submitting to void jurisdiction is no ground for disallowing application to prohibit continuance of such proceedings. No amount of laches or acquiescence has become unconstitutional because it is violative of Article 14. I therefore set aside all proceedings and orders by the Commission that have taken place after January 25, 1950, and prohibit its further continuance. The application is accordingly allowed and the Writs of Certiorari and Prohibition be issued, accordingly.

A/D.H. Application allowed.

A. I. R. 1953 HYD. 105 (Vol. 40, C. N. 40)

FULL BENCH

PALNITKAR C. J., SIADAT ALI KHAN AND SRINIVASACHARI JJ.

Tahira Begum, Appellant v. State of Hyderabad and others, Respondents.

Writ Petn. No. 4/A of 1952, D/- 23-9-1952.

(a) Constitution of India, Art. 14 — Firman by H.E.H. Nizam appointing Commission to enquire into succession of late Nawab Salar Jung, III — Classification on consideration of status and wealth — Classification resulting in more than one procedure — No right of appeal — Classification held discriminating — Proviso to S. 21(2), Hyderabad Jagir (Arbitration) Regulation held ultra vires — Constitution of India, Sch. III, item 18 — Scope of — Powers of executive — Constitution of India, Art. 220 — High Court Judges cannot do any other work — Commission held invalid.

Nawab Salar Jung III died on 2-3-1949 leaving enormous private property and a big Jagir. He left no issue but there were numerous persons claiming to be his heirs. On 31-5-1949 H.E.H. the Nizam, by issuing a Firman-e-Mubarak, appointed a Commission consisting of Hon'ble Judges of the High Court at Hyderabad, to inquire into and report on the succession of the late Nawab. The commission started enquiry on 19-6-1949 but a stay order was obtained by some of the claimants and one of them filed an application on 13-12-1950 for the issue of a writ of certiorari, mandamus and prohibition. On the question of the validity of the Firman appointing the commission and the continuation of the Commission after the advent of the Constitution of India,

Held that (i) it is true that the State has power to classify a group of persons on the basis of difference in circumstances; but to get over the inhibition of Art. 14, the classification must be rational, that is, it must have a reasonable relation to the object of the legislation. The status of the deceased Nawab and the vastness of his property (Crown grants as well as private property) would no doubt make a wholly plausible case for classification and separate treatment in the circumstances when the firman was issued. But these considerations are small in the days of the Republic i.e. after the advent of the Constitution of India. There remains no indignity as there exists no landed gentry. (Para 6)

In the instant case, almost all the claimants who claimed to be the heirs of the

deceased Nawab did not belong to the class of big noblemen and the subject of enquiry was no longer big jagirs but only right to commutation amounts and private property; status, either of the deceased Nawab or of the claimants, was therefore no sufficient ground for a separate treatment.

The vastness of property of the deceased was also no ground because the City Civil Courts had unlimited pecuniary jurisdiction. (Para 6)

(ii) Circular No. 10 of 1358F, made the ordinary Civil P. C. applicable only "as far as possible". Moreover, there was Atiyat Law which has a peculiar procedure of its own and there was also the Jagir (Abolition) Regulation 1358F, Sec. 21(2) of which made all claims about jagirs to be justiciable by the ordinary civil Courts. Therefore, there would be more than one procedure with no vested rights of appeal. This is discrimination and violative of Art. 14. Hence the firman was ultra vires Art. 14. (Para 6)

(iii) The proviso to S. 21 (2) of the Jagir (Abolition) Regulation 1358 F does not provide for the acquisition of any estate or any right therein or the extinguishment or modification of acquisition of any estate or right therein. The proviso safeguards only the 'existing law' and the 'existing law', of sanctioning succession proceeding is violative of the Constitution Act, as it saves the royal prerogative of sanctioning succession and denies the statutory right of appeal. The proviso is, therefore, discriminating and ultra vires the Constitution. Pronouncement of the majority in — 'Kamal Yar Jung's case', AIR 1952 Hyd 163 FB, held was Obiter Dicta and Dissented from. (Para 8)

(iv) The State Government has power under Schedule VII, item 18 of the Constitution of India to legislate about land and, therefore, sanction commutation after abolishing jagirs, but to determine the heirs as to who would receive the commutation amounts is not the lot of the executive under the Constitution. The heirs and their shares have to be determined by the ordinary courts of the land and to those heirs alone the executive can grant the shares so fixed. (Para 10)

(v) Under the Constitution of India no Judge of a High Court can do any other work than the High Court work. He can do other work by the permission of H. E. the President. No such permission was obtained and therefore the commission whose members were the Hon'ble Judges of the High Court at Hyderabad, was incompetent. (Para 10)

(vi) Hence, the Commission was not the proper forum for adjudicating various questions that arose from the deceased Nawab's succession case. Case law discussed. (Para 11)

(b) Precedents — Obiter dicta — Obiter dicta of previous Full Bench is not binding in subsequent Full Bench though the latter be a smaller Bench. (Para 8)

(c) The Salar Jung Estate (Administration) Regulation No. 34 of 1358 F and Nawab Salar Jung Bahadur (Administration of Assets) Act 39 of 1950 — Validity.

The object of the Regulation No. 34 of 1358 F and the Act 39 of 1950 being the preservation of the property pending ascertainment of heirs is valid. (Para 10)

Peerbhoy and Syed Mohd. Ahsan Abidi, for Appellant; B. N. Shastry and others, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('16) 43 Ind App 269: (AIR 1916 PC 89) 5, 10
('50) AIR 1950 SC 188: (1950 SCR 459) 7
('50) AIR 1950 SC 869: (ILR (1951) Hyd 461) 7
('51) AIR 1951 SC 318: (52 Cri LJ 1361) 7
('52) AIR 1952 SC 75: (1952 Cri LJ 510) 5, 6
('52) AIR 1952 SC 235: (1952 Cri LJ 1167) 5, 7
25 Deccan LR 1 8
35 Deccan LR 887 8
('51) ILR (1951) Hyd 1: (AIR 1951 Hyd 11: 52 Cri LJ 1333 FB) 7
('52) ILR (1952) Hyd 595: (AIR 1952 Hyd 163 FB) 5, 10
('52) Abdul Fateh Khan v. The State of Hyderabad: (AIR 1953 Hyd 100 FB) 2
(1920) AC 508: (89 LJCh 417) 8
(1913) 232 US 499 (Sic) 7

PALNITKAR C. J.: I have had the advantage of reading the judgments prepared by my learned colleagues, Dr. Justice Siadat Ali Khan and Mr. Justice Srinivasachari which they are about to pronounce. I agree in main with the reasoning of Siadat Ali Khan J. and the conclusions therein.

(2) With regard to the proviso to Section 21 (2) of the Hyderabad (Abolition of Jagirs) Regulation, I have expressed my views in the case of — 'Abul Fatah Khan v. The State of Hyderabad', (AIR 1953 Hyd 100 FB) & it is unnecessary to repeat the reasoning given therein.

(3) SIADAT ALI KHAN J.: This is the succession case of Nawab Salar Jung, Nawab Salar Jung III, grandson of the illustrious Salar Jung I, died on 2nd March 1949 leaving enormous private property and a big jagir. He left no issue but this did not prevent numerous persons from claiming to be his heirs. On 31st May 1949 H. E. H. the Nizam appointed a Commission consisting of Hon'ble Judges of this Court to inquire into and report on the succession of the late Nawab. The terms of reference were as follows:

1. Whether the jagir of Salar Jung escheated to the Government.
2. If not, who are the heirs of Salar Jung according to the sanads of (or?) otherwise?
3. Who are Salar Jung's heirs to his private property and what are their respective shares?
4. What should be deemed to be the private property of Salar Jung which can be distributed among his heirs?
5. Whether the late Nawab has left any will and if so, what is the effect thereof on the questions mentioned above?

The Commission started enquiry on 19-6-1949 but a stay order was obtained by some of the claimants, and now one Tahera Begum who professes to be the sister of Husaini Begum, wife of Nawab Salar Jung II has filed an application dated 13th December 1950 for the issue of a writ of Certiorari, Mandamus and Prohibition. Her allegations are briefly; that the Commission has no judicial powers and it is quite powerless against the Committee of Management established first by Regulation No. 34 of 1358 F. and continued and confirmed by

the Nawab Salar Jung Bahadur (Administration of Assets) Act No. 39 of 1950 as the Committee has not carried out its orders; that even if the Commission had powers, H. E. H. the Nizam has now no powers to sanction the report of the Commission; that only the Hyderabad Government or the Union Government could sanction the report and would thus be Judge in their own cause; that enquiry by a Commission is discriminating; that the ordinary course of law under which a claimant could seek redress has been blocked and the petitioner has been deprived of her valuable right of approach to seek justice before a common court of law; that, therefore, Respondent No. 1, the Hyderabad State, and Respondents 2 and 3, the Hon'ble Judges of the High Court, in their capacity of Members of the Commission, should be prohibited from proceeding further with the enquiry; that the case should be transferred to a court of law; that the Nawab Salar Jung Bahadur (Administration of Assets) Act No. 39 of 1950 should be declared void and ultra vires the Constitution of India; that the order dated 31st May 1949 under which the Commission is constituted should also be declared ultra vires and void; and that the Hyderabad State and the Committee of Management should be directed not to alienate, transfer or do any other act prejudicial to the interest of the claimant. Some other claimants also put up an appearance and they number 5 to 13 in the array of the respondents. The whole case was referred by a Division Bench to this Bench. The arguments of the learned advocates of the parties were heard at many a hearing. I record my opinion below.

(4) As the whole case has been referred to this Bench it is not necessary to reproduce verbatim all the eight questions that the Division Bench framed in its order of reference. Briefly these questions are:

1. Whether the appointment of the Commission is valid or it contravenes Article 14 of the Constitution;
2. Whether the Commission could continue to hold enquiry after the advent of the constitution;
3. Whether the Commission can be deemed to be a civil court;
4. Whether proviso 2 to S. 21 (2) of the Jagir Abolition Regulation 1358F. covers property of a Crown Grant only or whether it extends to private property also;
5. Whether the said proviso is consistent with the Constitution;
6. Whether the application of Atiyat Law to the parties to the suit would be discriminatory;
7. Whether appointment of a Commission for high noblemen is not discriminating and indicative of inequality and
8. What is the authority that would be competent to sanction the recommendations of the Commission.

(5) There can be no question as to the powers of H. E. H. the Nizam to appoint a Commission before the advent of the Constitution of India (hereinafter referred to as the Constitution Act). This was conceded by the Bar. It was the usual practice in the case of big noblemen. The only question, therefore, is: whether after the advent of the Constitution Act the appointment can still be deemed to be valid. The appointment and the continued enquiry by the Commission is impugned not only on the ground of discrimination forbidden by the equality clause of the Constitution Act but also on the ground that on the advent of the Constitution Act, the sovereign powers of H. E. H. the Nizam were brought to an end and, therefore, when the source became dry, the Commission cannot thrive or continue to function and it should also stop work.

Taking the point of discrimination first it was argued by the learned Counsel, Sir Sultan Ahmed, that Government has power to classify and its classification cannot be questioned if there is a reasonable basis for it; that having regard to the status of the deceased Nawab and vastness of his property, there was a reasonable basis for classification and that, therefore, argument from the equality clause is untenable. The learned Counsel argued further that no doubt the application of two procedures has been tabooed by the Supreme Court in — 'Lachmandas v. State of Bombay', AIR 1952 SC 235 and in — 'State of West Bengal v. Anwar Ali', AIR 1952 S C 75, but it cannot be argued in the case under consideration that the Commission will apply any other procedure than the Indian Civil Procedure Code, for, under the provisions of Circular No. 10 of 1338 F. the Hyderabad Civil Procedure Code, applicable to all other civil causes, will apply to the enquiry by the Commission also; that as contended by the learned Advocate-General in para. 3 of his counter the Commission was, as a matter of fact, a civil court; that having regard to Art. 227 and Art. 136 of the Constitution Act there will be two rights of appeal, one to this court and the other to the Supreme Court; that as held in 'AIR 1952 S C 75 absence of power of transfer of cases alone is not sufficient to indicate discrimination; and that, therefore, not only the Commission will apply the same procedure but there will be no discrimination on the grounds of power of revision, appeal and transfer. Thus, he concluded that the argument from the equality clause of the Constitution Act is untenable.

Regarding the proviso to S. 21 (2) of the Jagir Abolition Regulation he referred to the recent Full Bench — 'Ahmad-un-Nissa Begum v. State of Hyd.', ILR (1952) Hyd. 595 (FB) (5 Judges) case of Kamal Yar Jung's succession and urged that there it was held by majority that pending proceedings are saved by virtue of this proviso and, therefore, an enquiry by the Commission which started to function before the advent of the Constitution Act cannot be challenged because of its promulgation.

The last important point made by the learned Counsel was that it is an undisputed principle of Moslem Law that there cannot be two successions; that as soon as the propositus dies, the ownership of the matruka vests in his heirs; that under this principle the ownership of the private property of the deceased Nawab vested in his heirs whoever they might ultimately be found to be; that, therefore, the property comprised in the Crown grant or what is left of it namely, the commutation amount, should also be deemed to have vested along with it. In support of his contention he cited — 'Murtaza Husain Khan v. Muhammad Yasin Ali Khan', 43 Ind App 269 at pp. 281-282 (PC).

(6) I have carefully considered the above argument and I am clearly of the opinion that it is untenable. I do not deny that the State has power to classify as has been held in — 'The

State of West Bengal v. Anwar Ali', AIR 1952 S C 75:

"All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment, and, therefore, the protecting clause has been construed as a guarantee against the discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation. This classification may be on different basis. It may be geographical or according to the objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article. The classification must not be arbitrary; but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but 'those qualities or characteristics must have a reasonable relation to the object of the legislation'. In order to pass the test, two conditions must be fulfilled, namely, that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinguishing things and what is necessary is that there must be a nexus between them."

This will show that the State may classify a group of persons on the basis of difference in circumstances and that will not constitute discrimination, but that to get over the inhibition of the Art. 14, the classification must be rational, that is, must have a reasonable relation to the object of the legislation. The question therefore, arises whether the classification made by the Firman-e-Mubarak by which the Commission was appointed is reasonable and has a reasonable relation to its object. The object is nowhere given in the Firman, but, as alleged by the learned Counsel, it was the status of the deceased Nawab and the vastness of his property and the fact that the property covered not only Crown grants but valuable private property. I concede fully that all these make a wholly plausible case for classification and separate treatment. But let me examine it a little more closely.

The reasoning would have been irresistible had the circumstances been the same as that in which the Firman-e-Mubarak was issued and the Commission was appointed. Considerations that have force in the hey-day of the jagirdars with all their pomp and parapharnelia look small in the days of the Republic when all the jagirs have been abolished, and commutation amounts bearing a nominal proportion to the income of the jagirs alone are their paltry substitute. I believe I will not hurt the sentiments of anybody if I state that today the words 'big noblemen' sound more or less a mockery.

It is true that the 'Arzdasht' read at the instance of Sir Sultan Ahmed, by the learnel Counsel, Shri Mir Akbar Ali Khan, embodied the consent of the Amirs of the Paigah & the late Sir Maharaja Kishen Pershad, the enquiries into the succession cases of big noblemen should be made by a Commission. But not only this Arzdhasht also was submitted in the hey-day of the jagirdars and the mighty Amirs of Paigah but was even much prior to the Police Action. Further it is also an undisputed fact that the reason why separate commissions or Tribunals were appointed was that it was considered beneath the dignity of the big noblemen to the (be?) subjected to ordinary process of the Civil Courts. This is evident from the Firman referred to by the learned advocate, Mr. Peerbhoy, namely, the Firman dated 2nd April 1895, by which the deceased Nawab was exempted from the jurisdiction and the processes of the civil courts of the State.

I repeat that all this has changed completely. There remains no indignity as there exists no landed gentry. Almost all the claimants who claim to be the heirs of the deceased Nawab do not belong to the class of big noblemen and the subject of enquiry is no longer big jagirs but only right to commutation amounts and private property. In the circumstances there does not appear to be sufficient ground for a separate treatment. The vastness of the property is no bar, because the First Court, City Civil Court, has unlimited pecuniary jurisdiction.

Regarding the argument that by virtue of Circular No. 10 of 1358 F. the ordinary Civil Procedure Code is applicable, it should not be forgotten that it was in the words of the Circular applicable only 'as far as possible'. It cannot be said that it was wholly applicable, because, had it been so applicable there would have been appeals. It is a question here whether there would be right of two appeals. The learned Counsel argued from Arts. 227 and 136 that there will be two rights of appeal even from the decision of the Commission. But surely Art. 227 refers only to the revisionary powers of the High Court and not to its appellate powers and Art. 136 is about leave for appeal to the Supreme Court. Leave for appeal to the Supreme Court is something different from a vested right of appeal. The one cannot be refused; and the other can be refused.

Besides, it has not been denied that Atiyat Law has a peculiar procedure of its own which is embodied inter alia in Circular No. 17 of 1312 F.; and the commission will have to apply it. Hence, strictly speaking, there appears to be no escape from the fact that there would be here two procedures. If this case is to be tried by the ordinary civil courts, the Civil Procedure Code and its complementary Acts like Civil Court Act would apply; but if it is to be tried by the Commission, no doubt the Civil Procedure Code will apply, but will apply only 'as far as possible' and Circular No. 17 will also apply, with the result that there will be no vested right of appeal and, the right of appeal to the Supreme Court will depend upon the decision of the Supreme Court on a petition of leave to appeal.

Regarding the further argument that right of transfer has been held in the Bombay case not to be material, I concede that it may not be material, as two Hon'ble Judges of this Court are members of the Commission; but, it should not be forgotten, that in spite of this. the Writ application under consideration has been filed and a stay order has been taken from a Division Bench of this Court to stay the proceedings of the Commission. The application leaves no doubt that the petitioner is not at all satisfied. It is to be noted further that during the period wherein H. E. H. the Nizam had full sovereign powers, he used to direct that a decree in terms of the finding of the Commission

should be made & executed as the decree of a civil court by a court which he used to name. It is for consideration whether H. E. H. or his Government can now exercise the same powers, as, it does not appear that the power has been conferred on them by any statute. Moreover, the Jagir (Abolition) Regulation 1358 F. has been promulgated by the Military Governor and certified, confirmed and maintained by the Union Parliament. Its section 21 (2) has made all claims about jagirs to be justiciable by the ordinary civil courts of the land. Having regard to all these facts it appears to me quite clear that the enquiry by the Commission will result in discrimination and will be violative of Art. 14 of the Constitution Act and I hold accordingly.

(7) I pause here and reflect further. Of course as held in '(1913) 232 U S 499 (sic) the State has a right to the fixation of the jurisdiction of the courts and the formations of various courts. Again as mentioned in Cooley's Treatise on Constitutional Limitation, Vol. II, page 754:

"Every State has complete control over the remedies which it offers to the suitors in its courts....., laws.....abolishing one remedy, where two or more existing may be perfectly valid even though the new and the remaining remedies be less convenient than that which was abolished and less prompt and speedy."

And as held by this Court in the case of — 'Abdur Rahim v. Pinto', ILR 1951 Hyd 1

"Equal protection of law does not mean protection by identical laws as sometimes it is necessary to abridge the ordinary procedure in the interests of justice itself."

It is to be noted further that as held in — 'State of Bombay v. Balsara', AIR 1951 S C 318:

"There is nothing wrong prima facie in the Legislature according special treatment to persons who form a class by themselves in many cases."

Again to the same effect are the observations in — 'Charanjitlal v. Union of India', AIR 1950 S C 869 that:

"A law which relates to one person or a class of persons is not unconstitutional if there is sufficient reason or basis for it."

Prof. Willis in his Constitutional Law at page 680 has also made similar observations, namely:

"The fact that only one person is affected is not proof of denial of the equal protection of the laws."

And it goes without saying that as held in — 'Bharat Bank Ltd. Delhi v. Employees of the Bharat Bank Ltd. Delhi', AIR 1950 S C 188 that:

"The fact that the Government has to make a declaration after the final decision of the Tribunal is not in any way inconsistent with the view that the Tribunal acted judicially."

I have carefully considered all the above learned observations and my reflection on them leads to the same conclusion that if there be a sufficient reason or basis for classification, the State is not prevented from legislating for a class or even a single person; that in so legislating the prescribing of remedies even less prompt or speedy than the existing remedies may not necessarily be deemed to be discrimination; that the fact that the Government has to make a declaration does not detract from the judicial character of a Tribunal. In the case under consideration, therefore, the only question is: whether the Firman-e-Mubarak constituting the Special Commission for inquiring into the succession of the late Nawab Salar Jung proceeded upon sufficient and reasonable basis. After careful consideration I do not find any reason to vary my observations in the preceding para. 4 of this judgment. The times have completely changed. The jagirs have been abolished. The landed gentry is no more and, therefore, the reasons which actuated the Firman-e-Mubarak have evaporated completely and, therefore, in the changed circumstances the continued functioning of the Commission cannot be held to have proceeded upon a reasonable classification.

Moreover, though the subject has no vested right in any remedy, he may reasonably claim that if there is no sufficient and good reason for separate treatment, the remedies available for every other person should be available to him also. I think, that is the reasoning upon which the Supreme Court in the case of — 'Lachmandas v. State of Bombay', AIR 1952 S C 235 has held that:

"Any deviation or departure from established procedure amounted to a discrimination and, therefore, violative of Art. 14 of the Constitution."

Thus my reflection on some of the cases cited or references made leads to the same conclusion as in the preceding paragraph that the inquiry by the Commission will result in discrimination and will be violative of Art. 14 of the Constitution Act and again I hold accordingly.

(8) Regarding the argument that, as the enquiry by the Commission was pending at the time of the promulgation of the Jagir (Abolition) Regulation, it is saved by the proviso to S. 21 (2) of the Jagir (Abolition) Regulation, I am of opinion that this argument is also wholly untenable. In my opinion the proviso saves the existing law: the existing law as defined in the said Regulation itself includes the Atiyat law; and Atiyat Law is a creature of the prerogatives of H. E. H. the Nizam. It cannot be denied that after the advent of the Constitution Act, the sovereign power of H. E. H. the Nizam, including the prerogatives, do no longer exist. I should be more explicit on this point and state clearly that the reports of the Commissions of this kind were sanctioned by H. E. H. the Nizam in virtue of his 'prerogatives of a Sovereign'; for, not only this has been the subject of unequivocal judicial pronouncement of the then highest Tribunal of the Hyderabad State, namely, the Judicial Committee, for example, in '25 Deccan L R 1 and 35 Deccan L R 887', but it was also expressly enacted in all the Statute laws on constitutional and Atiyat matters including Circular No. 17 of 1312 and No. 10 of 1338 F., that sovereign powers and prerogatives of H. E. H. the Nizam are not controlled by any provisions of the said Statutes. It is said that as held by Lord Dunedin in — 'Attorney-General v. De Keyser's Royal Hotel', (1920) A C 508:

"It is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules."

But, as already stated above, it is equally clear that in all the statutes on constitutional matters of pre-Constitution Act days the royal prerogative of H. E. H. was expressly saved and, therefore, whether by Circular No. 17 of 1312 F. or Circular No. 10 of 1338 F.

or No. 19 of 1332 F. or any other Circular or other statute law on constitutional or Crown grant matters, the whole ground of the Crown grants was not covered by any Statute and, there was express saving in favour of the intransigent nature of the prerogatives of the Sovereign and, therefore, this argument cannot be deemed valid. It is also an undeniable fact that it was not the case that H. E. H. the Nizam invariably accepted the report of the Commission. There are instances in which he appointed a second Commission after receiving an unpalatable report of a first Commission; and there exist instances of his sanctioning virasat to persons totally different from those recommended by the Commission. No doubt, such instances were few and far between; but they indicate and prove the existence of the intransigent and transcendental prerogative. I may even state that even if there had been no such instance, it cannot be denied that in Atiyat Law every grant was a fresh grant and the sanction was entirely at H. E. H. the Nizam's will. Hence it cannot be said that the personal law was invariably applied or its invariable application detracted from the prerogative. The proviso under consideration is, therefore, undoubtedly bad and ultra vires the Constitution because it saves the royal prerogatives which do not and cannot find any place in a Republican regime.

The view cannot be subscribed to that H. E. H. the Nizam used to sanction the report of the Commission as the Head of the Government only, because the Hyderabad Judicial Committee cases already referred to, namely, '25 Deccan L R 1 and 35 Deccan L R 887' have held that the sanctioning of a grant was in exercise of his royal prerogative qua Sovereign. Amendment to Art. 31 by Art. 31A also does not save this proviso; for what was saved by this article was "the acquisition of any estate or any rights therein or the extinguishment or modification of any such rights." The proviso to S. 21 (2) of the Jagir (Abolition) Regulation does not provide for the acquisition of any estate or any right therein or the extinguishment or modification of acquisition of any estate or right therein. The proviso safeguards only the 'existing law' and the 'existing law' of sanctioning succession proceeding is, in my opinion, violative of the Constitution Act, as it saves the royal prerogative of sanctioning succession and denies the statutory right of appeal, and is, therefore, discriminating.

(9) Now I pass on to the argument from the Kamal Yar Jung's succession case. It is argued that this proviso has been expressly held to be intra vires of the Constitution Act by the majority of the learned Judges who decided that case. This is so. But I am persuaded that as the question in Kamal Yar Jung's case was: whether the report of the Commission could be sanctioned by the Chief Minister of the time, the pronouncement of the majority on the question of the proviso to S. 21 (2) of the Jagir (Abolition) Regulation was OBITER DICTA and, therefore, is not binding on this Full Bench, although it is a smaller Bench. There the question centered round the order of Shri M. K. Vellodi, the then Chief Minister, whether it should be held valid or not. Arguments for the most part ranged under Arts. 166 and 154 (2) of the Constitution Act and S. 13 of the Atiyat Enquiries Act. All this is not germane to the questior under consideration now, which is: whether the Commission can continue to function. Thus I am clearly of the opinion that the pronouncement of their Lordships of the majority was OBITER DICTA and, therefore, this Bench is fully entitled to differ respectfully from the OBITER DICTA pronouncement.

(10) There remains a few minor questions: one is the argument of the learned Counsel, Sir Sultan Ahmed, from the case of — 'Murtaza Husain Khan v. Mohd. Yasin Ali Khan', 43 Ind App 269 (PC). I have already stated what the argument is at the end of para. 3 of this judgment. Briefly, it is this: that having regard to the principle of Moslem Law that there cannot be two devolutions of property, the Atiyat property of the deceased Nawab would also be deemed to have devolved along with the private property as soon as the deceased Nawab breathed his last and vice versa; that as the petitioner, Tahera Begum, has not claimed any share in the Atiyat property and she is deprived by custom from claiming any share in the Atiyat property, the same principle of exclusion, because of the principle of devolution, will apply to the private property; that, no doubt, as held in the Privy Council case referred to above, a different custom can be proved in respect of private property, but the onus of proof will be on the petitioner; and that as Tahera Begum has not claimed any share in the jagir property, that fact tantamounts to an admission of exclusion and that admission should operate against the Matruka property as well and, this Writ petition should be dismissed because of the operation of the principle.

I am afraid this is a wholly untenable argument, for in the first place, '43 Ind App 269 (PC)' was not a case of Crown Grant. It was about 'Non-Talukdari' property and hence the principle of one devolution cannot apply here to a Crown Grant property wherein there is no succession, as every grant is a fresh grant. Secondly, the Crown Grant property also cannot go the way of private property because of the one devolution principle, for before a grant is conferred it cannot be said to devolve; and regarding exclusion by custom and by not putting up a claim, the question of custom has still to be proved by evidence and not claiming a share in the Crown grant property is also not conclusive. I was so far speaking from pre-Constitution days. Coming to post-Constitution times, of course there is no bar to the vesting of the property. The property may have vested in the heirs of the deceased Nawab simultaneously and in splitseconds, with his last breath. But who the heirs are has to be found only after protracted and lengthy litigation. Thus this argument, I am afraid, is neither correct nor very helpful. It, however, leads to a consideration of the validity of the Salar Jung Estate (Administration) Regulation No. 34 of 1338 F. (1358?) and the Nawab Salar Jung Bahadur (Administration of Assets) Act No. 39 of 1950. The learned advocate, Mr. Pheerbhoy, has challenged their validity. But it is evident that their object being the preservation of the property pending ascertainment of heirs, their validity is beyond question. Neither S. 4 of the Regulation nor S. 8 of the Act bars any claimant from having recourse to a court of law and, therefore, the argument that they do so prevent is, I am afraid, incorrect. The power behind them is in item 11 of the concurrent list of Sch. VII of the Constitu-

tion Act: where both the Centre and the States are empowered to legislate on "Administrators-General and Trustee." I pause here to consider whether I should have taken a distinction between the Crown grant and the private property should have dealt with them separately. Having regard to the conclusions I have arrived at about the incompetency of the Commission, the admitted validity of the Jagir (Abolition) Regulation and therefore of its S. 21 (2), whereby the Atiyat property has also become justiciable by the ordinary courts, and the finding that proviso to S. 21(2) being ultra vires the Constitution Act, no distinction between the two kinds of the property appears to be necessary and I, therefore, did not take any.

I should, however, make this clear that the State Government has power under Sch. VII, item 18 of the Constitution Act to legislate about land and, therefore, sanction commutation after abolishing jagirs: but to determine the heirs also who would receive the commutation amounts does not seem to be the lot of the executive under the Constitution Act. The heirs and their shares will have to be determined by the ordinary courts of the land and to those heirs alone the executive can grant the shares so fixed. I have discussed these points in the 'Kamal Yar Jung's case' (Ahmad-un-Nissa Begum v. State of Hyderabad', ILR (1952) Hyd 595) and I need not, therefore, detail further the reasoning here.

One more point; that the Commission is incompetent because its members are the Hon'ble Judges of this Court and under the Constitution Act no Judge of a High Court can do any other work than the High Court work. But, evidently, he can do other work by the permission of H. E. the President although as a matter of fact, to the best of my knowledge, the said permission has not been obtained. Hence this argument is not of much force.

Lastly, it was argued that as the deceased Nawab had not only informed the Government that he had no heir but has also left a will; that both these facts are in favour of the estate escheating to the Government; and, therefore, the Government is interested and is a Judge in its own cause. It appears to me that there is a fallacy here: and it is in confusing the Commission with the Government. As far as the competency of the Commission is concerned, it cannot be questioned on the ground of interest and the learned Government Advocate, Shri Vinayak Rao Vaidya and the learned Advocate-General, Shri Rajaram Iyer, have stated that the Government will abide by the report of the Commission. Had the Commission been otherwise competent, this objection would not have weighed with me.

(11) In the result, I am of the opinion that the Commission is not the proper forum for adjudicating the various questions that arise from the deceased Nawab's succession case. I, therefore, direct that the Writs of Certiorari, Mandamus and Prohibition should issue. The Commission should stop work. The Hyderabad State should not require the Commission to inquire and report. The management of the estate may remain with the Committee as it is but a Trustee for the heirs to be, and both the Regulations 34 of 1358 F. and 39 of 1950 A.D. are not void. The parties may go to the law court to have their claims settled. In view of the circumstances of the case we direct that the parties should bear their own costs.

(12) SRINIVASACHARI J.: This case relates to the estate of one of the foremost noblemen of Hyderabad, Nawab Salar Jung III, who died on 2-3-1949. Immediately after his death, the Nizam issued a 'Firman' on the 23rd of May 1949 constituting a Commission to enquire into the succession to the estate of the late Nawab with regard to his jagir and non-jagir properties. This Commission which was constituted by H. E. H. the Nizam was directed to enquire into and report with regard to the following matters:

(i) Whether the jagir of the Nawab escheated to the government by reason of his having died issueless;

(ii) If not, who are the heirs of the Nawab;

(iii) Who are the heirs of the Nawab in so far as his private property was concerned;

(iv) What is the extent of the private property which is divisible among his heirs; and

(v) Did the Nawab leave any will and what is the effect thereof in regard to the distribution of the property?

In pursuance of the above direction, the Commission commenced its enquiry by issuing notice calling upon all parties, who had any share in the estate of the late Nawab, to appear before the Commission and file their respective claims. A number of persons appeared before the Commission and put forward their respective claims. The members of the Commission felt that it would facilitate the enquiry if the proceedings relating to 'atiyat' property and the proceedings pertaining to 'non-atiyat' property were split up and enquiry was conducted independently and so that was done. The Commission framed the necessary issues arising out of the pleadings of the parties and the parties were called upon to lead their evidence. When the Commission was engaged in recording the evidence of the witnesses on behalf of the parties the present petitioner, Tahira Begum, filed an application before this court for the issue of writs of 'certiorari, mandamus' and 'prohibition'. The petitioner impeached the constitution of the Commission itself on various grounds, primarily that such a tribunal could not exist as it offended the provisions of Arts. 14 and 15, Constitution of India. The petitioner also questioned the validity of the Nawab Salar Jung (Administration of Assets). Act, Act 64 of 1950. After the filing of this application on 27-12-1950 a Bench of this Court directed the Commission to stay further proceedings until further orders. The result was that all the proceedings before the Commission came to

a standstill thereafter. The petitioner filed another application on 25-1-1951 seeking the leave of this Court to add further grounds in the application.

(13) In this writ application, the petitioner impleaded the State of Hyderabad being respondent No. 1, the Hon'ble Judges constituting the Commission being respondents 2 and 3, the committee appointed for the management of the estate of the late Nawab being respondent No. 4, and those persons who put forward their claims to a share in the estate of the late Nawab. These are respondents Nos. 5 to 13. Counter was filed on behalf of respondent No. 1, the State of Hyderabad. The Attorney-General of India filed a separate counter to that portion of the petitioner's application impeaching the validity of Act 64 of 1950 by adopting the counter of respondent No. 1, in so far as this question was concerned. Respondent No. 4, the Committee filed a separate counter more or less on the same lines as those of the respondent No. 1. Respondent No. 5, Khurshid Begum was one with the applicant and supported her contention. Respondent No. 6 opposed the petition. Respondent No. 7 supported the application.

(14) I would summarise the main contentions of the petitioner in invoking our jurisdiction under Art. 226 of the Constitution of India. They are as follows:

(a) The Commission as constituted by H.E.H. the Nizam is not invested with all the powers of a court;

(b) There is no sanction behind the orders of the Commission and, therefore, the Commission cannot enforce its orders;

(c) Even if such a Commission could be constituted under the powers vested in the Nizam before the coming into force of the Constitution such a Commission cannot have a legal status after 26-1-1950 and it is clearly 'ultra vires';

(d) The Constitution of a special court for the purpose of enquiry into a particular case clearly offends the fundamental right granted under Art. 14 of the Constitution as the right of equality before the law is infringed.

(15) Before I deal with the various contentions raised in this case it is just as well that I refer to the state of the law in Hyderabad with regard to jagirs.

(16) The estate left by the late Nawab consists of two kinds of properties: (1) 'atiyat' property or property granted by the Nizam to the forefathers of the Nawab being in the nature of a crown grant and (2) 'non-atiyat' property, other assets consisting of movable and immovable property. The attributes of these kinds of properties are different in so far as succession to such properties is concerned. The first principle relating to 'atiyat' property is that it is a grant by the sovereign to a particular individual and on his death the fiction of the 'atiyat' law is that it reverts to the sovereign and there is a fresh grant by the sovereign in the name of his heir or successor, although as a matter of practice the jagir is only granted to the legal heir. Another feature about the 'atiyat' property is that all matters relating to such property would be heard & determined not by the civil court but by the special courts, called the 'atiyat' courts, which would have exclusive jurisdiction over these cases relating to such property, the Nizam issued a 'Firman' which has been embodied in a Regulation Code, Regulation No. 34 of 1331 F. According to this Regulation, on the death of a jagirdar, the person who claims to be entitled to succeed to the deceased jagirdar had to appear before the Taluqdar in cases where the annual income of the jagir did not exceed Rs. 2,500 and in all other cases before the 'Nizim-i-atiyat' (officer in-charge of Crown grants). These were the courts established to deal with cases relating to the 'atiyat' property. Independent of and quite irrespective of these special courts, where the estate was a big estate and related to noblemen who were called Umarai Uzam (High Noblemen) the Nizam used to constitute special commissions or tribunals for facility of enquiry and quick disposal. The power of the Nizam to constitute such special courts was well recognised, because he had vested in him the legislative, judicial and executive powers. In this connection, the leading case of — 'Raja Pratabgir v. State of Hyderabad', reported in 35 Deccan L R 153 would be in point. It is abundantly clear, therefore, that the establishment of a Special Commission to enquire into the succession to the estate of the late Nawab was quite valid and constitutional according to the law in force at that time. The Commission was appointed in May 1949.

(17) On 14-8-1949, the Jagir Abolition Regulation No. 69 of 1949 was passed under which all jagirs were abolished and all claims relating to a jagir or to any share in the income thereof were to be entertained and decided by the appropriate civil court. This enactment, therefore, put an end to the special courts that had been established for the determination of the jagirdar, for after this enactment there was no question of the grant of a jagir as such. A provision, however, was made in this enactment that in so far as those cases, which were pending enquiry at the time when this enactment came into force, were concerned, the enquiry was to be completed according to the existing law, viz., the law relating to 'atiyat' property. It is well known that the 'atiyat' courts were primarily courts, which after making the necessary enquiry and investigation, generally submitted their recommendations to the Nizam, who accorded his sanction to such recommendations. The position was that it was only after the sanction was accorded that the findings of the 'atiyat' court became enforceable and operative. Admittedly, this case was pending when the Jagir Abolition Regulation came into force and according to the proviso to S. 21 of the above Regulation, the old law had to be followed, viz., that the recommendations of the Commission would need to receive the approval of the Nizam.

(18) As pointed out by me above, inasmuch as the estate left by the Nawab consists of both jagir and non-jagir properties the Judges constituting the Commission would be bound to apply the special law relating to Crown grants so far as the jagir property was concerned and the personal law would be applied in so far as the other kind of property is concerned. It has also to be borne in mind that the law that would be applied would be the existing law until modified by the legislature, subject however to this condition that it is not repugnant to any of the provisions of the Constitution of India. I have now to consider whether the coming into force of the Constitution would affect the continuance of the proceedings before the Commission. I am of opinion that it cannot have any such effect. It has to be remembered that this legislation, namely, the Jagir Abolition Regulation of 1949 was certified under Art. 31(6) of the Constitution of India, by a Notification dated 25-4-1950, vide Gazette of India, Part (I) S. (I) dated 6-5-1950. The result of this was that this enactment could not be called in question in any court of law. Subsequently, by the passing of the Constitution First Amendment Act 1951, the Jagir Abolition Regulation was specified in the 9th Schedule and the aforesaid amendment expressly made it clear that none of the Regulations mentioned in the 9th Schedule nor any of the provisions thereof shall be deemed to have been void or ever to have become void on the ground that such regulation was inconsistent or took away any of the rights conferred by any provisions of the Constitution. It, therefore, follows from this that the provisions of the Jagir Abolition Regulation cannot be held to be inconsistent with any of the provisions of the Constitution. The validity of this Constitution First Amendment Act was challenged before the Supreme Court in the case of — 'Shankari Pershad Singh Deo v. Union of India', AIR 1951 S C 458: 64 Mad L W 1005 (SC) and it was held in that case that the said Act was 'intra vires'. The provision in an enactment that pending proceedings should be concluded according to the law applicable at the time when the rights and liabilities accrued and the proceedings commenced has been held to be good law by the Supreme Court in the Case of — 'Ramjilal v. I. T. Officer', AIR 1951 S C 97: 1951 S C R 127.

(19) I shall now deal with the other grounds on which the Constitution of the Commission is attacked. The most important ground is that it clearly offends Art. 14 of the Constitution of India. It is stated that while all cases relating to succession to Muslims' property used to go before the Ecclesiastical Court and after the abolition of the Ecclesiastical Court would go now before the ordinary civil court, there is no reason why this distinction should be made and this case should be heard and decided by a Special Commission. It was contended that all the privileges and advantages that the petitioner would have in an ordinary court of law could not be had before the Commission. It was also urged that its orders were only in the nature of recommendation and were not enforceable until they received the sanction of higher authority. Article 14 of the Constitution reads as follows:

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It has been guaranteed by this provision of the Constitution that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. It has to be observed in this connection that this guarantee of equal protection in legal proceedings does not secure to all persons the same laws and remedies. The right of the state of fixing different venues of civil action is well-recognised. It does not prevent the state also from determining jurisdiction of its courts. In this connection, the case reported in 232 United States Reports, p. 499 would be in point. Coming nearer home, the matter has been the subject of judicial pronouncement by the highest court in the land. It was tersely put by Fazl Ali, J. in the well known case of — 'Chiranjit Lal v. Union of India', 1950 S C R 869: AIR 1951 S C 41 that a law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it. In the case before us, it has to be observed that the Nizam constituted commissions for the enquiry into the succession to the estate of only big jagirs; in effect, special commissions used to be constituted for enquiring into the succession to the estate of the noblemen class and therefore, this can very well be regarded as a law, for the 'Firman' of the Nizam was the law of the land, which applied to one class of persons, viz., the noblemen class and it was held by the Supreme Court in the case referred to above that if there is a classification it would not be held as invalid simply because the law might have been extended to other persons and in such cases the legislature alone is the best judge. Therefore, on the ground of their being no basis for this classification the constitution of the Commission cannot be attacked and inasmuch as under the Jagir Abolition Regulation which is good law the existing law alone could be applied, the fact that a different kind of law other than the present law is being applied could not be regarded as a differentiation between the general class of people and the jagirdars. Therefore, no inequality could be predicated in this instance. The same learned Judge Fazl Ali, J. observed in the case of — 'State of Bombay v. F. N. Balsara', AIR 1951 S C 318: 52 Cri L J 1361 (SC): "If a law deals equally with members of a well defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons." The learned Judge further goes on to say "that every classification is in some degree likely to produce some inequality and mere production of inequality is not enough." It cannot be said that this classification of directing the cases relating to the succession to the estate of persons who were known as 'Umara-i-Uzam is not a classification based on an understandable basis. If there is some understandable basis then such a distinction cannot be said to violate the principles of equality

before the law or equal protection of the laws according to the dictum of the Supreme Court in the case of — 'State of Bombay v. F. N. Balsara', AIR 1951 S C 318: 52 Cri L J 1361 (SC). His Lordship Fazl Ali, J. observed "I find that there is nothing wrong 'prima facie' in the legislature according special treatment to persons who form a class by themselves in many cases" (AIR 1951 S C 318 at p. 327). It was urged that the petitioners have no right of appeal while if the case were to be instituted in a civil court that would have the various grades of appeals to the superior courts. This argument, to my mind, cannot be sustained. In this connection, I may straightway point out that the right of appeal is not an inherent right but it is a right which must be conferred by a statute. This doctrine was established as early as 1876 and this was subsequently followed by the Privy Council in the case of — 'Rangoon Botutoung Co. v. Collector, Rangoon', 39 Ind App 197: 40 Cal 21 (PC). Therefore, it is clear that the right of appeal cannot be regarded as a fundamental right. Above all, as regards the remedies available to suitor in courts the state has absolute control over them and the fact that a suitor is deprived of any one remedy cannot be regarded as offending against the principle of equal protection of the laws or equality before the law. I might in this connection refer to what Cooley has said in his 'Treatise on Constitutional Limitation', Vol. II, p. 754. "Every State has complete control over the remedies which it offers to suitors in its courts ..... laws ..... abolishing one remedy where two or more existing may be perfectly valid even though the new or the remaining remedy be less convenient than that which was abolished or less prompt and speedy." That gives a complete answer to this part of the argument that the petitioner is deprived of the right of appeal. The Chief Justice in the full bench case of — 'Abdul Rahim v. J. A. Pinto', has rightly observed "Equal protection of laws does not mean protection by identical laws, sometimes it is necessary to abridge the ordinary procedure in the interests of justice itself." (AIR 1951 Hyd 11: 52 Cri LJ 1333 (FB)).

(20) The application of a law different from what would be applied to a similar case today according to me cannot be regarded as producing inequality and as such offending the provisions of equal protection of the laws. This view of mine receives support from the observations of Das J. in the case of — 'Ramjilal v. I. T. Officer', AIR 1951 SC 97: 1951 SCR 127 wherein his Lordship observes "in any case the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced is a reasonable law founded upon a reasonable classification.....which is permissible." The question of inequality can arise only in the enforcement of the laws. The doctrine would not come into play unless the law is discriminatorily applied. Apart from all other considerations, the one important consideration in these matters cannot be ignored that it is upon the party impugning the particular legislation to show that there is no reasonable basis for such classification. Professor Willis says: "The fact that only one person is affected is not proof of denial of the equal protection of the laws." (Willis' Constitutional Law, p. 580).

(21) It was urged that the Commission cannot be regarded as a court because its finding is not a final order but only partakes of the nature of a recommendation to be sanctioned by the competent authority. This argument again cannot hold water. The Commissioner has all the powers of a court in so far as its proceedings are concerned. It can call upon parties to lead evidence, summon witnesses, give findings on issues and do all such acts as an ordinary court of law would do, and if it possesses all those powers, then to say that there is anything defective about it cannot be justified. The fact that some higher authority has to give a formal sanction to its recommendations would not matter. It is nevertheless a court. As was artistically put by Fazl Ali J. it has not only all the trappings of a court, but the power to decide the rights of the parties vests in the Commission alone and their rights would be finally adjudicated upon by the finding of the Commission itself, and the Government's sanction thereupon is only formal. Mahajan J., in the — 'Bharat Bank v. Employees of Bharat Bank', observes "The fact that the Government has to make a declaration after the final decision of the tribunal is not in any way inconsistent with the view that the tribunal acted judiciously." (AIR 1950 SC 188 at p. 198: 1950 SCR 459). In — 'Rex v. Electricity Commissioners', (1924) 1 KB 171 at p. 207: 93 LJ KB 390 it was observed "it is to be noted that it is the order of the commissioners that eventually takes effect .....I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to confirmation or approval even where the approval has to be that of the House of Parliament." It is a judicial tribunal, it is under the supervision of the High Court, under Art. 227 and under the appellate authority of the Supreme Court under Art. 136 of the Constitution. So this argument also fails.

(22) In these proceedings the petitioner sought to impugn some of the provisions of the Nawab Salar Jung Bahadur (Administration of Assets) Act, 1950 as offending the provisions relating to some of the fundamental rights conferred by the Constitution. It was argued that S. 4(2)(c) of the above Act interfered with the right of the petitioner to hold and dispose of property.

(23) The Nawab Salar Jung Bahadur (Administration of Assets) Act, Act No. 36 of 1950, is an enactment passed by the Parliament of India, and it came into force on 21-4-1950. Section 4(2)(c) of the aforesaid Act, which is being challenged, reads as under:

"Without prejudice to the generality of the powers given to it by sub-section 1, the committee may for any of the purposes, aforesaid,

(a) .....

(b) .....

(c) transfer in any manner whatsoever the assets or any part thereof;

(d) .....

It is argued by Mr. Mohsin that under the Mohammedan Law on the death of the propositus his estate devolves upon his heirs according to their respective shares and they hold the estate as tenants-in-common. The rights given to the committee to transfer the assets in any manner clearly interferes prejudicially with the right of his client to hold and dispose of the property which is a fundamental right conferred on him under Art. 19, clause (f) of the Constitution. Article 19 clause (f) says that "all citizens shall have the right to acquire, hold and dispose of property."

(24) I am afraid there is a fallacy in this argument. The Nawab Salar Jung (Administration of Assets) Act of 1950 was passed primarily for the administration and management of the estate by a committee of management to be appointed. As the preamble would show it was enacted only for the above purpose. The preamble says "an act to provide for the administration of the assets of the late Nawab Salar Jung Bahadur of Hyderabad and for matters connected." Section 3 of the Act also strengthens this view. Section 3 says "all the assets of the Nawab shall vest in the Committee and shall be administered by the Committee subject to the control of the Central Government." This Act is a central Act passed by the Indian Parliament and Parliament has also the power to legislate in respect of any of the matters contained in List III, the Concurrent List. Item No. 11 in the Concurrent List is "Administrator-General and Trustees". The provisions of the Nawab Salar Jung (Administration of Assets) Act are practically similar to those of the Administrator-Generals Act. The circumstances which led to the passing of this legislation were these. The Nawab died issueless leaving behind a vast estate consisting of valuable movable and immovable property. There were number of persons laying claim to the estate and their claims had to be enquired into and adjudicated upon. Until such time as the rightful claimants were determined it was thought essential that the estate should be managed and preserved by a committee of management for the preservation of the estate so that eventually it may be available to the rightful heirs. They merely hold as trustees for those who may eventually be declared to be entitled. The position of this body of the committee of management is only like that of the Court of Wards. The Court of Wards is empowered to keep possession of the property of the ward and dispose of any portion of it if it thought expedient. There is nothing wrong against this right of the Court of Wards Act to dispose of property. Likewise, the committee of management could dispose of the property if it thought the sale of the property was advisable in the interests of the estate. Where there is the apprehension of deterioration or waste of assets, the taking over of the estate for preservation and management cannot be regarded as unjustified. The argument that Mr. Mohsin's client has a fundamental right to hold his share in the property is wrong. No one can say today as to who would be the heirs entitled to and to what shares. Therefore, it is futile to contend that any fundamental right has been infringed.

(25) It was argued by one of the counsels appearing for the petitioner that S. 18 of the Hyderabad (Abolition of Jagirs) Regulation, 69 of 1358 F. excludes personal property of a jagirdar, from the application of this Regulation and that the Commission had been entrusted with the task of enquiring into the succession to the private property of the Nawab as well. This enquiry could not be continued by the Commission even under the proviso to S. 21(2) of the above Regulation. The short answer to this is that H.E.H. the Nizam had the power to constitute a special Commission for enquiring into the succession to the estate of a nobleman, Ameeri-Uzam, both with regard to jagir property as well as non-jagir property. Such a Commission had jurisdiction to decide about the heirs and successors to the private and non-jagir property of the Nawab.

(26) The advocate appearing for the petitioner stressed a further point in the case, viz., that in this case the Government claims the property by way of escheat and after the Commission gives its final report, it would have to be sanctioned by the same Government. It was sought to be urged that this violated the well accepted principle of law that no man could be a judge in his own cause. The Government, it was said, could not be a party and at the same time a judge. This argument has no force. The Commission as constituted consists of judges of the High Court who are quite independent of the Government which figures as a party before them. Their proceedings will be judicial, and according to law and established procedure. After they come to a conclusion, the formal sanction would be given by the head of the administration to conform to the procedural law relating to findings of commissions and special tribunals. It is only where there is a likelihood that the judges would from kindred or any other cause have a bias in favour of the Government that it would be wrong for this Commission to act. Such a thing cannot be imagined of this body of judges. Where they give their opinion the Government has merely to give its formal sanction and implement it. I hold that this fact cannot militate against the principle that a person cannot be a judge in his own cause.

(27) I would have held that the proceedings before the Special Commission could not be quashed on the ground that there was discrimination between one and another and that it violated the principle of equality before the law, but my hands are tied on account of the pronouncement of the Supreme Court in the case of — 'Lakshmandas Kevalram v. State of Bombay', AIR 1952 SC 235: 1952 Cri LJ 1167 (SC). In that case their Lordships held that any deviation or departure from the established procedure amounted to a discrimination and if there was a discrimination it violated Art. 14 of the Constitution of India and if it violated

Art. 14 the proceedings before any commission or special tribunal which were at variance with the ordinary procedure could not be justified and, therefore, the commission would be deemed to have no jurisdiction after the coming into force of the Constitution. In adverting to the various deviations from the established procedure, their Lordships held that the absence of the right to apply for a transfer of the case was detrimental to the interests of the accused and could not be allowed. Holding that this amounted to a discrimination between an accused before the special court and an accused before an ordinary court, the proceedings before special court were held to be without jurisdiction and the conviction was quashed. Applying the above principle, I find that in the proceedings before the special commission, there is no scope for the parties to apply for a transfer of the cases before any other tribunal in the event of their apprehending that they would not get fair justice. It has to be realised that this Commission was constituted by H.E.H. the Nizam and although under the provisions of the Regulation No. 10 of 1358 F. (which was sanctioned by the Nizam) has the force of the law all proceedings before the Commission would be governed by the Civil Procedure Code so far as may be, no provision has been made to permit parties before the commission to apply for a transfer of the case to any other authority or tribunal. It is not open to any of the parties to move for a transfer because if they did move for a transfer, to which court could the case be transferred? Although the High Court under Art. 227 of the Constitution has powers of superintendence over this Commission, it being only a tribunal within the meaning of Art. 227, the High Court cannot direct the transfer of the case pending before the Commission to any other authority. The difficulty in this case is that S. 24, Civil P.C. cannot be applied, for the simple reason that S. 24 contemplates the transfer by the High Court of any proceeding pending before any court to any court subordinate to it and competent to try. In this case in so far as the 'non-atiyat' property is concerned, the High Court certainly could get the case transferred to the courts competent to try the case. But with regard to the 'atiyat' property, so long as the existing law states that enquiry into the succession to 'atiyat' property shall be by special courts, viz., 'Atiyat' Courts, the High Court has no jurisdiction to transfer a case pending before the 'atiyat' Court. This commission in so far as it enquires into the succession to the jagir properties must be deemed to be an 'atiyat' Court. It is clear that the High Court's power to transfer cases is confined to transferring them to the courts constituted under the Civil Courts Act which are subordinate to it and not to the Courts which have special and exclusive jurisdiction known as the 'atiyat' Courts. It has also to be observed that this body is not competent to pass a decree or order which would be executable as an ordinary court could, for all its findings are only recommendatory and not operative. This also in my opinion deprives the parties before this Commission of a substantial procedural right which they would otherwise be entitled to. These facts, according to me, are detrimental to the interests of the parties before the Commission.

(28) For the above reasons, I hold that the proceedings before the Special Commission cannot continue and writ of prohibition will issue prohibiting the continuance of the proceedings hereafter. A writ of certiorari will issue quashing the proceedings before the Commission. I do not make any order as to costs having regard to the particular circumstances of this case.

A/H.G.P. Writ petition allowed.

NOTE

By oversight, the judgment of Srinivasachari J. was not taken notice of in the Headnote as printed on p. 105. The Headnote requires modification as indicated below.

(In Point (a) of the head-note, in col. 1 on page 106 'add' after (vi) the following):—

'Per Srinivasachari J.: The establishment of a Special Commission to enquire into the succession to the estate of the late Nawab was valid and according to the law in force at that time. The Jagir Abolition Regulation 1949 was not inconsistent with any of the provisions of the Constitution. The fact that there was a different kind of law did not differentiate between the general class of people and the jagirdars. Even if there was a classification it did not violate the principles of equality before the law. (Paras 17, 18, 19)

The right of appeal is not an inherent or a fundamental right. The State has absolute control over the remedies available to suitors in Courts and the fact that a suitor is deprived of any one remedy cannot be regarded as offending the principle of equality before the law. The Commission has all the powers of a Court in so far as its proceedings are concerned and the fact that some higher authority has to give a formal sanction to its recommendation did not matter. It is a judicial tribunal under the supervision of the High Court under Art. 227 and under the appellate authority of the Supreme Court under Art. 136 of the Constitution. (Paras 8, 19, 20, 21)

The Commission constituted was thus invested with all the powers of a Court, with a sanction behind its orders. It did not offend the fundamental right under Art. 14 by infringing the principle of equality before the law and was not ultra vires the Constitution on the ground that there was discrimination between one and another man.

There was however no scope for the parties to apply for a transfer of the case before any other Tribunal and also the Commission was not competent to pass a decree or order which would be executable. These facts would deprive the parties of a substantial procedural right and were de-

trimental to the interests of the parties. The proceedings before the Commission could not therefore be continued.
(Paras 27, 28)

(After Point (c) in the head-note on page 106, 'add' the following points):

(d) Constitution of India, Art. 19(f) — Appointment of Commission to inquire into succession — No breach of fundamental rights of claimants.

'Per Srinivasachari J.:' The rights given to the Commission to transfer the assets do not interfere prejudicially with the rights of the claimants under Art. 19(f). Since no one could say as to who would be the heirs entitled to and to what shares of the estate, the claimants have no fundamental right to hold his share; on the other hand the position of the Commission is like that of the Court of Wards whose action for management and preservation of the estate cannot be regarded as unjustified.
(Paras 12, 13)

(e) Constitution of India, Art. 227 — Power of High Court to transfer case.

'Per Srinivasachari J.' : Although the High Court under Art. 227 has powers of superintendence over Commission appointed to inquire succession, it being only a tribunal within the meaning of Art. 227 the High Court could not direct the transfer of the case pending before the Commission to any other authority. (Para 16)

(f) Civil P. C. (1908) S. 24 — Applicability and scope — Case pending before Atiyat Court.

'Per Srinivasachari J.' : Section 24 is not applicable because the High Court has no jurisdiction to transfer a case pending before the Atiyat Court. (Para 16)

Anno: Civil P. C. (1908) S. 24 N. 2.

A.I.R. 1953 HYD. 111 (Vol. 40, C. N. 41)

QAMAR HASAN AND
MANOHAR PERSHAD JJ.

Abdul Ali, Petitioner v. Rupchand and another, Respondents.

Revn. Petn. No. 1 of 1952-53, D/- 23-9-1952.

(a) Civil P.C. (1908), Ss. 145, 47 and O. 41, R. 5 — Surety's liability — Nature and extent of — Surety is not party to decree — Execution against him — Stay does not operate.

A stay order operates as stay against all persons who are parties to the decree. But the surety becomes liable under the terms of his bond, and on that account execution is taken out against him under S. 145, Civil P. C., and not because he is or has become a party to the decree. No doubt, the decree is executed against him under S. 145, as though he were a party to the suit and the principal debtor, but that does not make him a virtual party to the decree itself. Section 145 says that surety shall be deemed to be a party within the meaning of S. 47 only for a limited purpose, namely for the purpose of appeal. Therefore, if an order staying the execution of the decree is granted by a court, it is restricted in its operation to the actual parties to the decree, and it will not deter the decree-holder from seeking execution against the surety. AIR 1920 Mad 75 and AIR 1919 PC 55, Followed. (Para 4)

Anno: Civil P. C., S. 145 N. 8, 9 and 12.

(b) Civil P. C. (1908), S. 145 — Surety's liability — Bond — Construction of — Judgment-debtor applying under Hyderabad Money Lenders' Act, S. 12 — Execution against surety held premature.

The question whether the surety has incurred liability under the bond depends upon the terms of the bond. Where the words in a surety bond are capable of different meanings, they must be strictly construed. Where the bond expressly provided that in case the judgment-debtor fails to comply with the order of the court to pay the decretal amount the surety would incur his liability and after that the judgment-debtor applied under S. 12, Hyderabad Money Lenders' Act, for fixing instalments for payment of decretal debt and on decree-holder's application for execution against the surety, the lower Court ruled out the objections of the surety, the High Court in revision.

Held (1) that it was not a case in which mere non-payment by the judgment-debtor would give a cause of action to the decree-holder. Order of the Court and consequent failure of the judgment-debtor to comply with that order was necessary to give rise to the obligation of the surety. (Para 5)

(2) It may be that the presentation by the judgment-debtor of an application for securing instalmentary payment, of a decretal amount was tantamount to failure on his part and therefore the surety became liable to be proceeded against in execution; but that fact would not amount to an order of the court as contemplated by the bond. The order of the executing Court directing attachment of the surety's property was therefore premature.
(Para 6)

Manohar Pershad J.: (Nature and extent of surety's liability explained). (Para 13)

Anno: Civil P. C., S. 145 N. 8 Pts. 12 to 16; N. 9 Pts. 1, 23.

(c) Civil P. C. (1908), Ss. 145 and 47 — Surety — Execution against — Appeal.

An order enforcing or refusing to enforce security, passed under S. 145 is appealable as a decree. (Para 13)

Anno: Civil P.C, S. 145, N. 12 Pts. 1 and 2.

Jalil Ahmed, for Petitioner; Abdul Vahid Ovaisi, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('19) 46 Ind App 228: (AIR 1919 PC 55) 4
('20) 55 Ind Cas 363: (AIR 1920 Mad 75) 4
('33) AIR 1933 Mad 309: (56 Mad 625) 10

QAMAR HASAN J.: This application in revision challenges the order of the learned Judge, Small Causes Court, Hyderabad, dated 16-10-1951, overruling certain objections raised by the petitioner in respect of the execution of decree.

(2) The petitioner executed a surety bond on 19th February 1951 in pursuance of an order of the High Court granting stay of execution pending a revision application preferred by the judgment-debtor on his furnishing security. The security bond recited:

"Whereas the decree-holder has applied to execute the decree and the execution has been ordered to be stayed on the furnishing of a reliable security, therefore, I of my own free will stand security to the extent of Rs. 1,728-15-0 and covenant that if the judgment-debtor is ordered to pay the above amount he shall deposit it with costs. If he should fail therein, then any amount so payable shall be realised from moveable or immovable property belonging to me....."

The High Court disallowed the revision on 24-7-1951, and on the same date the judgment-debtor applied to the executing court under S. 12, Hyderabad Money Lenders' Act, for an order fixing instalment for payment of the decretal debt. On another application of the same date, the learned Judge ordered stay of execution during the pendency of the application. Rupchand, the assignee of the original decree, who is opposite party No. 1 before us, on 26-7-1951 applied to have his name substituted for the decree-holder in the execution petition, and for issuing notice to the surety and the judgment-debtor. No order was passed on this application, but on 27-8-1951, the court recognised the assignment of the decree and ordered the assignee-decree-holder to file reply to the judgment-debtor's application for instalment. On 4-9-1951, the decree-holder applied for attachment of the surety's property which was resisted, and it was urged on his behalf that execution does not lie against him because of the stay of execution and absence of notice to the judgment-debtor to pay the amount and exoneration of the surety by reason of stay order.

(3) The learned Judge held that the stay order did neither exonerate the surety from his liability nor did it operate to suspend the execution proceedings against the surety because it was granted for the limited purpose of seeing whether the judgment-debtor was entitled to the benefit of S. 12, Money Lenders' Act. In regard to the objection that unless the judgment-debtor was called upon to pay the amount awarded by the decree, the decree-holder cannot proceed against the surety, he held that the mere presentation of the application on the part of the judgment-debtor for being allowed to pay the amount by easy instalments was tantamount to a denial giving rise to the validity of the process against the surety.

(4) It was in the first place argued by the learned Advocate for the petitioner that a stay order absolute and unqualified in terms cannot be regarded to be partial in its operation. Therefore, as long as the stay order continued, no execution can be levied against the surety. No law or authority has been quoted in support of this contention. I, no doubt, agree with the contention to this extent that a stay order absolute in terms operates as stay against all persons who are parties to the decree. But it is clear from the terms of the decree itself that there was no decree against the surety. The surety becomes liable under the terms of his bond, and on that account execution is taken out against him under the provisions of S. 145, Civil P. C. and not because he is or has become a party to the decree. No doubt, the decree is executed against the surety under S. 145 of the Code as though he were a party to the suit, and the principal debtor but that does not make him a virtual party to the decree itself. The language used in S. 145 of the Code points to the same conclusion because it says that surety shall be deemed to be a party within the meaning of S. 47 only for a limited purpose, namely for the purpose of appeal. This view is fortified by the observations of their Lordships of the Madras High Court in the case of — 'Ramanathan Pillai v. M. Doraiswami Ayyangar', 55 Ind Cas 363 (Mad), to the effect that the surety is not a party to the suit or to the decree made therein nor does he become party to the execution proceedings until application is made for an order against him. He is not a party to the suit within S. 47, and S. 145 only makes him a party for the limited purpose of appeal. In the case of — 'Raj Raghubar Singh v. Jai Indra Bahadur Singh', 46 Ind App 228 (PC), their Lordships of the Privy Council remarked that Ss. 47 and 144 apply only to the parties or the legal representative of the original parties and do not apply to sureties. For these reasons, I am of the opinion that if an order staying the execution of the decree is granted by a court, it would be restricted in its operation to the actual parties to the decree, and it will not deter the decree-holder from seeking execution against the surety.

(5) The question whether the surety has incurred liability under the bond depends upon the terms of the bond. Where the words in a surety bond are capable of different meanings, they must be strictly construed. In the light of these principles, it is to be seen whether the decree-holder was entitled to proceed against the surety as soon as there was failure on the part of the judgment-debtor to pay the decretal amount or whether an order of the court, and consequent failure of the judgment-debtor to comply with that order was necessary to give rise to the obligation of the surety. In my opinion, that is not a case in which mere non-payment by the judgment-debtor would give a cause of action to the decree-holder. The bond expressly provides that in case the judgment-debtor fails to comply with the

order of the court to pay the decretal amount, the surety would incur his liability to pay the stipulated sum.

(6) It is contended on behalf of the decree-holder, opposite party, that the presentation by the judgment-debtor of an application for securing instalmentary payment of a decretal amount was tantamount to failure on his part, therefore, the surety had become liable to be proceeded against in execution. That may be so, but that fact will not amount to an order of the court as contemplated by the bond. From the record it appears that no orders have as yet been passed by the court below on the execution petition dated 25-1-1951.

(7) For this reason, I make the rule absolute and hold that the order under revision directing attachment of the petitioner's property is premature. In view of the circumstances of this case, I make no order as to costs.

(8) MANOHAR PERSHAD J.: This petition in revision had initially come up before me when I was sitting as a Single Judge. In view of the question of law involved, I had referred it to the Division Bench which is before us now.

(9) I have read the judgment prepared by my learned brother and I agree with the result, but I wish to add a few lines.

(10) It appears that a money decree was passed against the judgment-debtor who had filed a revision petition in this Court. On the miscellaneous petition for stay filed by the judgment-debtor, the revision petitioner stood surety. The revision petition of the judgment-debtor was dismissed by this Court. On the same day, the judgment-debtor put in a petition before the executing court praying for instalments. Notice of this petition was given to the decree-holder who objected to the same being granted. After hearing the arguments of the parties, the court directed that the execution of the decree be stayed till the final disposal of the petition. After this, the decree-holder started execution proceedings against the surety who in reply stated that when the court has stayed the execution of the decree, no execution can proceed against him. The court rejected the plea of the surety relying on the case of — 'Annadana Jadaya v. Konammal', AIR 1933 Mad 309, against which is this petition in revision, on behalf of the surety.

(11) In this petition in revision, it is argued that the liability of the surety and the judgment-debtor is co-extensive and when the whole decree has been stayed on the petition of the judgment-debtor, no execution can proceed against him.

(12) In order to appreciate this point, it has to be seen how and under what circumstances liability of the surety arises. Admittedly, the surety is not a party to the decree. The liability appears to arise from the terms of the bond. The surety's liability is co-extensive with that of the judgment-debtor and he is jointly and severally liable with the judgment-debtor for the decree amount. A decree against the principal can, in fact, be treated as a decree against him. Hence the party for whose benefit security has been given is not bound to execute the decree against the judgment-debtor before proceeding against the surety, except where the decree otherwise provides. Within the limits prescribed by the security bond, the surety's liability extends to any amount recoverable from the judgment-debtor. The surety's liability being co-extensive with that of the judgment-debtor the extinction or dimunition of the latter's liability operates as a discharge of the surety to a corresponding extent. Conversely, a surety is bound as long as the judgment-debtor is bound. Thus, in other words, the surety becomes liable under the terms of the bond and execution can be taken out against him under S. 145, Civil P. C. Though execution is taken out against the surety under S. 145, Civil P. C., still the surety does not become a party until an application is made for execution against him.

(13) Section 145, Civil P. C., provides that the decree or order may be executed against the surety "in the manner herein provided for the execution of decrees" and that the surety shall for the purposes of an appeal be deemed to be a party within the meaning of S. 47. Hence, the order enforcing or refusing to enforce security under this section is appealable as a decree.

(14) Admittedly, when the judgment-debtor applied for instalments to the executing court, the decree-holder had not started execution proceedings against the surety, as such the order for stay of the decree passed on his application would ordinarily operate against him alone, and would not in any way debar the decree-holder from seeking execution against the surety. Thus, I do not agree with the contention of the learned Advocate for the petitioner that the stay of the execution of the decree against the judgment-debtor would operate as a stay against the surety also.

(15) On behalf of the petitioner it is contended that the liability of the surety arises out of the terms of the bond and relying on the terms of the bond, he urges that according to the terms of the bond, the judgment-debtor would be called first to pay the amount and on his failure, the surety would be liable to pay the amount, and as the judgment-debtor has not been called upon to pay the amount, the liability of the surety for the payment of the amount does not arise at all.

(16) In order to appreciate this point, a reference to the terms of the Bond is necessary. The relevant English translation of the surety Bond is in the following words:

> "I agree through this that if the judgment-debtor is ordered to pay the amount, the judgment-debtor would deposit the amount with costs and if he does not do so, then the amount which is due under the decree would be recoverable from his moveable and immoveable property."

(17) Thus, it is clear from this that the condition precedent is that the judgment-debtor would be first called upon to deposit the amount and on his failure the surety would be liable to pay. Great stress is laid on this, and urged that as in the case the judgment-debtor has not been called upon to deposit the amount, no question of the surety's liability arises.

(18) On behalf of the other side, it is contended that when the judgment-debtor himself has put in a petition for instalments, it should be deemed that he is unable to pay, as such, no question of the court calling upon him to deposit the amount arises, and the decree-holder is at liberty irrespective of this to execute the decree against the surety. I am afraid, I cannot accept this contention in toto.

(19) As pointed above, the surety's liability would be restricted to the terms of the agreement. The terms are clear that the judgment-

debtor would be called first to pay the amount. Thus according to the terms of the bond, the liability of the surety would only arise when the judgment-debtor has failed to deposit.

(20) Now it has to be seen whether the fact of the judgment-debtor having put in a petition for instalments would amount to his failure to pay. In my opinion failure to pay would only be said when according to the terms of the bond, the judgment-debtor has been called upon to deposit and he fails to do the same. Thus, mere filing of a petition for instalments would not amount to failure to deposit.

(21) From a perusal of the record I find that no orders have been passed by the court below on the execution petition of 25-1-1951. In view of this, I think it is premature on the part of the lower court to order attachment of the surety's property. Petition in revision is, therefore, allowed and judgment of the court below is set aside. Having regard to the facts of the case, I do not wish to pass any order regarding costs.

B/H.G.P. Revision allowed.

A.I.R. 1953 HYD. 114 (Vol. 40, C. N. 42)

MANOHAR PERSHAD AND SIADAT ALI KHAN JJ.

Lakshmibai and others, Appellants v. Bhoja and others, Respondents.

Appeals Nos. 766 and 1049 of 1356 and 1357 Fasli, D/- 8-2-1952.

(a) Registration Act (1908), Ss. 17(1)(b) and 49 — Ekrarnamas creating and extinguishing rights in immovable property.

Where certain 'Ekrarnamas' create a right in property in favour of the defendant and by these 'Ekrarnamas', the rights of the plaintiffs have been extinguished, they require registration according to S. 17(1)(b), Registration Act, and if they are not registered, they are not admissible in evidence. (Para 11)

Anno: Registration Act, S. 17 N. 13, 18 S. 49 N. 6.

(b) Transfer of Property Act (1882), S. 53A — Relinquishment — "In part performance of the contract."

Relinquishment is also a transfer, and there is no reason why the principle of part performance should not be applied to it. Where plaintiffs had mortgaged the property with N and D and as the plaintiffs had no right to the property and defendants were the owners, so in order to save the trouble of litigation it was agreed that defendants should pay the amount of the mortgage and plaintiffs should relinquish all their alleged rights in the property. In pursuance of this agreement, defendants paid the mortgage amount to the mortgagees and got possession of the property and plaintiffs executed 'Ekrarnamas' and the plaintiffs transferred the 'shikmidari' in the name of defendant No. 1. It can be said that defendants came into possession of the property in part performance of the contract and they would be entitled to the benefit of S. 53A: AIR 1946 Mad 452 Rel. on. AIR 1937 All 578 (FB) and AIR 1939 All 529 Disting. (Paras 14, 15)

Anno: T. P. Act, S. 53A N. 6, 10.

Zakaullah, for Appellants; Sham Rao, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('37) AIR 1937 All 578: (ILR (1937) All 817 FB) 12, 14

('39) AIR 1939 All 529: (184 Ind Cas 91) 12, 14

('46) AIR 1946 Mad 452: (226 Ind Cas 478) 14, 15

MANOHER PERSHAD J.: Lakshimbai & Sakku Bai filed a suit against Bhoja & others for possession of house and five annas four pies share in the lands bearing survey Nos. 68, 72, 73, 74 and 75, and for a declaration of 'shikmidari'. It is alleged in the plaint that the suit property is the plaintiffs' ancestral property and they were in possession till 1352 Fasli. Defendant No. 5 is the 'pattedar' and 'hissedar' and in possession to the extent of five annas four pies. Originally, the plaintiffs' grand-father Rama was in possession of the suit property. After him, his son Satwa remained in possession. After Satwa's death plaintiffs' mother Yeshodhabai came into possession and after her the plaintiffs remained in possession; the defendants 1 to 4 who have no right, have dispossessed the plaintiffs on 15th Azur 1352 Fasli and hence the plaintiffs are entitled to a decree.

(2) Defendants Nos. 1 to 4 in their written statements admitted that defendant No. 5 is the pattedar of the land but denied that plaintiffs or defendant No. 5 have any claim to the suit property and are in possession. It was further alleged that defendants Nos. 1 to 4 and plaintiffs' ancestors were members of a joint and undivided Hindu family. Though plaintiffs had no right in the suit property, but as they had mortgaged the suit property to Nevarthy and Dada, the defendants, in order to avoid litigation, agreed to give the amount of the mortgage to the mortgagees and the plaintiffs in their turn agreed that they would have no claim in the suit property. Accordingly, plaintiffs executed separate 'Ekrarnamas' in favour of defendants Nos. 1 to 4 and on the basis of this agreement, the defendants got possession of the suit lands and defendant No. 1's name has been entered as a 'shikmidar' in the revenue records. Plaintiffs in reply to the written statements denied having executed the 'Ekrarnamas' and having agreed to transfer the 'shikmidari'.

(3) Both the parties led evidence. On the evidence, the trial court decreed the plaintiffs' suit to the extent of possession of lands and declaration of 'shikmidari' and dismissed the suit to the extent of possession of the house, having held that the 'Ekrarnamas' relied upon by the defendants, not being registered, are inadmissible in evidence and that defendants have failed to establish that plaintiffs' ancestors and the defendants were members of a joint & undivided Hindu family. Against this judgment both parties went in appeal. The appellate Court dismissed the plaintiffs' suit to the extent of possession of the lands and declaration of 'shikmidari', but decreed the suit to the extent of possession of the house, against which are these appeals on behalf of the parties. The object of the plaintiff's appeal is that their suit should be decreed in toto while the object of the defendants' appeal is that the decree to the extent of possession of the house should also be set aside.

(4) In both these appeals we heard the arguments of the learned Advocates on behalf of the parties. I would first take up the appeal of the plaintiffs which relates to the possession of the lands and 'shikmidari'.

(5) On behalf of the plaintiffs it is urged that there is no evidence on record that plaintiffs' ancestors and defendants Nos. 1 to 4 were

members of a joint and undivided Hindu family and that the 'Ekrarnamas' being inadmissible in evidence, defendants cannot claim any right to the property. The second contention is that plaintiffs are the owners and were in possession till 1352 Fasli and have been wrongfully dispossessed.

(6) On behalf of the respondents, it is replied that it is established that defendants Nos. 1 to 4 and plaintiffs' ancestors were members of a joint and undivided Hindu family. As regards the question of registration of the 'Ekrarnamas', it is contended that in the first place, registration is not necessary and if at all it is held that the 'Ekrarnamas' require registration, then in that case also plaintiffs' suit for possession of the suit lands cannot be decreed as defendants are in possession of the property in part performance of the contract and they are entitled to the benefit of section 53-A, Transfer of Property Act. It is further contended that 'shikmidari' goes with the lands and when plaintiff No. 2 has transferred the lands and 'shikmidari' by executing an 'Ekrarnama' and defendant No. 1's name has been registered as a 'shikmidar', plaintiffs cannot get a decree either for the 'shikmidari' or for the possession of the lands.

(7) In order to appreciate the arguments of the parties, a reference to the evidence is necessary. But before discussing the evidence, I would like to mention some of the admitted facts. It is admitted in the case that Sakkubai, defendant No. 5 is the 'pattedar' of the lands, and Rama was the 'shikmidar' to the extent of five annas four pies. It is further admitted that Rama was in possession and after him Satwa, his son became the 'shikmidar' and remained in possession to the extent of five annas four pies. Plaintiffs' case is that in the five annas four pies share of Rama, defendants have no right. Defendants' contention is that they and Rama and Satwa were members of a joint and undivided Hindu family, and after Satwa's death they, as survivors, became entitled to the full share and plaintiffs are entitled only to maintenance.

(8) The first question which is crucial is whether the family was joint. The burden of proof was on the defendants. They produced two witnesses; D. W. 1 Madhu and D. W. 2, Kanaiyalal. D. W. 1, has said nothing about the family being joint. Of course, D. W. 2, has simply said that the family was joint. D. W. 2 is not related to the parties. He has not disclosed any source of his knowledge. In the absence of that, it is very difficult to hold on his solitary statement that defendants were members of a joint family along with Rama and Satwa.

(9) On behalf of the defendants it is urged that P. W. 1, Gopalrao, the Patwari, has admitted in his cross-examination that defendants and plaintiffs' ancestors were members of a joint and undivided Hindu family, and that they were in possession. I am very reluctant to believe his statement. Plaintiffs all along have alleged that the Patwari was against them & was responsible for the wrong entries in the revenue records. The way P. W. 1 has deposed supports the contention of the plaintiffs. He has admitted that after the death of Satwa he made a report that his 'virasat' may be sanctioned in the name of his wife. If as he says, the defendants were members of a joint and undivided Hindu family, he could not have made such a report. He has tried to explain this by saying that he made the report because Satwa's wife came weeping to him. He further admits that after the death of Yeshodhabai, he again made a report for the 'virasat' to be sanctioned in the name of Sakkubai, on the same ground that she came weeping. I fail to understand how a responsible person like him would do such a thing if really the defendants were members of the joint family. I am, therefore, not inclined to believe his statement. The entries in the revenue records also negative the contention of a joint family. In view of this, I cannot agree with the contention of the defendants that they and the ancestors of the plaintiffs were members of a joint family.

(10) On behalf of the defendants it is urged that in the 'Ekrarnamas' the joint family is admitted. I cannot accept this contention either since the 'Ekrarnamas' have not been registered and this fact cannot be proved.

(11) It is contended next that even if the existence of a joint family is held not to be proved, the plaintiffs' suit cannot be decreed, having regard to the provisions of S. 53-A, Transfer of Property Act, as defendants have paid the amount of the mortgage and in pursuance of the 'Ekrarnamas' they have come into possession and defendant No. 1's name has been entered in the 'Shikmidari' register, as a 'shikmidar'. The plaintiffs' allegation is that the 'Ekrarnamas' require registration and as they are not registered, they are inadmissible in evidence. The trial court has held that the 'Ekrarnamas' are inadmissible in evidence as they are not registered. The appellate court has held that 'Ekrarnamas' are proved and declared them admissible in evidence. So far as the execution of the 'Ekrarnamas' is concerned, I am of opinion that the evidence is sufficient to hold that execution is proved. The question now remains, whether they require registration. As these 'Ekrarnamas' create a right in property and by these 'Ekrarnamas', the rights of the plaintiffs have been extinguished, they require registration according to S. 17 (1) (b), Registration Act, and as they are not registered, they are not admissible in evidence. Defendants rely on S. 53-A, Transfer of Property Act.

(12) For the plaintiffs, it is contended that S. 53-A, Transfer of Property Act, does not apply to the facts of this case as in the present case there is neither a transfer of any immovable property for consideration nor a contract for such a transfer. Following up this contention, it is urged that at the most the 'Ekrarnamas' can be said to be 'a family arrangement' and family arrangements as such cannot be deemed to be a transfer of immoveable property. Reliance is placed on the cases of — 'Mt. Mahadei Kunwar v. Padarat Chaube', AIR 1937 All 578 (FB) and — 'Tulshiram v. Gobind Singh', AIR 1939 All 529.

(13) In order to appreciate the arguments of the parties, a reference to section 53-A of the Transfer of Property Act is necessary. That section enjoins that:

"Where any person contracts to transfer for consideration any immoveable property..... and the transferee has, in part performance of the contract, taken possession of the property or any part thereof..... and has done some act in furtherance of the contract..... then notwithstanding that the contract, though required to be registered, has not

been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

It follows from this that there should be transfer of immoveable property for consideration, or a contract to transfer, and further in part performance of the contract, possession of the property has been taken or some overt act has been done in furtherance of the contract. Thus, the defendants would have to establish that there was a transfer and that they came into possession in part performance of the contract.

(14) I would first take up the question whether the transaction in question amounts to a transfer. On behalf of the defendants, it is urged that the plaintiffs have abandoned their claim, which, in other words, amounts to a relinquishment of their right, and relinquishment of a right amounts to a transfer, and as such the doctrine of part performance applies. In order to appreciate this point, I have to consider the meaning of 'transfer' as defined with reference to the word 'convey'. This word in English Law in its narrow and more usual sense, refers to the transfer of an estate in land: but it sometimes is used in the wider sense to include any form of an assurance inter vivos. The definition laid down in S. 205 (1) (ii) of the Law of Property Act is

"'conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and any other assurance of property or any interest therein by any instrument except a will".

Thus, it would follow from this that relinquishment is also a transfer. When it comes within the meaning of a transfer, there is no reason why the principle of part performance should not be applied.

A similar discussion had arisen in the case of — 'Somepalli Mutyalu v. Veerayya', A. I. R. 1946 Mad 452. This was a case where the plaintiff had given a letter to the defendant stating that he had no connection whatever with the said property and that Defendant No 1 could himself enjoy the property. The question arose whether this was a transfer within the meaning of S. 53-A, Transfer of Property Act. Chandrasekhara Aiyar, J. (at present a puisne Judge of the Supreme Court) held in that case:

"So long as the passing of the consideration was not a term of the contract, evidence adduced to show that it did pass, even though the contract did not recite it, was not within the scope of the prohibition in Sec. 92 of the Evidence Act and oral evidence of the same could be admitted under proviso 2 as it was not in any way inconsistent with the terms of the letter, and further there being nothing, in the letter which created any confusion or any doubt as to what the terms were, the doctrine of part performance was applicable and precluded the plaintiff from recovering possession."

The case of—'Mt. Mahadei Kunwar v. Padarat Chaube', AIR 1937 All 578 (FB) relied upon was a case of family arrangement. In this case, it has been held that in a family arrangement, there is no question of any property (the admitted title of which rests in one of the parties) being transferred to one of the other parties, and there is no transfer of ownership such as is necessary to bring the transaction within the definition of 'Exchange' in S. 118, Transfer of Property Act. It was further held that the petition did not give any indication of any transfer but it was merely an acknowledgment of the right of the other party. The case of — 'Tulshiram v. Gobind Singh', AIR 1939 All 529 is also a case of a family arrangement. Thus, both the cases relied upon by the appellant do not help his contention.

(15) The case of — 'Somepalli Mutyalu v. Veerayya', AIR 1946 Mad 452. is on all fours with the facts of the present case. In the present case, defendants' allegation is that plaintiffs had mortgaged the property with Nevarthy and Dada and as the plaintiffs had no right to the property and defendants were the owners, so in order to save the trouble of litigation it was agreed that Defendants should pay the amount of the mortgage and plaintiffs should relinquish all their alleged rights in the property. In pursuance of this agreement, defendants paid the mortgage amount to the mortgagees and got possession of the property and plaintiffs executed 'Ekrarnamas' and plaintiffs transferred the 'shikmidari' in the name of defendant No. 1. In other words, defendants' case is that in part performance of the contract they have come into possession of the property and defendant No. 1's name is entered as a 'shikmidar' and plaintiffs have relinquished their rights in the property for the amount of Rs. 2,000/- paid to the mortgagees.

We have to see whether the defendants have established that they came into possession in part performance of the contract. On behalf of the defendants, reliance is placed on the statement of D. W. 1, D. W. 2 and P. W. 1, and the judgment of the Tehsil. Madhu and Kaniyalal, D. Ws. 1 and 2 respectively, both depose that defendants paid the amount of the mortgage and plaintiffs executed the 'Ekrarnamas'. P. W. 1 after referring to the revenue records has stated that defendants came into possession in 1352 Fasli. The 'Ekrarnamas' are of 1352 Fasli. From the judgment of the Tehsil dated 13th Dai 1353 Fasli it appears that defendant No. 1's name has been registered as a 'shikmidar'. Thus, the fact of the defendants coming into possession in 1352 Fasli and the name of defendant No. 1 being entered as a 'shikmidar' goes to prove that this was done in pursuance of the contract.

This is further supported by the fact that the mortgage deed has been produced from the possession of the defendants. If there had been no agreement and the defendants had not paid the mortgage amount, the mortgage deed would not have come into their possession. It can, therefore, be said that defendants came into possession of the property in part performance of the contract and they would be entitled to the benefit of S. 53-A. In the result, plaintiffs' suit for possession of the land and 'shikmidari' would be dismissed.

(16) After this, I have to consider the appeal of the defendants which relates to the house. In this appeal, it is argued that there is absolutely no evidence that the house in question belongs to the plaintiffs. Shri Zakaulla, Advo-

cate, appearing on behalf of the plaintiffs could not satisfy us from the record. His only contention is that as they stay in the house it must be treated to be their property. I am afraid I cannot accept this contention. When there is no evidence that the house in question is the property of the plaintiffs, their suit cannot be decreed to that extent. The trial court has held a similar view and I agree with that view. In the result, the defendants' appeal would be allowed.

(17) The appeal of the plaintiff is, therefore, dismissed and the appeal of the defendants is allowed, and plaintiffs' suit is dismissed in toto. Defendants would be entitled to costs throughout. This judgment shall govern the connected appeal.

(18) SIADAT ALI KHAN J.: I agree.

B/D.H. Order accordingly.

A.I.R. 1953 HYD. 117 (Vol. 40, C. N. 43)

PALNITKAR C. J.
AND SRINIVASA CHARI J.

Jahandarunnissa Begum, Petitioner v. Mohd. Moinuddin and others, Respondents.

Revn. Petns. Nos. 119 and 126 of 1951, D/- 7-11-1952.

Mahomedan Law — Custom — Hyderabad Custom in variance or derogation of Mahomedan law.

In Hyderabad State, it is not open to a Mahomedan to set up and lead evidence of a special family custom which is in variance with or against the principles of Mahomedan Law. There is no exception in this case in respect of any kind of property such as atiyat property. (Para 14)

Thus, where after the abolition of jagirs, compensation or commutation amount has been given, the amount has to be distributed to the claimants according to their shares according to the civil law, i.e., where parties are Muhammadans according to the Muhammadan law, uninfluenced by orders on the atiyat or former jagir side of the Government: Case law reviewed. Law in part A states distinguished. (Para 14)

M. Sadashiv Rao and Gulam Ahmed, for Petitioner; Shankar Rao and Anisuddin, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('63-66) 10 Moo Ind App 511: (2 Sar 189 PC) 3
('13) 18 Ind Cas 571: (15 Bom LR 76 PC) 4
('16) 43 Ind App 35: (AIR 1915 PC 86) 5
('18) 45 Ind App 10: (AIR 1917 PC 181) 7
('22) 49 Ind App 119: (AIR 1922 PC 59) 10
('28) 55 Ind App 407: (AIR 1928 PC 294) 11
(1866) 1 Agra 38 4
(1900) 23 All 20: (1900 All WN 181) 4
('07) 4 All LJ 792: (1908 All WN 7) 4
('17) 39 All 574: (AIR 1917 All 381) 6
('36) 163 Ind Cas 650: (AIR 1936 All 443) 8
('02) 26 Bom 198: (3 Bom LR 717) 9
7 Nazare Osmania 463 12

ORDER: This revision has come before us in the following circumstances:

A suit was brought by one Mohammed Moinuddin as against five persons stating that he and the five defendants are the issues of one Ikramuddin Khan who died on 18-7-1950 leaving behind a son (the plaintiff) and five daughters (defendants 1 to 5). An interim allowance of Rs. 18,000/- was fixed as being payable to the deceased Ikramuddin Khan when his jagirs were taken over by the Government under the Jagir Abolition Regulation. He stated that he applied to the Jagir Administration for the payment of the allowance. He was directed to get his right established in a Civil Court. He also alleged that according to the custom prevalent in this family the daughters of the family were entitled to Rs. 100/- P.M. as allowance. He, therefore, stated that they be paid allowance at the rate of Rs. 100/- per mensem and the balance be paid over to him. Defendants 2, 3 and 4 did not contest the suit and stated that they were willing to receive a sum of Rs. 100/- per mensem as allowance. Defendants 1 and 5, however, contended that they should be given the share which they were entitled to under the Mohommedan Law. It was also contended by these defendants that it was not open to the plaintiff to set up a custom which was in derogation of the Mahomedan Law and that he could not be allowed to lead evidence as regards the alleged family custom. The trial court framed an issue in regard to this matter and heard arguments of the parties on this issue. After hearing the arguments, it came to the conclusion that evidence could be allowed to be adduced with regard to a family custom although such custom was in derogation of the principle of Muslim Law. This finding therefore was against the defendants 1 and 5. These defendants have therefore filed a revision against this finding.

(2) We have heard the arguments of the respective advocates. Although this is only a revision which is before us, still the question that requires consideration in our opinion, is one of considerable importance. The question that has to be decided is as to whether it is open to a party to lead evidence of a special family custom which is in variation of or against the principles of Mohammedan Law.

(3) It has to be observed that Mahomedan Law does not admit the validity of an alien custom which is contrary to or in conflict with its principles. The intimate connection between Law and religion in the Mahomedan faith is very great. Any variation or modification of that Quranic Law is usually not permitted. The rigidity of the Quaranic Law has been well described by Roy in his Treatise on Customs and Customary Law in British India. He says:

> "Any attempt to repudiate the Law of Quran would amount to a declaration of infidelity such as would render the individual concerned liable to civil punishment by the Khazi in this world and to eternal punishment in the next."—Tagore Law Lectures on Roy's Customs and Customary Law, at page 379.

In a case which went up to the Privy Council in 1868 on appeal from the Sadar Diwan Adalat, North West Frontier Province, Agra the question was not decided but their Lordships observed

> "whether it is competent for a family converted from the Hindu to the Mahomedan faith to retain for several generations Hindu usage and customs and by virtue of that retention to set up for itself a special customary law of inheritance which so far as their Lordships are aware has never been decided. It is not absolutely necessary for the determination in this appeal to decide that question in the negative and their Lord-

ships abstained from doing so." — 'Jowala Baksh v. Dharum Singh', 10 Moo Ind App 511 (PC) at p. 538.

This was a case where the question was whether a Hindu who has converted himself to Mohommedanism could set up a custom to say that in his family a Hindu custom relating to inheritance was still retained. This question was not considered by the Privy Council in this case as they thought it was not necessary for the determination of the appeal.

So far as the Indian High Courts are concerned, cases have arisen where a local custom or usage or a family custom has been allowed to be proved although it was in derogation of the principles of Mahomedan Law, because of special enactment in the various provinces which permitted evidence being led of such custom or usage although the custom was in conflict with the principles of Mahomedan Law. For example, in Bengal, Bihar, Agra and Assam, S. 37, Bengal and Assam Laws Act, 1905, enacts that the civil courts of those provinces usually decide all questions relating to succession and inheritance, etc., by Mahomedan Law except where such Law has, by legislative enactment, been altered or abolished. So far as Allahabad was concerned, it was governed by the Bengal Civil Courts Act. As regards Bengal as I have already mentioned, the Bengal, Agra and Assam Civil Courts Act 12 of 1887 applied. For Bombay, Regulation No. 4 of 1827 governed the trial of suits wherein it was enacted that the Acts of Parliament and Regulations of Government applicable to the case should be observed in the trial of suits and in the absence of such acts and regulations the usage of the country in which the suit arose. So far as Madras is concerned, the Madras Civil Courts Act, 3 of 1873 applied and under S. 16 of the aforesaid Act, it was enacted that all questions relating to succession, inheritance, marriage, etc., shall be decided in cases where the parties are Mahomedans by the Mahomedan Law or by custom having the force of law. So far as East Punjab was concerned, the Punjab Laws Act 4 of 1872 governed the case and under the provisions of Ss. 5 and 6, Mahomedan Law was to be administered in the case of Mohommedans unless it had been altered or abolished by Legislative enactment or had been modified by any custom.

(4) It would be convenient to refer to cases which have arisen in various provinces in regard to this matter. We might refer herein to the case which came up before the Allahabad High Court. In this case, the question was whether a custom by which daughters were excluded from inheritance which principle was in conflict with the principles of Mahomedan Law relating to succession by daughters could be regarded as good and valid custom and could evidence be led in this regard. The learned Judges held that S. 37 of the Act 12 of 1887 forbade evidence of such custom being led, for, they held that the words of S. 37, Bengal Civil Courts Act were different from the words used in S. 5 of the Act 4 of 1872 in that the latter enactment provided for evidence of custom being allowed which was not contrary to justice, equity and good conscience. Therefore they disallowed the leading of evidence with regard to the special custom which was at variance with Mohommedan Law — 'Jammya v. Diwan', reported in 23 All 20. This case was followed in a subsequent case of Allahabad High Court in the case of — 'Ismail Khan v. Imtiaz Unnissa', reported in 4 All L J 792. In the above case, the Judges were reluctant to differ from the trend of the decisions of the Allahabad High Court and preferred to follow the Full Bench Ruling of the Allahabad High Court in — 'Michel Patrick Dunne v. William Francis Legge', 1 Agra 38 and also the case reported in '23 All 20. This case of — 'Ismail Khan v. Imtiaz Unnissa', went to the Privy Council and the Privy Council set aside the judgment of the Allahabad High Court. This case is reported in — '18 Ind Cas 571, Mohd. Ismail Khan v. Shivmukh Rai', (PC) and — 'Ismail Khan v. Imtiaz Unnissa'. This was a case which arose under the Bengal, North West Frontier Provinces and Assam Civil Courts Act. Their Lordships of the Privy Council considered that the suits should be remanded to the High Court to enable the parties to produce evidence with regard to the issue as to whether the defendants could plead that the family in the matter of inheritance was subject to a custom which was supersession of the Mohommedan Law. They set aside the judgment of the Allahabad High Court in '4 All L J 792'.

(5) After this pronouncement of the Privy Council in the case of 'Ismail Khan v. Imtiaz Unnissa', already referred to, another case went up in appeal to the Privy Council from the Court of appeal for Eastern Africa. There the parties were Memons, a sect of Mohommedans which were converted from Hinduism about the 16th Century but adhered to Hindu Law in matters of succession. In this case the Privy Council held that where Memons migrated from India and settled among Mahomedans, a presumption should be made that they have adopted Mahomedan custom of succession. Their Lordships held that the analogy in this case is rather to proof of a change of domicile than a change of custom—Vide — 'Abdul Rahim Haji Ismail Methu v. Halimabai', 43 Ind App 35 (PC).

(6) After this decision by the Privy Council there came up a case before the Allahabad High Court, viz., the case of — 'Ali Asghar v. Collector of Bulandashahr', reported in 39 All 574, wherein, after adverting to the Privy Council cases referred to above the learned Judges held that evidence was admissible to prove the custom notwithstanding the fact that such custom was contrary to the Mahomedan Law.

(7) After this decision of the Allahabad High Court, the Privy Council had to consider this question in an appeal which went up to the Privy Council from the Judicial Commissioner's Court, Sind. So far as Sind was concerned, the Bombay Regulation 4 of 1827 was extended to it by a Notification and therefore this Regulation governed the trial of suits arising in Sind. As we have already observed, S. 26 of the above Regulation allowed the trial of suits having regard to the usage of the country which meant that evidence as regards any particular usage which was in contravention or in conflict with the principles of Mahomedan Law was allowed. In this case their Lordships observed "Custom binding inheritance in a particular family has long been recognised in India although such a custom is unknown to the law of this country (England) and is foreign to its spirit — 'Abdul Hussein v. Mt. Bibi Sona Dero', 45 Ind App 10 (PC) at p. 14. The aforesaid observations of their Lordships also lend sup-

port to the view that their Lordships considered that evidence of any particular custom or usage could be led notwithstanding that it was against the principles of Mahomedan Law.

(8) The same question came up for discussion before the Allahabad High Court in the case of — 'Mt. Jaffo v. Chitta', reported in 163 Ind Cas 650 where Sulaiman, C. J. held that in view of the pronouncement of the Privy Council, it must be held that a family custom which alters the personal law of the parties even though not in accordance with the strict Mahomedan Law can be allowed to be proved. These are the cases which have arisen in Allahabad.

(9) The case which arose in the Province of Bombay was the case of — 'Ramarao Narayan v. Rustum Khan', reported in 26 Bom 198. The question in that case was where a graveyard was disused for over 30 years still the custom of the country was to the effect that it retained its sacred character in spite of disuse, whether such custom or usage could be allowed to be proved. The Bombay High Court held that under S. 26 of Regulation 4 of 1827, the courts were enjoined to decide according to the usage of the country and in that case usage was established.

(10) A case arose in the Madras Province which related to the Lubbai Mahomedans of Coimbatore District. The suit was brought to recover a share in the estate of one Mohd. Hussain Rowlat. The defence was that the parties were governed by a custom whereby females were excluded from inheritance. The Subordinate Judge who tried the case held that the plea of the defendants was untenable and he also held that it was not established. He therefore declared that Mahomedan Law alone would govern the case. The defendants appealed to the High Court and the High Court reversed the decision of the lower Court and dismissed the suit. The Chief Justice of the Madras High Court held that the evidence was sufficient to show that the defendants family like most lubbais of that district adhered to the Hindu rule, excluding the succession of females. This case came up before the Privy Council and although in the particular case their Lordships held that the evidence fell far short of the standard proof requisite to establish a custom or a usage excluding females from succession, they observed that

"in India, however, custom plays a large part in modifying an ordinary law. And it is now established that there may be a custom at variance even with the rules of Mahomedan Law governing succession in a particular community of Mahomedans." — 'Mahomed Ibrahim v. Shaik Ibrahim", 49 Ind App 119 (PC) at p. 124.

(11) Their Lordships of the Privy Council had occasion to consider about this question in another case which went up in appeal from the Court of the Judicial Commissioner, N. W. F. P. This was governed by S. 27, N. W. F. P. Regulation, which was the same as S. 5 of the Punjab Laws Act, 1872 where the Courts were to administer Mahomedan Law excepting in cases where it had been varied by any custom or usage. Adverting to this question their Lordships held

"Where a custom is pleaded a duty is imposed upon the court to endeavour to ascertain the existence and nature of the custom." — 'Vaishnu Ditti v. Mt. Rameswari', 55 Ind App 407 (PC).

(12) This is the state of Law so far as the former British Indian Courts are concerned. So far as this Court is concerned, the then Judicial Committee has held in the case of — 'Munwar Begum v. Najib Mirza', reported in 7 Nazare Osmania 463 that any custom which is in direct contravention or in complete variation of any principle of Mahomedan Law could not be proved. They held that it has not been stated in Sharai Shariff (Mahomedan Law) that local or family custom would have preference over Sharai Shariff. They also held that such a custom could not be allowed to be proved unless such custom is allowed to be proved by enactment.

(13) So far as the Part 'A' States of the Indian Union are concerned, the matter has been set at rest by the Shariat Act of 1937 under which by virtue of S. 2 of the Act, notwithstanding any custom or usage to the contrary in all questions regarding intestate succession of special property of females including personal property inherited or obtained under direct gift or by any provision of personal law the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat). Thus the Muslim Personal Law alone would apply and all evidence of custom would be shut out. But this enactment has not been applied to Part 'B' States, by virtue of Part 'B' States Laws Act, Act 3 of 1951. Therefore, it could not be said that the particular act forbids evidence of custom. Nevertheless as would appear from the series of decisions that have been referred to in the foregoing paragraphs evidence of custom has been allowed to be led only where there were special enactments permitting evidence of custom or usage being allowed to be led though in derogation of the principles of Mohommedan law. So far as Hyderabad State is concerned, the Judicial Committee which was the highest Tribunal in the land has also held the same view that no evidence of custom could be allowed unless it has been allowed under any special enactment.

(14) Moreover, in this particular case, the plaintiff-respondent's contention is that the alleged family custom exists only so far as the Atiyat property is concerned. After the Hyderabad (Abolition of Jagirs) Regulation No. LXIX of 1358 F., it is clear that nobody can now be a Jagirdar. Under the Hyderabad Jagirs (Commutation) Regulation, No. XXV of 1359 F., a commutation has been allowed and it is for a share in that commutation amount that the suit has been filed. The plea of the plaintiff is that under a family custom pertaining to a devolution of Atiyat property, the defendants are entitled to only maintenance. The plaintiff's learned Advocate conceded before us that so far as the ordinary private (Non-Atiyat) Property of the deceased was concerned, there is no such custom in the family and such a custom cannot be proved. It is contended that only to the limited extent of the Atiyat property which has now been discontinued and commutation allowed for the same, it is that the above custom is alleged. We fail to understand how the family custom can be set up with respect to a particular property while it is conceded that it cannot be set up with regard to all other properties. The idea underlying the argument seems to be based upon the powers of the gran-

tor of the Jagirs & the then sovereign has made it clear in his various Firmans that he could dispose of the jagir property as he liked and it is stated that invariably in all the successions pertaining to jagirs, the defendants or such or similar ladies were only given maintenance, though under the ordinary Mahomedan Law of succession they ought to have got a share in the property. Now that the jagirs have been abolished and a share in the income or commutation amount pertaining to a jagir has been made the subject of a civil right which only civil courts can decide the courts will naturally decide according to the civil law prevalent in the country. Orders on the atiyat or the former jagir side of the Government whatever their nature, cannot influence the opinion of the civil courts. Thus the custom alleged cannot be allowed to be proved.

(15) For all the above reasons, we are of opinion that evidence could not be allowed to be led and the lower court was wrong in permitting evidence to be led. The revision is allowed, the order of the lower court is set aside and the case will go back to the trial Court for trial of other issues. The petitioner will be entitled to the costs of the revision petition. Advocate's fee Rs. 50/-. This order will also govern the other connected revision petition.

A/R.G.D. Revision allowed.

A.I.R. 1953 HYD. 120 (Vol. 40, C. N. 44)

MISRA C. J. AND MOHD. AHMED ANSARI J.

Babu Rao, Petitioner v. State of Hyderabad, through Tahsildar, Kinwat and others, Respondents.

Admission No. 681/B-5/2 of 1952-53, D/-18-11-1952.

Constitution of India, Art. 226 — Other remedy available — Hyderabad Tenancy and Agricultural Lands Act (21 of 1950) — Order passed by Tahsildar under S. 32(4) against petitioner — Remedy by way of appeal, second appeal and revision provided in Ss. 90 and 91 of the Act — Writ cannot be issued. Case law considered. (Para 3)

Anno: Civil P. C. App.; Const. of Ind., Art. 226 N. 8.

Nandapurkar, for Petitioner.

REFERENCES: Courtwise/Chronological/ Paras
('50) AIR 1950 S.C. 163: (1950 S.C.R. 566) 7
('52) AIR 1952 All 753: (1952 All LJ 505 F.B.) 7
('52) AIR 1952 All 836: (1952 All LJ 163) 7
('51) AIR 1951 Pat 434: (30 Pat 21) 7

ORDER: This is an application for the issue of a writ of Certiorari and direction under Art. 226 of the Constitution. The petitioner Baburao is the landlord of Survey No. 52 at Patoda, taluqa Kinwat. The opposite party No. 2 is the son of one Laxman, who was a protected tenant within the meaning of S. 34, Hyderabad Tenancy and Agricultural Lands Act, No. 21 of 1950. Laxman is now dead and Maruthi, alleging that he is the heir to his father and entitled to possession of the protected land, has applied for restoration thereof in view of that fact that Baburao has taken it into his possession illegally.

(2) The application was filed in the Court of the Tahsildar and was decided under S. 32 of the aforesaid enactment. Sub-sections (1) & (2) thereof provide that a tenant entitled to possession of any land under the provisions of the Act may apply to the Tahsildar in writing in the prescribed form for delivery of possession & that no land-holder shall obtain possession of such land except under an order of the Tahsildar. Sub-section (4) then lays down that any person taking possession of any land or dwelling-house in contravention of sub-section (1) or (2) shall, without prejudice to his liability to the penalty provided in S. 96, be liable to forfeit his crops, if any, grown on the land and to the payment of such costs as may be awarded by the Tahsildar or by the Taluqdar on appeal. Acting under the aforesaid provisions, the Tahsildar of Kinwat passed an order that Maruthi, opposite party No. 2, is entitled to possession of the land as well as of the crops standing thereon. The applicant desires that this order of the Tahsildar should be quashed in view of the fact that it is erroneous and against equity, good conscience and natural justice.

(3) The jurisdiction vested in this Court to issue prerogative writs is an extraordinary jurisdiction and it can be exercised only in cases where adequate or appropriate remedy is not otherwise available, or where protracted litigation might entail irremediable loss or hardship. Under S. 90, Hyderabad Tenancy and Agricultural Lands Act, every original order passed by the Tahsildar is appealable to the Taluqdar and from the order passed in such appeal by the Taluqdar, a second appeal lies to the Board of Revenue. There is a further right of going up in revision to the Government under S. 91 against the final appellate order, on the ground that the order is contrary to law or that the Board of Revenue has failed to decide a material legal issue or that injustice has been occasioned by a substantial failure to follow the procedure provided by the Act. It is to be noticed that the authority, exercising the appellate or revisional jurisdiction under the afore-mentioned Act, has also been given the jurisdiction to pass such orders, consistent with the Act, by way of confirmation, recession or modification of the order impugned as may appear to it to be just.

(4) It is clear in the present case that the applicant has an adequate remedy open to him and he can, by recourse to his right of appeal, obtain a complete and speedy recession of the Tahsildar's orders. There appears to be no valid reason why he should be allowed to by-pass the regular procedure provided by the aforementioned Act and to come up to this Court and pray for exercise of its extraordinary jurisdiction under Art. 226 of the Constitution.

(5) It is urged on behalf of the applicant that he has no hopes of obtaining reversal of the Tahsildar's orders on account of the existence of two Circulars, viz., Circulars Nos. 1375 dated 17-7-1952, and 2032, dated 13-9-1952. The former Circular has been laid before us. According to our reading, it only enjoins that enquiries in cases falling under S. 32 should be carried out as expeditiously as possible and that during the course of the enquiry, if it appears that the tenant has with him a certificate showing that he is protected under the Act, his possession should be regarded as 'prima facie' valid till the presumption is displaced by the result of the enquiry. We do not consider that this Circular can preclude

the appellate authority from considering the appeal on merits and giving full justice to the aggrieved party.

(6) The other Circular is not forthcoming and we have no reason to think that it operates to abrogate the appellant's right of appeal.

(7) The applicant's learned counsel cited a number of cases in support of his petition: — 'Rashid Ahmed v. Municipal Board, Kairana', AIR 1950 SC 163; — 'Sayeedah Khatoon v. The State of Bihar', AIR 1951 Pat 434; — 'Buddhu v. The Municipal Board, Allahabad', AIR 1952 All 753; and — 'Sm. Prabhabati Devi v. District Magistrate, Allahabad', AIR 1952 All 836. None of these cases goes to the length of laying down that an applicant should be given a remedy by way of the issue of a writ, irrespective of the question whether or not another remedy is open to him. All that they purport to do is to emphasize that in appropriate cases where the other remedy available is either inadequate or is not speedy enough, the High Court may exercise its extraordinary jurisdiction. We do not think that these decisions have any application to the matter before us. In view of the fact that adequate and convenient remedy is available to the applicant for redressing the wrong of which he complains, we do not think that there is sufficient cause to allow him to obtain a writ of certiorari. We accordingly reject the application summarily.

A/H.G.P. Application rejected.

A.I.R. 1953 HYD. 121 (Vol. 40, C. N. 45)

KHALILUZZAMAN SIDDIQI J.

Bagiriti, Appellant v. Laxmibai; Respondent.

Appeal No. 425/4 of 1950, D/- 10-3-1950.

Specific Relief Act (1877), S. 27 (b) — (Hyderabad) Specific Relief Act, S. 22B — Notice and burden of proof.

The burden of proof in respect of facts relating to S. 22B, Hyderabad Specific Relief Act, is on the defendant, the person who claims the benefit of the Section. But where the plaintiff brings a suit for specific performance of an unregistered agreement to sell on the specific allegation that the defendant had bought the house in suit with full knowledge of the prior agreement to sell in the plaintiff's favour and the defendant denies the allegations, the burden of proof would be on the plaintiff to prove his allegations if the Court has framed an issue to that effect casting the burden on the plaintiff.

If the parties have led complete evidence in the trial Court the question of burden of proof becomes immaterial and if the appellate Court comes to the conclusion on the evidence that the defendant is a bona fide transferee for value without notice of the prior agreement the Court would refuse to grant specific performance in the exercise of its discretion under S. 22B. (Para 3)

Anno: Sp. Rel. Act, S. 27 N. 4.

Laxminarasiya and Vishwanatha, for Appellant; Gopal Rao Ekbote and Bheemsena Chari Ashrat, for Respondent.

REFERENCE..... /Para. 2
30 Deccan LR 388

JUDGMENT: This is a civil suit between two ladies, residents of the Ramkote, a thickly populated Mohalla of the city of Hyderabad. It appears that both these ladies have a house adjoining their houses. The plaintiff lady claims this house on the ground that there was an agreement to sell it to her and a sum of Rs. 25/- was paid by her to defendants 2 and 3 as advance money, thereafter the two defendants sold this house to defendant No. 1.

The defence is that the agreement is really a sale deed and not merely an agreement of sale and therefore needs registration. The second point is that this house was sold by defendants 2 and 3 to another person before this agreement and therefore there was no right in them to transfer and the agreement is unenforceable. The third ground is that in any case defendant No. 1 had bought this house after payment of full consideration and is therefore protected under S. 22, clause B of the Local Specific Relief Act. The Trial Court finding for the defendant lady on all accounts dismissed the plaintiff's suit. But simple money decree of Rs. 25/- the advance money was awarded only against defendants 2 and 3. The first appellate court reversed the finding of the trial court and decreed the plaintiff's suit.

(2) It must be remembered that the relief the plaintiff lady has come forward for is in the nature of specific relief and is purely in its inception an equitable relief. In considering the facts of this case, I shall, therefore, be influenced to a certain extent by equitable considerations in this respect, see 30 Deccan LR 388. As to the first point raised by the defendant lady that the agreement of sale is in fact the sale deed, I am of opinion that in view of the fact that this document has been drafted without any legal advice perhaps on the advise of some pyrocar or ordinary clerk much importance cannot be attached to the phraseology used. What I should see is the real purpose and intention of the parties and the anxiety to bind them (Vendors) with so much responsibility as possible might have induced the draftsman to employ such words as 'sold out in sale' etc., (the document is in Telugu language). I therefore hold that it is a mere agreement of sale and not a sale deed.

As to the other point that the house was sold out to another man before this agreement, it is very difficult to hold the sale proved where the parties to that document swear that it was not in fact sale deed and especially in view of the conduct of the parties which bears out the evidence given by the supposed vendee. Because, if he was really the purchaser of the house and if this registered sale deed in his favour was really effective there was no need for him to give up that house just to please the different parties litigating in this suit.

(3) But I find for the defendant in respect of issue No. 3. The plaintiff lady came with an express allegation that the agreement of sale was within the knowledge of defendant No. 1 at the time when he transacted the sale for herself. The evidence produced in this respect mainly consists of P. Ws. 1 and 3, P. W. 1 has not been credited by the trial court and some portions of his statement certainly create reasonable doubt as to his credit. The second witness towards the end of his statement does admit that the Panchayat was held on the same day when the document was registered.

Now the lower courts have made much of the legal point that the burden of proof in respect of facts relating to S. 22B, Specific Relief Act is on the defendant the person who claims the benefit of the section. That legal proposition can hardly be doubted but it must be remembered that burden of proof depends very much on the admissions and the allegations which are made in the pleadings and in the way the issues are joined by the parties thereupon. When the related issue was framed it was so worded as to clearly indicate that the burden was on the plaintiff; of course it is not conclusive. It happens this way, that plaintiff lady came with a definite allegation in the plaint that house has been bought by the defendant lady with full knowledge and acquaintance of this agreement with the plaintiff lady and was therefore short of a bona fide transaction as it involved risk arising from that knowledge. To that the defendant put in a denial which led to the present issue being framed in that way by the lower court in the presence of the lawyers of both the parties.

I consider it highly doubtful whether it is now open to the courts without amending the issue or without giving any opportunity to the party concerned to adduce evidence to change the ground at the time of the judgment and say that the burden is not on the person on whom it was indicated to be in the course of the trial but on the other side. However, both the courts have looked on this matter in this light that complete evidence has been produced by both the parties and I see no reason to differ from this fact because none of the parties before me submitted any list of further evidence that might have been adduced with any appreciable advantage in the case. Defendant lady came in the witness box and she has sworn to the fact that it was not within her knowledge at the time that there was a contract of sale in existence against her. I see no reason to doubt her statement. The plaintiff lady of course has not offered herself as a witness and the other side had no opportunity to elucidate facts from her.

In view of these facts, I think that all equitable considerations lead in one direction that a bona fide purchaser for full value shall be protected against a contract of sale provided full and adequate consideration has been paid by that purchaser. As to the payment of consideration there is not the slightest doubt which was in fact paid in cash before the Registrar. It has not even been challenged. In view of S. 22B, Specific Relief Act, I am unable to exercise my discretion in awarding the specific relief and deprive the bona fide purchaser the value of her already acquired and completed rights against a mere claimant, who comes in under an unregistered deed to enforce the contract. The third persons purchasers must be protected if they have taken all the reasonable care which can be expected of an average man. It appears that both these ladies allege right of pre-emption to this house but that is not a point under trial in this suit and even on that score I do not find any equity in favour of the plaintiff lady. I, therefore, allow this appeal, reverse the judgment of the First Appellate Court and uphold the judgment and decree of the trial court. The defendants will get costs throughout.

B/K.S. Appeal allowed.

A.I.R. 1953 HYD. 122 (Vol. 40, C. N. 46)

NAIK C. J. AND JAGANMOHAN REDDY J.

Dantam Rangiah, Petitioner v. Banday Narsimlu, Respondent.

Revn. Petn. No. 295 of 1951-52, D/- 9-4-1952.

Registration Act (1908), S. 17 (b) — Award re-written on stamp paper after signing by arbitrators and parties and then registered — Validity of registration.

Certain arbitrators wrote out an award which recited that the same was read out to the parties and was signed by them in token of their acceptance of the award. Subsequently, the very award was rewritten on a stamp paper of Rs. 20/- and was presented for registration on 1-9-1950 along with the original award dated 1-8-1950, and was duly registered. The validity of registration was however challenged in the application for filing the award:

Held that the rewriting of the award on a stamp paper for purposes of its presentation for registration may be deemed to be an act in furtherance of making the award binding and legal, and can be considered to be only a ministerial act of arbitrators. (Para 5)

Further that as both the original as well as the copy on the stamp paper were filed for registration within the prescribed time and as the Registrar had accepted the original award as having been filed with a copy on the stamp paper, his endorsement on the stamped copy that the document as per the translation in Urdu had been registered, could not in any way affect the original award, nor make the award inadmissible in evidence for want of registration: AIR 1941 Pat 215 and AIR 1934 Bom 6, Disting.; 1 Mad HCR 178, Ref. (Para 5)

Anno: Regn. Act, S. 17 N. 67.

Umapathi Rao, for Petitioner; Zamir Ali, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('33) 35 Bom LR 1101: (AIR 1934 Bom 6) 4
('62-63) 1 Mad HCR 178 5
('41) AIR 1941 Pat 215: (195 Ind Cas 87) 2

JAGAN MOHAN REDDY J.: This is a revision petition against an order of the Appellate Court, setting aside the order of the Trial Court and allowing an application to file an award. The point that arises in this petition is whether the registration of the award is proper or not. It appears from the record that the arbitrators have written out an award which recited that the same was read out to the parties and was signed by them in token of their acceptance of the award. Subsequently, however, this very award was rewritten on a stamp paper of Rs. 20/- and presented for registration on 1-9-1950, the original award being dated 1-8-1950.

(2) Now it is contended on behalf of the revision petitioner that the award is inadmissible in evidence for want of registration. The award was given in a claim against the petitioner for a certain amount on the basis of accounts. According to the award, a sum of Rs. 3,200/- was found due to the opposite party by the petitioner and as a security for the payment of this money, the award created a charge on a house belonging to the petitioner. The contention of the petitioner is that as this award affects immovable property of the value of over Rs. 100/-, it is compulsorily registrable under Section 10 of the Hyderabad Registration Act, corresponding to Section 17 of the Indian Registration Act. It is contended

that registering a copy of the award is not sufficient, as once the arbitrators had given the award, they became 'functus officio'. Any further writing by them is without jurisdiction. In support of this contention the petitioner's advocate relies on — 'Chhati Lal v. Ram Chariter', AIR 1941 Pat 215.

(3) From a perusal of that case, it appears that the plaintiff filed an award which was unregistered. It was then discovered that since it affected immovable property of the value of over Rs. 100/- and required to be registered, the Court was requested to return the award for being presented for registration which the Court refused. Whereupon the arbitrators rewrote the award making the previous award part of it and had the same registered. It was this award which was again filed and with respect to which objection was taken. The main ground of the decision in the above case was not that the original award was rewritten, but it was not presented for registration within the time allowed by S. 23, Registration Act, viz., within four months from the date of the execution. The respondent in order to get over this objection had contended that the registered award should be treated as an award made on a new submission by the parties, but this contention was rejected on the ground that the arbitrators had become 'functus officio' and had no jurisdiction whatever to give a fresh award. During the course of the judgment it was observed that if the respondents wished to avoid the argument that the arbitrator was 'functus officio' they are also bound to say that it was merely the original award rewritten by the arbitrators. If it is treated as such, then the award comes within the mischief of S. 23 of the Act of Registration. The ratio of the above decision, in my view, is not that the copying out of the award on a stamp paper for purposes of registration was invalid, but the presentation of the rewritten award was outside the period prescribed by S. 23 of the Registration Act; as such cannot be deemed to have been registered. In this case, the arbitrators gave no new award but only engrossed the original award and had the same registered affixing the original award with it, for registration within the time prescribed by S. 17 of the Hyderabad Registration Act (corresponding to S. 23 of the Indian Registration Act) which governs this case.

(4) In the case of — 'Parshottam Das v. Kekhushru', 35 Bom LR 1101, the arbitrators heard the parties, wrote out their award on a rough paper which was signed by all the arbitrators after which it was handed over to one of the arbitrators for getting it engrossed on a stamp paper. Later, however, at the instance of one of the parties and with the consent of the other, four of the arbitrators reopened the award and made a fresh award which was duly written on a stamp paper and signed. The fifth arbitrator who was out of station affixed his signature to the new award after his return. In this case it was held that when once an award was made, dated and signed by all the arbitrators, it was not open to them to substitute another award for it.

(5) In 'Kula Nagabushanam v. Kula Seshachalam', 1 Mad HCR 178, where in a suit to recover a sum of money on award five arbitrators came to a decision and made, dated and signed a rough draft of the award and the defendant then withdrew from the submission after which a fair copy was made bearing the same date as that of the rough draft, but signed by only four of the arbitrators, it was held that the award was complete on the date of the rough draft and that its validity was not affected by the subsequent occurrences. Once the arbitrators had not only given and published their award, but obtained the consent of the parties to the award and took their signatures in token of their having accepted the award, the rewriting of the same on a stamp paper would not affect the validity of the original award. The question here is whether the rewriting of it on a stamp paper for purposes of its presentation for registration can be deemed to be an act in furtherance of making the award binding and legal or can be considered to be only a ministerial act of the arbitrators. From the endorsement on the registered award it is apparent that both the original as well as the copy on the stamp paper were filed for registration within the time prescribed under S. 17 of the Hyderabad Registration Act. When once the Registrar accepted the original award as having been filed with a copy of the same on the stamp paper, his endorsement on the stamped copy that the document as per the translation in Urdu has been registered, in my view, cannot in any way affect the original award, nor make the award inadmissible in evidence for want of registration.

(6) In the result the revision is disallowed and the judgment of the appellate Court is confirmed, and the lower Court's order holding the award inadmissible is set aside and it is directed to dispose of the case according to law. Having regard to the special circumstances of the case no order is made as to costs.

(7) NAIK C. J.: I agree.

B/D.R.R. Revision disallowed.

A.I.R. 1953 HYD. 123 (Vol. 40, C. N. 47)

JAGANMOHAN REDDY J.

S. V. Subbarao, Appellant v. State.

Revn. No. 156/6, 61/6 of 1952, D/- 24-10-1952.

Penal Code (1860), S. 304-A — Rash or negligent driving — Test — Cyclist in trying to overtake rikshaw dashing against mud-guard of bus coming from opposite direction — Cyclist receiving injuries resulting in death — Bus-driver held was not guilty under S. 304A.

The question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. In such cases it is necessary to avoid being influenced by the prejudice arising out of the loss of a life which is so dominant a factor in accident cases: AIR 1944 Sind 124; AIR 1950 All 300 and AIR 1926 Cal 300, Rel. on. (Paras 2 and 5)

A deceased cyclist in trying to overtake a rickshaw dashed against the right side of a mud-guard of a bus coming from opposite direction, fell down and received injuries resulting in death. It was established that the bus-driver had to bring his bus to a stand-still 150 yards before the accident took place because there was a cart obstructing his way. After the obstruction had cleared he again set

his bus in motion, and after proceeding 100 yards or so this accident took place.

Held that having regard to all these facts it was not possible to hold that the bus-driver was driving his bus in such a rash or negligent way as would bring him within the ambit of S. 304-A. On the other hand it was clear that there had been negligence on the part of the cyclist who in attempting to overtake a rickshaw dashed against the mud-guard of the bus. (Para 5)

Anno: Penal Code, S. 304-A N. 5.

V. S. Ashok, Vakil, for Appellant; Trimbakrao Deshmukh, Govt. Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('50) AIR 1950 All 300: (51 Cri LJ 865) 2
('26) AIR 1926 Cal 300: (27 Cri LJ 153) 2, 5
('44) AIR 1944 Sind 124: (46 Cri LJ 759) 2
(1937) AC 576: (106 LJKB 370) 2

ORDER: This is a revision petition filed against the judgment of the Sessions Judge, Secunderabad, convicting the accused of rash and negligent driving under S. 304-A, Penal Code, and imposing a fine of Rs. 125/-. It also appears that a revision petition for enhancing the fine was filed before the District Magistrate of Hyderabad City District by the prosecution and a reference has been made by the said District Magistrate for enhancing the sentence. This judgment will govern both these petitions.

(2) It appears that on the date of the incident, i.e., on the 24th May, 1950, the accused was driving a Road Transport bus at about 5 p.m. in the Afzalgunj area. It was a rainy day and it is stated that the bus driver by his rash or negligent driving knocked down a cyclist coming in the opposite direction as a result of which the cyclist received injuries and ultimately died. The defence is that there was a rickshaw coming in the opposite direction and the cyclist tried to overtake the rickshaw and in doing so, hit against the right side of the mud-guard of the bus, fell down on the road and was injured. The defence witnesses had given their statements to the Road Transport authorities immediately after the accident and since they have not been produced on behalf of the prosecution their evidence was adduced on behalf of the defence. The learned Fifth City Magistrate who tried this case, after discussing the entire evidence of the defence witnesses does not give a finding as to whether he believes or disbelieves their evidence but merely states that what they say has not been borne out by the prosecution witnesses; as such the presence of the rickshaw at the time of the accident becomes doubtful. Later in the judgment however he admits the presence not only of the rickshaw, but the fact that the cyclist over-took the rickshaw. The learned Sessions Judge has not, in my opinion, directed his mind to this fact. The vital question in this case is as to what constitutes negligence for the purpose of conviction under S. 304-A of the Indian Penal Code. Negligence for the purposes of a criminal liability has been clearly stated by Lord Atkin in — 'Andrews v. Director of Public Prosecutions', (1937) AC 576 at p. 583 where he observed:

> "Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction."

This dictum has been cited with approval in several cases in India viz. in — 'Emperor v. W. S. Priestley', AIR 1944 Sind 124 and — 'Tika Ram v. Rex', AIR 1950 All 300. In both these cases, a similar view has been adopted citing with approval the dictum of Mukherjee, J. in — 'H. W. Smith v. Emperor', AIR 1926 Cal 300, where he laid down that the question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. This then is the test of a rash or negligent act for the purposes of S. 304A.

(3) In view of the fact that both the lower Courts have not properly directed their minds to the facts of the case from this aspect of law, relating to the act of the accused being rash or negligent, the evidence in the case has got to be looked into for the purposes of assessing liability, if any, of the accused.

(4) From a perusal of the evidence of defence witnesses there can be no doubt (and even the learned Magistrate was compelled to admit it in his judgment later) that there was rickshaw coming from the opposite direction which the deceased cyclist tried to overtake and in trying to do so, he dashed against the mudguard of the bus. It is also further established from the evidence that the bus driver had to bring his bus to a stand-still 150 yards before the accident took place because there was a cart obstructing his way. After the obstruction had cleared, he again set his bus in motion, and after proceeding 100 yards or so this other accident took place. This fact by itself would establish (and there does not seem to be any reason why this testimony should be doubted) that the bus was not travelling at a high speed but at a reasonable speed, which one of the defence witnesses puts it at 7 miles an hour.

(5) No reasons have been shown why the eye-witnesses produced on behalf of the defence should not be believed. One of them was a passenger in the bus who had a clear view of the accident. The prosecution witnesses also have testified to the fact that the cyclist struck the mud-guard and fell down. The question is whether it was the bus that struck the cyclist or the cyclist that struck the bus. This is important for the purposes of assessing the liability of the driver. In such cases as observed by Mukherjee, J. in — 'H. W. Smith v. Emperor', AIR 1926 Cal 300, already referred to, it is necessary to avoid being influenced by the prejudice arising out of the loss of a life which is so dominant a factor in accident cases. Having regard to all these facts, it is not possible for me to hold that the accused was driving his bus in such a rash or negligent way as would bring him within the

ambit of S. 304-A. On the other hand it appears to me and is clear from the defence evidence which I believe, that there has been negligence on the part of the cyclist who in attempting to overtake a rickshaw dashed against the mud-guard of the bus. The learned Government Advocate also was unable to satisfactorily support the judgments of the lower Courts except to say that there were concurrent findings of fact. When the lower Courts have not considered the evidence from the aspect of rashness or negligence as set out above, the concurrent findings have no particular significance. I therefore allow the revision petition, set aside the conviction and sentence of the accused. If any fine has been paid, it shall be returned.

(6) In view of this, the reference made by the District Magistrate for enhancing the sentence does not arise and consequently it is not necessary to answer it. A copy of this order may be affixed in the reference filed.

B/G.M.J. Revision petition allowed.

A.I.R. 1953 HYD. 125 (Vol. 40, C. N. 48)

MOHD. AHMED ANSARI
AND JAGANMOHAN REDDY JJ.

Nageschandra and another, Petitioners v. State of Hyderabad.

Revn. Petns. Nos. 176 and 177 of 1951, D/- 30-7-1952.

(a) Supply and Prices of Goods Act (1950), S. 27 (2) —Notifications fixing prices issued under replaced Ordinance are saved — Act coming into force — Prosecution for contravention of notification — Mention of Ordinance in charge — Trial not vitiated.

Notifications fixing prices of articles issued under Supply and Prices of Goods Ordinance 1950, which was replaced by Supply and Prices of Goods Act (1950) are saved by S. 27 (2) of the Act. Consequently, prosecution for contravention of notification, after coming into force of the Act is not illegal when there is a mention of the Ordinance in the first information report and the charge. At the most it would be a misdescription in the charge which could be corrected. (Para 3)

(b) Essential Supplies (Temporary Powers) Act (1946), S. 3 — No Notification fixing prices of articles — No charge can be framed under Act for contravention of notification under Supply and Prices of Goods Ordinance (1950). (Para 4)

(c) Supply and Prices of Goods Act (1950), S. 17 — Charge under Act — No sanction as required by S. 17 obtained — Prosecution is vitiated: AIR 1948 PC 82, Relied on. (Para 4)

Murtuza Khan, for Petitioners; Gopal Rao Murumkar, Govt. Advocate, for the State.

REFERENCE..... /Para.

('48) AIR 1948 PC 82: (49 Cri LJ 261 PC) 4

JAGANMOHAN REDDY J.: These are two revisions against the framing of a charge by the Munsiff-Magistrate, Gulbarga, dated 1-2-1951, under which the accused were charged with the contravention of Notifications S.R.O. 500 and S.R.O. 1103 issued under the Supply and Prices of Goods Ordinance, 1950 and of Sections 3 and 7 of the Essential Supplies (Temporary Powers) Act, 1946. The learned Advocate for the revision-petitioners contends 'inter alia' (a) that on the date when the offence was committed, viz., 19-1-1951, the Supply and Prices of Goods Ordinance 1950 was replaced by Supply and Prices of Goods Act 1950 (Act No. 70 of 1950); (b) that under S. 17 of the said Act, no person below the rank of the Inspector of Police shall investigate an offence punishable under the Act and no prosecution for any such offence shall be instituted except with the previous sanction of the Central Government or of any officer not below the rank of a District Magistrate empowered by the Central Government to grant such sanction. It is contended that since the investigation into the offence was made by a Sub-Inspector of Police, P. W. 1, D. S. Pathak, and since the prosecution was unable to show that there was any sanction of the Central Government or an officer empowered by it in that behalf, no charge should have been framed as the trial is without jurisdiction.

(2) The facts of the case are that the police had on 19-1-1951 reason to believe that the accused, who is the proprietor of the Prabhat Stores was selling Glaxo at a price much above the rate of I. G. Rs. 3-2-0 (O. S. Rs. 3-10-4) fixed by Notifications issued under the Supply and Prices of Goods Ordinance, 1950. They therefore laid a trap and sent one Rochappa with a marked five rupee note to purchase one pound tin of Glaxo. Rochappa accordingly went and purchased a Glaxo tin and produced a cash memo for O. S. Rs. 4-8-0 (Ex. 2). The tin and cash memo were immediately seized by the panches who had followed Rochappa to the shop after which they recovered the marked five rupee note, which was also seized from a person in the shop who was taking some currency notes in which the marked note was included. Thereafter a first information report was issued stating the facts of the case and the offence committed.

(3) With respect to the first point, there is no doubt that the Supply and Prices of Goods Ordinance was promulgated on 2-9-1950 and simultaneously a Notification, S. R. O. 500 dated 2-9-1950 fixing prices of infants food, i.e., Horlicks, Glaxo and Cow and Gate was issued. On 23-12-1950, the Ordinance was replaced by the Supply and Prices of Goods Act referred to above which was passed in pursuance of a resolution under Art. 249 of the Constitution "for the control of prices of certain goods and supply and distribution thereof." Another Notification S. R. O. 1103 pursuant to the provisions of the repealed Ordinance was also published in the Gazette of India on the same date, vide Ex. 4 according to which one pound of Glaxo tin was priced at Rs. 3-2-0 I.G. corresponding to Rs. 3-10-4 O. S. It appears that the Notification was issued prior to the enforcement of the Act under the repealed Ordinance though it was published on the same date as the Act itself. The question whether the offence was committed under the Ordinance or under the Act is not really material for the reason that the incident admittedly took place on the 19-1-1951 after the coming into force of the Supply and Prices of Goods Act, and Notifications though issued under the Ordinance were saved by Sub-Section (2) of S. 27 of the said Act. At the most the mention of the Supply and Prices of Goods Ordinance in the first information report or in the charge is a misdescription and it could always be corrected in the charge.

The Advocate for the revision petitioner, has not, in view of what has been stated

above, pressed this point. His main contention is with respect to the second point, namely, that the investigation was done by a person not authorised under the Act and the prosecution was without sanction of the Central Government or any person authorised by the Central Government in this behalf. The learned Government Advocate contends that if an accused is charged with several offences, some of which require sanction as a condition precedent to the prosecution and the others not, a charge can always be framed under the provision which does not require sanction. Before we consider it necessary to deal with this aspect of the case, we required the learned Government Advocate to state whether there was any order made under S. 3 of the Essential Supplies (Temporary Powers) Act fixing the prices of Horlicks, Glaxo milk and other infant food products. We feel that this was necessary because S. 3 of the Essential Supplies (Temporary Powers) Act provides that:

"The Central Government, so far as it appears to be necessary or expedient for maintaining or increasing the supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, may, by order, provide for regulating or prohibiting production, supply and distribution thereof and trade and commerce therein."

(4) In view of the aforesaid provision, before any argument can be advanced in respect of an offence alleged to have been committed under this provision it is necessary that an order should be made by the Central Government fixing the price of a tin of Glaxo. The learned Advocate for the State took time to ascertain whether any such order was made and after two adjournments he now reports that there is no such order. The charge also does not specify the particular order or orders which are alleged to have been contravened. In these circumstances no charge could be framed under the Essential Supplies (Temporary Powers) Act. Since the accused has been charged under the Supply and Prices of Goods Act, 1950, there being no sanction under S. 17 thereof, of the Central Government or any person authorised in that behalf, the prosecution is vitiated and the trial, if any, is without jurisdiction. 'The sanction to prosecute', as the Privy Council have observed in — 'Gokulchand Dwarkadas Morarka v. The King', AIR 1948 PC 82, 'is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction.'

(5) In the result the charge framed whether under the Essential Supplies (Temporary Powers) Act or under the Supply and Prices of Goods Act is bad and the prosecution of the accused for offences under these Acts is invalid. We accordingly quash the charge and order the accused to be discharged.

B/R.G.D. Accused discharged.

A.I.R. 1953 HYD. 126 (Vol. 40, C. N. 49)

PALNITKAR C. J.
AND SRINIVASA CHARI J.

Laxminarayan Bhayya, Petitioner v. The Praga Tools Corporation Ltd., Respondents.

Petn. No. 707 of 1952, D/- 19-9-1952.

Companies Act (1913), S. 38 — Power of Court.

There is discretion vested in the High Court either to exercise or not in a particular case the power under S. 38. The proceedings being in the nature of summary proceedings, there is no warrant for the High Court to go into a detailed investigation into the matters alleged by one party and denied by the other. If the petitioner has been wronged he may have his remedy, otherwise than in an application for rectification of the Register. Where the facts requiring consideration are complicated and not simple a separate action alone would be the proper remedy. (Having regard to the facts and circumstances of the case the High Court was not inclined to exercise power under this Section). (1904) 1 Ch 598, Rel. on.

(Para 2)

Anno: Companies Act, S. 38 N. 3.

Venkat Rao Deshpande, Vakil, for Petitioner; Noshair Chinoi, for Respondents.

REFERENCE..... /Para.
(1904) 1 Ch 598: (73 LJ Ch 308) 2

ORDER: This is an application filed under S. 38, Companies Act on behalf of Laxminarayan Bhayya, a share-holder in the Respondent Company, The Praga Tools Corporation Ltd., holding 100 shares. The petitioner's prayer is for the rectification of the Register of share-holders maintained by the Respondent Company. The facts alleged by the petitioner are that he purchased 100 shares of the Respondent Company in the Hyderabad Stock Exchange on 28-7-1948, and obtained the share scrip as also a transfer form duly filled and verified. He averred that he submitted the share scrip of the Respondent Company on 8-12-1948, requesting the Company to effect the transfer and enter the petitioner's name in the Register of share-holders. He alleged that in pursuance of this request the petitioner's name was entered in the share-holders' Register on 14-12-1948, and that thereafter he was in receipt of the balance sheet and the profit and loss accounts from the Company as a share-holder would do. His grievance is that the share scrip that was lodged with the Company for the purpose of effecting the transfer was not returned to him after recording the transfer, although he repeatedly asked the Company to send the same.

Finally the petitioner stated that all of a sudden on 18-12-1951, he was informed by the Respondent Company that the transfer deed sent by him was a forged document and that therefore the transfer could not be effected by the Respondent Company and that that transfer which had been made previously had been cancelled. On these allegations the petitioner contended that the unilateral cancellation of the transfer originally effected by the Company was void and not binding upon him. He alternatively pleaded that if for any reason it be held that the transfer form submitted by him was a forged document, he should be compensated by the allotment of shares of equal value as there was estoppel against the Respondent Company in that they made him believe that the shares had been transferred in his name. The Respondent Company in response to the notice issued to it filed a counter wherein it stated that the petitioner was not entitled to the relief and that no transfer could be effected in his name inasmuch as the transfer in his favour was a bogus one and the signature on the transfer form was forged. It was also urged by the Respondent Company

that the plaintiff was not entitled to the relief in this Court.

(2) We heard the arguments of the respective counsel. The various processes through which the shares passed and the steps that were taken at the Respondent Company and at the Stock Exchange are matters which require a detailed and thorough investigation and we are of opinion that the proceedings before us being in the nature of summary proceedings, there is no warrant for us to go into a detailed investigation into the matters alleged by one party and denied by the other. It was argued by the learned Vakil for the petitioner that in this case the Company is estopped by reason of its having entered the name of the petitioner in the Register of share-holders; and it was not open to the Company to cancel the same subsequently. As observed by us above whether really the original transfer deed was a faked one or it bore a forged signature are matters pre-eminently fit for an enquiry in a regular suit.

It was urged by the Counsel for the Respondent Company that the original transfer was effected on account of the mistake of a Clerk in the Office and that when the Company came to realise the mistake it forthwith cancelled the transfer. These are matters which require proper evidence and enquiry and we think that it would not be proper to grant the prayer of the petitioner in these summary proceedings. Where the facts requiring consideration are complicated and not simple a separate action alone would be the proper remedy: — 'In re: Sussex Brick Co.', (1904) 1 Ch 598. If the petitioner has been wronged he may have his remedy, otherwise than in an application for rectification of the Register under S. 38, Companies Act. There is discretion vested in us either to exercise or not in a particular case the power under S. 38, Companies Act. Having regard to the facts and circumstances of this case we are not inclined to exercise our power under this Section. The petitioner will be at liberty to take such steps as he may be advised to do. This petition is, therefore, dismissed. Having regard to the facts of this case we make no order as to costs. Each party will bear his own costs.

B/D.H. Petition dismissed.

A.I.R. 1953 HYD. 127 (Vol. 40, C. N. 50)

SRINIVASACHARI J.

Mohamed Athar and another, Petitioners v. Narsingh Das Jaju and another, Respondents.

Civil Revn. Petn. No. 299/4 of 1951-52, D/- 12-9-1952.

Civil P. C. (1908), S. 151 and O. 23, R. 3 — Mode of setting aside compromise decree — Compromise decree obtained by practising fraud on Court — Inherent power to set aside.

Where a party to a suit files an application for setting aside a compromise decree passed in the suit on the allegation that fraud was practised upon the Court inasmuch as no summons was served on him and that he had not given his consent to the compromise, the Court has inherent power to make enquiry into the matter and correct its own proceedings. (Para 2)

A distinction should be drawn between a case where the allegation between the parties to an alleged compromise is that he never gave his consent and a case where he alleges that it was obtained by fraud. Where the allegation is that fraud was practised on the Court, the Court has inherent power to correct its own proceedings. But if the allegation is that fraud was as between the parties, the remedy is only by way of a regular suit. 22 WR 290 (PC), Ref. (Para 2)

Anno: C.P.C., S. 151 N. 1, 4 and 6; O. 23 R. 3 N. 28.

R. Babu Ram Dayal, Vakil, for Petitioners.

REFERENCE..... /Para.
('74) 22 WR 290 (PC) 2

ORDER: This is a revision against the judgment of the Court of Small Causes. The suit was for the recovery of an amount due on a promissory note alleged to have been executed by the defendant on 29-3-1951. The hearing in the case was fixed for 21-9-1951. Before, however, the date of hearing came an application was filed in the Court purporting to be a compromise petition on behalf of both the parties on 6-9-1951 and the order of the Judge of that day is to the following effect:

"The hearing has been advanced. The plaintiff in person, defendant by vakil; a compromise has been filed which has been verified. It is, therefore, ordered that the suit be decreed in pursuance of the compromise."

After this the petitioner before me who was the defendant in the case filed an affidavit and an application alleging that no summonses were taken to him in the suit; that he did not employ any vakil on his behalf; that he is no party to the compromise. He therefore sought to set aside the decree that was passed on the basis of the compromise. The lower Court dismissed this application on the ground that the remedy of the party was to file a regular suit and he could not move the Court in these proceedings. The defendant therefore has come up in revision before me.

(2) The short point to be considered is as to what is the remedy of the defendant, having regard to the circumstances of this particular case. In all such cases where a compromise is alleged by one party and denied by the other, the procedure has always been to direct the party to file a regular suit, for, the allegation of the party is that the compromise was brought about by practising fraud upon him. Otherwise the Court has jurisdiction to enquire into the fact as to whether the party did give his consent to the compromise. A distinction should be drawn between a case where the allegation between the parties to an alleged compromise is that he never gave his consent and a case where he alleges that it was obtained by fraud. If there is an apparent consent then the remedy would be only by way of a suit. It, therefore comes to this that where the allegation is that fraud was practised on the Court, the Court has inherent power to correct its own proceedings. But if the allegation is that fraud was as between the parties, the remedy is only by way of a regular suit. The Privy Council in the case of — 'Unnoda Dabee v. Maria Louisa Stevenson', reported in 22 WR 290 (PC), observed:

"The compromise may have been proper and if all the facts could be assumed.....but the vice of the arrangement is that it was made without the party who is principally affected being sufficiently represented."

In such a case the Court has jurisdiction to enquire into the fact as to whether the party gave his consent. The record does not show that the defendant was served with summons.

The verification on the back of the compromise petition does not show that the defendant was there in person. The fact that no summons was taken on to the defendant, that the hearing of the case was advanced from 21-9-1951 to 6-9-1952 and the fact that the defendant was not there in person, all go to show that the defendant did not give his consent. In support of this there is the affidavit of the defendant also. It is just possible that the plaintiff may be able to prove that the defendant did give his consent to this compromise. In my opinion this is clearly a case which could be regarded as a case where one of the parties could be said to have practised fraud upon the Court. As such the Court would have jurisdiction under its inherent powers to make enquiry and correct its own proceedings. I, therefore, allow this revision, set aside the order of the lower Court and remand the case to the Court of Small Causes for enquiring into the fact as to whether there was a compromise as alleged and decide the case according to law. If the lower Court comes to the conclusion that the defendant gave his consent, then the decree would stand; otherwise the case would have to be heard and judgment pronounced after proper trial. The petitioner will be entitled to costs of this revision. Advocate's fee Rs. 25.

B/K.S. Revision allowed.

A.I.R. 1953 HYD. 128 (Vol. 40, C. N. 51)

JAGANMOHAN REDDY J.

Shabbir Ali Hussain, Petitioner v. Janaba Sartaj Jaha Begum, Respondent.

Revn. No. 188/4 of 1951-52, D/- 18-7-1952.

Houses and Rents — Hyderabad Rent Control Order (1353 F), S. 6 (c) — Excess rent amount with landlord to credit of tenant — Suit for arrears of rent by landlord — Adjustment of rent.

Clause (c) of S. 6, Hyderabad Rent Control Order provides that where any amounts have been paid towards rent regarding a dwelling house in excess of fair rent the sum will be paid back to the lessee or adjusted in accordance with the directions. Where, therefore in a suit filed by the landlord in a Small Cause Court against the tenant for recovery of rent in arrears, the Court comes to the conclusion that the Rent Controller has fixed the rent at a rate lower than what is actually paid by the tenant and a plea is taken in the suit by the tenant for adjustment of the amount under S. 6 (c), the tenant is entitled to have the same adjusted. AIR 1951 Mad 343, Ref. **(Para 1)**

Syed Anisuddin Ahmed, for Petitioner; Mohamad Murulla Ansari, for Respondent.

REFERENCE..... /Para.

('50) 1950-2 Mad LJ 579: (AIR 1951 Mad 343) 1

ORDER: In this revision the only point for consideration is whether the lower Court having come to the conclusion that the Rent Controller had fixed a rent of Rs. 25 instead of Rs. 75 should have accepted the plea of adjustment based on Cl. (c) of S. 6 of the Rent Control Order which provides that where any amounts have been paid towards rent regarding a dwelling house in excess of fair rent whether it was paid before or after the coming into force of the said order, the sum will be paid back to the lessee or adjusted in accordance with the directions. The house was taken on lease on 3-2-1950. It appears that a sum of Rs. 600 was paid by the revision-petitioner to the respondent towards rent till 2-10-1950 at the rate of Rs. 75 per month. Rent was due from 3-10-1950 to 2-4-1951 which the respondent demanded, but the petitioner moved the Rent Controller on 15-3-1951 for fixing fair rent which was fixed by him at Rs. 25 per month. After debiting the rent account at the rate of Rs. 25 per month upto 2-4-1951, there is still due to the petitioner a sum of Rs. 250. The respondent had filed a suit on 25-4-1951 for the recovery of rent at the rate of Rs. 25 for six months from 3-10-1951 to 2-4-1951. The petitioner in his written statement filed on 5-7-1951 has stated that he had adjusted the rent upto 2-7-1951 and that Rs. 175 has still to be adjusted. The Small Cause Court held that there was no separate suit for refund of the sum of Rs. 175 and as such rejected the petitioner's contention and decreed the respondent's suit.

As far as the claim for refund of Rs. 175 was concerned the judgment of the Small Cause Court is in order but in decreeing the suit it did not act according to the Rent Control Law. The plea of the petitioner for adjustment of the amount is in accordance with Cl. (c) of S. 6 of the Rent Control Order and if he wants that the suit amount should be adjusted from the amount due to him under the aforesaid provision of the Rent Control Order, he is entitled to have the same adjusted. Once that amount is adjusted, the respondent will have no claim for rent against the petitioner for the period claimed. The respondent's advocate contends that the petitioner should have requested him to adjust the rent and unless he did so he cannot take that plea. From the facts set out above it is clear that after the petitioner applied to the Rent Controller for fixing fair rent on 15-3-1951, the respondent filed a suit on 25-4-1951 presumably to counter that application and it cannot be said that petitioner had admitted the suit claim based upon rent of Rs. 75 per month. On the other hand in his written statement he has categorically claimed an adjustment of the rent up to the date of the filing of the written statement and asked for a refund of Rs. 175. In these circumstances he intended and did in fact invoke the provisions of Cl. (c) of S. 6 of the Rent Control Order. No doubt in — 'In re Navaneethammal', 1950-2 Mad LJ 579, Rajamannar C. J. and Balakrishna Iyer J. held under Cl. (c) of S. 6, Madras Rent Control Act of 1946 which corresponds to Cl. (c) of S. 6, Hyderabad Rent Control Order, that the mere fact that the landlord has with him a credit of certain sum of money towards rent does not necessarily mean that the tenant has not committed default. But where however (as in this case) the whole proceedings show that the petitioner is contesting the right of the respondent to demand rent at the rate of Rs. 75 per month and has applied to the Rent Controller for fixing a fair rent, it cannot be presumed that his intention was not to have the same adjusted. The petitioner in fact asked for such adjustment.

(2) In this view of the matter the revision petition is allowed and the decree of the lower Court set aside.

C/V.S.B. Revision allowed.

AIR 1953 HYDERABAD 129 (Vol 40 C. N. 52)

QAMAR HASAN J.

Ameenuddin, Petitioner v. Mohammad Khader Ali, Respondent.

Revn. Petn. No. 216 of 1951, D/- 8-9-1952.

(a) Transfer of Property Act (1882), S. 111 (c) — Lease by usufructuary mortgagee — Duration — Redemption by mortgagor — Effect.

The general rule is that a person cannot by transfer or otherwise, confer a better title on another than he himself has. A usufructuary mortgagee, therefore, cannot create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. It follows that he may grant leases not extending beyond the period of a mortgage; any lease granted by him must come to an end at redemption. AIR 1952 SC 205, Rel. on.

The interest of a tenant of a mortgaged house therefore comes to an end on redemption of the mortgage and the mortgagor is entitled to actual possession of the house in execution of his decree for redemption. (Paras 4, 5)

Anno: T. P. Act, S. 111 N. 5 Pt. 2.

†(b) Houses and Rents — Hyderabad Rent Control Order (1353 F), S. 8 — Tenant from usufructuary mortgagee — Redemption — Effect — Application under the Order not necessary — (T. P. Act (1882), S. 111(c)).

Clause (2) of S. 8 directs that a landlord who seeks to evict a tenant shall apply to the Controller for a direction in that behalf. It would thus appear that in order to attract the provisions of this Section there should exist the relationship of landlord and tenant i.e., there should be a privity of contract between the parties. The absence of definition of the word 'tenant' in the Order rules out the idea of statutory tenant, leaving the expression to its ordinary significance under the Transfer of Property Act, with the effect that on termination of the mortgagee's interest in the property by redemption, the lease also terminates under S. 111(c) and there being no relationship of landlord and tenant between the mortgagor and the tenant from mortgagee, the mortgagor can evict the tenant without applying to the Controller under the Order.

(Para 7)

Anno: T.P. Act, S. 111 N. 5.

Mohd. Abdullah Timmapuri, for Petitioner; Raghavendra Rao Sharma, for Respondent.

REFERENCE..... /Para.

('52) AIR 1952 SC 205: (1952 SCR 775) 4

ORDER : In the course of the execution of a final decree for redemption, the petitioner Syed Aminuddin intervened with an objection that he being in occupancy of the mortgaged house as a tenant of the usufructuary mortgagee, was not liable to be evicted unless and until the procedure embodied in the Hyderabad Rent Control Order was adopted and an order for eviction obtained from the Rent Controller.

(2) The learned Fourth Judge of the City Civil Court has by his order of 28-9-1951, overruled the contention. The objector has now come up before us in revision.

(3) To dispose of the contention raised by the petitioner the first point to be determined is what is the position of a tenant inducted into the mortgaged property by the usufructuary mortgagee vis-a-vis the mortgagor, who has obtained a final decree in a redemption suit under the relevant provisions of the Hyderabad Civil Procedure Code corresponding to the provisions contained in R. 8 of O. 34, Civil P.C.

(4) It has been held by the Supreme Court in the case of — 'Mahabir Gope v. Harbans Narain Singh', AIR 1952 SC 205, that the general rule is that a person cannot by transfer or otherwise, confer a better title on another than he himself has and therefore a mortgagee cannot create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. It follows that he may grant leases not extending beyond the period of a mortgage; any lease granted by him must come to an end at redemption. A mortgagee cannot during the subsistence of the mortgage, act in a manner detrimental to the mortgagor's interest such as giving a lease which may enable the tenant to acquire occupancy rights in the land thereby defeating the mortgagor's right to khas possession.

(5) In this view of the law it can safely be postulated that the petitioner's interest in the disputed house came to an end after the termination of the mortgagee's interest by reason of redemption. Order 34, R. 8, Civil P.C., 'inter alia' provides that on payment into Court of the amounts due from the mortgagor, the Court may in the final decree, if necessary, order the mortgagee to put the mortgagor in possession of the property redeemed. If the property is in possession of the mortgagee, there is no dispute that the mortgagor can be put in actual possession of the property under O. 21, R. 35(1), Civil P.C. by removing any person bound by the decree who refuses to vacate the property. In case the property is in the occupancy of a tenant or other persons entitled to occupy the same, O. 21, R. 36 makes provision for symbolical possession to be delivered to the decree-holder. In order to be able to take advantage of the provision of this rule the petitioner will have to show that he is entitled to continue in occupation of the house despite the fact that the mortgagor has secured a right to its possession. Under Cl. (c) of S. 111, Transfer of Property Act, the lease determines by the termination of the lessor's interest. Thus, the petitioner cannot claim to be a tenant within the meaning of O. 21, R. 36, Civil P.C., or a person entitled to occupy the property in dispute. But the learned advocate for the petitioner relying on S. 8, Hyderabad Rent Control Order 1353F argued that whatever may be the position of the petitioner under the Transfer of Property Act or the Code of Civil Procedure, he could not be evicted without an order of the Controller to that effect.

(6) Now S. 8(1) of the Order enacts that :

"A tenant in possession of a building shall not be evicted therefrom whether in execution of a decree or otherwise and whether before or after the promulgation of this Order except in accordance with the provisions of this Section."

(7) Then Cl. (2) of S. 8 directs that a landlord who seeks to evict a tenant shall apply to the Controller for a direction in that behalf. It would thus appear that in order to attract the provisions of this Section there should exist the relationship of landlord and tenant i.e., there should be a privity of contract between the parties. The Rent Control Order has defined the expression 'landlord' exhaustively; but has omitted to define the word

'tenant.' The absence of definition rules out the idea of statutory tenant leaving the expression to its ordinary significance under the Transfer of Property Act.

(8) In this view of the matter, I find no force in this revision, and I refuse to interfere with the order passed by the learned Fourth Judge, City Civil Court. The rule is discharged with no order as to costs.

B/D.R.R. Rule discharged.

AIR 1953 HYDERABAD 130 (Vol 40 C. N. 53)

MANOHER PERSHAD AND SRINIVASACHARI JJ.

Nankoo Nathia, Petitioner v. Nagnur Parmeshwaramma and others, Respondents.

Revn. Petn. No. 89 of 1952, D/- 22-8-1952.

(a) Civil P.C. (1908), S. 151 — Ends of justice — Consolidation of suits which are not cross-suits — (Hyderabad Civil P. C., Ss. 648 and 644).

Every Court whether a Civil Court or otherwise must in the absence of express provision be deemed to possess inherent powers in its very constitution, all such powers as are necessary to do the right and undo the wrong in the course of the administration of justice. (Para 8)

S. 648, Hyderabad Civil P. C., provides for the consolidation of cross-suits, and it does not apply to consolidation of suits which are not cross-suits. But excepting S. 648, Hyderabad Civil P. C., there is no other specific provision for consolidation of suits which are not cross-suits. (Para 8)

Therefore, where the Court consolidated suits which were not cross-suits under S. 648, Hyderabad Civil P. C., the consolidation would hold good and would be deemed to have been passed under S. 644, Hyderabad Civil P. C. corresponding to S. 151, Indian Civil P.C. 33 Cal 927; AIR 1947 Nag 248; AIR 1943 Bom 12 and AIR 1922 Pat 566 (1) Rel. on. (Para 13)

Anno: Civil P.C., S. 151 N. 4 Pt. 13.

(b) Civil P.C. (1908), Ss. 115 and 151 — Judicious discretion — No interference.

Where the trial Court came to the conclusion that as the defendant has not started the evidence and they have not filed the list of defence witnesses, it would be in the ends of justice to allow the plaintiff to produce her evidence again after she had closed her evidence,

Held, that it was not an injudicious discretion and there was no reason for the High Court to interfere in revision. (Para 14)

Anno: Civil P.C., S. 115 N. 20; S. 151 N. 4.

Amanullah Khan, Vakil, for Petitioner; Khaja Abdul Muqtadar, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('43) AIR 1943 Bom 12: (ILR (1943) Bom 104) 11
('06) 33 Cal 927: (3 Cal LJ 67) 9
('47) AIR 1947 Nag 248: (ILR (1947) Nag 691) 10
('22) AIR 1922 Pat 566(1): (1 Pat 669) 12

ORDER: This is a petition in revision on behalf of defendant No. 1 against the order of the Court below dated 9-6-1951 whereby the Court directed the plaintiff to produce her witnesses and the defendants to file their list of the defence witnesses.

(2) The revision-petition seeks to attack the order of the lower Court on two grounds: firstly that the trial Court was wrong in holding that the suits had already been consolidated earlier, and that therefore the later application of the Indian Civil P. C. to the Hyderabad State could not in any way affect the previous consolidation of the suits. Following up this contention it is urged that as a matter of fact there is no order of the Court that the suits were consolidated earlier. It is further urged that having regard to the facts of the case, S. 648, Hyderabad Civil P. C. is not applicable and so the suits could not be consolidated.

(3) The second contention is that when the plaintiff had closed her evidence in November 1950, she could not be allowed to produce her evidence again and in permitting the plaintiff to produce evidence again the Court had not used its discretion judicially.

(4) On behalf of the other side it is contended that it is not correct to say that the suits were not consolidated before. Relying on the proceedings-sheet of 21-9-1950, it is stated that on that date the suits were consolidated.

(5) As regards the question whether S. 648, Hyderabad Civil P. C. is applicable, the learned Counsel for the plaintiff very rightly conceded before us that S. 648, Hyderabad Civil P. C. was not applicable, but his contention is that the Court has got inherent powers under S. 644, Hyderabad Civil P. C. corresponding to S. 151, Indian Civil P. C. to consolidate suits. Thus, he urges that there is nothing wrong in the order of the Court below which could be interfered with in revision.

(6) With regard to the question of the evidence of the plaintiff, it is stated that though the plaintiff had closed her evidence in November 1950, the defendant had not started his rebuttal evidence, therefore, the Court allowed the plaintiff to examine witnesses who were already mentioned in the list. Thus he contends that there is no wrong exercise of discretion. In the result it is contended that the revision petition should be dismissed.

(7) In so far as the first contention of the learned advocate for the petitioner is concerned which relates to the consolidation of the suits, from a perusal of the proceedings of the lower Court dated 21-9-1950, it is clear that the Court at the instance of the plaintiff consolidated both the suits. Therefore, it is not correct to say that the Court did not consolidate the suits as a matter of fact.

(8) The question that has to be considered is as to whether having regard to the nature of the suits, they could be consolidated together. We went through the plaints in both the cases. In our opinion, having regard to the nature of the suits they could be consolidated. The contention is that under S. 648, Hyderabad Civil P. C., only cross-suits could be consolidated and as these are not cross-suits, these could not be consolidated. It is true that both these suits are of the plaintiff herself and these are not cross-suits. So S. 648, Hyderabad Civil P. C. would not be applicable. But we do not agree with the contention of the learned advocate that the Court has no inherent power to consolidate the suits of this nature which are not cross-suits. It may be pointed out that every Court whether a Civil Court or otherwise, must therefore, in the absence of express provision for the purpose be deemed to possess inherent powers in its very constitution, all such powers as are necessary to do the right

and undo the wrong in the course of the administration of justice. Admittedly, excepting S. 643, Hyderabad Civil P. C. there is no other specific provision to that effect. In the absence of express provision the Court must be deemed to have inherent power, and in this connection it has the inherent power to determine how its proceedings should be conducted.

(9) In the case of — 'Hukumchand v. Kamal Chand', 33 Cal 927 it has been held by Woodroffe and Mukherjee JJ.:

"The Court has therefore in many cases where the circumstances require it acted upon an assumption of the possession of the inherent powers, to act 'ex debito justitiae' and to do that real and substantial justice for the administration for which it alone exists. It has been thus held that when the Code contains no express provision on the matters hereinafter mentioned the Court has inherent power 'ex debito justitiae' to consolidate; postpone pending the decision of the selected action and..."

(10) In — 'Manoher Vinayak v. Laxman Anandrao', AIR 1947 Nag 248, Grille C. J. and Padhye J. held that there is no specific provision of law in the Civil Procedure Code for consolidation of two suits as is contained in O. 41 of the Rules of Supreme Court requiring one trial and one judgment in consolidated actions. It is under the inherent powers of the Court under S. 151, Indian C. P. C. that the suits are consolidated. The legal effect of the 'de facto' consolidation is usually achieved by two suits being tried together by the consent of the parties and with the approval of the Court.

(11) In — 'Ganesh v. Gopal', AIR 1943 Bom 12 Broomfield and Macklin JJ. held that:

"If suits are filed simultaneously there is no contravention of the part of the rule which prohibits the plaintiff from afterwards suing for a relief omitted in a former suit, the two suits should be consolidated and tried together on the same evidence."

(12) In — 'Mohd. Fazal v. Malikumar Mahton', AIR 1922 Pat 566 (1), Coutts and Das JJ. held:

"The Court has inherent jurisdiction to consolidate the suits with jurisdiction exercisable without the consent of the parties."

(13) Having regard to the consensus of opinion of all Courts that there is the inherent power in a Court to consolidate suits in the ends of justice, we do not find anything wrong in the order of the Court below in consolidating the two suits. Of course, the trial Court had consolidated the suits under S. 648, Hyderabad Civil P. C., but in our opinion that order of consolidation would hold good and would be deemed to have been passed under S. 644, Hyderabad Civil P. C. corresponding to S. 151, Indian Civil P. C. Thus, this contention fails.

(14) As regards the other question which relates to the evidence, there is absolutely no force in the argument. It is true that in November 1950, plaintiff had closed her evidence, but plaintiff requested the Court that as the defendant has not started with the defence evidence, she might be permitted to produce those witnesses whose list had already been filed earlier. The Court came to the conclusion that as the defendants have not started the evidence & they have not filed the list of the defence witnesses, it would be in the ends of justice to allow the plaintiff to produce her evidence. In exercise of its discretion by the Court below we see no reason to interfere. We do not regard it as an injudicious discretion. Petition in revision is, therefore, dismissed with costs. Advocate's fee Rs. 35.

B/H.G.P. Revision dismissed.

AIR 1953 HYDERABAD 131 (Vol 40 C. N. 54)

PALNITKAR C. J.

AND DESHPANDE J.

Ramchandra Reddy, Petitioner v. Shankaramma, Respondent.

Writ Petn. No. 200/8 of 1952, D/- 8-10-1952.

(a) Constitution of India, Art. 132 (1) — Substantial question of law.

Judgment holding S. 13, (Hyderabad) Atiyat Enquiries Act, 1952 ultra vires the Constitution — Interpretation of Constitution involved — Certificate could be granted. (Para 2)

Anno: C.P.C., App., Constitution of India, Art. 132 N. 1.

(b) Constitution of India, Art. 133 — Civil proceeding — (Constitution of India, Art. 226) — (Hyderabad (Abolition of Jagirs) Regulation (69 of 1358 F), S. 21 (2)).

The question whether it is a civil proceeding or not should be decided taking into view the nature of the proceeding. Under the provisions of S. 21 (2), Hyderabad (Abolition of Jagirs) Regulation, claims relating to a jagir or to any share in the income thereof have been made the subject-matter of civil litigation. Therefore the term 'civil proceeding' in Art. 133 of the Constitution applies to civil writs issued under Art. 226. (Para 3)

Anno: C.P.C., App.; Constitution of India, Art. 133 N. 2.

Ramchandar Rao Nandapurkar, for Petitioner; Sadashive Rao, for Respondent.

ORDER: This is a petition for leave to appeal to the Supreme Court, and a certificate under Arts. 132 and 133 of the Constitution is prayed for.

(2) For the purposes of Art. 132, Cl. (1), we have to decide whether the case involves a substantial question of law as to the interpretation of the Constitution. In the judgment under consideration, we find that S. 13, (Hyderabad) Atiyat Enquiries Act of 1952 has been held 'ultra vires' of the Constitution. We are, therefore, of the opinion that this is a case which involves a substantial question as to the interpretation of the Constitution. In our opinion, a certificate under Art. 132, Cl. (1) should be granted to the petitioner.

(3) With regard to Art. 133, Cl. (1)(a), it is admitted by the parties that the value of the subject-matter of the dispute is above Rs. 20,000. It is also clear that the High Court by the judgment under consideration has disagreed with the judgment of the Honourable the Revenue Minister and therefore, under the provisions of the said Article, leave must be granted inasmuch as there is a difference of opinion. The question whether passing of orders by this High Court in its writ jurisdiction under Art. 226 of the Constitution is a 'civil proceeding' for the purposes of the said Article was argued before us. Shri Sadashive Rao, the learned Advocate for the counter-petitioners argued that this Article applies only to cases in which the High Court exercises jurisdiction under the Civil Procedure Code in cases of regular appeals. No doubt, it is a moot point. We have considered the point very carefully. We are of the opinion that

the question whether it is a civil proceeding or not should be decided taking into view the nature of the proceeding. It is clear that the proceedings before the High Court were not of a criminal nature. The property which is the subject-matter of the dispute consists of lands, houses and other movable and immovable property. The question as to who should get the income or a share of the income of the Jagir belonging to the family is also involved. Under the provisions of S. 21 (2), Hyderabad (Abolition of Jagirs) Regulation, claims relating to a jagir or to any share in the income thereof have been made the subject-matter of civil litigation and it has been laid down that all such claims shall be filed in and decided by the appropriate civil Court. Thus, it is clear that the subject-matter of the dispute involves proceedings of a civil nature. Section 15, Supreme Court of Judicature Act, 1884, reads as follows:

> "15. Proceedings in 'quo warranto' shall be deemed to be civil proceedings, whether for purposes of appeal or otherwise."

No doubt, Art. 226 of the Constitution covers not only writs in the nature of 'quo warranto' but also other writs. Applying the principle contained in S. 15 above-mentioned, we are of the opinion that the term 'civil proceeding' in Art. 133 of the Constitution will apply to civil writs issued under Art. 226. We, therefore, also grant a certificate to the petitioner under Art. 133, Cl. (1) of the Constitution. A certificate be, therefore, accordingly granted.

A/H.G.P. Application allowed.

AIR 1953 HYDERABAD 132 (Vol 40 C. N. 55)

PALNITKAR C. J. AND SRINIVASACHARI J.

Gujrathi Ramanna, Petitioner v. Parpati Venkatram Reddi and others, Respondents.

Writ Petn. No. 358 of 1952, D/- 13-10-1952.

Debt Laws — Hyderabad Debt Conciliation Act (1 of 1349F), S. 14 — Requirements of.

The petitioner had obtained a money decree for a sum of Rs. 9,000 and odd against one G. G submitted a petition for the settlement of this decretal amount before the Debt Conciliation Board at Warangal. After some proceedings, the Conciliation Board passed orders on 29th Amardad 1353F, as the parties had arrived at an agreement. After recording the order dated 29th Amardad 1353F, no further steps were taken by the Debt Conciliation Board.

Held that under Cl. (1) of S. 14, it is imperative upon the Board to reduce to writing in the form of an agreement the amicable settlement arrived at between the parties. The Board had failed to carry out its statutory duties. Under S. 14 when such an agreement is drawn up, certain entries are to be made in the agreement. That should have been done in the light of the order, dated 29th Amardad 1353F. The agreement should contain description of movable and immovable property of the judgment-debtor as described in Cl. (Alif) of the Section and should also contain the other details mentioned in S. 14(1). (The High Court decided that an agreement be drawn up accordingly and then the agreement be registered as laid down in Cl. (3) of the said Section). **(Para 4)**

J. V. Narsing Rao, for Petitioner; Sadashiv Rao, for Respondents.

ORDER: In this case, an interesting question of law as to the interpretation of S. 14, Hyderabad Debt Conciliation Act 1 of 1349F has arisen.

(2) The facts briefly are that the ancestor of the respondents, Gopal Reddi, was indebted to the petitioner, who had obtained a money decree for a sum of Rs. 9,000 and odd against him. Gopal Reddi and others submitted a petition for the settlement of this decretal amount before the Debt Conciliation Board at Warangal. After some proceedings, the Conciliation Board passed orders on 29th Amardad 1353F as the parties had arrived at an agreement. The summary of the said order is to the effect that Rs. 3,000 had been paid by the judgment-debtors; that the rest of the amount to be paid was settled at Rs. 5,500; that the judgment-debtors were to pay the same by paying Rs. 1,500 out of this on 15th Farwardi 1354F; and that the remaining Rs. 4,000 were to be paid in three equal instalments. It was agreed that an agreement was to be drawn up and registered after the said amount of Rs. 1,500 was paid on 15th Farwardi 1354F. It appears from the record of the Debt Conciliation Board that the said amount of Rs. 1,500 was paid on 12th Farwardi 1354F along with the necessary money for registration, etc.

It is also clear from the file that the agreement was not drawn up as required in S. 14, Cl. (1) of the said Act. On 11th Khurdad 1354 F the creditor submitted a petition before the Talukdar of Warangal stating that though the Board had passed an order under S. 14, it had not prepared the agreement nor had got it registered, and prayed that the same may be done forthwith and the creditor was prepared to pay the registration fees. No order appears to have been passed on this petition. The file ultimately was sent back to the Debt Conciliation Board. When the file was received there, the creditor again submitted a petition on 17-2-1950, before the Board making the same prayer as was made before the Talukdar and stating that under S. 14 an agreement be drawn up and got registered. This petition was rejected on 29-1-1951. Against this order, the present petition had been submitted and we wish to treat the same as a writ petition under Arts. 226 and 227 of the Constitution.

(3) We have gone through the order under consideration and we are not clear as to the reasoning adopted by the said Board. The Board seems to be of the opinion that some interpolation has been made in the original order, dated 29th Amardad 1353F and a word "suam" (third) instalment seems to have been added in that order. The Board is of the opinion that the interpolation was meant for purpose of saving limitation, and that the interpolation had made the order incapable of execution.

(4) We have heard at length the arguments of the learned advocates of the parties, and we are of the opinion that this writ petition should be allowed. The question for decision is whether an agreement as laid down in S. 14 of the said Act has been drawn up or not. It is clear from the file and from the various petitions submitted by the parties, that after recording the order dated 29th Amardad 1353F, no further steps were taken by the Debt Conciliation Board. Under Cl. (1) of S. 14, it is imperative upon the Board to reduce to writing in the form of an agreement the amicable

settlement arrived at between the parties. The Board has failed to carry out its statutory duties. Under S. 14 when such an agreement is drawn up, certain entries are to be made in the agreement. That should be done in the light of the order, dated 29th Amardad 1353F. The agreement should contain description of movable and immovable property of the judgment-debtor as described in Cl. (Alif) of the Section and should also contain the other details mentioned in S. 14(1). We direct that an agreement be drawn up accordingly and then the agreement be registered as laid down in Cl. (3) of the said Section.

(5) It was represented to us that while these proceedings were dragging on before the Board and before the Talukdar, the original debtor died and his sons have been brought on record. Shri Sadashiv Rao, the learned advocate for the said sons (legal representatives) drew our attention to this fact and raised a question as to how far it is possible for the agreement being drawn up against the legal representatives of the judgment-debtor. We leave this question to be decided by the Board. We allow this writ petition, as above; and direct the Board to act accordingly. In view of the circumstances of the case, we make no order as to costs.

B/D.H. Petition allowed.

AIR 1953 HYDERABAD 133 (Vol 40 C. N. 56)

QAMAR HASAN AND JAGANMOHAN REDDY JJ.

State of Hyderabad v. Annantha Reddy and others, Respondents.

Criminal Confirmation No. 1467 and Appeals Nos. 1392 to 1401 of 1951, D/- 24-3-1952.

(a) Criminal P. C. (1898), S. 367 — Appreciation of evidence — Credibility of witnesses — Eye witnesses — In considering their evidence, it is necessary to see whether they are independent witnesses or have interest in any of the parties — (Evidence Act (1872), S. 1). (Para 7)

Anno: Cr. P. C., S. 367, N. 6; Evi. Act, S. 1 N. 9, 12.

(b) Criminal P. C. (1898), Ss. 162 and 288 — Previous statement of witness — Admissibility — Extent of — (Evidence Act (1872), S. 145).

A cursory reading of S. 162, Criminal P. C. or S. 145, Evidence Act, would show that previous statements are inadmissible in evidence except to the extent mentioned therein. If any of the previous statements have to be utilised as a whole they can only be under S. 288, Criminal P.C. (Para 8)

Anno: Cr. P. C., S. 162 N. 10; S. 288 N. 2, 7; Evidence Act, S. 145 N. 4.

(c) Evidence Act (1872), S. 27 — Scope.

For purposes of S. 27, Evidence Act, what is required is that the recovery should be made as a consequence of information furnished by the accused in order to make so much of that statement leading to the discovery admissible. If the accused produces certain articles as a result of enquiry by a police sub-Inspector, the recovery itself is inadmissible. (Para 10)

Anno: Evidence Act, S. 27 N. 1, 3, 4.

(d) Criminal P. C. (1898), S. 162 — Statements of witnesses to police — Admissibility — Duty of Court.

Statements of witness to police made during the course of investigation are clearly inadmissible under S. 162. Recording courts must be careful to see that no inadmissible evidence is allowed to be adduced or recorded because it raises an inference or gives rise to the suggestion that the trial judge was influenced by such inadmissible evidence. (Para 11)

Anno: Cr. P. C., S. 162 N. 2, 11 and 12.

Mohd. Mirza, Govt. Advocate, for the State; Manohar Rao Jagirdar, for Respondents.

JAGAN MOHAN REDDY J.: In this case, the Sessions Judge of Bidar convicted the accused Anantharedy, Malgonda and Mathuri Narsayya, son of Narsayya Dhed, under Ss. 302 and 148, Indian Penal Code, and sentenced each of them to death and two years rigorous imprisonment respectively and convicted seven accused, viz., Fakirappa, Ramanna (Ramayya), Shankerappa, Sangayya (Sangappa), Lingayya, Gundappa and Bhaganna (Bhagayya) under Ss. 302 and 148, Indian Penal Code, sentencing them to transportation for life and two years rigorous imprisonment respectively. He acquitted three accused viz., Ramanna, Erayya (Eraooa) and Lalayya of the aforesaid charges. In the case of the first three accused, who have been sentenced to death records have been sent for confirmation and all the ten accused who have been convicted have also filed appeals.

(2) The story of the prosecution is that the accused along with some others who belonged to the party of Anantharedy (Accused No. 1) due to enmity with Lakshmareddy, the deceased with whom the said Anantharedy had some land disputes, murdered the deceased after inflicting wounds with axes near the pial of Rasool Saheb's house at about 6 a.m. on the 8th Dai, 1359 F., while the said Lakshmareddy was going to his field. This incident was witnessed by four persons, viz., Malkappa (Malkanna) P. W. 4, Papayya (Pagagonda) P. W. 6, Keshanna (Keshgonda) P. W. 7 and Revappa P. W. 8, who it is alleged reported the incident to Gundareddy, P. W. 2, the brother of the deceased Lakshmareddy, who in his turn reported the incident at about 7 a.m. to the Police Patel of the village, Lakshmareddy, P. W. 1. The said Lakshmareddy, P. W. 1, made a report to Sub-Inspector in charge of the Station House, Madnoor, who issued the F.I.R., Ex. 1, with which is attached the original report. On receipt of the said report, at 11 a.m. the Sub Inspector of Police Md. Abdul Ghafar, P. W. 9 went to the spot made a Panchanama of the dead body, Ex. 16, and sent the body for post-mortem examination to the Civil Surgeon of Bidar who issued the post-mortem report Ex. 17. 13 out of the 16 accused who were alleged to have taken part in the commission of the crime were arrested on the same day and as a result of the information furnished by them axes were recovered through Panchanamas Exs. 3 to 13. After the investigation was completed a charge sheet was filed before the Magistrate, Bidar, for offences under Ss. 243 and 124 of the Hyderabad Penal Code (corresponding to Ss. 302 and 148, Indian Penal Code) on the 14th Bahman, 1359 F.

(3) After the preliminary enquiry under the Hyderabad Criminal P. C., the case was committed to the Addl. Sessions Judge, Bidar on 23-2-50. After that the trial was commenced first by Nawab Ahmed Khan, who recorded the evidence of 8 witnesses from 3-2-50 and then

after his transfer Gaziuddin Ahmed the succeeding Addl. Sessions Judge recorded the evidence of 7 witnesses afresh but was transferred before the conclusion of the case. In view of the application of the Indian Criminal P. C. from 1-4-51 the Sessions Judge who convicted the accused, conducted the trial under the Indian Criminal P. C. from 6-7-51 with the aid of the assessors. The previous statements of some of the witnesses recorded by the Sessions Judge who could not complete the trial before his transfer, became available to the defence for being utilised in the manner provided for in S. 145 of the Indian Evidence Act for the purposes of discrediting some of the material prosecution witnesses the effect of which will be noticed at the appropriate time hereafter in discussing the evidence.

(4) The following incriminating evidence against the accused has been urged by the prosecution, namely:

(1) That there have been eye-witnesses who have seen the accused attack and injure the deceased with axes which resulted in his death.

(2) The incident was reported to the brother Gundreddy by these eye-witnesses and Gundreddy and the said eye-witnesses reported to the Police Patel, P. W. 1.

(3) The Police patel immediately made a report mentioning the names of the 13 accused upon which the F.I.R. Ex. 1 was issued which included these names.

(4) The accused were arrested the same day as a result of this investigation and the material objects, viz., the axes with which the accused are alleged to have perpetrated the crime were recovered at their instance from their respective houses.

(5) The Police Patel's (P. W. 1) evidence in brief is that about 7 a.m. Gundreddi, P. W. 2 came and informed him that his brother Lakshmareddy was killed by the 13 accused whose names he mentioned and that he was informed of this incident by the eye-witnesses Revappa, Malkanna, Papagonda and Keshgonda and that immediately he issued the report attached to Ex. 1. According to the endorsement on the report and the evidence of P. W. 9 the investigating Officer, it is clear that it reached the station house at Madnoor which is only two miles from Elgoi at about 11 a.m. and immediately after the receipt according to P. W. 9 he reached the spot at 12-30 p.m. According to P. Ws. 2 and 8, however, P. W. 9 reached the spot one hour or two hours after the incident which would be about 8 or 9 a.m. The determination of the approximate time at which the Sub-Inspector reached the spot becomes important for the consideration of the question whether the report was sent before or after the arrival of the Sub-Inspector on the scene. It is contended on behalf of the appellants and suggestions have been made in the cross-examination both of P. W. 1 and P. W. 2 that the report was sent by P. W. 1 at the instance of P. W. 9 after the investigation had been made and the names of the accused were subsequently ascertained. In order to determine this question it will have to be seen whether the testimony of P. Ws. 1, 2 and 9 can be believed. (His Lordship then referred to the evidence of P. Ws. 1, 2 and 9 and concluded that it cannot be believed).

(6) If the statement in the First Information Report could be believed, it is a very strong piece of incriminating evidence against the accused, but in the view I have taken, it appears to me that the evidence of the eye-witnesses is robbed of considerable force.

(7) When considering the evidence of the eye-witnesses, it is also necessary to see whether they are independent witnesses or have any interest in Gundreddi, P. W. 2 or the deceased Lakshmareddy. (The judgment then refers to testimony of other P. Ws. and concludes that it is unsafe to rely on it).

(8) The State Prosecutor has urged that the previous statements of the witnesses should be read as a whole. This argument in my view is wholly untenable in law. A cursory reading of S. 162, Criminal P. C. or S. 145, Evidence Act, would show that previous statements are inadmissible in evidence except to the extent mentioned therein. If any of the previous statements had to be utilised as a whole, they could only be done under S. 288, Criminal P. C. and if this was not possible, the Public Prosecutor ought to have utilised the right of re-examination to obtain any explanation of the witnesses regarding the previous statement so confronted, a right which has not been exercised at all.

(9) After going through the evidence of these eye-witnesses, the casual nature in which these witnesses relate the incident,—very unconcerned and unmoved—in spite of its seriousness, creates an irresistible impression that the statements are artificial and made up for the occasion, a typical example of which is the statement of P. W. 8 when he says that when Papayya, P. W. 6, was going, witness asked him and Papayya told him that Lakshmareddy was killed. If this is so, he could not have been in his house when the accused dragged the deceased past it. On a consideration of the evidence of these witnesses as a whole, I am of the view that it will be unsafe to rely on their testimony.

(10) The next incriminating circumstances against the accused is the recovery of the axes and clothes of the deceased alleged to be at their instance so as to make it admissible under S. 27, Evidence Act. Exhibits 3 to 13 are the Panchanamas of the recovery which shows that from the accused Gundappa, Baganna, Ramanna, Shankerappa, Sangappa, Anantha-reddy, Lalayya, Narsayya, Lingayya, Fakirappa and Malgonda, axes were recovered and from accused Ramappa, a rug (Kambal), dhoti and shamla of the deceased were recovered. None of these articles are alleged to contain any blood-stains, nor were they sent to the Chemical Examiner. The prosecution case is that the deceased after being killed was dragged and thrown into the well and his dhoti and shamla and rug (Kambal) were left behind which the accused took with them. There is, however, no positive evidence with respect to this fact. When the dead body was recovered the deceased had on him only a shirt and a half sleeve vest which were found to contain human blood vide Ex. 16 (3) report of the Chemical Examiner. If the dhoti and shamla recovered from the accused belonged to the deceased, the deceased having been struck violently and there being profuse bleeding, as is evident from the earth on the spot sent to the Chemical Examiner which contained human blood, one would have expected these articles to have been immersed in blood, but no such thing is evident either from the Panchanamas or the testimony of the Panch

witness Maruthi, P. W. 5, the only Panch who has been examined. P. W. 5's testimony that on the Police Sub Inspector's enquiry accused Ramanna brougnt the dhoti and other things makes the recovery itself inadmissible. For purposes of S. 27, Evidence Act, what is required is that the recovery should be made as a consequence of information furnished by the accused in order to make so much of that statement leading to the discovery admissible. The witness is also unable to say which axe was recovered from which accused. On the other hand, his statement that there are no bloodstains on any of those axes makes the recovery useless. The evidence pertaining to this aspect of the case led by the prosecution, in my view, has the effect of overburdening the record.

(11) Before concluding I wish also to observe that in the depositions of P. Ws. 8 and 9, evidence of the statements made by witnesses to the police during the investigation which is clearly inadmissible under S. 162, Criminal P. C. has been let in. Recording courts must be careful to see that no inadmissible evidence is allowed to be adduced or recorded so as to raise an inference or give rise to the suggestion that the trial Judge was influenced by such inadmissible evidence.

(12) I have not deemed it necessary to consider the defence evidence in the view I have taken of the prosecution evidence.

(13) From the entire review of the evidence on record, the credibility of the witnesses, and a consideration of the probabilities, I have no hesitation in coming to the conclusion that the prosecution has not discharged the heavy onus resting upon it to bring home the guilt to the accused. In this view of the matter, the convictions and death sentences awarded to the three accused Anantharedddy, Malgonda and Narsayya cannot be confirmed and the appeals of all the 10 accused are allowed by setting aside their convictions and sentences and ordering their release forthwith, if not required to be detained under law. The axes recovered be returned to the accused and the clothes be destroyed.

(14) This judgment will govern the other connected appeals.

C/K.S. Appeals allowed; Convictions quashed.

AIR 1953 HYDERABAD 135 (Vol. 40 C. N. 57)

MISHRA C. J. AND
MOHAMMED AHMED ANSARI J.

Gundappa, Petitioner v. Collector of Gulbarga and another, Respondents.

Admission No. 641/B5/2 of 1952-53, D/- 27-11-1952.

(a) Constitution of India, Art. 227 — Superintendence.

The powers enjoyed under Art. 227 must be restricted to cases where there has been a grave dereliction of duty or flagrant abuse of any fundamental principles of law and natural justice, and they must further be confined to cases where no other adequate or prompt remedy is available. Case law Rel. on. (Para 4)

(b) Houses and Rents — Hyderabad House Rent Control Order (1353 F), S. 10 — Use of rent for Charitable purposes.

The mere fact that the mulgies and the rooms belong to a mosque does not necessarily imply that their income is or was used in that manner. (Para 2)

Apparao, for Petitioner.

REFERENCES: Courtwise/Chronological/ Paras

('35) AIR 1935 All 514: (154 Ind Cas 1004) 3
('51) AIR 1951 All 667: (52 Cri LJ 984(2)) 4
('33) 60 Cal 618: (AIR 1933 Cal 132: 34 Cri LJ 299) 3
('51) AIR 1951 Cal 138: (56 Cal WN 23) 4
('51) AIR 1951 Cal 193 (SB) 4
(1841) 1 QB 66: (113 ER 1054) 3

ORDER: This is an application for the issue of a Writ of 'certiorari' under Art. 226 of the Constitution. At the time of arguments, it was desired to press it as an application in revision under Art. 227, it being urged that the case was a fit one for interference under its power of superintendence.

(2) The applicant Gundappa was a tenant at Rs. 6/- per month of two mulgies and two rooms belonging to a mosque situate at Station Bazaar, Gulbarga. The rent was later increased to Rs. 11-8-0 per month and at a subsequent reassessment made by the Committee in 1358F. the amount was enhanced to Rs. 15/- per month. The petitioner considered that the increase was unjustified and he ventilated his grievance in the Court of the Tahsildar by seeking cancellation of the last mentioned enhancement. The Court of the first instance refused to interfere and the decision was upheld in appeal by the Collector of Gulbarga. Gundappa now contends that the Rent Control Order does not apply to the case in view of S. 10, which excludes from its operation buildings etc., whose rent is utilised for educational, charitable and public purposes.

This point was not raised in the Court of the Tahsildar & though in the memorandum of appeal filed by the petitioner before the Collector of Gulbarga, a ground to that effect was included, it was apparently abandoned at the time of the argument. We say so because the point is not referred to in the appellate judgment and further because the argument could not be sustained without any allegation much less proof of the facts which could entitle the building to exemption namely that its income was utilized for the purposes mentioned in S. 10. We need scarcely stress that the mere fact that the mulgies and the rooms belong to a mosque does not necessarily imply that their income is or was used in that manner, at the time of reassessment of rent in 1358 Fasli.

(3) The powers of the High Courts under Art. 227 are the same which they possessed before the passing of the Government of India Act, 1935. Under the Act of 1935, the general superintendence of the High Court included powers of judicial as well as of administrative character and they were exercised as was pointed out in — 'Jhakri Kewat v. Ram Naresh Sahi', AIR 1935 All 514 in exceptional circumstances only. In — 'Manmatha Nath v. Emperor', 60 Cal 618, Sir George Rankin observed in this connection:

> "The general superintendence which this Court has over all jurisdictions subject to appeal, is a duty to keep them within the bounds of their authority, to see that they do what their duty requires, and they do it in a legal manner. It does not involve responsibility for the correctness of their decisions either in fact or law".

It is obviously not practicable that under Art. 227 this Court should retry all cases which have been tried by judicial tribunals & that it should do so upon no settled principles but arbitrarily and sporadically. The power of superintendence is a power of known and well recognised character and it has to be exercised upon judicial principles

which give it its character. As remarked by Lord Denman C. J., in — 'Queen v. Balton', (1841) 1 Q. B. 66 at p. 76:

"It is of much more importance to hold the rule of law straight, than from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

(4) The position has been clearly defined in — 'Sukhdeo v. Brij Bhushan', AIR 1951 All 667; — 'Narendra Nath v. Binode Behari', AIR 1951 Cal 138; and — 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1951 Cal 193 (SB), & it is now well established that the superintendence referred to in the aforementioned Article does not invest the High Court with an unlimited prerogative to interfere in cases where a wrong decision has been arrived at either in fact or in law. The powers enjoyed under it must, we apprehend, be restricted to cases where there has been a grave dereliction of duty or flagrant abuse of any fundamental principles of law and natural justice, and they must further be confined to cases where no other adequate or prompt remedy is available. Applying this principle, it is clear that the present case does not fall within the article.

(5) This application has no substance. We dismiss it accordingly.

A/D.H. Application dismissed.

AIR 1953 HYDERABAD 136 (Vol 40 C. N. 58)

PALNITKAR C. J. AND SRINIVASACHARI J.

Afzal Begum, Petitioner v. Gulam Samdani and others, Respondents.

Writ Petn. No. 129 of 1951-52, D/- 23-9-1952.

Houses and Rents — Hyderabad Rent Control Order (1353 F), Para 8, Cl. 3(a) — "Amaada" or "Tayyar" — Meaning.

The word "Amaada" or "Tayyar" in Cl. 3 (a), of Para. 8 does not mean that if an expression of a desire to pay the arrears of rent is made before the Controller that will be sufficient compliance. What it means is that when the Rent Controller is ready to hear the objections of the parties, an actual tender of the money due should be made before him.

(Para 3)

R. Baburam Dayal, for Petitioner; Abul Wahid Oasi, for Respondents.

JUDGMENT: In this case, a question of interpretation of para 8, cl. 3(a) of the Hyderabad Rent Control Order has arisen. The rendering of the Urdu wording of that clause is that if after hearing the objections of the parties, the Controller is satisfied that the tenant has not paid the arrears of rent due or tendered the rent due by him, then he may order the eviction of the tenant. The Urdu wording which is equivalent to this clause is "VOH USKI ADAYI KE LIYE AMAADA YA TAYYAR NAHI HAI". It was argued before us that the word "AMAADA" or "TAYYAR" means that if an expression of a desire to pay the arrears of rent is made before the Controller that will be sufficient compliance of the wording of the clause and actual payment of tendering of arrears is not necessary. We are not prepared to agree with this contention.

(2) The facts which have given rise to this revision petition which we have treated as a writ petition, are briefly as follows: The respondent executed a registered rental agreement on 30th Farwardi 1354 Fasli in favour of the petitioner, stating that he would pay a monthly rent of Rs. 30 on the first of each month. On the basis of this rental agreement, the petitioner filed a suit before the Rent Controller on 13-6 1358 Fasli, stating that arrears of rent for a period of 3 years and 5 months were due and that they not having been paid, the tenant should be evicted and arrears ordered to be paid. On 25-7-1358 Fasli the respondent filed the written statement denying the execution of the Rent Deed and stated that he is not the tenant of the petitioner and made several other allegations stating that the house really belonged to one Saheb Begum, who had mortgaged the same with the petitioner and that the so-called rent was really the interest due towards the mortgage-money, which was not allowed under the law. While the case was pending before the Rent Controller, the petitioner filed a suit on 4-8-1358 Fasli in the Court of Small Causes for arrears of rent for three years. In his written statement in that Court, the respondent again denied that he was a tenant. The Small Cause Court decreed the petitioner's suit on 27-12-1358 Fasli for Rs. 1,080/- and costs. A revision petition was filed against that decree in the High Court on 17-1-1950 and the High Court rejected the revision petition observing that it was not for the respondent to raise the question of mortgagor and mortgagee and their relations 'inter se,' as he was only a tenant. After the rejection of the said revision petition by the High Court, the respondent deposited the decretal amount in Court on 22-1-1950.

(3) It is now alleged on the basis of this payment that this must be construed as amounting to readiness of the respondent to pay the amount and that though he has paid the amount long after the filing of the suit before the Rent Controller, it should be held that he had complied with the provisions of para 8, cl. 3(a) referred to above. We are clearly of the opinion that this is not a compliance of the above provision. What the provision means is that when the Rent Controller is ready to hear the objections of the parties, an actual tender of the money due should be made before him. We find in the written statement that has been filed before the Rent Controller that not only he did not tender the amount but he denied that he was a tenant and contended that the petitioner could not receive the rent. This cantankerous attitude cannot be reconciled with willingness to pay. Under the circumstances, we cannot hold that the provisions of the above para have been complied with. We are clearly of the opinion that he is a defaulter.

(4) Shri Babu Ramdayal, the learned advocate for the petitioner, raised another point. He argued that there was an amount of arrears of rent for 5 months due which he could not recover from the respondent as having been time-barred, but for the purposes of assessing the question of tender of the rent due, the Court should look into the fact of non-payment of this amount. We are of the opinion that there is great force in this argument. Shri Abul Wahid Oasi, the learned advocate for the respondent, stated that as the amount had become time-barred he was not bound to pay. However, it is not necessary to decide this question of non-payment of 5 months' rent in view of our interpretation of para 8, cl. 3(a). We, therefore, allow this writ petition, quash the lower Court's order and direct the eviction of the tenant.

(5) The tenant today submitted an application. We cannot entertain it and it is rejected.

B/V.S.B. Petition allowed.

AIR 1953 HYDERABAD 137 (Vol 40, C. N. 59)

SIDDIQI J.

Baji Rao, Appellant v. Ganaji and others, Respondents.

Appeal No. 399/4 of 1359 Fasli, D/- 10-3-1950.

Limitation Act (1908), Arts. 132 and 147 — (Hyderabad) Limitation Act (2 of 1322 Fasli), Arts. 118 and 133 — Applicability — T. P. Act (1882), S. 67.

A suit for foreclosure of a mortgage without possession which expressly stipulates that the mortgagee is entitled to foreclose the property on failure to pay the mortgage money is maintainable and is governed by Art. 133 and not by Art. 118 of the (Hyderabad) Limitation Act. 36 Deccan LR 858, Rel. on. (Para 2)

Anno: Lim. Act, Art. 132 N. 1, 2; Art. 147 N. 1.

Govinda Rao Arhdapurkar, for Appellant; Sham Rao, for Respondents.

REFERENCE..... /Para.
36 Deccan LR 858 2

JUDGMENT: This is a suit by a mortgagee against the mortgagor for enforcement of the terms of the mortgage and he prays for a decree for foreclosure. The trial court on issues 1 and 2 as to the mortgage and rights and consideration found for the plaintiff and as regards the issue No. 4 relating to the compliance with the terms of the Money Lender's Act partially decided in favour of the defendant that the accounts have not been supplied to the defendant from time to time as determined by the provisions of that Act. The Court in this respect remarked that this matter would only effect the right of the plaintiff to recover interest and costs. But under issue No. 3, that he referred to the bar of limitation and dismissed the suit as barred by period of limitation on account of Art. 118 of the local Limitation Act. The appellate Court upheld this view and dismissed the first appeal. The plaintiff, therefore, is before me in his second appeal. The preliminary objection by the respondent's advocate that second appeal does not lie fails because for reasons that would be sufficiently evident from the latter portion of this judgment.

(2) The first point that comes up for consideration is whether Art. 118 will be applicable or Art. 133 of the local Limitation Act will apply. The first mentioned Article refers to a case of money secured on immovable property and lays down a period of 12 years from the date when the right to get that money accrues to the plaintiff. But Art. 133 of this Act is an express provision for cases of foreclosure and mortgage and has a long period of 30 years from the date of mortgage money being payable. The lower court has applied Art. 118 on this ground that here the mortgage is a simple one without possession and therefore plaintiff cannot come in for a foreclosure suit. This view would be perfectly correct if I come to the conclusion that in a mortgage of this kind plaintiff has no right of foreclosure on account of the inherent nature of the contract, and not on account of some collateral or side issue. But this deed of mortgage though without possession contains a clause to the effect that the plaintiff will be entitled to foreclosure if the amount of mortgage is not paid.

It is one thing to say that a simple mortgage does not in itself carry the right of foreclosure, but it is altogether a different matter if it is contended that in spite of such contract between the parties such express term would be void and unenforceable at law for some legal prohibition, public policy, so on. This condition being there the defendant will have to convince me that that term is void or voidable. I have always been of opinion and have taken that line in number of reported cases that the law of contract as it stands gives complete liberty to contract to the parties and such an authority between competent parties is only restricted by specific prohibitions and such prohibition will have to be express or by necessary implication.

In '36 Deccan L R 858', I have pointed out that Law of contract gives considerable amount of freedom of contract to the parties to the contract and the Transfer of Property Act has not completely superseded the provisions of the Contract Act in dealing with the immovable property in matters not covered by Transfer of Property Act. The Contract Act being a general law covering all contractual transactions, the Transfer of Property Act is a specific law relating to the transactions of property and for that reason the provisions of Transfer of Property Act will certainly supersede the provisions of the Contract Act so far as they relate to property, but where the provisions of the Transfer of Property Act are silent and do not cover a particular case or cases and when there is no restriction on the liberty ot the contracting parties there can be a valid contract under the Contract Act & that contract cannot be avoided merely on the ground that the Transfer of Property Act does not directly provide for it, and I have refused to accept and read such a principle into the Transfer of Property Act.

Here I am not concerned with this question whether this mortgage is a simple mortgage or not but I have stated in that case reported that a simple mortgage would be one in which there is no contract as to the right of foreclosure, and I have also held that S. 67, Transfer of Property Act, does not take away the right of foreclosure if such a right has been contracted for. In view of that reported case and for the reasons I have mentioned there, plaintiff is entitled to sue for foreclosure whether he will get that decree or not in view of the facts of this case would be altogether a different matter. That being so, I have no hesitation in applying Art. 133, Limitation Act, because this is a suit for foreclosure and has admittedly been instituted within 30 years from the date when the mortgage money fell due and became recoverable.

(3) Apart from this consideration, I hold that Art. 118 even if applicable to this case is ineffective for this reason that the amount became recoverable according to the terms of the contract not on 15th Azur 1343 Fasli but on 15th Azur 1344 F. The lower court came to the conclusion otherwise for this reason that in the absence of any evidence as to the intention of the parties the document will have to be resorted to in this matter. The date mentioned there and the period for which mortgage was made being repugnant to each other the court concluded that the intention of the parties is evident from the document itself was for the mortgage to subsist upto 15th Azur 1343 Fasli on account of that date being a definite one to indicate the intention of the parties and the following sentence of 3 years period of a general nature will be necessarily of lesser importance in finding the intention sought.

On the other hand, I am of opinion that the period of the mortgage as stated in this document is 3 years there is every reason to assume that it is the period on which all the emphasis lay as the parties came to terms and contracted accordingly. Those who have experience and knowledge of agricultural contracts in this country know perfectly well that the agriculturist does not go about in his daily dealings usually by particular dates but certainly the period of mortgage would be a very important matter for them. This is a case from Marathwadi district and it will be very difficult for me to come to the conclusion that in the circumstances of this particular case the parties attached any importance to that particular date, 15th Azur 1343 Fasli. Perhaps the parties were fully unaware of the Fasli calendar.

But of course these are mere guesses and probabilities and the matter cannot be decided solely on them unless supported by the record. If this date was really important to the parties and as the question of limitation was raised it was open to the defendant to show that that particular date had some particular importance in the mind of the parties so as to enable the court to overlook the period of 3 years contracted for. The Fasli year begins from 15th Azur and if the parties were particular about dates, I do not see any reason why it was not convenient to terminate this contract of mortgage on the end of the Fasli year instead of dating it to the 15th. Surely a period of 15 days is almost negligible in a case of this kind. Evidently the 15th Azur was fixed because the year from the date of mortgage ended on that date.

The year 43 Fasli was to my mind inserted erroneously under the impression that the 3 years period concludes on that date and having come to 3 years contract the date was probably found by the scribe. Apart from the fact that similar contracts are usually made for 3, 5, 6 years, I am supported in this view that it was a contract for 3 years, in this fact that one of the terms of this deed lays down that interest will be paid annually from year to year from the date of the contract. Now if this contract was only for 2 years there was no need to make this term in these words because the only date on which interest would be payable would have been 15th Azur 1342 Fasli and then of course the year after the whole amount of mortgage money and interest would become due. It was easier and simpler to say in that case that interest will be paid on 15-1-42 and the whole amount on 15-1-43 and there was no need to adopt the present phraseology.

Even if Art. 118 applies the period will commence from expiry of 3 years and the suit is instituted within limitation i.e., within the period of limitation of 12 years if accounted from 15th Azur 1344 Fasli, I, therefore, hold that in either case the suit is free from the bar of limitation.

(4) On other points the lower courts have found for the plaintiff. I see no reason to disagree with them. Of course consequences of the finding of fact under issue No. 4 will have to be determined. I have it on the oath of the plaintiff in the witness box and in the absence of any evidence of rebuttal I have no hesitation in holding that plaintiff is a licenced money lender. Indeed it would be an act of unusual daring to swear to it when he does not hold the necessary licence, and the defendant could have easily rebutted it. Of course, the accounts have not been supplied to the defendant from time to time as found by the trial court and for that reason plaintiff will not be entitled to the interest and the costs of this suit. But I see no reason to dismiss this suit to the extent of the principal amount with foreclosure terms and a foreclosure decree.

I, therefore, allow this appeal and reverse the judgment of the lower courts and decree the plaintiff's suit for foreclosure for the principal amount of Rs. 300/- and a preliminary decree is granted therefor with a period of 6 months to pay the mortgage amount. No order as to costs for the reasons above mentioned.

C/K.S. Appeal allowed.

AIR 1953 HYDERABAD 138 (Vol. 40 C. N. 60)

PALNITKAR C. J. AND SIADAT ALI KHAN J.

Chathakni Ramulu, Petitioner v. Chathakni Ganga Ram, Respondent.

Revn. Petn. No. 262/4 of 1951, D/- 9-10-1952.

Civil P. C. (1908), O. 39, R. 1 and O. 43, R. 1 (r) — Order granting temporary injunction — Appeal — Maintainability.

Where a notice to show cause why a temporary injunction should not be granted in favour of the plaintiff under O. 39, R. 1 is issued to the defendant, the latter has two remedies open: either to go before the trial Court and show that there was no cause for the issue of the injunction or file an appeal under the provisions of O. 43, R. 1 (r) against the order granting injunction. The Court cannot compel him to choose any particular remedy. When the defendant has chosen to prefer an appeal against the order the appellate Court cannot dismiss it on ground that other remedy was open to the appellant but must give a hearing and the appeal should be disposed of according to law. (Para 2)

Anno: C.P.C., O. 39, R. 1, N. 20.

Jehangir Ali, for Petitioner; Bhimsen Rao, for Respondent.

ORDER: This revision petition has been directed against the order of the District Judge at Nizamabad, dated 27-9-1951, by which he has dismissed the appeal of the present petitioner on the ground that it was premature and does not lie. We have heard the arguments of the learned advocates of the parties at great length. We are of the opinion that this revision petition should succeed and the judgment of the lower Court be set aside.

(2) The facts briefly are: that a temporary injunction under the provisions of O. 39 R. 1 was granted in favour of the plaintiff-respondent by the trial Court. The petitioner filed an appeal against that order in the Court below. The Court came to the conclusion that the appeal is not maintainable as the petitioner had a remedy of representing his case as to why the temporary injunction should not be granted before the trial Court and notice to show cause was actually issued by that Court. We do not agree with this contention. The defendant-petitioner has two remedies open: either to go before the trial Court and show that there was no cause for the issue of the injunction or file an appeal under the provisions of O. 43, R. 1 (r). The Court cannot compel him to choose any particular remedy. When the petitioner had chosen the course of

filing an appeal before the lower Court, he ought to have been given a hearing and the appeal should have been disposed of according to law. We remand the case to the lower Court and direct that the appeal be disposed of according to law. We allow costs to the revision-petitioner. Advocate's fee Rs. 30.

B/K.S. Revision allowed.

A.I.R. 1953 HYDERABAD 139 (Vol. 40, C.N. 61)

PALNITKAR C. J. AND M. S. ALI KHAN, J.

Mangani Ram Nathumal, Appellant v. Government of India, Respondents.

Revn. No. 27/4 of 1952, D/- 12-9-1952.

(a) Civil P. C. (1908), S. 80 — Suit against Railway — Notice — Suit filed when Hyderabad Civil P. C. was in force at the place — No provision in Hyderabad Civil P. C. corresponding to S. 80, Civil P. C. — Notice is not necessary: (Para 3)

Anno: C.P.C., S. 80 N. 9.

(b) Railways Act (1890), S. 77 — Hyderabad Railways Act, S. 46 — Word 'Loss' in S. 77 does not include non-delivery — Suit against Railway for compensation for non-delivery — Notice under S. 77 is not necessary — Notice expressly claiming compensation but not specifying any fixed and certain sum as compensation — Notice is in sufficient compliance of S. 77: Case law referred. (Para 3)

Anno: Railways Act, S. 77 N. 2.

(c) Railways Act (1890), S. 80 — Scope — Suit for compensation for loss of consignment carried by more than one railway — All Railways could be made parties. (Para 5)

Anno: Railways Act, S. 80 N. 1.

(d) Limitation Act (1908), S. 9 and Art. 31 — Hyderabad Limitation Act, Art. 26 — Suit against railway for compensation for non-delivery — Absence of Forum — Effect — Starting point of limitation — (Hyderabad) Suits against Government Act (5 of 1320 F).

Held that before 26-1-50, that is, the advent of the Constitution and the integration of the Hyderabad State Railways on 1-4-50 the plaintiff had no forum where he could sue both the Railways. Till the advent of the constitution he could not sue the Hyderabad State Railway as S. 4 of the (Hyderabad) Suits against Government Act was an impediment in his way. Nor could he have sued the East Punjab Railway in Hyderabad as India was a sovereign State and it was doubtful whether any Hyderabad Court would have entertained a suit against the Government of India. Absence of forum had the effect of suspension of remedy. Apart from all this the law of Limitation has to be applied liberally and, having regard to the circumstances of the case the principle that the plaintiff is entitled to date his cause of action from the date when the remedy is available was applicable and, therefore, the suit was within limitation under Art. 31, Limitation Act (corresponding to Art. 26 of Hyderabad Limitation Act). AIR 1924 Cal 600; AIR 1928 Cal 646 (SB) and AIR 1935 Cal 333, Relied on. (Para 5)

Anno: Lim. Act, S. 9 N. 2, 3; Art. 31 N. 10.

Bishambar Dayal and Girija Parshad Sanghi Vakil, for Appellant; Krishna Chandra Mulashwar, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('13) 21 Ind Cas 428: (11 All LJ 775 Note) 5
('25) 85 Ind Cas 474: (AIR 1925 All 273) 3
('26) 96 Ind Cas 604: (AIR 1926 All 686) 3
('26) 97 Ind Cas 474: (AIR 1926 All 698) 3
('46) AIR 1946 All 198: (ILR (1946) All 250) 3
('49) AIR 1949 All 223: (1949 All LJ 166) 3
('03) 5 Bom 371 5
('72) 18 WR 145(2) 5
('07) 34 Cal 419: (11 Cal WN 1071) 5
('24) 79 Ind Cas 520: (AIR 1924 Cal 600) 5
('28) AIR 1928 Cal 646: (56 Cal 61 SB) 5
('35) AIR 1935 Cal 333: (62 Cal 66) 5
('45) AIR 1945 Cal 412: (49 Cal WN 240) 3
('49) AIR 1949 Cal 380 3
('27) 102 Ind Cas 149: (AIR 1927 Lah 471) 3
('27) AIR 1927 Oudh 478(2): (3 Luck 102) 3
('23) 75 Ind Cas 18: (AIR 1924 Pat 811) 5
('27) AIR 1927 Pat 344: (6 Pat 105) 5
('28) AIR 1928 Pat 95: (105 Ind Cas 546) 3
('28) AIR 1928 Pat 259: (107 Ind Cas 158) 3
('28) AIR 1928 Pat 270: (7 Pat 192) 3
('33) 12 Pat 67: (AIR 1933 Pat 45) 5
('33) AIR 1933 Pat 630: (148 Ind Cas 396) 5
('51) AIR 1951 Punj 383 3

ORDER: This is a reference from the Single Bench dated 11-4-1952. We have heard the arguments of the learned advocates of the parties and record our opinion below.

(2) The reference has arisen from a revision petition against the order of the District and Sessions Court, Secunderabad, dated 9-8-1951, by which the revision petitioner's (the joint family of Mangani Ram Nathmal per Manager Nathmal) suit against (1) the Government of the Union of India owning the East Punjab Railway per the Chief Administrative Officer of East Punjab Railway, head office, Delhi and (2) the Government of the Union of India owning the Nizam State Railway per General Manager, Head Office, Secunderabad, was dismissed. Hence the revision and the reference by the Single Bench. The facts alleged are that on 20-11-1946 a consignment of two bags of 'alu baqara' and one of 'hing' valued at Rs. 569 were on behalf of the revision-petitioner handed over to the North Western Railway at Multan City for carriage and safe delivery to him in Hyderabad. The consignment was not delivered in time and was not delivered till the date of the suit, i.e., 20-7-1950. On 8-4-1947, the revision-petitioner gave notices to both the respondent Railways under S. 46, Hyderabad Railways Act, corresponding to S. 77, Indian Railways Act. The second respondent Railway replied on 17-4-1947 that the matter was receiving attention and after some correspondence by which they sent for the original 'bichuk' and the receipt, they ultimately intimated the revision-petitioner on 20-7-1948 that, his claim cannot be entertained as it was barred by limitation. The revision-petitioner carried on further correspondence protesting that his claim was not barred, but the said respondent on 17-2-1949 dismissed his claim again on the same plea of limitation. To enable himself to sue the respondents Railways, the revision-petitioner filed an appeal to the Secretary to Hyderabad Government, Railway Department, on 6-1-1949 but the Secretary did not reply and it seems that he did not take any action on the appeal till the date of the suit. In these circumstances the revision-petitioner has claimed that he had no remedy till the advent of the Constitution on 26-1-1950 and the integration of the Nizam State Railway with the Indian Railways on 1-4-1950 and hence his suit is within time. Respondent 2 filed a written statement on 10-1-1951 pleading

that the revision-petitioner was not entitled to maintain the suit as not only he had given no notice under S. 80, Indian C. P. C. and S. 77, Indian Railways Act, but his suit is also hopelessly out of time. The first respondent Railway also filed a written statement on 31-3-1951 and it is to the same effect.

(3) The only questions in this revision petition are: whether the notice under S. 80, Indian C. P. C. and S. 77, Indian Railways Act, or the corresponding S. 46, Hyderabad Railways Act, is necessary and whether the suit is barred by limitation. As far as notice under S. 80, Indian C. P. C. is concerned the learned District and Sessions Judge, Secunderabad, has held correctly that as at the time of the filing of the suit the Hyderabad Civil Procedure Code was in force and there is no provision in it corresponding to S. 80, Indian C. P. C., no notice under S. 80 was required. Regarding the notice under S. 46 or S. 77 of the Railways Act, the judgment under revision is silent, but the learned advocates of the respondents argued that notice under the said sections was necessary and though the revision-petitioner gave a notice on 8-4-1947, it did not comply with the provisions of the sections and was insufficient and incorrect inasmuch as no compensation and no fixed and determinate amount of compensation was claimed in it. They explained that though the revision-petitioner's contention is that the consignment was not delivered to him, yet the word 'loss' used in S. 77 has been interpreted in the cases cited in the margin * to include "non-delivery" and, therefore, it was incumbent on him to give a notice in full compliance of the requirements of the section and claim fixed and determinate compensation. This contention is easily disposed of, for the notice given by the revision petitioner expressly claimed compensation and though it did not claim any fixed and certain sum as compensation, neither the wording of S. 77 nor the authorities cited require that a fixed and certain sum should be claimed in the notice. Thus, we are of the opinion that the notice issued by the revision-petitioner was in sufficient compliance of the provisions of the section. We may mention further that the view taken in the cases cited above that the word 'loss' used in the section includes non-delivery is against the volume of authority of the Indian High Courts. Reference may be given to the marginally ¶ cited cases. Of the cases cited by the learned advocates for the respondents, — '102 Ind Cas 149 (Lah)' is clearly against his contention and as to the rest of the cases, we can only hold that the volume of authority is against the view taken in them. It is thus clear that as the goods were not delivered, no notice under S. 77 was required; and the notices issued by the revision-petitioner were in sufficient compliance of the section.

(4) The most difficult question in this revision, however, is that of limitation. The learned advocates for the defendants argued that the suit is hopelessly out of time from every point of view. They argued that Art. 26, Hyderabad Limitation Act, corresponding to Art. 31, Indian Limitation Act, is the only article that is applicable to this suit; that the goods were consigned for delivery on 20-11-1946 and, therefore, time began to run as soon as the ordinary period of transit was over; that for a consignment to arrive from Multan to Hyderabad it could not take more than a month or so and, therefore, taking the ordinary period of transit to end, say, on 1-1-47 time began to run from that date and the revision petitioner should have filed the suit before 1-1-48 but he has filed it on 20-7-1950; that there was no need for the plaintiff to enter into any lengthy correspondence with the respondent Railways as they were not admitting any liability; that he should, therefore, have forthwith given the notice and filed the suit in pursuance of S. 77, Indian Railways Act; that even conceding without admitting that he waited for a reply of the respondent Railways, the first reply was given to him on 20-1-1948 and he should have filed the suit within one year of that date; that even conceding further that he entered into negotiations pleading with the Railways that his suit was not barred by limitation, which he should not have done and even exempting this time, he should have filed his suit within one year of the second refusal of his claim on 6-1-1949, i.e., on or before 6-1-1950 whereas he has filed his suit, as already stated, on 20-7-1950. Thus, the learned advocate argued that looked at from any point of view, the plaintiff's suit is hopelessly out of time. The learned District and Sessions Judge has in the judgment under revision fully endorsed this opinion. We have to examine whether this finding and the contentions of the learned advocates can be upheld after considering the reply of the learned advocate for the revision-petitioner.

(5) The learned advocate for the revision-petitioner argued that owing to unprecedented political and constitutional circumstances his remedy was affected. He stated that the circumstances which affected his remedy were the attainment of independence by India on 15-8-1947; and the attainment of independence by Hyderabad; that Hyderabad also became a sovereign state, as the British paramountcy over it was expressly ended and it was recognized that it was not replaced by the paramountcy of any other power; that all the railway areas in the Hyderabad State were also renditioned on 2-8-47; that it is a principle of International Law that a sovereign state cannot be sued in any other state; that because of it the revision-petitioner could not sue the Government of India owning the East Punjab Railway in Hyderabad, nor could he sue the Nizam State Railway in Delhi; that he could not sue the state-owned Nizam State Railway in

---

* Thakurdass Manrokkham Lal v. E. I. Railway Co., 96 Ind Cas 604 (All); Sheo Dayal v. G. I. P. Railway Co., 97 Ind Cas 474 (All); E. I. Railway Co. v. Fazal Elahi, 85 Ind Cas 474 (All); Haryana Cotton Mills Co. Ltd. v. B. B. and C. I. Rly. Co.', 102 Ind Cas 149 (Lah); Sristidhar Mandal v. Governor General in Council, AIR 1945 Cal 412.

¶ Jalli G. A. v. Dominion of India, AIR 1949 Cal 380; Janeshwarlal Rajeshwarlal v. Dominion of India', AIR 1951 Punj 383; Governor General in Council v. Mohammad Badr-i-alam', A. I. R. 1949 All 223; Governor General in Council v. Debi Sahai', AIR 1946 All 198; Bala Prasad v. B.N.W. Rly. Co., AIR 1927 Oudh 478 (2); Nagendra Nath Sen v. B. and N. W. Railway Co., AIR 1928 Pat 95; Tarachand v. B. N. Rly. Co., AIR 1928 Pat 259; G. I. P. Rly. Co. v. Gopiram Gauri Shankar, AIR 1928 Pat 270; 96 Ind Cas 604 (All); 97 Ind Cas 474 (All); 85 Ind Cas 474 (All); 102 Ind Cas 149 (Lah); AIR 1945 Cal 412.

Hyderabad, because of the provisions of S. 4, Hyderabad Suits Against Government Act (No. V of 1320), which provide that before an application for permission to file a suit against Government can be filed with the Government Legal Adviser, the right of appeal to the Department concerned should first be exercised by a petitioner; that, as already stated above, the revision-petitioner filed an appeal before the Railway Secretary who, however, did not take any action on it. The learned advocate argued further that this state of affairs continued till the accession of Hyderabad State to India in October 1948, the advent of the Constitution and the integration of the Nizam State Railway with the Indian Railways on 1-4-1950; that till the last-mentioned date he had no forum where he could have sued both the respondent Railways; that it was essential for the success of his suit to sue both the Railways and no law compels him to sue the North Western Railway alone in Delhi; that as a matter of fact the North Western Railway was partitioned and the portion with the Multan City went to the share of Pakistan and obviously, he could not have sued the Government of India at Multan, that similarly he could not have sued at Delhi the East Punjab Railway which is the portion of the North Western Railway that fell to the share of India before the India Independence (Rights, Property, Liabilities) Order of 1947 and, after the said Order of 1947 he could have sued the East Punjab Railway in Delhi, but in that case he could have sued that Railway alone; that, as already stated even under S. 80, Indian Railways Act, he could not be compelled to sue one Railway only.

In our opinion, the decision of the question of limitation is thus reduced to two points only. One is whether S. 4 of the Act, V of 1320, was really in the way of the revision-petitioner and the other is whether the revision-petitioner can be compelled to sue the East Punjab Railway only. Taking the latter point first, it is important to be clear about the reasons why he could not have sued the East Punjab Railway at Delhi soon after the India Independence (Rights, Properties, and Liabilities) Order, 1947. It is clear that the consignment was made to the East Punjab Railway or their predecessor, the North Western Railway at Multan; that the contract was with these Railways; that according to some cases the Nizam State Railway was an agent only while according to some others it was the principal; that it is clear law that one can sue either the principal or the agent. The very cases referred to by the learned advocate, namely, — 'Arjundas Gulab Rai Firm v. E. I. Rly. Co.', 75 Ind Cas 18 (Pat); — 'Jamunadas Ramjas v. E. I. Rly. Co. Ltd.', AIR 1933 Pat 630, — 'G. I. P. Rly. Co. v. Radhakisan', 5 Bom 371 and — 'Narang Rai v. Riversteam Navigation & Co. Ltd.', 34 Cal 419 while holding the forwarding Railway to be the agent of the delivering Railway do not dispute the principle that both the Railways, that is, the forwarding Railway & the delivering Railway can be sued, the principle being that ordinarily a principal is liable for the negligence of his agent, and that the person who suffers the loss would also have the option of suing the agent himself who had been negligent. Thus, it seems clear that the revision-petitioner could have sued the East Punjab Railway. But is this really so? For even S. 80, Indian Railways Act, which would have been the section applicable to his suit against the East Punjab Railway, gives him the option to sue the delivering Railway, and in the exercise of this option considerations like the following considerations have been deemed to be valid:

"If the Railway which delivers the goods at destination to the consignee or any other Railway in the series should be the railway on whose line the loss, etc., occurred, 'the consignee, if he should be a resident of the destination station or of the station of that railway on whose line the loss etc., occurred, may find it easier to institute his suit at that place than if he be obliged to go to the place from which the goods were forwarded'. The effect of S. 80 is, therefore, to 'enable' the aggrieved party, subject to other conditions, to 'choose' the railway for instituting his suit for compensation. Suppose the railway on whose line the loss, etc., occurred, is looked upon as a mere agent of the forwarding railway, then, if this section had not been enacted, it is possible to raise the objection that the agent cannot be sued. 'Kokamal v. G.I.P. Rly.', 21 Ind Cas 428 (All) that, therefore, the suit against that railway is not maintainable and that it should be instituted only against the forwarding or contracting railway. Again, the objection to the suit against the losing railway may also be that there is no privity of contract — 'Gujendro Mohun Shana v. E. B. Rly. Co.', 18 W R 145 (2) between the plaintiff and the offending railway and that, therefore, as against such railway, the plaintiff has no right of suit. In order to prevent the raising of such defences on behalf of the railways, it is now enacted that the plaintiff has a right to choose the railway which he may sue, either the railway from which the plaintiff obtained his pass or bought his ticket or to which he delivered his goods or animals, or the railway administration on whose railway the loss, injury, destruction or deterioration occurred. Of course, the plaintiff has always a right of suit against the railway with which he made his contract originally, that is, with which he has privity of contract, to refer to it shortly, the forwarding or the contracting railway, which he must always sue in his own interests. But he may have no right of suit against the railway at the place where the loss, etc., occurred. To enable, therefore, the plaintiff, if he happened to be residing at or near the place of loss, etc., to sue the railway on whose line the loss may occur, it is now enacted that he may elect to sue the railway on whose line the loss etc. occurs".

It would thus be seen that by S. 80 the liability of the Railways has been made a statutory liability and is not made to rest either on the shifting relation of principal and agent or on tort, as is held by Sir Courtney-Terrel C. J. of the Patna High Court in — 'B. and N. W. Rly. Co. v. Kameshwar Singh', 12 Pat 67. However this may be, it is fairly clear from what has been quoted above that had the revision-petitioner sued the East Punjab Railway at Delhi, Section 80, Indian Railways Act, would have applied and under it he would have had an option and would have been permitted to elect to sue the Nizam State Railway. There appears to be no reason why we should not hold that he elected to sue the Nizam State Railway, as that was the Railway of his residence and it was convenient to him to sue it,

but found impediments in the way. We have already described these impediments above & we will comment upon them just now. But before we do that we may mention here that although S. 80 gives the plaintiff the option to sue any one of the two companies through whose lines the goods have been carried, it by no means prohibits him from impleading both the companies in a suit. Indeed in many cases, it may be difficult for the plaintiff to know before the institution of the suit on which line the loss occurred: hence if the plaintiff sues 1 of the 2 Railways it may very well turn out that the loss occurred on the other railway & it was a necessary party to the suit. Such was the case in—'E. I. R. Rly. Co. Ltd. v. Kedarnath Seth', AIR 1927 Pat 344. Thus, the insistence of the learned advocate for the revision-petitioner that before 26-1-50, that is, before the advent of the Constitution and the integration of the Hyderabad Railways he had no forum where he could sue both the Railways does not seem to be devoid of weight.

Coming to the impediments which the revision-petitioner had in suing the Nizam State Railway it seems to us fairly clear that the provisions of Suits Against Government Act, (V of 1320 F.) were really in the way. The Nizam State Railway was a state-owned Railway, and to sue it, the permission of the Government was necessary. We do not think that the plea of the revision-petitioner that the Legal Adviser's Office wanted in some kindred cases that he should also file an appeal before the Railway Secretary is incorrect. In this way, the plaintiff could not sue the Nizam State Railway till the advent of the Constitution. Nor could he have sued the East Punjab Railway in Hyderabad as India was a sovereign State and in spite of the comment of the learned Sessions Judge, Secunderabad, we have our doubts whether any Hyderabad Court would then have entertained a suit against the Government of India. Thus, it seems to us that the main points of the arguments of the learned advocate for the revision-petitioner are not devoid of force. The Nizam State Railway took time for inquiry and then without answering what happened to the consignment in a straightforward manner, pleaded limitation on 20-1-48. In this way we are clearly of the opinion that before the advent of the Constitution and the integration of the Railway on 1-4-1950 there was no forum. Absence of forum having regard to—'Dwijendra Narain v. Joges Chandra', 79 Ind Cas 520 at p. 530 Col. (2) (Cal) has the effect of suspension of remedy. Similarly, it has been held in — 'Hari Mohan v. Parmeshwar Shaw', AIR 1928 Cal 646 and — 'Jateendra Chandra v. Rabateemohon', AIR 1935 Cal 333, that the plaintiff is entitled to date the cause of action from the date on which the remedy is available. Apart from all this, we are persuaded that the Law of Limitation has to be applied liberally &, having regard to the circumstances of this case, this principle is all the more applicable. We are thus of the opinion that this revision petition should be allowed. In the circumstances of the case we make no order as to costs.

Revision allowed.

B/K.S.

A.I.R. 1953 HYDERABAD 142 (Vol. 40, C.N. 62)

A. M. ANSARI J.

Sketna Dev Padmiah, Petitioner v. Firm of Srigiri Venkiah and others, Respondents.

Revn. Petn. No. 255 of 1950, D/- 12-9-1951.

(a) Companies Act (1913), S. 4 (2) — Members less than 20.

Where the members of the 'Chit Fund' together with the organisers are less than 20, the association is not compulsorily registrable as a company under S. 4 (2), Companies Act. 29 Mad 477, Foll. (Para 4)

Anno: Companies Act, S. 4 N. 2.

(b) Promissory note — Suit based not solely on pro-note but also on transaction resulting in pro-note — Pro-note inadmissible — Plaintiff can prove transaction and arrears on that account. (Para 4)

(c) Hyderabad Paper Currency Act, S. 15 — Suit on bearer pronote does not lie. (Para 4)

(d) Debt Laws — Hyderabad Money Lenders Act, S. 2, Exemption (E) — Applicability.

Exemption (E) is not at all applicable where the amount has not been advanced upon any negotiable instrument other than a pronote. (Para 6)

(e) Debt Laws — Hyderabad Money Lenders Act, S. 2, Exemption (B) — Association of lender not registered as Stake-holder — Exemption does not apply. (Para 6)

(f) Debt Laws — Hyderabad Money Lenders Act, Ss. 2, 9 — Organizers of Chit Fund held money-lenders — Their suit for loan held could not be decreed, if they had no license. AIR 1935 Mad 385; AIR 1937 Mad 364, Disting. (Para 7)

Bhimsen Achari, for Petitioner; V. K. V. Sunder Raj, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('06) 29 Mad 477: (16 Mad LJ 385) 4
('35) AIR 1935 Mad 385: (158 Ind Cas 1037) 6
('37) AIR 1937 Mad 364: (169 Ind Cas 692) 6

ORDER: This revision petition arises out of a money suit by the firm of 'Srigiri Venkiah', the Organiser of a 'Chit Fund' which had twelve members, each subscribing Rs. 100/- a month for the period of a year. The defendant 1 was a member of the fund and held two shares contributing Rs. 200/- a month. According to the rules of the Chit Fund, it is said, the total amount of subscription collected every month was auctioned among the members, and one who bid the lowest amount, i.e., gave the largest discount, secured the amount bid for. After the conclusion of a successful bid, the purchaser of the lot was required to execute in respect of the annual contribution, as security of the regular payment of the monthly subscription. It was stated in the plaint that defendant 1 purchased in auction a 'chit' in the fourth month and another in the sixth month and executed a pronote on each occasion; and defendant 2 stood surety for the same. According to the plaintiffs defendant 1 did not pay his contribution for the six months following. The defendant 2 on demand paid Rs. 210/- under the two pronotes, and defendant 1 paid Rs. 100/- only. Thus the defendants owe Rs. 1061-13-6 including interest.

(2) Defendant 2 died during the pendency of the suit, and his legal representatives expressed ignorance of the whole transaction. Defendant No. 1 however, admitted the orga-

nisation of 'Chit Fund' and his membership with two shares, and securing two chits in the auction, and the execution of both the pronotes. But he claimed that defendant 2 paid Rs. 575/- to the plaintiff under the pronotes besides Rs. 100/- paid by himself. He further stated that a sum of Rs. 200/- was paid by himself to Ramaswamy the father of Venkiah, a partner of the plaintiff's firm. Thus they have paid in all Rs. 947/- and only Rs. 252/8/- are due by defendant 1. This could not be paid owing to the defendant having left the place due to disturbed conditions in the State and the 'Chit Fund' also having ceased to function. He pleaded that in view of the plaintiff's firm not having been registered as a banking company under the Indian Companies Act, and not holding a license under the Hyderabad Money Lenders' Act, the suit is liable to be dismissed. Further as both the pronotes are payable to the bearer, in contravention of S. 15, Hyderabad Paper Currency Act, they cannot form the basis of the suit.

(3) The trial Court rejected these objections but held that payments to the extent of Rs. 465/- were proved, and accordingly passed a decree to the extent of Rs. 954-8-2, against which the defendant 1 has come to us in revision, and has raised the same points of law, as were pressed before the lower Court.

(4) Taking into consideration that the members of the 'Chit Fund' together with the organisers are less than 20, the registration of the association is not compulsorily registrable under S. 4 (2), Indian Companies Act as was held in — 'Neelamegha Sastri v. S. Appiah Sastri', 29 Mad 477. The advocate for the petitioner also does not press this point. As regards the contention that the pronote in question is a bearer bond, and has been drawn up in contravention of the Hyderabad Paper Currency Act, the advocate of the respondent admits in principle that the note cannot form the basis of the suit, but he submits that according to his plaint, his suit is based upon the original transaction, and he has given all the facts relating to it culminating in the drawing up of the pronotes, which were taken only as collateral security. This will have to be decided with reference to the statement made in the plaint. Going through the plaint carefully I am of the opinion that the suit is not solely based upon the pronotes but on the transaction of the 'Chit Fund' also and the plaintiff has explained under what circumstances the pronotes were drawn up. Therefore, though the pronotes in question are inadmissible in evidence, plaintiff can prove the actual transaction and the arrears on that account.

(5) As regards the second objection of the Advocate of the petitioner, that the transaction as disclosed by the plaint, is in the nature of a loan, and the plaintiff not being a licensed money lender, the entire suit is liable to be dismissed under S. 9, Hyderabad Money-lenders' Act; we will have to consider two things in this connection: whether under Cl. 4, S. 2 of the Act, the transaction is that of a loan, and the plaintiff in respect of this transaction, a money-lender under Cl. 7 of the said section. Clause 4 describes what transactions will be deemed to be loan; and under this, money drawn by the appellant from the respondent, is clearly a loan, and does not fall under any of the exemptions. It was argued on behalf of the respondent that exemptions marked (B) and (E) save this transaction from the definition of a 'loan'.

(6) Exemption marked (B) is to this effect: "Any loan given to, or obtained from, a Society or association registered under any law, and also any amount in its custody as a trust."

It is obvious that plaintiffs, the so-called stake-holders, are not registered under any law as stake-holders though they may be a registered firm for carrying on other business. Exemption (E) also is not at all applicable, as the amount has not been advanced upon any negotiable instrument other than a pronote. It is further argued on benalf of the respondent that the transaction in question is not that of borrowing and lending in view of the fact that the respondent is a stake-holder and trustee on behalf of all the members of the 'Chit Fund'. Besides, the appellant was a purchaser in auction of two chits and not a borrower. Two decisions of Madras — 'Raghavan v. Arumugham', A. I. R. 1935 Mad 385 and — 'Ramanatha Ayyar v. Narayanaswami Ayyar', AIR 1937 Madras 364 have been relied upon in this respect. This argument is met by the appellant by submitting that the transaction in question is that of borrowing and lending pure and simple. Had it been otherwise, i.e., the pronotes were taken merely as collateral security for the due payment of the monthly instalments, the amount in the pronotes could not have been Rs. 1200/- each and interest would have been charged only on instalments that remained unpaid and not on the whole amount of the pronotes. It is admitted that the petitioner bought the first chit in the fourth month, when he was responsible to pay only Rs. 800 being the full amount of the remaining eight instalments of the Chit Fund. Why should he execute a pronote of Rs. 1200/- instead? Similarly, when he bought the second chit, he had to pay only six instalments; but he undertakes to pay Rs. 1200/- together with interest, which could not be due unless and until all the instalments fell in arrears. So it is clear the pronotes were not executed as mere collateral security for the remaining instalments. In — 'AIR 1935 Mad 385', their Lordships were of the opinion that a 'Chit Fund' transaction was only buying and selling and not borrowing and lending, for the law, as it then stood, did not exclude money from the category of goods. All the same they refrained from passing any opinion as to whether this reasoning will hold good when the Sale of Goods Act came into force. The Indian Sale of Goods Act is now in force, and a similar Act was in operation in this State when the transaction in question took place, according to which goods means "every kind of movable property other than actionable claims and money....." and buyer means 'person, who buys or agrees to buy goods' & 'seller' means who sells or agrees to sell goods. Money is necessarily excluded from the definition of 'goods' because it constitutes the price in exchange for which goods are sold, and owing to its being currency, is governed by wholly different principles. In the case of — 'A. I. R. 1937 Mad 364' the other ruling cited by the advocate for the respondent the scheme was that every member was to subscribe Rs. 500/- per month; and the second month's collection was to go to the stake-holder as a reward for his services in running the Scheme. The defendant did not pay the second instalment and

executed a pronote instead. The stake-holder sued for the amount of the second instalment. The defendant besides pleading limitation, had contended that the suit was for the enforcement of a specific performance and not a suit for money. His Lordship Beasley C. J. concurring with AIR 1935 Mad 385 which was itself not conclusive on this point, thought that the stake-holder in the case was not a borrower and a contract to pay for the services rendered in connection with the 'Chit Fund' could be enforced; but as he had not heard the parties on this point he refrained from expressing a definite opinion and dismissed the suit on the point of limitation. AIR 1937 Mad 364 likewise, is not helpful to us in arriving at a definite conclusion as regards the nature of the transaction and the contract between a 'Chit Fund' subscriber and the Manager of the Fund.

(7) In the case before me the contention of the plaintiff that the suit is in fact for the realisation of the instalments that had fallen due, and that the pronotes were taken as mere collateral security for the future instalments, is not supported by the pronotes themselves. Had it been so, as is alleged by the plaintiff, the first note would have been for Rs. 800/- and the second note for Rs. 600/- only; but the notes are for Rs. 1200/- and interest on both the notes is chargeable or the whole amount including the instalments already paid up. In short, the plaint reveals that the 'Chit Fund' Scheme was a borrowing and lending society, doing the business for mutual benefit; and the so-called auction for the sale and purchase of a Chit was in fact for securing priority of obtaining a loan. Therefore, the advancing of the month's collections to the defendant on each occasion was a loan for all intents and purposes, and the Organisers of the Fund, money-lenders. A license for carrying on this business, therefore, was necessary. For the breach of the provisions of the Hyderabad Money Lenders' Act under S. 9, the claim of the plaintiff cannot be decreed. Revision is allowed and the suit dismissed with costs.

B/R.G.D. Revision allowed.

A.I.R. 1953 HYDERABAD 144 (Vol. 40, C. N. 63)

SIADAT ALI KHAN J.

Vishnu Das, Petitioner v. Dr. Krishna Kumar, Respondent.

Revn. Petn. No. 262/4 of 1951-52, D/- 11-9-52.

Civil P. C. (1908), S. 151 — Application for fair rent before Rent Controller — Stay of suit.

When the Rent Controller has jurisdiction to determine fair rent, the balance of convenience will lie in staying the suit for rent for otherwise it will be putting the parties to inconvenience and expense.

Not only there was an application for the fixation of a fair rent before the Rent Controller, but, in fact, the Rent Controller had fixed a fair rent, and an appeal had been filed against the order of the Rent Controller:

Held that the suit in the Small Cause Court be stayed till the decision of the appeal against the order of the Rent Controller was pronounced: Case law Ref. (Paras 3, 4)

Anno: C.P.C., S. 151 N. 2.

Hasan Abid Ali, for Petitioner; Ghouse Mohammed, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('50) Revn. Petn. No. 253/5/1A of 1950 (Hyd) 2

('51) Revn. Petn. No. 124/4 of 1951 (Hyd) 2

('50) AIR 1950 Madh-B 8 2

('51) AIR 1951 Madh-B 115 2

ORDER: This is a revision petition in a civil case. By judgment dated 11-12-1951, the First Judge, Small Cause Court, has decreed the landlord's suit for four months' rent amounting to Rs. 400. This revision petition is against this order. I have heard the arguments of the learned Advocates of the parties and record my opinion below.

(2) The learned Vakil for the revision-petitioner argued that the learned Judge, Small Cause Court, erred in not staying the suit when not only there was an application for the fixation of a fair rent, before the Rent Controller, but, in fact, the Rent Controller had fixed a fair rent; that the contractual rent was Rs. 100 p.m. and the fair rent fixed by the Rent Controller was Rs. 9 per month; that there is plenty of authority for staying of the suit before the learned Judge: vide — 'Dulhammal Rizumal v. Abdul Kadar', AIR 1950 Madh-B 8 and — 'Ramchandra v. Rameshwar', AIR 1951 Madh-B 115, and a judgment of this Court in — 'Revn. Petn. No. 124/4 of 1951'. In reply the learned advocate for the respondent argued that an appeal has been filed against the order of the Rent Controller which is palpably unjust; that there is authority of this Court for not staying the rent suit: vide — 'Revn. Petn. No. 253/5/1A of 1950' and that, therefore, the learned Judge was quite correct in not staying the suit.

I have carefully considered the arguments of the learned advocates and I am of the opinion that the judgment under revision cannot be upheld. The judgment of this Court referred to by the learned advocate for the respondent held that the suit need not be stayed as the Court can make ample provision for safeguarding the rights of the tenant in case a lower rent is fixed by the Rent Controller as fair rent, and a perusal of the judgment under revision will show that the learned Judge did not pay any heed to this condition and make no provision in his judgment for refund. Moreover, the judgment of this Court relied upon by the learned advocate for the respondent can be distinguished as in that case the Rent Controller had not fixed any rent and the learned Single Bench Judge who decided that case was pleased to remark that one does not know how long will it be before the Rent Controller would fix the fair rent. Such is not the case here. The Rent Controller has already fixed the fair rent and the appeal cannot certainly take a long time.

(3) On principle it appears to me that when the Rent Controller has jurisdiction to determine fair rent, the balance of convenience will lie in staying the suit for rent for otherwise it will be putting the parties to inconvenience and expense.

(4) On these grounds I accept this revision, set aside the judgment under revision and direct that the suit be stayed till the decision of the appeal against the order of the Rent Controller is pronounced. I make no order as to costs.

B/D.H. Revision allowed.

A.I.R. 1953 HYD. 145 (Vol. 40, C.N. 64)

SRINIVASACHARI J.

Abdul Munim Khan, Appellant v. The State of Hyderabad.

Criminal Appeal No. 1403/6 of 1950, D/- 17-9-1951.

(a) (Hyderabad) Special Tribunals Regulation (5 of 1358 Fasli) — Validity — Regulation is not unconstitutional — Constitution of India, Arts. 14, 21, 245.

The Hyderabad Special Tribunals Regulation is not unconstitutional and is valid law. (Para 13)

The Regulation does not infringe Art. 14 of the Constitution. All constitutions have recognised the power of the legislature to make classification of Courts resting upon reasonable grounds of distinction. It does not offend against the guarantee of equal protection of the laws envisaged by Art. 14. Equal protection of the laws is ensured when the laws operate alike on all subjects without any discrimination. As regards Procedural Law, it is open to the Legislature to abolish Courts, create new ones and it may prescribe different modes of procedure in its discretion. This power is subject only to one limitation and that is that in so doing the legislature shall not dispense with any substantive rights. AIR 1951 Hyd 11 (FB), Foll. (Para 13)

The trial of an accused by a Special Tribunal under the Regulation does not infringe Art. 21 of the Constitution. The expression "procedure established by law" in Art. 21 must mean procedure prescribed by the law of the State: AIR 1945 PC 48 and AIR 1950 SC 27, Rel. on. (Para 14a)

The provision in the Special Tribunals Regulation whereby the Tribunal would get jurisdiction only when the case was transferred by the Military Governor is not unconstitutional and does not amount to abrogating the extant law, namely, the Criminal Procedure Code, because a provision in an Act that the operation of the Act is to be determined by some officer does not amount to delegation of any legislative power. It can only amount to an authorisation to enforce the Act on the fulfilment of the conditions specified therein. (Para 14b)

(b) (Hyderabad) Special Tribunals (Validation of Proceedings) Regulation (1948), S. 3 — Validity.

Section 3 of the Regulation validates retrospectively all proceedings that took place before the Special Tribunal in the absence of a specific order by the Military Governor transferring the case to the Tribunal. The Regulation did not affect the jurisdiction of the Tribunal because it had jurisdiction already. The proceedings held by it could not be regarded as void because there was no express prohibition to try the case, and statutes which merely purport to cure defects in legal proceedings, which are in their nature only irregularities, are always permissible under the law. (Para 14d)

(c) Criminal P. C. (1898), S. 337 — Evidence of an accomplice — Credibility of — Evidence Act (1872), Ss. 114 and 133.

An approver is one who purchases his own freedom at the expense of others; he is prone to throw the blame upon his fellow conspirators for acts done by him and primarily he is a man admittedly guilty of a crime and the prosecution relies upon his statement in order to be able to get complete details about the crime where there is no other satisfactory method of getting all the evidence in the case. Therefore, in such cases where a Court has before it the evidence of an approver corroboration is always insisted upon by way of 'ex majore cautela'. As regards the nature and extent of the corroboration there is no difference between English and Indian Law. It is not necessary that every statement should be corroborated. It is sufficient if it is corroborated in material particulars. (Para 16a)

The general rule is that 'prima facie' it would be unsafe to convict any one on the evidence of an accomplice. Every endeavour should be made to test the truth of such evidence. The Court will have to consider whether the story bears the impress of truth. (Para 17)

Anno: Cr. P. C., S. 337 N. 17; Evi. Act, S. 133 N. 4, 5.

(d) Evidence Act (1872), S. 133 — Accomplice, who is.

An accomplice is one who is an active participant in the commission of the crime. The fact that a person is passively helping another to commit a crime or having been present when the crime was committed does not inform the police or for the matter of that where a person helps the criminal in disposing of the murdered body or concealing it, would not make him an accomplice. One has to take into consideration the nature and extent of his participation in the crime. If the Court finds that his act is such as to render it probable that he himself would have been charged for the offence, then his evidence is absolutely of no value. (Paras 18-19)

Anno: Evi. Act, S. 133 N. 2.

(e) Evidence Act (1872), S. 9 — Identification parade — Duty of Magistrate — Identification of accused how far can be basis of conviction.

The identification parade test is not quite sufficient to form the basis of conviction though it may add weight to the other evidence. One other factor also that has to be taken into consideration is that it would not be safe to base a conviction on the identification by the injured person especially when the name of the person was not mentioned by the identifier in the early stages of the investigation or in his statement. A most careful scrutiny about identification parades cannot be overemphasised and it is the duty of a Magistrate conducting an identification parade to see that all precautions are taken in the matter of satisfying himself that the injured had no opportunity to see the accused before. A Magistrate conducting an identification parade should take an intelligent interest in the proceedings as the life of an accused depends on his vigilance and the caution that he exercises. (Para 20b)

Even the omission to observe a minor necessary procedure, at the time of the iden-

tification parade, would detract from its value and the utmost scrutiny and vigilance is expected of the officer conducting such parade. The proceedings thus conducted ought to leave no room or loophole to create the least suspicion in the mind of the Court. There is a duty cast upon the officer to make a thorough enquiry. He should ask the accused whether he had been taken round anywhere just to satisfy himself (the Magistrate), whether there could have been the remotest possibility of the injured having seen the accused. (Para 21)
Anno. Evi. Act S. 9 N. 5.

(f) Evidence Act (1872), S. 24 — Probative value of confession — Duty of Court — Criminal P. C. (1898), S. 164.

Confessions are not always true and they must be checked, more particularly in a murder case, in the light of the whole of the evidence on the record, to see if they carry conviction and where the confession has been restracted it is the duty of the Court, especially in a case of murder to satisfy itself by considering all the material points and surrounding circumstances whether the confession is true. In order to render a confession admissible it must be voluntary. It is the duty of every Court to enquire carefully into all the circumstances that led to the making of the confession. When considering about confessions one of the most important factors which should be taken into consideration is the length of time during which the accused was in police custody before making the confession. No doubt, no hard and fast rule can be laid in this regard but the Court will have to judge for itself from the intrinsic evidence of the confession and the surrounding circumstances as to whether such confession should be relied upon. AIR 1945 P. C. 181, Rel. on. (Para 23)
Anno. Cr. P. C. S. 164 N. 11.

(g) Criminal P. C. (1898), S. 164 — Mode of recording confession and procedure.

Section 164, Criminal P. C. corresponding to S. 168, Hyderabad Criminal P. C. does not compel a Magistrate to put questions to the accused; he can be asked to give the story in his own way. The idea is that it must be a spontaneous narrative. The Indian High Courts have deprecated the practice of putting questions and eliciting answers. The idea of putting questions also does not appeal to common sense because a Magistrate could put questions only if he had before him, a note of what the accused was going to say. (Para 23(iii))
Anno. Cr. P. C. S. 164 N. 11.

(h) Criminal P. C. (1898), S. 172 — Use of police diary — Admissibility in evidence.

Section 172(2), Criminal P. C. strictly forbids the use of the entries in police diaries as a piece of evidence. The diary can be used to enable the police officer to refresh his memory or it might be used for the purpose of contradicting him. These are warranted by the section itself. It is a privilege attaching to this document and such privilege cannot be dispensed with. The prohibition to its use by the accused or by the Court excepting for the restricted purposes has been imposed on grounds of sound public policy and the Court cannot deviate from it. The entries by themselves cannot be taken as evidence, but there is nothing to prevent such entries being looked into for the elucidation of points which need clearing up. 19 All 390 (FB), Rel. on. (Para 25-27)
Anno: Cr.P.C., S. 172 N. 4, 6.

(i) Criminal P. C. (1898), Ss. 375, 428 and 540 — Additional evidence — Power of appellate Court.

In the matter of additional evidence, the Appellate Court has always the power to call for the same under the provisions of Ss. 375, 428 and 540, Criminal P. C. The first section would come into operation when the case is before the High Court for confirmation of the sentence of death. The second section would come into operation when there is an appeal pending before the High Court and the third S. 540 contemplates the summoning of any person as a witness or examining any person in attendance though not summoned as witness or the re-calling of a witness who has been already examined. This section, therefore, is more or less an omnibus section giving power to the Court to examine witness, if it considered necessary. Calling of additional evidence is not confined to cases where the accused makes the application. It would also apply to cases where the prosecution makes such an application. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of a person wrongly accused owing to the carelessness and ignorance of one party. There is no differentiation between the two cases. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction, the Court would be justified in exercising its discretion in calling for additional evidence. It is not desirable to allow the prosecution to patch up the evidence wanting in the case. Negligence on the part of the prosecution can never be a ground for taking additional evidence against the accused and by allowing such additional evidence, surely justice would fail. (Para 29)
Anno: Cr.P.C., S. 375 N. 2; S. 428 N. 4; S. 540 N. 4.

D. A. Grant and Mohammad Dawood Khan, for Appellant; V. Rajaram Iyer, Advocate General, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('45) AIR 1945 PC 48: (46 Cri LJ 589) 14(b)
('45) AIR 1945 PC 181: (47 Cri LJ 575) 23
('50) AIR 1950 SC 27: (51 Cri LJ 1383) 14(a), 14(b)
('83) 5 All 217: (1882 All WN 227) 29
('97) 19 All 390: (1897 All WN 174 FB) 25, 27
('30) AIR 1930 All 746: (32 Cri LJ 152) 23
('39) AIR 1939 Cal 335: (40 Cri LJ 667) 18-19
15 Deccan LR 31 23
('51) AIR 1951 Hyd 11: (52 Cri LJ 1333 FB) 13
('04) 27 Mad 271: (14 Mad LJ 226) 18-19
('19) 42 Mad 885: (AIR 1920 Mad 928: 20 Cri LJ 455 SB) 29
('39) AIR 1939 Mad 266: (40 Cri LJ 606) 18-19

JUDGMENT: Criminal Appeal from the judgment and order of the Court of the Special Tribunal IV, Trimulgherry, dated 11-9-1950 in Cr. Case No. 1 of 1358 Fasli on the file of that Court, and on a reference made by the Hon'ble

the Chief Justice dated 13-4-1951, there being a difference of opinion between the Hon'ble Judges constituting the Division Bench.

This case has assumed much more importance than the general class of cases of murder which we come across every-day because of the political background behind it and because there was implicated in it the most powerful figure in Hyderabad during the period prior to the Police Action.

(2) The motive alleged for the crime by the prosecution is that one Shoebullah Khan who was editing a daily Newspaper called 'Imroze' was repeatedly publishing articles against the policy of Syed Mohamad Khasim Razvi, the leader and President of the Itehad-ul-Muslim, which was the most powerful organisation exercising enormous control over the administrative machinery in the Hyderabad State. Its ultimate aim was to keep the Hyderabad State as an independent unit and not allow it to accede to the Indian Union. Shoebullah was opposed to this policy and it is stated that he gave vent to his views in his daily Newspaper 'Imroze'. It is stated that Khasim Razvi having got annoyed at the repeated attacks by Shoebullah Khan against him and his policy decided that Shoebullah Khan should be got out of his way. With a view to achieve this object he sent for one of his Sattelites, Syed Khader Mohiuddin Aseer, who was the President of Ward A of the Ittehad-ul-Muslimin and consulted him as to what steps should be taken to see that Shoebullah Khan was put out of the way.

(3) The whole story about how the conspiracy was hatched and what stages it passed through has been deposed to by one Khader Mohiuddin Aseer, one of the accused, who turned an approver.

(4) (a) According to the above witness the first talk that took place about this affair was somewhere in February 1948 between Khasim Razvi and the President of the A Ward Branch of the Ittehad-ul-Muslimin, who is P. W. 1. After having sounded P. W. 1 about the feasibility of making arrangements for putting Shoebullah Khan out of the way, Khasim Razvi appears to have kept silent for about two months and in April or May 1948, when Aseer met Razvi at Darus-salam, the headquarters of the Itehad-ul-Muslimin, Khasim Razvi again broached the subject and asked Aseer if he had considered about the matter that he had mentioned to him some time ago. Aseer, it is stated, was not very enthusiastic about this affair and appears to have replied that it would not be possible for him to undertake this most inhuman task as he was a man with a tender heart and further that he had his old parents, children and a big family to support. Khasim Razvi, however, said that he did not want that Aseer, P. W. 1, himself should undertake the murder and that it could be achieved through the instrumentality of a Razakar of the locality.

(b) After this incident also there appears to have been lull. Somewhere about the beginning of August 1948, after Khasim Razvi returned from his tour of Hingoli, he is said to have sent for one Syed Kadirullah, P. W. 27, to find out whether it would be possible to see that the murder was committed. Khasim Razvi was disappointed when Syed Kadirullah expressed his inability to undertake the task.

(c) Thereupon, it is stated that on 13-8-1949 at about 10 P. M., Khasim Razvi sent for Aseer to his bungalow and had a discussion with him there about this affair. This is the first stage when some decision appears to have been taken as regards the plan to be adopted in the execution of the task. Khasim Razvi was in conversation with one Azimuddin, the Chief Engineer, who was seated there with a sten-gun in his hand. Aseer went to see Razvi at this time and Razvi, it is stated, called him into his drawing room and told him that the matter could not afford to wait any longer as things had come to a crisis. Telling him he asked his A. D. C. Sajjad Hussain to give his pistol to Aseer and when Sajjad Hussain said that there would be no other pistol for use, Razvi directed Vazir Mohammed Khan, his Private Secretary to give his pistol to Sajjad Hussain. Thus closed the first stage of the conspiracy.

(d) The second stage in the conspiracy was on the very next day when Aseer, P. W. 1, is said to have sent for one Syed Mustafa 'alias' Mustoo, P. W. 4, through Syed Abdul Khader, P. W. 2, and told him that he should somehow see that Shoebullah Khan was murdered as those were the orders of the President, Khasim Razvi. Mustoo merely said that he would consider about the matter and let him know.

(e) The third stage was on 15-8-1948 when Gulam Yazdani, P. W. 10, who was the District Commander of the Razakars of the locality, came to see Aseer and at this visit he objected to Mustoo, a razakar of the locality, being used for the murder of Shoebullah Khan. He said that they could very easily be identified if they committed the murder. Instead he suggested that it might be entrusted to others who were prepared to lay down their lives and in this connection he is said to have mentioned the name of Abdul Munim Khan, A-2, as one of such desperadoes.

(f) The fourth stage was on 16-8-1948, when Abdul Munim Khan, A-2, for the first time, went to Aseer's house (evidently having been sent by Gulam Yazdani), it was at this time that Aseer asked him to swear by the Koran and take an oath of secrecy and conveyed to him what Khasim Razvi told him. As to what Abdul Munim Khan said on that day is not quite clear, but it is stated that Aseer asked him to come the next day for a Pistol. As per the desire of Aseer, Munim Khan, A-2, went to Aseer's house the next day (this would be 17-8-1948). Somehow or other the pistol was not handed to Munim Khan that day also; what the purpose underlying the putting off of the handing over of the pistol was, one is not able to conjecture.

(g) The next stage after this was when Imamullah Husaini and Abdul Aziz Hashimi (father of Mohsin Raza) came to Aseer's house. At this time, according to the story of the prosecution, Abdul Aziz Hashimi is said to have offered the services of his son, Syed Mohsin Raza, for this task and he is said to have told Aseer that his son would work conjointly with Munim Khan, accused 2, in this task. This takes us to the 18-8-1948.

(h) The momentous day of the conspiracy, when it appears to have reached its final stage, was the night of 19-8-1948. On this day Imamullah Husaini, Abdul Aziz Hashimi, Mohsin Raza and Munim Khan are said to have gone to Aseer's house and they all discussed about the plan to murder Shoebullah Khan. It is stated

that at this stage another person Syed Sajid Ali, P. W. 5, who is the brother-in-law of Aseer came there. On seeing him this party stopped the conversation and a little later Aseer took Munim Khan into the adjoining bed room and taking out a pistol from his almirah, handed it over to Munim Khan just near the door between the drawing room and the bed room. I would have occasion to deal more in detail about this handing over of the pistol and how it was designed that Sajid Ali should not know about this. Mohsin Raza and Munim Khan appear to have gone away while others also appear to have left soon after the handing over of the pistol. The conspiracy being over, it is stated that A-2 and Mohsin Raza started on their task in right earnest and they first went to the office of 'Imroze' where Shoebullah Khan is said to have been working every-day till 1 A.M. and peeped through the windows to see if Shoebullah Khan was there, but not finding him there they returned to Aseer's house and told him that Shoebullah had not come. The pistol that was taken from Aseer was also returned to him.

(j) The day following, namely, 20-8-1948 in the evening at about 6 P.M. again Munim Khan and Mohsin Raza came to Aseer's house, demanded the pistol and after getting it, went again to the 'Imroze' office and to their disappointment again they found the office closed. They went back again to Aseer's house to report as to what had happened.

(k) Then came the next day, viz., the fateful day, 21-8-1948. It was at 7 P.M. on this day, it is stated that Munim Khan went to Aseer's house and finding that Mohsin Raza had not come informed Aseer to send him along to the cross-roads near the 'Imroze' office. Soon after Mohsin Raza met Aseer. He was directed to join Munim Khan at the cross-roads.

(l) An hour later at about 8 P.M. the prosecution story goes on to say that Munim Khan, Zamiruddin, one of the absconding accused, Mohammad Azeezuddin, P. W. 8 and one Makdoom Pershad, were returning towards Lingampalli cross-roads from Kachiguda after having had a walk when it is stated that Munim Khan called Zamiruddin aside and asked him to join him and Mohsin Raza in attacking Shoebullah Khan. Zamiruddin, it is stated, readily agreed and joined.

(m) Even at this stage they were not quite ready to start their task. They found that Mohsin Raza had no sword with him and they, therefore, went on a bicycle to fetch the sword. After getting the sword the three accused appear to have marched on their dastardly task, viz., to put an end to the life of Shoebullah Khan.

(n) They went to the house of Shoebullah Khan and knocked at the door and a young girl, who has not been called by the prosecution, told them that Shoebullah was not in the house. They appear to have been loitering on the road after this and it was at about 1 A.M., on the night of the 21-8-1948 they found Shoebullah Khan and his brother-in-law, Ismail Khan, coming out of their office going along towards their house which is just about 200 yards away.

(o) After they approached the gate of the house, the accused greeted them and Shoebullah Khan and Ismail returned their greetings. The accused is then said to have enquired from Shoebullah Khan whether they had seen some three people running. Just as this conversation was going on Munim Khan, accused 2, it is stated, went behind Shoebullah Khan and fired the pistol. Immediately Shoebullah Khan fell down and Ismail Khan, his brother-in-law, ran towards his drawing room (which is opening on the main road) to get a rifle, and Munim Khan pursued him and inflicted serious injuries with the sword, with the result that the left hand and the little finger of his right hand were cut off and Ismail Khan also fell down.

(p) After this incident the three accused are said to have fled wending their way through lanes and gone to Aseer's house to report to him that they had completed the task entrusted to them. These persons appear to have deposited the pistol and the sword in Aseer's house and gone to their respective houses. This, in brief, is the story of the murder of Shoebullah, according to the prosecution.

(5) It is stated that Shoebullah Khan and Ismail Khan were hurried to the hospital and Shoebullah Khan appears to have succumbed to the injuries by 5 A. M., on 22-8-1948, while Ismail Khan was admitted into the hospital and after treatment for about 20 or 25 days he was discharged. Ismail Khan's statement was recorded immediately after the occurrence on 22-8-1948. In his statement he is said to have stated that one of his assailants was one of the brothers of Dastagir, Vakil, by name Gulam Yazdani or Gulam Samdhani. On this information the police arrested, on 22-8-1948, Gulam Yazdani and Gulam Samdhani. On 25-8-1948, the police held an identification parade wherein Gulam Yazdani and his two brothers Gulam Subhani and Gulam Samdhani were put in and Ismail Khan, the injured, was asked to identify the man who inflicted injuries on him and who shot Shoebullah Khan, and at this parade Ismail Khan stated that he could not find his assailant in the group and so Gulam Yazdani and his brothers were released.

(6) Between 25-8-1948 and 5-10-1948 there does not appear to be any event worth mentioning and it was on 5-10-1948 that A-2, Abdul Munim Khan, was arrested. The police held another Identification Parade on the same day under the supervision of a Magistrate, and it was at this parade that Ismail Khan is said to have identified Abdul Munim Khan, A-2, as the person who shot at Shoebullah Khan and inflicted injuries on him. Mohsin Raza, who is said to have been with Abdul Munim Khan in the murder was arrested on 10-10-1948. Khader Mohiuddin Aseer the person who figured prominently in the plot and the conspiracy to murder was arrested on 15-10-1948 and on 30-10-1948 he was produced before a Magistrate who tendered pardon to him. He turned an approver and has been examined as P. W. 1 in the case.

(7) The prosecution took time after time to file the charge-sheet and this covers a period of 8 months from 29-11-1948 to 27-7-1949 as evidenced by Ex. D. 27. The challan was filed against five persons of whom two were reported to be absconding, charging them under Ss. 243, 248, 66 and 77, Hyderabad Penal Code.

(8) The case came before the Special Tribunal 'IV' and before the Tribunal 42 witnesses were examined on behalf of the prosecution and as many as 103 exhibits were filed. The defence led no evidence. The Special Tribunal after

a protracted enquiry found all the accused guilty; accused 1 was found guilty under Ss. 77 (b) and 243 read with S. 66, Hyderabad Penal Code; accused 2, Abdul Munim Khan, guilty under Ss. 77 (b) and 243 and also 248, read with S. 7, Hyderabad Penal Code and accused 3 was found guilty under Ss. 77 (b), 243 and also 248, read with S. 7, Hyderabad Penal Code, and they were sentenced to different terms of imprisonment on the different counts. All the three accused were sentenced to transportation for life and the case, therefore, came before the Division Bench for confirmation of the sentence and there were also appeals filed by the accused against their conviction which were also heard by the Division Bench. A revision application was filed on behalf of the Government praying for enhancement of the sentences.

(9) The Division Bench held in so far as Syed Mohammad Khasim Razvi and Mohsin Raza were concerned that the prosecution had not made out a case against them and therefore acquitted them of all the charges while as regards A-2, Abdul Munim Khan one of the Judges, the Chief Justice was of the opinion that the identification of A-2 was not satisfactory and did not carry conviction and therefore he acquitted A-2 as well, while the other Judge, Khaliluzzaman Siddiqi J., held that he had no doubt about the guilt of this accused just as he had doubts about the guilt of accused 1 and 3 and being satisfied about the complicity of A-2 in the crime confirmed the sentences passed by the Special Tribunal against accused 2, Abdul Munim Khan.

(10) After this there having been a difference of opinion between the two Judges constituting the Division Bench with regard to one of the accused, the learned Chief Justice directed that the case be placed before me to be dealt with according to law and the case was, therefore, put up before me.

(11) A point of law was argued at this stage by the Advocate General and the Counsel for the accused as to whether I could hear only the case relating to accused 2 or whether, under the law, it would be deemed as though the whole case was before me. After hearing the arguments of the respective Counsel in detail, I gave my finding on 18-5-1951 that I was only competent to hear the case of Abdul Munim Khan, accused 2

(12) After this finding the case came up for hearing on 13-8-1951 and was heard by me from day to day.

(13) A legal objection was raised by the Counsel for the defence with regard to the jurisdiction of the Special Tribunal to try this case. The learned Counsel urged in the first instance that the Special Tribunals Regulation itself was void as it infringed Art. 14 of the Constitution of India. All Constitutions have recognised the power of the legislature to make classification of Courts resting upon reasonable grounds of distinction. It does not offend against the guarantee of equal protection of the laws envisaged by Art. 14 of the Constitution of India. Equal Protection of the laws is ensured when the laws operate alike on all subjects without any discrimination. As regards Procedural Law, according to Cooley, the famous author, it is open to the Legislature "to abolish Courts, create new ones,.....and it may prescribe different modes of procedure in its discretion"—Cooley's Constitutional Limitations, Vol. I, page 552. This power is subject only to one limitation and that is that in so doing the legislature shall not dispense with any substantive rights. This question about the Special Tribunals Regulation being void was raised in the case of — 'Abdur Rahim v. Joseph A. Pinto', which came up before the Full Bench of this Court and in that case the Full Bench held that the Special Tribunals Regulation was valid law, — 'AIR 1951 Hyd 11 (FB)'.

14 (a) The next argument of the learned counsel for the accused was that the trial in this case infringed Art. 21 of the Constitution of India, in that it was not according to the procedure established by law. As to what is meant by 'procedure established by law' has also been defined in the case already referred to. Mathews in his book on American Constitution referring to the 'due process clause in the 14th Amendment' says,

> "This clause requires that the defendant shall have due notice and a fair hearing and provided these conditions are fulfilled the methods of procedure in Criminal Trials are within the control of the State. The due process clause provides for ordinary procedure and does not require any particular procedure."

Coming nearer home, the Chief Justice of India in the case of — 'Gopalan v. The State of Madras', AIR 1950 SC 27 at p. 39 interpreted the words 'procedure established by law'. His Lordship observed "'procedure established by law', must mean procedure prescribed by the law of the State."

(b) It was urged that the provision in the Special Tribunals Regulation whereby the Tribunal would get jurisdiction only when the case was transferred by the Military Governor was unconstitutional and it amounted to abrogating the extant law, namely, the Criminal Procedure Code. I do not agree with this contention because a provision in an Act that the operation of the Act is to be determined by some officer does not amount to delegation of any legislative power. It can only amount to an authorisation to enforce the Act on the fulfilment of the conditions specified therein. Wills in his 'Constitution' says, Legislature may delegate the power to determine the conditions or contingencies under which a statute shall be operative.

A similar contention was raised in the case of—'Emperor v. Benoarilal' and was negatived by the Privy Council, AIR 1945 P C 48. Therein their Lordships adverted to the judgment of the Original Court (the Calcutta High Court) and also to the observations of the Chief Justice of the Federal Court Sir Varadachariar and Sir Zafrullah Khan in the appeal and disagreed with them. Sir Varadachariar and Sir Zafrulla Khan were of the opinion that the Special Criminal Courts Ordinance left the local Government the discretion to direct what offences or class of offences should be tried by the Special Court and this was bad because it left to the sweet will and pleasure of the executive Officer to lay down the policy or the condition with reference to which the power had to be exercised, and this resulted in a discrimination between one accused and another because one case may go before the ordinary Court and the other before the Special Court. Their Lordships of the Privy Council expressed that they were not in agreement with the

Judges of the Federal Court and that it did not violate any principle and that that fact did not make the act or ordinance 'ultra vires'. A similar observation was made by the Chief Justice of India, Harilal Kania in the case of — 'Gopalan v. The State of Madras', AIR 1950 SC 27.

(c) Another argument advanced was that according to the Special Tribunals Regulation, the Tribunal would get jurisdiction to try a case only if there was a specific order by the Military Governor transferring the case to the Tribunal. The learned Counsel contended that in this case there was no such order. In this connection it would be desirable to note the sequence of events, relating to this case. The challan, in this case, was filed on 27-7-1949, the evidence, in the case, started on 17-8-1949 and the charges were framed on 29-9-1949. After this the Counsel for the defence raised an objection before the Special Tribunal that it had no jurisdiction to try the case. It was after this date on 6-10-1949 that an order was issued by the Military Governor referring this case to the Special Tribunal. On 8-10-1949 again another Regulation was promulgated by the Military Governor styled 'The Special Tribunals (Validation of Proceedings) Regulation' and by virtue of S. 3 of the aforesaid Regulation it was provided that all proceedings taken by the Special Tribunal in relation to the offences which the Special Tribunal was, by an order of the Military Governor dated 6-10-1949, directed to try, shall be deemed always to have been as valid and effectual for all purposes as if the said order had been made before the tribunal took cognizance of the offence. In short this Regulation purported to validate retrospectively all proceedings that took place before the Tribunal. The learned Counsel for the defence very strongly urged that the Military Governor could not have validated the proceedings which were 'ab initio' void. The Tribunal overruled this objection and on appeal both the Judges of the Division Bench held that this plea was unsustainable. As the law stands, I am also inclined to agree with the findings of the Tribunal and the learned Judges.

(d) The next question that arises for consideration is as to whether the Military Governor by a validating Regulation could regularise an irregular trial and confer jurisdiction on the tribunal. It cannot be said that the Tribunal had no jurisdiction at all.

With regard to the Validating Regulation promulgated by the Military Governor it has to be observed that in the various classes of legislation there is such a thing as curative legislation or a validating law. Curative statutes have been styled by Crawford in his treatise 'Statutory Construction' as those statutes which attempt to cure or correct errors and irregularities in judicial or administrative proceedings. The nature of the validating regulation of the Military Governor was exactly the same. After all what the Military Governor sought to do was to regularise an irregularity. It did not affect the jurisdiction of the Tribunal because it had jurisdiction already. The proceedings held by it could not be regarded as void because there was no express prohibition to try the case. and statutes which merely purport to cure defects in legal proceedings, which are in their nature only irregularities, are always permissible under the law.

(15) After disposing of the point about the jurisdiction of the tribunal to try the case, I have now to determine as to whether there is sufficient evidence in the case to prove the guilt of accused 2, Abdul Munim Khan. The case against Abdul Munim Khan, A-2, according to the prosecution is that he was sent for by Aseer, P. W. 1, in furtherance of the conspiracy hatched in his house to put an end to the life of Shoebullah Khan. It is stated that accused 2 received a pistol from P. W. 1, Aseer, and in company with Mohsin Raza and another friend of his by name Zamiruddin, who is an absconding accused, started on this expedition and on the night of 21-8-1948 at about 1-15 A. M. fired at Shoebullah Khan which resulted in his death and that he also inflicted severe injuries on Ismail Khan. He has, therefore, been charged for the murder of Shoebullah Khan, for the abetment of murder and participation in the conspiracy. The evidence produced by the prosecution to connect accused 2 Abdul Munim Khan, with the guilt consists of (i) P. W. 1, Aseer, who was tendered pardon and turned an approver, (ii) P. W. 5, Syed Sajjid Ali, who is said to have been present when the pistol was handed to A-2, (iii) P. W. 10, Gulam Yazdani, before whom accused 2 is said to have admitted having murdered Shoebullah Khan and (iv) P. W. 31, Ismail Khan, the injured, who is said to have stated that the man who attacked him on the night of 21-8-48 was the same man who slapped the boy in the Chappal Bazaar Mosque on the last day of Ramzan 1948. In addition to this evidence the prosecution relies upon his own confession recorded by the Magistrate which is Ex. P. 7.

(16) (a) The first piece of evidence is that of Aseer, P. W. 1, the approver. It has to be borne in mind that an approver is always regarded as a man of little moral worth because his disclosure of facts is in its very nature the result of inducement or promise to pardon and in this case actual tendering of pardon. An approver is one who purchases his own freedom at the expense of others. He is prone to throw the blame upon his fellow conspirators for acts done by him and primarily he is a man admittedly guilty of a crime and the prosecution relies upon his statement in order to be able to get complete details about the crime where there is no other satisfactory method of getting all the evidence in the case. Therefore in such cases where a court has before it the evidence of an approver corroboration is always insisted upon by way of 'ex majore cautela'. As regards the nature and extent of the corroboration there is no difference between English and Indian Law. It is not necessary that every statement should be corroborated. (After discussion of the evidence of P. W. 1 the Judgment proceeds).

(17) The general rule is that 'prima facie' it would be unsafe to convict any one on the evidence of an accomplice. Every endeavour should be made to test the truth of such evidence. The Court will have to consider whether the story bears the impress of truth. As I have observed above P. W. 1's story does not bear the impress of truth. It was argued by the learned Advocate General that it would have to be determined whether P. W. 1 could be charged as a co-accused. If he could not be his evidence could not be rejected. I am of opinion that P.W. 1 is clearly an accomplice. A witness in the position of an abettor who had been

tendered pardon is an accomplice. He is an abettor because he instigated A-2 to go and commit the crime. I, therefore, hold P. W. 1's evidence should be rejected.

(18-19) (After discussion of the evidence of P. W. 5 and that of P. W. 10 in part the judgment proceeds).

(e) The learned Advocate General urged that having regard to the part played by him in this case this man could not be regarded as an accomplice and his statement is not liable to be rejected on this ground. It was argued that like P. W. 2 and P. W. 4 this man was not a willing agent in the commission of the crime. The trend of decisions in the various High Courts has been to regard an active participant in the commission of the crime, one who is a 'particeps criminis' alone, as an accomplice. The fact that a person is passively helping another to commit a crime or having been present when the crime was committed does not inform the police or for the matter of that where a person helps the criminal, in disposing of the murdered body or concealing it, would not make him an accomplice. In this connection the cases of — 'Ramaswami Gounden v. Emperor', 27 Mad 271, 'in Re Adanni Venkadu', AIR 1939 Mad 266, decided by the Madras High Court and the case of — 'Nurul Amin v. Emperor', AIR 1939 Cal 335 decided by the Calcutta High Court would be in point. One has to take into consideration the nature and extent of his participation in the crime. If the Court finds that his act is such as to render it probable that he himself would have been charged for the offence, then his evidence is absolutely of no value. It may be pointed out that this witness, Gulam Yazdani, has escaped being made an accused in the case by an irony of fate. Ismail Khan time and again referred to this man as his assailant and one cannot fathom what transpired between 22-8-1948 and 25-8-1948 which made Ismail Khan say that he was not the person who attacked him. I do not reject his evidence on the ground that he was an accomplice but I am strongly of the opinion that this man cannot be relied upon, for the reasons set out by me. Though not an accomplice in the actual murder he was an active participant in the conspiracy during all its stages. (After discussion of the evidence of this witness the judgment proceeds).

(20) (a) The next witness is P. W. 31, Ismail Khan, the injured himself, who is the most important witness in this case. I would deal with his evidence in extenso later but at this stage I would prefer to discuss about the Identification parade of 25-8-1948 and the Identification Parade of 5-10-1948 and the evidence relating to the incident in the Chappal Bazaar Mosque on 7-8-1948 (the last Friday of Ramzan).

(b) With regard to Identification Parades it has been held that the Identification Parade test is not quite sufficient to form the basis of conviction though it may add weight to the other evidence. One other factor also that has to be taken into consideration is that it would not be safe to base a conviction on the Identification by the injured person especially when the name of the person was not mentioned by the identifier in the early stages of the investigation or in his statement. A most careful scrutiny about Identification Parades cannot be over-emphasised and it is the duty of a Magistrate conducting an identification parade to see that all precautions are taken in the matter of satisfying himself that the injured had no opportunity to see the accused before. A Magistrate conducting an identification parade should take an intelligent interest in the proceedings as the life of an accused depends on his vigilance and the caution that he exercises. (After discussing the evidence with regard to identification parade of 25-8-1948 the judgment proceeds).

(21) (a) Having dealt with the identification parade of 25-8-1948, it would be convenient to deal with the other Identification Parade held on 5-10-1948.

(b) A-2, Abul Munim Khan, was arrested on 5-10-1948 and this parade was held on the same day. No doubt this circumstance has to be explained by the prosecution that although Ismail Khan is said to have mentioned about his assailant as being the person who slapped the boy in the Chappal Bazaar Mosque as early as 25-8-1948, it was not until 5-10-1948 that A-2, who was known to be the person who slapped the boy in the Chappal Bazaar Mosque was arrested and the Identification Parade held to enable the injured to identify the accused. P. W. 10, Gulam Yazdani says that there were rumours afloat about Munim Khan being the man who was referred to by Ismail Khan as the person who slapped the boy in the Chappal Bazaar Mosque. It was urged by the prosecution that A-2 was sent away to the front as a Razakar. As regards this identification parade also the learned Counsel for the accused urged that the proceedings were not conducted properly. Why was this parade held when Yazdani knew who Munim Khan was? He could easily have been arrested. The first objection of the counsel for the accused is that this parade was held in the police head-quarters; the second objection is that it looks as though the whole thing was cut and dry and the Magistrate merely came to put his rubber stamp on this which had been got up already, and the third objection is that the majority of the persons who were included in the parade were all police men and no members of the public were called. As I have already observed, even the omission to observe a minor necessary procedure, at the time of the identification parade, would detract from its value and the utmost scrutiny and vigilance is expected of the officer conducting such parade. The proceedings thus conducted ought to leave no room or loophole to create the least suspicion in the mind of the court. There is a duty cast upon the officer to make a thorough enquiry He should ask the accused whether he had been taken round anywhere just to satisfy himself (the Magistrate), whether there could have been the remotest possibility of the injured having seen the accused. I find from the statement of P. W. 26, the Magistrate that he satisfied himself only by enquiring from the Police Officers there that the injured had not seen the accused previously. He says, "Besides that I had no other means of satisfying myself"— P. W. 26, page 8. I fail to understand how the Magistrate had no other means to satisfy himself. Enquiring from the Police Officers would not absolve the Magistrate from making independent enquiries. He could have asked the accused and if he said that he was shown to the injured he could have investigated into the matter. The Magistrate again does not take the trouble to verify as to whether persons had

been called from among the members of the public. He goes by what the police tell him —P. W. 26, page 8. The fact that the profession of many of those who were called is employment in the Police Department does not put him on the guard. He does not care to direct the police to get persons other than police constables. My view is that not much turns upon an Identification Parade. The fact that the accused has been pointed out as the assailant is no proof that he took part in the crime. At best it can only serve as corroboration of the evidence in Court.

(22) It would be convenient at this stage to discuss about the Chappal Bazaar Mosque incident. The Chappal Bazaar Mosque has assumed a notoriety and importance in this case by reason of the fact that Ismail Khan, the injured, is said to have made a statement that the man who inflicted injuries on him was the person who slapped the boy in the Chappal Bazaar Mosque on the last Friday of Ramzan (1948). (After discussion of evidence with regard to this incident the judgment proceeds).

(23) Having dealt with the two identification parades held on 25-8-1948 and 5-10-1948 and the Chappal Bazaar Mosque affair, I would now advert to the confession of accused 2 which is also relied upon by the prosecution. The confession of accused 2 was recorded on 21st Azur 1358 Fasli, corresponding to 21-10-1948, and is marked Exhibit P. 7. This confession was recorded by the Magistrate Shankar Pershad, P. W. 11. Before discussing about the recorded confession it would be necessary to know about the probative value of confessions in criminal cases. It was observed by their Lordships of the Privy Council in the case of — 'Harold White v. The King', AIR 1945 P C 181, that confessions are not always true and that they must be checked more particularly in a murder case in the light of the whole of the evidence on the record, to see if they carry conviction and where the confession has been retracted it is the duty of the Court, especially in a case of murder to satisfy itself by considering all the material points and surrounding circumstances whether the confession is true. In order to render a confession admissible it must be voluntary. It is the duty of every Court to enquire carefully into all the circumstances that led to the making of the confession. When considering about confession one of the most important factors which should be taken into consideration is the length of time during which the accused was in police custody before making the confession. No doubt no hard and fast rule can be laid in this regard but the Court will have to judge for itself from the intrinsic evidence of the confession and the surrounding circumstances as to whether such confession should be relied upon. Both the learned Judges constituting the Division Bench have rejected the confession. The learned Chief Justice has observed,

> "Having regard to the defects both in the investigation and the evidence mentioned above, I am not prepared to give that weight to them (confessions) which I would otherwise have done".

Likewise Khaliluzzaman J. has not attached any weight to it. As regards the confession of A-2, the following objections were raised by the counsel for the accused:

(i) That A-2 was in police custody from 5-10-1948, that is to say for 16 days prior to the date of the confession. No doubt this fact is borne out by the record because according to P. W. 37, A-2 was arrested on 5-10-1948 and this confession was recorded on 21st October 1948. Length of time in police custody is enough to raise a suspicion. Although such a confession may not be inadmissible it will certainly affect the value of the confession and when the confession is retracted, the Court will probe into the matter in order to ascertain why the accused made the confession.

(ii) That A-2 was tortured by the police officer investigating the case. It was also urged that the police employed third degree methods. In so far as this objection is concerned I am not inclined to agree with the counsel for the accused, because it was open to the accused to have stated before the Magistrate that the police resorted to third degree methods in extorting the confession from him and that he has not done. No doubt, there is a strong circumstance in favour of the accused, namely, the person against whom this charge is made of having tortured the accused is one Ghouse Beig, who certainly was an important witness for the prosecution, having regard to the very prominent part played by him in the investigation of this case. This Ghouse Beig was not called by the prosecution and legitimately the counsel for the accused argued before me that I should draw an adverse inference against the prosecution on account of their failure to call this important witness and subject him to cross-examination. There is evidence on record that it was this Ghouse Beig who took accused 2 and Mohsin Raza to the Magistrate; it was he who tackled the case; he it was that submitted application for adjournment to file the challan.

(iii) Accused 2's learned counsel also objected to the confession being admitted on the ground that the Magistrate did not record the confession in the form of questions and answers. His complaint was that the Magistrate should have put questions and elicited answers. If the story was given in the form of a narrative he contended that it had to be taken with caution and in support of this argument he relied upon a decision of this High Court reported in 15 Deccan L. R. 31, I am afraid this argument cannot be sustained. Section 164, Indian Criminal P. C. corresponding to S. 168, Hyderabad Criminal P. C. does not compel a Magistrate to put questions to the accused; he can be asked to give the story in his own way. The idea is that it must be a spontaneous narrative. The Indian High Courts have deprecated the practice of putting questions and eliciting answers. The idea of putting questions also does not appeal to common sense because a Magistrate could put questions only if he had before him, a note of what the accused was going to say. In the case of — 'Abdul Jalil Khan v. Emperor', reported in AIR 1930 All 746, one accused gave a different version from the other accused and the Magistrate thereupon put some questions. It was held in that case that the Magistrate could not put questions. This objection, therefore, is of no avail. (After pointing out certain discrepancies between the confession and the evidence in the case the judgment proceeds).

(24) I have in the foregoing paragraphs dealt with the evidence, documentary and oral, produced by the prosecution to prove the guilt of A-2 in the murder of Shoebullah Khan and

the inflicting of injuries on Ismail Khan. It now remains for me to consider about the evidence of Ismail Khan himself, who has been examined by the prosecution as P. W. 31. (After discussion of the evidence of this witness the judgment proceeds).

(25-27) So far as entries in case diaries are concerned, the section of the Criminal Procedure Code which deals with them is S. 172. An Officer investigating the crime has to record the result of his investigation day to day and this is called the case diary. Sub-clause (2) of the above section says that a Court might send for such diaries in a case only to aid in enquiry and not for any other purpose. The section, therefore, strictly forbids the use of the entries in diary as a piece of evidence. The Court can for its own satisfaction and for its own assistance go through them. This point as to the admissibility of entries in Police Diaries as evidence in a case was discussed at length by a Special Bench of the Allahabad High Court in the case of — 'Queen Empress v. Mannu', 19 All 390 (FB). It was held in that case that it could be used to enable the Police Officer to refresh his memory or it might be used for the purpose of contradicting him. These are warranted by the section itself. It is, according to me, a privilege attaching to this document and such privilege cannot be dispensed with. The prohibition to its use by the accused or by the Court excepting for the restricted purposes has been imposed on grounds of sound public policy and the Court cannot deviate from it. The same matter came up for decision before the Privy Council in a case which went up from the Court of the Judicial Commissioner, Central Provinces. Their Lordships while fully approving of the decision in — 'Queen Empress v. Mannu', 19 All 390 (FB) observed that using the diary for a purpose other than merely elucidating points which needed clearing up was against the provisions of S. 172, Criminal P. C. It, therefore, follows that the entries by themselves cannot be taken as evidence, but there is nothing to prevent such entries being looked into for the elucidation of points which need clearing up. I do not propose to rely upon the entry in the diary of accused 2 having a beard. The defence could very well have cross-examined Hamiduddin Khan or if it came to know of this entry late have requested the Court to tender him for cross-examination. The law prevents my using it to rebut Hamiuddin Khan, even if I wanted to do so.

(28) I must also point out that with regard to the persons who attacked and how the attack was made Ismail Khan's statements are conflicting and contradictory. (After discussion of the evidence the judgment proceeds): These facts only go to show that Ismail Khan could not have noted clearly who the assailant was.

(29) (a) Almost at the close of the arguments an application was filed by the learned Advocate General praying that the Court might summon four witnesses mentioned in the application. He, however, urged that he was making the application without prejudice to his contention that the evidence on record was enough to prove the guilt of accused 2. A copy of this application was given to the counsel for the accused, who opposed the admission of this additional evidence. A similar application was filed before the Division Bench and the Division Bench rejected the application. No doubt, I am not bound by the order passed by the Division Bench in rejecting the application, and it is open to me to consider about the merits of the application 'de novo', and grant or refuse the application. In the matter of additional evidence the Appellate Court has always the power to call for the same under the provisions of Ss. 375, 428 and 540, Indian Criminal P. C. The first section would come into operation when the case is before the High Court for confirmation of the sentence of death. The second section would come into operation when there is an appeal pending before the High Court and the third S. 540 contemplates the summoning of any person as a witness or examining any person in attendance though not summoned as witness or the re-calling of a witness who has been already examined. This section, therefore, is more or less an omnibus section giving power to the Court to examine witness, if it considered necessary. The case now before me has come up both by way of confirmation of sentence passed against accused 2 and also by way of an appeal filed by accused 2. I have now to consider whether this is a fit and proper occasion to call additional evidence. It has to be borne in mind that calling of additional evidence is not confined to cases where the accused makes the application. It would also apply to cases where the prosecution makes such an application. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of a person wrongly accused owing to the carelessness and ignorance of one party. There is no differentiation between the two cases. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the Court would be justified in exercising its discretion in calling for additional evidence. I would be entitled to call for the additional evidence if I feel that the additional evidence will expand or clear up the evidence in support of the charge; but not where, on the evidence, a conviction could not be sustained that I should call evidence which may go to support such a conviction. I would herein quote the observations of an eminent Judge of the Madras High Court, Sadasiva Iyer J., in the case of — 'Varadarajulu Naidu v. Emperor', 42 Mad 885 (SB):

> "I do not deny the power of the appellate Court to do so under S. 428, Criminal P. C., but I am clearly of opinion that it should be exercised against the accused 'only in very exceptional cases'."

I have, therefore, to determine whether exceptional circumstances exist in this case. The same Judge also observed,

> "The discretion to be exercised by the appellate Court in taking additional evidence is not arbitrary discretion as is shown by the provision that it 'shall record its reasons'. Surely it should not be exercised, especially, against the accused in a criminal case, where under similar circumstances the Court of appeal hearing a civil appeal would not admit additional evidence on appeal under O. 41, R. 27, Civil P. C."

As early as 1883, Mohmood J. stated that when all evidence produced by the prosecution fails to sustain the charge, the High Court will not direct that additional evidence should be taken

except in very exceptional circumstances, especially where the prosecution having had ample opportunities to produce evidence and that evidence falls short of sustaining the charge (Empress of India v. F. Fateh', 5 All 217). I would go further and say that negligence on the part of the prosecution can never be a ground for taking additional evidence against the accused and by allowing such additional evidence surely justice would fail.

(b) The learned Chief Justice has pointed out the unsatisfactory manner in which the investigation was conducted in this case. I entirely agree with him that this case has been investigated and conducted in most slipshod manner. I would herein refer to a few instances of the absolute want of care of the prosecution:

(i) The weapons that are said to have been used for the murder and for inflicting injuries on Ismail Khan have not been properly recovered. So far as the pistol is concerned the pistol was returned to Vazir Mahomed Khan by Aseer and the pistol has not been produced in Court. In the evidence of P. W. 37, he says that Vazir Mahomed Khan's statement was recorded but before ever he could be produced he appears to have left for Pakistan. No strenuous effort was made to know about the whereabouts of Vazir Mahomed Khan.

(ii) The sword is recovered from the police office as Vazir Mahomed Khan with whom it was left by Sajjid Ali, P. W. 5, is said to have surrendered the same when there was a general order for surrendering of arms. The identity of the sword has not been correctly established.

(iii) The statement that it was the man who slapped the boy in the Chappal Bazaar Mosque that hit Ismail Khan was made as early as 25-8-1948 and this statement was also recorded in the case diary by P. W. 37. Gulam Yazdani, P. W. 10, knew about it then alone. In fact Gulam Yazdani is said to have been present on the day of the slapping of the boy in the Mosque and therefore he knew who it was that slapped the boy. There could have been no difficulty in knowing the actual murderer. In spite of this A-2, Abdul Munim Khan was not arrested till 5-10-1948 and the explanation that is offered by the Investigating Officer is that he could not be got. It was incidentally suggested by the prosecution that he had left for the front. That he had gone to the front is clear from the evidence of P. W. 23, Mahomed Abdul Ahad. When asked whether himself, Hassan Ali, Zamiruddin and Munim Khan went to Alampur he says "No, we did not go" — P. W. 23, page 3 —, and the reason given for not going is given by him as arrangements not having been made, and this witness also says that 1½ or 2 months after the death of Shoebullah Khan they all went to the President, Ziauddin, from where they had to go to Alampur. That clearly shows that Munim Khan was here 1½ or 2 months after the death of Shoebullah Khan and did not go to the front.

(iv) The presence of important witnesses is not secured and ensured like Vazir Mahomed Khan and Sajjid Hussain.

(v) Material witnesses have not been called with regard to whom there could be no excuse of their being not available. Such witnesses are Fazle Razul Khan and Ghouse Beig, the very life and soul of this case. Both these persons were wholly in charge of the investigation of this case and one cannot understand why the prosecution fought shy of putting these persons in the witness box.

Acting on this principle that it would not be desirable to allow the prosecution to patch up the evidence that is wanting in this case, I agree with the learned Chief Justice that this application for adducing additional evidence cannot be granted.

(30-31) (After discussion of some more evidence the judgment proceeds:) On such unsatisfactory evidence I feel it would be hazardous to convict the accused of the charge. In such cases although the facts may cast the utmost suspicion on the accused, what the Court has to consider is whether they amount to some suspicion or whether they contain that element of certainty so essential to a conviction in a criminal case. I am of opinion that the evidence, as it has been presented to the court, is not such as to make it clear, beyond all possible doubt, that Abul Munim Khan, A-2, shot at Shoebullah Khan and inflicted injuries on Ismail Khan. The result is that the evidence is not conclusive and there is a doubt, and, therefore, the accused would be entitled to the benefit of doubt. I am, therefore, inclined to agree with my Lord the Chief Justice in holding that the prosecution has failed to make out its case against A-2, Abul Munim Khan, and he is, therefore, entitled to an acquittal. He is found not guilty of the charges made against him. The appeal of accused 2 is allowed and the judgment of the Special Tribunal is set aside. In view of the fact that I have come to the conclusion that A-2 is entitled to an acquittal. I do not think it necessary to go into the Revision Application of the prosecution for enhancement of the sentence against Munim Khan from one of transportation for life to that of the extreme penalty of the law, namely, death.

(32) I cannot help remarking that the most gruesome murder has been perpetrated and there is material enough to show that the Razakar element was responsible for it, but in criminal law, suspicion, however strong it might be, cannot take the place of legal proof and further probably for want of sufficient proof a guilty man is escaping punishment, but according to well accepted notions it is better that ten guilty men escape rather than one innocent man suffer.

(33) I must express my thanks to the Advocate General and the counsel for the accused for their having argued very ably which enabled me to sift and analyse the mass of evidence in this case.

A/K.S. Appeal allowed.

A. I. R. 1953 HYD. 154 (Vol. 40, C. N. 65)

PALNITKAR C. J. AND SRINIVASACHARI J.

Samrat Mul and others, Appellants v. Indar Mul, Respondent.

Revn. Petn. No. 292/4 of 1950, D/- 16-9-1952.

Stamp Act (1899), S. 2(5), (22) and Sch. 1, Art. 1 — Bond, promissory-note and acknowledgment of debt.

In order to determine as to whether the particular document is a promissory-note or a bond, the intention of the parties is a very necessary circumstance to be taken

into consideration. AIR 1938 PC 121. Foll. (Para 2)

Anno: Stamp Act, S. 2(5) N. 6; S. 2(22) N. 4; Sch. 1 Art. 1 N. 8.

Laxminarayan Somani, for Appellants; Govind Das Mehta, for Respondent.

CASE CITED:

(A) ('38) AIR 1938 PC 121: 47 Mad LW 601

ORDER: This is a revision directed against the order of the lower Court, declaring a document that was produced by the plaintiff as a bond. The suit was filed on the basis of dealings between the plaintiff and the defendant. In support of the dealings between the parties, the plaintiff produced an extract from his account book, which contained a recital of the transactions between the parties and under which the defendant promised to pay the amount that he had borrowed, to the plaintiff. It was contended by the defendant in the lower Court that this document was a promissory-note and inasmuch as it did not contain any stamp, it was inadmissible in evidence. The lower Court after going through the contents of the document came to the conclusion that it could not be regarded as promissory-note and declared it to be a bond and levied the stamp duty and the penalty from the plaintiff. We understand that the stamp duty and the penalty have also been paid by the plaintiff. The defendant has come up in revision questioning the order of the lower Court.

(2) We have read the document and we are in agreement with the order of the lower Court that it cannot be regarded as a promissory-note. In order to determine as to whether the particular document is a promissory-note or a bond, the intention of the parties is a very necessary circumstance to be taken into consideration, and the test that has been laid down by the Privy Council in determining such a question is that the intention of the parties has to be looked into. This has been laid down by the Privy Council in the case of — 'Karam Chand v. Firm Mian Mir Ahmad Aziz Ahmad', AIR 1938 PC 121 (A). Applying the above test laid down by the Privy Council to the document in question, we find that this document was executed by the defendant at the time when the loan was advanced and it was never the intention of the parties that this document should be negotiable. It was to serve as evidence of a debt contracted by the defendant. Under those circumstances, where it was not intended to be negotiable and where it was only intended to serve as evidence of debt, the document cannot be regarded as a promissory-note. It was argued by the learned Advocate for the petitioner that if it is not a promissory-note it is at least an acknowledgment of a debt coming within the scope of Art. 1 of Schedule I of the Stamp Act. We are not in agreement with the learned Advocate because we find in the document that there are words promising to pay the debt. It is only where the document does not contain any promise to pay that it can be regarded as an acknowledgment to serve as evidence of such a debt. The fact that it contains a promise to pay the debt would take it away from the category of an acknowledgment of a debt. We are, therefore, of the opinion that the order of the lower Court cannot be interfered with. This revision is, therefore, dismissed with costs. Advocate's fee rupees thirty.

B/D.H.

Revision dismissed.

AIR 1953 HYDERABAD 155 (Vol. 40, C. N. 66)

SURYANARAYANA RAO J.

State of Hyderabad, Petitioner v. Kaneez Fatema, Respondent.

Criminal Revn. No. 527/6 of 1951-52, D/- 4-2-1952.

(a) Influx from Pakistan (Control) Act (1949) — Accused, a woman, obtaining a permit to visit her parents in Hyderabad City — Accused without obtaining fresh permit directly going to Gulbarga where her parents had gone — Accused held guilty of a technical offence — Sentence of fine of Rs. 100 held adequate in the circumstances of the case. (Para 2)

(b) Criminal P. C. (1898), S. 32 — Sentence of fine — Matters to be taken into account.

Where a fine is imposed on an accused person, it should be such as is commensurate with the offence, the character and conduct of the accused, the circumstances leading to the commission of the offence, the degree of 'mens rea', as well as with the financial circumstances of the accused. To impose a fine which the accused has no means to pay really means that the accused is being sentenced under the cloak of fine, to undergo imprisonment or subject himself to further legal process. The fine in no event should be either excessive or such as to make an accused feel, however wrongly, that he is being persecuted instead of being prosecuted. (Para 2)

Anno: Cr. P. C., S. 32 N. 6.

Mohommed Mirza, Government Advocate, for the State; Azizullah Khan, for Respondent.

ORDER: In this revision petition Government seek enhancement of the fine imposed on the respondent for contravening the provisions of the Influx from Pakistan Control Act. The respondent is a woman who obtained a permit to Hyderabad to visit her parents but finding that her parents were not in Hyderabad City and that they were living in Gulbarga, she went directly to Gulbarga (in the Hyderabad State). Technically it is an offence. The permit could be utilised only for the destination for which it was obtained and if she intended to go to Gulbarga she should have got down at Hyderabad and obtained a fresh permit to proceed to Gulbarga or she could have got her permit amended. She did not do so. In the circumstances she was rightly convicted.

(2) As regards the sentence the trial Magistrate fined her Rs. 500/- which, in appeal, was reduced to Rs. 100/-. The respondent is a woman and is evidently not having any independent source of livelihood or income. Her Advocate also pleads that she was not conversant with the provisions of law. I understand that she requested the authorities for permission to permanently stay with her parents since her husband abandoned her in Pakistan. The Government Advocate is not able to say anything about it either way since there is nothing on record to support the statement. The advocate for the respondent, Mr. Azizullah, however, states that he has personal knowledge that the respondent is in Gulbarga and that the permit obtained from Pakistan has already expired. There is, therefore, nothing to suggest that the respondent is a dangerous or undesirable person. Otherwise she would not have been allowed to stay in India longer than the period the permit has

permitted. In the circumstances, I consider the fine of Rs. 100/- adequate. Any enhancement of fine would really be punishing her supporters or relatives. Where a fine is imposed on an accused person, it should be such as is commensurate with the offence, the character and conduct of the accused, the circumstances leading to the commission of the offence, the degree of mens rea, as well as with the financial circumstances of the accused. To impose a fine which the accused has no means to pay, really means that the accused is being sentenced under the cloak of fine, to undergo imprisonment or subject himself to further legal process. The fine in no event should be either excessive or such as to make an accused feel, however wrongly, that he is being persecuted instead of being prosecuted. In the result the revision petition is dismissed.

C/K.S. Revision dismissed.

AIR 1953 HYDERABAD 156 (Vol. 40, C. N. 67)

PALNITKAR C. J. AND SRINIVASACHARI J.

Mohd. Azam Gori, Appellant v. Mohd. Salahuddin Gori and others, Respondents.

Misc. Appeal No. 97 of 1950, D/- 13-10-1952.

Court-fees Act (1870), S. 17 — Hyderabad Court-fees Act, S. 13 — Relief for possession and mesne profits.

The word "subject" in the Indian Court-fees Act and the words 'cause of action' in the Hyderabad Court-fees Act are not synonymous. Case Law discussed. (Paras 2, 3, 6)

Anno: Court-fees Act, S. 17 N. 11.

Jalil Ahmed, for Appellant; J. V. Narsing Rao, for Respondents.

CASES CITED:

(A) ('78-80) 2 All 682 FB
(B) ('43) AIR 1943 Pat 355: 209 Ind Cas 530
(C) ('35) AIR 1935 Cal 573: 63 Cal 163
(D) ('82) 8 Cal 593: 10 Cal LR 359 FB
(E) ('30) AIR 1930 Mad 833: 54 Mad 1 FB
(F) ('42) AIR 1942 Oudh 402 205 Ind Cas 364
(G) ('94) 16 All 401: 1894 All WN 124
(H) ('38) AIR 1938 Mad 241: 174 Ind Cas 983

JUDGMENT: This is a miscellaneous appeal against the order of the District and Sessions Judge, Warangal, rejecting the plaint under O. 7, R. 11, Sub-cl. (3), Civil P.C. This was a suit by the plaintiff, who is the appellant before us for possession of a house situated in Girmajipet, Warangal and for a decree for mesne profits for three years prior to the date of the suit. An objection was raised by the office that the two reliefs viz., the relief relating to the possession of immovable property and the relief as regards the mesne profits should be valued separately and court-fee payable on each relief should be paid. It was contended by the plaintiff that where the main relief was for possession of the immovable property the claim as regards mesne profits was only an ancillary relief and, therefore, he was entitled to value the reliefs separately, add them up and pay court-fee thereon. An issue was raised in this behalf and after hearing the arguments of the plaintiff's advocate the District Judge held that the court-fee paid by him on the above calculation was not correct. He, therefore, called upon the plaintiff to pay the additional court-fee and granted two weeks' time to pay the deficit court-fee. This order was passed on 14-7-1950. Again on 12-8-1950 inasmuch as the deficit court-fee was not paid by the plaintiff within the time granted by the court, the court rejected the plaint for not making up the deficient court-fee. It is against this order that this appeal has been filed. We heard the arguments of the respective advocates and also the Government pleader and we are of opinion that the order of the lower Court is wrong.

(2) For the determination of this question, the relevant section of the Court-fees Act that would have to be looked into is S. 13, Hyderabad Court-fees Act, corresponding to S. 17 of the Indian Act. It has to be observed that the words of S. 17 of the Indian Court-fees Act are to the following effect:

> "Where a suit embraces two or more distinct subjects the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act";

whereas the words of S. 13, Hyderabad Court-fees Act are as follows:

> "Where in any suit different causes of action have been joined then the court-fee on such plaint or memorandum of appeal shall be computed on the total of the value of each claim based on each cause of action."

It would, therefore, appear that the words in S. 13, Hyderabad Court-fees Act and those in S. 17 are not identical in terms. The word in S. 17 is 'subjects' whereas the wrods in S. 13 are 'Causes of Action'. The question is whether the word 'subjects' is to be construed as being synonymous with 'causes of action.' No doubt this view was taken by the Allahabad High Court wherein their Lordships construed the word 'subject' as synonymous with cause of action — 'Chedilall v. Kirath Chand', 2 All 682 (A). But this interpretation of the Allahabad High Court was not followed or approved by the other High Courts, for the Patna High Court in — 'Ramadhin Singh v. Baijnath', AIR 1943 Pat 355 (B), clearly held that the word 'subject' in S. 17 of the Indian Act is not the same as 'cause of action'. The Calcutta High Court dissented from this view in — 'Haru Behari v. Kshitish Bhusan', AIR 1935 Cal 573 (C). It would, therefore, follow that the word 'subject' in the Indian Court-fees Act and the words 'cause of action' in the Hyderabad Court-fees Act are not synonymous and cannot be regarded as being the same.

(3) The next question is that where two reliefs are based on the same cause of action whether it is obligatory on the plaintiff to value the reliefs separately, assess the court-fee on each relief and add them up and pay the aggregate court-fees. What is the basis for the claim for possession of land and what is the basis for claim for mesne profits? We are of opinion that both the claims are connected and both are based on the right or title of the plaintiff to the land. The cause of action relating to mesne profits flows from the establishment of the right of the plaintiff to the suit land.

(4) A claim for possession and mesne profits is treated as one entire claim. This was the view taken by the Calcutta High Court in the case of — 'Kishorilal v. Sharat Chunder', 8 Cal 593 (D) and this decision was followed by the Madras High Court in the case of in 'Re. Parameswara Pattar', AIR 1930 Mad 833 (E).

(5) Even under the Indian Court-fees Act the trend of decisions has been that the claim for possession to land together with the claim for mesne profits could not be regarded as distinct subjects of claim within the meaning of S. 17, Indian Court-fees Act. This has been the view of the Madras High Court: vide AIR 1930 Mad 833 (E) and vide also — 'Sundaram v. Subba Rao', AIR 1942 Oudh 402 (F) and — 'Reference under Court-fees Act', 1870 S. 5, 16 All 401 (G). Another aspect of the case which might be considered is with reference to O. 2, R. 2, Civil P.C. Order 2, Rule 2 forbids the splitting of claims which the plaintiff is entitled to make in respect of the cause of action. But a suit for possession alone could be filed when claiming mesne profits and that would not debar the plaintiff from bringing a separate suit for mesne profits. It was, therefore, argued that the fact that the plaintiff is at liberty to file a suit separately for mesne profits and not include it along with the claim for possession would show that these are two different subjects and if these are different subjects, then S. 17 of the Court-fees Act would come into operation. With regard to this aspect of the case it has been held that for the purposes of S. 17 of the Court-fees Act, this will not be the test that would be applied. The Madras High Court in the case of — 'Rangaswamy Reddiar v. Venkat Perumal Reddiar', AIR 1938 Mad 241 (H) held the above view that in order to determine whether there are different and distinct subjects or not, the test under O. 2, R. 2 will not be applied. We are in agreement with the view held by the Madras High Court.

(6) For all the above reasons we hold that the order of the lower Court cannot stand and S. 13 of the Hyderabad Court-fees Act cannot apply to this case and the court-fee payable on the suit would be the court-fee payable on the value of the claim for possession and the value of the claim for mesne profits added together. This appeal is allowed, the order of the lower Court is set aside. The appellant will have his costs of the appeal from the respondent. The case will go back to the lower Court for further hearing. This order will govern the Revision Petition also (314/4 of 1950).

B/D.H.

Appeal allowed.

AIR 1953 HYDERABAD 157 (Vol. 40, C. N. 68)

MISRA C. J. AND M. A. ANSARI J.

Mohamed Habibuddin s/o Azimuddin Ahmed, Petitioner v. Government of Hyderabad through the Custodian, Evacuee Property, Respondent.

Writ Petn. No. 15/5 of 1951-52, D/- 15-1-1953.

(a) Constitution of India, Art. 226 — Certiorari — (Administration of Evacuee Property Act (1950), S. 40).

Where the applicant himself sought the confirmation of the sale under the provisions of the Regulation similar to S. 40, Administration of Evacuee Property Act, and this provision conferred jurisdiction on the Custodian in his discretion to confirm or refuse the sale, the order upon the application cannot be held either in excess of jurisdiction or to be without jurisdiction. Similarly, if the authorities in reaching the conclusion against the applicant gave the petitioner every opportunity to urge his case and they proceeded in a manner laid down for the hearing of such applications, if their conclusions are against him, it does not follow that any error in them, assuming that there are such errors, can be corrected by issuing a writ of certiorari. For, every error is not necessarily of natural justice and it cannot be corrected as if the High Court sits as an appellate authority over the decisions of Custodians of Evacuees' Property. AIR 1952 SC 319, Ref. (Para 2)

Anno: Civil P.C., Const. of India, Art. 226 N. 13.

(b) Constitution of India, Art. 14 — Test of infringement of — (Administration of Evacuee Property Act (1950)).

The test generally applied to ascertain whether any particular enactment is violative of Art. 14, is to see whether it is based on some rational classification. The rational classification denotes three things: a reasonable differentia between the persons governed by the impugned Act and those not covered, a definite objective for enacting the law and a nexus between the two that should be just and reasonable. AIR 1952 SC 75, Rel. on; AIR 1952 SC 123 and AIR 1952 SC 235, Ref. (Para 3)

Administration of Evacuee Property Act (1950) fulfils all these tests. The territorial classification also has been recognised as a rational classification both in this country and United States and what is good ground of classification cannot render discrimination thereby brought in, as violative of the guarantee of equal protection. The discrimination did not therefore violate the guarantee of the actual protection of laws given by Article 14. (Paras 4, 5, 6 and 7)

(c) Administration of Evacuee Property Act (1950), S. 40 — Validity — (Constitution of India, Art. 19 (1) (f) and (5)).

Section 40 being intimately connected with the scheme of the Act and being based on the necessity for ascertaining the genuineness and legality of transfers, is a reasonable restriction on the right of a citizen to acquire property and is not violative of Art. 19(1)(f) of the Constitution. (Para 8)

(Distinction between the rights of eminent domain and of police power indicated).

(d) Administration of Evacuee Property Act (1950), S. 40 — If contrary to Art. 31 of the Constitution — (Constitution of India, Art. 31).

The necessity of confirmation of a sale contained in S. 40 being reasonable, constitutional and in exercise of the police power, the absence of any provision relating to compensation which is a limitation on the exercise of the power of eminent domain does not make S. 40 contrary to Art. 31 of the Constitution. AIR 1952 SC 339, Rel. on. (Para 10)

(Distinction between the exercise of Police power and of eminent domain pointed out).

(e) Administration of Evacuee Property Act (1950), S. 1 — Scope — (Interpretation of Statutes — Hardship) — (Civil P. C. Pre.).

The Act is clearly retrospective and the mere fact that its application will result in hardship to an individual cannot be a ground of exempting him. (Para 11)
Anno: Civil P.C. (1908), Pre. N. 7.

(f) Administration of Evacuee Property Act (1950), S. 40 — Scope.

Section 40 is not bad on the ground of vesting uncontrolled discretion in the Custodian. (Para 11)

Syed Mohd. Ahsan Abidi and Mohd. Yousuf Mazhar Ali, for Petitioner; B. N. Shastri, for Respondent.

CASES CITED:
(A) ('52) AIR 1952 SC 319: 1952 SCR 696
(B) ('52) AIR 1952 SC 75: 1952 Cri LJ 510 (SC)
(C) ('51) AIR 1951 SC 318: 52 Cri LJ 1361 (SC)
(D) ('52) AIR 1952 SC 123: 1952 Cri LJ 805 (SC)
(E) ('52) AIR 1952 SC 235: 1952 Cri LJ 1167 (SC)
(F) ('51) AIR 1951 All 746: 1951 All LJ 576 (FB)
(G) ('52) AIR 1952 Madh B 181
(H) ('52) AIR 1952 Punj 428: 54 Pun LR 415
(I) ('52) AIR 1952 SC 339: 1952 SCJ 490

ORDER: This is an application for writs of certiorari and prohibition against an order of the Custodian of the Evacuee Property, which is of 4-4-1951. He has refused confirmation of the sale of a house, No. 1079-B, in favour of the applicant. The house is situated in Ma-Sahib Talab, Hyderabad City and belonged to one Akhtar Jahan Begum. The applicant claims that on Mehir 25, 1358 Fasli (25-8-1949) he purchased it for Rs. 35,000 and took possession. The sale deed is alleged to have been registered on the same date. It is admitted that Akhtar Jahan Begum afterwards left for Pakistan, and is an evacuee as defined by the law relating to the Administration of Evacuee Properties. Before the transaction of the sale was completed the Hyderabad Evacuee Property Regulation had come into force on 22-8-1949. The regulation was later repealed by another State Regulation which was also repealed by the Administration of Evacuee Property Act which was extended to this State by the Notification for September 1950. The applicant had applied for the confirmation of the sale in his favour to the Deputy Custodian of Hyderabad under the Regulation on 14-2-1950, which was refused. Whereupon, he went in appeal which was also disallowed by the Custodian. Against this order he went in revision to the Custodian-General, which has been rejected on 17-3-1950. In between the dates of the dismissal of the appeal and the rejection of the revision petition, this application for issuing of the Writs was filed in this Court challenging the correctness of the order of the Custodian as well as the constitutionality of S. 40 of the Administration of Evacuee Property Act (31 of 1950).

(2) If the applicant's case on the unconstitutionality of S. 40 of the Act fails, there is no ground to allow his Writ application. For their Lordships of the Supreme Court in the case of — 'Ebrahim Aboobakar v. Custodian-General of Evacuee Property, New Delhi', AIR 1952 S. C. 319, (A) have laid down that to justify issuing of the Writ of certiorari the order must be either in excess of jurisdiction, without jurisdiction or in violation of fundamental principles of justice. Therefore, the Writs prayed for can only be issued if all or any one of the aforesaid conditions exist in the particular case, otherwise not. The applicant himself sought the confirmation of the sale under the provisions of the Regulation similar to S. 40 of the Act, and this provision conferred jurisdiction on the Custodian in his discretion to confirm or refuse the sale. The order upon the application cannot in these circumstances be held either in excess of jurisdiction or to be without jurisdiction. As regards the violation of the fundamental principles of justice, the authorities in reaching the conclusion against the applicant gave the petitioner every opportunity to urge his case. They proceeded in a manner laid down for the hearing of such applications. If their conclusions are against him, it does not follow that any error in them, assuming that there are such errors, can be corrected by issuing a Writ of certiorari. For every error is not necessarily of natural justice and it cannot be corrected as if this Court sits as an appellate authority over the decisions of Custodians of Evacuee Property. The success or otherwise of the application therefore depends upon the acceptance or rejection of the arguments addressed on behalf of the applicant, relating to S. 40 of the Evacuee Property Act being against Arts. 14, 19(1)(f) and 31 of the Constitution. We propose to deal with the arguments seriatim.

(3) The ground urged for holding the Section to be violative of Art. 14 is that it places certain disabilities on persons who are citizens of this State for purchasing properties from those who are defined as evacuees under the Act. Moreover, the Act does not extend to the whole of India. The test generally applied to ascertain whether any particular enactment is violative of the article is to see whether it is based on some rational classification. The rational classification denotes three things: a reasonable differentia between the persons governed by the impugned Act and those not covered, a definite objective for enacting the law and a nexus between the two that should be just and reasonable. In the case of —'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 S. C. 75, (B) Fazl Ali J. says:

"There is nothing sacred or sacrosanct about the test of reasonable classification, but it has undoubtedly proved to be a useful basis for meeting attacks on laws and official acts on the ground of infringement of the equality principle."

Mahajan J. in the above case refers:

"By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation..... The cassification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis."

Das J. in the same case says:

".....In order to pass the test, two conditions must be fulfilled, namely, that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and that differentia must have a rational relation to the object sought to be achieved by the act. The differentia which is the basis of the classification and the object of the act are distinct things and what is necessary is that there must be a nexus between them."

Then Aiyar J., approves in the case the several propositions laid down by Fazl Ali J. in the earlier case of —'State of Bombay v. F. N. Balsara', AIR

1951 SC 318 (C). The seventh proposition in the latter case is as follows:

"While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrary and without any substantial basis....."

Then the test of reasonable classification had been applied by the majority of their Lordships of the Supreme Court in the latter case of —'Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (D), and in —'Lachchmandas Kewalram v. State of Bombay', AIR 1952 SC 235(E). We have, therefore, to ascertain the constitutionality of S. 40 of the Administration of Evacuee Property Act by applying the aforesaid classification test to it.

(4) It is well known that after the partition of the country a large number of persons migrated from this country to Pakistan and this migration created different problems. The fact of having migrated is a reasonable differentia marking them off from the others, and so also those who had purchased their properties from those who acquire lands from persons still residents in the country. This distinction is a rational one having regard to the circumstances in which the large influx of population took place.

(5) The next question is about the object of the legislation, and whether it can be held to be just and proper. In the case of AIR 1952 SC 123 (D) it has been held by the majority of the Supreme Court that in order to ascertain the object, the preamble and the surrounding circumstances of the legislation could be gone into. The object of the Act is to provide for the administration of evacuee properties and for certain matters connected therewith. This, in our opinion, is a definite and rational object, and the second requirement of the doctrine of classification has been accordingly fulfilled in the case.

(6) The third question is the nexus between the object and the provisions contained in the Section. The entire scheme of the Act is to provide for the custody and administration of the evacuee property. The title of the evacuee is not affected, the restoration of the properties contemplated, and the Custodian acts practically as a statutory agent. Section 40, in our opinion, contemplates ascertainments of the good faith, valuable consideration, legality and genuineness of the conveyances by the evacuee undoubtedly with a view to properly administer the property, and there is thus a reasonable nexus between the object and the Section which is impugned by the applicant. The three conditions having been fulfilled the discrimination complained of by the applicant does not violate the guarantee of the equal protection of the laws given to him by Art. 14, and this plea of his therefore fails.

(7) It was then urged that the Act is discriminatory because it extends only to part of the country. Now the territorial classification has been recognised as a rational classification both in this country and United States and what is good ground of classification cannot render discrimination thereby brought in as violative of the guarantee of equal protection. The result is that the argument of the Advocate of the applicant about S. 40 being unconstitutional on grounds of its being violative of Art. 14 fails.

(8) The next argument is that the need of confirmation is an unreasonable limitation on the right of the citizens of this country to acquire property, and S. 40 is void because it is contrary to the freedom to acquire properties conferred by Cl. (f) of sub-Art. (1) of Art. 19. In advancing this argument, the Advocate of the applicant has overlooked the undoubted power of the sovereign to prevent persons under its jurisdiction from conducting themselves in a manner detrimental to the general welfare. This is generally known as the police power & is distinct as well as separate from the right of eminent domain. Its distinguished characteristic is that the State can regulate exercise of the right of property in order to prevent its being detrimental to the interest of the general public. From one point of view considerable resemblance between the two powers exists. In that each power recognises the superior right of the community against the selfishness of the individual; but there is this fundamental differentia between them that for the proper exercise of the police power it is necessary to make compensation, nor does it amount to taking of the property. The power is constitutionally recognised by cl. (5) of Art. 19, which authorises reasonable restrictions on the exercise of the right of the property in the interest of the general public. Now there are authorities of different High Courts in this country holding certain restrictive provisions of the Administration of Evacuee Property Act as reasonable and constitutional, and S. 40 being intimately connected with the scheme of the Act and being based on the necessity for ascertaining the genuineness and legality of transfers, appears to us to be a reasonable restriction on the right of a citizen to acquire property. Thus, in the case of — 'Asiatic Engineering Co. v. Achhururam', AIR 1951 All 746 (F.B.) (F), it has been observed at page 773:

"In fact, we think that upon a fair consideration of all the factors involved, the enactment can be justified as satisfying the requirements of Art. 19(5). For this reason, we think that there is no force in the argument that the Act is void under Art. 19(f) of the Constitution, nor can, in our opinion, any argument be at all advanced under Art. 31 of the Constitution."

Similarly, in — 'Shanta Devi v. Custodian of Evacuee Property', AIR 1952 Madhya Bharat 181, (G) Dixit J. at page 186 observes:

"If it were necessary to decide the point I would be prepared to hold that the restrictions imposed by the Act are reasonable and in the interest of general public."

So also in — 'Shaik Mohd. Din v. Takar Singh', AIR 1952 Punj 428(H) a Division Bench has held that the restrictions contained in S. 17 of the Act are reasonable and in the interest of the general public. The several provisions of the Act are closely connected and we are of opinion that S. 40 of the Act is not violative of Art. 19(1)(f) of the Constitution. Therefore, this part of the argument also fails.

(9) It was then urged that the refusal to confirm will result in taking of the property of the applicant without compensation, and therefore, S. 40 infringes cl. (2) of Art. 31 of the Constitution, and is unconstitutional. In this connection, it was argued that the agreement between this country and Pakistan does not extend to Hyderabad State, and therefore S. 40 is not covered by cl. (5) of Art. 31. This argument overlooks the distinction between the exercise of police power and of eminent domain. Nichols in the Law of Eminent Domain, 3rd Edn., Vol. 1, page 70 observes:

"A proper exercise of the police power by the sovereign does not require the payment of compensation. Compliance with an enactment of the legislature in the exercise of the police power for purposes of health, morals, safety or welfare without compensation does not constitute a

damaging or taking of property without just compensation within the meaning of the law of eminent domain. It follows therefore that the constitutional provisions which limit the exercise of the power of eminent domain, so that just compensation must be provided for, have no application to and impose no limitation upon the proper exercise of the police power."

The difference has been also pointed out in the case of — 'Nabhirajiah v. State of Mysore', AIR 1952 S. C. 339 (I), by Chandrasekara Aiyar J., for he observes at page 343:

"There was no requisition of property in this case under S. 75-A of the Defence of India Rules. The control Order was promulgated under R. 81(2)(bb) which provides for the regulation of letting and subletting houses. It is rather the exercise of a police power of Regulation in public interest than anything done in the exercise of a power of eminent domain, in which case alone questions relating to compensation and public purpose will arise."

(10) The necessity of confirmation contained in S. 40 having been held to be reasonable, constitutional and in exericse of the police power, the absence of any provision relating to compensation which is a limitation on the exercise of the power of eminent domain does not arise in this case and this argument of S. 40 being contrary to Art. 31 of the Constitution also fails.

(11) It was then urged that on the day the property was purchased the applicant did not know that his vendor was going to be an evacuee as she left the place subsequently, and therefore his being subjected to the loss is harsh and inequitable. These would have no weight if the Act be held to be retrospective. Now, Sub-S. (1) of S. 40 clearly requires confirmation of all transfers made after 14-8-1947 by the evacuees and 'evacuee' has been defined as any person who leaves after the first day of March 1947. The Act, in these circumstances, is clearly retrospective and the mere fact that its application will result in hardship to an individual cannot be a ground of exempting him. Then it was argued that S. 40 vests absolute discretion in the Custodian to allow or disallow sales. But the object of the Act having been clearly laid down, the Section, in our opinion cannot be held to be bad on the ground of vesting uncontrolled discretion in the Custodian.

(12) On the grounds mentioned above, we think that there is no force in this application, and therefore, it is disallowed.

A/H.G.P. Application disallowed.

A.I.R. 1953 HYD. 160 (Vol. 40, C.N. 69)

NAIK C. J. AND MOHD. AHMED ANSARI J.

Jaikishen and others, Appellants v. Thotaram and another, Respondents.

Second Appeal No. 883 of 1349 Fasli, D/- 1-10-1951.

Debt Laws — Hyderabad Prevention of Agricultural Land Alienation Act — Retrospective effect.

The Notification declaring the judgment-debtor's tribe to be agricultural one has no retrospective effect. It is not the date of the execution petition which is to be taken into consideration for determining whether the Prevention of Agricultural Land Alienation Act was applicable; but it is really the date on which the decree-holder got vested right under the decree. AIR 1923 Lah 673, Rel. on. (Paras 3, 4)

Vinayak Rao Vaidya, for Appellants; Moulvi Abu Wafa Mohmed Khasim, for Respondents.

REFERENCE..... /Para.

('23) AIR 1923 Lah 673: (76 Ind Cas 135) 4

NAIK C. J.: This is a second appeal on behalf of the decree-holder in an execution proceeding and the point to be decided is whether the Hyderabad Prevention of Agricultural Land Alienation Act is applicable to the case. The relevant facts are as follows:

(2) A decree in favour of the appellant was passed on the basis of a compromise on Mehir 18, 1345 Fasli: 24-8-1936, A. D. By it the decretal amount of Rs. 5,220/- was made payable in ten instalments and in case of default of two instalments, consecutive or otherwise, the decree-holder became entitled to recover the possession of the lands in suit as owner by the execution. It is contended on behalf of the appellant that at the date of the decree the judgment-debtor was not a member of the tribes which have been declared as 'agricultural' under the Act, and only on Thir 26, 1347 Fasli: 31-5-1938, his tribe which is 'Pardesi' has been declared as 'Protected'. This date of the declaration is not challenged in the appeal. Although the execution proceedings were started after that on Thir 20, 1348 F: 26-5-1939, yet in the application the non-payment of the two instalments on which the decree-holder became entitled to possession of the property are given on Ardebehist 31, 1344 and 1347 F: 5-4-1935 and 1938 A. D. Both of them are prior to the judgment-debtor's tribe being declared 'protected' under the Act. These facts are also not challenged.

(3) The contention of the appellant is that it is not the date of the execution petition which is to be taken into consideration for determining whether the Prevention of Agricultural Land Alienation Act was applicable; but it is really the date on which the decree-holder got vested rights under the decree. It is contended on behalf of the judgment-debtors that the compromise on the basis of which a decree was passed amounted to a mortgage by conditional sale and the decree-holder's prayer of being given proprietary possession under S. 10, sub-s. (3) of the Act cannot be granted by the Civil Court; but the decree has to be transferred to the revenue Court. Both the lower Courts have upheld the contention of the judgment-debtor.

(4) We think that the appellant's contention is correct. It cannot be said that the Notification declaring the judgment-debtor's tribe to be agricultural has retrospective effect. This has been held in — 'Miran Baksh v. Milkhi Ram', AIR 1923 Lah 673, in connection with the similar provision of the Punjab Land Alienation Act and the reasonings apply to this appeal also. Then it appears to me to be the intention of the parties that the remedy by an execution alone should be open to the decree-holder, which has become vested as soon as the two instalments due were not paid by the judgment-debtor, and the later Notification applying the Act to the judgment-debtor cannot affect the vested right. The appeal is, therefore, allowed, the judgments of both the lower Courts set aside and the case is remanded to the Court below to be proceeded with according to the merits of the case. The parties will bear the costs of this appeal.

(5) ANSARI J.: I agree.

C/D.H. Appeal allowed.

A.I.R. 1953 HYD. 161 (Vol. 40, C.N. 70)

SRINIVASACHARI AND JAGANMOHAN REDDY JJ.

Narayan and others, Appellants v. State.

Appeals Nos. 902 to 904 of 1951-52, D/- 9-9-1952.

(a) Criminal P.C. (1898), S. 154 — Inconsistency between F. I. R. and evidence of informant — Evidence held would not be rejected

The object of the F. I. R. is to have a contemporaneous account against the alleged offenders at the earliest opportunity when the occurrence took place and the inconsistency between the statements in the F.I.R. and the evidence of the informant at the trial would discredit the evidence of the informant to that extent but does not make the statement in the F.I.R. the evidence upon the matter in the case. (Para 4)

Anno: Cr. P. C., S. 154 N. 9.

(b) Evidence Act (1872), S. 27 — Statement connecting fact discovered with offence charged is not admissible — Fact discovered in consequence of information given by several accused.

No confession made to a Police Officer by an accused person whether in custody or not can be proved against the accused unless it be made in the immediate presence of a Magistrate; so much of the information received from a person accused of an offence in custody of a Police Officer as relates distinctly to the fact thereby discovered is admissible under S. 27, Evidence Act, and can be proved against him but any statement made to a Police Officer which connects the fact discovered with the offence charged is inadmissible. Where a fact is discovered as a consequence of information furnished by several accused, only the information which is first given by one of the accused is admissible if it leads to the discovery. The statement of the accused while in Police custody regarding the concealment of any article or the accused's knowledge of its whereabouts and the discovery in consequence of the said statement is admissible in evidence. AIR 1952 SC 167; AIR 1947 PC 67; AIR 1929 Lah 344 (FB): AIR 1932 Bom 286; AIR 1952 Bom 299 (FB), Relied. ILR (1937) Mad 695 held overruled by AIR 1947 PC 67; AIR 1952 Bom 72 held disapproved in AIR 1952 Bom 299 (FB). (Para 8)

Anno: Evid. Act, S. 27 N. 3, 10.

(c) Evidence Act (1872), S. 133 — Witnesses witnessing murder but remaining inactive — Accomplices after fact — Value of evidence.

Where the witnesses who actually saw the accused chasing the deceased & killing him, did neither intervene nor tried to arrest the accused after the incident, but carried on their activity in the field as if nothing had happened and went home after their work was finished, their conduct would lead to the conclusion that they were accomplices and assisted the commission of the offence by their inactivity; and their evidence will have to be looked at, applying the salutary rule of practice which has acquired the force of law, only on being corroborated in material particulars by independent evidence. (Para 16)

Anno: Evid. Act, S. 133 N. 2.

(d) Penal Code (1860), S. 302 — Criminal trial - Motive — Proof of, necessity of.

Ordinarily when there is sufficient direct and circumstantial evidence connecting the accused with the commission of the offence the proof of motive becomes unimportant. (There was held not sufficient motive for murder). (Para 19)

Anno: Penal Code, S. 302 N. 14.

(e) Penal Code (1860), S. 34 — Common intention — Proof of — (Hyderabad Penal Code, S. 7) — (Cr. P. C., (1898), Ss. 223 and 535).

Common intention within the meaning of S. 34 implies a pre-arranged plan. To convict the accused of an offence applying S. 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. Where the accused (one of whom had an axe in his hand) chased the deceased and two of them caught hold of the deceased and the other inflicted injuries on the neck and body with the axe, common intention to commit murder can be inferred from their act. Whether in order to sustain such a conviction under the substantive section read with S. 34 a charge should be specifically framed, there is a divergence of opinion in the different High Courts but where the accused has suffered no prejudice the omission to specifically charge under S. 34 will not materially affect the conclusion in the case. AIR 1945 PC 118 and AIR 1941 Rang 301, Relied. (Para 20)

Anno: Penal Code, S. 34 N. 1, 7; Criminal P. C., S. 535 N. 2, 3; S. 223 N. 18.

(f) Penal Code (1860), S. 302 — Sentence — Mitigation — Murder by hired assassins.

That the accused who committed murder were hired assassins is no reason to award lesser sentences of life imprisonment. (Para 21)

Anno: Penal Code, S. 302 N. 18.

Gopal Rao Ekbote and Bhimsen Achari, for Appellants; Gopal Rao Murumkar, for the State.

CASES CITED :

(A) ('52) AIR 1952 SC 167: 1952 Cri LJ 863 (SC)
(B) ('47) AIR 1947 PC 67: 48 Cri LJ 533 (PC)
(C) ('37) AIR 1937 Mad 618: ILR (1937) Mad 695: 38 Cri LJ 1027 (FB)
(D) ('29) AIR 1929 Lah 344: 10 Lah 283: 30 Cri LJ 414 (FB)
(E) ('32) AIR 1932 Bom 286: 56 Bom 172: 33 Cri LJ 396
(F) ('52) AIR 1952 Bom 299: 52 Cri LJ 1219 (FB)
(G) ('52) AIR 1952 Bom 72: 1952 Cri LJ 334

(H) ('50) Confirmation Case No. 13 of 1950 (Bom)
(I) ('45) AIR 1945 PC 118: 46 Cri LJ 689 (PC)
(J) ('41) AIR 1941 Rang 301: 43 Cri LJ 123

JAGANMOHAN REDDY, J.: Three persons, Narayan, Sopan and Lakshman, who are the appellants before us were charged for the murder of one Jivan Rao on 11-11-1950, in a field known as Farkandi in the village of Mungaloore. The story of the prosecution is that Jivan Rao was going to Ambadh village on a horse-back, accompanied by P. W. 1, Bhawane. After crossing the border of the village from which they were proceeding, Jivan Rao was accosted by Narayan who came and caught hold of the reins of the horse on which Jivan Rao was riding & stopped him from proceeding further. Jivan Rao apprehending danger apparently looked behind & observed Sopan & Lakshman running towards him from behind, and finding that these people were chasing him, he got down from the horse and ran towards the field known as Farkandhi belonging to Venkat Rao. It is further alleged that on this field Sopan and Narayan caught hold of Jivan Rao and brought him down and Lakshman inflicted injuries on him with an axe in consequence of which Jivan Rao died. Information of the occurrence was given by Bhawane to the Police Patel, Saheb Rao. P. W. 13 made a report (Ex. 2) the same day, on the basis of which the First Information Report dated 12-11-1950, was issued and sent to the Court by post reaching it on 14-11-1950. The accused Sopan and Narayan were arrested on 13-11-1950, and the accused Lakshman was arrested on 25-11-1950. Later, as a result of the investigation, Venkat Rao who was also found to have had something to do with the offence was included in the challan as an absconding accused. The inquest (Panchnama) on the dead body was made on 13-11-1950 (Ex. 1). On the same day the axe, alleged to have been used for inflicting injuries on the deceased was discovered as a consequence of the information alleged to have been given by the accused and a Panchnama (Ex. 3) was made relating to this discovery on the same day. Panchnamas (Exs. 5, 6 and 9) relating to the seizure of shirt and two dhoties belonging to the accused were also made. After the investigation was completed a challan was filed on 25-12-1950.

The accused pleaded not guilty. At the trial the prosecution examined 14 witnesses and marked the evidence of the Doctor recorded in the enquiring Court and the accused examined 5 witnesses. After the defence evidence was over, the Court acting under S. 540, Criminal P. C., examined four witnesses. It may here be stated that the Committing Magistrate ordered the striking out of the name of the absconding accused, Venkat Rao, from the challan against which a revision was filed by the prosecution before the Sessions Judge who has made a reference recommending to this Court that the revision should be allowed and the order of the Committing Magistrate set aside. The revision is also before us for consideration which will be dealt with separately.

(2) The learned Sessions Judge, on the evidence on record held all the three accused guilty of the murder of Jivan Rao under S. 302, Penal Code, but preferred not to give them the maximum sentence allowed by law as according to the Sessions Judge they appeared to him to be hired assassins. It is against this conviction and sentence that the accused have appealed.

(3) We have heard the arguments of the learned Advocate for the accused and the Public Prosecutor in extenso. The main contentions of the learned Advocate for the accused may be summarised as under.

1. That the First Information Report mentions an axe being used although P. W. 1, Bhawane states specifically that he has not observed an axe in the hands of any accused;
2. That the discovery relating to the axe is not admissible under S. 27, Evidence Act;
3. That the evidence of conspiracy or motive is totally unreliable;
4. That there are material discrepancies in the statements of the eye-witnesses with regard to the actual occurrence;
5. That even if it be conceded for the sake of argument that it is proved that Lakshman inflicted injuries on Jivan Rao the other accused, Sopan and Narayan, could not be held guilty under S. 243 for the reason that no common intention as required under S. 7 corresponding to S. 34, I. P. C., has been established and that any conviction is invalid by reason of a specific charge not having been framed under S. 7; and
6. That in the alternative no case of abetment under S. 66 equivalent to S. 109, I. P. C., has been made out.

(4) With respect to the first contention, viz., that the statements under S. 154, Criminal P. C., in the F. I. R. and those in the evidence of Bhawane, P. W. 1, are contradictory, it is well to remember that the object of the F. I. R. is to have a contemporaneous account against the alleged offenders at the earliest opportunity when the occurrence took place and the inconsistency between the statements in the F. I. R. and the evidence of the informant at the trial would discredit the evidence of the informant to that extent but does not make the statement in the F. I. R. the evidence upon the matter in the case. It is no doubt true that P. W. 1 Bhawane states that he did not observe any weapon in the hands of the accused as he was at some distance. But there is nothing in the F. I. R. which justifies the comment of the learned Advocate for the Appellant that this witness has stated anything to the Police Patel about an axe. All that the report says is that P. W. 1 Bhawane informed the Police Patel that as Jivan Rao and he were going to Ambadh, Narayan, Sopan and Laxman accosted him and took Jivan Rao's life and that after the receipt of the report, he — the Police Patel — went and saw that Jivan Rao was lying dead in the Farkandi with injuries caused by an axe on his body and neck. There is, therefore, no warrant for the assumption that Bhawane had made contradictory statements. Further, in the cross-examination of P. W. 1, no question was put to him with reference to this alleged contradictory statement in the F. I. R.

(5) Now coming to the second point, viz., that the discovery relating to the axe is not admissible under S. 27, Evidence Act, the learned Advocate for the appellant has addressed elaborate arguments before us and has submitted that the statement as recorded in the Panchnama — Ex. III — has not been taken down in the first person and that it is a joint statement of the accused which does not show which of them individually gave the information leading to the discovery. Before we deal

with his contentions, it is necessary to notice the language in which the Panchnama has been recorded. The following is an English translation of the Panchnama, Ex. III.

"The accused aforesaid (namely Sopan and Narayan) have stated before us, the Panchas, that on 11-11-1950 I, Lakshman and Narayan have murdered Jivan Rao in the Firkandi number with Lakshman's axe, and myself and Lakshman have buried the axe in the Firkandi number of Venkat Rao in which there is Jawari cultivation and I will go and show it. So saying he took us and the Police to the said field where there is Jawari cultivation and an axe with blood stains was dug out from that place and he said that we killed Jivan Rao with this axe. Narayan accused was also present and said that that is the axe with which we three killed Jivan Rao. My brother Karappa and Lakshman sat and buried the axe in the Jawar field and I was standing at a distance."

Without expressing our view as to whether it is essential that the information furnished by the accused should be recorded in the first person so as to make it admissible in evidence, it is clear from the aforesaid statement in the Panchnama that the informations furnished by Sopan and Narayan have been recorded in the first person, although they could have been taken down in a more lucid and specific language. The words, "I, Lakshman and Narayan", "myself and Lakshman", "Narayan the accused was also present and said 'we three'" used in the panchnama can only point out to the fact that the first statement is that of Sopan and the second statement is of Narayan and that the same is made in the first person. The evidence of the Panch witness Jheeja, P. W. 8. who proved Ex. 3 relating to the discovery of the axe is as follows:

"Another panchnama was held in respect of the discovery of axe. It was kept concealed in a pit in Venkat Rao's adjacent field known as Farkandi in Jawari crop. Sopan showed that place and dug it out saying that with that axe injuries were inflicted to Jivan Rao. The axe had blood stains which were dry by that time. I identify my signature on Ex. 3 and say that the contents are true."

There was nothing in the cross-examination to suggest that the statement was not made by Sopan as stated in the Panchnama nor was there any attempt to discredit the authenticity of the Panchnama. In the cross-examination, certain questions appear to have been put relating to the blood-stains on the axe to which the witness answered

"the blood-stains on the axe and its handle were dark as blood was dried, and that the stains can be seen now also on the handle of the axe."

The other witness to the Panchnama Bansi P. W. 9 also proved Ex. 3. In cross-examination he stated that the axe which was recovered was kept concealed beneath the level of the ground. Syed Gulam Rasool, P. W. 14, Investigating Officer states that he recovered the axe pointed out by Sopan and made a Panchnama. In cross-examination the only fact that was elicited was the distance of the place of recovery of the axe from the dead body, which the witness said was about 15 paces away from the scene of the offence. The evidence pertaining to the recovery of the axe, in our view, cannot be thrown out as being not credible. The trial Court has also believed the same.

(6) The only question is how much of the statement made by the accused is admissible under S. 27, Evidence Act. In the case of — 'Lachman Singh v. The State'. AIR 1952 S C 167 (A) their Lordships of the Supreme Court, in a case where as a result of the statement made by several accused certain parts of the dead body were recovered but the initial pointing out was by one of the accused, heid that:

"even if the rule to be applied in the case was that it is only the information which is first given that is admissible under S. 27 and once a fact has been discovered in consequence of information received from a person accused of an offence, it cannot be said to be rediscovered in consequence of information received from another accused person, the case was covered by the rule"

and the discoveries made at the instance of the person who initially pointed it out were admissible under S. 27. In this case it is clear that it was the accused Sopan who made the first statement and it was he who led the Police and the Panchas to the place where the axe was buried & had the same recovered. Consequently the discovery of the axe made at the instance of Sopan would be admissible in evidence under S. 27. There have been recorded in the Panchnama as well as in the evidence of Jheeja P. W. 8 certain statements alleged to have been made by the accused which are clearly inadmissible in evidence under S. 27.

Whatever difference of opinion there may have been in the High Courts in this country with respect to the admissibility of the entire statement of the accused once a fact has been discovered as a consequence thereof, the Privy Council has set at rest that controversy in the leading case of — 'Pulukuri Kottayya v. Emperor', AIR 1947 P C 67 (B) which over-ruled the Full Bench case of — 'Athappa Goundan v. Emperor', AIR 1937 Mad 618 (FB) (C). In the latter case the Madras High Court while admitting that the weight of Indian authority is against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under S. 27. It admitted the confession of murder made by a person in Police custody in view of the fact that the objects produced not being in themselves of an incriminating nature, their production would be irrelevant unless they were shown to be connected with the murder and there was no evidence so to connect them apart from the confession. Their Lordships of the Privy Council rejected this reasoning and observed that the difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. They approved the decisions in — 'Suthan v. Emperor', AIR 1929 Lah 344 (FB) (D) and — 'Ganu Chendra v. Emperor', AIR 1932 Bom 286 (E). Where a statement of the accused leading to the discovery of any fact under S. 27 consists both of inadmissible and admissible evidence the statements which are clearly inadmissible should be separated and omitted from those which can be admitted and the Courts should

apply their minds only to the admissible evidence under S. 27, Evidence Act.

(7) In the recent case of — 'Rama Shidappa Thorali v. State', a Full Bench of the Bombay High Court in AIR 1952 Bom 299 (F) held disapproving — 'Rangrao v. State', AIR 1952 Bom 72 (G) and the confirmation Case No. 13 of 1950 (H) Bombay, that when a statement of an accused while in custody is tendered in evidence under the provisions of S. 27, Evidence Act, on the ground that an article which is concealed and the accused's knowledge of its whereabouts are discovered in consequence of the statements, words included in the statement with regard to the authorship or concealment, for example, "I have concealed" "I have hidden" or "I have kept" are admissible in evidence. The judgment of the Full Bench delivered by Chagla C. J., with which we are in respectful agreement, has after an exhaustive consideration of the case-law on the point come to the aforesaid conclusion and is in accord with the decision in AIR 1947 P C 67 (B) where their Lordships of the Privy Council pointed out that the fact discovered referred to in S. 27 embraces the place from which the object is produced. It is, therefore, clear that the fact discovered need not merely be the physical object like an axe, and not only the place from where these objects are found, but the fact discovered may also be the knowledge of the accused of the place where the articles were concealed. Their Lordships at page 70 further observed that:

> "Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant."

From a consideration of the provisions of Ss. 25, 26 and 27 and the leading cases referred to above, the following points emerge:

(i) No confession made to a Police Officer by an accused person whether in custody or not can be proved against the accused unless it be made in the immediate presence of a Magistrate;

(ii) So much of the information received from a person accused of an offence in custody of a Police Officer as relates distinctly to the fact thereby discovered is admissible under S. 27, Evidence Act, and can be proved against him but any statement made to a Police Officer which connects the fact discovered with the offence charged is inadmissible;

(iii) Where a fact is discovered as a consequence of information furnished by several accused, only the information which is first given by one of the accused is admissible if it leads to the discovery;

(iv) The statement of the accused while in Police custody regarding the concealment of any article or the accused's knowledge of its whereabouts and the discovery in consequence of the said statement is admissible in evidence.

Applying these principles to the statements recorded in the Panchnama and proved by P. Ws. 2, 8, 9 and 14, the following statement of Sopan alone is admissible under S. 27, Evidence Act, against him:

> "Myself and Lakshman have buried the axe in the Farkandi Number of Venkatrao in which there is Jawari cultivation and I will show it. So saying he took us and the Police to the said field where there is Jawari cultivation and an axe with blood-stains was dug out from that place."

The rest of the statement whether of Sopan or Narayan is clearly inadmissible.

(8-15) We propose now to deal with the third and fourth contentions of the appellants' Advocate relating to the evidence of motive and the commission of the offence. (After reviewing the evidence of prosecution witness, his Lordship proceeded).

(16) This leaves for consideration the evidence of P.W. 2 Babu, P.W. 5 Thatayya, C.W. 2 Bapu, C. W. 3 Rustum. From the evidence of these four witnesses, it is apparent on their own admission that none of them tried to prevent the commission of the murder by the three accused, even though all of them saw the accused chasing Jivan Rao. Even if, as admitted by Babu P. W. 2, Thatayya P. W. 5, and Rustum C. W. 3 Babu alone tried to intervene, the fact remains that after the incident none of the witnesses tried to arrest the accused, but carried on their work as if nothing had happened and went home after their work was finished. This conduct on their part is not what in the ordinary course of human conduct one would expect of them. If they were in fact present on the scene as stated by them, then their conduct would incline us to the belief that they were accomplices and assisted the commission of the offence by their inactivity or alternatively they came on the scene immediately after the commission of the crime. There is no reason for Bhawane making a false statement that he has seen these witnesses after the incident. It must not be forgotten that (on their own admission) they were working for Venkat Rao who is one of the absconding accused in this case at the instance of Shanker who is his Bataidar and at Venkat Rao's instigation it is alleged this offence was committed. Even on the basis that these witnesses were in some way accomplices to the commission of the crime, their evidence will have to be looked at, applying the salutary rule of practice which has acquired the force of law, only on being corroborated in material particulars by independent evidence. Bhawane P. W. 1, whose evidence we have believed, corroborates the presence of these witnesses on the scene and the fact that Sopan was with them at the time when he came and found Jivan Rao lying dead with wounds on the neck and body. He further states that none of these witnesses said anything when Sopan asked him to tie the horse to the tree and go away. This evidence clearly confirms our view that the aforesaid witnesses were in the nature of accomplices. The learned Advocate has argued that if these witnesses were present on the scene, as they alleged, they could have observed the axe being buried by the accused, but they did not say anything about this fact in their evidence. He further submits that it is quite contrary to human conduct for the accused to be burying the axe in the presence of these persons who had witnessed the incident. These contentions would be valid if they were

independent witnesses without having become accomplices in the commission of the offence.

(17) P.W. 4 Nago Rao, who is an independent witness and on whom there was practically no cross-examination of any worth tending to discredit his evidence, has stated that he was working in his field, which is outside the village of Mangrool, at about breakfast time in the morning when he saw Jivan Rao going to Ambadh on horse-back followed by Bhawane and these three accused Lakshman. Sopan and Narayan were going by a short-cut which met the road taken by Jivan Rao to Ambadh. (His Lordship reviewed his evidence and proceeded). There is, in our view, corroboration on material particulars in the evidence of these eye witnesses by the evidence of other independent witness as to make them credible.

(18) Apart from this evidence there is also strong circumstantial evidence to connect the accused with the guilt of the offence, which is as follows:

(i) P. W. 1 Bhawane who speaks of the three accused chasing Jivan Rao into a field and of his finding Jivan Rao lying dead in the field with injuries on the neck and body and of Sopan asking him to tie the horse to a tree and go away;
(ii) P. W. 4 Nago Rao speaks of having seen Jivan Rao on a horse followed by Bhawane proceeding towards Ambad and the three accused (of whom Lakshman was carrying an axe) proceeding by a short-cut which meets the road to Ambad;
(iii) the discovery of the axe which was hidden in the ground on the information given by Sopan from near the scene of occurrence;
(iv) the seizure of a blood-stained shirt from Narayan through a Panchnama Ex. 5 which was admitted by Narayan in his statement under S. 342 to be his;
(v) the certificate of the Chemical Examiner showing that the said Khudta of Narayan and the axe recovered had stains of human blood on them;
(vi) the total absence of any explanation by the accused either as to their presence on the scene of occurrence or as to the chasing of Jivan Rao or of the blood-stains on the shirt of the accused Narayan or on the axe, except for the plea of alibi which has been disbelieved by the lower Court and with which we are in agreement;

All the aforesaid proved facts are links in the chain of circumstantial evidence which forge the conclusion that the accused have committed the offence as alleged.

(19) The learned Advocate for the accused has submitted that the evidence as to the motive is unreliable. Ordinarily when there is sufficient direct and circumstantial evidence connecting the accused with the commission of the offence as in this case the proof of motive becomes unimportant. In this case it is alleged by the prosecution that the three accused were inimically disposed towards Jivan Rao because Mina Bai, P. W. 11 who belongs to their brotherhood wanted to adopt Jivan Rao's son Kishen which was disliked by the accused. Apart from this, it is also alleged that Venkatrao who instigated this murder was also inimically disposed towards Jivan Rao because of certain disputes over land. (His Lordship reviewed the evidence in this respect and proceeded).

(20) There is one other point about which a good deal of stress has been laid by the Advocate for the accused and that is that even if it is proved that Lakshman had inflicted the blows on Jivan Rao, the other accused Sopan and Narayan could not be convicted under S. 243 for the reason that no common intention under S. 7 has been established. In the alternative the prosecution has not made out a case of abetment under S. 66, Hyderabad Penal Code, corresponding to S. 109, Indian Penal Code. In the case of — 'Mahboobshaw v. Emperor', A I R 1945 PC 118 (I), their Lordships of the Privy Council held that common intention within the meaning of S. 34 implies a pre-arranged plan. To convict the accused of an offence applying S. 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

In the case of — 'Sulaiman v. The King', AIR 1941 Rang 301 (J), cited by the learned Advocate, the accused were held not to have a common intention to cause injury known to be likely to cause death though the combined effect of the injuries caused was likely to cause death. In that case a common assault on the deceased was made by the accused and his party with fists and one of them made an assault with a stick. On these facts it was held that the offender knew that he was likely to cause not only hurt but grievous hurt and that the common intention of his party was to cause grevious hurt. The facts of the case justified that conclusion but in the instant case where the facts are that the accused (one of whom had an axe in his hand) chased the deceased and two of them caught hold of the deceased and the other inflicted injuries on the neck and body with the axe, common intention to commit murder can be inferred from their act. The learned Sessions Judge in the charge framed by him left no doubt in the minds of the accused that each one of them along with the other two assaulted Jivan Rao and inflicted injuries with an axe causing his death, on account of previous enmity at Mangrool and thereby committed an offence of murder. In other words, he has made it clear that they had common intention to commit an offence of murder. Of course, the accused were not charged under S. 7, Hyderabad Criminal Procedure Code. Whether in order to sustain such a conviction under the substantive section read with S. 7 of the said Code, a charge should be specifically framed, there is a divergence of opinion in the different High Courts, but it is clear that where the accused has suffered no prejudice and the Advocate for the accused was unable to show any prejudice the omission to specifically charge under S. 7 will not materially affect the conclusion in the case. The case of Sopan and Narayan in assisting Lakshman in the commission of the crime also

constitutes abetment under S. 66, Hyderabad Penal Code (corresponding to S. 109, Indian Penal Code). We, therefore, hold the accused Lakshman, Sopan and Narayan guilty of the offence under S. 243 and confirm the conviction and sentence passed by the learned Sessions Judge.

(21) We would, however, pause here to observe that the reasoning assigned by the Sessions Judge for awarding sentence of life imprisonment on the ground that the accused appear to have been hired assassins is not, in our view, correct. Nevertheless, we confirm the conviction and the sentence and dismiss the appeals.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 HYD. 166 (Vol. 40, C.N. 71)

KHALILUZZAMAN SIDDIQI J.

Gopinath, Petitioner-Appellant v. Sayed Pathru, Respondent.

Appeal No. 219 of 1950, D/- 1-2-1951.

†(a) **Civil P.C. (1908), O. 8, R. 5 — Defendant not putting written statement due to negligence but later on putting some defence — Court coming to conclusion that plaintiff has not proved his case — Court is justified in dismissing suit — In such case failure to file written statement does not amount to admitting plaintiff's case — (Hyderabad Civil P.C., S. 109).** **(Para 4a)**

Anno: Civil P.C., O. 8 R. 5 N. 6.

(b) **Civil P.C. (1908), O. 41, Rr. 27, 28 — Remand in second appeal to allow appellant to tender further evidence should not be ordered.** **(Para 6)**

Anno: Civil P.C., O. 41 R. 27 N. 1; O. 41 R. 28 N. 1.

Maruthi Rao Joshi, for Appellant.

CASES CITED:

(A) ('48) AIR 1948 Nag 168: ILR (1947) Nag 982

(B) ('36) AIR 1936 Bom 285: 60 Bom 788

(C) 20 Deccan LR 540

JUDGMENT: Appellant's lawyer heard. A suit was filed for possession of a small piece of open land behind the plaintiff's house. The trial Court dismissed the suit for want of proof and that judgment was upheld on first appeal. This is the second appeal.

(2-3) It is contended by the learned lawyer for the appellant in the first place that the plaintiff's evidence was sufficient to entitle him to a decree; secondly that even if the evidence was insufficient the case ought to be remanded for further evidence as the plaintiff was misled by the fact that there was no defence in the case and he believed that only minimum amount of evidence would be sufficient to obtain a decree in view of these circumstances. The third contention is that it was the duty of the Court to point out to the appellant that the evidence produced by him was insufficient.

(4) What actually happened in this case is that the defendant failed to submit his written statement on a day fixed for that purpose, and in view of the statements of the Vakil, the Court ordered that the defendant is not allowed to put in his defence and framed issues and proceeded with the case. Thereafter while there was no written statement on the record, the defendant's Vakil was present and adduced evidence on behalf of the defendant and finally the suit was dismissed. In view of these facts I am unable to apply the principle laid down in — 'Sheo Narayan Harlal v. Kanhayalal', AIR 1948 Nag 168 (A), or — 'Shriram Surajmal v. Shriram Jhunjhunwalla', AIR 1936 Bom 285 (B); or 20 Deccan LR 540 (C). The reason is in cases where the defence is put in and there are only partial denials, it follows in view of the provisions of S. 109, Hyderabad Civil P.C. that a fact not specifically denied is deemed to be admitted. It may be as pointed out in one of the above stated rulings where the defendants did not put in the written statement purposely or intentionally, it may be possible to interpret his conduct to mean that the plaintiff's claim or certain facts alleged by him have been admitted by necessary implication.

(4a) I have always been of opinion that the Indian Civil P.C., whatever may be the law in other countries, does not usually impose any penalty or punishment where a party in a civil suit fails to appear or fails to do a certain act. What this Civil P.C. provides is where the parties fail to perform an act which is necessary for the further prosecution of the case, the Court shall proceed further if it so desires so that the failure of the party does neither call for punishment nor entitles him to any benefit by way of compelling the Court to adjourn the case where it does not want to do so in the interests of justice. That being so the theory of admission of a fact stated in the pleadings whether by necessary implication or otherwise must logically or reasonably result from the circumstances present. That is to say where a person admits or denies some facts and does not admit or deny any one of them clearly then the operation of the principle embodied in S. 109, Civil P.C. will come into operation. Similarly as in AIR 1936 Bom 285 (B) it may be possible to say in a case where no defence has been lodged in spite of an opportunity to do so, it may be rightly concluded by necessary implication that certain facts have been admitted. But to push this theory to this extent that where the conduct of the parties does not actually amount to admission(?) is to be assumed to have been admitted by way of punishment simply because on account of the negligence or some other fault he failed to put in defence is, I think, going much further than what is contemplated under our Civil P.C. What happens here on account of the defendant's failure to act in time is he is not allowed to put in his written statement. It is clear that he wanted to put in a written statement, certainly not merely to admit the case but, as it is clear, to resist the case. Therefore unless the Civil Procedure Code permits an admission by way of necessary implication as a punishment for failure, I am not prepared to interpret S. 109 to extend to a case of this kind.

(5) The other two rulings one of Nagpur and the other of the Hyderabad High Court do not help this case. What has happened here is that the plaintiff produced all his evidence which consists of four witnesses. The defendant, who was not allowed to submit his defence, produced two witnesses evidently all the evidence he wanted to submit. On that evidence the trial Court refused to believe the story put forth by the plaintiff that the land in dispute was under his ownership. The argument of the learned lawyer is that the plain-

tiff proceeded with the case on the assumption that the plaintiff's allegations in the plaint were admitted by necessary implication and therefore the plaintiff had put in only minimum amount of evidence which is required in a case where there is no express denial. If this contention is correct, I am afraid the learned lawyer might have gone a step further and said "well my case is admitted; there is no need for the plaintiff to produce any evidence". Naturally in cases of admission no evidence is required. Only in cases where there is a denial that the plaintiff is called upon to produce evidence. Of course in cases where there is no defence evidence, the minimum amount of evidence is all that is required.

(6) The plaintiff comes in and claims title of a piece of land. He has no documentary evidence of whatever nature because he says that in villages there is no record of ownership. There is also evidence produced by the defendant denying the ownership and possession of the plaintiff. In spite of these factors, I might have remanded this case if I had found that the plaintiff was actually misled at any stage of this suit or he was prevented from bringing in further evidence which he could produce but did not for some cogent reason. After the judgment of the trial Court was delivered, the plaintiff certainly knew that the evidence he has produced has failed to convince the Court. If there was any evidence yet to be tendered he should have mentioned that fact and claimed a remand in the first appellate Court. But no such case is made out and I am not prepared to interfere in the grounds at this stage in second appeal. There is nothing on the record to show that there is any evidence in the possession of the plaintiff which can be of any use. As pointed out by their Lordships in the Privy Council remanding cases without a careful consideration of all these factors may lead to false evidence being brought in into Court and remand of cases requires great care. It is admitted by the learned advocate for the appellant that there is no documentary evidence on the subject. I, therefore, dismiss this appeal. As the respondents are absent there is no order as to costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 HYD. 167 (Vol. 40, C.N. 72)

PALNITKAR C. J. AND
SIADAT ALI KHAN J.

Kondiba Ganoji and others, Appellants v. Moti Ram Ganoji and others, Respondents.

Civil Revn. No. 129 of 1951, D/-18-8-1952.

Civil P. C. (1908), O. 22, R. 9 — Setting aside abatement — Sufficient cause — Limitation — Limitation Act (1908), S. 5.

One G., defendant 1 was said to have died during the abnormal conditions prevailing before the Police Action and it was alleged that the Razakars murdered him in some jungle. After the Police Action it was found that the files were in pell-mell condition. When normal conditions were restored, the Munsiff took the file on hand and issued notices to the parties and their lawyers. The lawyer for defendant 1 stated that his client was not making any appearance and did not come to him for giving instructions and that he did not know what had happened to him. Afterwards on 18th Amardad 1358 F the said lawyer stated that his client died more than 8 months ago. On 18th Azur 1359 F a petition was presented to the lower Court, stating that defendant 1 was either dead or could not be found or traced and therefore, in view of the statement of the lawyer for the said defendant, the plaintiff put in a petition, making the heirs of the deceased as his legal representatives.

Held that in such a case the provisions of O. 22, R. 9, Civil P. C. were applicable and the petition which was presented long after the expiration of the period of limitation should be treated as one for setting aside the order of abatement. In view of the extraordinary circumstances in which defendant 1 was said to have died, it was clear that the plaintiff was not expected to know when and where the said defendant died. Under these circumstances, the lower Court was right in giving the benefit of S. 5, Limitation Act to the plaintiff. **AIR** 1938 Mad 218, Rel. on. **(Para 3)**

Anno. C. P. C., O. 22 R. 9 N. 7, 8; Lim. Act, S. 5 N. 6.

Kalyan Rao Patki, for Appellants; Govind Rao Ardhapurkar, for Respondents.

REFERENCE..... /Para.
('38) 174 Ind. Cas. 951: (AIR 1938 Mad 218) 3

ORDER: This revision petition is directed against the order of the Munsiff at Nanded dated 1-6-1951, by which he has allowed the plaintiff's petition for setting aside the order of abatement and bringing the legal representatives of defendant 1, Ganoji, on record.

(2) The brief facts of the case are that Ganoji is said to have died during the abnormal conditions prevailing before the Police Action and it is alleged that the Razakars murdered him in some jungle. After the Police Action it was found that the files were in pell-mell condition. When normal conditions were restored, the Munsiff took the file on hand and issued notices to the parties and their lawyers. The lawyer for defendant 1 stated that his client is not making any appearance & did not come to him for giving instructions and that he does not know what has happened to him. Afterwards on 18th Amardad 1358F the said lawyer stated that his client died more than 8 months ago. The lawyer for the plaintiff enquired into these facts. It is stated before us that it was not possible for the plaintiff to actually find out and satisfy himself whether the said defendant is dead. Therefore, on 10th Azur 1359F a petition was presented to the lower Court, stating that defendant 1 is either dead or cannot be found or traced, and therefore, in view of the statement of the lawyer for the said defendant, he had put in a petition, making the heirs of the deceased as his legal representatives. A plea of limitation was raised before the lower Court, which was disallowed. Hence this revision petition.

(3) After going through the records of the case, we are satisfied that no ground has been made out for our interference. The lower Court has rightly held that in such a case the provisions of O. 22, R. 9, Civil P.C. will be applicable and the petition which was presented long after the expiration of the period of limitation should be treated as one for setting aside the order of abatement. It is clear that in such cases, the provisions of S. 5, Limitation Act will be applicable. In view of the extraordinary circumstances in which defendant 1 is said to have died, it is clear that

the plaintiff was not expected to know when and where the said defendant died. Under these circumstances, the lower court was right in giving the benefit of S. 5, Limitation Act to the plaintiff. In — 'Secretary of State v. Vinjamuri Kist Namacharyulu', 174 Ind Cas 951 (Mad), it has been held that the ignorance of the death of the respondent in the absence of negligence or other act of omission, for which the appellant can be held responsible, would be sufficient cause within the meaning of S. 5, Limitation Act and the delay in applying to set aside the abatement can be excused. We are, therefore, of the opinion that there is no force in this revision petition and we dismiss it. We make no order as to costs, as the defendant has already agreed to pay Rs. 30/- as fees to the guardian 'ad litem' of the minor respondent.

B/D.H. Revision dismissed.

A.I.R. 1953 HYD. 168 (Vol. 40, C.N. 73)

MANOHAR PERSHAD AND SIADAT ALI KHAN JJ.

Rashid Chenoy, Appellant v. Raja Pratapgirji, Respondent.

Civil Appeal No. 972-848 of 1354 Fasli, D/- 23-7-1952.

Registration Act (1908), S. 87 — Defect in procedure — Document presented to Registrar having jurisdiction — Registration done by officer appointed by Registrar — Officer appointed not having jurisdiction by himself still validity of Registration cannot be disputed: AIR 1929 PC 279; AIR 1931 PC 52; AIR 1938 Nag 550; AIR 1924 Cal 349; AIR 1914 All 76 (2); AIR 1923 All 232, Dist. and Case law referred and discussed. (Para 5)

Anno: Reg. Act, S. 87 N. 2.

J. V. Narsinga Rao, for Appellant; Harikishen Singh, for Respondent.

CASES CITED:
(A) ('29) AIR 1929 PC 279: 7 Rang 624
(B) ('31) AIR 1931 PC 52: 10 Pat 481
(C) ('38) AIR 1938 Nag 550: ILR (1940) Nag 74
(D) ('24) AIR 1924 Cal 349: 74 Ind Cas 679
(E) ('14) 1914 All 76(2): 24 Ind Cas 451
(F) ('23) AIR 1923 All 232: 65 Ind Cas 654
(G) ('23) AIR 1923 Rang 176: 1 Rang 22
(H) ('74-75) 2 Ind App 210: 15 Beng LR 228 (PC)
(I) ('14) AIR 1914 PC 16: 42 Ind App 22
(J) ('22) AIR 1922 PC 279: 49 Ind App 375
(K) ('21) AIR 1921 PC 93: 47 Ind App 177
(L) ('89) 11 All 319: 1889 All WN 101 (FB)
(M) (1900) 23 Mad 580
(N) ('88-89) 16 Ind App 19: 16 Cal 468 (PC)
(O) ('76-77) 4 Ind App 166: 1 All 465 (PC)
(P) ('35) AIR 1935 Lah 301
(Q) ('01) 28 Ind App 15: 23 All 233 PC

JUDGMENT: This is a first appeal in a civil case. The only point for determination in this appeal is whether the registration effected is valid in law. We have heard the arguments of the learned Advocates of the parties and record our opinion below.

(2) The learned Advocate for the appellants argued that the registration effected is infructuous in law inasmuch as it has been effected by the Assistant Registrar of the suit property which was beyond the limits of the Hyderabad City; that the Registration Act delimits the jurisdiction of the Assistant Registrar to the precincts of the Hyderabad City; that the only exception in the Act is in section 24 (ii) and is in favour of the Registrar & not in that of the Assistant Registrar, and that that section 87 only cures defects in procedure and not defects of jurisdiction and, hence, as in this case the Assistant Registrar has no jurisdiction outside the City, he could not have registered the mortgage deed and as such, the registration is infructuous in law. He has cited the following cases.

— 'Ma Pwa May v. Chettiar Firm', AIR 1929 PC 279(A). — 'Dottie Keran v. Lachmi Prasad Sinha', AIR 1931 PC 52 (B) — 'Suganmal v. Mt. Umraobi', AIR 1938 Nag 550 (C); — 'Basanta Kumar v. Manjuri Dassi', AIR 1924 Cal 349 (D); 53 All. 34 (Sic). Bansraj Singh v. Rajbans Barthi', AIR 1914 All 76 (2) (E); Mt. Ram Pia v. Hazari Lal', AIR 1923 All. 232 (F).

We have carefully gone through all cases referred to by him and are of the opinion that they are distinguishable. There can be no quarrel with the principle that registration outside territorial jurisdiction is invalid. In the case under consideration, however, the Registrar had admittedly power under section 24 (2) to effect registration of the property situate anywhere in this State and therefore, as the document was presented to him all the cases referred to by the learned advocate become, strictly speaking, irrelevant. The only question that remains is whether the Registrar can delegate the registration to one of his officers, as he delegated it in this case to the Assistant Registrar. The cases cited by the learned advocate throw no light on this point. The question may be viewed from this point of view that by the presentation of the document to the Registrar, the Registrar became seized of jurisdiction and anything he did after he had jurisdiction can only be a question of procedure. It may be that under S. 36, Registration Rules, he should have himself registered the document. But the question is that when he issued a commission delegating the act of registration to his subordinate officer, whether the delegation deprives him of the jurisdiction or is it a mere defect in procedure? A little discussion on this point seems necessary.

(3) To begin with, the case of — 'S. M. A. R Chetty Firm v. Ko Teik Ka', A. I. R. 1923 Rang 176 (G) may be referred to where it was held that:

"Where a document is presented by a person duly authorised to present it who thus initiates the jurisdiction of the registering officer and who does all that is required to do under the Act and is guilty of no shortcoming thereunder, it would be contrary to the scheme of the Act and it could not have been the intention of the Registrar that he should be punished for any error or defect in procedure of the registering officer subsequent to the presentation".

Similarly Sir Barnes Peacock in —'Sah Mukhun Lal v. Sah Kundan Lal', 2 Ind App 210 (H) held:

"Now considering that the registration of all conveyances of immovable property of the value of Rs. 100 or upward is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyance of land of small value, it is scarcely reasonable to suppose that it was the intention of the legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of Ss. 19, 21 or 36 (now Ss. 34-35, Indian Registration Act, XVI of 1908) or other similar provisions. It is rather to be inferred that the legislature intended that such errors or defects should be classed under the general words 'defects in procedure' in S. 88 (now S. 87) of that Act so that innocent and ignorant

persons should not be deprived of their property through any error of inadvertence of a public officer on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under S. 83 or upon petition under S. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights".

(4) The learned commentator, Sir Brojendra Lal Mitter, in his commentary on the Indian Registration Act on S. 35 page 162 after quoting the above passage from '2 Ind App 210 (H) has remarked:

"But later rulings of Privy Council leave hardly any doubt that the registration in such a case is a nullity. The view taken in recent cases is that the provisions of the present section (S. 35) are not merely directory but imperative. In — 'Jambu Parshad v. Muhammad Aftab Ali', AIR 1914 PC 16 (I) their Lordships said:

'One object of Ss. 32, 33, 34 and 35 of Act III of 1877 was to make it difficult for persons to commit frauds by means of registration under the Act. It is the duty of Courts in India not to allow the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it'.

"Similar observations occur in still later cases — 'Choteylal v. Collector of Moradabad', AIR 1922 PC 279 (J) & —'Bharat Indu v. Md. Hamid Ali Khan', AIR 1921 PC 93 (K). The view taken by the High Court of Allahabad in —'Hardei v. Ram Lal', 11 All 319 (L) (F B), and by the High Court of Madras in — 'Pakran v. Kunhammed', 23 Mad 580 (M) that non-compliance with the provisions of Ss. 34 and 35, is a mere 'defect in procedure' within the meaning of S. 87, can no longer be sustained. In fact the decision in Hardei's case' (L) is inconsistent with the ruling of the Privy Council in 'Jambu Pershad's case' (I) cited above."

It may, however, be remarked that all the cases referred to by Sir Mitter are prior to 1929 and in AIR 1929 P C 279 (A) their Lordships of the Privy Council again quoted '2 Ind App 210' (H) with approval. In view of this it is difficult to agree that the authority of the Allahabad and Madras cases referred to by Sir Mitter is weakened, or that those cases are inconsistent with the Privy Council's rulings. A principle that can be deduced clearly from these cases is that where there is no fraud or suspicion of fraud it is not the intention of the Registration Act to invalidate a registration deed which is otherwise valid. This is evident from the Full Bench case of — 'Hardei v. Ram Lal', (L) referred to above, where the Allahabad High Court relying on '2 I. A. 210 (H) held that even:

"non-attendance of the executant of an instrument before the Registrar would not on that account render his registering the instrument invalid."

Straight, C. J. cited the case of —'Majid Husain v. Fasl-un-nissa, 16 Ind App 19 (N) in support of the above proposition, where it was held by their Lordships of the Privy Council that:

"though a direction in the statute to parties seeking registration of a document had not in terms been complied with, nevertheless the certificate of the Registrar was sufficient and satisfactory proof of due and proper registration."

The Privy Council case of — 'Mohammad Ewaz v. Brijlal', 4 Ind App 166 (O) may also be referred to here. There Sir Montague E. Smith explained that:

"the object of the Registration Law being to afford notoriety to instruments relating to immovable property, the circumstance that a document has been in fact registered, satisfies the object at which the statute aimed."

And further,

"A certificate of registration is sufficient to render a document admissible in evidence, without inquiry as to whether the same was properly granted."

We may also refer to —'Zohra Jan v. Haveli Shah', AIR 1935 Lah 301 (P). This case has an almost direct bearing on the point now under consideration, as it has been held there that:

"The appointment of an official by Registrar to do the registration shows that he was duly appointed & S.87 covers any defect in qualification necessary for the appointment."

The learned advocate for the appellant argued that as this case was decided on S. 11, Registration Act, and the Hyderabad Registration Act contains no section corresponding to S. 11, it has no bearing on the present case and the Registrar could not have delegated the registration to the Assistant Registrar. It may, however, be pointed out that the Lahore High Court has expressly stated in their judgment that even if the appointment had not been under S. 11, S. 87 would have cured any defect in appointment.

(5) The above should not blur the other side of the case: of course there are circumstances which vitiate registration. These are well stated in Lord Atkin's judgment to be as follows:

"In seeking to apply S. 87, Registration Act, it is important to distinguish between defects in procedure of the registration and lack of jurisdiction. Where the Registrar has no jurisdiction to register as where a person not entitled to do so presents his registration or where there is lack of territorial jurisdiction or where the presentation is out of time, the section is imperative. On the other hand, if the Registrar has jurisdiction in exercise of it the section takes effect."

Keeping these also in view the position comes to this that where the defect is one of jurisdiction as opposed to one of procedure, it is not curable. This is evident right from '2 Ind App 210' (H) down to Privy Council case of — 'Mujibunnissa Begum v. Abdur Rahim', 28 Ind App 15 (Q) and AIR 1929 P. C. 279 (A). No doubt, it cannot be gainsaid that lack of territorial jurisdiction makes a regn. invalid. But when as in the case under consideration the Registrar has jurisdiction, his appointing a registering officer to do the regn. does not appear to be a defect of jurisdiction & is a defect only of procedure & as such curable by S. 87 Indian Registration Act or its corresponding Section of the Hyderabad Registration Act. In the result, we are of the opinion, that the registration effected by the Sub-Registrar, under the directive of the Registrar is correct and cannot be questioned. We hold, therefore, that the mortgage-deed was properly registered.

(6) On merits, the execution of the mortgage-deed is admitted. The allegation is that there was no consideration; but this contention has no force, as the defendant himself made several payments under it. In the result, we agree with the finding of the first Court. There remains the plain-

tiff's appeal. The first appellate Court has not given any interest for the pendency of the suit. In our opinion some interest should have been allowed. We direct 2 per cent interest for the pendency of the suit & till full payment. In the result, the defendant's appeal is dismissed and the plaintiff's appeal is allowed. Plaintiff will get cost throughout. This judgment should govern the connected appeal.

B/M.K.S. Order accordingly.

A.I.R. 1953 HYD. 170 (Vol. 40, C.N. 74)

MANOHER PERSHAD AND DESHPANDE JJ.

Lakshmamma, Petitioner v. Someswar Rao and another, Respondents.

Civil Revn. No. 51/3 and Appeal No. 241 of 1951, D/- 13-1-1953.

(a) **Civil P.C. (1908), O. 1, R. 10 — Appeal.**

There is a clear distinction between a case where a party's name is struck out on the ground of misjoinder and the case where the suit is withdrawn or abandoned at the last hearing. The provisions of O. 1, R. 10 (2) would not apply to the latter case. The question whether an appeal would lie or not against an order striking out the name of a party would depend on the fact whether it is in substance a decree and whether the rights of the parties have been conclusively determined by the Court with regard to all or any of the matters in controversy in the suit. (Para 11)

(Conflict of opinion between Madras High Court on the one hand and Rangoon, Allahabad, Lahore and Patna High Courts on the other pointed out). (Paras 4 to 10)

Anno: C.P.C., O. 1 R. 10 N. 42.

(b) **Civil P.C. (1908), O. 1, R. 10 — "Whose presence before the Court may be necessary."**

A person is a proper party only if his presence before the Court is necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit. In other words, the expression "proper party" means a party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point at issue. (Para 22)

In a partition suit a person who is not at all interested in the result of the suit and who is not entitled to any share or interest in the suit property on the plaint allegations is not a proper or necessary party. (Para 23)

Anno: C.P.C., O. 1 R. 10 N. 14 Pts. 1, 2; N. 16 Pt. 10.

(c) **Civil P.C. (1908), O. 14, R. 1 — Issues between co-defendants.**

In a partition suit issues arising as between co-defendants which are not material or necessary for adjudication of the plaintiff's claim and which would unnecessarily complicate matters and raise controversies which do not arise for decision in suit should not be framed and tried. (Paras 24, 25)

Anno: C.P.C., O. 14 R. 1 N. 3

K. Ramamurthy, for Petitioner; Ramaswamy Iyengar, for Respondents.

CASES CITED:
(A) ('22) AIR 1922 All 42: 64 Ind Cas 961
(B) ('31) AIR 1931 All 333(2): 53 All 466
(C) ('25) AIR 1925 Pat 121: 85 Ind Cas 90
(D) ('33) AIR 1933 Mad 435: 143 Ind Cas 476
(E) ('34) AIR 1934 Rang 154: 152 Ind Cas 1079
(F) ('44) AIR 1944 Lah 273: 217 Ind Cas 376
(G) ('42) AIR 1942 Pat 270: 199 Ind Cas 196
(H) ('26) AIR 1926 PC 88: 96 Ind Cas 887 (PC)

JUDGMENT: These are two connected petitions, one an appeal and the other a petition in revision, filed on behalf of Kalluri Lakshmamma, the plaintiff against the order of the Court below dated 3-9-1951 holding that defendant 3 is not a necessary or a proper party and refusing to frame certain issues.

(2) Shri Ramaswamy Iyengar, the learned advocate, for the respondent raised a preliminary objection that the order of the Court below holding that defendant 3 is not a proper or necessary party and that her name should be struck off, is not an order which is appealable, and as such, the appeal is not tenable. Reliance is placed on the cases of — 'Abdul Hakim Khan v. Ram Gopal', AIR 1922 All 42 (A) and — 'Sher Ali v. Jagmohan Ram', AIR 1931 All 333(2) (B).

(3) On behalf of the appellant Shri Ramamurthy urged before us that where the name of the defendant is struck out, the effect is the same as if the suit is dismissed against him and as far as he is concerned, the suit comes to an end, and therefore, he contends that the appeal is proper. Reliance is placed on — 'Ramji Pandey v. Alaf Khan', AIR 1925 Pat 121 (C).

(4) After giving a careful consideration to this question, we feel that there is a difference of opinion among the various High Courts in the Indian Union. In the case of — 'Jujushiti Panda v. Lakshmana Dola', AIR 1933 Mad 435 (D), Beasley C. J. and Bardswell J. held:

"Where parties have been wrongly joined and the suit against them is given up by the plaintiff or upon that ground he exonerates them or there is a finding come to that they have been wrongly joined, then the correct procedure is to strike out their names as having been improperly impleaded. On the exoneration or the striking out of the names of persons on the ground of misjoinder, they cease to be parties to the suit. And these defendants must be treated as persons who had been dismissed from the suit and not as persons against whom the suit has been dismissed."

(5) Arrayed against this view, there are the decisions of the Rangoon, Allahabad, Lahore and Patna High Courts. In the case of — 'Mapu v. K. R. V. E. K. Firm', AIR 1934 Rang 154 (E), it has been held that:

"An order striking out a person's name from the list of the defendants is in effect an order dismissing the suit as against him and the dismissal of the suit as against him is final unless and until it is set aside by way of appeal".

(6) In the case in AIR 1931 All 333(2) (B), Mears C. J. and Sen J. held that:

"Where a cause of action against a defendant is specifically pleaded and a distinct relief has been claimed against him, and the defendant is not impleaded only for the sake of convenience, an order directing the removal

of the name from the array of the parties is in substance, although not in form, a decree, because the effect of the order is the refusal to grant the relief to plaintiff which he had prayed for. The proper remedy for the party aggrieved from the order is to file an appeal and not an application in revision under S. 115."

(7) In the case of — 'Babu Ram v. Shafi-ul-Zaman', AIR 1944 Lah 273 (F), Harries C. J. and Mahajan J. held that :

"The order of the Court removing the name of the defendant from the array of parties was in effect an order of dismissal of the suit against him."

(8) In the case of —'Jagdiswar Prasad v. Harsaran Rai', AIR 1942 Pat 270 (G) Harries C. J. and Dhavle J. held similarly that :

"The effect of striking off the name of a party from the array of the defendants is that the suit as far as he is concerned comes to an end."

(9) In a Privy Council decision — 'Haveli Shah v. Shaikh Painda Khan', AIR 1926 PC 88 (H), there is a similar observation that striking out of the names would amount to this, that the suit was brought to an end as against those persons.

(10) Thus it would appear from this that the majority view is that when a party's name is struck out, the suit comes to an end and as far as that person is concerned, it would be deemed to be dismissed against him.

(11) There is no direct ruling of this Court on this point but the practice of this Court has been to treat an order of such a nature as a non-appealable order. Though there was no direct ruling we were inclined to refer this matter to a larger Bench, but the learned advocate for the respondents Shri Ramaswamy Iyengar stated before us that he does not press this point in view of the fact that there is difference of opinion in the High Courts and a separate revision petition has been filed on behalf of the appellant. But he contended that in that case, it has to be seen whether interference is justified in revision. As the learned advocate did not press this point and as a separate revision petition has also been filed, we do not wish to refer the matter to a larger Bench and enter into a detailed discussion of the point. We may nevertheless point out that the question whether an appeal would lie or not, would depend on the fact whether it is in substance a decree and whether the rights of the parties have been conclusively determined by the Court with regard to all or any of the matters in controversy in the suit. In our opinion there is a clear distinction between a case where a party's name is struck out on the ground of misjoinder and the case where the suit is withdrawn or abandoned at the last hearing. The provisions of O. 1, R. 10(2) would not apply to the latter case.

(12) Now we have to see whether there is sufficient material to invoke our revisional jurisdiction. Shri Ramamurthy, advocate for the petitioner, contends that his case is that defendant 3 is the daughter of late Chandramma who had a share in the suit house, now sought to be partitioned and that defendant 1 is not her adopted son nor has rights as a 'Persona Designata' under the will by Chandramma which is fraudulent. He, therefore, argues that in her presence as the proper heir of Chandramma, the partition must be effected and instead of determining who is the proper heir, the learned Judge has erred in striking out the name of defendant 3 from the array of defendants. He, therefore, contends that defendant 3 is not merely a proper but a necessary party for effective determination of the suit.

(13) The second contention is that defendant 3 has denied that she is the daughter of late Chandramma and claims to be the daughter of the plaintiff while the plaintiff denies both the facts. It is, therefore, necessary that an issue be framed to that effect. The third contention is that the learned Judge has erred in disallowing the issues as to whether defendant 1 is the adopted son of Kalluri Veeria, husband of late Chandramma and the gift-deed and the will are fraudulent. These issues, he contends, are necessary for ascertaining the real nature of the case.

(14) On behalf of the respondents Shri Ramaswamy Iyengar, the learned counsel urged before us that so far as defendant 3 is concerned, she is neither a proper nor a necessary party as she is not entitled to any share or interest in the suit house or for a decree for partition or possession of any share therein.

(15) With regard to the question of the issues being framed relating to the adoption of defendant 1, the gift-deed and the will, he contends that in the circumstances of the case, the questions relating to the adoption of defendant 1. the gift-deed or of the will in his favour which have been raised by the plaintiff, do not arise for determination in this suit as they are not germane or relevant to the adjudication of the plaintiff's claim.

(16) In order to appreciate the respective view points of the learned advocates of the parties, a reference to the pleadings is necessary.

(17) In the plaint plaintiff has averred that she is the widow of one Kalluri Ramanna and that defendant 1 is the son of Maseti Kistia and styles himself wrongly as the adopted son of Kalluri Veeria and Chandramma, the widow. Defendant 2, it is stated, is the son of defendant 1 and defendant 3 is the daughter of the said Kalluri Chandramma by the said Kalluri Ramanna, husband of the plaintiff with whom she lived as mistress almost from the time she attained puberty; the husband of the plaintiff died in 1913 and left cash and moveable property worth about Rs. 12,000/-; plaintiff and the said Chandramma had Stridhan, that is, gold jewels weighing about 50 tolas given to her by the plaintiff's husband while the said Chandramma was living in the plaintiff's husband's house as mistress, he married plaintiff; three years after her marriage, defendant 3 was born to the said Chandramma and was living with them in the same house; Chandramma had acquired a dominating position in the house and after the death of the plaintiff's husband, she and her daughter continued to live in the house of the plaintiff.

Plaintiff being illiterate used to be guided by her; she promised to manage her house and property for her benefit; she used to do money-lending business with the property of the plaintiff; she had no money of her own left to purchase the properties; she purchased with plaintiff's funds the house of Duba Laxmia in Secunderabad; again with a portion of the said fund and jewels of the plaintiff,

cash left by the husband and the profits thereof, Chandramma purchased the house No. 2732 for Rs. 7,000/- out of which Rs. 6,000/- belonged to the plaintiff. At the time of the purchase of the house, Chandramma said that she would purchase it in the name of herself and the plaintiff and she would put Rs. 1000/- of her own and Rs. 6,000/- of the plaintiff; plaintiff was illiterate and reposed confidence in her and believed her version to be true. The expenses of Rs. 200/- for the said purchase were paid from the plaintiff's funds; later the said house was improved at a cost of Rs. 8000/- from plaintiff's properties.

Some time after the second marriage of defendant 1, his second wife Nagamma began to quarrel with the plaintiff and harass her; seeing this Chandramma rented a room for the plaintiff and put her there and gave her provisions and moneys for her expenses; later when the plaintiff's eye-sight was completely spoiled and she could not cook for herself, Chandramma put the plaintiff in the house of defendant 3 who began to feed and look after the plaintiff. After the death of Chandramma when the plaintiff asked defendant 3 about the management of the property, she was informed by the husband of defendant 3 that the sale-deed of house No. 2732 stands in the name of Chandramma and defendant 2 instead of the plaintiff; that Chandramma executed two deeds: one gift-deed and the other will during her illness. Chandramma was not the full owner of the house, as such, she was not entitled to make a will; Chandramma in collusion with defendant 1 exercised fraud on the plaintiff to deprive her of her properties; the recitals in the documents are false to the knowledge of Chandramma and defendant 1. In conclusion, plaintiff prays for a declaration that she is entitled to the said house in proportion to her moneys (Rs. 14,200) and that Chandramma is entitled to only Rs. 1000/-. Defendants 1 and 2 have no manner of right to the said house; Chandramma is the mistress of the plaintiff's husband and defendant 3 is her daughter.

(18) Defendant 1 totally denied the allegations of the plaint. Defendant 3 in her written statement denied that she is the daughter of Chandramma but alleged that she is the daughter of Ramanna and is entitled to the property as his heir; Chandramma had no right to the property and as such, she was not entitled to execute either a gift-deed or a will. Plaintiff, being the wife, is entitled to a declaration that she is entitled to the said house till her lifetime. Plaintiff filed a reply after which the case was posted for issues.

(19) In the meantime, on 10-4-1951, defendant 1 put in a petition stating that in view of the allegations of defendant 3, there arises no question of her being entitled to any share in the said house or being granted a decree for partition or possession of any share therein in her favour and as such, defendant 3 is not a necessary or proper party; and that her name should be struck off therefrom. The questions relating to the adoption of defendant 1 or a gift-deed or the will in his favour which have been raised by the plaintiff do not arise for determination, as they are not pertinent or relevant to the adjudication of the plaintiff's claim. Plaintiff filed a counter after which the learned District and Sessions Judge heard the arguments of the parties and accepted the petition of defendant 1 and directed that the name of defendant 3 be struck off.

(20) From a perusal of the pleadings it is clear that the real question in issues is whether the moneys belonging to plaintiff's husband were invested in the house purchased by Chandramma and if so plaintiff would be entitled to a share in the house proportionate to the amount invested and if the plaintiff establishes this fact, she will be entitled to a decree.

(21) We have now to see whether defendant 3 is a necessary or a proper party and whether her presence is necessary for the proper adjudication of the case within the meaning of O. 1, R. 10, Civil P.C. Plaintiff wants to retain defendant 3 alleging that she is the daughter of Chandramma and as Chandramma's share in the invested money is Rs. 1000/- she will be entitled to that amount. Secondly, defendant 3 denied that she is the daughter of late Chandramma and claims to be the daughter of the plaintiff and her heir, while plaintiff denies both these facts. It is, therefore, necessary to decide the said points raised by the parties in order to decide the point at controversy. Thirdly, defendant 1 claims to be the adopted son of Chandramma and he alleges that he has a will in his favour which would affect the rights of defendant 3. Under these circumstances, he contends that defendant 3 is a proper and necessary party.

(22) We are afraid, we cannot accept the contention of the learned advocate, in view of the allegations in the plaint; there arises no question of her being entitled to any share in this suit or any share or interest in the suit house for granting a decree for partition or possession in her favour. Plaintiff would be entitled to a decree provided she establishes that Rs. 14,200/- were invested from her property for the purchase of the house and that fraud was practised on her. The question of the interest of defendant 3 would only arise to the share of Chandramma. The fact whether defendant 3 is entitled to the share of Chandramma or defendants 1 and 2, are questions which are not pertinent or relevant to the adjudication of the plaintiff's claim; they are the rights 'inter se' between defendant 3 and defendants 1 and 2, and plaintiff's claim can be decided without having to determine those rights and the fact whether defendant 3 is Ramanna's heir also does not become relevant for the determination of the suit. Admittedly, she would not be entitled to any share in the lifetime of the plaintiff. Further defendant 3 in para 7 of her written statement denies that she is Chandramma's daughter. When she denies that she is the daughter of Chandramma, the question whether she would be entitled to her share or not, does not arise, and a person is a proper party only if his presence before the Court is necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit. In other words, the expression "proper party" means a party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point at issue.

(23) As discussed above, defendant 3 is not at all interested in the result of the suit and, therefore, in our opinion also defendant 3 does not in any way become a proper or a necessary party. Thus we find nothing wrong in

the order of the Court below and this contention fails.

(24) We have next to consider whether it is necessary to frame an issue regarding the fact of the adoption of defendant 1 and the gift-deed and the will. As pointed out above, these are questions which are not pertinent or relevant to the adjudication of the plaintiff's claim. Admittedly, defendant 1 is in possession of the property. If the plaintiff establishes her claim, she will be entitled to the possession of the property. The question whether defendant 1 is the adopted son or not does not become material and it is not necessary for the adjudication of the plaintiff's claim. These are questions 'inter se' between the defendants. The introduction of the said question and the framing of the issues regarding them, would, in our opinion, complicate matters and raise controversies which do not arise for decision in this suit.

(25) We are, therefore, of the opinion that the issues pertaining to the adoption of defendant 1 or the gift-deed or the will in his favour are not at all necessary. Thus there does not remain any force in this petition in revision. Petition in revision is, therefore, dismissed. This order shall govern the connected appeal. Parties to bear their own costs.

B/K.S. Appeal and Revision dismissed.

A.I.R. 1953 HYD. 173 (Vol. 40, C.N. 75)

SIDDIQI J.

Radhabai and another, Appellants v. Gango Bai, Respondent.

Civil Appeal No. 296/4 of 1359 Fasli, D/- 10-3-1950.

Civil P.C. (1908), O. 21, R. 31 — Hyderabad Civil P.C., S. 58 — Decree for specific movable property — Non-mention of money value to be paid as alternative relief — Executing Court cannot fix value.

It has however power, in view of S. 58 Hyd. Civil P.C. (O. 21, R. 31(2), Civil P.C.) to fix the amount of compensation that can be awarded in view of the conditions that have arisen in the execution of the decree. (Para 2)

Anno: C.P.C., O. 21 R. 31 N. 6.

Govind Rao Ardhapurkar, for Appellants; Gopal Rao Ekbote and Bhimseena Chari Ashrat Vakil, for Respondent.

JUDGMENT: This is a suit between two sisters. One of the sisters, the plaintiff, got a decree for delivery of certain specific movable property (Jewellery etc.) but in spite of her prayer in the plaint the decree did not specify the amount of the value of the articles referred in S. 288, Local Civil Procedure Code. I mean that the values of the jewellery or the amount recoverable as such from the defendants was not decided by the trial court on account of insufficiency of evidence and the decree was passed simply for delivery of the specific property mentioned. In execution of the decree, on failure of the defendants, the sister and her husband, to deliver those articles, subject of the decree, the court proceeded to value these articles for the purpose of alternative procedure for the decree-holder to recover the value of the Jewellery.

The first appellate court dismissed the appeal of the judgment-debtor which was based solely on this legal ground that the Execution Court was incompetent to add to or alter the terms of the decree as they stood. An appeal was preferred to this High Court and was heard 'ex parte' and the judgments of the lower courts were modified in one respect otherwise the judgment was upheld. Now on account of Regulation No. 1 of 1358 Fasli the second appeal in the High Court is re-opened and I have to decide the appeal 'de novo'.

(2) The question for decision before me is whether the execution court is competent in a case like this to do something which was within the duty of the trial court. In the absence of any express provision to that effect, I would have been very reluctant to import any general authority in the executing court to add to the decree where the trial court disallowed that particular alternative relief for insufficiency of evidence. In that case, the appellant's contention that the execution court is not competent to go beyond the exact limits laid down by a decree even into collateral or dependent matters would have prevailed. But here we have a specific provision of the Civil Procedure Code dealing with a case of this kind and all those principles relating to the powers of the original court of trial and the execution court cannot be invoked to defeat a specific provision of law.

Section 58, Civil P.C. covers this case completely. It provides where the judgment-debtor has failed to carry out the decree (i.e. to deliver the movable property) the decree-holder will be entitled to such compensation found due for non-delivery of that property according to the terms of the decree. Now this decree did not provide for this contingency and the value was not decided upon and fixed. But the later provision of the same section lays down that otherwise the decree-holder will be entitled to such an amount by way of compensation which the court finds reasonable. Now this provision naturally applies to the execution court and not to the trial court because this contingency arises only when the value of the articles has not been so fixed in the decree for the purposes of execution. I, therefore, hold that while the executing court is not competent to go into that question now and fix the valuation of these articles which was at the time in the sole competence of the trial court but the execution court can in view of the alternative provision referred to in this section fix compensation that can be awarded in view of the conditions that have arisen for the execution of the decree.

I find similar provision is embodied in O. 21, R. 31, of the Bharat Code of Civil Procedure. It is almost similarly worded as the Local Section which reads "in other cases such compensation as it thinks fit." I therefore allow the appeal, modify the judgment of the lower courts to this extent that the execution court will proceed to determine the compensation according to the later portion of cl. 2, S. 288 and execute accordingly. The cost of this appeal will abide by the result.

C/K.S. Appeal allowed.

A.I.R. 1953 HYD. 174 (Vol. 40, C.N. 76)

QAMAR HASSAN AND DESHPANDE JJ.

Ratanlal Kesarachand and others, Appellants v. Bandulal Radhakishen and others, Respondents.

Second Appeal No. 230/2 of 1951, D/- 27-10-1952.

(a) **Registration Act (1908), S. 17 —Declare or extinguish — Subsequent agreement reciting that consideration for sale was returned and vendee had no right in property is provable and does not require registration — (Evidence Act (1872), S. 92) — (Hyderabad Evidence Act, S. 76 (6)). Case law Ref. and Rel. on; AIR 1914 Mad 639 (1), Dist. (Paras 4, 7)**

Anno: Reg. Act, S. 17 N. 15, 18; Evi. Act, S. 92 N. 10, 20.

(b) Registration Act, S. 49 — Unregistered deed, though requiring registration does not prevent evidence being let in to show the sham or nominal nature of the sale transaction for, the effect of such evidence is not to vary or contradict the terms of the sale-deed: A. I. R. 1926 Rang 94, Rel. on. (Evidence Act, S. 92). (Paras 4, 6)

Anno: Reg. Act, S. 49 N. 19; Evi. Act, S. 92 N. 9, 10, 20.

Govind Das Mehta, for Appellants; Vinayakrao Vaidya and Ram Pandit, for Respondents.

CASES CITED:

(A) ('52) AIR 1952 All 83
(B) ('15) AIR 1915 Mad 530; 25 Ind Cas 721
(C) ('26) AIR 1926 Mad 362: 91 Ind Cas 452
(D) ('26) AIR 1926 Rang 94: 95 Ind Cas 512
(E) ('35) AIR 1935 Lah 821: 160 Ind Cas 773
(F) ('36) AIR 1936 Lah 576: 165 Ind Cas 156
(G) ('38) AIR 1938 Oudh 119: 174 Ind Cas 378
(H) ('14) AIR 1914 Mad 639(1): 23 Ind Cas 409 (FB)
(I) ('32) AIR 1932 PC 55: 136 Ind Cas 798
(J) ('24) AIR 1924 PC 226: 47 Mad 729
(K) ('25) AIR 1925 PC 75: 3 Rang 106

DESHPANDE J.: The facts out of which this second appeal has arisen are that Defendants Nos. 1 and 2, Kesarchand and Gulabchand, got a decree in a money suit against defendants Nos. 3, 4 and 5, Sitaram, Jainarayan and Dhanraj and in execution of the decree, attached the house situated at Wasi, Taluqa Kalam, and in the Court sale it was purchased by defendant No. 6, Mudaliar. Bansilal, the plaintiff, alleged in his plaint dated 6th Amardad, 1352 F., that the house along with other property was sold by defendants Nos. 3 to 5 for Rs. 1,500/- for which they executed a registered sale-deed dated 1st Farwardi, 1349 F., and gave possession of it to the plaintiff. It was further alleged that when he came to know of the attachment he filed a claim petition which was dismissed on the 27th Khurdad, 1352 F. Hence the present suit.

Defendants Nos. 1 and 2 in their written statements denied the fact alleged in the plaint and stated that the sale-deed by defendants Nos. 3 to 5 in favour of plaintiff was a nominal one without consideration and was brought into existence with a view to defraud the creditors. The suit remained ex parte so far as defendant No. 3 was concerned and the court guardian on behalf of defendants Nos. 4 and 5 denied any knowledge of the execution of the sale-deed and stated that the sale-deed was bad for want of legal necessity. Defendant No. 6, the auction-purchaser, resisted the claim on grounds similar to those advanced by defendants Nos. 1 and 2 and further relied on a document alleged to be in the custody of one, Kanniahalal, evidencing true nature of the transaction between the ostensible vendors and vendee. It was further alleged that the plaintiff had never been put in possession of the house in pursuance of the sale.

On behalf of plaintiff three witnesses were examined and the defendants Nos. 1 and 2 examined one witness and defendant No. 6 examined one witness. Thus, in all five witnesses have been examined. On this evidence, the Court of first instance held that the sale-deed in favour of the plaintiff though proved, cannot be said to create a title in him because of the document produced by the witness, Kanniahalal, purporting to show the nominal nature of the sale-deed. The learned lower appellate court on the contrary held that the document required registration as it purported to extinguish the right created by the sale-deed. The document being inadmissible in evidence the right created by the sale-deed would remain unaffected giving the plaintiff an unhampered right to a decree under S. 330, Hyderabad Civil P. C. It is against this judgment and decree that the defendants Nos. 1, 2 and 6 have (filed?) the present appeal. During the pendency of this appeal respondents Nos. 1 and 2 have died and are represented by their legal representatives.

(2) It is argued on behalf of the appellants that the agreement does not require registration as it merely declares the existing right and does not create or extinguish any right, title or interest to the property. Even supposing that it requires registration, this document can be relied upon for the collateral purpose of proving that the sale-deed was a sham one. In support of this contention, the learned Advocate has relied upon: — 'Ram Rao Singh v. Ajodhya Pd. Singh', A I R 1952 All 83 (A); — Seshacharlu v. Chinniah', AIR 1915 Mad 530 (B); — 'Ramayya v. Appayya', AIR 1926 Mad 362 (C); — 'Abdul v. Arliu', AIR 1926 Rang 94 (D); — 'Punjab & Sind Bank Ltd. v. Rustomji', AIR 1935 Lah 821 (E); — 'Warkam Singh v. Sunder Singh', AIR 1936 Lah 576 (F); — 'Jafar Ali Khan v. Qamar-un-nissa', A. I. R. 1938 Oudh 119 (G). In reply the Advocate for the respondent-plaintiff strongly contends that the agreement filed by the witness, Kanhiahalal, clearly extinguishes the right of the plaintiff and as such it requires registration and as it is not registered it is inadmissible in evidence even to show collaterally the nominal nature of the transaction because it affects the immovable property. In this connection he relies on — 'Venkatachalpathi Garu v. Muthu Venkatachalapathi', AIR 1914 Mad 639(1) (H). So far as the cases cited on behalf of the appellant are concerned, he concedes that the proposition of law laid down in cases cited by the learned Advocate for the appellant is quite correct. But he contends that the sale-deed is not a sham one but a bona fide transaction by which the right to the disputed property was transferred in his favour. The contention of the appellant that under S. 53, T. P. Act, the sale should be regarded as executed in order to defraud the creditors does not help the appellant in any way because under S. 53, such a sale does not become void but voidable and unless and until it is set aside the sale remains valid.

(3) We have gone through the records of this case carefully. As held by both the lower

courts the sale-deed and the agreement are proved to be executed by their respective executants. The only question which falls to be decided in this appeal is whether on a construction of the document it can be held that the sale-deed was a sham or a nominal transaction. In this agreement it is stated that the plaintiff, as settled already, received back the consideration of the sale-deed and the assertion is that the plaintiff had got no right in the property which is the subject-matter of the dispute. Taking into consideration the statement of the witness, Kanniahalal, and the two documents together, I am of the opinion, that the transaction of sale was merely a nominal and sham transaction. The intention of the parties was that the judgment-creditors' property should be saved and in order to achieve this they staged a drama of executing a sale-deed and an agreement which together considered, conclusively proved that there was no intention of transferring the right, title and interest of the property in favour of the plaintiff. Under such circumstances, I hold that no right was passed in favour of the plaintiff in the property.

(4) As regards the contention that the agreement requires registration, my opinion is, that the agreement does not require registration because it does not in itself create or extinguish any right, title or interest in the property. It merely shows the nature of the transaction so called as the sale-deed, as was held in — AIR 1915 Mad 530 (B):

> "A document which simply proves that a document executed previously was only benami in its nature, is admissible in evidence even if unregistered."

In the case of — 'AIR 1926 Mad 362 (C)', it was clearly held that:

> "An unregistered document which merely shows that a registered sale-deed executed previously in respect of certain immoveable property was only nominal in its nature is admissible in evidence inasmuch as it is not used as evidence of any transaction affecting immoveable property".

In the present case also the agreement is being used to show that the sale-deed was a nominal one and therefore it is admissible in evidence as in the Madras case above referred to. In the case of — 'AIR 1926 Rang 94 (D)', it was held that:

> "Where a person who has executed a document seeks to show that the document is a mere sham deed and represents nothing, he is not seeking to vary or contradict any of the terms of the document, and oral evidence is admissible to prove that there was no such agreement between the parties."

This case supports the contention of the appellant that in spite of the document being unregistered evidence can be led to prove the sham or nominal nature of the transaction. In the case of — 'Bageshwari Charan Singh v. Jagarnath Kuari', AIR 1932 PC 55 (I), the Privy Council has held that:

> "A document which merely acknowledges as a fact that a right is vested in a particular person, does not require registration."

The agreement in this case also simply acknowledges the fact that the sale-deed was a sham transaction. Therefore, it does not require registration. In the case of 'AIR 1935 Lah 821 (E)', it was held that:

> "the letters which merely contain an acknowledgment of the past transaction will not require registration."

Similarly in the case of — 'AIR 1936 Lah 576 (F)', it was held that an agreement which was a mere recital of existing fact and which did not of itself declare any rights which did not previously exist, did not require registration. And in the case of — 'AIR 1938 Oudh 119 (G)', it was held that a document, which amounts merely to an admission of a pre-existing state of affairs and does not operate to create title is admissible in evidence, though unregistered. Thus, in view of these cases, it is my opinion, that the agreement does not require registration and can be used in evidence to show that the transaction was a sham or nominal one. The case of — 'AIR 1914 Mad 639 (1) (H)', does not in any way help the respondent, because in that case the document was an out-and-out sale and the plaintiff sought relief alleging that it was a mortgage. So, it would appear that in that case claim of the plaintiff was never that there was a sham transaction but that the sale was in reality a mortgage. As the letter which was to be proved affected the transfer of the right which was admitted by the plaintiff, the latter was held to require registration. But, in the present case, the facts are different. The defendants do not state that title passed to the plaintiff, and therefore, this case does not help the respondent.

(5) The evidence of Kanniahalal clearly goes to prove that the intention of the party was that none should claim any right in the property. In view of this evidence and in view of both the sale-deed and the agreement taken together, it is clearly proved that the transaction of sale was a sham and a nominal transaction transferring no right or title in the property. Such a deed does not require to be set aside, as it creates no right, title and interest. In view of these facts, I am of the opinion that the court of first instance was right in dismissing the suit. Therefore, I allow the appeal with costs throughout and restore the judgment and decree of the trial Judge.

(6) S. QAMAR HASSAN J.: I agree throughout in the conclusions of my learned brother. I, however, wish to add a few observations of my own. In the judgment of the Privy Council, reported in — 'Narsingerji Gyangerji v. P. Parthasaradhi Rayanim', AIR 1924 P C 226 at p. 228 (J), their Lordships observed:

> "Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect."

Later on at page 230 it is stated:

> "When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view irresistible that here a mortgage and a mortgage only was in the direct contemplation & intention of both parties to the transaction".

Similarly in the case reported in — 'Baijnath Singh v. Hajee Vally Mohomed', AIR 1925 PC 75 at p. 77 (K), the Privy Council remarked:

> "Section 92 of the Evidence Act merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of the surrounding circumstances".

In this connection proviso 6, S. 76, Hyderabad Evidence Act, which applies to this case should be kept in mind; Any fact may be proved which shows in what manner the language of a document is related to existing facts.

(7) For this purpose, the learned trial Judge took the impugned document into consideration and on evidence came to the conclusion that the sale-deed of 1st Ferwardi, 1349 F., Ex. No. 2, though ostensibly evidenced a sale, yet the document of 3rd Ferwardi, 1349 F. unmistakably went to show the sham and fictitious nature of the sale-deed. The learned District Judge ignored the document as, in his opinion, it purported to extinguish the right created by the sale-deed. But it is to be observed that the appellants exhibited the document not to prove a reconveyance but to show the fictitious and fraudulent purpose of the sale-deed. Had they used it for the purpose of showing the extinguishment of title created by the sale-deed, the observations of the Full Bench in the case of AIR 1914 Mad 639(1) (H) would have applied with full force. What they desired to make out was that the sale transaction was meant to save the property from being sold in execution of the decrees. In this they are supported by the recital in the impugned document that by reason of certain decrees the vendors had sought the assistance of the vendee and a deed of sale had been executed, but the vendee had taken back and received the consideration money paid before the Registrar and the earnest money as well. There is no explanation on the part of the executant why such a document came into existence two days after the formal sale-deed. It is also significant that the document was left in the custody of D. W. 5 to prevent the vendee from raising any adverse claim to the property ostensibly sold. I am satisfied that the questioned document in its attendant circumstances cannot be said to evidence a reconveyance. It was brought into existence to keep the property safe for the vendor after the danger of its being sold in execution of the decree was over and to evidence the nominal nature of the sale transaction. For this purpose, the document can be used and no question of registration arises. The appeal, therefore, succeeds with costs throughout.

B/M.K.S. Appeal allowed.

A.I.R. 1953 HYD. 176 (Vol. 40, C.N. 77)

PALNITKAR C. J. AND SIADAT ALI KHAN J.

Manohar and another, Petitioners v. Dattaji and others, Respondents.

Civil Revn. No. 287/4 of 1950, D/- 20-8-1952.

Pre-emption — Suit for — Suit based on Hyderabad Revenue Law — Death of pre-emptor pending suit — Ordinary rules and not provisions of Muhammadan law apply — Legal representatives of pre-emptor can be brought on record — (Muhammadan Law — Pre-emption).

It is no doubt true that under Muhammadan Law it has been held that if during the pendency of the suit, the pre-emptor dies, the suit cannot be continued by his legal heirs. But where the pre-emptor bases his suit upon the provisions of Revenue Law and alleges that in view of the provisions of Dastur-ul-Amal Shikmidaran he has a preferential right of purchase, ordinary rules and not provisions of Muhammedan Law will apply and after the death of the pre-emptor his legal representatives can be brought on record and the suit disposed of according to law. (Para 3)

Ramchandra Rao Shedakar, for Petitioners; Govind Das Mehta and Govind Rao Deshpande, for Respondents.

ORDER : This is a revision petition directed against the order of the Munsiff at Omerga, dated 26-7-1950, by which he has declined to entertain the petition filed by the legal representatives of the deceased plaintiff.

(2) The facts of the case briefly are that Vaijnath the plaintiff died during the pendency of the suit and on 28th Shehrenar 1356 Fasli, the Court dismissed the suit on the ground that the plaintiff is dead. The present petitioners who are the sons and heirs of the deceased Vaijnath submitted a petition for their being brought on record as the legal representatives of the deceased plaintiff on 30th Shehrewar 1356F, stating that the deceased died on 18th Amarded 1356F. The defendants contested this petition stating that the petition was time-barred and that no such petition could lie in view of the nature of the suit. The lower Court after recording the evidence of the parties came to the conclusion that the allegations of the petitioners with regard to the date of death of the deceased were proved and that the petition was within time, but dismissed the petition on the ground that in view of the nature of the suit, the provisions of Mohammedan Law will apply and as such the petition cannot be entertained.

(3) It is contended before us by the learned advocate for the petitioners that the suit was filed under the Dastur-ul-Amal Shikmidaran and under the provisions relating thereto under the Revenue law and that it was not a suit based on any provisions of Mohammedan Law. After going through para. 1 of the plaint, we are of the opinion that the suit was based on the plaintiff's right under the Revenue Law and that the plaintiff alleged that in view of the provisions of the Dastur-ul-Amal Shikmidaran, he had a preferential right to purchase the land in question. It is clear that under such circumstances the provisions of Mohammedan Law will not apply. It is no doubt true that under Mohammedan Law it has been held that if during the pendency of the suit, the pre-emptor dies, the suit cannot be continued by his legal heirs. But in this case, as the plaintiff has based his suit upon the provisions of the Revenue Law, the ordinary rules will apply. We are of the opinion that the petition of the revision-petitioners should be allowed. We order accordingly and direct that the petitioners be brought on record as the legal representatives of the deceased and the suit be tried and disposed of according to law. We allow the revision petition, and set aside the order of the lower Court. Costs will abide the result.

B/G.M.J. Revision petition allowed.

A.I.R. 1953 HYD. 177 (Vol. 40, C.N. 78)

MANOHAR PARSHAD AND DESHPANDE JJ.

Noor Mohammad, Petitioner v. Sedmal, Respondent.

Petn. No. 589 of 1952, D/- 4-2-1953.

(a) Constitution of India, Art. 133 (1) (a) — Applicability — (Civil P. C. (1908), S. 110).

Suit filed in Hyderabad State long before coming into force of Constitution when Hyderabad Civil Procedure Code was in force—Suit dismissed—Appeal to Hyderabad High Court allowed after coming into force of Constitution and after Indian Civil P. C. was applied to Hyderabad — Valuation of subject matter of suit in Court of first instance on date of institution below Rs. 20,000/- but above Rs. 10,000- — Valuation in appeal above Rs. 20,000/- — Appellant having right of appeal to Judicial Committee or H. E. H. the Nizam according to law in force before Constitution — After Constitution these authorities ceasing to have jurisdiction to hear appeals by virtue of Art. 374 (4):

Held that in the absence of any provision in the Constitution authorising H. E. H. to entertain and dispose of appeal no question of any vested right of appeal arose and the question of leave must be determined according to Art. 133 of the Constitution — Leave cannot be granted under Art. 133 (1) (a) as requirement as to valuation is not fulfilled: AIR 1951 SC 217, Rel. on; AIR 1952 Him P 14 and AIR 1951 Orissa 141, Disting. (Paras 9, 10)

Anno: C.P.C., S. 110 N. 8.

(b) Interpretation of Statutes — Retrospective operation — Rule as to, stated. (Para 7)

Anno: C.P.C., Pre N. 3.

(c) Constitution of India, Art. 133 (1) (c) — Substantial question of law — (Civil P. C. (1908), S. 110 (c)).

The question whether the Hyderabad Money Lenders Act is applicable to the facts of a particular case is not a substantial question of law either of public or private importance and leave cannot be granted under Art. 133 (1) (c) or under S. 110 (3), Civil P. C. (Para 11)

Anno: C. P. C., S. 110 N. 17.

Sadashiv Rao, for Petitioner; Bishambar Dayal, for Respondent.

CASES CITED:

(A) ('52) AIR 1952 Him P 14

(B) ('51) AIR 1951 Orissa 141: ILR (1950) Cut 663

(C) ('51) AIR 1951 SC 217: 1951 SCJ 320: 52 Cri LJ 736 (SC)

ORDER: This is a petition for leave to appeal to the Supreme Court filed on behalf of the defendant against the judgment of this Court allowing the appeal of the plaintiff and setting aside the judgment of the trial Court which had dismissed the suit.

(2) In this petition Shri Sadashiv Rao, Advocate, urged before us that though the subject-matter of the suit at the time of the institution of the suit was Rs. 16257/9/3 yet at present it is Rs. 21700/- and as the suit was filed before the enforcement of the Constitution and before the amendment of S. 110, Civil P. C., it cannot take away the vested right of appeal of the petitioner, and the petition for leave to appeal to the Supreme Court should be granted, more so, when the judgment of the High Court is not of affirmance. Reliance is placed on the cases of — 'Murtu v. Parasaram', AIR 1952 Him P 14 (A) and — 'Kamal Nayan v. Bira Naik', AIR 1951 Orissa 141 (B).

(3) On behalf of the other side it is urged that no question of any vested right of appeal arises as the Judicial Committee before which an appeal could be filed is not in existence now and there is no provision in the Constitution of India giving powers to the Nizam (now the Raj Pramukh) to hear the appeals. Following up the contention it is urged that the only provision applicable is Art. 133 of the Constitution, but according to this Article, it is necessary that the amount or the valuation of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000/-. Admittedly, the valuation of the subject-matter in the Court of the first instance was less than Rs. 20000/- as such no leave can be granted to the petitioner.

(4) We find sufficient force in this contention. Admittedly, the value of the subject-matter of the dispute in the Court of the first instance was Rs. 16257/9/3. The question, however, is whether for the fulfilment of the said requirement as regards the amount or value of the subject-matter of the dispute, the present petition is to be governed by the provisions of S. 110, Civil P. C. or Art. 133 of the Constitution of India or some other provisions.

(5) In order to decide this point, it is necessary to state that the suit was filed on 6th Khurdad 1353 F. (April '44) which was dismissed on 15th Azur 1355 F. 20th (October '45). An appeal was filed in this Court on 16th Dai 1355 F. (20th November 1945) which was allowed on 16-12-1952, and the present petition is dated 16-1-1953. The Constitution of India came into force on 26-1-1950 long after the institution of the suit when the Hyderabad Civil Procedure Code was still in force. The Indian Civil Procedure Code (5 of 1908) was applied to Hyderabad State on 1-4-1951.

(6) It was urged on behalf of the petitioner that the right of appeal was a substantive right and not a mere matter of procedure and that it would be governed by the law prevailing at the date of the institution of the suit and that right cannot be taken away by any subsequent enactment unless the subsequent enactment purports expressly or by necessary implication to be retrospective.

(7) We do not dispute this point. It is a fundamental rule of law that no Statute shall be construed to have a retrospective operation unless such a construction appears very clearly from the terms of the Act, or arises by necessary and distinct implication (see Maxwell on Interpretation of Statutes, Edn. 9, p. 221). It is further observed that every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be, out of respect to the Legislature, to be intended not to have retrospective effect. (see Maxwell on Interpretation of Statutes, Edn. 9, p. 222). The language of Art. 133 of the Constitution of India is also quite plain and there is nothing in it which might lead to the conclusion that it was meant to have a retrospective effect.

(8) Now we have to see what was the law prevailing at the time of the institution of the suit. The relevant law in force on 6th Khurdad

1353 F. when the present suit was filed was not that contained in the Civil Procedure Code, for, the Code was applied to the State of Hyderabad on 1-4-1951. Second appeals were admitted in the High Court under the provisions of the Hyderabad Civil Procedure Code and appeals against the decree and order of the High Court were preferable to the Judicial Committee under the Special Act known as the "ZABT-E-JUDICIAL COMMITTEE". Of course, the provisions of that Act were similar to those embodied in S. 110, Civil P. C. as it existed before the amendment to that Section and Art. 133 of the Constitution of India, the only difference being in regard to the valuation of the subject-matter of the suit. According to the law prevailing then, an appeal could lie to the Judicial Committee if the value of the subject matter of the suit was not less than Rs. 10,000/-.

(9) This Act was replaced by the Appeals to H. E. H. the Nizam's Regulation No. 21 of 1358 F. This Regulation was in similar terms excepting that according to this Regulation also the valuation of the subject matter ought not to be less than Rs. 10,000/-. By a Firman dated 23-11-1949, H. E. H. the Nizam accepted the Constitution of India as being suitable for the Government of Hyderabad. On 26-1-1950, the Constitution of India became applicable to the Union of India and the Part B States. Under Art. 374 (4) on and from the commencement of the Constitution, the jurisdiction of the authority functioning as the Judicial Committee here to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any Court within the State ceased and all appeals and other proceedings pending before the said authority at such commencement stand transferred to and have to be disposed of by the Supreme Court. This sub-clause thus abolishes the jurisdiction of the Judicial Committee and after the Constitution of India came into force that body and its jurisdiction altogether ceased. There is no other provision in the Constitution authorizing the Nizam (at present the Raj Pramukh) to hear such appeals. The alleged right of appeal was to H. E. H. under the then prevailing law "ZABT-E-JUDICIAL COMMITTEE" and latterly the Regulation No. 21 of 1358 F., and when that authority has ceased to function, and the Act and the Regulation are no more in force and when there is no provision in the Constitution authorising H. E. H. to entertain and dispose of appeals, no question of any vested right of appeal arises. Similar observations were made by their Lordships of the Supreme Court in the case of — 'Janardhan Reddy v. The State of Hyderabad', AIR 1951 SC 217 (C). The cases cited by the learned Advocate for the petitioner do not apply to the facts of the present case. In both the cases appeals could lie to the then Privy Council and now the Supreme Court while this is not so in the present case as no appeals from the decree or order of this Court could lie to the Privy Council then.

(10) Further in the Orissa case the petition for leave to appeal to the Supreme Court was filed long before the Constitution of India came into force. In view of this, we do not wish to discuss them in detail. Thus, the only provisions applicable are Art. 133 of the Constitution of India and S. 110, Indian Civil P. C. (5 of 1908). According to these provisions it is necessary that the amount of the valuation of the subject-matter of the dispute in the Court of first instance and still in dispute in appeal was and is not less than Rs. 20,000/-. Admittedly, the valuation of the subject-matter of the dispute in the Court of the first instance is less than Rs. 20,000/-. Thus the present petition does not fulfil the requirements of both the said provisions of law.

(11) We have then to consider whether the petitioner would be entitled to the benefit of Art. 133 (c). Under this provision it is necessary that this Court should certify that it is a fit case. It is urged on behalf of the petitioner that a substantial question of law is involved and that as such leave should be granted. We do not agree with this either. There is no such substantial question of law in the case within the meaning of Para 3 of S. 110, Civil P. C. The only point is whether the Hyderabad Money Lenders' Regulation of 1347 F. or the Hyderabad Money Lenders' Act of 1349 F. is applicable to the case. It was held that the Hyderabad Money Lenders' Act of 1349 F. was applicable. It is a matter which has been determined with reference to facts and no question of law either of public or private importance arises and, therefore, leave cannot be granted either under Art. 133 Cl. (c) or under S. 110 sub-s. 3. On the merits also we are of the opinion that this is not a fit case. The suit is based on a pro-note which is admitted. The pro-note is for previous loans advanced which are also admitted.

(12) The only contention is that accounts were never gone into and the amount consists of interest and compound interest. This Court has held that after the execution of the pro-note, accounts cannot be opened and the pro-note was executed after going through the accounts. The petition is, therefore, rejected.

A/K.S. Petition rejected.

A.I.R. 1953 HYD. 178 (Vol. 40, C.N. 79)

SHRIPAT RAO PALNITKAR C. J. AND A. SRINIVASA CHARI J.

Mohd. Kasim, Petitioner v. Mohd. Munawar Khan, Respondent.

Revision Petn. No. 29/4 of 1951, D/- 7-10-1952.

Workmen's Compensation Act (1923), S. 22 — Additional District Collector not appointed Commissioner — Power to hear application.

Where a District Collector is appointed as a Commissioner for the purposes of the Workmen's Compensation Act, he acts in his capacity as a persona designata. Therefore, an Additional District Collector, who is not so appointed, cannot be regarded as Commissioner for the purposes of the Act. Hence, he has no jurisdiction to hear and dispose of an application for compensation under S. 22. (Para 1)

Anno: W. C. Act, S. 22 N. 1.

Hameedullah, for the Petitioner.

JUDGMENT: This is a revision petition against the order of the Additional Collector at Hyderabad dated 30th April 1951 by which he has awarded 15 days' wages as compensation under S. 6, Workmen's Compensation Act, to the respondent. The learned advocate for the petitioner argues before us that the order under consideration is without jurisdiction inasmuch as under S. 22 of the Act, the petition for compensation can be heard and disposed of by a Commissioner appointed under the Act. A Commissioner as defined under the Act is a person who is appointed as such under S. 20 of

the Act. Under S. 20, the State Government has to appoint a person to be a Commissioner by a Notification, for the purposes of this Act. A Notification dated 4th Azur, 1357 F., issued by the Secretary to Government, Labour Department, has been issued which appoints all the District Collectors as Commissioners for the purposes of the said Act. It is clear that when the District Collector is appointed a Commissioner for the purposes of this Act, it is in his capacity as a persona designata that the appointment is made. Therefore, the Additional District Collector cannot be regarded, in our opinion, as Commissioner for the purposes of the said Act. Hence, the Additional District Collector cannot be said to have jurisdiction to hear and dispose of the application of the respondent. We, therefore, set aside the order under consideration and direct the Collector of Hyderabad to hear and dispose of the petition according to law.

B/V.S.B. Order set aside.

A.I.R. 1953 HYD. 179 (Vol. 40, C.N. 80)

SRINIVASA CHARI AND PALNITKAR JJ.

Thatha Rao Dada Rao, Appellant v. Jummarlal Dhanji and another, Respondents.

Appeal No. 230 of 1359 Fasli, D/- 11-1-1952.

(a) Civil P. C. (1908), S. 100 and O. 41, R. 31 — Perusal of evidence in second appeal.

If the judgment of the lower appellate Court is not in consonance with the provisions of O. 41, R. 31 and the lower appellate Court has not referred to various witnesses as to whether on what grounds it agrees or disagrees with the trial Court, the High Court can peruse thoroughly the evidence in the case. (Para 1)

Anno: C.P.C., S. 100 N. 53; O. 41 R. 31 N. 6, 7.

(b) Civil P. C. (1908), O. 8, R. 5 — Admission in evidence.

Where in a suit for cancellation of a sale deed one of the two defendants gives evidence in support of the plaintiff's case but the Court holds that the sale deed is regular and genuine it would not be fair and just to pass a decree against such defendant and in favour of the plaintiff to the extent of half share. If the plaintiff has any right on the basis of such evidence he may have recourse to such remedy as may be available to him in law. (Para 2)

Anno: C.P.C., O. 8 R. 5 N. 6.

Sadashiva Rao and Ramachander Rao Badekar, for Appellant; Laxman Rao Ganu and Abdul Wafa Mohamed Kasim, for Respondents.

CASES CITED:

(A) ('11) 8 Ind Cas 644: 35 Bom 93

(B) ('51) AIR 1951 SC 16: 1951 SCR 852

PALNITKAR J.: This appeal has been filed on behalf of Thatha Rao defendant 2. The facts of the case briefly are that Jummarlal plaintiff-respondent 1 filed a suit for cancellation of the sale deed dated 23rd Dai 1347 F and for possession of the suit land stating that the plaintiff who was originally of Salegaum was living in the village of Korhal. The plaint allegation is that the villagers of Salegaum having become inimical towards him, he left that place and came to live in Korhal. He possessed the suit land in Salegaum. The plaintiff had eternal trouble from his enemies and he was not able to manage and enjoy his property peacefully. The defendants made him believe that if the plaintiff sold the land to them the enmity will vanish and disappear in due course of time. They made him believe that during the duration of enmity they would pay half the produce of the land to the plaintiff and after the cessation of the hostilities the land would be returned to him.

The plaintiff alleged that the defendants failed to give half the produce of the land and did not return the land as agreed and that he realised that the defendants had committed fraud. He therefore filed a suit for cancellation of the sale on the ground of fraud. Defendant 2 filed a written statement stating that there was no element of fraud in the contract of sale, that the land was sold on 23rd Dai 1357 F. for Rs. 5,000/- which was already paid to the plaintiff, that the sale deed was duly registered and that there was no agreement as stated in the plaint for the return of the land. The defendants stated that there was not only a sale deed but subsequent to the sale deed there was a decree passed against the plaintiff for declaration of the patta and rights of defendant 2 and shikmi rights of defendant 1 and that the plaintiff admitted in that case the genuineness of the sale deed.

Defendant 1 Baba Rao did not file his written statement and the case was decreed 'ex parte' against him. The first Court after recording of evidence decreed the suit which was affirmed by the appellate Court on 30th Dai 1359 F. Against the latter judgment and decree defendant 2 filed this appeal before us. Normally when the two lower Courts are concurrent on the evidence of fact, it is not the practice of this High Court to interfere with regard to the appreciation of evidence. But we find that the judgment of the lower appellate Court is not in consonance with the provisions of S. 595, Hyderabad Civil P. C. corresponding to O. 41, R. 31, Indian Civil P. C. It was the first appeal before the lower Court and the learned Judge has not referred to various witnesses as to whether on what grounds he agrees or disagrees with the trial Court. Therefore, we at the request of the parties perused thoroughly the evidence in the case, and as the evidence was complete, we did not think it necessary to remand the case to the first appellate Court. (After discussing evidence his Lordship proceeds :)

(2) The obvious facts that are against the case set up by the plaintiff are that the sale deed in question is a registered sale deed. There is a recital in the sale deed that the plaintiff received Rs. 5000/- towards the purchase money from the defendants. The same recital is repeated before the Registrar who registered the sale deed. Secondly, there is the admission by the plaintiff in the civil suit filed by the plaintiff for declaration of patta and shikmi rights in which plaintiff clearly admits receipt of Rs. 5000/-. Thirdly, there is the admission of the plaintiff before the criminal Court referred to above.

Under the circumstances, the burden of proof was heavily against plaintiff to prove that the consideration for sale was not paid and not only that, but it was never the intention in the very beginning that the defendants would not pay the money which was the consideration for the sale deed. The evidence produced on behalf of the plaintiff is to this effect that there was a contract of sale between the

plaintiff and the defendants, but simultaneously there was a contract that after the cessation of hostilities as referred to by the plaintiff the sale deed and the land in dispute would be returned to the plaintiff. In other words the plaintiff alleges that a contract different from what was written in the sale deed was entered into by the parties. We have to consider the question whether under S. 76, Hyderabad Evidence Act corresponding to S. 92, Indian Evidence Act such evidence can be admissible. We are clearly of the opinion that in view of the wording of S. 92, Indian Evidence Act such evidence cannot be allowed to be admitted.

Mr. Abul Wafa Mohamed Kasim the learned Advocate for the respondents relies upon proviso (4) to S. 76 corresponding to proviso (1) to S. 92 and argues that any fact may be proved which would invalidate any document or which would entitle any person to any decree such as fraud, intimidation, illegality etc. But it is to be remembered that only a fact which would invalidate a document such as fraud can be proved. It clearly means that fraud was committed in the execution of the document or that a document which was not intended to be executed was executed fraudulently in favour of the defendants. Such is not the allegation of the plaintiff in this case.

Plaintiff alleges that there was no fraud whatsoever with regard to the writing of the sale deed. The sale deed was written clearly with the open intention that only a sale deed has to be written. Hence, we are of the opinion that the evidence for proving that the sale deed was not intended to be written cannot be led, where no question of fraud arises with regard to the execution of the sale deed. Therefore we have to consider the argument of the learned Advocate for the respondents whether there was fraud under S. 17, Hyderabad Contract Act corresponding to the same Section of the Indian Contract Act sub-s. (3) that defendants made a promise that they would return the land without any intention of performing it. The two lower Courts have not given such a finding that the intention of the defendants was not to perform the promise and that they have given a promise that they would return the land after the lapse of the so-called enmity.

On carefully considering the evidence of the parties we are of the opinion that there is no material on the record to prove that defendants intended to do any act without the intention of performing the same. We are therefore of the opinion that the fraud as alleged by the plaintiff is not proved in the case or that there is any substance in the allegation of the plaintiff that defendants entered into a promise with the object of not performing the same. We are supported in our view by the judgment of the Bombay High Court in — 'Dagudu v. Nana', 35 Bom 93 (A) in which it has been held that under S. 92 such evidence cannot be admitted and parties cannot be allowed to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document. Moreover, as alleged by the plaintiff, assuming that he received the produce for 4, 5 years and afterwards defendants changed their mind and stopped giving him the produce or refused to return the land, that does not go to establish initial intention of not performing the promise as alleged by the plaintiff. The defendants may have changed their mind subsequently and such a change of mind does not necessarily mean that there was an initial intention which is a necessary element to constitute fraud.

On the evidence on record we are satisfied that there was neither such a promise by the defendants nor the case of fraud as alleged by the plaintiff is proved. In cases of fraud, the important thing which has got to be proved is the intention to defraud. This point has been very lucidly dealt with by their Lordships of the Supreme Court in — 'Yeshvant Deorao v. Walchand Ramchand', AIR 1951 SC 16 (B). Such an intention to commit fraud has not been proved in this case. We therefore allow the appeal, set aside the judgments and decrees of the two lower Courts and dismiss the plaintiff's suit with costs throughout.

(3) One more fact which agitated our mind was whether to dismiss the suit in toto or dismiss so far as defendant 2 (appellant) is concerned because Baba Rao (defendant 1) in his statement on behalf of the plaintiff has given evidence in support of the plaintiff's case though his evidence is certainly not worth any credit. But as we have taken the view that the sale deed is regular and genuine and no fraud is proved, it would not be fair and just to pass a decree against Baba Rao defendant 1 and in favour of plaintiff to the extent of half share as that is merely on his evidence as plaintiff's witness. If the plaintiff has any right on the basis of the said evidence, he may have recourse to such remedy as may be available to him in law. Appeal allowed. Costs of all the Courts will be given to the extent of the costs of the appellant.

(4) SRINIVASA CHARI J.: I entirely agree with my learned brother that this appeal should be allowed and as an interesting question as to whether what would constitute fraud has to be determined in this case I desire to add a few lines. That there was an intention to defraud at the time when the transaction took place it is not always possible to lead direct evidence but a party would be permitted to show by the subsequent conduct of the opposite party that at the time when the transaction took place there was no intention to carry out the terms of the contract or to fulfil the promise that was made. This view is supported by a decision of the Supreme Court in AIR 1951 SC 16 (B). It has to be observed that it would constitute fraud only where either there has been a promise made without any intention of performing it or where there has been an active concealment of fact by one having knowledge or belief of the fact.

So far as the facts of this case are concerned the first contingency is not to be found because the plaintiff has not been able to prove by the evidence of the conduct of the defendants that there was no intention on the part of the defendants to carry out the terms of the contract. For a period of four years the defendants did conform to the terms of the contract by giving the plaintiff a portion of the produce as agreed upon. They however stopped giving a share in the produce after 1351 F and this failure on their part to give a share in the produce from the year 1351 F cannot be regarded as a conduct which would lead to an inference that the defendants had no intention of performing the contract or keeping up the promise. At the worst this act of the defendants could be regarded as a breach of the promise or a violation of the agreement entered into

at the outset for which the plaintiff has his own remedy.

(5) The other contingency of the defendant having concealed from the plaintiff any material fact which they had knowledge or belief of, does not also arise in this case because the plaintiff entered into this arrangement with open eyes and according to him it was with a view to avoid the interference by his enemies of his possession of the land so that it could not be said that there was any fact which defendant concealed from the plaintiff in inducing him to execute the sale deed. When these facts are not borne out by the evidence no fraud could be held to have been established and the plaintiff cannot succeed.

C/D.H. Appeal allowed.

A.I.R. 1953 HYD. 181 (Vol. 40, C.N. 81)

PALNITKAR AND DESHPANDE JJ.

Govardhan Das, Appellant v. Ahmadi Begam, Respondent.

Second Appeal No. 717/4 of 1356 F., D/- 28-11-1952.

(a) Civil P. C. (1908), S. 107 — Appreciation of evidence by appellate Court.

Ordinarily the opinion of the trial Court which records the evidence and has the opportunity to look to the demeanour and behaviour of the witness should be given preference to unless there are other impelling grounds for disagreeing with that view. (Para 5)

Anno: C.P.C., S. 107 N. 14.

(b) Evidence Act (1872), Ss. 45, 67 — Hand-writing expert.

Where the evidence does not, in any special manner, refer to the expert knowledge with regard to the hand-writing, the sworn testimony of the other witnesses should be given preference to the opinion of the expert when those witnesses swear on oath that the signatures were written in their presence by the signatories. (Para 6)

Anno: Evidence Act, S. 45 N. 6.

(c) Evidence Act (1872), S. 45 — Hand writing expert.

After a severe attack of Malaria or some virulent disease the patient may recover within a week, and there may be tremor in his hand as compared to the signature which he may have made a week or 10 days prior to the illness. Such facts also should be taken into consideration by the handwriting experts before expressing their final opinion. (Para 6)

Anno: Evidence Act, S. 45 N. 6.

(d) Evidence Act (1872), S. 45 — Handwriting expert.

A fine or stub pen, haste or deliberation, good or bad health, sitting or standing, drunk or sober may radically change the appearance and quality of writing. At the most, expert opinion on hand-writing can raise a suspicion as to the genuineness of a document but it is of no moment unless confirmed by other evidence. (Para 8)

Anno: Evidence Act, S. 45 N. 6.

(e) Evidence Act (1872), S. 67 — Circumstantial evidence.

The hand-writing may, in addition to the usual methods, be proved by circumstantial evidence as S. 67 prescribes no particular kind of proof. AIR 1937 Cal 467, Rel. on. (Para 8)

Anno: Evidence Act, S. 67 N. 1.

Jahangir Ali and Sadashiv Rao, for Appellant; Gopal Rao Borgaonker and Waman Rao, for Respondent.

CASES CITED:
(A) ('05) 2 Cri LJ 311: 1 Cal LJ 385
(B) ('12) 13 Cri LJ 289: 16 Cal WN 812: 39 Cal 606
(C) ('20) AIR 1920 Nag 164(1): 56 Ind Cas 247
(D) ('37) AIR 1937 Cal 467: 170 Ind Cas 267

JUDGMENT: Heard the arguments of the parties.

(2) This is defendant's appeal. The plaintiff-respondent filed a suit for the payment of Rs. 1500/- or in the alternative for the sale of the property and payment of the mortgage money. Plaintiff's case was based upon two mortgage deeds; one is dated 1st Farwardi 1351 F. for the sum of Rs. 800/- and the other dated 17th Dai 1353 F. for Rs. 250/-. In the written statement, the defendant while admitting the mortgage deeds stated that he had paid on the 31st Farwardi 1353 F. Rs. 950/- towards the mortgage money in respect of the two mortgage deeds and that he had to pay the balance of Rs. 100/- for which a decree be passed and that he is prepared to pay that amount.

(3) Ex. No. A. 1 was filed by the defendant in support of his claim of payment of Rs. 950/-. This document was denied by the plaintiff. The trial Court after recording the evidence of the parties came to the conclusion that Ex. No. A. 1 was proved by evidence and therefore it passed a decree for Rs. 100/- in favour of the plaintiff and in the alternative for the sale of the property if the plaintiff (defendant?) did not pay the money.

(4) The first appellate Court disagreeing with the judgment of the trial Court decreed the plaintiff's claim in toto and was of the view that Ex. A. 1 was not proved by evidence. Against that judgment this appeal has been filed and the question for determination is whether Ex. A. 1 has been proved or not.

(5) Ordinarily the opinion of the trial Court which records the evidence and has the opportunity to look to the demeanour and behaviour of the witness should be given preference to unless there are other impelling grounds for disagreeing with that view. Keeping this criterion in mind, we examined in detail the evidence in this case as also the judgment of the first appellate Court. We are of the opinion that the judgment of the trial Court is correct and should be upheld. The approach to the case by the first appellate Court is that the witnesses of the plaintiff have not borne testimony to the fact that the plaintiff who is a 'pardahnashin' lady signed Ex. A. 1 in their presence. It is clear that being a pardahnashin lady the defendants who were not persons before whom she would move without pardah could not swear to the fact that the document in question was signed by her. One fact which has got to be kept in mind in connection with this is that the whole transaction in question was entered into between the parties through one Mohd. Muniruddin who was the father of the plaintiff. The two mortgage deeds prove this fact. The mortgage money with respect to Ex. 2 was paid before the Registrar by the said Muniruddin and the Registrar has written on the back of the mortgage deed that currency

notes worth Rs. 800/- were paid in his presence to defendant by Mohd. Muniruddin. The document has been executed in favour of the plaintiff, Ahmedi Begum, and it is clear that the transaction was gone through the medium of Mohd. Muniruddin, her father.

The same thing has happened with regard to Ex. No. 3, the other mortgage deed, on the reverse of which also the Registrar has endorsed that Rs. 250/- worth of currency notes were paid by Muniruddin to the defendant. Thus, it is clear that the whole transaction was entered into through the father of the plaintiff. The lower appellate Court while discussing the evidence has not taken this important fact into consideration. Another fact which is worth mentioning is that the suit in question was filed more than a year after the Ex. A. 1 was alleged to have been executed and defendant by his notice dated 16th Mehir 1353 F., relied upon this fact of payment of Rs. 950/- and the existence of the document Ex. A. 1. The question therefore to be decided is whether the money was paid to the plaintiff through Muniruddin and Syed Ismail, the husband of the plaintiff.

(6) Plaintiff (defendant?) has produced five witnesses in support of Ex. A. 1 and the payment of Rs. 950/- mentioned therein. D. W. 1 is Govardhan Das. He is the defendant himself. He states on oath that he paid the money at the house of Muniruddin through Syed Ismail to the plaintiff, and the document Ex. A. 1 was written and sent inside for the signature and Syed Ismail brought out the same saying that it was signed by his wife, the plaintiff. D. W. 2 is Shariful Hassan. He is the witness who has signed on Ex. A. 1 and gives evidence in detail and states that the defendant paid Rs. 950/- in his presence to Syed Ismail who went inside and paid the money to his wife, the plaintiff. It is true that he in cross-examination has stated that the plaintiff is a pardahnashin woman and that the transaction was entered into through the vakil sahib, i.e. Mohd. Muniruddin. He also states that the money (obviously Rs. 950/-) was taken by Syed Ismail and that the same was taken to Ahmedi Begum and handed over to her. He states that Muniruddin had also gone inside when the document was signed. He also signed on the same. He identifies his own signature and also the document Ex. A. 1. A little difficulty has been created in this case on account of the opinion of the handwriting experts. The Hyderabad Government Expert has given the opinion that the thumb impression on Ex. A. 1 marked as A and B is such that it is not capable of being identified; while the other Expert has stated that the signatures marked X and Y on Ex. A. 1 cannot be said to tally in view of the reasoning given by him. But the signatures X and Y are those of Syed Ismail and Mohd. Muniruddin.

It would have been better if the signatures of other witnesses also, viz. Shariful Hassan and Dawool Khan have also been sent to the opinion of the Expert. After looking at the signatures of the witnesses, Shariful Hassan on Ex. A. 1 and the signature on the statement, it is difficult to say that they differ. That is a factor in favour of the case of the defendant. That is also the case with regard to the signature of Dawood Khan on Ex. No. A. 1 and on the statement recorded by the Court. With regard to the opinion of the hand-writing expert we have to state that we cannot agree with the same in view of the evidence and facts of this case. In his statement on oath, the hand-writing expert Shri M. B. Dixit states that there is tremor in some letters in signature X as also in some letters in signature Y. He admits that the beginning word 'meem' in Exs. A. 1, 3 and 4 is not different. He states that "'ray' of A. 3 is longer whereas in A. 1-4 it is straight and not so long." He states that he has not measured the difference in bends by Curvometre but by naked eye. Thus, it is clear that the above portion of the evidence does not, in any special manner, refer to the expert knowledge with regard to the hand-writing; and examination by the naked eye of the above words in the signature is not different from that of a lay man. That is also the case when he states

> "the bend in word 'ray' in 'Munir' in signature A. 1-4 is much smaller than the bend in signature marked in the letter 'lam' and 'yee' in signature X."

There is no reason therefore, why the sworn testimony of the witnesses Sheriful Hassan and Dawood Khan should not be given preference to this part of the opinion of the expert when those witnesses swear on oath that the signatures X and Y were written in their presence by the signatories.

It appears from the statement of the expert that he took assistance of one Mr. Joshi in carrying out his work of a hand-writing expert. He states that himself and Mr. Joshi examined some cases separately and discussed. He deposed that sometimes there used to be difference on some points. Thus, it is clear that experts differ in their opinion. He admits that to the naked eye, in the signatures given in B. 1 and B. 2 there is some difference due to bad ink of B. 2. It is to be remembered that the signatures in the above Exs. have been admitted to be of the self-same person. He admits in cross-examination that he has not examined the word 'hay' but he states that there are some differences. Naturally he admits that he is not infallible. He further states that due to lapse of time there may be some differences but in this case, as the signatures purport to be of the same year, the differences have got to be accounted for on the other grounds.

With regard to the question of tremor in signatures we wish to suggest to the hand-writing experts whether besides the lapse of time the question of the general health of the signatory at the time of signature can also be taken into consideration or not. It is common knowledge that after a severe attack of Malaria or some virulent disease the patient may recover within a week and may have to sign papers and there may be tremor in his hand as compared to the signature which he may have made a week or 10 days prior to the illness. We think that such facts also should be taken into consideration by the hand-writing experts before expressing their final opinion. The science of identifying signatures in writings has got to be developed in these directions if more accurate results are to be obtained and the question of tremor has got to be given importance and pertinency with regard to the signature on a disputed document. The expert admits that he does not know Urdu. Whether & how far an expert should know the language in which the signatures have been executed is discussed in some rulings; and in — 'Panchu Mondal v. Emperor', 1 Cal LJ 385 (A) it was held that the evidence of the experts should be approached with considerable care and caution.

(7) Mr. Charles Hardless in his book: "The Identification of Hand-writing and the Detection

of Forgery" has stated that comparison by formation and noting the make of some special letters as guides is an unsatisfactory test. From the way in which the expert has given evidence in this case, it is clear that he has relied upon the make of special letters: 'meem', 'hay', 'ray' while arriving at his conclusion. On the whole we do not find any reason to give preference to the opinion of the hand-writing expert on the sworn testimony of witnesses who have signed the document.

(8) Ames (page 28.) has expressed the opinion that a fine or stub pen, haste or deliberation, good or bad health, sitting or standing, drunk or sober may radically change the appearance and quality of writing as may the condition of health or age change or impair the personal appearance of the writer. It has been held that at the most, expert opinion on hand-writing can raise a suspicion as to the genuineness of a document but it is of no moment unless confirmed by other evidence. Looking at the other evidence in the case, we are satisfied that the suspicion created by the expert has no foundation. We therefore cannot accept the opinion of the hand-writing expert. See — 'Suresh v. Emperor', 16 Cal WN 812: 39 Cal 606 (B). Under S. 67 of the Evidence Act, when a document is alleged to be in the hand-writing of the person, it must be proved to be so. In — 'Kasidanbi v. Gangulal', AIR 1920 Nag 164(1) (C), it was held that it is not necessary that the attesting witness should have already seen the lady sign the document. In — 'Ashutosh v. Nalinakshya', AIR 1937 Cal 467 (D) it was held that the hand-writing may in addition to the usual methods be proved on circumstantial evidence as S. 67 of the Evidence Act prescribes no particular kind of proof. Thus, in our opinion, the document Ex. A. 1 is proved by the witnesses who have borne testimony to the fact that the husband and father of the plaintiff took the document inside, got her signature over it and assured to them that it was signed by the plaintiff.

The lower appellate Court, it is to be remembered, did not allow the appeal on this ground; but on the grounds as mentioned above, that the plaintiff did not sign the document in the presence of the witnesses. That was not possible because she was a pardanashin lady and the statements of her husband and her father that she had signed was enough for the witnesses who signed the document. The evidence of the hand-writing experts is recorded at the High Court at the instance of the respondent. In the particular circumstances of the case we are of the opinion that the evidence is not sufficient to establish the case of the respondent.

(9) Looking from the naked eye (as stated by the hand-writing experts) we do not find any difference between the signatures on Exs. A. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 though if we closely compare; as the hand-writing expert has stated there may be some differences in 'meem' here and 'ray' there; 'Wav' here and 'wav' there; and it is to be remembered that all these signatures have been of one and the same person. It is to be remembered that these Exs. A. 14 to A. 30 are receipts of rent signed by the said Muhammed Muniruddin and given to the tenant from time to time. This is further established by the fact that the whole transaction — not only of the mortgage but also collections of rents — was done by the father of the plaintiff Muhammed Muniruddin and that the signature of Muniruddin was regarded as sufficient on behalf of the plaintiff. That shows the important role played by Mohd. Muniruddin in the transaction in question.

(10) Our attention was drawn to Exs. 9 and 10. These are letters written by Muniruddin to Syed Ismail, the husband of the plaintiff dated 10th Ardebehist 1353 F. and 24th Thir 1353 F. . In Ex. 9 it is mentioned that the defendant Govardhan Das is insisting for the return of his mortgage deed stating that the amount is ready and be accepted. The writer of these two letters is the same Muniruddin. In Ex. 10 it is written that at the instance of Govardhan Das the writer of the letter (viz., Muniruddin) went to Govardhan Das and Govardhan Das stated that "you wait for a few days as the person who was given the money has gone to Nanded." The learned advocate for the respondent argued that if money was paid as stated in Ex. A. in Farwardi prior to the writing of these letters whether Muniruddin would write like that. But it is to be noted that as stated in Ex. A. 1 Rs. 100 were still to be paid to the mortgagee and it has been mentioned in Ex. A. 1 within two months the balance of Rs. 100 will be paid and the document will be taken back. The learned advocate also argued that if a major portion of the mortgage money was paid why was the rent of Rs. 10 paid to the respondent. This objection is unsound as it is mentioned in Ex. A. 1 itself that from the date of the writing of that Ex. only Re. 1/- per month will be paid as rent instead of Rs. 10/- per month until such time as the balance of Rs. 9/- is paid to the mortgagee. It is further written in A. 1 that the document has been signed in the presence of the father and husband of the plaintiff. It is clear from the above, that enough precautions were taken by the defendant-appellant when the money was paid to the plaintiff and Ex. A. 1 was executed by the plaintiff in his favour.

(11) On a careful consideration of all the facts of the case, we are of the opinion that there is no reason to disagree with the judgment of the trial Court. The approach of the appellate Court was somewhat far-fetched; as that court stated that there was no proof that the document Ex. A. 1 was signed in the presence of the plaintiff's witnesses. The defendant and his witnesses do not state that the document A. 1 was signed in their presence by the plaintiff and stated that they signed the same as the father and the husband of the plaintiff stated that it was signed in their presence by the plaintiff. We, therefore, set aside the judgment and decree of the first appellate Court and restore the judgment and decree of the trial Court. This appeal is allowed. We award the appellant the costs of this appeal.

C/D.H. Appeal allowed.

A.I.R. 1953 HYD. 183 (Vol. 40, C.N. 82)

PALNITKAR C. J. AND SIADAT ALI KHAN J.

Ankush Rao, Petitioner v. The Collector, Bhir, Respondent.

Writ Criminal No. 2343/7 of 1951-1952, D/- 12-8-1952.

Arms Act (1878), S. 18 (a) — Reasons for cancellation — Failure to record that cancellation is necessary for public peace — Effect.

The authority should clearly record in so many words that the cancellation of the licence is necessary for the purposes of security of

public peace. When the authority omits to record such a reason, it fails to comply with the provisions of S. 18 (a). (Para 2)

Anisuddin Ahmed, for Petitioner; Gopal Rao Tuljapurkar, for Respondent.

ORDER: Heard arguments of parties. The facts which have given rise to this writ petition are briefly as follows:

The petitioner had in his possession a 12-bore gun for which he held a licence under the Arms Act. On 13-3-1952, the Collector of Bhir informed the petitioner that the licence for the said weapon has been cancelled and that the petitioner should deposit the rifle together with the licence and ammunition at the Police Station. Shri Anisuddin Ahmed, the learned advocate for the petitioner, argues that under S. 18, Arms Act, authority has been given for the officer concerned to cancel or suspend the licence with regard to the arms which were licensed but cl. A of that Section makes it incumbent upon the officer to record in writing the reasons for such a cancellation and that the licence can be cancelled only when it is deemed necessary to do so in the interest of the public peace. From a reading of the sub-section, it is clear that the licence can be cancelled when the officer deems it necessary to do so for the security of the public peace. We do not find such reasons recorded either in the report of the District Superintendent of Police dated 8-3-1952 nor in the reply dated 18-4-1952 sent by the Collector of Bhir to the Registrar of this High Court. Both these writings state that the petitioner has misused his gun and therefore the licence should be cancelled and that the petitioner is not a good citizen. Shri Anisuddin Ahmed further argues that the delivery of blows with the butt-end of the gun alleged in the report of the District Superintendent of Police is not admitted by the petitioner; but even conceding without admitting that he had done so, it is not a misuse of the gun.

(2) After reading the reasons recorded by the District Superintendent of Police and the explanation given by the Collector, we are satisfied that the provisions of S. 18-A have not been complied with by the cancelling authority That authority should have clearly recorded in so many words that the cancellation was necessary for the purposes of security of public peace. The authority having failed to record such a reason, we direct the authority concerned to reconsider the whole question in the light of the arguments of the parties and proceed according to the provisions of S. 18-A already cited above. We issue a writ accordingly.

A/M.K.S. Order accordingly.

A.I.R. 1953 HYD. 184 (Vol. 40, C.N. 83)

PALNITKAR C. J. AND SRINIVASACHARI J.

Syed Yakub Ali, Petitioner v. Addl. Collector, Hyderabad and others, Respondents.

Writ Appln. No. 45 of 1952, D/- 25-6-52.

Houses and Rents — Hyderabad House Rent Control Order (1353 F.), R. 8(e) — Grounds of eviction — Considerations involved.

While deciding the question of "reasonableness" of the ground for eviction, the Rent Controller ought to take into consideration every circumstance that might affect the interests of the landlord or of the tenant in the premises, including the financial hardship which might be inflicted upon the tenant if the order for eviction was made. (1924) 2 KB 173 and (1948) 1 KB 73, Rel. on. (Para 1)

Gopal Rao Ekbote, and Mohammed Abdul Khader Qurishi, for Petitioner; Abu Sultan Wahiduddin Mohomad, Mohomad Abdula Bari Faruqi, and Mohomad Jehangir Ali, for Respondents.

CASES CITED:
(A) (1924) 93 LJKB 726: (1924) 2 KB 173
(B) (1947) 1947-2 All ER 604: (1948)-1 KB 73

PALNITKAR C. J.: This is a petition for the issue of a writ of Certiorari against the order of the appellate authority upholding the order of the Rent Controller. The short point for decision is whether under R. 8 (e) of the Rent Control Order, the respondent has made out a reasonable ground for evicting the petitioner, the tenant. After perusing the orders of the two lower tribunals, we are not satisfied on this point. The Rent Controller does not seem to have devoted his mind and attention to the facts of the case and allegations made by both the sides which may go to determine the question. While deciding the question of "reasonableness", the Rent Controller ought to have taken into consideration every circumstance that might affect the interests of the landlord or of the tenant in the premises, including the financial hardship which might be inflicted upon the tenant if the order for eviction was made. This has been held in — 'Williamson v. Pallant', (1924) 2 KB 173 (A). Another ruling on the point submitted by the learned Advocate for the petitioner is — 'Harte and another v. Frampton', (1948) 1 KB 73 (B), in which it has been held that in considering the question of the relative hardship involved to a landlord and a tenant by the making or refusal to make an order for possession, the Court should take into account the hardship to all who may be affected by the grant or refusal of an order for possession. The Court should weigh such hardship with due regard to the needs of both the tenant and the landlord. We do not find any such discussion in the orders of the two lower tribunals.

(2) The learned Advocate for the respondent argues that the landlord is a lawyer who had to discontinue his profession on account of his suffering from paralysis. He states that the malgis (shops) in question are ancestral property in which the brothers of respondent 2 are also sharers and that their needs also have got to be looked to. He states that because respondent 2 is not able to practise his profession as lawyer, he wishes to establish some business and increase his income which has been reduced due to cessation of practice.

(3) The learned Advocate for the petitioner contends that both the lower Courts have come to the conclusion that it has not been made clear as to what business the respondent wishes to start in the malgis. The vague statement that he will open a hotel there should not be given much weight because he has also stated that if permission for opening a hotel be not granted, he may think of doing some other business. The learned Advocate for the petitioner also contends that the petitioner has a furniture shop, which he is running in the premises for the last twenty years and that he will suffer heavy loss if he is made to vacate the 'malgis'. We, therefore, remand the case and direct the Rent Controller to take into view

the alleged hardships of the landlord and of the tenant and come to a conclusion as to whether the landlord has made out reasonable ground for the eviction of the tenant. The orders under consideration are quashed and the case is remanded as above.

(4) Costs will abide the result.

(5) A. SRINIVASACHARI J.: I agree.

B/D.R.R. Case remanded.

A.I.R. 1953 HYD. 185 (Vol. 40, C.N. 84)

SURYANARAYANA RAO J.

Hanmantha, Petitioner v. Hanifabi and others, Respondents.

Revn. No. 152 of 1951, D/- 22-10-1951.

(a) Criminal P. C. (1898), S. 145 — No likelihood of breach of peace — Order regarding possession.

Though ordinarily where the Magistrate comes to a conclusion that there was no likelihood of breach of peace, any further order passed by him in connection with the question of possession is beyond his jurisdiction there are certain cases where in spite of the Magistrate holding that there was no likelihood of breach of peace, he still, in the interests of justice, has got to pass an order regarding possession. Case law ref. (Para 1)

Anno: Cr. P. C., S. 145 N. 12.

(b) Criminal P. C. (1898), S. 145 — Plea in lower Court that there was apprehension of breach of peace — Contrary plea in revision should not be allowed except in rare cases. 10 Deccan LR 107, Foll. (Para 3)

Anno: Cr. P. C., S. 145 N. 61.

(c) Criminal P. C. (1898), S. 145 (6) — Existence of likelihood of breach of peace — Further enquiry.

On the existence of apprehension of breach of peace the further enquiry relates only to possession under S. 145 (6). (Paras 3, 4)

Anno: Cr. P. C., S. 145 N. 12.

Apparao, for Petitioner; Syed Abdulla, for Respondents.

CASES CITED:

(A) 1 Deccan LR 158
(B) 3 Deccan LR 131
(C) 4 Deccan LR 278
(D) 17 Deccan LR 138
(E) 18 Deccan LR 535
(F) 31 Deccan LR 143
(G) 34 Deccan LR 267
(H) 35 Deccan LR 58
(I) 10 Deccan LR 107

ORDER: This is a revision application in proceedings under S. 148 of the Hyderabad Criminal P. C., corresponding to S. 145 of the Indian Code. The first party who had complained in the lower Court that there was apprehension of breach of peace is the revision-petitioner. His main contention before me is that the Magistrate having found that there was no likelihood of breach of peace should have forthwith dropped further proceedings and should not have gone further and given a finding that the respondent was in possession of the property at the crucial time and that she could not be dispossessed by the revision-petitioner, taking the law into his own hands. Mr. Apparao appearing for the revision-petitioner has cited the following authorities of this High Court in support of the proposition that where the Magistrate comes to a conclusion that there was no likelihood of breach of peace, any further order passed by him in connection with the question of possession is beyond his jurisdiction: — '1 Deccan L R 158' (A); — '3 Deccan L R 131' (B); — '4 Deccan L R 278' (C); — '17 Deccan LR 138' (D); — '18 Deccan LR 535' (E); — '31 Deccan LR 143' (F); — '34 Deccan LR 267' (G) and — '35 Deccan L R 58' (H). These rulings do not discuss the effect of admission of all the parties to the proceedings that there is a likelihood of breach of peace; therefore, it is unnecessary for me to discuss these authorities in detail. As a general proposition of law I agree with the principle urged. But there are certain cases where in spite of the Magistrate holding that there was no likelihood of breach of peace, he still, in the interests of justice, has got to pass an order regarding possession; for instance, where in the case of emergency the Magistrate has directed that possession of the property should be taken over by the police or by the Court, acting prima facie on the complaint or information before him, and when later he finds that there was no likelihood of breach of peace, he has got to make restitution of possession to the person from whom possession was taken by the police or by the Court.

(2) On the merits Mr. Apparao for the revision-petitioner contends that for ascertaining whether there was likelihood of breach of peace the Magistrate had called for a report from the Police; that the respondent has suo motu appeared in Court even without notice to her. On the other hand, Mr. Abdullah Thimmapuri, appearing for the respondent has pointed out from the counter of the respondent that the respondent has not denied the apprehension of breach of peace and that on the other hand she denied that she, being a poor and helpless widow, could have the courage or the strength to commit breach of peace, and that she asserted that the first party in collusion with the patwari of the village was trying to create some trouble and interfere with her peaceful enjoyment. At this stage it is relevant to point out that between the parties there were also other proceedings of criminal nature. The respondent had filed two complaints before the police. The police took action against the revision petitioner (1) for theft and (2) for trespass in respect of other items of property of the respondent. In both the cases, the revision-petitioner was acquitted in appeal in the Sessions Court. That may be so, but it is a relevant circumstance to point out that at the crucial time there were certain misunderstandings and illfeelings between the two parties and that the first party was certainly trying to create some trouble as against the respondent. The respondent is a widow and her father-in-law appears to have been killed during the Police Action as is seen from the record.

(3) I have now to consider on the merits as to which of the contentions of the two learned advocates is correct. I do not take the counter of the respondent to mean that there was no likelihood of breach of peace. I take it to mean that there was likelihood of breath of peace; only she denied that she could be responsible for it. The advocate for the respondent has quoted a ruling in — 'Gadagappa v. Chanbasappa', 10 Deccan L R 107 (I) decided by a

Division Bench of this High Court wherein it was held that the party who in the lower Court contended that there was apprehension of breach of peace should not be allowed in revision to contend that there was no apprehension of breach of peace. If such contention is accepted it would only mean that in other words the party really said that he had filed a false case in the lower Court and since the decision in the lower Court was against him he is now trying to blow hot and cold by reason of a plea contrary to what he had taken in the lower Court. Such attitude should not be encouraged or approved, for, it will open the door wide for fraud and untruth. I respectfully agree with this principle and only in exceptional and rare cases where the bona fides of the party are proved beyond doubt, could a contrary plea be permitted if it is otherwise consonant with the material on the record. Hence I hold that as both the parties admitted in the lower court that there was likelihood of breach of peace it was unnecessary for the Magistrate to have further proceeded to enquire whether there was likelihood of breach of peace and thus the only evidence that should have been allowed was with regard to possession. From the record I take it that the parties persisted to lead evidence as regards possession though the revision-petitioner has, in his statement in support of his claim for possession, also added a statement that the respondent was trying to dispossess him. There is no other evidence aliunde by the revision-petitioner or the respondent as regards breach of peace.

(4) At the close of the evidence it was unnecessary for the Magistrate to have reagitated the question as to the existence of apprehension of breach of peace, once the parties had themselves admitted its existence and proceeded to trial on the footing. It is true that the respondent's vakil started arguing there has no likelihood of breach of peace contrary to the counter filed by his client. But that does not affect the legal position. The Magistrate's finding that there was no apprehension of breach of peace is, therefore, improper and is set aside. On the existence of apprehension of breach of peace the further enquiry relates only to possession under the analogous S. 145 (6) of the Indian Criminal P. C. and the Magistrate having appreciated the evidence of the parties has come to the conclusion that the respondent has been in possession and that the revision-petitioner should not interfere with her possession.

(5) In the result substantial justice has been done in the case and I see no reason to interfere. Subject to the modification of the order of the Magistrate as regards his finding on the question of the existence of breach of peace, the revision petition is disallowed.

(6) Since the advocates have argued the case also on questions of law, I direct the parties to bear their own costs in this Court.

C/D.H. Order accordingly.

A.I.R. 1953 HYD. 186 (Vol. 40, C.N. 85)

QUMAR HASSAN AND MANOHAR PERSHAD JJ.

Narsing Rao Ramkrishnayya, Petitioner v. Veerayya Rajanna and others, Respondents.

Revn. Petn. No. 337 of 1952, D/- 22-9-1952.

(a) Civil P. C. (1908), O. 8, R. 6 — Legal and equitable set off — Distinction.

In the case of a legal set off, the amount could be claimed by the defendant as a matter of right subject to the payment of the Court fees, while in the case of an equitable set off, it is in the discretion of the Court. (Para 5)

Anno: Civil P. C., O. 8, R. 6 N. 1.

(b) Civil P. C. (1908), O. 8, R. 6 — Equitable set off — Essential conditions for claim — Suit on breach of, service contract by master — Set-off of claim for damages for unauthorised sale of (servants) defendant's goods cannot be allowed. 7 All 284, Rel. on. (Para 11)

Anno: Civil P. C., O. 8, R. 6 N. 5.

Rama Murti, for Petitioner; K. Venkatachari, for Respondents.

CASES CITED:

(A) ('85) 1885 All WN 40: 7 All 284
(B) ('52) AIR 1952 Hyd 34: ILR (1951) Hyd 621
(C) ('35) AIR 1935 Mad 115(1): 58 Mad 338
(D) ('51) AIR 1951 Hyd 57: ILR (1951) Hyd 632
(E) ('78-80) 2 All 252
(F) ('17) AIR 1917 All 176(1): 39 All 362
(G) ('16) AIR 1916 Pat 167: 37 Ind Cas 367
(H) (24) AIR 1924 All 872: 46 All 922

ORDER: This is a petition in revision on behalf of defendant 1 against the order of the Court below dated 1-2-1952 deciding issue 5 against him. It is argued on behalf of the defendant-petitioner that the Court below has erred in deciding issue 5 against him. His contention is that set off claimed by him arises out of the same transaction (and?) as such the defendant is entitled to both legal and an equitable set off. Reliance is placed on the cases of—'Pragilal v. Maxwell', 7 All 284 (A); — 'Suryanarayan v. Ratanlal', A I R 1952 Hyd 34 (B); —'Lakshmanan Chettiar v. Ramanathan Chettiar', AIR 1935 Mad 115(1) (C).

(2) On behalf of the other side it is urged that the defendant is not entitled to either legal or equitable set off. With regard to the legal set off it is contended that as the sum claimed by the defendant is not an ascertained sum, he cannot be entitled to a claim for a legal set off. With regard to the question of equitable set off, it is contended that as the claim of the defendant is for damages and the claim of the plaintiff is based on a contract, it cannot be said that it arises out of same transaction. Reliance is placed on the cases of — Muslim Bank v. Hasan Shiraza', AIR 1951 Hyd 57 (D); — 'Raghunath Das v. Ashraf Hussain', 2 All 252 (E); — 'Victoria Mills Co. Ltd. v. Brij Mohanlal', AIR 1917 All 176 (1) (F); 'Mt. Diltor Koer v. Harkhoo Singh', AIR 1916 Pat 167 (G) and — 'Har Prasad v. Ram Sarup Radha Kishen', AIR 1924 All 872 (H).

(3) In order to appreciate the view points of the parties, a reference to the allegation of the defendant in the written statement is necessary. In para. 1 of the written statement the defendant has alleged that in pursuance of the plaintiff's request he left his service and moved into the plaintiff's workshop where in a rear portion he was allowed to do his sole business..... Thereafter, when he was away in Akola, plaintiff got the lathe machines and other tools sold away in order to make him an employee of the plaintiff.

(4) Because of the (un?) authorised sale defendant claims Rs. 2000/- as damages and this amount he wanted to be set off against the suit claim. Thus, it is clear from this that the defendant claims the amount by way of damages.

(5) We may point out that set off may be of two kinds; legal set off and an equitable set off. In a legal set off, the amount claimed is an ascertained sum of money which is legally recoverable, while in an equitable set off, the defendant is entitled to get credit for the amount by way of equity and it is not necessary that the amount claimed should be ascertained. In the case of a legal set off, the amount could be claimed by the defendant as a matter of right subject to the payment of the court fees, while in the case of an equitable set off, it is in the discretion of the Court.

(6) If the defendant claims a legal set off, among the necessary conditions, one condition is that the defendant's claim must be for an ascertained sum of money. The contention of the learned advocate on behalf of the respondent is that (as?) the defendant's claim is for damages as such, it cannot be said that it is for an ascertained sum of money. We find considerable force in this contention. "Ascertained sum of money means a sum of money of which the amount is fixed and known; it does not necessarily mean a sum admitted by the other side or decreed by the Court.

(7) Similar discussions had arisen in the cases of 2 All 252 (E); AIR 1917 All 176(1) (F) and AIR 1924 All 872 (H), wherein it has been laid down that claims for damages are not claims for ascertained sums of money. Thus, in our opinion (are?) items (such?) as unliquidated damages and mesne profits the amount of which is not ascertainable until the Court determines it. Order 8 R. 6, Civil P. C., provides that in a suit for the recovery of money, the defendant can claim to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. As discussed above the amount claimed as damages is not an ascertained sum of money, (and?) so according to the Code of Civil Procedure, there cannot be a set off for damages. This is clear from illustration (c) to the rule. Thus this contention fails.

(8) After this we have to consider the question whether the defendant is entitled to an equitable set off. It may be pointed out at the outset that the defence of equitable set off cannot be claimed as a matter of right but the Court has discretion to adjudicate upon it in the same suit or order it to be dealt with in a separate suit.

(9) On behalf of the respondent it is urged that as the trial Court has exercised its discretion, this Court should be reluctant to interfere in the same unless it is shown that the Court has not exercised its discretion judicially.

(10) In the present case the trial Court has held that the transactions are entirely different and as such the claim for an equitable set off also is not sustainable. It is essential for a party claiming an equitable set off that the cross-demands should arise out of the same transaction, that is, the defendant will have to establish that the claim of set off arises out of the same transaction. The learned Advocate for the petitioner contended before us that his claim not only arises out of the same transaction, but is connected with it. Reliance is placed on the case of 7 All 284 (A). We are afraid, we cannot accept this contention. Plaintiff's claim for the money in the present suit is based on a contract while the defendant's claim is for damages. It cannot be said that it arises out of the same transaction. It is further contended that the transactions are connected in their nature and circumstances. We are afraid we cannot accept this either. In our opinion, both the transactions are entirely different.

(11) In 7 All 284 (A), relied upon by the petitioner, it has been held that the right of set off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit.

(12) Thus, it is clear from this ruling also that in order to entitle the defendant to an equitable set off, the defendant will have to establish that his demand arises out of the same transaction or is so connected in its nature and circumstances as to make him entitle to the same.

(13) As discussed above, the plaintiff's case is based on a contract while the defendant's claim is for damages. It cannot be said either that it arises from the same transaction or is connected with the same. In our opinion, this ruling does not help the contention of the Advocate of the petitioner. Thus, the contention for an equitable set off also fails. Petition in revision is, therefore, dismissed. Costs to abide the result of the suit.

C/M.K.S. Petition dismissed.

A.I.R. 1953 HYD. 187 (Vol. 40, C.N. 86)

MANOHAR PRASHAD AND SRINIVASA CHARI JJ.

Balwant Rao and others, Appellants v. Kerba and another, Respondents.

Second Appeal No. 1353 of 1356 F., D/- 25-8-1952.

(a) Civil P. C. (1908), O. 1, R. 10 — Partition Suits — (Hyderabad Law of Partition (1352 F.) — Rules under — R. 3).

In a suit for partition not only those who are entitled to a share in the joint family property but also those persons who are entitled to maintenance and also those persons for whose marriage provision has to be made from out of the joint family property are necessary parties. 37 Deccan LR 654, Rel. on. (Para 3)

Anno: C. P. C., O. 1, R. 10 N. 16.

(b) Evidence Act (1872), S. 108 — Presumption.

Unless it has been established that the whereabouts of a person are not known and he has not been heard of for the past seven years before the date of the suit, the presumption would be that he is alive. (Para 5)

Anno: Evidence Act, S. 108 N. 1.

Vasanth Rao, for Appellants.

CASE CITED:

(A) 37 Deccan LR 654

JUDGMENT: This is a second appeal in a suit for partition filed by the plaintiff against the

other members of the joint family claiming that he is entitled to one-third share in the joint family property. The persons who are made parties to this suit are: (1) the uncle of the plaintiff and (2) nephew by a predeceased uncle. The defendants resisted the suit on the ground that the plaintiff was not entitled to any share in the suit property as he was not a member of the joint family. The trial court recorded the evidence led by both the parties and passed a preliminary decree in favour of the plaintiff to the extent of one-third share in the joint family property. When the case came up in appeal, the appellate court remanded the case to the trial court to enable the defendants to examine some witnesses who were not allowed to be examined in the first instance. When the case came to the trial court after remand, the defendants did not produce those witnesses whom they were directed to examine by the lower appellate court in its order of remand but desired to produce other witnesses whom the court declined to examine. Eventually, the trial court passed a preliminary decree in favour of the plaintiff. This decree was confirmed by the lower appellate court. This appeal is against the judgment of the lower appellate court confirming the decree of the trial court.

(2) The points urged by the learned advocate for the appellant are:

(a) that the suit is liable to be dismissed because all the necessary parties in a suit for partition were not before the court;

(b) that the court was wrong in not having permitted the defendants to examine the witnesses who were produced by them in court, and

(c) that it has not been established that Doula who is admittedly a member of the joint family has absconded as alleged by the plaintiff or that his whereabouts were not known, therefore, he was also a necessary party to the suit and if his share also were taken into consideration, the plaintiff would not be entitled to one-third share but only to one-fourth.

(3) The first argument relating to necessary parties not being impleaded was elaborated upon by the advocate for the appellant by submitting before us that there were in addition to the parties before the court the mother of the plaintiff who was entitled to maintenance from out of the joint family property. It is also clear from the statement of P. W. 5 that Lakshman defendant 2 has two unmarried daughters. It is well established that in a suit for partition not only those who are entitled to a share in the joint family property but also those persons who are entitled to maintenance and also those persons for whose marriage provision has to be made from out of the joint family property are necessary parties.

(4) In this connection we would refer to R. 3 of the Rules under the Law of Partition of 1352 F. which is to the following effect:

"In a suit for partition of joint family property all those persons who are entitled to a share in the joint family property, those who have a right of residence and those who are entitled to maintenance from out of the income of the joint family property and those who are entitled to the expenses of the marriage from out of the joint family property, shall be made necessary parties."

According to the above rule the mother who is entitled to maintenance & the daughters who are entitled to marriage expenses are necessary parties to the suit. It is not denied by the learned advocate for the respondent that the mother is alive or that Laxman has daughters. Under the above circumstances, the mother and the daughters of Laxman are necessary parties; that these persons are necessary parties in a suit for partition has been decided by this court in the case of — 'Bapu Rao v. Hanmantha Rao', 37 Deccan L. R. 654 (A).

(5) With regard to the statement made by the plaintiff that Doula who was one of the members of the joint family had run away has not been established. We must point out that there is no mention in the plaint as to when he ran away and since what time his whereabouts are not known, and there not having been any specific mention as to when Doula ran away, the defendants did not make any statement with regard to Doula. Under S. 108, Evidence Act, unless it has been established that the whereabouts of Doula are not known and he has not been heard of for the past seven years before the date of the suit, the presumption would be that he is alive. If he is alive, he is a necessary party to the suit & the plaintiff will not be entitled to a one-third, share in the joint family property but only to one-fourth, as admittedly he is an equal sharer.

(6) The only point that has to be considered is as to whether the court was wrong in not allowing the defendants to examine the witnesses whom they produced in court. On a perusal of the judgment relating to the remand, we find that the Sessions Judge had expressly stated that the defendants would be entitled to examine only those witnesses whom they had mentioned in the list and that they would not be entitled to examine any other witness. Under those circumstances we think the trial court was right in not allowing the defendants to examine the witnesses produced in court. Inasmuch as we have come to the conclusion that the necessary parties were not before the court at the time of the suit, we must set aside the preliminary decree passed in this case and remand the case to the trial court with the following directions:

(i) that the trial court do make all those persons parties to the suit who have been declared to be necessary parties under the above rule, and after taking the statements of the persons who have been made parties take evidence that might be produced by the parties.

(ii) As regards Doula, the trial court should take a statement with regard to his whereabouts and as to whether he is dead or live, from the plaintiff and after taking the statement of the plaintiff and the reply of the defendant in this regard, take evidence and if it comes to the conclusion that he is alive, he should be made a party.

After going through the above procedure, the trial court should decide the case according to law.

(7) We, therefore, allow this appeal, set aside the judgment of both the courts and remand the case to the trial court with the aforesaid directions. Costs of this appeal will abide the result.

C/D.H. Appeal allowed.

A.I.R. 1953 HYD. 188 (Vol. 40, C.N. 87)

MOHD. AHMED ANSARI AND SURYANARAYANA RAO JJ.

Mir Ahmed Ali Khan, Petitioner v. State of Hyderabad.

Criminal Transfer Petn. No. 1942 of 1950, D/- 13-4-1951.

(a) Criminal P. C. (1898), S. 526 (8) (before amendment of 1923) — Hyderabad Criminal P. C., S. 494 (8) — Hearing — Meaning — Hearing in S. 494 (8) means first opportunity after cause for transfer has arisen. 29 Deccan LR 401, Foll. (Para 2)

Anno: Cr.P.C., S. 526 N. 19.

(b) Criminal P. C. (1898), S. 526 (8) and (9) (before amendment of 1923) — Hyderabad Criminal P. C., S. 494 (8) — Application by accused stating that he would apply for transfer — Even if Judge could decline to order stay of proceedings, yet he should at least have adjourned the case giving reasonable time to accused to move the High Court. (Para 2)

Anno: Cr. P. C., S. 526 N. 19, 22.

(c) Criminal P. C. (1898), S. 526 — Principles governing cases for transfer.

In cases of transfer, it is of paramount importance that parties arraigned before the Courts should have confidence in the impartiality of the Courts. It is the duty of the High Court at all events to clear away every thing, which might reasonably engender suspicion and distrust in the Courts and so to promote and maintain in the public a feeling of confidence in the admi istration of justice, which is so essential for social order and security. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly seem to be done. AIR 1951 Hyd 50 (FB), Foll. (Para 4)

Anno: Cr. P. C., S. 526 N. 4.

Shanker Rao Bargaonkar, for Petitioner; Gopal Rao Marumkar, Govt. Advocate, for the State.

CASES CITED:

(A) 29 Deccan LR 401
(B) 7 Deccan LR 236
(C) 14 Deccan LR 191
(D) ('51) AIR 1951 Hyd 50: 52 Cri LJ 273 (FB)

ORDER: This is an application for transfer of a criminal case comprising charges for murder and other offences, now pending before the Special Sessions Judge at Warangal. A number of prosecution witnesses have already been examined and during the course of further cross-examination of one of the prosecution witnesses, the Advocate for the accused desired to elicit from the witness the names of persons under whom the witness had hitherto worked as a driver. Unfortunately there was disagreement between the Judge and the Advocate with the result that the Advocate withdrew from the case. We wish to point out that this need not have happened. It is not conducive to the dignity of the Bench or the Bar. On the same day (28-11-1950) the accused filed an application requesting for time to engage another lawyer. The Court gave a day's time and posted the case to the next day. It is futile to expect that in a case of murder when already several witnesses have been examined, it is possible for an accused to engage a fresh lawyer and duly instruct him to proceed with the case, within the next 24 hours. The accused could not engage a lawyer and finding that the Court was proceeding with the case in hurry which the accused considered unreasonable, filed an application stating that he would apply to the High Court for transfer of the case and for stay. The Special Judge dismissed the application and posted the case to 30-11-1950, on which day he ordered the accused to put in a list of witnesses to be summoned through the Court. On 2-12-1950, the Judge directed accused 2 to produce witnesses of his own accord. On 5-12-1950, the Court examined a witness on behalf of accused 3 and the case was posted to 12-12-1950. On 11-12-50, the Judge ordered the file to be sent to the High Court in pursuance of the transfer application.

(2) It is rather unfortunate that the learned Special Judge should have considered it fit to proceed with the case when the petitioner had categorically stated that he would apply for transfer. The Special Judge had held that S. 494 (8), Hyderabad Criminal P. C. was not applicable to the transfer application. Section 494(8) corresponds to S. 526 (8), Indian Criminal P. C., before the amendment of 1923 and its translation is reproduced below:

Adjournment on application under this section.

"If, in any criminal case or appeal before the commencement of the hearing, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of the case, the Court shall exercise the powers of postponement or adjournment given by S. 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal."

Apparently the Special Judge came to the conclusion that the transfer application was not filed before the "hearing". A Division Bench of this Court has interpreted "hearing" in S. 494 (8) to mean the first opportunity after cause for transfer has arisen (Vide — 'Tulsiram v. Sarkar Ali', 29 Deccan L R 401 (A)). That being the latest view of the High Court, it would have been more appropriate to grant stay. Mr. Gopal Rao Marumkar, the Government Advocate has strenuously argued that it was competent for the learned Judge to have declined to grant the stay, in view of the earlier rulings reported in — '7 Deccan LR 236' (B) and — '14 Deccan LR 191' (C). Technically it may be so, but the more advisable course for the Judge would have been to follow the latest ruling. Further, even if the Judge could decline to order stay of proceedings, yet he should at least have adjourned the case giving a reasonable time to the accused to move the High Court.

(3) On the merits of the application we feel constrained to observe that it is unfortunate that the Special Judge should have proceeded with this case with such unnecessary hurry as to create in the mind of the accused a reasonable apprehension that the Court was prejudiced against him and that he would not secure a fair trial. While unreasonable delay is certainly to be prevented, at the same time Judges should see that they themselves unwittingly do not become the cause of unnecessary delay of litigation. The learned Special Judge could have given a week's time to the accused to get a stay order. We have no doubt that the precipitate action of the Special Judge in hurrying up the case at that stage has made the accused suspicious of the fairness of the Court.

(4) We are conscious that in a case like this, where several prosecution witnesses have been examined, a transfer order will lead to further delay and inconvenience. Unfortunately it can-

not now be avoided in this case. It could have been avoided by the Special Judge himself. Confidence in Courts and interests of justice are paramount considerations and all other considerations are subservient. In this connection we wish to draw the attention of Judicial officers to the recent Full Bench ruling of this High Court reported in — 'Mohd. Abdul Raoof v. State of Hyderabad', AIR 1951 Hyd 50 (FB) (D), wherein the principles governing cases of transfer have been discussed, and it has been laid down that

> "It is of paramount importance that parties arraigned before the Courts should have confidence in the impartiality of the Courts. It is the duty of the High Court at all events to clear away every thing which might reasonably engender suspicion and distrust in the Courts and so to promote and maintain in the public a feeling of confidence in the administration of justice, which is so essential for social order and security. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly seem to be done."

These principles should be borne in mind not only by the High Court but also by all Judicial Officers so that they may be on guard to see that no cause is given to the accused to move for a transfer since a transfer especially at a late stage always throws a burden on public time and finance, with its attendant inconveniences besides affecting the prestige of the Court. In the result the transfer application is allowed and the case is transferred to the Sessions Judge, Warangal, for trial.

C/V.B.B. Application allowed.

A.I.R. 1953 HYD. 190 (Vol. 40, C.N. 88)

MISRA C. J. AND SRINIVASACHARI J.

Komrusetti Agayya and another, Petitioners v. Sub-judge, Secunderabad and another, Respondents.

Writ Petn. No. 97 of 1952, D/- 31-1-1953.

Constitution of India, Art. 227—Rectification of dereliction of duty — (Civil P. C., O. 20, R. 4 and O. 41, R. 31).

Where a case is set up by one party and there is evidence led in support of such case, the failure of the presiding officer of the Court to bestow any thought or to consider the matter, would be regarded as a dereliction of duty. Thus, disposal of a case on an alternative but minor ground without considering and giving a finding on the primary ground of relief sought in the suit amounts in law to a failure or a dereliction of the duty on the part of the Court. The High Court has ample powers under Art. 227 of the Constitution to have such defect rectified. AIR 1952 SC 179, Rel. on. (Para 3)

Anno: C.P.C., O. 20, R. 4 N. 6 and 9; O. 41, R. 31 N. 6 and 12.

Ramaswamy Iyangar, for Petitioners; Narsimha Iyangar, for Respondents.

CASE CITED:

(A) ('52) AIR 1952 SC 179: 1952 SCR 519

SRINIVASACHARI J.: This is an application for the issue of a Writ of Certiorari directed against the order of the Subordinate Judge, Secunderabad, as the appellate authority in proceedings under the House Rent Control Order. The applicants before us applied to the Rent Controller, Secunderabad, for the eviction of their tenant, respondent 2, on the ground that the house was required by them for their use and occupation. The petitioners averred that they were residing at a place called 'Laknawara' in Sangareddy; that they had to leave the place on account of the fear of communists and that they had been driven to the necessity of having to settle down permanently in Secunderabad and eke out their livelihood. The petitioners averred that they required their house which was in occupation of respondent 2 for their own use to enable them to carry on business there. They said that they purchased the suit-property purposely with a view to settling down in Secunderabad and carrying on business there. It was also stated in the petition that when purchasing the property they were assured by the vendors that they would be given vacant possession of the premises and accordingly the tenant, who was in occupation of the premises, was asked to execute an agreement in favour of the petitioners undertaking to vacate the premises within one month from the date of the agreement. According to them, they were entitled to eject the tenant both by reason of the fact that they required the premises for their own use and occupation and also on account of the fact that he had undertaken to vacate the premises within a month from the date of the rental agreement.

(2) The tenant, while admitting the execution of the rental agreement, contended that the document was executed by him in ignorance of its contents. He stated that it was represented to him that the paper contained only a rental agreement and he was wholly unaware that in the rental agreement there was a condition that the premises would be vacated within a month from the date of the execution of the document. In fact, he emphatically denied having ever undertaken to vacate the premises within a month. The Rent Controller after examining the evidence came to the conclusion that the petitioners had failed to show sufficient cause for the eviction of the respondent. The landlords appealed to the Sub-Judge, Secunderabad, and the Sub-Judge dismissed the appeal holding that the landlords had not been able to establish that the tenant undertook to vacate the premises within a month. Against this order of the Sub-Judge the landlords have now come before this Court seeking to quash the order of the appellate authority under Article 226 of the Constitution.

(3) In order to exercise our powers under Art. 226 of the Constitution, the essential conditions are—

(a) it must be shown that the authority passing the order had no jurisdiction to enquire into the matter or that he had exceeded the jurisdiction vested in him, or

(b) that there has been a violation of the principles of natural justice.

The learned counsel for the petitioners urged before us that the Sub-Judge failed to bestow any thought on the main ground on which the landlords sought eviction of the tenant, viz., that the house was required for their use and occupation. A perusal of the order of the Sub-Judge would show that he has as a matter of fact not considered this aspect of the case. He has based his order upon the other contention raised by the landlords, namely, that the

tenant was estopped from contending that he could not be ejected by reason of the fact that he undertook in the rental agreement (Exhibit P. 1) to vacate the premises within one month. This contention of the landlords was an alternative contention wherein they raised the plea of estoppel as against the tenant. We find that the Sub-Judge has discussed in detail about this plea of the landlords and has come to the conclusion that on the evidence this plea could not be sustained. It would appear from the application before the Rent Controller that the landlords based their case for eviction on the ground of their requirement. This they sought to establish by evidence. Petitioner 1 and Lakdawala, the vendor went into the box and deposed about their need for occupation of the house, but we find from a perusal of the order of the Sub-Judge that there is not a word mentioned about this plea. Indeed, he has not even alluded to the evidence that was led in this behalf. It was urged by the learned Advocate for the respondent that it was not necessary for the Sub-Judge to deal with every ground raised by the landlord and that he could very well dispose of the case on any one of the grounds, if the matter could be disposed of without reference to the other grounds. We feel that this argument cannot be sustained. It would appear that the main ground and the basis for the application for eviction was the requirement of the house by the landlords for their own use and occupation. The plea of estoppel was only by way of an additional ground, that is to say that the landlords were entitled to evict the tenant in view of the undertaking given by the tenant. The primary ground was the requirement of the landlords alone. When that was the primary ground, the Sub-Judge could not have disposed of the case on the alternative plea. It was open to him to go into the primary ground and come to a conclusion one way or the other. He might not have believed the evidence of the landlords and come to the same conclusion as he has done now. But as stated already, there is not a word said about it in the judgment of the Court of appeal. The Rent Controller also omitted to give a finding on the question of landlords' necessity. This, in our opinion, amounts in law to a failure or a dereliction of the duty on the part of the Rent Controller and the Sub-Judge. In this connection, it is scarcely necessary to stress the well known rule that where a case is set up by one party and there is evidence led in support of such case, the failure of the presiding officer to bestow any thought or to consider the matter, would be regarded as a dereliction of duty. The High Court has ample powers under Art. 227 of the Constitution to have the defect rectified, vide — 'Parry and Co. v. The Commercial Employees' Association of Madras', reported in AIR 1952 SC 179 (A).

(4) We, therefore, set aside the order of the appellate authority and remand the case to the Sub-Judge, Secunderabad, with the direction that he do go into the question about the requirement of the landlords for the occupation of the suit premises and decide the case 'de novo' according to law. The petitioners will be entitled to the costs of this Writ petition, which is assessed at Rs. 50/- (rupees fifty).

A/V.S.B.

Case remanded.

A.IR. 1953 HYD. 191 (Vol. 40. C.N. 89)

SHRIPATRAO PALNITKAR C. J. AND SRINIVASA CHARI J.

Sultan Husain Khan, Petitioner v. Satnarain Lal, Respondent.

Civil Revn. Petition No. 369 of 1952, D/- 18-10-1952.

Civil P. C. (1908), O. 9, R. 13 — Ex parte decree against several defendants — One alone applying to set it aside — Competency.

Under O. 9, R. 13 there is no compulsion on one of the defendants against whom an ex parte decree is passed to make his co-defendants parties to his application to set aside the decree. Where such an application is made by one defendant only, then under the proviso to the rule a discretion has been given to the Court to decide whether the decree can be set aside as against the other defendants also. However, this does not mean that as the decree is against several defendants they all should be made parties. There is no warrant for such a proposition. (Para 3)

Anno: C. P. C., O. 9 R. 13 N. 15 Pt. 1; N. 23.

Syed Naimullah and Rashid Siddique Hussain, for Petitioner; Gopalrao Ekbote, for Respondent.

JUDGMENT: This revision petition is directed against the order of the First Judge of the City Civil Court, dated 28th January 1952, dismissing the petition of the revision petitioner for setting aside the ex parte decree passed against him.

(2) The respondent is absent. After hearing the arguments of the learned Advocate for the petitioner, we are of the opinion that this revision petition should be allowed. The facts briefly are that the respondent obtained a money decree against the petitioner and two others on the basis of a promissory note executed by all the three defendants. As the judgment and decree was passed ex parte, the petitioner sought to set it aside under the provisions of O. 9, R. 13, Civil P. C. After due enquiry, the first Court found that the service on the petitioner was not sufficient and proper under the provisions of the law but that Court dismissed the petition on the ground that the other two defendants were not made respondents in the petition. This judgment was upheld in appeal by the lower Appellate Court.

(3) The question of law to be decided is whether one of the defendants can apply for an order to set aside the ex parte decree. Under the provisions of Order 9, Rule 13, Civil P. C., there is no compulsion on the petitioner to make his co-defendants parties to the petition. All that is laid down in the above rule is that if the court is satisfied that the summons was not duly served, the court shall make an order setting aside the decree as against him upon such terms and conditions as to costs, payment into court or otherwise, as it thinks fit. There is a proviso to this rule which lays down that where the decree is of such a nature that it cannot be set aside as against such defendants only, it may be set aside as against all or any of the other defendants also. Thus, a discretion has been given to the Court to decide other defendants. It is nowhere laid down in this proviso that for the purposes of passing such an order the other defendants should also be made parties to the proceedings. The lower Court has based its judgment on the reasoning that as the decree is against the defendants, they all should be made parties. There is no warrant for such a proposition. The decree may be joint or several but that is no criterion for the presentation of a

petition under Order 9, Rule 13, Civil P.C. We are of the opinion, therefore, that the defendant who has submitted the petition can submit the same without making the other defendants parties. We remand the case to the first Court and direct that the petition of the revision petitioner be decided on the merits as also the question whether the decree will be set aside against the other defendants as well, who are not parties to the petition. The revision petitioner is entitled to the costs of this petition. Advocate's fee Rs. 30/-

B/V.S.B. Case remanded.

A.I.R. 1953 HYD. 192 (Vol. 40, C.N. 90)

QUAMAR HASAN AND DESHPANDE JJ.

Nawab Mohd. Razack Ali Khan, Petitioner-Appellant v. Hyderabad Bank Ltd. and another, Respondents.

Revn. No. 375 of 1952, D/- 31-10-1952.

Civil P. C. (1908), O. 6, R. 17; O. 1, R. 10 — Amendment not altering nature of suit or adding new cause of action.

A, liquidator of certain Bank, sued B for recovery of certain loan. B admitted the loan but alleged to have pledged certain more shares of the same Bank. On enquiry A found that there was a deliberate fraud committed by C, husband of B, in delivering and depositing those shares while C was the Bank's director. A therefore, applied for permission to implead C as defendant and to make consequential amendments in the plaint:

Held that A had no knowledge of these facts when he filed the suit and hence could not be said to have omitted them from plaint. (Para 6)

(2) Further as the amendment did not alter the nature of the suit or amount to a substitution of a totally new case, it could be allowed by the Court under O. 6, R. 17, Civil P. C. AIR 1922 PC 249, AIR 1927 P C 18 and AIR 1950 Mad 32, Disting. (Para 8)

(3) That once the amendment is allowed, C was a necessary party to the suit. AIR 1932 Cal 448 and AIR 1935 Sind 194, Ref. (Para 8)

Anno: Civil P. C., O. 6, R. 17 N. 3, 4, 8.

Raja Bahadur Bishweshwarnath, for petitioner; Hassan Abid Ali, for No. 1; Rashid Siddiq Hussain, for No. 2, for Respondents.

CASES CITED:

(A) ('22) AIR 1922 PC 249: 48 Cal 832 (PC)
(B) ('27) AIR 1927 PC 18: 6 Pat 323 (PC)
(C) ('50) AIR 1950 Mad 32: 1949-2 Mad LJ 421
(D) ('32) AIR 1932 Cal 448: 138 Ind Cas 104
(E) ('35) AIR 1935 Sind 194: 158 Ind Cas 814

ORDER: This application in revision is directed against the order of the learned First Judge, City Civil Court, Hyderabad, dated 22-3-1952 allowing the plaintiff to amend the plaint in terms of his application of 7-1-1952 and add the petitioner as party defendant in the suit.

(2) The plaintiff, the Hyderabad Bank in voluntary liquidation originally instituted the suit against Mrs. Hasan Banu, opponent 2 for recovery of a demand loan amounting to Rs. 30,957-4-2. Mrs. Hasan Banu admitted the loan, but demurred as to the number of shares alleged to be pledged with the plaintiff. She asserted that in addition to hundred old shares of Sirpur Paper Mills and two hundred new shares of the same Mill, she had pledged another three hundred old shares of Sirpur Paper Mills and in support of this allegation, she relied on a receipt apparently purporting to be given by the plaintiff Bank. The plaintiff categorically denied the truth of this statement in his rejoinder stating that the receipt filed by the defendant did not relate to any transaction with the plaintiff Bank, that it was neither on the printed form of the plaintiff Bank nor did it bear the signature of any proper officer for or on behalf of the Bank. It was further submitted that a deliberate fraud was sought to be perpetrated on the plaintiff by the defendant (if one of that name existed and was a real person) and Nawab Mohd. Razak Ali Khan who was the Director and later the Managing Director of the Bank. In order to create evidence in the books of the Bank regarding deposit of three hundred old shares of Sirpur Paper Mills, the said Nawab taking advantage of his connection with and official position in the Bank managed to tamper with the register of the Bank in a clumsy manner which betrayed itself. For this reason, the plaintiff suspected that Hasan Banu was not a real person and that Nawab Razak Ali Khan had for his own ends got an account opened with the Bank fictitiously in the name of the said Hasan Banu and he himself or someone had been fictitiously signing as Hasan Banu and the said Nawab had been attesting all such signatures, delivering shares, taking them back, receiving and making payments himself and perhaps having the benefit of all the said monies himself. Neither the father's name nor husband's name of Hasan Banu was furnished to the Bank; nor the address was given in the books as care of Nawab Mohd. Razak Ali Khan.

(3) Reproducing these allegations in a separate application of 7th January 1951 the plaintiff asked for permission to implead Nawab Razak Ali Khan and make consequential amendment in the plaint. The defendant and Nawab Mohd. Razak Ali Khan resisted the application on various grounds the principal ones being that he was neither a necessary nor a proper party to the suit and that the addition of the proposed fresh party and consequential amendment of the plaint would alter the character of the suit.

(4) The learned First Judge on a careful consideration of the whole matter in the light of the materials on record before him overruled the contentions advanced by the opposite parties and holding that the proposed amendment and addition of the Nawab as party defendant would not change the character of the suit, allowed the plaintiff's application.

(5) It is against this order Nawab Mahamed Razak Ali Khan has come up in revision. The learned Advocate for the petitioner argued that the learned Court has erred in allowing the proposed amendment and addition of the petitioner as defendant, because a new case was set up on fresh facts, which facts were available even when the plaint was filed and that if a new case cannot be allowed to set up, the addition of the petitioner would become superfluous and not covered by the provisions of O. 1, R. 10(2), Civil P. C. The learned Advocate for the petitioner cited — 'Ma Shwe Mya v. Maung Mo Hnaung', AIR 1922 PC 249 (A) and — 'Ram Saran Mandar v. Mahabir Sahu'

AIR 1927 PC 18 (B) in support of his contention that under the guise of amendment a new case cannot be allowed to be set up. For the proposition that if available facts are not made part of the plaint as originally filed, the introduction of fresh facts so as to make out a new case is not permissible, he relies on — 'Gopala Krishnamurthi v. Sredhara Rao', AIR 1950 Mad 32 (C). To show that the petitioner is neither a necessary nor a proper party to the suit reliance is placed on — 'Banvihari Mukerji v. Bhejnath Singh', AIR 1932 Cal 448 (D) and — 'Mukhi Jeramdas Jethanand v. Tikhmal Mulchand', AIR 1935 Sind 194 (E).

(6) The first point to be considered is whether the plaintiff, at the time of the institution of the suit, had knowledge of those facts which he seeks to bring on record by means of an amendment of the plaint. As already stated the suit is brought by the liquidator in the name of the Bank. He was a complete stranger to the suit transaction until the Bank went into voluntary liquidation and the present suit had to be brought in the discharge of his statutory duties. For the purposes of the suit he could naturally rely on the apparent tenor of the suit documents and entries in the books of the Bank. When the defendant produced a receipt to support her allegation that she had, in addition to the shares mentioned in the plaint, pledged three hundred shares of Sirpur Paper Mills, the liquidator was put on inquiry and made a close scrutiny of the whole environment in which the suit transaction was brought about. In the Bank's books and other necessary papers the husband's name or that of the father of the defendant was not mentioned except that she could be contacted through the petitioner. It is admitted that defendant is the wife of the petitioner. In these circumstances, it seems difficult to predicate of the liquidator that he had pre-knowledge of facts and omitted it to state them in the plaint. This aspect of the case, therefore, distinguishes it from the Madras case referred to above.

(7) The other argument that the amendment would alter the character of the suit though at first it appeared plausible to us, yet on further consideration seems to be devoid of substance. Even after the amendment the suit remains a suit for money had and received. Order 6, R. 17, Civil P. C. states that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. No doubt, there are authorities which clearly limit the exercise of this right; an instance of one of such cases is to be found in — 'AIR 1922 PC 249' (A), where Lord Buckmaster delivering the judgment of the Privy Council declares that:

> "All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject-matter of the suit."

The latter words are, no doubt, very wide, but they have to be read in connection with the facts of that case which show that the parties originally sued in respect of a contract made in 1912 and when they came up to appellate Court they applied and obtained, an amendment basing their claim upon a contract made in 1903. His Lordship on these facts observed:

> "The real question in controversy between the parties in these proceedings was the existence and character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain. When once that contract has been negatived to permit the plaintiff to set up and establish another and an independent contract altogether would in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure."

(8) It will be seen that these facts are very different from those in the present case. Similarly the case of — 'Ramsaran Mandar v. Mahabir Sahu', (B) is distinguishable on facts. There the whole case was sought to be altered at the time of argument in the Privy Council. The reason for the rule enunciated by the Privy Council appears to be that the substitution of a totally new case in place of the original one, cannot be said in any sense to be an amendment of the original claim. No such consideration arises in the present case. The original claim has not been altered. What is intended to be made sure is whether the original defendant has entered into a bona fide transaction or her husband has been manipulating in her name for ulterior motives taking advantage of his official position in the Bank and on which of them the liability is to be fixed. In this view of the matter, we need not discuss the cases cited by the learned Advocate of the petitioner in support of the proposition that the petitioner was not a necessary party. Those rulings also are distinguishable on facts. Once it is held that amendment allowed was not beyond the competence of the Court below, the petitioner becomes a necessary party. The result is that the revision fails and is hereby dismissed. There will be no order as to costs.

C/D.R.R. . Revision dismissed.

A. I. R. 1953 HYD. 193 (Vol. 40, C. N. 91)

PALNITKAR C. J.
AND SRINIVASACHARI J.

Narsimgeer, Petitioner v. Satyanarayan Baghade and another, Respondents.

Revn. Petn. No. 23 of 1951-52, D/- 22-9-1952.

Civil P. C. (1908), O. 21, Rr. 59 and 60 — Person when entitled to lead evidence.

For the purposes of Rr. 59 and 60, the fact which the petitioner has to prove is either that he has an interest in the attached property or is in possession of the same. Obviously, therefore, even if the petitioner has an interest in the attached property he has a right to lead evidence. It is not necessary that he must be or claim to be in possession to do so. (Para 2)

Anno: C.P.C., O. 21 R. 59 N. 2.

Bishambar Dayal, for Petitioner.

JUDGMENT: The learned advocate for the petitioner is present and the respondents are absent. In this revision petition the question for decision is whether the petitioner has any interest in the property attached for the purposes of O. 21, R. 59, Civil P. C. and further if the judgment-

debtor is in possession of the attached house, is his possession to be considered to be on his own behalf or some other person for the purposes of the same order. The brief facts of the case are that the petitioner obtained a decree against one Dayalpuri and attached the house in question in execution proceedings stating that it belongs to the judgment-debtor. The respondent Satyanarayan Baghade obtained a money decree against respondent 2, Narendapuri and attached the same house in execution of his decree stating that it belonged to Narendrapuri. The house has now been put up for sale. The petitioner submitted his petition in the lower Court under O. 21, R. 58 stating that in view of the decree of the High Court declaring that the house belonged to Dayalpuri he has an interest in proving that the house belongs to Dayalpuri and therefore was not liable to attachment in execution of a decree against Narendapuri. The lower Court rejected the petitioner's claim without making any enquiry into his allegation on the preliminary ground that the petitioner is neither in possession of the attached house nor does he claim to be in possession of the attached house. We are unable to agree with the opinion of the lower Court.

(2) For the purposes of Rr. 59 and 60, the fact which the petitioner has to prove is either that he has an interest in the attached property or is in possession of the same. The lower Court has obviously failed to observe that even if the petitioner has an interest in the attached property he has a right to lead evidence. Under Rr. 59 and 60, Civil P. C. it is clear that if the petitioner is able to prove his claim that he has a decree against Dayalpuri and that the house belongs to Dayalpuri, he can always succeed. Thus both for the purposes of Rr. 59 and 60 the petitioner has, in our opinion, a 'prima facie' case to prove. We, therefore, set aside the order of the lower Court and direct that proper enquiry should be made into the claim of the petitioner. We allow costs to the revision petitioner. Advocate's fee Rs. 30.

B/V.S.B. Revision allowed.

A. I. R. 1953 HYD. 194 (Vol. 40, C. N. 92)

MISRA C. J.

Mohd. Akbar Khan, Petitioner v. Jaswant Rao and others, Respondents.

Revn. Appln. No. 737/B5/2 of 1952-53, D/- 2-12-1952.

Civil P. C. (1908), S. 115 — Wrongly casting of issues and burden of proof is not irregular exercise of jurisdiction.

Where a perverse decision is given or a conscious departure from the true principles of law is made,—such cases are of very rare occurrence — different principles are applicable. (Paras 1, 2, 3, 4)

Anno: Civil P. C., S. 115 N 9, 12.

Jalil Ahmed, for Petitioner.

CASES CITED:

(A) ('17) AIR 1917 PC 71: 44 Ind App 261 (PC)

(B) (1900) 27 Ind App 216: 25 Bom 337 (PC)

(C) ('83-84) 11 Ind App 237: 11 Cal 6 (PC)

ORDER: This is an application in revision under S. 115, Civil P. C. The suit is still pending decision in the Court of the learned Munsiff of Parbhani. The complaint is about the nature of the issues framed by him. It is said that the learned Munsiff has cast the issues wrongly inasmuch as he placed the burden of proof on the applicant without justification.

The first point which has to be considered in this case is whether in wrongly casting the burden of proof on the applicant, the learned Munsiff can be said to have committed an error of jurisdiction within the meaning of S. 115, Civil P. C. The Section, it is well known, is the definitive of the scope within which the revision power of a High Court can be exercised. As observed by their Lordships of the Privy Council in —'Balakrishna Udayar v. Vasudeva Aiyar', AIR 1917 PC 71 (A), the Section applies to jurisdiction alone. It is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. Once it is conceded that Court had the requisite jurisdiction to decide the matter, it is wholly immaterial for the purpose of the Section whether the decision is right or wrong on merits. Reference in this connection may be made to the well-known passage in the pronouncement of Lord Hobhouse in —'Malkarjun v. Narhari', 27 Ind App 216 (PC) (B):

> "In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed."

(2) The earliest case in which the matter was considered is —'Amir Hassan Khan v Sheo Baksh Singh', 11 Ind App 237 (PC) (C). Their Lordships there remarked:

> "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

It follows that when the Court has exercised its jurisdiction in the prescribed way but its conclusions on merits are challenged recourse cannot be had to S. 115, Civil P. C., for redress of the wrong since the Court cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. It only decides wrongly; but does not necessarily exercise its jurisdiction wrongly.

(3) There have been, it is true, occasional departures from this rule in view of some hard cases and I am aware of decisions where it has been said that where issues are framed wrongly or their burden has been misplaced, it may be deemed to constitute irregular exercise of jurisdiction inasmuch as the error is basic and it cannot be rectified except after great delay if the aggrieved party is forced to wait till after the decision of the suit. I regret I am not able to reconcile myself to that view. It may, of course, at times, happen that a perverse decision is given or a conscious departure from the true principles of law is made. Such cases are of very rare occurrence and have to be determined on different principles. Cases where there is a bona fide error in deciding questions of law or fact do not fall under it, and if there is no question of jurisdiction arising in them, they do not fall under S. 115, Civil P. C.

(4) In the present case, I can find no justification for holding that there is any irregularity in the exercise of jurisdiction. I regret therefore, I am unable to admit this application.

(5) The application is rejected summarily.

B/R.G.D. Application rejected.

A.I.R. 1953 HYD. 195 (Vol. 40, C. N. 93)

SIADAT ALI KHAN J.

Hussain Bin Ali and others, Plaintiffs v. Salah Bin Ahmed and others, Defendants.

Suit No. 41/5 of 1358F, D/- 3-7-1951.

(a) Muhammadan Law — Wakf — Shafei School.

A wakf-alal-aulad simpliciter is recognised as perfectly valid and the mere fact that there is no provision in it, either express or implied, for an ultimate gift to poor or charity cannot render it invalid. (Para 4)

(b) Muhammadan Law — Wakf — Shafei School — Acceptance of wakf by beneficiaries cannot be deemed to be a condition for its validity. **(Para 5)**

(c) Muhammadan Law — Wakf — Shafei School — Wakf contingent on death of wakif — Validity.

According to Shafei School of Muhammadan Law though it is a condition of the validity of the wakf that the wakf should be unconditional and absolute without being contingent upon any future event, still if it is made contingent upon death of wakif it is deemed to be valid. Though such a wakf is deemed to be valid, still it is regarded at least partially a will, inasmuch as it can be revoked like a will, and like a will can only be enforced to the extent of a third of the donor's property only and if it were in favour of an heir the consent of other heirs is required for its validity. (Para 7)

Held upon a construction of the wakf as a whole that it was not a contingent wakf and it contained all the conditions necessary for creation of wakf. The mere statement of the wakif in it that the will he has already made or the will that he may make in future will be binding on beneficiaries cannot be validly deemed to be a revocation of a very solemnly created wakf. The wakf was irrevocable and could be enforced during the lifetime of the wakif. (Paras 8, 9)

(d) Trusts Act (1882), S. 1 — Rules regulating trusts cannot be applied to Muhammadan wakfs — No proof that certain property was purchased by wakif out of income of endowed property — Such property not dedicated expressly by uttering words with intention of creating wakf — Such property cannot be followed as trust property — (Muhammadan Law — Wakf). **(Para 10)**

Anno: Trusts Act, S. 1 N. 3.

Rai Bishamber Dayal, for Plaintiffs; Abdul Wahed Ovaisi, for Defendants.

CASES CITED:

(A) ('93) 20 Cal 128
(B) ('30) AIR 1930 All 837: 130 Ind Cas 631
(C) ('36) AIR 1936 All 404: 163 Ind Cas 344
(D) ('32) AIR 1932 Cal 93: 133 Ind Cas 657
(E) ('40) AIR 1940 Cal 417: ILR (1940) 2 Cal 189
(F) ('32) AIR 1932 Oudh 71: 135 Ind Cas 372
(G) ('32) AIR 1932 PC 81: 59 Ind App 74 (PC)
(H) 34 Deccan LR 412
(I) ('45) AIR 1945 All 261: ILR (1945) All 818 (FB)
(J) ('44) AIR 1944 Oudh 291: 20 Luck 6

JUDGMENT: In this suit for account and injunction the four plaintiffs have sued their grand-father, Salah Bin Ahmed, with some other relatives. They allege that Salah Bin Ahmed has dedicated certain properties by two valid deeds of Wakf dated 16th Farwardy 1346 F. and 5th Khurdad 1351 F; that these deeds are deeds of WAKF-ALAL-AULAD conferring on them the right to the usufruct of the property; that the grand-father is not allowing them to derive any benefit from the properties; that, on the other hand, he is thinking of alienating them and, therefore he should be restrained by an injunction from alienating the property and compelled to account for its usufruct: and when this is done they should be awarded their share. In reply the defendants have denied that the abovementioned deeds were deeds of WAKF-ALAL-AULAD. They allege that the deeds were mere wills and have been revoked by their author. The following issues were framed by my predecessor on 13th Dai 1359 F. corresponding to 13-11-1949 A. D.

"1. Whether the suit is maintainable without the sanction of the Prime Minister, H. E. H. the Nizam's Government;
2. Whether the valuation of the suit is correct and proper Court-fees have been paid;
3. Whether the plaintiffs have any right of action.
4. Are not deeds dated 16th Farwardy 1346 F. and 5th Khurdad 1351 F. Wakfnamas but are wills and are, therefore, unenforceable during the lifetime of the defendant;
5. Whether defendant 1 can revoke the deeds dated 16th Farwardy 1346 F. and 5th Khurdad 1351 F. and whether they have been cancelled because of his revoking them;
6. Whether having regard to the content of the deeds the plaintiffs have any right to account and whether the plaintiffs can get during the lifetime of defendant 1 any money by demanding statement of account;
7. Whether the houses mentioned in lists B and C were purchased or taken on mortgage by defendant 1 from the income of the endowed property and as such this property comes within the meaning of endowed property;
8. Whether the document dated 5th Khurdad 1351 F. was executed during the illness of defendant 1 when he had despaired of life;
9. Whether the income of the endowed property as detailed in para. 5 of the plaint is correct; and
10. To what further relief are the plaintiffs entitled?"

The defendants have adduced five witnesses including defendant 1 and the plaintiffs have adduced four witnesses including the plaintiff Hussain Bin Ali. Of the five witnesses of the defendants three were experts of Shafei Law about which my predecessor held on 11-7-1950 A. D. that they were unnecessary witnesses and as such their cross-examination was not required. The 4th witness Mohd. Ali is a Medical Officer and he has deposed that defendant 1 was admitted into the Osmania Hospital on 13-4-1952 and discharged on 30-4-1942. Of the nine issues one has been decided on 17-1-51. The case was

ably argued by the learned advocates of the parties, and the only question on which they laid emphasis was whether having regard to the tenets of the Shafei Law the Wakfs are valid. It is admitted that the parties follow the Shafei Law. As already stated, the case was well argued and reference to over 70 original books of highest legal authority on Shafei Law was given by the parties; in addition, a large number of cases decided by the Indian High Courts were also cited. I have perused the original Arabic books referred to and also the Case Law and studied the whole question in the light of the record and state my opinion below.

(2) The learned advocate for the defendants has argued the following four points:

1. The object of the Wakf is benefit to the poor but here the property was bestowed upon the family to the exclusion of the poor and, therefore, the alleged Wakf is invalid;
2. That in Shafei Law it is necessary that all the beneficiaries should accept the Wakf; that here there was no such acceptance nor even an offer and hence the alleged Wakfs are invalid;
3. That the enforcement of the Wakfs have been made contingent on the death of the Wakif, that is, defendant 1; for the income of the endowed property has been bestowed upon the family after the death of the donor and, therefore, the Wakfs here are similar to a will entailing the power of revocation; and
4. That if the power of revocation is reserved in a deed of Wakf, the Wakf becomes void; and as such a power is reserved in the documents under consideration, the Wakfs are void.

(3) As this case has been much contested, it will be advisable to translate the operative portions and important recitals of the two deeds under consideration, which are Exs. A-5 and A-6.

Ex. A-5 is headed as 'Wakfnama' and runs as follows:

"I, Salah Bin Ahmed Mohsin Lahamdi, resident of Chatta Bazaar adjacent to Nawab Salar Jung's Devdi, Jamadar of Arabs, write in full possession of reason and senses and without force of coercion and of my own free-will and volition that, the following two houses which are my own property to the exclusion of anybody else and which are in my full possession and disposal .....
(here comes the description of the two houses)
.... and the lands adjacent to them are hereby dedicated as WAKF-ALAL-AULAD in accordance with the Moslem Law and in the path of God. The income of the endowed houses and the land should be spent first in the maintenance of the houses and the land and the residue should be spent upon the subjects of the Wakf.

Subjects of the Wakf.

Living sons:—(1) Ewaz Bin Salah, (2) Mohd. Bin Salah, (3) Ahmed Bin Salah;
and (4) sons of the deceased sons Umar Bin Salah and Ali Bin Salah
and their sons and the issues of all of them, generation after generation, as long as they exist and whether they remain in Hyderabad (Deccan) or Hazarmouth or any other place. All the sons should get equal shares, i.e. 1/5th each of the residue of the income of the endowed property which will devolve after them upon their male and female issues in the proportion of 2 shares to male and 1 share to female; but the issues of the daughters will not get any share in the endowed property. Of my aforesaid sons, if any of them dies without any issue, his share will devolve upon the other sons. This Wakf property will be endowment upon my sons and their issues; and nobody else will have any right in it.

'Towliath (Supervision)': The supervision of this endowed property will pertain to the seniormost among my sons and issues who would reside in Hyderabad provided that their conduct, integrity, trustworthiness and bona fides is admitted and, when they leave Hyderabad they will have power to appoint any trustworthy person as Agent and to entrust him with the administration of the work as also with the repair and maintenance, etc, of the endowed property.

'Control of the endowed property': Every person from the subjects of the Wakf shall have the right to demand accounts of the income of the endowed property and check and audit them whenever he likes whether the Mutavalli may be from the sons or a stranger. On the above conditions I have endowed the aforesaid property on my sons and their issues till they remain, as a valid legal and perpetual Wakf so that the property will not be sold or given in gift or transferred and nobody can be its owner. Thus dedicating the property with all the legal and Sharai conditions on the aforesaid sons, I, myself, as long as I live, will keep it in my possession and disposal and will be its Superintendent and Mutavalli and after my demise the supervision and the distribution of the income, etc. may be arranged in the manner described above.

NOTE: If in my lifetime I do not build the dilapidated house on the east of the endowed house No. 6901, adjacent to Nawab Salar Jung Baradari, then, out of my estate, before it is distributed, Rs. 10,000/- should be set apart and the house built up by the Mutavalli and Executor; and as to the rest of the estate it will be the bounden duty of my Sharers (heirs) to abide by the directions of God and Prophet and my will which is now made or which may be made in future. I have written these few words as Wakfnama before all the persons present so that it may be of authority in future. God suffices us.

Dated: 16th Farwardy 1346 F.

NOTE: The will which I have made separately or which I may make in future will have to be acted upon by the subjects of the Wakf."

Sd. Salah Bin Ahmed.

'Witnesses':
(four in number)

The Wakfnama of 5th Khurdad 1351 F. is in exactly the same words as the Wakfnama I have described above, except that, instead of two houses five houses have been dedicated in it. Exactly the same words have been used in the latter Wakfnama upto the note ending "will have to be acted upon by the subjects of the Wakf" & then an explanation is added which runs as follows:

"It may be explained that out of the houses I have dedicated by my Wakfnama dated 15th Farwardy 1346 F. one house situate inside Delhi Darwaza has been taken over by the C. I. B. for public purposes, and that I have purchased in its place houses Nos. 6717 and 6718 situate in Hyderguda and also two more houses Nos. 114/97/8B and 115/97/7B in Mukharab Gunj street and have dedicated all these houses and written this Wakfnama. I have given Toliath of this Wakfnama comprising the houses mentioned previously and specified here to my son

Ahmed Bin Salah as he is most suitable and, therefore, as stated above he should after my demise act as Mutavalli of the endowed property till he lives and after him the person who would be suitable."

Dated: 5th Kurdad 1351 F.

Sd. Salah Bin Ahmed.

'Witnesses':
(four in number)

(4) The real question is the interpretation of these Wakfnamas so as to judge their validity; and the four points made by the learned advocate for the defendants invite attention to some of the important points involved in their interpretation. Thus point No. (1) is that as no benefit has been reserved for the poor, the Wakfs under consideration cannot be deemed to be valid; for whether before the Mussalman Wakf Validating Act of 1913 or after it, it has been almost unanimously held by all the Indian High Courts that for a valid Wakf an ultimate gift to charity should expressly or impliedly be given; otherwise the Wakf cannot be deemed to be valid. No doubt as held by the eminent Judge, the late Amir Ali, in 20 Cal 128 (A), the mere use of the word 'Wakf' implies an ultimate gift to the poor and endowment in favour of one's family is also regarded in Muslim Law as charity; but this view has not prevailed and the High Courts of Allahabad,—'Irfan Ali v. Official Receiver', AIR 1930 All 837 (B), —'Mt. Rukiah Begum v. Sarajmul', AIR 1936 All 404 (C); Calcutta —'Masuda Khatun Bibi v. Mohd. Ebrahim', AIR 1932 Cal 93 (D); —'Mohd Ali v. Dinesh Chandra', AIR 1940 Cal 417 (E) and Oudh — 'Sheikh Ramzan v. Rahmani', AIR 1932 Oudh 71 (F); have held that no ultimate gift to charity can be deemed to be implied, where none is named, from the mere use of the word 'Wakf'. The Privy Council has also taken a similar view. — 'Gulam Mohd v. Gulam Hosain', AIR 1932 PC 81 (G). In the Wakf under consideration, there is not only no express limitation in favour of the poor, but there is also no implied reservation, as the Wakif has expressly stated 'the Wakf property will be endowment upon my sons and their issues; and nobody else will have any right in it'. Thus having regard to the Indian decisions the Wakf documents cannot be deemed to be valid. But there appear to be other considerations: the parties are governed by the Shafei Law & in all the numerous works of highest authority cited by both the parties, Wakf-Alal-Aulad simpliciter is recognized as perfectly valid. None of these authorities make any mention of an express or implied ultimate gift to the poor and they (Faiz-it-Ilah-Malik by As-Sayeed Omar Barakar Vol. II p. 100, Al-Mughni-ul-Muhtaj, by Allahmah Sherbaini, Vol. II, p. 368; These authorities show that if a property is dedicated on Zaid, and nothing further is said after Zaid it will be Wakf on the poor.) endorse the view that on failure of issue the poor will become the beneficiaries. This Court in 34 Deccan LR 412 (H) at p. 414 took similar view. This suit was instituted in Farwardy 1358 F. corresponding to February 1949 A. D.; that is about a year before the advent of the Constitution. Numerous Acts of the Central Government have been extended to Part B States by the Part B states (Laws) Act of 1951 and otherwise; but the Mussalman Wakf Validating Act of 1913 does not figure in any of such extending enactments. Thus, it appears to me, that the law applicable to the parties to this suit will be the pure Shafei Law, and having regard to it I cannot hold that the Wakf documents under consideration are invalid because of omission in them of any ultimate gift to the poor whether express or implied. In the result, this argument of the learned advocate for the defendant is rejected.

(5) The learned advocate for the defendants laid great emphasis on his second point and it is in his argument on it that he has cited most of the original Arabic authorities, a reference to some of them will be found in the margin.*

He has argued that according to Shafei Law, acceptance of the Wakf is necessary when the Wakf is in favour of a specified person or persons: that the acceptance should be just after the utterance of the words creating the Wakf and should be by all the persons on whom the endowment is made. I have carefully checked these statements and I do not agree with them. The founder of the Shafei School of Muslim Law, Imam Shafei, himself has stated in his work UMM that Wakf is among those transactions which are unilaterally complete as soon as the words making these transactions are uttered. This clearly rules out acceptance; but then it is said that if his two eminent disciples, viz., Imam Rafei and Imam Nuwi are agreed upon any point, they are to be followed in preference to what Imam Shafei is reported to have said as they, being eminent lawyers and greatly conversant with Imam Shafei's works and reasoning, are eminently fitted to say what really Shafei has said. Granting even this the texts do not uniformly show that Rafei and Nuwi are agreed on acceptance being a condition for the validity of a Wakf. They show that according to the accepted report only Rafei has laid it down as a condition, while Nuwi has agreed with him in his work Minhaj, but differed from him in his work known as Rowza. And it is agreed that if there are divergent views on any question of law in the various works of Nuwi, then the views expressed in Rowza are to be preferred to those expressed in Minhaj. To detract from the weight of this divergence between Rafei & Nuwi it is argued that though acceptance is not made a condition of the validity of the Wakf in Rowza, still the chapter in which Nuwi has expressed himself thus is the chapter on theft, whereas he has made acceptance a condition in Minhaj in the relevant chapter on Wakf; and therefore, Minhaj is to be preferred in this particular case. It is not necessary for me to decide between these rules of preference: suffice it to say that not only many later Jurists have come to the conclusion that acceptance is not a condition of the validity of Wakf, but that

*(Kilabul-Umm by Imam Shafei Vol. III, p. 274. Fathul-Jawwad a commentary on Irshad by Imam Sharfuddin, p. 462 Farwaid Mukkiah by Allamh Syed 'Alwi p. 41, (1317) A. H. Edition at Mecca); Gaijure's commentary on Minhaj; Bag-Yatul-Musturshidin by Mohd. Abdur Rahman, known as 'Alvi; Imam Zakaria Ansari's commentary on Ibnul. Wardi's Albahat; Syed Omar Barakat's Faiz-il-Ilahil-Malik; Sherbaini's Al-Mughni-ul Muhtaj; Minhaj's commentary Nihayatul-Muhtaj; Commentary of Abdul Hained Sherwani Tahfatul Muhtaj (itself a commentary of Nuwi's Minhaj); Mugni-ul-Muhtaj, a commentary of Minhaj; Kitabul-Anwar by Imam Yusuf Al-arad-baili; Sulaiman Bai-Irami's commentary on Minhaj-ut-Tullab; Kitab-ur-Rahmatul Ganiyal by Ibn Hajar; Imam Zakaria Rawza-ut-Talabir; Syed Alvi-ul-Sakkaj's Fathul-Mubean); (Minhaj's commentary Tahfatul-Muhtaj; Minhaj-ul-Tullab's commentary, Fathul-Wahhab; Minhaj commentary Nihayat-ul-Muhtaj; Irshad's commentary Fathul Jawad by Ibn Hajar; Imam Safei's Umm; Abu Ishak Shirazi's Kitabul-Mohazzab).

they have also scrutinised the grounds of both the divergent views I will first quote one or two Arabic texts to show that acceptance is not a condition and then a text or two in which the grounds for the divergent views are stated. Thus it is stated in Fathul-Wahab, a commentary on Minhaj-ut-Tullab, Vol. I, p. 292 that:

"Conditions for the validity of Wakfs are permanence and the dedication being absolute and unconditional; acceptance even from a specified person is not a condition; for a Wakf is made with the intention of seeking nearness to God. What I have stated above about a specified person is reported from the majority and it has been preferred and adopted in Rowza in the chapter on theft, and also in the commentary on Wasit where it is based on the authority of a text of Shafei; & Awzae and others have stated also that that is the accepted view. It is stated also that acceptance is made a condition from a specified person for the reason that it (Wakf) is conferring of ownership; and this was the original view".

In Fathul-Jawad, a commentary on Sharhul-Ir-shad at p. 460; after stating that acceptance is a condition for the validity of Wakf on the authority of Minhaj, it is stated further that:

"In Rowza, in chapter on theft (non-acceptance and) non-rejection (by beneficiaries) is preferred and it is stated further that condition for the validity of Wakf is that it should not be rejected by beneficiaries; and it is this view for a long time; and the authority for it is that it is based on a text (of Shafei) and adopted by a vast majority".

The reasons for making acceptance a condition are stated to be as follows, viz., that where the beneficiaries are specified persons, acceptance is easy and possible; that it is difficult to hold that a thing or its usufruct can pass into the ownership of a beneficiary without his consent when it is not a case of inheritance. These grounds are considered and replied to in Nihayatul-Muhtaj, a commentary on Minhaj Vol. IV, p. 294 in the following words:

that is:

"It is said that a Wakf is the ownership of usufruct and not of the property; but the better view is that in a Wakf not ownership passes to the beneficiaries; only as Subki has stated and explained the use is made lawful: he has said that no agreement or acceptance of a Wakf is necessary; for the beneficiary does not own the usufruct by any act of the person creating the Wakf; really he allows the use thereof for the sake of God".

The abovementioned reasons for acceptance being necessary for the validity of a Wakf or not speak for themselves and no comment is required. I am satisfied that though there is a difference of opinion in the learned of the Shafei School as to whether acceptance is a condition of Wakf or not the true position is as stated by Subki in the following words at p. 368 of Mughni-ul-Muhtaj by Allama Sherbaini, Vol. II. viz:

"that what is gathered from the language of Shafei and his followers is that they do not make acceptance a condition (for the validity of Wakf)."

The same author Subki is reported in the same book just quoted to have further stated that:

"and this (non-acceptance) is evident from texts of Shafei in other places (in chapters other than the chapter on Wakf); and accepted and preferred by Shaik Abu Hamid, Salim and Mawardi, as also by the author (Nuwi) in Rowza in the chapter on theft; and he (Nuwi) has reported it in Wasit also from Shafei; Ibn Salah has also adopted and preferred this view; and our Sheik is also of the same opinion in his Munhaj and in Al Mohemmet, and (perhaps) Rafei's view also is agreeable with this."

And lastly it is elucidated in Kitabul-Anwar by Imam Yusuf Al-Araobaili, vol. 1, p. 414 a work of high authority that:

"originally this (acceptance) was made a condition of the validity of Wakf as is reported in Minhaj; but later on this view was corrected by Imam Shafei and others."

All this will show that according to Shafei School acceptance cannot be deemed to be a condition of the validity of Wakf, and I hold the same. Assuming for the sake of argument that it is a condition, the evidence of the plaintiffs show that it was accepted by all the grandsons and that both the surviving sons of the Wakif were also then present. It is true that according to the tenets of Shafei School, no inference is usually drawn from mere silence; but in the circumstances of the Wakf under consideration when their father was creating a Wakf by which the sons of two of his deceased sons — disinherited according to Muslim Law — were getting a share equal to them, they should have spoken; and if they did not speak, the only conclusion is that they accepted the Wakf. As the learned advocate for the defendants has not adduced any evidence to rebut this evidence of the plaintiffs, I must attach credence to it.

(6) In this second argument of his, the learned advocate for the defendants has also stated that there was no offer of a Wakf and therefore no acceptance. I will consider this after dealing with his argument at serial (3) of para. 2 of this judgment.

(7) In my opinion the most important point made by the learned advocate for the defendants is about the Wakf being contingent. This I have numbered as serial (3) of para 2 of this judgment. Briefly the argument is that as defendant 1 has withheld the usufruct from the use and enjoyment of the beneficiaries till after his death, the Wakf is a contingent Wakf and one of its incidences is that it can be revoked like a will. First I will examine the Shafei Law on this point and then see whether in the Wakf-deeds under consideration, the Wakf is made contingent on defendant 1's death, I began by quoting from the commentary of Imam Zakaria Ansari, on the text Al-Bahjat of Ibn-ul-wardi, where on p. 272 it is stated that:

"there are four conditions for the validity of a Wakf viz., (1) statement of the use, (2) making it absolute & unconditional (3) perpetuity & permance & (4) making it binding. A Wakf can only be valid if it is absolute and unconditional: thus a Wakf like a gift cannot be deemed to be valid if it is made contingent (e.g., when the doner says 'I dedicate my house when the beginning of the next month comes'; but if he were to say 'I dedicate my house to the poor after my death', Al Ustad Abu Ishaq held in a Fatwa that the Wakf is valid and it becomes operative after his death like the manumission of a slave whose enfranchisement has been agreed to. All the learned and the Imams have agreed with him and Rafei has stated this Wakf is like a will; for Kaffal has stated that if the Wakif puts the property endowed in this manner to sale it will be deemed that he has revoked the Wakf. And the Imam (Ibnul Wardi) has said that this is not simply making the Wakf contingent but it is more

than that, for the disposal of the property is ordained in it to be after death. Subki has stated that what Shafei and his followers are at one is that such a Wakf is valid and this is also the Fatwa of Ustad Abu Ishaq. This statement of the Imam (Ibn-ul-Wardi) that the Wakf here is contingent is correct; but it should be noted that in a will the devolution of property is validly made contingent on death, hence it can also be valid in a Wakf".

And it is stated in Bagyatul Mustarhashaddin by Mufti Abdur Rahman Ibn Mohd., known as 'alavi', at p. 192 in question No. 10:

"A Wakf cannot be made contingent; for example, if a donor says 'I dedicate my house three days before my death-sickness; the Wakf cannot be valid; but there are two exceptions to the invalidity of a contingent Wakf; one is where the Wakf is for public purposes and expressly stated to be so; for the agreed reason that in such a case the ownership of the endowed property like mosques and schools in God; thus such a contingent Wakf is valid absolutely; secondly when a Wakf is made contingent upon death as when the donor says 'I dedicate my house after my death' or when he says 'when I die my house is a Wakf', the Wakf will be valid and will take effect after death. By consensus of opinion it will go the way of a will, inasmuch as it will be liable to revocation and will be valid to the extent of a third of the donor's estate only, and in case it is made in favour of an heir the consent of the other heirs will be necessary; in all other respects it will go the way of a Wakf and it will be governed by the rules pertaining to the Wakf."

In Vol. III of commentary Allamah Sulaimanul Baijrami on commentary of Manhajutullab p. 206 it is stated that:

'a condition for the validity of a Wakf is perpetuity and therefore, it will be invalid if it were timed, as when a donor says 'I have dedicated it on 'Zaid' for an year'; and another condition is Tanjis, that is, the Wakf should be unconditional and absolute and, therefore, if it were made contingent as when a donor says 'I dedicate it on Zaid when the beginning of the next month comes', it would be invalid. But if a Wakf is made contingent on death, it is valid, as when a donor says 'I dedicate my house after my death on the poor'. Both the Sheikhs (Rafei and Nuwi) have stated that 'it is like a will; as Kaffal has said that if the house is put to sale, it will be deemed that the Wakf is revoked .....Zarkashi has related from Alkazi that 'if a donor were to make an unconditional Wakf but were to make the enjoyment of its usufruct contingent upon his death, the Wakf will be valid and will be like a will; and the donor will have the power of revocation; a similar proposition that it is like a will will be found in Sharhae Minha-Jutullab'.

These quotations establish quite clearly that though it is a condition of the validity of the Wakf that the Wakf should be unconditional and absolute without being contingent upon any future event, still if it is made contingent upon death it is deemed to be valid by Shafei and his followers including Rafei and Nuwi. It will be seen further that though such a Wakf is deemed to be valid, still it is regarded at least partially a will inasmuch as it can be revoked like a will, and like a will can only be enforced to the extent of a third of the donor's property only and if it were in favour of an heir the consent of other heirs is required for its validity. In all the numerous books cited by the plaintiffs no reference is given to any book or text which establishes a contrary view. The Fatwa filed by the plaintiffs and written by Al-Habib Abdullah Bin Ahmed of the Nizamia College also does not contain anything on Janjis of contingency of the Wakf. I am, therefore, persuaded that this statement of law by the authorities quoted is the correct Shafei Law.

(8) Now I pass on to examine the two Wakf documents under consideration in the light of the above condition of Tanjis. No doubt, defendant 1 has stated in so many express words that he has dedicated his property in perpetuity and that it cannot be sold or given in gift or transferred and so forth in more than one place; yet the following portion of the deed requires careful consideration. It is found verbatim the same in both the deeds and it is as follows:

"Thus dedicating the property with all the legal and Sharai conditions on the aforesaid sons, I myself as long as I live, will keep it in my possession and disposal and will be its Superintendent and Mutavalli 'and after my demise the supervision and the distribution of income etc., may be arranged in the manner described above'."

The first thing to consider about this passage is the Wakif's statement that he will keep the property in his possession and disposal as long as he lives. Is the possession and power of disposal to be that of an absolute owner? There is no difficulty in answering this question, for not only he has stated in the lines just above this passage that there will be no owner of the property as it will be Wakf, but in the passage itself and just after the words under consideration he has qualified his possession and power of disposal by stating that he will be the Superintendent and Mutavalli of the property. The only conclusion from this, especially when it is considered in the light of the context of the whole of the deed wherein he has repeatedly declared the property to be Wakf is that, the possession and power of disposal reserved are those of a Mutavalli.

The next thing to consider is the effect of the underlined (herein ' ') words, viz., 'and after my demise the supervision and distribution of the income etc. may be arranged in the manner described above'. The plain and important question about this sentence is:— Has defendant 1 made the usufruct contingent upon his death? If this question is answered in the affirmative the Wakf will be liable to revocation like a will and if it is answered in the negative, the Wakf will be binding and irrevocable. The question is of the intention of defendant 1, and, of course, I will have to gather it not only from the underlined (herein ' ') sentence, but from the whole deed. The sentence taken by itself is almost liable to the construction that the gift of the usufruct is made contingent, almost but not quite; for the Urdu words used are 'IHTEMAM HOTA RAHIGA', & not 'IHTEMAM HOGA',: had he used the latter words, then the intention that the distribution of income etc. should be after his death will be stronger; but as he used the former words it appears to me that the intention is to refer to the 'continuity' of the arrangements he has detailed and not to its contingent character. I cannot forget that the underlined (herein ' ') sentence has come just after the passage in which he has described his possession and power of disposal to be that of a Mutavalli; and also after repeated declaration of Wakf in the deed.

It may also be noted that he has expressly referred to the income and usufruct in another place

in the deed, where he has said that the income of the endowed houses shall first be used in their repair and maintenance and that the residue shall be distributed between the beneficiaries. All this, I think, goes to show that the intention was to make the Wakf binding and effective and not to make the usufruct contingent on death. The learned advocate for the defendants has stressed that in both the Wakf deeds the last line is about the will of the defendant being binding on the beneficiaries. I do not think that this has the effect of making the Wakf contingent: for the notes to the Wakf deeds show that defendant 1 is treating the Wakf as separate from the will; he speaks of his Matruka along with the endowed property, and directs that Rs. 10,000/- should be taken out of the Matruka for construction and repair of the endowed house No. 6901, which is the first house endowed in the first Wakf deed Ex. A-6. The directive that his will shall be binding on the beneficiaries pertains by express intendment not only to future wills but also to a present will co-existing with the Wakf: and this indicates that he does not regard them conflicting; and as he has spoken of his Matruka, it shows that he has other property left, — as in fact he has — after endowing the property specified in the two Wakf deeds: and that it was in respect of the Matruka that he wanted his behests to be binding on the beneficiaries.

Thus I do not think I will be justified in regarding the last sentence of the deed as indicating an intention on the part of the donor that the Wakf deeds he has so solemnly made are mere wills; and liable to revocation. The plain truth of the matter is that if he had intended that the Wakf deeds should have effect after his death he should have stated that the houses specified in both the deeds shall be Wakf after his death. He has not done that. On the other hand he has not only endowed the houses by using express words of Wakf repeatedly but also expressly stated that the income shall be distributed between the beneficiaries. Thus on very careful consideration, I have come to the conclusion that the Wakf is not a contingent Wakf and I, therefore, reject this argument also of the learned advocate for the defendants. In para. 6 of this judgment I have reserved for consideration the learned advocate for the defendants' argument, that in the Wakf deeds under consideration there is no offer of Wakfs and, therefore, there cannot be any acceptance of them. What he means is that as the Wakfs were contingent and hence governed by the rules pertaining to wills, they were wills and not Wakfs. As I have now after careful consideration held that the Wakfs are not contingent, this part of his argument also falls to the ground and I reject it. The Wakf deeds contain all the conditions necessary for the creation of Wakfs and are therefore deeds of Wakfs and not wills.

(9) There remains the fourth point and argument of the learned advocate for the defendants namely, that as a power of revocation has been reserved in the Wakf deeds, Exs. 5 and 6, these documents and the Wakf contained therein are void. I have dealt with this in the proceeding paragraphs and I do not think that the mere statement by defendant 1 that the will he has already made or the will that he may make in future will be binding on the beneficiaries can validly be deemed to be a revocation of a very solemnly created Wakf. I, therefore, reject this argument also of the learned advocate for the defendants.

(10) In the light of the above findings I have to decide the various issues. As stated above issue No. 1 has already been decided by my predecessor. Issue No. 2 is about Court-fees, The learned advocate for the defendants did not press the point; on the valuation stated in the plaint the Court-fees appear to be proper; and if in the accounts that would be taken in the preliminary decree, mere Court-fees will be found to be due, they will be realized. Issue No. 3 is "Whether the plaintiffs have any right of action". In the light of the above findings they clearly have a right of action for a statement of accounts as also for a perpetual injunction to restrain the alienation of the Wakf property. I hold the same and decide this issue in favour of the plaintiffs. Issue No. 4 is about the nature of the deeds dated 16th Farwardy 1346 F. and 5th Khurdad 1351 F. I hold that they are valid Wakf deeds and are enforceable during the lifetime of defendant 1. Issue No. 5 is

> "Whether defendant 1 can revoke the above-mentioned two Wakf deeds and whether they have in fact been revoked and cancelled by defendant 1."

In the light of the above findings, these Wakf deeds are not revocable and their cancellation by defendant 1 is of no effect. Issue No. 6 is 'Whether the plaintiffs have any right to account during the lifetime of defendant 1'. I hold that they have, and decide this issue in favour of the plaintiffs. Issue No. 8 is 'Whether the Wakf deed dated 5th Khurdad 1351 F. was executed during the illness of defendant 1 when he had despaired of life. The defendants have adduced no evidence in respect of the seriousness of the illness of defendant 1. Their witness No. 4, a medical attendant, has just stated that the defendant was admitted into the hospital for about three weeks and was then discharged. He does not depose to the seriousness of the illness or even to the nature of the illness at all. It appears from the evidence adduced on behalf of the plaintiffs that he was suffering from Hernia and was always in full possession of his senses. I, therefore, decide this issue againt the defendants. Issue No. 9 is as to whether the income of the endowed property as described in para. 5 of the plaint is correct. Sufficient materials to decide this issue is not brought on record and I, therefore, leave it to be decided later on after taking due evidence. There remains issue No. 7 which is

> "Whether the houses mentioned in lists B and C attached to the plaint were purchased and taken on mortgage by defendant 1 from the income of the endowed property and are, therefore, endowed property?"

The learned advocate for the plaintiffs waxed eloquent on this point and argued that having regard to the Indian Trusts Act these houses should be regarded as Wakf property; for, they were purchased from the income of the houses expressly endowed in the two Wakf deeds and, therefore, on the doctrine of 'following the trust property' the plaintiffs should be allowed to follow them. I do not agree with him. The plaintiffs have not adduced sufficient evidence to show that these houses were purchased from the income of the endowed property. They have just stated that their grand-father, defendant 1, used to speak like that; but that is not sufficient. Defendant 1 has totally denied that he purchased these houses from the income of the endowed property. Section 1, Indian Trusts Act is quite clear and it states that 'Nothing herein contained affects the rules of Mohammadan Law as to Wakfs". There are number of cases in which

it has been held that the rules regulating trusts cannot be applied to Wakfs. Besides, according to Muslim and Shafei Law a property cannot be dedicated except by the use of certain words uttered with intention of creating the Wakf. There is no such evidence here and the donor himself has deposed that he did not dedicate these houses. I, therefore, decide this issue against the plaintiffs and hold that the houses mentioned in lists B & C cannot be followed as trust property. The plaintiffs have a right to account to a 1/4 (one fourth) share of the income of the Wakf property and nothing more. The last issue is 'To what further relief are the plaintiffs entitled?' I have already said that they are entitled to the perpetual injunction prayed for and to a preliminary decree of accounts and I, therefore, direct that such a decree be passed and accounts be stated from the date of the Wakfs till the date of the suit and also of this judgment.

(11) Before I close I may refer briefly to the cases cited by the learned advocate for the defendant like, the case in —'Mahomed Ali Khan v. Ahmed Ali Khan', AIR 1945 All 261 (FB) (J) and — 'Mahomed Safi v. Khadim Ali', AIR 1944 Oudh 291 (G). These and similar cases cited by him hold that for a Wakf to be valid the dominant intention should be charity. I have already discussed in para 4 of this judgment that I have in this case to apply pure Shafei Law and have referred to the authoritative works on Shafei Law which validate Wakf-Alal-Aulad pure and simple. Paragraph 4 of this judgment may, therefore, be referred to in this connection. I therefore, pass a preliminary decree of accounts with costs and direct that the defendants be restrained from alienating the property. I fix a period of three months for stating the accounts. I will appoint a Commissioner if the need is felt and the plaintiffs approach me for that purpose. I direct defendant 1 to state the accounts within the next 3 months from the date of the decree. The suit shall stand adjourned for making a final decree to 5-10-1951.

B/K.S. Judgment accordingly.

A.I.R. 1953 HYD. 201 (Vol. 40, C. N. 94)

MOHD. AHMED ANSARI
AND SRINIVASACHARI JJ.

T. S. Ramchandra Rao, Petitioner Appellant v. Government of India (through the Minister for Railways), Respondents.

Writ Petn. No. 49/B/5/2 of 1952-53, D/- 10-12-1952.

(a) Constitution of India, Art. 226 — Writ of Certiorari.

Order sought to be quashed must be one partaking of the nature of judicial or quasi judicial order — Test to determine whether order is one of quasi-judicial nature, laid down — Proceedings by way of Departmental inquiry, in the matter of disciplinary action against railway employee, held to be in nature of quasi-judicial inquiry. AIR 1950 SC 222, Applied; (1924) 1 KB 171, Rel. on. (Paras 3, 4, 5)

(b) Constitution of India, Art. 311(1) and (2) — Employee reduced in rank — Provisions of Sub-Arts. (1) and (2) cannot be invoked. (Para 7)

Raja Bahadur Bishweshwarnath and Laxmanrao Ganu, for Appellant; R. Raghavan and N. S. Chenoy, for Respondents.

CASES CITED:
(A) ('50) AIR 1950 SC 222: 1950 SCR 621
(B) (1924) 93 LJKB 390: (1924) 1 KB 171
(C) ('52) AIR 1952 Madh B 105: ILR (1952) Madh B 253
(D) ('52) AIR 1952 Orissa 285: ILR (1952) Cut 324
(E) ('53) AIR 1953 Cal 316: 55 Cal WN 605
(F) ('49) AIR 1949 PC 112: 50 Cri LJ 383
(G) ('42) AIR 1942 FC 3: 1941 FCR 37
(H) ('45) AIR 1945 FC 47: 1945 FCR 103
(I) ('48) AIR 1948 PC 121: 1948 FCR 44

SRINIVASA CHARI J.: This is an application for a writ of certiorari praying that the order of the Dy. Chief Traffic Manager reducing the petitioner from the position of a Commercial Inspector to the rank of an Assistant Station Master be quashed on the ground that the said order was illegal and beyond the powers vested in the Dy. Chief Traffic Manager. The petitioner further prayed for an order that the petitioner be reinstated in his original positon of Commercial Inspector. We heard the arguments of the learned advocates for the petitioner and the Government advocate.

(2) The petitioner was holding the office of Commercial Inspector in the Nizam's State Railway. The petitioner being aggrieved by the orders of the Railway Authorities in respect of his promotion etc., submitted an appeal to the Railway Board setting forth his complaints against the officers in the Railway. He alleged in his representation to the Railway Board that he was denied promotion during 1945-1949 and further that a promotion to the post of Traffic Manager in the same year was denied to him, that an increment due to him in 1947 was not granted. These grievances were set forth in the form of a memorandum and the petitioner requested that the same be forwarded to the Railway Board through the proper channel. The said memorandum, the petitioner contended, was not forwarded, but instead a charge was framed against him for serious misconduct, for using disrespectful and objectionable language and making serious allegations against his superior officers. In the charge, however, the attention of the petitioner was drawn to the portions of the memorandum wherein the said disrespectful and objectionable language was said to have been used. The petitioner was directed to show cause in writing why he should not be removed from service or punished with any of the lesser penalties specified in R. 1702 of the Railway Establishment Code. He was also called upon to submit his defence within a period of seven days. After the charge sheet was given, the petitioner submitted a reply to the charges levelled against him which is dated 6-12-1951.

In his reply to the charge the petitioner submitted that the only action permissible under the Code for using disrespectful and improper language was the withholding of the appeal from submission, as a penalty and he also urged that this penalty could be imposed only by the Chief Traffic Manager and not by the Dy. Chief Traffic Manager. In substance his answer was that the imposition of any penalty could be only by the Chief Traffic Manager and not by the Dy. Chief Traffic Manager. After that, the petitioner was again addressed on 13-12-1951 asking him to show cause why he could not be removed from service or punished as provided for under R. 1702 of the said Code inasmuch as

he had violated R. 1719 of the Indian Railway Establishment Code. Again the petitioner contended that the competent authority alone was entitled to withhold the appeal for infringement of instructions contained in R. 1719. After this another letter was addressed by the Dy. Chief Traffic Manager to the petitioner stating that he had not answered the charges mentioned in the charge sheet and that he, therefore, held him responsible for serious misconduct and was proposing to demote him as Asst. Station Master. The petitioner was called upon to show cause why this penalty could not be imposed. This procedure was followed in accordance with the provisions of R. 1712 of the Railway Establishment Code. In answer to this the petitioner in his letter dated 26-12-1951, stated that in the absence of clarification of the points raised by him he considered the decisions and proposals of the authorities as illegal and if any action was taken the authorities would be held personally responsible and that he would be constrained to assert the fundamental rights conferred on citizens of India by the Constitution. It was after this on 16-1-1952, that the order demoting him to the rank of Assistant Station Master was served on him. The letter said

"You have failed to answer the charge sheet No. E. 351/3/12-1951 and the notice No. E. 351/21-12-1951 to show cause why the penalty of demotion as Assistant Station Master should not be imposed. You are with effect from 17-1-1952 demoted as Assistant Station Master".

It is this order that the petitioner is now challenging and has applied to this Court for quashing the same as being illegal.

(3) The learned advocates for the petitioner urged before us that the provisions of Sub-Arts. (1) and (2) of Art. 311 of the Constitution were not conformed to. They contended that the petitioner had been reduced in rank without an opportunity having been given to him to show cause against the action; they further urged that this order was passed by an unauthorised person, that is to say, not by the authority by whom the petitioner was appointed for Art. 311, Sub-Art. (1) contemplates the removal and dismissal by that authority who appointed a person. Counsel for the Railway submitted that the order that was sought to be quashed was in the nature of an administrative order &, therefore, a Writ of Certiorari would not lie. It was also urged that a Writ by way of Mandamus could not issue for the reason that the Railway could not be compelled to keep him in the place where he desires to be reinstated.

3 (b) The petition before us being one for the issue of Writs of Certiorari and Mandamus invoking our jurisdiction under Art. 226 of the Constitution, it would be necessary to consider whether the order sought to be quashed partakes of the nature of an administrative order or could be regarded as a quasi-judicial order, for it is only in the latter case could we exercise our powers under Art. 226 of the Constitution. Proceedings by way of Departmental enquiry are, in our opinion, in the nature of quasi-judicial proceedings.

The learned counsel for the respondent relied upon the case of the — 'Province of Bombay v. Khooshaldas', AIR 1950 SC 222(A). The test laid down by the Supreme Court in the leading case of the — 'Province of Bombay v. Khooshaldas', (A) is to the effect that where in order to arrive at a decision the law enjoins a judicial approach by the authority deciding then such a decision or order would be regarded as quasi-judicial order. What has to be considered is the manner in which the decision has to be arrived at. Is there any duty to decide judicially will be the question that will have to be considered. In the Supreme Court case above referred to, the Chief Justice laid down that there ought to be a judicial element in the process leading to the decision. The fact that a decision of fact is arrived at by an executive authority and that decision affects the rights of parties would not matter. What is essential is the determination of the question judicially. Fazl Ali J. in the same case also observed "The real test is: 'Is there any duty to decide judicially?" Das J. who concurred with the Chief Justice and Fazl Ali J. also expressed that the real test was whether there was a duty to act judicially.

(4) It may also be observed that in determining as to whether a particular order should be regarded as quasi-judicial or not, it would have to be considered as to whether following ingredients are present in it:

(a) a dispute or 'lis' which contemplates the setting up of a case and an opposition; and

(b) whether the officer concerned has to weigh the pros and cons to come to a conclusion.

A 'lis' would come in where one party put forward a claim and another contests it, a third party decides it. But it is not quite necessary that there should be two parties whose dispute is decided by another authority in order to constitute the decision of such authority as 'quasi-judicial'. It may be that in certain cases, a case is set up by one party and the authority is authorised to investigate into the matter and decide the case. In such cases if the Statute prescribes that the authority should hear the objections, institute an enquiry and make an investigation and then come to a conclusion after taking into consideration all the facts and circumstances of the case, it would still be regarded as a quasi-judicial act, provided such decision affects the rights of parties. That this is the position of the law is supported by the case of — 'Rex v. Electricity Commissioners', (1924) 1 KB 171(B). The case of the — 'Province of Bombay v. Khushaldas',(A) cannot help the learned counsel for the respondent because in that case their Lordships had to consider about requisition of certain premises for a public purpose under the Bombay Land Requisition Ordinance, 5 of 1947. The question arose as to whether the decision of the Government that there was a public purpose had to be arrived at after instituting an enquiry. They held that there was no such statutory duty and the Legislature had committed to the executive authority the decision as to whether land or premises is required for a public purpose, the Court could not go into the question.

(5) The result of all these decisions is that where the decision affects the right of a party, the fact that there are no two parties one to propose and other to oppose, and a third person to decide, would not take the decision out of the category of quasi-judicial decisions provided the law enjoins an enquiry into the

matter by hearing objections and considering the pros and cons of the case. Decidedly in cases of this kind, such as the one before us the constitution enjoins that a member of a Civil Service before he is dismissed or removed or reduced in rank should be given an opportunity to put forward his objections and the authority is expected to consider these objections and then pass orders. There are, therefore, both the ingredients viz. (i) the duty to hear objections and give a decision and (ii) such decision affected the rights of a party. We are, therefore, of opinion that that decision must be regarded as quasi-judicial. In case before the Madhya Bharat High Court which was a case of a Writ of Certiorari against an order terminating the services of an employee in the Health Ministry of Madhya Bharat the learned Judges held that no writ would lie, but in that case the facts would show that the enquiry into the allegations denied by the Civil Servant was only optional and not obligatory under the Madhya Bharat Civil Service (Punishment and Appeal) Rules, 1950, and where it was not obligatory to enquire the learned Judges held, the decision could not be regarded as a quasi-judicial act to be subjected to Certiorari — 'Lilawati v. State of Madhya Bharat', AIR 1952 Madh B 105 (C). We are inclined to agree with the view expressed by the Judges of the Orissa High Court in the case of — 'Kashinath Patnaik v. P. K. Kapila', AIR 1952 Orissa 285 (D), where the learned Judges held that where there has been a contravention of Cl. (2) of Art. 311 of the Constitution the High Court is entitled to interfere under Art. 226 of the Constitution and quash the order in Certiorari. Our view is further supported by the decision of the Calcutta High Court in the case of — 'Suresh Chander Das v. Himangshu Kumar Roy', AIR 1953 Cal 316 (E).

(6) The next argument to be considered is as to whether the Railway administration had conformed to the provisions of Art. 311 (2) of the Constitution. It would appear from Art. 311, Sub-arts. (1) and (2) of the Constitution that the provisions contained therein are mandatory and are not directory. Therefore, where a dismissal has been made by an authority who had no power to appoint or where a reasonable opportunity has not been given for showing cause against a contemplated action of dismissal, removal or reduction in rank, the action would be held to be void and inoperative. This article is a reproduction of sub-ss. (2) and (3) of S. 240, Government of India Act, 1935. The Federal Court of India and the Privy Council had occasion to interpret the provisions of S. 240, Government of India Act in the case of — 'Surajnarain Anand v. North West Frontier Province', AIR 1949 PC 112 (F) and — 'AIR 1942 FC 3 (G). In the above case their Lordships of the Federal Court clearly laid down that the provisions of S. 240 corresponding to the present Art. 311, were mandatory and therefore if a civil servant was dismissed by any authority subordinate to the person who appointed him, the order was inoperative. In the Government of India Act, 1915, there was no provision similar to S. 240 (1), (2) and (3), Government of India Act, 1935. Therefore, when re-enacting the Government of India Act, 1935, these provisions were incorporated providing proper safeguards.

(7) The question came up for consideration again in — 'Secretary of State of India v. I. M. Lal', AIR 1945 FC 47 (H), which went up to the Privy Council, vide — 'High Commrs. for India v. I. M. Lall', AIR 1948 PC 121 (1). While interpreting sub-s. (3) of S. 240, Government of India Act, their Lordships of the Federal Court observed that the person against whom some disciplinary action is proposed to be taken before the actual order of either dismissing, removing or reducing to a lower rank is taken, such person should be afforded a reasonable opportunity of showing cause against the proposal to reduce him or dismiss him. In the case of — 'Secretary of State v. I. M. Lal', the point arose as to whether the plaintiff in a suit or in an action for wrongful dismissal should be afforded an opportunity after the finding of the enquiry had been considered and the punishment decided upon. The High Court was of the opinion that this was not necessary. The High Court came to the conclusion that there was no necessity to have two enquiries and a further notice to the person against whom the charge was brought informing him about the punishment proposed to be inflicted and asking him to show cause why such punishment should not be made was not necessary. With this opinion of the High Court Varada Chari J. agreed in the Federal Court. The view of the majority consisting of the Chief Justice and Zafrullah Khan J. was 'contra'. The Chief Justice and Zafrullah Khan J. held that the person who would be dismissed or reduced in rank must know what punishment is proposed as the penalty for certain acts or commissions on his part and must be told the grounds on which it is proposed to take such action, and must be given a reasonable opportunity of showing cause why such punishment should not be imposed (— 'AIR 1945 FC 47 (H)'). When the matter went up before the Privy Council on appeal their Lordships agreed with the view taken by the majority of the Judges of the Federal Court and held that the provision relating to a reasonable opportunity of showing cause against the action proposed to be taken was a mandatory statutory provision. They were dealing with S. 240, sub-ss. (2) and (3), Government of India Act, corresponding to Art. 311, Sub-arts. (1) and (2) of the Constitution of India. A definite conclusion as to what action is proposed to be taken has to be arrived at by the authority and then the employee should be given an opportunity to make his submission as regards the proposed action. This dictum of the Federal Court was approved of by the Privy Council on appeal (— 'AIR 1948 PC 121) (I)'. There can be no doubt that if the action by the Railway Administration lacked the essential mandatory procedural rights enjoined by the Constitution the decision of the Railway authority would be void and inoperative.

We have to consider whether the record in this case shows that the Railway authorities acted strictly in conformity with the conditions laid down in the Statute. That the procedure warranted by law was adhered to in this case is clear from the letter No. E.352/21-12-1951 issued by the Dy. Chief Traffic Manager wherein the Dy. Chief Traffic Manager holding the petitioner as being responsible for serious misconduct intimated to him that he proposed to demote him as Asst. Station Master and called upon him to show cause before the 27th Instant, why that penalty should not be imposed. We may point out that if there has been violation

of the provisions of Art. 311, Sub-arts. (1) or (2) we would be justified in exercising our powers under Art. 226 of the Constitution to rectify an irregularity. This is a case where the petitioner has been reduced in rank and where a person has been reduced in rank sub-art. (2) of Art. 311 says that he shall not be reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken. So far as this aspect of the case is concerned we are satisfied that the petitioner had been given a reasonable opportunity to show cause against the action proposed to be taken. As detailed by us above, the petitioner was furnished with a charge-sheet, he was asked to give an explanation and when he failed to give an explanation the authorities issued a notice to him to state as to why action under the rules could not be taken against him; he was asked to show cause. This he failed to do. Under those circumstances, we are of opinion, it could not be argued with success that no reasonable opportunity for showing cause had been given to the petitioner.

(7) The next argument is that Art. 311 (1) had not been conformed to. With regard to this, it has to be observed that it is only in the contingency of the person being dismissed or removed that such a dismissal or removal should be effected by that authority who appointed and not otherwise. This is a case where there has been only a reduction in rank and not an absolute dismissal or removal. Thus the provisions of Art. 311, Sub-arts. (1) and (2) cannot be invoked. Therefore, we come to the conclusion that neither the provisions of Art. 311 (1) nor Art. 311 (2) were violated. No case has been made out for the issue of a Writ of Certiorari and the result is that the application is dismissed. But having regard to the particular facts of this case, we direct that each party do bear his own costs.

A/R.G.D. Application dismissed.

A. I. R. 1953 HYD. 204 (Vol. 40, C. N. 95)

PALNITKAR AND
MOHD. AHMED ANSARI JJ.

Khaja Mian, Appellant v. State of Hyderabad.

Criminal Appeal No. 652 of 1950, D/- 1-2-51.

Hyderabad Arms Regulation (13 of 1358, Fasli), Ss. 10 and 11 and 14 — Possession of spear-head without licence is no offence — Arms Act (1878), Ss. 14, 15, 16 and 19 (f). 9 Bom 478 and 1 Weir 666, Rel. on. (Para 3)

Anno: Arms Act, S. 14 N. 1; S. 15 N. 1; S. 19 N. 7.

Syed Ismail, for Appellant; Gopal Rao Tuljapurkar, for the State.

CASES CITED:
('83) 9 Bom 478 3
1 Weir 666 3

JUDGMENT: This is an appeal against the conviction and sentence of the accused under Ss. 11 and 14 of the Hyderabad Arms Regulation No. 13 of 1358 Fasli and a legal question has arisen.

(2) The facts briefly are that the accused was charge-sheeted for unlawfully keeping in possession one spear-head. The question arises whether the possession of the said weapon is an offence under the said Regulation. Section 10 of the said Regulation lays down that — no person shall have in his possession or under his control any cannon, fire arms, ammunition or Military stores, except under a licence and in the manner and to the extent permitted thereby.

(3) It is clear that the accused had neither a cannon nor fire-arms, nor ammunition, nor Military stores in his possession. It is only the possession of these four categories of articles that has been prohibited unless under a licence by the Act. The spear-head in question in this case is not included in that category. Hence, the provisions of S. 10 do not apply to this case and it cannot be said that the possession of the spear-head is an offence under the said Section of the Regulation. The learned Government Advocate has relied upon S. 11 of the Regulation. The lower Court also has held that S. 11 of the Regulation applies to this case. The Urdu version of the Regulation Section 11 was read before us, and it appears to us that there is a lacuna in the Urdu Section. We, therefore, referred to the original Regulation which is in English and published in the Government Gazette for 1358 Fasli Vol. 80 Extra-ordinary Gazette No. 12 dated 29th Bahaman 1358 Fasli. That Section reads thus:

> "Any person possessing arms, ammunition or Military stores, the possession whereof, has in consequence of the cancellation or expiry of a licence or of an exemption or otherwise become unlawful, shall without unnecessary delay deposit the same either with the Officer-in-charge of the nearest Police Station or at his option and subject to such conditions as the Government may by rules prescribe with a licensed dealer."

From the wording of this sub-section, it is clear that the person possessing the articles referred to in this Section should deposit them with the Police or with a licensed dealer when licence to possess the same has been cancelled or its period expires or on account of non-applicability of the exception or for some other reason the further possession becomes unlawful. This section pre-supposes for its application, that originally the possession of the person must have been lawful and has become unlawful due to subsequent events. Such is not the case of the spear-head regarding which the accused has been charged. Hence, in our opinion, S. 11 is not applicable to the facts of the case. The only Section applicable could have been S. 10, if the article in question was one of those mentioned in the said section.

In our opinion, the mere possession of the spear-head in question is not unlawful under S. 10. We are fortified in our opinion by — 'Government of Bombay v. Dodyama', 9 Bom 478, in which it has been held that the possession of swords and daggers without a licence is not punishable. Such is also the view expressed in — 'Pakir Ahmad, In re', 1 Weir 666, in which it has been held that the possession of a sword without licence in a place to which S. 15, Indian Arms Act, has not been rendered applicable. is not punishable under S. 19 (f). We, therefore, hold that mere possession of the spear-head in this case is no offence and, therefore, no offence has been committed by the accused. We quash the sentence of the lower Court and acquit the accused. The bail bond entered into by the accused is cancelled and the fine if paid should be refunded. Appeal allowed.

B/K.S. Appeal allowed.

A. I. R. 1953 HYD. 205 (Vol. 40, C. N. 36)

PALNITKAR AND SRINIVASACHARI JJ.

R. Arvindam, Petitioner v. Mariam Vanderman, Respondent.

Petition No. 103/2 of 1952-53, D/- 3-2-1953.

Special Marriage Act (1872), S. 2(3)—Effect of want of consent of father.

The provisions contained in S. 2(3) are mandatory in their character and where mandatory provisions have not been complied with, such marriage is void in law; there is no scope for the application of the doctrine of factum valet. AIR 1929 Cal 631 (SB), Foll.; AIR 1946 Nag 60 (SB), Not Foll. (Para 7)

Anno: Sp. M. Act, S. 2, N. 2 and 4.

Venkata Char, for Petitioner.

CASES CITED:

(A) ('29) AIR 1929 Cal 631: 56 Cal 628 (SB)
(B) ('46) AIR 1946 Nag 60: ILR (1946) Nag 1 (SB)
(C) ('51) AIR 1951 Punj 88: 53 Pun LR 257 (SB)
(D) ('49) AIR 1949 Mad 808: 1949-1 Mad LJ 511
(E) ('50) AIR 1950 Bom 307: 52 Bom LR 394
(F) ('99) 21 All 460: 26 Ind App 113 (PC)

SRINIVASA CHARI J.: This case affords an example of how marital ties are sought to be made in order to overcome and circumvent certain express provisions of law as in this case it happened that a marriage was sought to be solemnised just to be able to get an Indian National's Certificate and remain here without going back to Pakistan. This is an application under S. 17, Special Marriage Act, seeking for a declaration that the marriage which was solemnised on 3-10-1951 between the petitioner and one Mariam Vanderman before the Registrar of Special Marriage, Secunderabad, be declared null and void. The petitioner alleged in his petition that the respondent, Mariam Vanderman, was the daughter of one Vanderman, who left India for Pakistan with his daughter. The father stayed away in Pakistan while the respondent herein returned from Pakistan under a temporary permit. The petitioner stated that the respondent who had returned from Pakistan under a temporary permit told him that she was being pressed by the authorities to get back to Pakistan as she had come under a temporary permit and that she did not want to return to Pakistan. He further stated that the respondent told him that certain friends of hers told her that if she wanted to remain in India permanently, the only course open to her would be to get an Indian National's Certificate and in order to get the said certificate it would be necessary for her to get herself married to an Indian. The petitioner further stated that because the respondent was in a pitiable condition he was moved by her entreaties and he agreed to marry her under the Special Marriage Act in order that her object may be achieved viz.. getting an Indian National's Certificate. It is stated that the petitioner went before the Registrar of Marriages and assumed the name of 'A. R. Mudaliar' and made a declaration before the Registrar stating that he was willing to marry the respondent. The petitioner and the respondent made the necessary declaration before the Registrar, the marriage was solemnised and the Registrar granted a certificate under S. 13 of the aforesaid Act. Some days later, it is stated, the Police having come to know that there were some suspicious circumstances surrounding this marriage began to make enquiries and they came to know that the person, A. R. Mudaliar who is said to have married the respondent, Mariam Vanderman, under the Special Marriage Act was not A. R. Mudaliar himself but his cousin, the petitioner. This was disclosed when the police went to investigate about the matter at the house of A. R. Mudaliar. The petitioner happened to be there and he made an open confession of what had happened.

(2) After this the petitioner was advised to get the marriage declared null and void and he, therefore, applied to this Court for a declaration that his marriage with the respondent be declared null and void. These are facts that have been alleged in the petition. Besides alleging these facts, the petitioner sought to get the marriage declared null and void on the ground that one of the conditions upon which a marriage under the Special Marriage Act could be solemnised not having been conformed to, such a marriage could not be held to be valid, the condition being that where any of the parties to the marriage had not completed the age of 21 years, it was essential that the consent of his or her father or guardian to the marriage should be taken. Admittedly the petitioner was below the age of 21 years and in this case the consent of the father was not taken.

(3) Notice was taken out to the respondent and as she could not be served in the ordinary way, substituted service was ordered and when she was absent in spite of the substituted service, she was set ex parte by an order of this Court.

(4) The petitioner examined in support of his petition, himself, his father and one other. Besides this oral evidence he produced the relevant documents from the office of the Registrar, Special Marriages, the application for admission in the schools in which he studied and the H. S. Certificate granted to him on his passing the H. S. C. Examination. By the latter documents the petitioner sought to prove that he was only 18 years. The father of the petitioner has gone into the box and deposed to the fact that the petitioner was born on 14-9-1933 and he has stated that he happened to remember the date of birth of the petitioner well because year after year the petitioner's birth day was celebrated on 14th September. The admission application forms to the respective schools have also been proved by the petitioner's father and these documents contain the date of birth of the petitioner as 14-9-1933. We are, therefore, of opinion that it is amply proved from both oral and documentary evidence that the petitioner was born on 14-9-1933. It would, therefore, follow that on the date of the marriage viz., 3-10-1951, he was 18 years and 2 months old. This is so far as the age of the petitioner is concerned.

(5) In so far as the other plea is concerned that this marriage was brought about to enable the respondent to stay in India, permanently, the petitioner has narrated before us what all happened from the date when the respondent approached him with the request that he should oblige her by making a farce of marriage before the Registrar agreeing to marry her in order that her object may be achieved till the time he made the application. On going

through the petitioner's evidence in detail we are satisfied that the petitioner never intended to marry the respondent, that no consent of the father was taken for this marriage and that the whole ceremony was gone through in order that the respondent may get the domicile of the petitioner as her husband, who was an Indian national. It is not necessary for us to go into the question as to whether this marriage could be declared null and void on the ground that the respondent never intended to marry her or on the basis that it was merely a made-up affair and that both the parties did not enter into the contract seriously. It would suffice for our purposes to declare the marriage null and void on the sole ground that a very essential condition which is a 'sine qua non' to the validity of a marriage where one of the parties happens to be under the age of 21 years, was not adhered to. Admittedly in this case the petitioner was below the age of 21 years at the time of the marriage. Section 2, sub-s. (3), Special Marriage Act, 3 of 1872, makes it obligatory that where any of the parties had not completed the age of 21 years, consent of his or her father or guardian should be obtained to the marriage. The petitioner's father, as has been stated by us above, has gone into the box and stated that he never knew about the marriage until the police came to investigate and informed him that it was his son who appeared before the Registrar under an assumed name of 'A. R. Mudaliar'.

(6) The short point now is as to whether the provisions of S. 2(3) are mandatory in their nature or merely directory. The object of the Legislature appears to be that a person under the age of 21 years is not likely to understand the true import and the necessary consequences of a marriage and so it has been enjoined that the consent of the parents who are interested in the welfare of their children should be obtained as a very essential safeguard. The Legislature has intentionally fixed the age of 21 years for a person to enter into a contract of his own accord without reference to his parents having regard to the responsible and onerous nature of the marriage contract. The idea is that it should not be merely a child's play to enter into a marriage and soon after get it dissolved at the whim and caprice of any party. Further the words of sub-s. (3) of S. 2 of the Act are

> "each party must, if he or she has not completed the age of 21 years, have obtained the consent of his or her father or guardian to the marriage."

The words of the sub-section clearly indicate that this provision relating to getting the consent of the father or guardian where either of the spouses happens to be under the age of 21 years is of a mandatory character. If we were to disregard the words appearing in the Section — 'must have obtained the consent of his or her father' — the rights of the parents or the guardians would be completely destroyed where their children are not in a position to fully appreciate the consequences of entering into a marriage contract. We are of opinion that the conditions laid down in S. 2 cannot be regarded as merely formal but they are conditions on the fulfilment of which alone a marriage could be declared to be valid. We are in this connection inclined to follow the decision of the Calcutta High Court in the case of — 'Basanta Sen v. Aghore Nath Sen', reported in AIR 1929 Cal 631 (SB) (A) and are hesitant to follow the decision of the Nagpur High Court reported in — 'Ganesh Prasad v. Mt. Damayanti', AIR 1946 Nag 60 (SB) (B). The trend of decisions in India appears to be in favour of declaring such a marriage null and void as would appear from the judgment of the Punjab High Court reported in — 'Parbati Mukherjee v. Samarendranath', AIR 1951 Punj 88 (SB) (C) and the decision of the Madras High Court in the case of — 'Jaya Lakshmi v. Soundararajan', AIR 1949 Mad 808 (D) and the decision of the Bombay High Court in the case of — 'Santosh Kumari v. Chimanlal Munilal', AIR 1950 Bom 307 (E).

(7) We may consider the question as to where the marriage is a fait accompli would the doctrine of factum valet govern the case and whether the marriage could not be rendered invalid by reason of the non-fulfilment of the conditions mentioned in S. 2 of the Act. In this connection it would be useful to advert to the observations of the Privy Council in the case of — 'Balusu Guru Lingaswamy v. Balusu Rama Lakshmamma', 26 Ind App 113 at p. 144 (PC) (F), wherein their Lordships observed that the factum of the external act would not be void in law merely by reason of a directory test not having been complied with, but it would be void only when the mandatory tests are flouted and are not complied with. We have already held that the provisions contained in S. 2(3) are mandatory in their character and where mandatory provisions have not been complied with, such marriage would be void in law and there would be no scope for the application of the doctrine of factum valet. Therefore on the sole ground that a mandatory provision of the law had not been conformed to, we declare the marriage solemnised under the certificate of the Registrar of Special Marriages, between the petitioner in the assumed name of A. R. Mudaliar and Mariam Vanderman, daughter of one Vanderman, to be null and void. The marriage is dissolved. Ordered accordingly. Having regard to the particular facts of the case, we make no order as to costs.

(8) SHRIPAT RAO J.: I agree.

B/V.S.B. Ordered accordingly.

A. I. R. 1953 HYD. 206 (Vol. 40, C. N. 97)

PALNITKAR C. J.
AND SRINIVASA CHARI J.

Bansilal Singh, Petitioner v. Benjamin Paul and others, Respondents.

Writ Petn. No. 684 of 1951, D/- 19-6-1952.

Houses and Rents — Hyderabad Rent Control Order (1353 F), Rr. 4, 5 — Determination of fair rent — Principles.

It is obligatory on every Rent Controller when determining the amount of fair rent to take into consideration a number of circumstances such as the prevailing rent for similar property in the locality in which the house is situated, the accommodation available for the tenant, the location of the house and the amenities that the tenant is enjoying. Similarly, the increasing or decreasing of the rent is not left to the whim and caprice of the Rent Controller, who has to take into consideration matters such as the general increase or decrease of rents in the vicinity, the enhancement or reduction of municipal assessment, and the special and particular amenities afforded to the tenant. (Para 2)

Held that the order reducing the rent did not conform to R. 5 as the Rent Controller had not bestowed any attention to the fact that the municipal assessment had been increased and that the owner had spent towards the repairs of the portion a large sum of money and therefore should be set aside. (Para 3)

Moleshwar, for Petitioner; P. L. Gajpat Rao, for Respondents.

JUDGMENT: Heard the arguments of the respective advocates. On going through the record we are of opinion that the Rent Controller in this case has not conformed to the provisions of R. 5 of the Rent Control Order.

(2) An application was filed by the tenant for the fixation of a fair rent under R. 4 of the Rent Control Order. The Rent Controller reduced the rent from Rs. 40 to Rs. 20. It is obligatory on every Rent Controller when determining the amount of fair rent to take into consideration a number of circumstances such as the prevailing rent for similar property in the locality in which the house is situated, the accommodation available for the tenant, the location of the house and the amenities that the tenant is enjoying. The reasons given by the Rent Controller for reducing the rent, according to us, do not justify the reduction of rent according to law. The increasing or decreasing of the rent is not left to the whim and caprice of the Rent Controller. It has to be determined having regard to certain well established principles such as the general increase or decrease of rents in the vicinity, the enhancement or reduction of municipal assessment, special and particular amenities afforded to the tenant. These are matters which the Rent Controller should have taken into consideration.

(3) The Rent Controller has not conformed to the provisions of R. 5 of the Rent Control Order and has not bestowed any attention to the fact that the municipal assessment has been increased and that the owner has spent towards the repairs of the portion a large sum of money. We allow this application and remand the case to the Rent Controller with a direction to investigate into the matter again in the light of R. 5 of the Rent Control Order and having regard to directions set forth above and pass a fresh order. The petitioner will have the costs of this petition of this Court. Advocate's fee Rs. 40 (rupees forty only).

B/D.R.R. Application allowed.

A. I. R. 1953 HYD. 207 (Vol. 40, C. N. 98)

SIDDIQUI AND SRINIVASACHARI JJ.

State of Hyderabad v. Siddappa and others, Respondents.

Appeal No. 539/6 of 1950, D/- 9-8-1951.

Penal Code (1860), S. 97 — Accused when may counter-attack ending in death.

If the accused apprehending immediate danger to his life thinks that it is only if he made a counter-attack that he could save his life and make the attack he is entitled to do so. The question in such cases whether the act of the accused was commensurate with and proportionate to the attack of the opponent is to be determined having regard to the particular facts and circumstances of the case. (Paras 2, 3)

Anno: Penal Code, S. 97 N. 2.

Gopal Rao Murumkar, Government Advocate, for State; Ahmed Sheriff, for Respondents.

SRINIVASACHARI J.: This is an appeal on behalf of the State against the judgment of the Sessions Judge, Gulbarga, acquitting six accused who were charged under Ss. 124 and 243, Hyderabad Penal Code. The story of the prosecution is that on 8th Amardad 1356 F., at about 8 a. m. the six accused went to the land known as Saharai Indola situated in Nilanga Taluq, Bidar District and finding the deceased, Basappa, sowing seeds and cultivating the land which, according to the accused belonged to them, inflicted severe injuries on Basappa and in consequence of which Basappa died and Sharnappa received severe injuries. The accused were charged with the murder of Basappa and for rioting. The accused denied the committing of the crime. On behalf of the prosecution eleven witnesses were examined, of whom P. Ws. 7, 8 and 9 were examined as eye-witnesses. It was stated by the prosecution that the motive for the crime was a dispute between the party of the accused and the party of the deceased with regard to the possession of the land. The prosecution examined other witnesses also with regard to the dispute about the land and about the fight between the two parties. On the evidence before the Sessions Judge, the Sessions Judge came to the conclusion that the accused were guilty of the offence of murder of Basappa, but he held that this act of the accused was in exercise of their right of private defence. In the result the Sessions Judge acquitted the accused. It is against this judgment that this appeal has been preferred.

(2) It is argued by the learned Public Prosecutor that the Sessions Judge, having found the accused to be guilty of the murder of Basappa, was wrong in having held that they were entitled to commit the murder in exercise of their right of private defence. The sole question in this appeal is as to whether the accused were entitled to commit the act they have been charged with in the exercise of their private defence and whether the circumstances necessitated the exercise of the right of private defence. So far as this question is concerned it cannot be gainsaid that the right of private defence could be exercised and a person may even strike his adversary with such a sharp weapon which may cause his death where he has a reasonable apprehension that he would be killed. If the facts show that his adversary was using such a weapon, the use of which would cause death, the accused is entitled to defend himself and in defending himself if he happens to kill the adversary he cannot be held guilty of murder. One argument was advanced by the learned Public Prosecutor that it was open to the accused persons to have recourse to the authorities or have gone to a Court of law in order to establish their right of possession rather than have recourse to the inflicting of injuries with a sharp weapon so as to cause death of the deceased. The evidence in the case shows that the deceased Basappa snatched the sword which was in the possession of Aynappa and tried to inflict injuries on Aynappa and actually inflicted injuries on him and also on Ramanna, the accused. It is also clear from the evidence that there was altercation and exchange of harsh words between the party of the accused and the party of the deceased. It is also clear from the evidence that Aynappa received a severe blow from the sword and fell. This was in consequence of the attack by Basappa. In such circumstances if the other five accused finding Basappa was attempting to kill Aynappa and Ramanna used lathis and inflicted severe injuries on Basappa and Shar-

nappa, we should regard it as an act of the accused in the exercise of their right of private defence. As has been observed by us above, the accused is always entitled to inflict severe injuries which may cause death, if there is danger of his being killed. We, therefore, agree with the Trial Court that in this case the accused were entitled to the exercise of private defence and if in the exercise of private defence they have used lathis and inflicted injuries on the deceased which caused death, they cannot be held guilty of the murder of the deceased.

(3) It has to be remembered that the right of private defence is available to a person where it is for the protection of property or for the person. In the case before us admittedly Basappa was tilling the soil on the field which belonged to the party of the accused and if after remonstration Basappa did not forbear from tilling the party of the accused threatened to beat when Basappa snatched the sword from Aynappa and hit him. The provocation was at the instance of Basappa. Although it is an elementary principle of law and jurisprudence that a man cannot take the law into his own hands but should have recourse to the proper authority to get his grievances redressed, but in a case where there is no reasonable opportunity for seeking his redress in a Court and there is imminent danger to his life on account of a person attacking him with a sharp weapon, he can avoid the danger to his life by counter-attack on the assailant. If the accused apprehending immediate danger to his life thinks that it is only if he made a counter-attack that he could save his life and makes the attack he is entitled to do so. The question also arises in such cases whether the act of the accused was commensurate with and proportionate to the attack of the opponent. A blow by a first cannot be returned by hitting with a sword. Whether the attack was commensurate with and proportionate to the attack of the adversary would have to be determined having regard to the particular facts and circumstances of the case.

(4) As regards the argument of the learned Public Prosecutor that recourse should be had to the authorities or a Court of law to establish their right of possession, we are of opinion that the events that have happened in this case do not justify and do not warrant our coming to the conclusion that the accused could have had recourse to the authorities. In the result we dismiss this appeal.

(5) SIDDIQUI J.: I agree. In cases of imminent danger to life, the one in danger of life is entitled to protect his life, and even counter-attack if necessary, if the circumstances permit, just to protect oneself. In the circumstances of this case the attack complained of is justified. Appeal is dismissed.

C/V.S.B. Appeal dismissed.

A. I. R. 1953 HYD. 208 (Vol. 40, C. N. 99)

NAIK C. J. AND MOHD. AHMED ANSARI J.

Kondiba, Petitioner v. Tatayya and others, Respondents.

Civil Revn. Petn. No. 344 of 1358 Fasli, D/-1-11-1951.

Limitation Act (1908), Art. 177 — Hyderabad Limitation Act, Art. 155 — Death of defendant — Application for substitution of legal representative filed after two years held barred. AIR 1951 Hyd 55, Dist. (Para 1)

Anno: Lim. Act, Art. 177 N. 2.

B. Ram Lal Kishen, for Petitioner; Madhav Rao Madhekar, for Respondents.

CASE CITED:

('51) AIR 1951 Hyd 55: (ILR (1951) Hyd 429) 1

ORDER: This is a revision application against an Order of the lower Court that the application to bring the legal representatives of a deceased defendant on record was beyond time. The facts necessary for the decision of the case are that the plaintiff had come in revision to the High Court and when the case was still in the High Court, defendant 1 died on 28th Azur 1356 F; (28-10-1946) the plaintiff filed a petition to bring the legal representatives on record on 20th Khurdad 1356 F (20-4-1947), which was even then clearly beyond time; the plaintiff's petition was disallowed and the case was sent back to the original Court. The record of the case was received there on 28th Ardibehisht 1357 F, (28-3-1948); but no one appeared and summonses were sent to the plaintiff as well as to the defendants to appear. At last on 10th Isfandar 1358 F, (10-1-1949), that is, about 10 months after the receipt of the record, the plaintiff appeared and on 25th Isfandar 1358 F (25-1-1949) he filed the application to bring the legal representatives of the deceased defendant on record, which the lower Court has held that to be beyond time. It is against this Order that the plaintiff has come in revision before us.

His counsel relies on a decision of this Court reported in — 'Venkata Narsimham v. Konda Reddy', AIR 1951 Hyd 55, in support of his contention that the Order of the lower Court should be reversed. I have carefully gone through this judgment and I do not think that it helps the petitioner at all. In that case it was the defendant who died and it was his revision petition that was pending in the High Court, when he died; after the case came back to the trial Court, the plaintiff applied to bring the legal representatives of the defendant, on record and the representative raised the objection about its being time-barred. Naturally, it was not thought equitable for the representative of the defendant to raise an objection for which he himself was responsible and the application was filed within four months of the receipt of the record in the trial Court; whereas in the present case, the plaintiff himself knew of the death of the defendant, had filed an application in the High Court to bring the legal representatives on record, which was rejected because no process fee was paid. When the case came back to the original Court it was for him to find out whether the record has been returned and to bring the legal representatives of the deceased party on record. He cannot escape from his responsibility merely by stating that no notice was given to him intimating receipt of the record in the original Court. Article 155, Hyderabad Limitation Act, is clear on the point and under it the starting point for the limitation of four months is from the date of the death of the deceased party. Admittedly the application of the revision petitioner which the Court has rejected was made more than two years after the death of the defendant and in these circumstances, the lower Court has rightly held it to be beyond time. I see no reason to interfere. The revision petition is, therefore, dismissed with costs.

(2) M. A. ANSARI J.: I agree.

B/K.S. Revision dismissed.

A. I. R. 1953 HYD. 209 (Vol. 40, C. N. 100)

MANOHAR PERSHAD J.

C. J. Balaram and another, Petitioners v. Rukmannamma and others, Respondents.

Petn. No. 500 of 1358F, D/- 13-11-1950.

(a) Houses and Rents — Hyderabad House Rent Control Order (1353 F), S. 8(2)(f) — "Sufficient or reasonable grounds" — (Words and Phrases).

The expression 'sufficient or reasonable grounds' in S. 8(2)(f) should not be given a restricted meaning as grounds analogous to those stated previously, as the grounds mentioned in S. 8 are enumerative and not exhaustive. (Para 4)

(b) Evidence Act (1872), S. 45 — Expert opinion and proof.

The certificate of a doctor cannot by itself be admissible in evidence unless the doctor is examined as a witness: AIR 1928 Lah 427 (1), Rel. on; AIR 1923 Bom 183, Ref. (Para 5)

Anno: Evid. Act, S. 45 N. 3.

(c) Constitution of India, Art. 226 — Scope.

The issue of writ of certiorari which is discretionary in nature, may be granted when the Court below has refused to exercise jurisdiction or there is an absence of jurisdiction. The fact of want of jurisdiction may arise from the nature of the subject matter or from the absence of some essential preliminary proceedings. Mere formal or accidental errors on the face of the proceedings do not afford grounds for certiorari and where the proceedings are regular upon their face and the Court has jurisdiction, the superior Court will not grant the writ of certiorari on the ground that the Court below has merely misconceived a point of law nor will it hear evidence impeaching the decision on the facts, but where there was no evidence proper to be considered in support of the point that would be a ground for issue of writ of certiorari. (Para 6)

The fact that a medical certificate was not substantiated by oral evidence can at the most be said to be a material irregularity in the exercise of jurisdiction in not taking evidence and is not a sufficient ground for interference by way of certiorari proceedings: AIR 1936 Mad 969, Rel. on. (Para 6)

(d) Constitution of India, Art. 226 — Nature and scope of proceedings.

The jurisdiction exercised by High Court under Art. 226 is both of revisory & superintending nature — It is not appellate and it is doubtful whether it has power to remand the proceedings — Nature and scope of proceedings distinguished from that of appeal and revision: Case law referred. (Para 7)

Gopalrao Ekbote, for Petitioners; Sadashivrao, for Respondents.

CASES CITED:

(A) ('23) AIR 1923 Bom 183: 84 Ind Cas 643: 26 Cri LJ 339
(B) ('28) AIR 1928 Lah 427 (1): 106 Ind Cas 493
(C) ('36) AIR 1936 Mad 969: 169 Ind Cas 379
(D) ('22) AIR 1922 PC 112: 3 Lah 127 (PC)
(E) ('34) AIR 1934 PC 213: 56 All 634 (PC)
(F) ('46) AIR 1946 Bom 280: ILR (1946) Bom 636
(G) ('45) AIR 1945 Bom 88: ILR (1944) Bom 487 (FB)
(H) ('49) AIR 1949 Mad 780: 1949-1 Mad LJ 412
(I) 39 Deccan LR 440
(J) 33 Deccan LR 413 (FB)
(K) 35 Deccan LR 153 (FB)

MANOHAR PERSHAD J.: (On difference between Khaliluzaman J. & Srinivasa Chari J.) This is a petition by the tenants for the issue of writ of certiorari against the decision of the District Magistrate, Secunderabad affirming the judgment of the Rent Controller and directing that the landlords be put in possession of the building. The facts set out in their petition are that Rukmanamma and G. Venkata Subbayya applied to the Rent Controller, Secunderabad, under S. 8, cl. (3), of the Rent Control Order that as the house where they live is narrow and dark, they have become ill and petitioner 1 Rukmanamma is suffering from Tuberculosis, and unless they shift to some other house which is more airy and spacious there is no chance of their survival; so the tenants be asked to vacate the premises and possession be given to them. The tenants admitting their tenancy denied the facts of the petition and stated that Rukmanamma and G. Venkata Subbayya want to sell the house to one Andori Ishwarayya & for this purpose were trying to get the premises vacated and evict the petitioners. A further objection was raised that the facts set out in the petition filed in the Court below neither justify the eviction nor are they sufficient for the same; so the tenants cannot be ejected. The Rent Controller allowed the petition of the landlords and directed the possession of the house to be given to them. Against this order the tenants filed an appeal before the District Magistrate, Secunderabad, who dismissed the same and hence this petition on their behalf for the issue of writ of certiorari. This petition came up for hearing before the Division Bench of this Court and owing to difference of opinion between the Judges the same has come up before me under S. 8, High Court Act.

(2) In this petition, various arguments were advanced on behalf of the petitioners. The first contention is that the Rent Controller has not followed judicial procedure and not taken any evidence at all. The second argument is that the medical certificate produced by the applicants was not substantiated by the oral evidence, hence no reliance can be placed on it. The third contention is that under S. 8 of the Rent Control Order there ought to be specific reasons for the order of ejectment and unless these reasons are mentioned the officer does not get any jurisdiction. The last contention is that in the Rent Control Order there is no provision for the termination of the tenancy and if the provisions of the T. P. Act are taken into consideration, then under that Act also the reasons for ejectment have to be given. In support of these contentions reliance is placed on — 'Ahila Manaji v. Emperor', AIR 1923 Bom 183 (A) — 'Wadhawa v. Jai Kishan Das', AIR 1928 Lah 427 (1) (B), — 'Venkataravadu v. Juladi Subbiah', AIR 1936 Mad 969 (C), Halsbury's Laws of England Vol. 10, page 193, — 'Chhaju Ram v. Neki', AIR 1922 P. C. 112 (D), — 'Bisheshar Pratap v. Parath Nath', AIR 1934 PC 213 (E), AIR

1949 P. C. 199 (Sic). In reply on behalf of the landlords it is argued that as the Controller had recorded arguments in the proceedings it has become a part of the record; hence the record, as it is, is sufficient to justify the eviction. Reliance is placed on — 'Jugglal Kamlapat Firm v. Collector of Bombay', AIR 1946 Bom 280 (F), —'Haveliram v. Maharaja of Morvi', AIR 1945 Bom 88, (FB) (G), — 'Krishnamurthi v. Parthasarathi', AIR 1949 Mad 780 (H).

(3) In order to appreciate the arguments of the learned Advocates on behalf of the parties, a reference to the original petition filed by the landlords is necessary. In para 5 of the petition it is stated that the house in which they are staying at present is unhealthy and hopelessly inconvenient and it has become the cause of their illness. In para 6 it is stated that the house is very small and cannot accommodate all the members of the family. In para 7 of the petition it is mentioned that the house is needed for their personal use and not for giving to other people on rent. In para 8 it is stated that the petitioners have received a notice of ejectment from the landlord of the house in which they are at present staying. This petition was substantiated by a certificate issued by one Dr. Moses and a notice of ejectment given to the petitioners by Gajapathirao, Advocate of Kola Narain. The tenants denied the allegations in the petition. So, the question that remains for my consideration is whether there is sufficient material on record before the Rent Controller for the grounds set out in the petition of the landlords justifying an eviction of the tenants and whether this is a fit case for the issue of writ of certiorari. It must not be forgotten that this is a petition for issue of a writ of certiorari and I am not sitting in appeal against the judgments of the Courts below and so I have got to see whether there is any justification for the issue of such a writ. In this connection I have got to consider first whether the facts set out in the landlords' petition justify such an eviction. The whole question rests on the wording of S. 8 Rent Control Act. The argument of the present petitioners is that an order can only be given if it falls within the purview of S. 8, and as no such grounds have been mentioned in the petition of the landlords no order of ejectment can be given. The decision on this point depends on the interpretation of this section, which runs as follows:

8. "(1) A tenant in possession of the building shall not be evicted therefrom whether in execution of a decree or otherwise and whether before or after the termination of the tenancy except in accordance with the provisions of this section.
(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction on their behalf. After hearing the objections of the parties, if the Controller is satisfied that the tenant—
(a) has neither paid the due rent before the presentation of the petition nor is he ready to pay the same, or
(b) is not ready to pay the reasonable rent for the period of his future possession,
(c) without the permission of the landlord has leased or sub-let the entire building or any portion thereof or used the building for purposes other than those for which it was leased,
(d) was not staying in the limits of the city, district or village where the house in question is situated 12 months prior to the filing of the petition and that in the public interest his stay in the city, district or the village is essential and that the landlord is not in a position to secure any suitable place for his residence, or
(e) that the tenant has not fulfilled any of the terms of the agreement, or
(f) that the landlord has got sufficient or reasonable grounds for the cancellation of the agreement of tenancy,

the Controller shall make an order directing the tenant to put the landlord in possession of the building."

(4) It is urged on behalf of the tenants that the petition of the landlords does not fall under any of the said clauses of S. 8 while the contention of the landlords is that it falls under cl. (f). Both the contesting parties have placed great stress on the wording 'sufficient or reasonable grounds' in cl. (f) of the aforesaid section and the whole decision rests on the interpretation of this. It is argued on behalf of the petitioners that 'sufficient or reasonable grounds' should be analogous to those specified immediately previously. The contention of the other side is that it is not necessary that 'sufficient or reasonable grounds' should be given a restricted meaning. There has been difference of opinion on the interpretation of this. Khaleeluzzaman, J. has held that it should be analogous while Srinivasa Chari J. has held that it should not be given a restricted meaning. In this respect I agree with the opinion of my learned brother Srinivasachari J. that the words 'sufficient or reasonable grounds' should not be given a restricted meaning as it cannot be said that the provisions of S. 8 are exhaustive. It must be remembered that the Rent Control Act was passed having regard to the shortage of housing accommodation during and after the period of war and to protect the rights of the tenants so that they may not be unnecessarily harassed by the landlords, but it cannot be said from this that no regard can be paid to the needs of the landlords and in cases where such needs are established Court would not grant relief to them. To interpret otherwise would mean to ignore the needs of the landlord which, in my opinion, cannot be the meaning of this Act. In the Rent Control Act of Calcutta and Bombay, similar provisions are made in S. 11, which reads:

"Notwithstanding anything contained in the Transfer of Property Act 1882, the Presidency Small Cause Courts Act 1882 or the Indian Contract Act 1872, no order.....or where the premises are bona fide required by the landlord either for purposes of building or for rebuilding or for his own occupation or for the occupation of any person for whose benefit the premises are held or where the landlord can show any cause which may be deemed satisfactory by the Court".

It has been held by these Courts that the legislature in enumerating in the proviso in S. 11 the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to those grounds, but merely enumerated those grounds for the purpose of indicating the grounds upon which a landlord would be entitled to possession as of right leaving it open to the Court to exercise its discretion in his favour upon any other grounds which might appear to the Court to be satisfactory. The other High Courts in the Indian Union also have held similar view. I am of the view that the words' sufficient or reasonable grounds' in cl. (f) should not be given a restricted meaning.

(5) After which the only question that remains for consideration is whether there are 'sufficient or reasonable grounds' in the case. On behalf of the landlords it is stated that the present house in which they live is not healthy. In order to substantiate this they have filed a certificate of a doctor. On behalf of the tenants it is argued that the house in question is no better than the house in which the landlords are at present living and the fact that the landlords are ill has not been proved by any evidence as the certificate of the doctor, under the Evidence Act, is not in itself admissible in evidence. Reliance is placed on — AIR 1923 Bom 183 (A) & — AIR 1928 Lah 427 (1)(B). In — AIR 1923 Bom 183 (A), a certificate of a Professor of Anatomy was in question & it was held by their Lordships of the Bombay High Court that this is only a hearsay evidence and is not admissible in the absence of the statutory authority. In the second case, AIR 1928 Lah 427 (1) (B), it has been laid down by their Lordships of the Lahore High Court that the opinion of the experts is not legal evidence unless they appear in the Court as witnesses and are examined by both the parties in respect of their opinion. I am, therefore, of the view that under the Evidence Act, the certificate of the doctor cannot by itself be admissible in evidence unless the doctor is examined as a witness.

(6) In the case admittedly the doctor has not been examined and no other evidence adduced. It is stressed on behalf of the landlords that the arguments recorded in the proceedings became a part of the record and so it is admissible and is sufficient evidence. I cannot agree with this contention. Thus I hold that the certificate in question is inadmissible in evidence. After which the question that remains for consideration is whether this is a fit case for the issue of writ of certiorari. As I have discussed above this is not a regular appeal, but it is only a petition for the issue of writ of certiorari which is discretionary in nature, and may be granted when the Court below has refused to exercise jurisdiction or there is an absence of jurisdiction. The fact of want of jurisdiction may arise from the nature of the subject matter or from the absence of some essential preliminary proceedings. Mere formal or accidental errors on the face of the proceedings do not afford grounds of certiorari & where the proceedings are regular upon their face and the Court has jurisdiction, the superior Court will not grant the writ of certiorari on the ground that the Court below has merely misconceived a point of law nor will it hear evidence impeaching the decision on the facts, but where there was no evidence proper to be considered in support of the point that would be a ground for issue of writ of certiorari.

It is argued that in the case there is no evidence at all and the Rent Controller has based his judgment on the certificate alone, and so this is a fit case for issue of writ of certiorari. Though the alleged certificate is inadmissible in evidence yet I am of opinion that this is not a fit case to issue a writ of certiorari, as it cannot be said that there was absence of jurisdiction or refusal to exercise jurisdiction. The fact that the certificate was not substantiated by oral evidence can at the most be said to be a material irregularity in the exercise of jurisdiction in not taking evidence. This irregularity in my opinion, is not a sufficient ground for interference by way of certiorari proceedings. It is not merely the order of the Rent Controller that is sought to be quashed but also the order of the appellate authority. The appellate authority has refused to interfere in appeal and I am not inclined to interfere. In — AIR 1936 Mad 969 (C), a similar discussion had arisen. It was a case of Madras Village Panchayat Act regarding election. In that case there was the report of the Tensildar regarding which a discussion had arisen whether mere report of the Tensildar is admissible in evidence or it had to be substantiated by the oral testimony of the Tehsildar, and it was laid down that the failure on the part of the revenue authorities to take evidence may at the most be a material irregularity but cannot be a ground for issue of writ of certiorari. As the issue of writ of certiorari is a discretionary matter I am not inclined to interfere in the discretion used by the lower Court as I am of opinion that the lower Court has rightly used its discretion.

(7) It is urged on behalf of the petitioners that the proceedings be remanded to the Court below for evidence. As already stated, this is not a regular appeal and the nature and scope of these proceedings are distinguishable from that of appeal. The powers of the appellate Court are wider than those of the Judge or Bench of Judges adjudicating upon these proceedings. The appellate Court may reject or return the memorandum of appeal, may reverse or vary the whole decree or remand the case. It has power to pass any decree or make such further or other decree or order as the case may require whereas the proceedings on writ only involve a consideration of the question whether the authority or tribunal against whose decision the petition is presented has acted in excess of its legal authority or without any authority or jurisdiction at all. The decision may also be questioned as being in violation of the principles of natural justice or being vitiated by fraud, collusion or interest of the Tribunal. The line between questions of law and questions of fact would not be perfectly earmarked in such cases though fundamentally the proceedings would involve the drawing of such inference from admitted facts. The proceedings cannot be said to be a rehearing of the same subject by a higher Tribunal in the sense in which an appeal is. The office of writ is to correct errors of law, apparent or admitted on established facts, never to settle disputed facts, a thing which is done in appeal, and thus the effect of issuing the writ is not to open or vacate the judgment or action of the inferior Court giving a new trial on the merits. In view of this it is doubtful whether these proceedings can be remanded. Relying on — 'Syed Mohiuddin Ali Khan v. First Taluqdar, Baghat', 39 Deccan L. R. 440 (I), it is argued that a Division Bench of this Court has remanded the case in a writ proceeding. It is true that in 39 Deccan L. R. 440 (I), a Division Bench of this Court has remanded the case but that was a petition in revision under S. 17, High Court Act, and this Court in the exercise of its power of superintendence remanded the same having held that Nigrankar, who passed the orders was not authorised by law and the judgment is, therefore, void, i.e., in other words it was a case of want of jurisdiction. It is urged that in the exercise of these powers of revision this petition may also be remanded. The revisional jurisdiction of the High Court bears a great analogy to the proceedings in question. The revisional powers are entirely a creature of statute. Outside the statutory provisions no High Court has any inherent powers of revision over Courts subordinate to it. In S. 615, Hyderabad Civil P. C., (corresponding to S. 115, Indian Civil P. C.,) the nature and limits of the jurisdiction exercised by High Courts are defined. The revisional powers of the High Court

are, however, not limited to S. 615, Civil P. C. The various High Courts have revisional jurisdiction under different Acts as well, Small Cause Courts Act, Specific Relief Act. The jurisdiction exercised in revision and that exercised through the writs are both of revisory and superintending nature. The Hyderabad High Court Act also gives power of superintendence which are revisional in nature over Courts subordinate to it.

In — 'Veerbhadrappa v. Abdur Rahim', 33 Deccan L. R. 413 (J), it has been laid down by a Full Bench of this Court that a Debt Conciliatory Board for the purposes of that Act is a subordinate Court and under S. 17, High Court Act, High Court has power of superintendence over them. In — 'Raja Pratapgirji v. The State', 35 Deccan L. R. 153 (K), another Full Bench consisting of seven Judges have held that under S. 17, High Court Act, High Court has power of superintendence and the powers exercised by the High Court for the issue of the writ are in the nature of revisional powers. This was a case where the writ was moved for quashing an order of an executive authority. In 39 Deccan L. R. 440 (I), it has been laid down that a Taluqdar under the Rent Control Act is subordinate to the High Court. From these it is clear that the High Court has power of superintendence and revision and can issue writ of certiorari whenever necessary. Thus it has to be seen whether this is a fit case.

(8) In the case there is no question of error of jurisdiction, but one relating to irregularity in the exercise of jurisdiction in not taking the evidence, which, in my opinion, is not a fit case for the issue of writ of certiorari. Thus there remains no substance in this petition and I agree with Srinivasachari J. that this petition should be rejected. Petition rejected accordingly.

A/K.S. Petition rejected.

A. I. R. 1953 HYD. 212 (Vol. 40, C. N. 101)

MANOHAR PERSHAD J.

Goverdhan Bang and Jt. Family of Kaniram Laxminarayan, Petitioners v. Govt. of the Union of India, Owning G. I. P. and N. S. Railways, Respondents.

Revn. Petn. No. 236 of 1951, D/- 3-2-1953.

(a) Civil P. C. (1908), O. 6, R. 17 — Discretion of Court to allow amendment of pleadings.

Amendment of the pleadings is in the discretion of the Court, but that discretion has to be exercised according to judicial principles. The main consideration to be borne in mind in exercising the discretion is that the rules of procedure have no other aim than to facilitate the task of administering justice, that multiplicity of suits should be avoided and that the interests of substantial justice should be advanced. While considering whether the amendment should be allowed, the Court need not or ought not to go into the alleged falsity of the case in the amendment. So also, the Court ought not to give its finding on the merits of the amendment sought for without first allowing the amendment, framing an issue thereon and allowing both the sides to adduce evidence. But there is a limitation on the wide powers of the Court to amend the pleadings viz., that the Court cannot by way of amendment substitute one distinct cause of action for another, or change the subject-matter of the suit. (Para 8)

Anno: C.P.C., O. 6 R. 17 N. 1, 2.

(b) Civil P. C. (1908), O. 6, R. 17 — Amendment taking away right accrued to a party by a lapse of time.

The rule prohibiting the amendment which takes away, an existing right from the defendant, refers to a legal right which has accrued to the defendant and not a bare right to plead limitation. Hence, where there is no attempt by the proposed amendment to introduce a new cause of action or to claim a new relief, the rule does not apply. AIR 1942 Oudh 161; AIR 1935 Mad 202 and AIR 1939 Nag 23, Rel. on. (Para 13)

Anno: C.P.C., O. 6 R. 17 N. 5.

(c) Civil P. C. (1908), O. 6, R. 17 — Amendment to be refused when application is not in good faith.

It is true that it is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment that the applicant has acted in good faith. But as a general rule, leave to amend ought not to be refused merely because the applicant has not acted 'bona fide', but would be refused if he has been acting 'mala fide'. (Para 14)

Anno: C.P.C., O. 6 R. 17 N. 7.

(d) Civil P. C. (1908), O. 6, R. 17 — Amendment affecting jurisdiction.

While considering whether an amendment should be allowed or not, the Court ought not to go on the merits of the case. If, after allowing the amendment, the Court comes to the conclusion that the Court has no jurisdiction, the Court could return the plaint to the plaintiff to be presented in the proper Court. (Para 16)

Anno: C.P.C., O. 6 R. 17 N. 16a.

(e) Provincial Small Cause Courts Act (1887), S. 25 — High Court's power of revision — (Civil P. C. (1908), S. 115) —(Hyderabad Small Cause Courts Act (6 of 1330F), S. 12).

The power of revision under S. 12 of the Hyderabad Small Cause Courts Act is wider than that under S. 115, Civil P. C. Under S. 115, Civil P. C. the High Court cannot interfere when the lower Court having jurisdiction has arrived at a wrong decision on a question of fact or even on a point of law. But the powers conferred under S. 12, Hyderabad Small Cause Courts Act, are wide enough to justify an interference in some cases on a question of fact and law also.

Thus, where the lower Court has wrongly refused to allow amendment of the plaint the High Court has power to interfere in revision under S. 12. (Para 17)

Anno: Prov. Sm. Cause Courts Act, S. 25 N. 1, 7, 11, 12.

(f) Civil P. C. (1908), O. 6, R. 17 — Amendment of plaint.

Plaintiff brought a suit for damages for non-delivery of the consignment consisting of one bag of 'pista' and one bag of 'qulai'. Plaintiff sought amendment of plaint by introducing words 'dry dates' in place of

'pista' and 'alu bukhara' in place of 'qulai' and the amount of compensation claimed was also sought to be reduced.

Held that the amendment should be allowed as it did not alter the cause of action or change the nature of suit. (Para 11)

Anno: C.P.C., O. 6 R. 17 N. 2.

Rai Bishamber Dayal and Girja Pershad Sanghi Vakil, for Petitioners; S. P. Srivastava, for Respondents.

CASES CITED:

(A) ('32) AIR 1932 Pat 355: 11 Pat 624
(B) ('35) AIR 1935 Rang 522: 160 Ind Cas 763
(C) ('25) AIR 1925 Bom 248: 87 Ind Cas 481
(D) ('28) AIR 1928 Lah 933: 114 Ind Cas 441
(E) ('27) AIR 1927 Lah 771: 101 Ind Cas 280
(F) ('22) AIR 1922 PC 249: 48 Cal 832 (PC)
(G) ('49) AIR 1949 Nag 5: ILR (1948) Nag 913
(H) ('44) AIR 1944 Cal 4: 212 Ind Cas 421
(I) ('41) AIR 1941 Rang 37: 194 Ind Cas 177
(J) ('40) AIR 1940 Lah 256: ILR (1941) Lah 39
(K) ('41) AIR 1941 Nag 289: ILR (1942) Nag 478
(L) ('35) AIR 1935 Mad 137: 154 Ind Cas 720
(M) ('31) AIR 1931 Mad 369: 122 Ind Cas 174
(N) ('38) AIR 1938 Lah 244: 181 Ind Cas 624
(O) ('42) AIR 1942 Oudh 161: 17 Luck 266
(P) ('35) AIR 1935 Mad 202: 67 Mad LJ 924
(Q) ('39) AIR 1939 Nag 23: 181 Ind Cas 106

ORDER: This is a petition in revision on behalf of the plaintiffs against the judgment and decree of the Court below dated 6-6-1951. dismissing the plaintiffs' suit. The facts in brief are:

(2) Goverdhan Bang and joint family business of Kani Ram Lakshminarayan, Plaintiffs, filed a suit for I. G. Rs. 1027/10/- against the Government (Union of India), owning the G. I. P. and the N. S. Railways. The allegation in the plaint is that on 28-12-1946 Messrs. Kirpa Shanker Gangaram or their representative made over to the first defendant Railway Administration at their Wadi Bandar, parcel Booking Office, two packages (one bag pista and the other of Qulai) bearing private marks of the sender for carriage and delivery to plaintiff No. 1 at Hyderabad — Deccan Railway Station. Kirpa Shankar Gangaram sent the Railway Receipt to plaintiff No. 1 with the instructions that after taking delivery of the consignment, he should deliver one bag Pista to Plaintiff No. 2. The suit consignment has not been delivered to the plaintiff No. 1 in spite of repeated demands. Hence the plaintiffs are entitled to a compensation for non-delivery of the suit consignments. Defendant No. 1 in his written statement denied that any consignment containing one bag of Pista and other of qulai was booked by Kirpa Shanker Gangaram on 28-12-1946 and stated that from Wadi Bandar two bags one of Karak and the other bag of Alu Buqara were booked under PWB/3614/93. The bag containing Karak was offered to the consignee who refused to take delivery, and it was, therefore, sold by auction. Apart from this some legal objections were also raised regarding the maintainability of the suit and the jurisdiction of the Court.

(3) A similar written statement was filed by plaintiff No. 2. On 19-3-1951, Plaintiff No. 1 put in a petition for amendment stating that due to oversight and by reason of a weak carbon being used by the staff while preparing the R. R. resulting in weak and faint impression of words, the plaintiffs have claimed one bag of Pista and one bag of Qulai instead of its actual contents of one bag of dry dates and the other bag of Alu Buqara; that for fair and just disposal of the suit, and for determining the real question in controversy, the following amendments are necessary:

" (a) the words 'one bag dry dates' and 'one bag of Alu Buqara' be substituted at all places in the plaint instead of the words 'one bag of Pista and one bag of Qulai' wherever they have been used;

(b) In para. 6 of the plaint the details of the amount of I. G. Rs. 1027/10/- may be struck off and the following details may be substituted instead of the said details in the said para.;

(i) the value of one bag of dry dates weighing 2 mds. at Rs. 71/- per md. the same being prevalent in the Hyderabad market in the first week of May 1948: total Rs. 142/-;

(ii) the value of one bag of alu buqara weighing 2 mds. at O. S. Rs. 130/- per md. total Rs. 260/- less railway freight and customs duties not paid — balance Rs. 340/-;

(c) The words 'O. S. Rs. 340/-' may be substituted in all places instead of the words 'I. G. Rs. 1027/10/- in the plaint, and

(d) That the following para may be added as per para 6(a) of the plaint.

The second defendant-railways offered one bag of dry dates on 13-12-1949, which was in a damaged and deteriorated condition and did not bear the proper marks, to the plaintiff who denied to accept the same."

(4) This petition was opposed by the defendants and a reply was filed on their behalf to the effect that the plaintiffs are not entitled to an amendment as this would not only alter the cause of action and the nature of the suit, but that the plaintiffs' suit will be barred by limitation if the amendment is allowed; that it will affect the jurisdiction and that finally, it will seriously hamper the defendants who cannot be compensated by costs.

(5) The Court below after hearing the arguments of the parties regarding the amendment, accepted the plea of the defendants and rejected the petition for amendment. In the result, the suit was dismissed. Hence this petition in revision.

(6) In this petition in revision it is argued on behalf of the petitioner that the court below has erred in rejecting the petition for the amendment holding that the amendment would not only change the nature of the suit but deprive the defendants of the vested right and would also affect the jurisdiction of the Court. It is contended that the suit is for compensation of non-delivery of the goods. Originally in the plaint it was stated that the consignment was for one bag of Pista and one bag of Qulai, and through the amendment, the plaintiffs only wanted to state that the consignment was not for one bag of Pista and one bag of Qulai but for one bag of Alu Buqara and one bag of dry dates. By these amendments neither the cause of action nor the nature of the suit is altered. It is only when the cause of action and the nature of the suit is altered that the Court is

justified in rejecting the petition for amendment. Reliance is placed on the cases of — 'Muhammad Raza v. Zamiruddin', AIR 1932 Pat 355 (A) and — 'Jamini Bala Biswas v. Bank of Chettinad Ltd.', AIR 1935 Rang 522 (B).

(7) On behalf of the other side Shri Srivastav, Advocate, very strongly urged before me that the amendment would not only alter the cause of action and the nature of the suit but would deprive the defendants of the vested right and would also affect the jurisdiction of the trial court. In view of this, he contends that the amendment should not be allowed. Reliance is placed on the cases of — 'Kokamal Madho Ram v. Gulab Singh Gurudat Singh', AIR 1925 Bom 248 (C); — 'Wadhava Singh v. Pratap Singh', AIR 1928 Lah 933 (D) and — 'Gulam Mond. v. Mehta Chandras', AIR 1927 Lah 771 (E). It is also contended that when the Court below has rejected the petition for amendment, this Court ought to be very reluctant in interfering in the discretion of the court below. I find that similar contention was raised on behalf of the defendants before the trial court also.

(8) In order to appreciate the view points of the learned advocates, a reference to O. 6, R. 17 is necessary which runs thus:

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

Thus, it is clear from this that amendment of the pleadings is in the discretion of the Court, but that discretion has to be exercised according to judicial principles. The main consideration to be borne in mind in exercising the discretion is that the rules of procedure have no other aim than to facilitate the task of administering justice, that multiplicity of suits should be avoided and that the interests of substantial justice should be advanced. While considering whether the amendment should be allowed, the court need not or ought not to go into the alleged falsity of the case in the amendment. So also, the court ought not to give its finding on the merits of the amendment sought for without first allowing the amendment, framing an issue thereon and allowing both the sides to adduce evidence. But there is a limitation on the wide powers of the Court to amend the pleadings viz., that the court cannot by way of amendment substitute one distinct cause of action for another, or change the subject-matter of the suit.

(9) In — 'Ma Shwe Mya v. Mg. Mo Hnaung', AIR 1922 PC 249 (F), their Lordships of the Privy Council observed as follows:

> "All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised but nonetheless no power has been given to enable one distinct cause of action to be substituted for another, nor to change, by amendment, the subject-matter of the suit."

(10) The reason of the above rule is that substitution of a totally new case in place of the original one cannot be said in any sense to be an amendment of the original claim. Nor can it be said that a totally new "case is necessary for the purpose of determining the real question in controversy between the parties", that is, the controversy disclosed in the suit as originally framed. It follows from this principle that under the present Code:

(i) An amendment will generally be allowed where the nature of the suit is not altered provided it does not cause prejudice or surprise to the opposite party, vide — 'Kannalal Damrulal v. Bhagwandas', AIR 1949 Nag 5 (G); — 'Rohini Kumar v. Niaz Mohd. Khan', AIR 1944 Cal 4 (H);— 'Eusoof Karva v. Mrs. Niemeyer & Co.', AIR 1941 Rang 37 (I) and — 'Ghaudhri Atmaram v. Umar Ali', AIR 1940 Lah 256 (J) and

(ii) An amendment may be allowed even if it introduces a new ground of claim or allegation of fact inconsistent with the original pleadings where the court thinks just and necessary, vide — 'Mangilal Nandram v. Zam Singh Ghagu & Co.', AIR 1941 Nag 289 (K); — 'Mangammal v. Rengappa Naicker', AIR 1935 Mad 137 (L)—'Gopalakrishnayya v. Ramaswami', AIR 1931 Mad 369 (M) and — 'Chaudhri Hakam Ali v. Hashu', AIR 1938 Lah 244 (N).

(11) Similar is the gist of the authorities cited by the learned advocate on behalf of the respondents. In view of this, I do not wish to discuss them in detail. To my mind, therefore, the question to be considered is whether by the proposed amendment the nature of the suit or the cause of action is altered. In the present case, plaintiff has claimed damages for non-delivery of the goods. In para 1 of the plaint, he has mentioned the goods as one bag of Pista and one bag of Qulai: by the amendment, the plaintiff wants to insert one bag of dry dates and one bag of Alu Buqara. This is the amendment which the plaintiff wants to make in the plaint. The cause of action was and is the non-delivery of the goods which would remain in either case. It is, therefore, difficult to hold how it can alter the cause of action or the nature of the suit itself. It is urged that it would deprive the defendants of the vested right, as for instance, the right of limitation.

(12) It is true that as a rule, plaintiff will not be allowed to amend his plaint by introducing a new cause of action which since the date of the suit has become barred by the statute of limitation. In other words, no such amendment should be allowed as will take away the valid defence under the law of limitation. Thus, where a plaintiff, though entitled to various alternative reliefs sued only for one of the reliefs within the period of limitation, he should not be allowed to amend the plaint in such a way as to enforce his other reliefs which have become time-barred at the date of the amendment.

(13) The rule prohibiting the amendment which takes away an existing right from the defendant, in my opinion, refers to a legal right which has accrued to the defendant and not a bare right to plead limitation. Hence where there is no attempt by the proposed amendment to introduce a new cause of action or to claim a new relief, the rule, in my opinion does not apply. I am supported in this view by the case of — 'Sampat Shukul v. Sub Karan', AIR 1942 Oudh 161 (O); — 'Srirangan Chettiar v. Sornampillai', AIR 1935 Mad 202 (P) and —

'Ramnath Hajarimal v. Mohanlal Radhakisan', AIR 1939 Nag 23 (Q).

(14) It is true that if the defendant is deprived of any vested right, then in that case, the court would be reluctant to allow an amendment. In this case no question of depriving the right of the defendant arises at all. The defendant claims that period of limitation would start from the date of the non-delivery of the goods: that would hold good and would not be affected by the amendment. It is further contended that the amendment should not be allowed as the application is not in good faith. It is true that it is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment that the applicant has acted in good faith. But as a general rule, leave to amend ought not to be refused merely because the applicant has not acted bona fide, but would be refused if he has been acting mala fide. To my mind, this contention of the learned Advocate also does not hold good. Originally, the plaintiff had claimed I. G. Rs. 1027/10/- and by the amendment he claims only O. S. Rs. 340/- which cannot be said to be mala fide. It is urged that the plaintiff's claim is more in the nature of a gamble. I fail to appreciate this argument either. Plaintiffs have paid a higher court fee and are claiming only O. S. Rs. 340/-. The learned District and Sessions Judge also has held that the plaintiffs have not acted bona fide. He has based his conclusion on two facts:

(i) That the plaintiffs in para 2 of the plaint have stated that Kirpa Shanker Gangaram sent the receipt with the instructions that one bag of Pista should be delivered to plaintiff No. 2 after taking delivery which clearly rules out the possibility of any mistake occasioned by the faint-writings, and

(ii) When the Railway authorities offered to deliver the consignment to the plaintiff, he refused to accept.

(15) To my mind, these facts do not constitute mala fide of the plaintiff nor do they as a matter of fact go to prove that the plaintiff has not acted bona fide.

(16) The next question that remains to be considered is whether an amendment could be refused on the ground that it affects the jurisdiction of the Court. The lower Court has held that as it affects the jurisdiction of the Court, the amendment cannot be allowed. I am afraid, I cannot agree with this opinion. I may only point out that while considering whether an amendment should be allowed or not, the court ought not to go on the merits of the case. If, after allowing the amendment, the court comes to the conclusion that the court has no jurisdiction, the court could return the plaint to the plaintiff to be presented in the proper court.

(17) The last point that has to be considered is whether this Court can interfere in revision. I may point out at this stage that the present suit is filed under the Hyderabad Small Cause Courts Act (VI of 1330 F.). Section 12 of the Act makes provisions for revisions and S. 14 lays down the powers of superintendence of the High Court. Section 12 corresponds to S. 115, Civil P. C. The power of revision under S. 12 of the Hyderabad Small Cause Courts Act is wider than that under Civil P. C. It is true that the powers conferred are discretionary and should, therefore, be exercised for the purpose of doing material justice. Under S. 115, Civil P. C., the High Court cannot interfere when the lower court having jurisdiction has arrived at a wrong decision on a question of fact or even on a point of law. But the powers conferred under S. 12 of the Hyderabad Small Cause Courts Act are wide enough to justify an interference in some cases on a question of fact and law also.

(18) Thus, after giving a careful consideration, I feel that the court below has erred in rejecting the petition for amendment and this is a fit case where interference is called for in revision. The plaintiff will have, however, to pay to the defendant Rs. 25/- by way of costs. The petition in revision is, therefore, allowed, judgment of the court below is set aside and the case is remanded to the trial court with the direction that the court should proceed with the case on the merits after allowing the amendment to be incorporated. Costs of this Court to abide the result of the suit.

B/K.S. Revision allowed.

A.I.R. 1953 HYD. 215 (Vol. 40, C. N. 102)

NAIK C. J. AND MOHD. AHMED ANSARI J.

Pingle Kodanda Ramma Reddy, Appellant v. J. K. Ram Rao, Respondent.

Appeals Nos. 435 and 418 of 1351F., D/- 14-6-1952.

(a) **Tort — Malicious prosecution — Essentials — Absence of reasonable cause is not necessarily malice.**

Mere absence of reasonable and probable cause does not necessarily mean malice. AIR 1926 PC 46, AIR 1950 Assam 101, AIR 1944 PC 1 and AIR 1940 Mad 683, Rel. on. (Paras 8, 12)

(b) **Tort — Malicious Prosecution — Malice — Anger is not malice.** (Para 16)

(c) **Tort — Malicious Prosecution — Burden of proof — Magistrate's finding in favour of defendant — Effect.**

Even though the Magistrate may have arrived at a finding in favour of the defendant, Civil Courts have got to reach their own conclusions in decreeing the suit for damages for malicious prosecution. The burden of proof in such cases is always on the plaintiff. (Para 16)

Jalil Ahmed, for Appellant; Ramchander Rao Nandapurkar, for Respondent.

CASES CITED:

(A) ('26) AIR 1926 PC 46: 1 Luck 215 (PC)
(B) ('50) AIR 1950 Assam 101: ILR 1950-2 Assam 181
(C) ('44) AIR 1944 PC 1: 45 Cri LJ 303 (PC)
(D) (1891) 61 LJQB 151: (1891) 2 QB 718
(E) ('40) AIR 1940 Mad 683: (1940) 1 Mad LJ 668

M. A. ANSARI J.: The defendant has filed this appeal against the decree, allowing plaintiff No. 1 Rs. 5,000 in his suit for damages for malicious prosecution. Two persons had jointly instituted the suit for Rs. 20,000; but the lower Court has dismissed the entire claim of plaintiff No. 2 and disallowed the rest of the claim of plaintiff No. 1, who has filed a cross-objection claiming the amount disallowed.

(2-3) The circumstances leading to this action can briefly be narrated. A business concern known as the American Oil Company was owned by the defendant, managed by one C. R. Iyengar, and carried through twelve sub-agents

at various places in this State as well as in Madras. In 1932, the defendant sold it to Iyengar for Rs. 50,000 and the sale was of all the stocks, assets and liabilities as per its balance-sheet of March 31, 1932. No formal document was executed and the terms of the sale are to be gathered from the two letters of the parties whose copies have been placed on the record of the case. Exhibit 27/1 is Iyengar's letter to the defendant, bears the date 19-8-32 and contains the offer. Exhibit 2 is the defendant's reply to the above offer and is dated 25-8-1932. According to this later document, Rs. 15,000, out of the price, was paid and the remaining sum of Rs. 35,000 was to be cleared by 20-11-1932. The defendant was to have a lien in respect of the kerosene oil stock in the Madras godown, which was to be in the custody of his agent. But as regards the rest, the purchaser was authorised to take immediate delivery of all the properties. In respect of the different agencies appointed before 1-4-1932, the purchaser had to get their agreements with the defendant cancelled and relieve him of all the responsibilities and liabilities in respect of the deposits made by the agents. It appears from the evidence that the relation between the parties soon became strained and the entire amount of the purchase price was not paid. It further appears that about fifty-nine barrels of Lubricating oil belonging to the company were in a godown owned by the defendant which he alleges to be within the compound of his bungalow, No. 939 A, Residency Bazar, Hyderabad-Dn. Exhibit 21 is the map of the godown, with an endorsement by the defendant showing that it was let out to the American Oil Company; but in his evidence in the case he says that it was not really let out; and was shown to be so let out in order to get the permission for the storing. This appears to me to be the correct position, for on 9-12-1932, the purchaser wrote to the defendant that if he would return the sixty barrels of Lubricating oils in sound condition the purchaser would give him credit for Rs. 3,515/11/10, which is not consistent with their possession being with the sub-agent.

(4) On 23-1-1933, G. K. Rama Rao and C. R. Govindu, the two plaintiffs in this case, who were also the employees of the purchaser, the former working as a travelling inspector and the other in the general staff, came to the godown, carted away twenty-four barrels of Lubricating oil to the Hyderabad Railway Station and booked them for Madras. The defendant tried to stop their being despatched and it is said that notwithstanding his being shown an authority by the purchaser to despatch them, he dishonestly complained to the Residency police about their removal without his permission, which he alleged to amount to an offence under S. 380, Penal Code. Exhibit 16 is the copy of the Information and Ex. 17 is the copy of the complaint to the Circle Inspector of Police of Residency Bazar, Hyderabad-Deccan. In the meantime, the two plaintiffs went to Madras; but were arrested on 15-2-1933, at Ramkot in Hyderabad-Deccan, and were four days later let out on bail. The Magistrate after recording the evidence including that of the defendant as P. W. 9 discharged the accused by a judgment of 31-7-1933. He came to the conclusion that the ownership of the barrels was transferred to the purchaser, who had also their possession as they were in the godown rented to the Sub-agency at Hyderabad. After referring to the various admissions by the defendant he held the barrels to be in possession of the purchaser till 5-11-1932. Later, he said that the offer of the return of the barrels was not accepted till 27-1-1933, four days after the carting, so that on 23-1-1933, possession was still with the purchaser. He concluded that as the accused acted under the authority of the purchaser, who honestly believed himself to be in possession of the barrels and as they carted the barrels openly, dishonesty and secrecy were not proved, and the accused should be discharged. The weakest part of the judgment in my opinion is that relating to the offer for the return of the barrels in the letter of 9-12-1932. In it the purchaser has first claimed Rs. 4,111-3-1 as due from the defendant from which he offers to deduct the price of the barrels if they are returned. Clearly, the offer contemplates redelivery of the possession and till then acknowledges defendant's control over them, otherwise the claim which included their price is meaningless. With the offer still open, how could the purchaser honestly direct their removal is not quite clear.

(5) After the discharge, the two accused on Shehrewar 24, 1343 Fasli (30-7-1934) filed the plaint alleging that Iyengar as the purchaser was entitled to possession, on 5-11-1932, the defendant informed him about the stock in Hyderabad being with the sub-agent, plaintiff No. 1 being the purchaser's servant at Hyderabad was directed to take the Lubricating oils from the godown and despatch them to Madras, plaintiff No. 2 was asked to accompany plaintiff No. 1, some barrels were carted, but when the remaining were being removed from the godown, the defendant obstructed, was shown the authority, nevertheless he prosecuted the plaintiffs who were eventually discharged and have jointly suffered the loss of Rs. 20,000. In the plaint, there is no explanation as to why the price had been earlier credited to the purchaser in the letter of 9-12-1932 and the offer for their return made. The defendant in his written statement admitted that the concern was sold; but has raised the pleas that only Rs. 25,000 out of the price were paid and for the rest he was entitled to a lien on oils in his possession. Another plea taken is that the purchaser was not entitled to the fifty-nine barrels, as he had already debited their price in the letter of 9-12-1932. Then the showing of the letter authorising the plaintiffs to take the barrels is denied and it is alleged that the plaintiffs taking advantage of the temporary absence of the defendant brought carts at about 9 O' Clock in the morning of 23-1-1933, entered his compound, assuring the Chowkidar about permission transported the twenty-four barrels to the Hyderabad Railway Station, and when the defendant sent his servant to the Station, the plaintiffs met him, told him that they would come, but they did not come, eventually he informed the police, who after enquiries challaned the plaintiffs. It is obvious that one of the pleas for the prosecution being honest and on reasonable ground is the acknowledgment of defendant's possession by the purchaser himself.

(6) The case which was instituted in the Original Side of the High Court was later transferred to the Court of the First Civil Judge of the Hyderabad City, who on Bahman 3, 1351 Fasli (Dec. 6, 1941) came to the conclusion that the ownership of the twenty-four barrels of the Lubricating oils was transferred to the purchaser, and the defendant had no lien over them for the unpaid amount of the purchase-

money, as he had a lien only on the Madras godown according to the sale transaction. Then the Judge came to the conclusion that the letter from the purchaser authorising the taking was shown to the defendant and notwithstanding this authority he prosecuted the plaintiffs. He further held that there was no evidence of malice; but as there were no circumstances justifying the complaint of theft, the claim of damages by plaintiff No. 1 should be allowed to the extent of Rs. 5,000. As regards plaintiff No. 2, he was not prosecuting the case and no judgment should be given in his favour. The defendant has appealed impleading only plaintiff No. 1 as the respondent who alone has filed the cross-objection. Hence, I need not consider in this appeal the correctness of the decision concerning plaintiff No. 2 of the part of the record which relates to his claim.

(7) I am of opinion that the decision by the Judge on the legal issue is very unsatisfactory. He at page 231 of the paper-book just mentions that certain authorities were cited on behalf of the defendant, which lay down that the plaintiff in order to succeed must prove the prosecution to have been started either maliciously or without any reasonable ground. Then at page 232, he accepts the authorities as correct; but refrains from citing any one in support of the legal proposition he has accepted as correct. Later, he on the same page decides about there being no evidence of malice, but holds that circumstances did not exist from which a case of theft or of any other kind of dishonesty could have been made out, the dispute was of a civil nature and the defendant who had for some time acted as a honorary Magistrate could not fail to understand the true nature of the plaintiffs' acts.

(8) I am afraid he has misunderstood the law relating to damages for malicious prosecution. Leaving for the moment the question of damages, there are altogether four essentials which must be proved in order to make a case for malicious prosecution successful. The plaintiff must first establish that he was prosecuted by the defendant. Secondly, he must prove that the proceeding terminated in his favour. These do not arise in this case. Thirdly, the plaintiff must show that his prosecution was without reasonable and probable cause and lastly, he should convince the Court about the prosecution by the defendant being due to a malicious intent, and not with one of carrying law into effect. These four essentials appear in the case of — 'Balbhaddar Singh v. Budri Sah', AIR 1926 PC 46 (A), where Lord Dunedin after referring at p. 49 to the four propositions laid by the Court of the Judicial Commissioners of Oudh, corrected the second proposition to one of termination of the proceedings in favour of the plaintiff from that of his being innocent of the charge and accepted the rest. Since then these four essentials have been applied in numerous authorities in his country. I shall only refer to the latest which is the case of — 'Tinsukia Municipal Board v. Bankim Chandra', AIR 1950 Assam 101 (B), where Ram Labhaya J. at p. 105 refers to them as well as to the Privy Council authority.

(9) It is obvious that the Judge in the case before me has erred in treating the prosecution without reasonable and probable cause and one with malicious intent as two alternative conditions. For having found no evidence of malice in the record, the decree in favour of plaintiff No. 1 is otherwise unexplainable. It is necessary to emphasise that both the essentials must be proved to exist before a decree in favour of the plaintiff can be given. This has been repeated by the Privy Council in the case of — 'Braja Sunder Deb v. Bamdeb Das', AIR 1944 P C 1 (C), where one of the appellants in the case the Raj of Aul, and the two original plaintiffs, his employees. It appears that a daughter of one Harikrishna was with the consent of her father taken to the Raja's house in order to make a subordinate form of marriage with him and about a month later she fell ill and died. This caused commotion among the persons who belonged to the girl's caste, which was accentuated when it was rumoured that the younger sister of the deceased girl was to be sent to the Palace. Later, a First Information Report was made implicating the Raja, his two servants, who were original plaintiffs to the suit, and the father of the girl in the offence of buying and selling minor girl for purposes of illicit intercourse and the defendants to the suit were considered responsible for instigating the prosecution as well as instructing the police. The Raja, however, was not sent for trial, the two original plaintiffs were put on trial; but the case was eventually dismissed. Thereafter, a suit for malicious prosecution was filed, which was decreed by the original Court; but dismissed by the High Court of Patna. Lord Porter, in delivering the opinion of the Privy Council dismissing the appeal, observes at page 4:

> "In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things: (i) that the defendant was malicious and (ii) that he acted without reasonable and probable cause. Malice has been said to mean any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrong headed a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. But malice alone is not enough: there must also be shown to be absence of reasonable and probable cause. If, in the present case, the respondents honestly believed a criminal offence to have been committed and had reasonable cause for so doing, they are not liable in this action, and even though they were malicious they still would not be liable if they had reasonable and probable cause for believing in the appellant's guilt."

(10) The Judge of the Court below, therefore, erred in decreeing a part of the claim on the basis of there being reasonable and probable cause. His decision even on this issue does not appear to me to be justified by the record. I do not say that absence of reasonable and probable cause can in no case be evidence of malice. There are English cases as well as authorities in this country which hold that such an absence under certain circumstances can be regarded as evidence of malice. In — 'Brown v. Hawkes', (1891) 2 Q B 718 (D), Cave J. observed at p. 723:

> "Of course, there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause, the jury may always find malice, no matter what the

circumstances may be.....Want of reasonable cause is sufficient evidence of malice in those cases only in which it is sufficient evidence that there was no genuine belief in the accusation made. If it appears that there was such a belief the plaintiff must produce some independent evidence of malice, and cannot rely on the absence of reasonable cause....."

(11) A Division Bench of the Madras High Court has in — 'Abu Bucker Ebrahim v. Maghanlal K. Javeri', AIR 1940 Mad 683 (E) held that absence of reasonable and probable cause does not necessarily mean malice and where it is found that the defendant honestly believed about the plaintiff being a party to fraud on him, there is no malice even though it is found that he had no reasonable grounds to launch the prosecution. Again, in the Assam case — 'AIR 1950 Assam 101' (B) already referred, the learned Judge had held at p. 106:

"But it is not in every case that because there is absence of reasonable or probable cause for a prosecution that a Judge would be justified in inferring malice. Where there is something more to indicate the existence of indirect or improbable motive besides the mere absence of reasonable or probable cause a finding that the prosecution was malicious would be justified."

(12) I need not multiply authorities, for it appears to me to be fairly well established that in order to sustain the decree of the lower court in this case, I must come to the conclusion not only that the lodging of the complaint by the defendant was without reasonable and probable cause; but he did then entertain no genuine belief in the accusation he was making. I now propose to deal with the evidence in this case.

(13-15) (His Lordship then discussed the evidence and concluded as follows): I cannot in these circumstances regard the complaint of the defendant to the police regarding the two persons to be without reasonable and probable cause.

(16) It may be that he was acting in anger. But that anger is not malice. It is true that the Magistrate has arrived at a finding in favour of the defendant. But civil Courts have got to reach their own conclusions in decreeing the suits for damages for malicious prosecution. The burden of proof in such cases is always on the plaintiffs. In the particular case before me, the letter of January 27 has not been produced, the sub-agent has not been produced, accounts have not been produced to show payment of rents or the chowkidar's pay. The purchaser has prior to the removal credited the defendant with their prices in his account and the letter of correction is not proved. The twenty-four barrels were removed without defendant's permission, the evidence of the two plaintiffs about the circumstances following the showing of the authority is conflicting, they are not corroborated, the writing of the letter itself is suspicious. In these circumstances, I do not think the motive of the defendant in informing the police can be treated as indirect or wrong. The Judge who delivered the judgment in the case has believed the oral evidence of the witnesses; but he did not record their depositions and therefore cannot be in a better position by having observed their demeanours. Comments are made in the judgment on the conduct and oral evidence of the defendant. But that alone cannot sustain the decree in the case when the burden of proof rested on the plaintiff and had not been properly discharged. I, therefore, allow the defendant's appeal, disallow plaintiff No. 1's cross-objection, dismiss the suit; but without any costs to the defendant either of this appeal or of the Court below.

(17) NAIK C. J.: I agree.

C/D.R.R. Appeal allowed.

A. I. R. 1953 HYD. 218 (Vol. 40, C. N. 103)

SIDDIQI J.

Janardhan Reddy and others, Petitioners v. State and others, Respondents.

Misc. Petn. No. 2331/7 of 1950, D/- 21-12-50.

(a) Hyderabad High Court Act (1337 F), S. 4, Cl. 3 — Order of Admission Judge under S. 4, Cl. (3) is not appealable. (Para 2)

(b) Constitution of India, Arts. 132 and 134 (1) (c) — No substantial question of law as to interpretation of the Constitution involved — No special ground made out under Arts. 132 and 134 (1) (c)—Leave to appeal to Supreme Court refused. (Para 3)

Danial Latifi, for Petitioners; Rajaram Iyer, for Respondents.

ORDER: Parties heard. The able Advocate for the applicants seeking leave to appeal to the Supreme Court submits that his application for the issue of a writ was based on matters not only covered by the decision of the High Court but also in respect of other matters such as obtaining the sanction of H. E. H. the Nizam for the carrying out of the sentences and also with regard to the manner in which the sentences are to be carried out. He submits that in Hyderabad in execution of death sentences the practice formerly was to sever the head from the shoulders and the order of the High Court has described the mode of carrying out the sentence by 'hanging until he be dead'. The Advocate General in reply to the arguments of the able Advocate for the petitioners says that he believes that the sentences will be submitted to H. E. H. the Nizam for his sanction but that he can only make a binding statement in this regard after consulting the Government as the legal position has to be examined by Government. With regard to the other matters of any consequence raised, the Advocate General submits that all these are covered expressly or by necessary implication by the High Court judgment.

(2) As I am rejecting the application for leave to appeal to Supreme Court, the learned Advocate for the petitioners requests that I should mention this fact in my order that the order of the Admission Judge under S. 4, Cl. 3 of the Hyderabad High Court Act is not appealable in the sense that no appeal from the order of the Admission Judge lies to any of the benches of this High Court. That statement is correct. The order is not so appealable.

(3) The application for issue of a writ has come before me under S. 4 Cl. 3 of the Hyderabad High Court Act for admission and I have rejected it under the provisions of Cl. 3 as the application was infructuous and the case attempted to be made had no prima facie merits. The order was:

"This High Court has finally decided the appeal. The Supreme Court has refused to grant leave. After a final decision of the High Court, there is no right in the subject

to be protected under Article 226 of the Constitution. If the petitioner can open the decision of the High Court in some appropriate proceedings, he may do so. The application is misconceived and is, therefore, rejected. This order will govern connected applications."

The above order refers equally to the procedure adopted. I see no effective substantial question of law (as to the interpretation of the Constitution) involved and no special ground has been made out under Arts. 132, and 134 (1) (c) of the Constitution of India. I, therefore, reject this application for leave to appeal to the Supreme Court.

C/V.B.B. Application rejected.

A.I.R. 1953 HYD. 219 (Vol. 40, C. N. 104)

(FULL BENCH)

PALNITKAR C. J., SIADAT ALI KHAN AND JAGANMOHAN REDDY JJ.

Muzafaruddin Mohammad, Petitioner v. State of Hyderabad.

Bail Petn. No. 578/6 of 1952, D/- 14-8-1952.

† **Criminal P. C. (1898), Ss. 496, 497, 498 and 340 — Bail when can be granted through a pleader without personal appearance.**

The meaning of the word 'bail' as ordinarily and commonly understood is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance: AIR 1950 EP 53 (FB) and AIR 1950 Sind 19, Rel. on. (Para 11)

None of the provisions in chap. 39, Criminal P. C., envisages a grant of bail to a person not arrested or detained or put under some kind of restraint. Section 498 does not confer any greater powers on the Court of Sessions or the High Court apart from those conferred by Ss. 496 and 497 to which it is ancillary or subsidiary. (Para 13)

The mere personal appearance or appearance through a pleader in court without his being arrested or detained or being subject to some kind of restraint cannot entitle an accused person to apply for bail under S. 497 as no question of his release on bail can arise in such a case. (Para 13)

Where a person is not actually in custody, but has to be arrested in consequence of a warrant issued by the court or under authority vested in the police officers to arrest him without a warrant, he can, by surrendering to the court place himself in the same position as if he was brought before the court. This is the significance of the word 'appears' in S. 497. If an accused 'appears' or is brought before the court under S. 61, Criminal P. C., within 24 hours he is entitled to be represented by counsel in such a proceeding under S. 340 of the said code. (Para 16)

Hence a person accused of any non-bailable offence cannot apply for bail unless he is liable to be arrested in execution of a warrant of arrest issued or is ordered to be arrested, thus placing him under restraint and if such a person is so sick or infirm that he is unable to be brought to a court without exposing him to risk or danger of his life and applies for bail, he may be deemed to have surrendered himself to the custody of the court and can be represented by a pleader in the said proceedings for bail. (Para 17)

Anno: Criminal P. C., S. 496 N. 1; S. 497 N. 3; S. 498 N. 1.

S. M. Hasan, for Petitioner; V. Rajaram Iyer, for the State.

CASES CITED:

(A) 21 Deccan LR 94 (FB)
(B) ('49) AIR 1949 Lah 77: 50 Cri LJ 387 (FB)
(C) ('45) AIR 1945 PC 94: 46 Cri LJ 662 (PC)
(D) ('50) AIR 1950 Sind 19: 51 Cri LJ 705
(E) ('50) AIR 1950 EP 53: 51 Cri LJ 480 (FB)
(F) ('51) AIR 1951 Nag 471: 52 Cri LJ 1535
(G) 1 Hale PC 96
(H) ('26) AIR 1926 Bom 551: 50 Bom 741: 27 Cri LJ 1169
(I) ('31) AIR 1931 Lah 99: 12 Lah 435: 33 Cri LJ 180
(J) ('32) AIR 1932 Lah 13: 12 Lah 211: 32 Cri LJ 1022
(K) ('30) AIR 1930 Lah 945: 12 Lah 16: 32 Cri LJ 339

JAGANMOHAN REDDY J.: This reference arises out of a petition for bail by one Muzafaruddin Mohamed, Taluqa Supply Officer of Gangavathi against whom information was laid by the Collector of Raichur that he has been responsible, along with one Abdul Hai, for defalcation of public funds by reason of a deficiency of 517 pallas of food-grain from the Government Godown at Gangavathi, of which they were both in charge. On receipt of this information, the Deputy Superintendent of Police, Koppal, made the following endorsement:

"Handed over to S. I. Police, Gangavathi, for registering a case under S. 409, I. P. C. He should arrest the two accused immediately and complete the investigation and file the charge-sheet; the Inspector, Gangavathi will also personally investigate the case.

Sd/- P. Kameshwar Rao,
Dy. S. P. Koppal.
26-5-1952.
Sd/- S. I. of Police,
GANGAVATHI.
16-5-1952."

(2) It was stated in the information report of the Collector that the applicant Muzafaruddin left Gangavathi on casual leave for 16th and 17th May, 1952, with permission to avail Sunday the 18th, on the pretext of his mother's serious illness. This fact is admitted by the applicant's Advocate, who states that after his arrival in the city of Hyderabad in connection with his mother's illness he has himself fallen ill and is in the Nursing Home at Hill View Sanitorium suffering from serious Cardio-Vascular disease and is unable to get up or move about. In this condition, it is said that the applicant presented an application through his Advocate Mr. S. M. Hasan before the Munsif-Magistrate. Gangavathi, who rejected the application on 4-6-1952, both on the ground that the accused cannot apply through an Advocate without being personally present and also on the merits. The Sessions Judge, Raichur, also rejected on 21-6-1952 a petition presented on behalf of the applicant on the ground that the application for bail presented by an Advocate on behalf of an accused without the accused appearing himself in Court cannot be entertained. When this petition for bail came on for hearing before a Divisional Bench consisting of Hon'ble the Chief Justice and Dr. Siadat Ali Khan J. it was urged on behalf of the State before them:

(a) that since the accused was not arrested, he cannot be granted bail, and

(b) that an application presented by an advocate on his behalf without his appearing personally in Court cannot be entertained.

(3) The Bench referred these questions to the Full Bench, in view of certain observations of a Full Bench judgment in — 'Government v. Shankar', 21 Deccan LR 94 (A), which appears to lend support to the argument of the learned advocate for the petitioner that the accused need not personally appear in order to apply for bail, but can do so through his pleader.

(4) The learned Advocate for the petitioner relies on the observations of Nawab Azgar Yar Jung Bahadur in the aforesaid case for the proposition that the person accused of an offence can apply for bail through his advocate or pleader and that he can be enlarged on bail without being actually arrested or detained. He further submits on the authority of the Full Bench of the Lahore High Court (Pakistan) in — 'Hidayatullah v. The Crown', AIR 1949 Lah 77 (B), that in a proper case the High Court has power under S. 498, Criminal P. C. to make an order admitting to bail a person suspected but not arrested or detained.

(5) In the Full Bench case in — '21 Deccan LR 94 (A)', Siraj Yar Jung and Jivan Yar Jung JJ., held on the language of S. 468 of the then Hyderabad Criminal Procedure Code that the application must be presented by the accused personally and that the word "Khud" (in Urdu) prefixed before the word "appears" in the said section, in the ordinary parlance, can only mean that the person applying for bail should personally present himself in Court. Azgar Yar Jung J., however was of the view that the word "Khud" (in Urdu) was used by the Legislature with a view to indicate the fact of the applicant appearing voluntarily in Court as opposed to a person brought into Court under restraint. He proceeded to observe that if this is the intention of the Legislature in inserting the word "Khud" in the said section a person can apply for bail both through his pleader as well as personally. In one view, the majority judgment of the Full Bench is in consonance with the ordinary meaning which can be given to the words "Khud Hazer Ho Jai" in Urdu and there is no warrant for the assumption that the word 'Khud' has been used in contra-distinction with the words "Hazar Laya Jai" (in Urdu). The mere use of the words "Hazar Laya Jai" or "Hazar Ho Jai" would by themselves have been sufficient to distinguish the cases of persons who have appeared under restraint and those who appear voluntarily. The Legislature by the use of the word "Khud" appears to have intended to exclude the case of a person appearing through his pleader.

(6) Now that the Indian Criminal P. C. has been extended to the State of Hyderabad, it will have to be seen whether the contention of the learned Advocate for the applicant can be validly urged under the provisions of the said Code. Section 496, Criminal P. C., deals with bailable offences, while S. 497 deals with non-bailable offences. Sub-section (1), S. 497 which is relevant to the questions before us is as follows:

"(1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life;

Provided that the Court may direct that any person under the age of 16 years or any woman or any sick or infirm person accused of such an offence be released on bail."

The learned Advocate for the applicant submits that the word 'appears' in S. 497 being disjunctive, it must be construed independently. In other words, his argument is that since the section provides for the granting of bail to any person accused when he is arrested or detained without a warrant by an officer in charge of the police station or is brought before a Court, some kind of restraint on the accused person in the said three cases is a necessary condition of applying for bail. The use of the word 'appears' in the fourth case would indicate that he need not be under arrest or restraint for obtaining bail if he appears in Court.

(7) The learned Advocate-General contends on behalf of the State that no person accused of a non-bailable offence can apply for bail unless he is arrested or restrained or against whom a warrant of arrest has been issued, as otherwise it will only be a case of anticipatory bail the grant of which is not warranted under any of the provisions of Criminal P. C. relating to bail. In the case of — 'Jairamdas v. Emperor', AIR 1945 PC 94 (C), their Lordships of the Privy Council, have observed that Chapter 39 of the Code, together with Section 426, contains a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. Dealing with the argument that S. 498 gives wide powers to High Courts and Courts of Session, their Lordships observed at page 97 as follows:

"Two things must be observed in relation to this section. The only bonds 'executed under this chapter' are executed by persons who are accused (not convicted) persons; and the words 'whether there be an appeal on conviction or not' merely qualify or relate to the words 'in any case' & only mean that all accused persons are within the section whether their case is appealable on conviction or not. In truth he scheme of Chapter 39 is that Ss. 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision."

(8) In the case of — 'AIR 1949 Lah 77 (B)', a Full Bench of the Lahore High Court made a distinction between the words 'admitted to bail' and 'released on bail' and have held that S. 498 gives wider powers than are contained in Sections 496 and 497. Cornelius J. who delivered the judgment of the Full Bench says at page 81 as follows:

"But the further argument of the learned Advocate-General that the Code does not contemplate any action for the grant of bail otherwise than action which has the effect of releasing a person from custody whether actual or threatened does not appear, upon careful examination, to be well-founded. He referred to Sections 496 and 497 wherein in each case power is given under which persons who are accused of offences may be 'released on bail' and attempted to argue that the High Court could not exercise any power except that of releasing on bail. This argument, it appears to me, fails to attach the necessary significance to the difference of the language employed by the Code in stating the powers of the High Court in regard to bail, from that used in relation to the powers possessed in the same regard by police officers and Courts of first in-

stance. As I have pointed above, the High Court has power to 'direct that any person be admitted to bail' and giving these words their full weight, I see no escape from the conclusion that the power extends not only to grant of bail to persons who are in custody of the High Court or of any inferior Court or a police officer, but also includes a power to give direction that persons should be admitted to bail who are not in custody."

(9) This case was dissented from by another Pakistan State High Court in — 'Mohd. Abbas v. The Crown', AIR 1950 Sind 19 (D), where Tyabji C. J. and Constantine J. held that it is not correct to speak of admitting person to bail unless and until he was in custody. Admission to bail necessarily and essentially implies the substitution of the accused of the detaining authority by the control of the bail (surety) into whose hands person bailed is delivered. The words 'any person' in S. 498 cannot, therefore, include any person who was not under arrest and in custody. Dealing with the judgment of the Full Bench of the Lahore High Court referred to above, Tyabji C. J. observed at page 20 as follows:

"It appears to me to be impossible to accept the reasoning and the construction of the words of Section 498 adopted in this decision. With all respect to the learned Judges who decided this case it appears to me that this decision is not compatible with the correct meaning of the words 'be admitted to bail' and is not in accordance with the terminology used in the Criminal P. C. with regard to bail."

(10) The decision of the Full Bench of the Lahore High Court was further considered by a Full Bench of the East Punjab High Court in the case of — 'Amirchand v. The Crown', AIR 1950 EP 53 (E). It was there held that S. 498 does not empower the High Court or the Sessions Court to grant bail to a person who has not been placed under restraint by arrest or otherwise. In that case, the persons applying for bail had presented themselves in Court and asked for bail because they apprehended arrest. It was admitted that no warrants for the arrest had been taken out nor had the police taken any steps to apprehend them. In this Full Bench judgment, the learned Judges after considering the interpretation put upon the words 'in any case' by the Full Bench case in — 'AIR 1949 Lah 77 (B), expressed their disagreement with it, as it would be in conflict with the decision of the Privy Council in — 'AIR 1945 PC 94 (C). After an elaborate discussion of the case law and the provisions of the Criminal Procedure Code relating to bail, Khosla J. observed at page 61 as follows:

"The very notion of bail presupposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrants have been issued. Section 498, Criminal Procedure Code does not permit the High Court or the Court of Sessions to grant bail to any one whose case is not covered by Sections 496 and 497, Criminal Procedure Code. It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a Court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself."

Kapur J. also remarked in that case at page 64 that a person who is not already under some kind of restraint cannot be put under restraint by being enlarged on bail and that the Code contains no such provisions whereby what is being termed 'anticipatory bail' can be given. These observations have been approved by Hemeon J. of the Nagpur High Court in the case of — 'State v. Hasan Mohd.', AIR 1951 Nag 471 (F).

(11) We are in respectful agreement with the observations of Das C. J. in his referring judgment and Khosla and Kapur JJ. in the Full Bench judgment of — 'AIR 1950 EP 53 (E) and of Tyabji C. J. in — 'AIR 1950 Sind 19 (D), that the meaning of the word 'bail' as ordinarily and commonly understood is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance. These observations are based upon the meaning of the word 'bail' as found in the Oxford and Webster's Dictionaries and the legal dictionaries like Wharton or Stroud and the 'Termes de la Ley'. The famous Jurist Blackstone in his Commentaries on the Laws of England Vol. IV, 4th Edn. 310 also defines bail as

"a delivery or bailment of a person to his sureties upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody instead of going to gaol."

This is the substantive sense in which the word 'bail' is used as a noun, but as a verb it means

"to deliver an arrested person to his sureties upon their giving security for his appearance at the time and place designated to submit to the jurisdiction and judgment of the Court."

(12) In — '1 Hale PC 96 (G)', it was observed that

"a person is said to be admitted to bail when he is released from the custody of the officers of law and entrusted to private custody of persons called his 'bail' who become bounded as sureties to produce him to answer, according to law, to the charge or claim, at a specified date or place."

(13) For the aforesaid reasons, we are clearly of the opinion that none of the provisions in Chapter 39, Criminal P. C., envisages a grant of bail to a person not arrested or detained or put under some kind of restraint. Section 498 of the Code does not confer any greater powers on the Court of Sessions or the High Court apart from those conferred by Ss. 496 and 497. The sentence "the High Court or Court of Sessions may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail" interposed in S. 498 between two provisions, one relating to the amount of bail required and the other relating to the power of the High Court to reduce the bail cannot, in our view, be intended to confer any inherent or extraordinary powers on the Court of Sessions or the High Court when the object of that Section is to provide for the working out of the provisions of Ss. 496 and 497 to which, as observed by the Judicial Committee, the said S. 498 is ancillary or subsidiary. We are, therefore, unable to accept the contention of the learned advocate for the petitioner for the reason that though undoubtedly the circumstances under which a person accused of any non-bailable offence can apply for bail are specified in the Section, they have to be read in the context and for the purpose for which the section has been framed. If, as submitted the mere personal appearance or appearance through a pleader in Court without his being arrested or detained or being subject to some kind of restraint entitles an accused person to apply for bail, no question of his release on bail can arise. In other words, there

can be no release without arrest, detention or some other form of restraint and for this reason the Section makes provision for the release of a person arrested or otherwise restrained. A person can be said to be under restraint when a warrant of arrest is issued by a Court or when the authorities have made a decision to arrest him in cognizable offences. Often it is not possible in cognizable offences to know whether a police officer who is authorised to arrest without a warrant has made up his mind to arrest a person or not. But when, as in this case, documents have been filed which clearly show that the Deputy Superintendent of Police had directed the Sub-Inspector, Gangavathi, to arrest the applicant immediately and complete the investigation and file a charge-sheet, such an order, in our view, would be a sufficient restraint entitling the person ordered to be arrested to apply for bail under S. 497, Criminal P. C.

(14) After this case was heard and judgment reserved, the learned Advocate-General by his application dated 8-8-1952, has brought it to our notice that a non-bailable warrant of arrest has been issued by the Munsif-Magistrate, Gangavathi, on 24-7-1952, long after the orders rejecting bail by the said Magistrate and the Sessions Judge of Raichur were passed. There is, therefore, no impediment for the applicant in being entitled to present an application for bail under S. 497.

(15) The only question which remains is whether his physical presence in Court is necessary before he can be granted bail. The learned Advocate-General submits that bail cannot be given to a person who has not appeared in Court personally or has not surrendered himself to the Court, while the Advocate for the applicant contends that this is not necessary. No authorities, however, have been cited which deal with this aspect of the case. In our view, where a person against whom an arrest warrant has been issued by the Court or who has been ordered to be arrested, is physically in a position to appear before the Court and does not so appear or surrender himself, he will not be entitled to bail. But, there may be instances where a person, in spite of his being desirous of appearing and surrendering himself to the Court is physically incapable of coming to Court or being brought to Court, except by exposing himself to danger of his life, applies for bail disclosing the place or abode in which he is staying, the condition in which he is and the reason for his non-appearance personally, he may be deemed to have surrendered himself as being within reach of Court, if the Court after directing its mind to this question comes to the conclusion in the circumstances stated in the petition that his personal appearance is not possible except by exposing his life to risk or danger. The proviso to S. 497 lends support to this conclusion. The Legislature has specifically by an amendment in 1923 to Criminal P. C., provided that any sick or infirm person accused of an offence punishable with death or transportation for life may be released on bail. The word 'appears' therefore should be read with this proviso. If a person is so sick or infirm that he is physically unable to come to Court, there will be no meaning in holding that he will not be released on bail merely because he is unable to physically appear in Court. To hold otherwise would be to restrict the proviso only to cases where a person becomes sick or infirm after he has been arrested, for which, in our view, there is no warrant.

(16) Section 497 contemplates the case of a person (a) who has been arrested, or (b) who is detained without warrant by an officer in charge of the police station, or (c) who is brought before a Court or (d) who appears. In the first three cases the accused is definitely in custody while in the fourth case he is not in immediate custody, but at the same time he is not a free man inasmuch as either a warrant has been issued by the Court for his arrest or that he has been ordered to be arrested. If he is arrested in execution of the arrest warrant issued by the Court, he will be produced before the Court and if he is arrested by the police in a cognizable offence without a warrant, he will have to be brought before the Court within 24 hours under S. 61, Criminal P. C. In either case the accused will be deemed to be in judicial custody so that where a person is not actually in custody, but has to be arrested in consequence of a warrant issued by the Court or under authority vested in the police officers to arrest him without a warrant, he can, by surrendering to the Court place himself in the same position as if he was brought before the Court. This, in our view, is the significance of the word 'appears' in S. 497 and is designed to cover a case such as has been indicated above. If an accused 'appears' or is brought before the Court under S. 61, Criminal P. C. within 24 hours, he is entitled to be represented by counsel in such a proceeding under S. 340 of the said Code. In the case — 'in re: Llewelyn Evans', AIR 1926 Bom 551 (H); — Balkrishna v. The Crown', AIR 1931 Lah 99 (I); — 'Amolak v. Emperor', AIR 1932 Lah 13 (J) and — 'Sundar Sing v. Emperor', AIR 1930 Lah 945 (K), it was laid down that the accused is entitled to be represented by a legal adviser once he is in custody. Section 340, Criminal P. C. specifically lays down that "any person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any Court may of right be defended by a pleader". Under this provision it was held in the above cases that the accused has a right to be represented by a lawyer from the moment he is in custody. But where he is not in custody or not deemed to be in custody either of the Court or Police Officer, he cannot be represented by a pleader for the purposes of S. 497, Criminal P. C.

(17) In the result, our answer to the reference is that a person accused of any non-bailable offence cannot apply for bail unless he is liable to be arrested in execution of a warrant of arrest issued or is ordered to be arrested, thus placing him under restraint and if such a person is so sick or infirm that he is unable to be brought to a Court without exposing him to risk or danger of his life and applies for bail, he may be deemed to have surrendered himself to the custody of the Court and can be represented by a pleader in the said proceedings for bail.

A/K.S. Answer accordingly.

A. I. R. 1953 HYD. 222 (Vol. 40, C. N. 105)

MISRA C. J. AND MANOHAR PERSHAD J.

Dost Mohammad Khan, Petitioner v. Hyderabad Government and others, Respondents.

Writ Petn. No. 26/5 of 1952, D/- 19-3-1953.

(a) Hyderabad Atiyat Enquiries Act (10 of 1952), S. 15 (b) — Atiyat Committee — Fact that the Atiyat Committee consisted of persons who were not members of the Bab-e-Hukmat does not render the opinion given by the Committee invalid in law. (Para 6)

(b) Hyderabad Atiyat Enquiries Act (10 of 1952), S. 15(b) — Party not heard by Atiyat Committee.

There is no violation of natural justice where the Atiat Committee gives its opinion on being called upon to do so by H. E. H. without giving an opportunity to the parties concerned for being heard when the Firman does not ordain that the parties should be given an opportunity to represent their case. (Para 7)

(c) Constitution of India, Art. 226 — Writ of certiorari.

Writ of certiorari is granted if it is shown that a tribunal or body or officer has acted wholly without jurisdiction or in excess of it or has acted in violation of the principles of natural justice or committed an error apparent on the face of the record and such act, or omission, or error has resulted in manifest injustice. (Para 8)

(d) Constitution of India, Art. 226 — Writ of mandamus.

An order for the issue of a writ of mandamus is a matter for the absolute discretion of the Court. Some of the essential conditions for the grant of such a writ are: (i) that the person applying must show that he is really and specially interested in the subject matter and has a specific legal right to enforce; (ii) that there resides in him a legal right to the performance of the legal duty by the party against whom such a writ is sought; and (iii) that there is no other equally efficacious, convenient and beneficial remedy. (Para 9)

(e) Constitution of India, Art. 226 — Writ of Prohibition.

The Writ of Prohibition is a writ which is issued primarily to prevent a Court or tribunal, judicial or quasi-judicial, from exceeding jurisdiction or acting contrary to rules of natural justice. (Para 9)

Bishweshwarnath, for Petitioner; Narsimha Iyengar, Advocate, for Respondents.

CASE CITED:

(A) ('52) AIR 1952 Hyd 163:
ILR (1952) Hyd 595 (FB)

MANOHAR PERSHAD, J.: This is an application on behalf of Dost Mohammed Khan for the issue of Writs of Certiorari, Mandamus and Prohibition under Art. 226 of the Constitution of India to quash the opinion of the Atiyat Appeals Committee of 9-5-1951 and the endorsement thereon of the Hon'ble the Chief Minister dated 31-5-1951 refusing to give an opportunity to the petitioner to represent his case and for an order against respondents 1 to 3 restraining them from enforcing the said order of the Chief Minister and prohibiting them and respondent 4 from taking any proceedings in pursuance of the said order.

(2) The facts which give rise to this petition are that one Mohammed Anwar Khan, Jagirdar of Tamooru, situate in Bokardan Taluqa, Aurangabad District, had two types of jagirs; the first consisting of 23 altamga villages and the second consisting of 11 villages which were earmarked for jamiath (Armed forces). The inam enquiry of the mash was started during the lifetime of Anwar Khan who died in 1313 F. and the virasat (succession) proceedings of the deceased started along with the Inam enquiry. Ibrahim Ali Khan was one of the claimants. But he died in 1321 F. leaving a son Dost Mohd. Khan the present petitioner and a daughter Shahzadi Begum. The eleven jamiat villages were resumed to Khalsa through His late Highness's Firman dated 12 Ramzan 1324 H. before the completion of succession and Inam proceedings. In the succession proceedings the Nazim Athiyat recommended that jamiat jagirs having been already resumed by a Firman of the H. E. H. the late Nizam, the altamga jagir alone could be continued in favour of Dost Mohammed Khan, and that Shahzadi Begum respondent 4 be given a guzara (maintenance) of Rs. 100/- per month. Aggrieved by this, the petitioner and respondent 4 preferred two separate appeals before the Atiyat Appeals Committee, Dost Mohammed Khan praying that the 11 jamiat Jagir villages be also restored and respondent 4 requesting that she should be given a share according to the Mohammedan Law in the mash instead of a mere guzara. The Atiyat Appeals Committee allowed both the appeals recommending a one-third share to Shahzadi Begum so far as her appeal is concerned and recommending restoration of the 11 jagir villages previously resumed so far as Dost Mohammed Khan's appeal was concerned. On submission of the recommendations of the Atiyat Appeals Committee by the Executive Council to H. E. H. the latter through his Firman dated 17th Muharrum corresponding to 24-5-1932 passed the following orders:

"The opinion of the Attiyat Committee and the President is approved. Accordingly the altamga mash (including the villages specially meant for jamiat) after taking 5 per cent. on account of Hakh-e-mallikana, be continued in favour of Dost Mohammed Khan, from the jagirs which the late Ibrahim Ali Khan may in his capacity as the heir of Anwar Khan be held entitled to Shahzadi Begum, the sister of Dost Mohd. Khan; shall be allowed to one-third share after deducting Haq-e-intezami and Haq-e-mallikana."

(3) On 9th Khurdad 1342 F. Shahzadi Begum submitted an application stating that her brother did not pay her anything towards her share in the jamiat Jagirs. The Joint Secretary heard the parties and gave his opinion that Shahzadi Begum was entitled to get her one-third share not only from the income of altamga but also from the jamiat jagir villages as per Firman of H. E. H. Dost Mohammed Khan submitted an application aggrieved by this opinion to the Revenue Member. Mr. Crofton, the then acting Revenue Member while agreeing with the opinion of the Joint Secretary ordered that an Arzdasht be submitted to H. E. H. requesting him to interpret the portion of the original Firman pertaining to the jagir villages. He elucidated that Shahzadi Begum as a daughter of Ibrahim Ali Khan is entitled to receive one-third share. The Executive Council entirely agreed with the decision of the Hon'ble Revenue Member and ordered that an informatory Arzdasht be submitted to H. E. H. H.E.H. did not pass any final orders but instead through Firman dated 23rd Jamadi 1336 H. corresponding to 15-5-1947 called for the opinion of the Attiyat Appeals Committee. Accordingly, the Attiyat Appeals Committee consisting of Raja Dhonderaj Bahadur and Sri Govind Rao gave their opinion on 9-5-1951 in favour of Shahzadi Begum. This opinion was later approved by the Chief Minister on 31-5-1951 which has given rise to the present petition.

(4) Raja Bahadur Bishweshwarnath, Advocate, appearing on behalf of the petitioner con-

fined himself to three points only although various other points have been raised in the petition. The first point urged before us is that the judgment of the Attiyat Appeals Committee was passed ex parte and the petitioner was not given any opportunity to represent his case. This act of Tribunal, he contends, is in violation of natural justice and cannot be sustained. The second contention is that cl. (6) of Gashti (Circular) 10 of 1338 F. enjoins that the Attiyat Appeals Committee shall consist of two members of the Bab-e-Hukumat (Executive Council) the impugned opinion which has been sanctioned by the Revenue Member and the Chief Minister has been given by Raja Donderaj Bahadur and Shri Govind Rao who were not members of the Bab-e-Hukumat and for this reason also the impugned judgment has no validity in the eye of law. The third contention is that under Circular 10 of 1338 F. which was, and still, is, the law relating to virasat proceedings and Crown grants, it is essential that the sanction of H.E.H. should be obtained for final adjudication of rights. The proceedings were not submitted to H.E.H. in this case for sanction and so the judgment is invalid and has no legal force. It is also urged that the Attiyat Enquiry Act of 1952 is 'ultra vires' the powers of the Rajpramukh as well as the legislature of the State under Item 18 of the State List (No. 2) of the Constitution.

(5) Shri Narasimha Iyengar, Advocate, appearing on behalf of Shahzadi Begum in reply contended that H.E.H. only sent for the opinion of the Attiyat Appeals Committee and there was no question of giving any opportunity to any of the parties. With regard to the second point, he contends that prior to the Constitution also H.E.H. used to constitute the Attiyat Committee consisting of persons who were not members of the Bab-e-Hukumat and that it is not necessary that an amendment should be made in Circular No. 10 of 1338 F. Following up the contention he urged that after the Police Action, H.E.H. delegated his power to the Military Governor and the present Bench consisting of Raja Dhonderaj Bahadur and Shri Govind Rao was constituted by H.E.H. on the recommendation of the Chief Minister and so it cannot be said that the Bench was not properly constituted. With regard to the argument relating to the validity of the Attiyat Enquiries Act of 1952, he urges that this question does not arise in the present case as the Firman calling for the opinion was passed long before the Constitution came into force. A similar argument is advanced on behalf of the other respondents as well.

(6) After giving a careful consideration to the arguments advanced, we are of the opinion that there is no force in this petition and it should be rejected. So far as the first contention is concerned, the learned advocate appearing for the petitioner has conceded before us that during the days prior to the Constitution H.E.H. used to constitute the Attiyat Committee comprising of persons who were not members of the Bab-e-Hukumat. But he contends that it cannot be held to be legal unless an amendment is made in Circular No. 10 of 1338 F. We are afraid, we cannot accept this contention either. H.E.H. had only asked for the opinion of the Attiyat Committee. The fact that the Attiyat Committee consisted of persons who were not members of the Bab-e-Hukumat does not become so material when it is remembered that H.E.H. himself has appointed this Committee. The contention that Circular No. 10 of 1338 F. makes a provision that only members of the Bab-e-Hukumat should be appointed does not in any way take away the right of the H.E.H. to appoint other persons. This right of the H.E.H. is not disputed at all. It is urged that the present appointment made by H.E.H. is as a Raj Pramukh and not as the Nizam. This does not make any difference.

(7) After this we turn to the other argument that the petitioner was not given an opportunity to represent his case. In this contention too we find no force. H.E.H. had only called for the opinion of the Attiyat Committee. The Firman does not ordain that the parties should be given an opportunity to represent their case. In the absence of any such direction, we are not inclined to accept the argument of the learned Advocate that he should have been given an opportunity to represent his case.

(8) The argument questioning the validity of the Attiyat Enquiries Act of 1952 cannot be sustained now in view of the decision of this Court in the case of — 'Ahmed-un-Nissa Begum v. State of Hyderabad', AIR 1952 Hyd 163 (A). The petitioner has prayed for the writs of certiorari, mandamus and prohibition. The writ of certiorari could be granted if it is shown that a tribunal or body or officer has acted wholly without jurisdiction or in excess of it or has acted in violation of the principles of natural justice or committed an error apparent on the face of the record and such act, or omission, or error has resulted in manifest injustice. As indicated above, no such points have been made out in the present case and so there is no question of issuing any writ of certiorari.

(9) As regards the issue of Mandamus and Prohibition we may point out that an order for the issue of Writ of Mandamus is, as a general rule, a matter for the absolute discretion of the Court. Some of the essential conditions relevant for the present purpose for the grant of such a writ are:

(i) that the person applying must show that he is really and specially interested in the subject matter and has a specific legal right to enforce;

(ii) that 'there resides in him a legal right to the performance of the legal duty by the party against whom such a writ is sought' and

(iii) that there is no other equally efficacious, convenient and beneficial remedy.

The Writ of Prohibition on the other hand, was a writ which used to be issued by the King's Bench Division primarily to prevent a Court or tribunal, judicial or quasi-judicial, from exceeding jurisdiction or acting contrary to rules of natural justice. In the present petition, the petitioner could not satisfy us as to what was the legal duty of the party against whom mandamus is sought. As discussed above the petitioner has not made out a case either for the issue of a writ of certiorari or for the issue of mandamus and prohibition. The petition is, therefore, rejected. Having regard to the facts of this case, we do not wish to make any order regarding costs.

A/V.S.B. Petition rejected.

*** A.I.R. 1953 HYD. 225 (Vol. 40, C. N. 106)**

QAMAR HASAN AND DESHPANDE JJ.

Madho Rao, Appellant v. (Bhao deceased L. R.) Patelba and others, Respondents.

Appeal No. 290/4 of 1359 F., D/- 9-12-1952.

(a) Registration Act (1908), S. 49 — Hyderabad Registration Act, S. 43 (as amended in 1346 F.) — Admissibility in evidence of unregistered sale deed.

An unregistered sale-deed can be given as evidence of a contract in a suit for specific performance under Chapter II of the Hyderabad Relief Act. 29 Deccan LR 819, held not good law. (Paras 5, 6)

Anno: Reg. Act, S. 49 N. 11 Pt. 4.

(b) Registration Act (1908), S. 17(v) — Hyderabad Registration Act, S. 10(5) — Document held to be sale deed.

A document after mentioning the amount of debt and the person from whom it was due and enumerating the lands intended to be sold recited that the vendors had sold the lands in extinguishment of the debt and put the vendee in possession, the result of which was described to be that the vendee had become the owner with full powers of alienation and the vendors had become divested of every title and interest in the property sold and that a registered sale-deed would be executed when demanded by the vendee.

Held that the document embodied a complete sale and not merely an executory contract. (1848) 154 ER 705, Foll.

(Para 8)

Anno: Reg. Act, S. 17 N. 53, 75.

***(c) Specific Relief Act (1877), Ss. 12 and 22 — Duty of buyer.**

By virtue of the combined effect of S. 55(1)(d), T. P. Act and S. 29(c), Stamp Act, it is the duty of the buyer to prepare a conveyance, tender it to the seller for execution and get it registered. And in case he fails to get the conveyance properly registered before the Sub-Registrar, he should pursue the remedy provided by the Registration Act. He is, thus, bound to have recourse to statutory remedy provided by the Registration Act before coming into the Court for the equitable relief of specific performance. Case law Ref.

(Para 9)

Anno: Sp. R. Act, S. 12 N. 3; S. 22 N. 6.

Govindas Mehta, for Appellant; Govindrao Nagapurkar, for Respondents.

CASES CITED:

(A) 29 Deccan LR 819
(B) (26) AIR 1926 PC 94: 53 Ind App 214 (PC)
(C) (1848) 2 Ex 778: 154 ER 705
(D) ('28) AIR 1928 Mad 344: 108 Ind Cas 782
(E) (1912) 81 LJ Ch 184: (1912) 1 Ch 284
(F) ('33) AIR 1933 PC 29: 60 Cal 980 (PC)
(G) 40 Deccan LR 391
(H) ('52) AIR 1952 Hyd 48: ILR (1951) Hyd 872
(I) 5 Aeen-e-Deccan 570
(J) 24 Deccan LR 717
(K) 33 Deccan LR 668
(L) 40 Deccan LR 412
(M) ('26) AIR 1926 Mad 530: 49 Mad 302
(N) ('38) AIR 1938 Mad 801: 179 Ind Cas 240
(O) ('39) AIR 1939 Mad 391: 184 Ind Cas 465
(P) ('42) AIR 1942 Mad 716: 206 Ind Cas 564
(Q) ('46) AIR 1946 Pat 62: 225 Ind Cas 541

JUDGMENT: This appeal is on behalf of the plaintiff in a suit for specific performance and it is directed against the judgment and decree of the learned Civil and Sessions Judge, Aurangabad, dated the 16th Dai 1353—F. by which he affirmed the judgment and decree of the District Judge of Aurangabad dated 24th Amardad, 1352—F. dismissing the suit on the preliminary ground that the suit document being unregistered could not be received in evidence.

(2) The material facts necessary for the disposal of this appeal may be stated as follows: Plaintiff's case was that a sum of Rs. 7204 15-3 I. G. equivalent to H. S. Rs. 8357-10-3 was due to him from defendants 1 and 2 the father of defendants 3 to 6 who sold Survey No. 7 excluding 2 to 3 bighas and Survey Nos. 72, 73, 79 and 80 situate in Chencholi Limbaji, Kannad Taluq in extinguishment of the debt by a document dated 16th Ardibehest 1347—F. and put the plaintiff in possession of the lands sold and promised to execute a regular sale-deed and get it registered when demanded by the plaintiff. The demand it was alleged was made in the month of Khurdad 1347—F. but instead of complying with it, the defendants wrongfully dispossessed the vendee from the lands.

(3) The defendants traversed these allegations. They further raised the plea that the document being unregistered was not admissible in evidence and that the alleged sale being in contravention of the provisions of Dastural Amal-e-Inteqal Arzi was void and consequently unenforceable.

(4) Both the Courts below have given effect to the former plea on the authority of — 'Shivappa v. Anna 29 Deccan. L. R. 819 (A)', in which a Bench of this Court following — 'Dayal Singh v. Indar Singh', A. I. R. 1926 P. C. 94 (B) held that an agreement for sale acknowledging the receipt of earnest money created a charge on the immoveable property under S. 55 Cl. (6) (b), T. P. Act, and therefore did of itself create an interest in property and requires registration and if such an agreement happens to be unregistered, it is inadmissible in evidence in a suit for specific performance relating to the property agreed to be sold.

(5) The learned Advocate for the appellant in the first place argued that the Courts below have failed to take note of the fact that the document upon which the plaintiff had based his claim came into existence on 16th Ardibehest 1347—F., and by that time a proviso has been added to S. 43 of the Hyderabad Registration Act enabling an unregistered document to be given as evidence of a contract in a suit for specific performance under Chapter II of the Hyderabad Relief Act.

(6) The force of this contention must be conceded. The suit document came into being on 16th Ardibehest 1347—F., attracting the proviso to S. 43, Hyderabad Registration Act which was introduced by the amending Act 3 of 1346—F. in the following words:

"provided that an unregistered document affecting immovable property and required by this Act or the Hyderabad Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Hyderabad Relief Act."

The amending Act came into force on 19th Dai 1346—F. It is thus clear that the provision applied and the suit being for specific performance, the document was admissible in evidence. The case of — '29 Deccan. L. R. 819 (A)', dealt with a situation which had arisen before the Amending

Act came into force and in view of the amendment of S. 43, Hyderabad Registration Act, it cannot be regarded to be good law. But the real difficulty which lies in the path of appellant is that he has not followed the procedure provided by Ss. 66 to 68 Hyderabad Registration Act corresponding to Ss. 71, 76 and 77 of the Indian Registration Act.

(7) The learned Advocate for the appellant argued that the document by itself did not create any right or interest in immovable property, but merely created a right to obtain another document and was covered by Sub-s. 2 (1), Cl. (5) of S. 10, Hyderabad Registration Act and therefore the provisions of Ss. 66 to 68 of the Act were not attracted. The provisions of cl. (5) above referred to are as follows:

> "Nothing in clauses (b) & (c) of Sub-section (1) applies to any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upward to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest".

In the light of these provisions, we have to see whether the document in question merely creates a right to obtain another document without creating or declaring any right, title or interest in the disputed property. The document after mentioning the amount of debt and the person from whom it was due and enumerating the lands intended to be sold recites that the vendors have sold the lands in extinguishment of the debt and put the vendee in possession, the result of which is described to be that the vendee had become the owner with full powers of alienation and the vendors had become divested of every title and interest in the property sold and that a registered sale-deed will be executed when demanded by the vendee.

(8) It would thus appear that the document embodies a complete sale and not merely an executory contract. In such a case, it seems difficult to agree with the contention that the document falls within the purview of Sub-s. 2 (1), cl. (5) of S. 10 of the Registration Act. It can neither be said to be a contract for sale within the meaning of S. 54, Hyderabad Transfer of Property Act. That section defines it in the following words:

> "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not by itself create any interest in or charge on such property".

The tenor of document as referred to above shows that not only terms were settled, but transfer of ownership effected in exchange for a price. In — 'Horsfall v. Hey', (1848) 154 E. R. 705 (C) it has been held that if the parties to an instrument have so expressed themselves as to make it apparent on the face of the instrument that the writing was intended to be the record of the transfer then being made, the instrument will operate as a convayance and it is immaterial whether the words used be in the past tense or in the present tense. At this stage, the question of registration assumes importance. It is argued on behalf of the appellant that under the document discussed above, it was part of the obligation of the respondents to get the deed that was in contemplation by the agreement drawn up, executed and registered. S. 27 (c) of the Hyderabad Stamp Act provides that in the case of sale the expense for providing the stamp shall be borne by the transferee. Paragraph 1, clause (d) of Section 55 of the Hyderabad Transfer of Property Act makes it the duty of the buyer to prepare a conveyance and tender it to the seller for execution. The appellant-buyer instead of complying with the above provisions of law contented himself with a sale-deed upon a plain paper. It has been observed in the case of — 'Valambalachi v. Durai Swami Pillai', AIR 1928 Mad 344 (D) by Srinivasa Aiyangar, J. that:

> "If a document duly executed by vendor is tendered by the vendor to the purchaser and the delivery of the document is accepted by the purchaser, we must take it that the purchaser who accepts the document undertakes to see the registration himself, he feeling assured that he has got provisions of Registration Act, under which he can compel the other party to the contract to come and register the document. I am therefore inclined to regard that in all cases where the purchaser of property accepts an unregistered document he may be regarded as relieving the other party, the vendor from his obligation to tender a registered document in performance of the contract. It seems to me impossible to accede to the contention that a person who agrees to sell and convey property is bound not only to execute a proper conveyance once but go on executing as many conveyances as may be required by the vendee in respect of that property".

(9) It is contended by the learned Advocate for the appellant that the document in question contains an express promise to execute and register a fresh document. Therefore the above case is distinguishable on facts. But in our opinion, the insertion of that promise does not detract from the executed nature of the written contract. The argument of the learned Advocate would have carried force if the agreement were of an executory nature. In this connection, we may with advantage quote the observations of Parker J. in — 'Von Hatzfeld Widenberg v. Alexander', (1912) 1 Ch 284 at p. 288 (E) which have been quoted with appproval by their Lordships of the Privy Council in — 'Currimbhoy and Co. v. L. A. Creet', AIR 1933 PC 29 (F). Parker J. states:

> "It appears to be well settled by the authorities that if the document or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of a further contract is a condition or term of a bargain or whether it is mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to a more formal document may be ignored."

It is next contended for the appellant that the absence of registration of the suit document cannot have an adverse effect on his suit because according to the proviso added to S. 43, Hyderabad Registration Act, by the amending Act 3 of 1346-F. an unregistered document can be received as evidence of a contract in a suit for specific performance. In support of this contention reliance is placed on — 'Sheikh Hashim v. Bhagwan Rao', 40 Deccan LR 391 (G) and — 'Babu Rao v. Sonaji', AIR 1952 Hyd 48 (H). These cases are distinguishable on the ground that in these cases the disputed agreements were held to be contracts for sale. In the present case, the document embodies the sale by which nothing more was to be done by the

respondent except the registration of the document. Ignoring the fact that he had failed to supply the necessary stamp the question arises whether the appellant was bound to have recourse to statutory remedy provided by the Registration Act before coming into the Court for the equitable relief of specific performance. This Court has consistently taken the view that any person seeking the registration of a document embodying a sale must pursue the statutory remedy before he comes to the Court for specific performance. Reference in this connection may be made to —Muryam Bi v. Syed Khawja', 5 Aeene-Deccan 570 (I), —'Narsagowd v. Raghupat Reddy', 24 Deccan LR 717 (J), — 'Churappa v. Narain', 33 Deccan LR 668 (K) and — 'Maroti v. Honaji', 40 Dec LR 412 (L). It was contended by the appellant that these authorities have lost their binding force either because they were decided before the proviso was added to S. 43 of the Hyderabad Registration Act or they have failed to take note of the proviso. This argument makes no difference, because the question now is not of admissibility of the document but of the statutory remedy which was available to the appellant and which he has failed to adopt. The view adopted by our High Court is in accordance with the view of the Madras High Court in — 'Satyanarayana v. Venkat Rao', AIR 1926 Mad 530 (M), which is further supported by a Bench decision of the same High Court in the case of — 'Venkatadri Somappa v. Official Receiver Bellary', AIR 1938 Mad 801 (N). The learned Advocate for the appellant refers to — 'Venkatasheshayya v. District Board, East Godawari', AIR 1939 Mad 391 (O), —'Venkata Subbamma v. Subbiah', AIR 1942 Mad 716 (P), and —'Jhaman Mahton v. Amrit Mahtom', AIR 1946 Pat 62 (Q) for the contrary view. We need not consider these authorities because so far as our High Court is concerned, the question appears to have been well settled. For these reasons, we dismiss the appeal with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 HYD. 227 (Vol. 40, C. N. 107)

MISRA C. J.

Konkimalla Veeresham, Petitioner v. Pudduturi Vajrama, Respondent.

Civ. Adm. No. 970/B 5/2 of 1952 and 1953, D/- 18-3-1953.

(a) Civil P. C. (1908), S. 115 — No revision lies against a mere finding of the Court below. (Para 1)

Anno: C. P. C., S. 115 N. 5.

(b) Civil P. C. (1908), O. 7, Rr. 17 and 18 — Non-production of document.

Under O. 7, R. 18 a very wide discretion is vested in the Court in connection with the reception of a document which does not accompany the plaint. The presentation of plaint and the acceptance in evidence of a supporting document are two different things. There is nothing in the Code which renders the plaint unaccompanied by the supporting documents ineffective or its presentation void. (Para 2)

Anno: C.P.C., O. 7, R. 17 N. 1 Pt. 6.

(c) Civil P. C. (1908), O. 20, R. 5 — Decision of each issue necessary.

As a general rule when a number of issues arise in a case, it is the duty of the trial Court to give its findings on all issues in order to avoid a remand. To enter upon each question separately and then to bring the finding thereon to the High Court either by way of revision or appeal is wholly wrong. (Para 5)

Anno: C. P. C., O. 20, R. 5 N. 2.

Vaimgani Madhav Rao, for Petitioner.

JUDGMENT: I have heard the applicant's learned counsel and I am definitely of the opinion that a revision does not lie against a mere finding of the Court below.

(2) The suit was based upon a promissory note. At the time when the plaint was presented, the promissory note was not filed and on the date on which it was brought on record, the limitation for filing the suit had expired. It was urged on behalf of the defendant in the lower Court that the plaint should be deemed to have been presented on the date on which the promissory note was filed and the suit was therefore barred by time. The contention was based on O. 7, R. 17, Civil P. C., which renders the production of a document, on which the plaintiff relies, imperative on the date on which the plaint is presented. It is said that according to the Code, the plaint must be deemed not to have been presented on the date it was actually filed but should be deemed to have been presented on the date on which the promissory note was filed. This is wrong. According to O. 7, R. 18, a document which ought to be produced by the plaintiff when the plaint is presented and which is not so produced, should not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit. A very wide discretion is thus vested in the Court in connection with the reception of a document which did not accompany the plaint. The presentation of plaint and the acceptance in evidence of a supporting document are two different things. There is nothing in the Code which would render the plaint unaccompanied by the supporting documents ineffective or its presentation void. Order 4, which was referred to by the applicant's learned counsel, has no application. The Court below, therefore, rightly refused to accept the argument in bar of limitation.

(3) Another preliminary point raised by the defendant was that the promissory note was not properly stamped. On this matter also, the Court came to a finding against the defendant. The result is that both the preliminary objections are over-ruled & the case is now set down for evidence.

(4) In this revision petition, it is contended by the defendant that the view of law taken on the two preliminary points by the learned Sub-Judge at Karimnagar is wrong. Obviously, there is no defect of jurisdiction involved, and it is impossible to entertain the revision under S. 115, Civil P. C.

(5) Before I conclude this judgment, I would like to say for the guidance of the subordinate Courts that there is no warrant in the Code for deciding issues piece-meal unless the Court decides to apply O. 14, R. 2, which is an exceptional provision applicable to cases when the point of law raised is likely in the opinion of the court to be fatal to the suit or the defence. The Privy Council has laid down repeatedly that as a general rule when a number of issues arise in a case, it is the duty of the trial Court to give its findings on all issues

in order to avoid a remand. To enter upon each question separately and then to bring the finding thereon to this Court either by way of revision or appeal is wholly wrong. The practice cannot be deprecated too strongly, for, besides being unauthorised it also results in holding up the decision of the case for unconscionably long periods.

(6) This application has no force. I reject it summarily.

B/V.S.B. Revision dismissed.

A.I.R. 1953 HYD. 228 (Vol. 40, C. N. 108)

MISRA C. J. AND MOHD. AHMED ANSARI J.

Mathavarapu Ananthramiah, Appellant v. B. Venkat Ratnam and others, Respondents.

Writ Petn. No. 187 of 1951-52, D/- 26-11-1952.

(a) Constitution of India, Art. 226 — "For any other purpose."

The words 'for any other purpose' contemplate only the enforcement of a legal right or performance of a legal duty. AIR 1950 Pat 387 (FB), Rel. on. (Para 3)

(b) Constitution of India, Art. 226 — Mere volunteer cannot apply.

The rights of which protection by way of writs is provided for in the Constitution, is a private and personal right. Hence, where the applicant is not amongst the persons who are injured by an order passed by an authority and his position is that of a volunteer he has no 'locus standi' to apply to the High Court under Art. 226 of the Constitution. (1923) 262 US 447; AIR 1951 All 1 (FB); AIR 1953 Mad 94; AIR 1952 Cal 799, Rel. on. (Paras 5, 6)

(c) Constitution of India, Art. 226 — Jurisdiction of High Court.

The jurisdiction to issue writs is not wide enough or large enough to enable High Courts to convert themselves into courts of appeal and examine for themselves the correctness of the decisions impugned or decide what is the view to be taken of the points at issue between the parties including the issue of jurisdiction, if any. AIR 1952 SC 192, Rel. on. (Para 5)

(d) Constitution of India, Art. 226 — Jurisdiction under Art. 226.

The jurisdiction conferred by Art. 226 does not provide an alternative mode of redress to the normal process of litigation in ordinary Courts of law. The powers under it are exercised only for meeting extraordinary cases where personal or private rights of persons have been seriously infringed, and they are otherwise unable to obtain any adequate or prompt remedy for the redress of their grievance. (Para 7)

Ramlal Kishen, for Appellant; Madhav Reddy and Narhar Sastrym, for Respondents.

CASES CITED:

(A) ('50) AIR 1950 Pat 387: 5 Dom LR (Pat) 189: 51 Cri LJ 1509 (FB)
(B) (1923) 67 Law Ed 1078: 262 US 447
(C) ('51) AIR 1951 All 1: 1950 All LJ 767 (FB)
(D) ('53) AIR 1953 Mad 94: (1952) 2 Mad LJ 671
(E) ('52) AIR 1952 Cal 799: 56 Cal WN 651
(F) ('52) AIR 1952 SC 192: 1952 SCR 583 (SC)

MISRA, C. J.: This is an application under Art. 226 of the Constitution for the issue of a Writ of Mandamus. The petitioner Muthavarapu Anantha Ramiah is an inhabitant of Huzurnagar taluq, Nalgonda District, and carries on motor transport business in that place. On 26-4-1951, opposite party No. 1, P. Venkat Ratnam, the Proprietor of Rama Mohan Motor Service, Vijayawada, was granted renewal for one year of his previous permit for plying stage carriages on Suriapet-Jagayyapet route. It is alleged by the petitioner that the granting of the aforesaid permit is in flagrant violation of the mandatory provisions of S. 57, Motor Vehicles Act. The specific complaint is that the non-adherence to the procedure laid down in the above section has operated to deprive the vested legal right of the petitioner to take objection to the grant and that the action of the Regional Transport authority in issuing the permit otherwise than in accordance with the procedure prescribed by the section is wholly illegal and without jurisdiction.

(2) Section 57(1) relates to the procedure which had to be followed in granting 'contract carriage permits' or 'private carrier's permits'. It has no application to cases of 'stage carriage permits', with which we are now concerned. Sub-section (2) of that section deals with the latter but it has to be read with S. 47. Representations against the applications made by persons for running stage carriages within the State are allowed by S. 47 of the Act and under it there are only 3 classes of persons who are given this right:

(a) persons already providing road transport on any proposed route or routes;
(b) a local or police authority within whose jurisdiction any part of the proposed route (or routes) lies; and
(c) an association interested in the provision of road transport facilities.

The applicant does not come within any one of these categories and the question which arises for consideration is whether it is open to him to invoke the aid of this Court by way of Mandamus under Art. 226 of the Constitution.

(3) It is conceded that the order complained of does not in any manner violate the petitioner's fundamental rights. The contention urged on behalf of the applicant is that since this Court has a right to issue writs not only to protect persons whose fundamental rights have been invaded, but also 'for any other purpose', the petitioner is entitled to relief. The words 'for any other purpose' have been interpreted from time to time by the High Courts and the decisions are uniform that they contemplate only the enforcement of a legal right or performance of a legal duty. It is sufficient in this connection to refer to the Full Bench case of the Patna High Court in — 'Bagaram v. State of Bihar', AIR 1950 Pat 387 (A). The observation of Meredith C. J. in that case may here be reproduced:

"It is quite clear that these words have been added advisedly and must mean something in addition to the enforcement of the rights conferred by Part III and this is so whether they be read ejusdem generis or otherwise. It is clear because Art. 32, which is the corresponding provision for the Supreme Court, does not contain these words, but speaks merely of the enforcement of any of the rights conferred by this Part, and that is obviously because the original jurisdiction of the Supreme Court extends only to the enforcement of the fundamental rights."

The learned Chief Justice then went on to observe:

"....Art. 226 contemplates the issue of writs and directions for purposes other than the enforce-

ment of the fundamental rights. At the same time the words can hardly mean that the High Court can issue writs for any purpose it pleases. I think the correct interpretation is that the words mean for the enforcement of any legal right and the performance of any legal duty. To that extent the words must be read 'ejusdem generis', which is the ordinary principle of construction."

(4) On behalf of the applicant it is said that he had a legal right to raise objection to the grant of stage carrier's permit to the opposite party No. 1 and that this right was denied to him. We have already mentioned that this is not correct as he is not one of the person referred to in S. 47.

(5) The next point which has to be considered is whether the petitioner as a member of the public can come to this Court for the issue of a Writ of Mandamus. Article 226 does not specifically mention the persons at whose instance the writs referred to therein can be obtained. It is, however, well-known that the rights of which protection by way of writs is provided for in the Constitution, is a private and personal right. As observed in — 'Commonwealth of Massachusetts v. Andrew W. Mellon', (1923) 262 U. S. 447 (B),

"it is only where the rights or persons or property are involved and such rights can be presented under some judicial form of proceedings, that Courts of justice can interpose relief."

Reference in this connection may be made also to the decision in — 'Indian Sugar Mills Association v. Secretary to Government, Uttar Pradesh Labour Department', AIR 1951 All. 1 (C), wherein a Full Bench of the Allahabad High Court laid down that the powers under Art. 226 should be sparingly used and only in those clear cases where the rights of a person have been seriously infringed and he has no other adequate or specific remedy available to him. The petitioners in that case were not affected by the order of which they complained. A preliminary objection was raised on behalf of the Government to the effect that the application was not maintainable as it had been filed by a person whose rights had not been directly affected. The learned Judges, who decided the case remarked in this connection that:

"everyone of the several millions of this State cannot be given the right to come up and agitate and re-agitate against an Act or order like the one in question. He cannot say that his rights are directly affected by the order. The said association has been registered under Sec. 4 of the Trade Unions Act, No. 16 of 1929. The applicant is thus a distinct and separate person from the various mills which are members of it and the order complained against is not an order directing any payment out of the assets of the applicant. Neither the bonus nor the retainer allowance has to be paid out of movable and immovable property of the Indian Sugar Mills Association but has to be paid by the sugar mills out of their own separate funds."

The same view was taken in — 'In re P. Rama Moorthi', (Rajamannar, C. J.), AIR 1953 Mad 94 (D), and the recent case of — 'Biman Chandra v. Governor, West Bengal', AIR 1952 Cal 799 (E). In — 'Veerappa Pillai v. Raman and Raman, Ltd.', AIR 1952 S C 192 (F), their Lordships of the Supreme Court have laid down that the writs referred to under Art. 226 can be issued in those rare cases only where the subordinate tribunals or bodies or officers act wholly without or in excess of jurisdiction or they refuse to exercise a jurisdiction possessed by them. They can also be exercised where redress is sought against violation of the principles of natural justice or there is an error apparent on the face of the record and the act, omission, error or excess has resulted in manifest injustice. Their Lordships emphasize that the jurisdiction to issue writs is not wide enough or large enough to enable High Courts to convert themselves into Courts of appeal and examine for themselves the correctness of the decisions impugned or decide what is the view to be taken of the points at issue between the parties including the issue of jurisdiction, if any.

(6) It may be mentioned in the present case that amongst the remedies provided for cases in which the prescribed procedure is not followed or wrong decision is given by the Regional Transport authorities in granting the permit, there is a right of appeal and methods are provided for rectification of errors. The applicant is not amongst the persons who are injured by the grant since he has no legal interest to protect. His position being thus merely of a volunteer we consider that he has no 'locus standi' to come to this Court under Art. 226 of the Constitution.

(7) We have advisedly thought it desirable to indicate in this case the view of law that has prevailed in the various High Courts in connection with the writ jurisdiction. This is because this Court is being inundated with applications under Art. 226 of the Constitution most of which are obviously untenable on elementary principles which govern the issue of these prerogative writs. We feel that it is necessary for the guidance of the bar to emphasize that the jurisdiction conferred by Art. 226 does not provide an alternative mode of redress to the normal process of litigation in ordinary Courts of law. The powers under it are exercised only for meeting extraordinary cases where personal or private rights of persons have been seriously infringed, and they are otherwise unable to obtain any adequate or prompt remedy for the redress of his grievance.

(8) The application fails and is accordingly dismissed.

A/V.S.B. Application dismissed.

A.I.R. 1953 HYD. 229 (Vol. 40 C. N. 109)

QAMAR HASAN AND DESHPANDE JJ.

Anwar Khan, Appellant v. Munim Khan, Respondent.

Appeal No. 999 of 1356 F, D/- 9-12-1952.

Limitation Act (1908), Art. 131 — Hyderabad Limitation Act, Art. 117 — Suit to recover share in emolument of watan.

A right to recover a share in the emolument of a watan being a periodically recurring right, a suit to establish such right is governed by Art. 117, Hyderabad Limitation Act. In order to constitute a refusal within the meaning of this Article, there must be a definite demand and refusal. The mere fact that the plaintiff has not exercised his right is not enough. 34 Deccan LR 153; AIR 1934 PC 108, Foll. (Para 2)

Anno: Lim. Act, Art. 131 N. 9 Pt. 2.

Govinddas Mehta, for Appellant; Kashinathrao Vaidya, for Respondent.

CASES CITED:

(A) 34 Deccan LR 153
(B) 37 Deccan LR 414
(C) ('34) AIR 1934 PC 108: 148 Ind Cas 796 (PC)

JUDGMENT: This appeal is on behalf of the defendant and it is directed against the judg-

ment and decree of the District Judge, Parbhani, dated 27th Azur, 1356-F, reversing the judgment and decree of the Munsiff of Sailu who had dismissed the suit.

(2) The only point argued before us was that of limitation. The questions of fact as found against the appellant were not challenged by the learned counsel for the appellant. The facts found by the lower appellate Court are that Rustam Khan was the incumbent of the police patelship of Palodi, Pathri Taluq. During his lifetime, he applied to the Deputy Collector for transfer of incumbency to his son Mohiuddin Khan, the father of the appellant. Taj Khan the father of the respondent intervened with the prayer that he be declared to be an equal sharer in the emolument of the Watan. After due inquiry, the necessary sanction was granted by the Collector for transfer of Watan and on express admissions made by Rustam Khan and Mohiuddin Khan, Taj Khan was declared to be an equal sharer. Mohiuddin Khan died in 1345 F. and was succeeded by the appellant. The present suit was instituted by the respondent on 26th Bahman 1355 F. It was argued by the learned counsel for the appellant that Article 106 of the Hyderabad Limitation Act applied which prescribes a period of six years from the date when the right to sue accrues. The suit, therefore, ought to have been brought within six years from the death of the respondent's father which occurred almost twenty-five years before the institution of the suit or within six years from the death of respondent's (appellant's?) father which occurred in 1345F. This contention has no substance in view of the authority of the late Hyderabad Judicial Committee in — 'Deo Rao v. Narain', 34 Deccan LR 153 (A) and — 'Yedvalli Gopamma v. Yedwalli Ramchander Rao', 37 Deccan LR 414 (B) which lays down that Article applicable in such cases is Article 117 of the Hyderabad Limitation Act. This view is supported by the pronouncement of the Privy Council in the — 'Secy. of State v. Parashram Madhav Rao', AIR 1934 PC 108 (C). That Article provides a period of twelve years for a suit to establish a periodically recurring right from the date when the plaintiff is first refused the enjoyment of the right. In order to constitute a refusal within the meaning of this Article there must be a definite demand and refusal. The mere fact that the plaintiff has not exercised his right is not enough. The respondent in paras 4 and 5 of the plaint has asserted that he received his share of the emolument upto 1353 F., but was refused the right on 20th Bahman 1355 F. The lower appellate Court has held this allegation to have been well substantiated by the respondent from which we do not see any reason to differ. The refusal being in 1354 F., the suit was within time.

(3) The result is that the appeal fails and is hereby dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 HYD. 230 (Vol. 40, C. N. 110)

PALNITKAR AND SRINIVASA CHARI JJ.

Vishnu and others, Appellants v. Jawaher Mall and others, Respondents.

Appeal No. 316/4 of 1350 F., D/- 10-12-1952.

Civil P. C. (1908), O. 2, R. 2 — Relinquishment of claim for jurisdiction.

Where on the date when the suit is instituted the Court has not the requisite pecuniary jurisdiction over the subject-matter of the suit it cannot acquire jurisdiction by reason of the plaintiffs' relinquishing a portion of the claim at a later stage of the suit. The relinquishment contemplated by O. 2, R. 2 in order to bring the suit within the jurisdiction of a Court is before the institution of the suit, and not at any subsequent stage. AIR 1921 Mad 696 and AIR 1940 Mad 689, Ref. (Para 2)

Anno: C. P. C., O. 2, R. 2 N. 12.

Gopal Rao Ekbote, for Appellants.

CASES CITED:

(A) ('21) AIR 1921 Mad 696: 66 Ind Cas 837
(B) ('40) AIR 1940 Mad 689: 194 Ind Cas 646

JUDGMENT: Defendants are the appellants before us. The brief facts relating to this case are that the suit was filed by the plaintiffs for possession of the suit lands on the allegation that these properties were mortgaged with them by defendants 1 and 2 with possession; that subsequent to the mortgage these lands were taken on lease by defendants 3 and 4. The plaintiffs prayed that a decree be passed in their favour for possession of the suit and for Rs. 400/- on account of the lease amount for a period of three years. The plaintiffs valued their suit for the purposes of jurisdiction at an aggregate value of Rs. 400/-, Rs. 300/- representing the amount due from the lessees on account of the lease amount and Rs. 100/- being the annual lease amount, the suit being treated as a suit to eject the lessees. The defendants raised the objection that the suit could not be treated as a suit against the lessees based upon the lease deeds executed by defendants 3 and 4 but must be treated as a suit for specific performance to get possession of the mortgaged property which the plaintiffs were entitled to under the mortgage. The defendants, therefore, contended that the suit should be valued according to the mortgage amount viz. Rs. 2900/-. The trial Court after hearing the arguments of the respective parties came to the conclusion that the suit should be treated as a suit for possession of land paying revenue and, therefore, valued the suit at ten times the revenue payable to the Government, that is to say, at Rs. 880/- and called upon the plaintiffs to pay the deficit court-fee. This order was passed on 7th Amardad 1347 F. The plaintiffs carried out the orders of the Court and paid the deficit court-fee. When the case came on for arguments the plaintiffs' Vakil made a statement that the plaintiffs were giving up their claim for the lease amount for three years, which they had claimed in their suit. The statement of the plaintiffs' Vakil was recorded in the proceedings and final arguments were heard. The suit was decreed by both the trial Court and the lower appellate Court. The defendants have now appealed against the above decrees.

(2) The learned advocate for the appellants has confined his argument to the question of law arising in the case as to whether it was open to the plaintiffs to have relinquished a portion of their claim at the stage of the arguments. His next contention is that on the date when the suit was filed the claim of the plaintiffs was beyond the pecuniary jurisdiction of the Munsiff Court. We have considered about the matter and we are of opinion that the con-

tentions of the learned advocate are well founded. The jurisdiction of the Munsiff Court at Kannad was Rs. 1,000/- on the date of the institution of the suit and after the finding given by the Court on 7th Amardad 1347 F. the value of the suit for the purposes of jurisdiction became Rs. 1180/- (Rs. 880 plus 300/-), which was decidedly beyond the pecuniary jurisdiction of the Munsiff Court, so that the short point is whether, where at the institution of the suit the Court had no pecuniary jurisdiction over the subject-matter of the suit, it would get jurisdiction by reason of the plaintiffs relinquishing any portion of the claim so as to bring it within the jurisdiction of the Court. So far as this point is concerned, O. 2, R. 2(1), Civil P. C. reads as under:

> "Every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action; but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

This relinquishment in order to bring the suit within the jurisdiction of a Court, in our opinion, is clearly before the institution of the suit, and not at any subsequent stage. This is the correct law. We desire to make it clear that if on the date when the suit was instituted the Court did not have the requisite pecuniary jurisdiction, it cannot acquire jurisdiction by reason of the plaintiff's relinquishing a portion of the claim. We would refer to the case of — 'Govinddas Swamy v. Kaliaperumal', AIR 1921 Mad 696 (A) and the case of — 'Chandrayya v. Seethanna', AIR 1940 Mad 689 (B).

(3) For the above reasons we set aside the decrees of the Courts below and order that the plaint be returned for presentation to the proper Court. The appellants will be entitled to the costs of all the three Courts.

B/V.S.B. Appeal allowed.

A.I.R. 1953 HYD. 231 (Vol. 40 C. N. 111)

MANOHAR PERSHAD AND VITHAL RAO DESHPANDE JJ.

Ranba, Appellant v. Bansilal and another, Respondents.

Appeal No. 447 of 1354 Fasli, D/-11-2-1953.

(a) Limitation Act (1908), Arts. 135 and 139 — Applicability.

Article 135 applies only to suits for possession by mortgagee as such. Where the mortgagee leases the mortgaged property to the mortgagor as his tenant and subsequently sues the mortgagor for ejectment the claim for possession is not by the mortgagee as such and would be governed by Art. 139 and not by Art. 135. 18 Ind Cas 899 (All), 31 All 318; AIR 1920 Lah 217 and 114 Pun Re 1890 Rel. on. AIR 1949 Pat 166 Distinguished. (Para 3)

Anno: Lim. Act Art. 135 N. 2 Pt. 1; Art. 139 N. 5.

(b) Transfer of Property Act (1882), S. 68 (d) — Failure to deliver possession.

There is nothing in law to prevent the mortgagee from filing a suit for possession on the basis of a lease-deed. When the mortgagee is entitled under the terms of the mortgage to possession and the mortgagor fails to deliver the same to him the mortgagee is entitled to sue under S. 68, cl. (d) for the mortgage money. He has also other remedies open to him. He may sue for damages for breach of the contract to deliver possession or may sue for possession. AIR 1921 Lah 309, 16 Ind cas 735 (Cal. AIR 1942 Oudh 172 Rel. on. (Para 4)

Anno: T. P. Act, S. 68 N. 5 Pts. 7 to 10.

Sadashiv Rao, for Appellant; Gopal Rao Ekbote and Govind Das Mehta, for Respondents.

CASES CITED:

(A) ('94) 1894 All WN 107: 16 All 318 (FB)
(B) ('49) AIR 1949 Pat 166: 29 Pat LT 132
(C) ('13) 18 Ind Cas 899 (All)
(D) ('09) 1 Ind Cas 208: 31 All 318
(E) ('20) AIR 1920 Lah 217: 57 Ind Cas 269
(F) ('90) 114 Pun Re 1890
(G) ('21) AIR 1921 Lah 309: 59 Ind Cas 966
(H) ('13) 16 Ind Cas 735 (Cal)
(I) ('42) AIR 1942 Oudh 172: 197 Ind cas 164

JUDGMENT: Bansilal and Pandurang, plaintiffs-respondents, filed a suit for the possession of the lands bearing Survey Nos. 335 and 360 and for mesne profits against Ranba, the defendant-appellant, with the allegation that the defendant took a loan of Rs. 4,500/- for the purchase of the lands and mortgaged the lands bearing survey Nos. 335 and 360 with the agreement that in case the loan is not repaid within a year the plaintiffs would be put into possession of the mortgaged lands. The defendants could not repay the loan, and therefore, in accordance with the terms of the stipulation the plaintiffs were put into possession of the mortgaged lands. The plaintiffs were in possession through their cultivators. On 20th Shehrewar 1338 F., the defendant took the lands on lease for one year and after the expiry of the period he renewed the lease for a further period of one year and promised to hand over possession after the expiry of the period. Though the period has expired but the defendant has neither returned the possession nor has he paid the amount of the lease. The defendant in his written statement denied the allegations of the plaint in toto and alleged that as the defendant is a member of the protected tribe the suit could not proceed in the Civil Court as provided by the Hyderabad Land Restraint and Alienation Act. Another legal objection was also raised that the suit is time barred. On these pleadings the original Court framed certain issues. Parties led evidence. On a consideration of the evidence the original Court decreed the plaintiffs' suit. Aggrieved by this the defendant went in appeal which was allowed only to the extent of one year's mesne profits and dismissed to the extent of the possession and the rest of the mesne profits. Hence this second appeal on behalf of the defendant.

(2) The main argument on behalf of the appellant is that the suit for possession cannot lie on the basis of the lease deed as after the expiry of the period of the lease the plaintiffs were not put into possession and the cause of action for the enforcement of the mortgage accrued and if this suit is treated as one based on a mortgage then in that case also it would be dismissed as being time-barred according to Art. 135, Indian Limitation Act. The Courts below, he contends, have not considered the case in that light. The second contention is that a suit for possession does not lie, the only remedy for the mortgagee is to file a suit for the recovery of the mortgage amount under S. 68, T. P. Act. Reliance is placed upon —'Hiralal v. Ghasitu', 16 All 318 (A) and —Bishun Prasad Ram v. Anup Narain Singh', AIR 1949

Pat 166 (B). Shri Govind Das Mehta on behalf of the respondent in reply urges before us that the suit is based on a lease deed and it is within time. With regard to the argument that a suit for possession does not lie it is contended that it is not correct to say that a suit for possession does not lie as two remedies are open to a mortgagee. He may either sue for possession or for the recovery of the mortgage amount or for damages. We find sufficient force in the contention of the learned Advocate for the respondent.

(3) The suit is based on the lease deed dated 25th Khurdad 1339F., which is for a period of one year, i.e., till 14th Ardibehist 1340F. The present suit is dated 15th Ardibehist 1352F., which is within twelve years and it is not disputed by the appellant also. The contention is that the period of the previous lease deed had expired on 27th Ardibehist 1339 F. and the second lease deed was executed on 25th Khurdad 1339F., i.e. nearly twenty-eight days after the expiry of the period. as such the right to enforce the mortgage had accrued to the plaintiffs on 27th Ardibehist 1339 F., and if this date is taken as the starting point of limitation then the suit becomes time-barred according to Art. 135, Limitation Act. We are afraid, we cannot accept this contention. It is true that the renewal of the lease was made after a lapse of twenty-eight days but when the lease deed has been executed and it has been proved, the relationship of lessor and lessee is again established, and thus it cannot be said that the right to sue on the mortgage had accrued. Article 135, Limitation Act would apply to suits for possession when the mortgagee claims possession as a mortgagee. It is not so in the present case. Hence Art. 135, Indian Limitation Act is not applicable to the present case and Art. 139, Limitation Act would be applicable. We are supported in our view by the cases of — 'Tulsiram v. Sunderlal', 18 Ind Cas 899 (All) (C); — 'Khunialal v. Madan Mohan', 31 All 318 (D); — 'Des Raj v. Jai Mal Singh', AIR 1920 Lah 217 (E) and — 'Ganpat Rai v. Jeevanlal', 14 Pun Re 1890 (F), where it has been held that where the mortgagee leases the property to the mortgagor and subsequently sues him for ejectment the claim for possession is not by mortgagee as such and consequently Art. 135 would not apply but Art. 139 would be applicable.

The cases cited by the learned Advocate for the appellant do not apply to the facts of the case and are not at all helpful to him. 'AIR 1949 Pat 166 (B)', was a case where the plaintiff had brought a suit against the defendants for ejectment from two houses and for the recovery of Rs. 274-1-0 alleging that he was a rehandar. The plaintiff's case was that he was not given possession of the houses on the understanding that the defendants-mortgagors will hold and occupy them as tenants of the mortgagee on payment of the monthly rent of Rs. 2/-. Along with the deed of mortgage this agreement was arrived at between the parties. In pursuance of this agreement the defendants executed a 'kabuliat' embodying the aforesaid terms. The usufructuary mortgage was for a term of five years from the month of Asarh 1335. to the month of Jeth 1340 Fasli, while the 'kabuliat' acknowledging the tenancy was for a term of four years from the month of Asar 1335 to the month of Jeth 1339 Fasli. On expiry of the term of the tenancy, the plaintiff wanted to enter into possession of the houses, but, as it is alleged by the plaintiff, the defendants made a request to allow them to remain in the house on payment of an enhanced rent of Rs. 5/- per month. This request was agreed to and the defendants occupied the said houses from the month of Asarh 1339 Fasli on the fixed rent of Rs. 5/- per mensem and had been paying the same upto the month of Bhado 1346. The defendants were called upon by the plaintiff to execute a fresh kabuliat, but they raised objection on the ground that they would be put to unnecessary expense. The defendants in contravention of the agreement having failed to pay the agreed rent, the plaintiff served them with a notice to quit calling upon them to give vacant possession of the houses as the alleged tenancy had terminated. The defendants resisted the plaintiff's claim impugning the real character of the rehan and repudiating the relationship of landlord and tenant and challenging the maintainability of the suit. It was held that there was no relationship of landlord and tenant between the parties after the expiry of the term of the mortgage. Consequently, the remedy of the mortgagee was under Section 68 for the recovery of the mortgage money and not by way of suit for possession or for recovery of rent in lieu of interest. This case is clearly distinguishable from the present case. In the case before us there is no period fixed for payment and the condition is that whenever the principal amount and interest will be paid the mortgage will be redeemed. In other words the mortgagee is entitled to the possession of the mortgage property till the payment of the mortgage money.

In the case of — '16 All 318 (A), the mortgagee himself had filed a suit for the mortgage money under S. 68, T. P. Act and did not claim possession so the question whether he could sue for possession or not did not arise. Still Banerji J. in his judgment has expressed his view in the following words:

> "By the terms of the mortgage-deed the mortgagees were entitled to remain in possession until the repayment of the mortgage money, and the mortgagor was liable not only to deliver possession to the mortgagees but to secure to them quiet and undisturbed possession. For a breach of that obligation the remedy of the mortgagees was twofold. They could either sue the mortgagor to recover possession of the mortgaged property, or they could bring a suit to recover the mortgage-money. This last remedy is given to them by S. 68 of Act No. IV of 1882."

Thus, this case also does not help the contention of the appellant, on the contrary it supports the case of the respondents.

(4) After this we turn to the other argument which relates to S. 68, T. P. Act. The contention is that no suit for possession lies and the only remedy open to the plaintiff is to enforce the mortgage by filing a suit for the recovery of the mortgage amount under S. 68 of the said Act. We are afraid, we cannot accept this either. There is nothing in law to prevent the mortgagee from filing a suit for possession on the basis of a lease-deed. When the mortgagee is entitled under the terms of the mortgage to possession and the mortgagor fails to deliver the same to him the mortgagee is entitled to sue under S. 68, cl. (d), T. P. Act for the mortgage money. He has also other remedies open to him. He may sue for damages for breach of the contract to deliver possession or may sue for possession. We are supported in this view by the cases: — 'Harnamsingh v. Bholasing', AIR 1921 Lah 309 (G); — 'Thakur Chowdry v. Manrup Mahaton', 16 Ind Cas 735 (Cal) (H); — 'Rampadart v. Nimarsingh', AIR 1942 Oudh 172 (I). Thus, it cannot be said that the mortgagee is not entitled to sue for possession of lands.

(5) Thus, after giving a careful consideration, we are of the opinion that there is no force in this

appeal and it should be dismissed. Appeal is, therefore, dismissed with costs.

B/K.S. Appeal dismissed.

A.I.R. 1953 HYD. 233 (Vol. 40, C. N. 112)

SRINIVASA CHARI J.

Naimullah Khan, Appellant v. State of Hyderabad.

Second Appeal No. 115/6 of 1952-53, D/-15-1-1953.

(a) Criminal P. C. (1898), Ss. 227, 237, 423 — Retrial on amendment of charge.

Even where a person has not been charged with an offence but the evidence shows that he has committed a particular offence, he can still be convicted under that offence. It is only in cases where it can be shown that the accused has been prevented from giving or of his having failed to give evidence material to his defence by reason of the amendment of the charge, that the court should offer him a new trial on the amended charge, otherwise not. AIR 1925 PC 130, AIR 1943 PC 192 Foll. (Para 2)

Anno: Cr. P. C., S. 237 N. 2, 2a, S. 423 N. 31

(b) Criminal P. C. (1898), Ss. 367, 424 — Contempt of judgment.

The judgment in addition to containing the points for determination should contain a resume of the evidence and the remarks of the Judge with regard to the statement of every witness. Held although the judgment was not in strict conformity with S. 424 read with S. 367 the case did not warrant a remand for a judgment anew. (Para 3)

Anno: Cr. P. C. S. 367 N. 4, 5, 6.

Shabbar Hasan, for Appellant; Mohd. Mirza, Govt. Advocate, for the State.

CASES CITED:

(A) ('25) AIR 1925 PC 130: 52 Ind App 191: 26 Cri LJ 1059 (PC)

(B) ('43) AIR 1943 PC 192: 45 Cri LJ 126 (PC)

JUDGMENT: This second appeal in a criminal case was admitted after notice to the Government Advocate. It was alleged that the accused who is the appellant before me took away one Khacher and Gouna from the house of one Rama when he was away and when his mother alone was present in the house. It is stated that when the mother protested against his taking away these things, he assured her that he would return the things the next day. It is also stated that the same accused took away a pair of bullocks from the house of one Mahboob in his absence. Later on, the accused is said to have disposed of these bullocks, the cart and Gouna to different persons making it appear as though he was the owner of all these things. The accused was charged under S. 406, I. P. C. and the Magistrate on the evidence taken by him found him guilty and sentenced him to undergo one years rigorous imprisonment. On appeal the Sessions Judge of Adilabad came to the conclusion that on the evidence the offence that the accused could be held guilty of was one under S. 380 and not S. 406, I. P. C. Therefore, he held him guilty under S. 380 and confirmed the same sentence of one year's rigorous imprisonment. It is against this judgment of the Sessions Judge that the appellant has come before the High Court in second appeal.

(2) The learned Advocate for the appellant confined himself to two contentions. The first contention is that the judgment of the Sessions Judge cannot be regarded as a proper judgment because there is no discussion about the evidence in the case; he (the Sessions Judge) has merely stated that in so far as the statements of the witnesses go, he agrees with the learned Magistrate of the lower court. The second contention is that where the Sessions Judge chose to convict the accused of an offence different from which he was charged by the Magistrate, an opportunity should have been given to the accused to put forward his defence with regard to the new charge under which he was going to be convicted. I would prefer to take up the second contention first. The relevant provision in Criminal P. C., relating to altering or adding to any charge is S. 227 which says that any court may alter or add to any charge at any time before the judgment is pronounced and in cases of trials before the Sessions Court or the High Court, before the verdict of the jury is returned or the opinions of the assessors expressed. This would make it clear that there is power in the Court to add to, alter or vary an existing charge. The only duty in such cases is to read out the charge and explain it to the accused. Section 236 enacts that where it is doubtful what offence has been committed by the accused and where a series of acts have been committed by the accused, the accused may be charged with having committed all or any of such offences and he may even be charged in the alternative with having committed some one of the said offences. The illustration makes it clear that where an accused is charged with an offence which may amount to theft or receiving stolen property or criminal breach of trust or cheating, he may be charged with all the offences or any one of the offences. The illustration to S. 237 makes it further clear that where an accused is charged with one offence and it appears in evidence that he committed a different offence for which he might not have been charged, he may still be convicted of the offence which is proved by the evidence, although he was not actually charged with it. The illustration to this section makes it conclusive that even where a person has not been charged with an offence but the evidence shows that he has committed a particular offence, he can still be convicted under that offence.

Illustration: 'A' is charged with theft. It appears that he committed the offence of criminal breach of trust or of having received stolen property. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) if he was not charged with that offence.

The next question is whether the facts are such that notice to the accused of the offence for which he is going to be convicted should be given although he was not charged with it. And if there has been no prejudice to the accused by the absence of a specific charge, then a conviction would be held good. That such a procedure is allowed by law has been well established by the decision of the Privy Council in the case of — 'Begu v. Emperor', A. I. R. 1925 P C 130 (A) wherein their Lordships observed as follows:

"The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge

in respect of it, if the evidence is such as to establish a charge that might not have been made ..... They were not charged with that formerly but they were tried on evidence which brings the case under S. 237".

It is only in cases where it can be shown that the accused has been prevented from giving or of his having failed to give evidence material to his defence by reason of the amendment of the charge, that the court should offer him a new trial on the amended charge, otherwise not. This view of mine is supported by the authoritative pronouncement of the Privy Council in the case of — 'Thakurshah v. Emperor', A. I. R. 1943 P C 192 (B). The power to amend the charge is vested in the appellate court under the provisions of Section 423 of the Criminal Procedure Code. It is only where the court comes to a finding that by reason of the amendment in the charge the accused has been misled and that consequently it has resulted in a failure of justice, that the court would order a retrial and not otherwise.

It has to be observed in this case that the charge against the accused was one of criminal breach of trust and the appellate court convicted him for theft. I do not see how the accused has been prejudiced for having been charged for theft because so far as the facts are concerned, the evidence was the same and it could not be said that the accused would have put forward a different defence if he were told that he was charged for theft. At the most it could not only be said that having regard to the facts, the offence could come under Section 406 and S. 380, I. P. C. But that cannot be regarded as having prejudiced the accused or having resulted in miscarriage of justice. I, therefore, hold that inasmuch as there has been no prejudice to the accused and there has been no resultant miscarriage of justice the case need not be sent back for retrial.

(3) Coming to the other argument of the learned Advocate that there has been no discussion of the evidence, I do find that the Sessions Judge has merely disposed of the evidence in two lines. No doubt the judgment ought to set out what the evidence is and not merely say that the Court agrees with the opinion of the lower Court. The Sessions Judge ought to have discussed the evidence stating as to why the evidence on record on the one side should be preferred to the evidence on the other. Section 424 of the Cr. P. C. makes it clear that what applies to a judgment of the original Court shall apply to that of an appellate court other than the High Court. The judgment, therefore, in addition to containing the points for determination should contain a resume of the evidence and the remarks of the Judge with regard to the statement of every witness. It must be said that in this case the Sessions Judge has ignored this. But I find from the judgment that in coming to a conclusion that the offence committed is one under Section 380 and not under Section 406 he has gone through the evidence. Although the judgment is not in strict conformity with Section 424 read with S. 367 the case does not warrant a remand for a judgment anew. I would remark that the Sessions Judge ought to be more careful in pronouncing his judgment and not do it haphazardly by merely stating that he is in agreement with the trial Court. It may happen that in some cases the accused is prejudiced by his not having the advantage of the opinion of the appellate court.

(4) A note of warning may be sent to the Sessions Judge stating that he should hereafter be careful in going through the evidence and expressing his opinion with regard to the evidence in the case as required by law.

(5) This appeal is dismissed.

C/D.H. Appeal dismissed.

A.I.R. 1953 HYD. 234 (Vol. 40, C. N. 113)

PALNITKAR C. J. AND SRINIVASACHARI J.

Md. Abdullah, Petitioner v. Saleha Bi and others, Respondents.

Civil Revn. Petn. No. 270 of 1950, D/- 25-9-1952.

Court-fees Act (1870), S. 7(xi)(cc) and (v) — Suit by landlord against tenant for ejectment — Denial of title of landlord by tenant — Suit is governed by S. 7(xi)(cc) and not by S. 7(v) — (Hyderabad Court-fees Act, Ss. 4 (9) (D) and 7(4). **(Para 2)**

Anno: Court-fees Act, S. 7(v) N. 1; S. 7(xi) N. 2.

Bheemsenachari, for Petitioner; Jahangir Ali, for Respondents.

CASES CITED:

(A) ('32) AIR 1932 Mad 409: 138 Ind Cas 88
(B) ('30) AIR 1930 Cal 42: 57 Cal 349
(C) 31 Deccan LR 22

ORDER: This is a revision against the order of the lower court calling upon the plaintiff to amend the plaint and pay court-fee on the suit as on a suit based on title and for possession. The petitioner before us is the plaintiff in the lower court. He filed a suit for ejectment against the defendant-respondent, alleging that the predecessor of the defendant took up the house on rent; that the predecessor died and that the defendants have not paid any rent subsequently. He, therefore, prayed for ejectment of the tenant and for possession of the house. The defence of the respondents was that the plaintiff had no title to the property and that the house belonged to the defendants and that they were in possession of the house in their own right. The lower court has come to the conclusion that having regard to the nature of the suit, it ought to be treated as one based on title and, therefore, the plaintiff was bound to pay court-fee as on a suit based on title and not as a suit for ejectment under S. 4, cl. 9(D), Hyderabad Court-fees Act. This revision is directed against the above order.

(2) We have heard the arguments of the respective advocates of the parties. We are of the opinion that the lower court was wrong in holding that this suit would be governed by S. 7, cl. 4, Hyderabad Court-fees Act. We would make it clear at the outset that the question of court-fee depends upon the allegations in the plaint and not on the defence raised by the defendant. Therefore, before deciding under what section of the Court Fees Act, court-fee has to be paid, the Court has to look into the allegations in the plaint.

(3) It is urged by the learned advocate for the respondents that the plaint allegations are such that the suit should be regarded as one against trespassers and not against a tenant, because the allegations in the plaint are that the defendant denied that the plaintiff was the owner of the house and the defendant was a tenant and that any rent was due by the defendant. The sum and substance of the argument is that when such allegations are made, the defendant can by no stretch of imagination be regarded as a tenant of the plaintiff and

the suit cannot be treated as a suit for ejectment of a tenant. It has to be observed that a tenant holding over does not cease to be a tenant because after the period of tenancy, he makes default in the payment of rent. In a suit for ejectment of a tenant by a landlord, the enquiry into the question of title will be restricted just to know whether the defendant is a tenant of the landlord. The enquiry is only confined to that extent. The plaintiff succeeds or fails on the strength of the allegations in the plaint and if it is established that the defendant is not a tenant, his suit goes. Where the plaintiff's allegations are that he is the owner of the house and the defendant is his tenant, to regard it as a suit based on title is not warranted by law. Our view is further supported by a decision of the Madras High Court reported in — 'Sivasubramania v. Subramania', AIR 1932 Mad 409 (A), and the decision of the Calcutta High Court in — 'Govinda Kumar v. Mohini Mohan', AIR 1930 Cal 42 (B). The learned advocate for the respondent invited our attention to a decision of this court reported in 31 Deccan LR 22 (C). We must say that that case is distinguishable from the case now before us, because from that judgment it would appear that the property was under the supervision of the Government and even at that time the defendant denied the plaintiff's ownership of the house and their Lordships held that even at that time the plaintiff was aware of the fact that the defendant was denying his title to the property and under the circumstances, to regard him as a tenant acknowledging the plaintiff as the owner of the house was not possible. Having regard to the facts and circumstances of that case, the Judges held that that suit must be regarded as a suit against a trespasser. That judgment, in our opinion, cannot help the respondent. If in this suit, the plaintiff is not able to establish that he is the owner and the defendant is a tenant, his suit would be dismissed. In our opinion it would be preposterous to compel the plaintiff to treat his suit as a suit against trespassers and make the plaintiff pay court-fee accordingly. For all the above reasons, the order of the lower court is set aside. The case will go back to the lower court for further trial. The petitioner will have the costs of this petition. Advocate's fee Rs. 30/-.

B/G.M.J.

Revision allowed.

A.I.R. 1953 HYD. 235 (Vol. 40, C. N. 114)

MISRA C. J. AND MANOHAR PERSHAD J.

Kishen Rao, Petitioner v. Mahboob Ali and another Respondents.

Writ Petn. No. 345/5 of 1951-52, D/-8-4-1953.

(a) Constitution of India, Art. 226 — Writ of certiorari when issued.

Where the order challenged is purely an administrative or an executive order the High Court is reluctant to issue any writ, but if the nature of the proceedings is judicial or quasi-judicial, a writ of certiorari will be issued, provided it is a fit case for the issue of the same. (Para 6)

(b) Constitution of India, Art. 226 — Judicial or quasi-judicial order — (Civil P. C., S. 9).

To constitute a judicial or quasi-judicial order, it must be necessary that the Tribunal should have to weigh the pros and cons before it can come to a conclusion. It would also have to consider facts and circumstances bearing upon the subject. If the determination or decision of the authority results in binding the subject so as to affect his right or impose a liability upon him, and if the exercise of the power by the authority is made dependent by the Legislature upon a contingency or a condition, which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then, the Court will come to the conclusion that there is a duty upon the authority not only to decide and determine but to decide and determine judicially. (Para 6)

Anno: C. P. C., S. 9 N. 53.

(c) Constitution of India, Art. 226 — Writ of Certiorari.

The grant of a Writ of Certiorari is discretionary in nature. It is refused if the proceedings appear to be vexatious and the applicant is not bona fide interested in the subject-matter of the application. (Para 9)

(d) Constitution of India, Art. 226 — Issue of Writ of Certiorari.

Under Art. 226 a Writ of Certiorari can be issued when the person or the Tribunal acts in excess of jurisdiction or fails to exercise jurisdiction which is conferred upon it or in the exercise of its jurisdiction contravenes principles of natural justice. (Para 10)

(e) Constitution of India, Art. 226 — Conferment of jurisdiction — (Civil P. C. (1908), S. 9).

Jurisdiction is not conferred on grounds of natural justice. It has to be specifically conferred by Statute and more so in the case of administrative bodies exercising Judicial or quasi-Judicial functions. Such bodies have to keep themselves strictly within the four corners of jurisdiction that is specifically conferred upon them, otherwise their orders become null and void. The fact that an officer has to keep law and order does not confer any jurisdiction to decide questions of title to property. (Para 10)

Anno: C. P. C., S. 9, N. 3.

Appa Rao, for Petitioner; Gopal Rao Ekbote and Aliuddin Ansari, for Respondents.

CASES CITED:

(A) ('50) AIR 1950 SC 222: 1950 SCR 621
(B) ('51) AIR 1951 Nag 38: ILR (1951) Nag 523

MANOHAR PERSHAD J.: This is a petition for the issue of a Writ of Certiorari under Art. 226 of the Constitution of India to quash the order of the Additional Collector, Gulbarga, directing that possession of the house may be given to one Yakub Ali.

(2) The facts which have given rise to this petition are that Mohamed Mahbub Ali made a complaint to the Civil Administrator that Tukaram transferred his house in favour of his brother Mohamed Ismail who is living jointly with him and the petitioner who is the son of Tukaram has no right to the said house, as the house fell to the share of Tukaram on partition. But taking advantage of the Police Action, he had forcibly taken possession of the said house in the month of September 1948. The Collector there-

upon issued a notice to the petitioner to appear and show his right to possession of the house by producing evidence. The petitioner appeared before the Collector and objected that he had no statutory authority to enquire into the allegations. This plea of the petitioner was rejected by the Additional Collector and the petitioner was directed to give possession of the house to the complainant, & on his refusal, the Additional Collector asked the District Superintendent of Police to evict the petitioner. Aggrieved by this order, the present petition has been filed for the issue of a Writ of Certiorari.

(3) In this petition it is contended first that the Additional Collector had no jurisdiction to enquire into the question of title to property and the order of the Additional Collector is 'ultra vires' and void. The second contention is that the order of the Additional Collector is based on the circular of the Civil Administrator, but this circular was never published in the Gazette nor has it been sanctioned by the Legislature; as such, it has no binding effect. Following up this contention, it is urged that it contravenes the provisions of Art. 191 of the Constitution of India. The third contention is that respondent 1 has no 'locus standi', to file a petition for possession against the petitioner.

(4) On behalf of respondent 1, Shri Gopalrao Ekbote, Advocate, in reply, contends that the conditions prevailing then were abnormal. The Collector was responsible for keeping law and order and accordingly he directed that possession of the house be given to Mohamed Munir, as he was of the opinion that Mohd. Munir was forcibly dispossessed during the Police Action. This order of the Collector, he contends, is an executive order and however illegal or 'ultra vires' the act may be this Court cannot issue any Writs. Reliance is placed on the case of —'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222 (A). The second contention is that the issue of a Writ of Certiorari is discretionary and the Court should be reluctant to issue such a Writ when the person who has come to Court has not come with clean hands. Reliance is placed on the case of —' Mohammad Ibrahim v. High Commissioner for India in Pakistan', AIR 1951 Nag 38 (B). The last contention is that no Writ can be issued where the proceedings are vexatious.

(5) A similar argument was advanced by Shri Narahari Sastri, the Advocate for the State.

(6) In order to appreciate the view points of the learned Advocate, we have to see first what the nature of the order of the Collector is whether it is judicial, quasi-judicial or administrative. It is true that if the order in question is purely an administrative or an executive order, this Court would be reluctant to issue any Writ, but if the nature of the proceedings is judicial or quasi-judicial, a writ of Certiorari would be issued provided it is a fit case for the issue of the same. The learned Advocate appearing for the respondent has very candidly conceded before us that if it is held that the order of the Collector is Judicial or quasi-judicial, a Writ of Certiorari could be issued. The tests for the determination of the question would, in our opinion, be:

(a) is there any duty cast by the Legislature upon the person or persons who is or are empowered to act, to determine or decide some fact or facts;

(b) is there some lis or dispute resulting from there being two sides to the question he has to decide; and

(c) is there a proposal and an opposition. To constitute a Judicial or quasi-judicial order, it must be necessary that the Tribunal should have to weigh the pros and cons before it can come to a conclusion. It would also have to consider facts and circumstances bearing upon the subject. In other words, the duty cast on the Tribunal must not only be to determine and decide a question, but there must also be a duty to determine or decide that fact judicially. If the determination or decision of the authority results in binding the subject so as to affect his right or impose a liability upon him, and if the exercise of the power by the authority is made dependent by the Legislature upon a contingency or a condition, which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then, the court would come to the conclusion that there is a duty upon the authority not only to decide & determine but to decide and determine judicially.

(7) In the case before us the Additional Collector issued the motion to the petitioner to appear and show his right to the possession of the house by producing evidence. This issue of the motion by the Additional Collector to the petitioner to appear and produce his evidence shows that there is a 'lis' or dispute which the Additional Collector had to decide. The dispute has been whether the subject should be deprived of his property or not. There are always two sides to the dispute. There is a proposal and an opposition, and there are equally pros and cons to be considered. The two sides are: the interest of the complainant Mohd. Ismail and others who require the property on the ground that Tukaram has sold the house and that they were rightfully in possession and have been forcibly dispossessed by Kishen. The interest of the other side, on the other hand, is that Tukaram had no right to sell the property and that he has the right to retain it. The Additional Collector has held that the petitioner has not produced any evidence and has failed to establish his right and title to the property and that he occupied the said house after the police action. Thus, it is clear from this, that there has been an adjudication on the matter. Such an act cannot be said to be a mere administrative or executive act. It is in our opinion, if not purely a judicial act, at least a quasi-judicial act. As the learned Advocate for the respondent has conceded that in case of a quasi-judicial or judicial act, a Writ of Certiorari could be issued, we do not wish to discuss in detail the ruling cited by the learned Advocate.

(8) After this, we turn to the second argument of the respondent which relates to the fact that the grant of a Writ of Certiorari is discretionary in nature and the Court should be reluctant to issue a Writ when the person who has come to the Court has not come with clean hands. In this connection, the learned Advocate drew our attention to the fact that the complainants were in rightful possession of the property and the petitioner taking advantage of the disturbed conditions in the wake of the Police Action, forcibly dispossessed him by taking the law into his own hands and when he has been ordered to be dispossessed by the Additional Collector, he has come to this Court in Writ proceedings which is clear to show that he has not come with clean hands. We are afraid we cannot accept this contention in toto.

(9) It is true that the grant of a Writ of Certiorari is discretionary in nature and it would be refused if the proceedings appear to be vexatious,

and the applicant is not bona fide interested in the subject-matter of the application. In the case before us, it cannot be said that the petitioner has not come to the Court with clean hands. Petitioner is the son of Tukaram, who is said to have transferred the property to the complainant's brother. The contention of the petitioner is that it is a joint family property. The contention of the complainant is that in partition the property fell to the share of Tukaram which is denied by the petitioner. It would thus appear that rightly or wrongly, the petitioner claims a right in the property and enters into possession, such an act of his could not be said to be an unclean or a vexatious act. It cannot also be said that he has no bona fide interest in the subject-matter.

(10) Now, we have to see if this is a fit case where a Writ of Certiorari could be issued. Under Art. 226 of the Constitution of India, a Writ of Certiorari could be issued when the person or the Tribunal acts in excess of jurisdiction or fails to exercise jurisdiction which is conferred upon it or in the exercise of its jurisdiction contravenes principles of natural justice. In the case before us, the contention of the petitioner is that the Collector had no jurisdiction at all. The contention of the respondents, on the other hand, is that the Additional Collector who is an executive officer possessed the requisite authority by virtue of Circular No. 1599 dated 18-6-49 and that he was acting within his jurisdiction. We find that the Additional Collector also relied on the said circular and held that he has jurisdiction, but this circular was neither produced before the Additional Collector nor has it been produced before us. We asked the learned Advocate for the respondents whether there was any such circular & if so they should produce it. They expressed their inability. The alleged circular which is said to give jurisdiction has not been produced & no other authority has been shown. We fail to understand how the Additional Collector can get jurisdiction. Jurisdiction is not conferred on grounds of natural justice. It has to be specifically conferred by Statute and more so in the case of administrative bodies exercising judicial or quasi-judicial functions. Such bodies have to keep themselves strictly within the four corners of jurisdiction that is specifically conferred upon them, otherwise their orders become null and void. The fact that he has to keep law and order does not confer any jurisdiction to decide questions of title to property. We are, therefore, constrained to hold that the order of the Additional Collector is beyond his jurisdiction and that he assumed a jurisdiction not conferred on him by law when passing the order under question.

(11) After giving a careful consideration to the above circumstances, we are of the opinion that this is a fit case where we should grant relief to the petitioner by issuing a Writ of Certiorari. The petition is therefore allowed; the order of the Additional Collector dated 24-3-1951 is hereby quashed as being 'ultra vires' and null and void. The petitioner would be entitled to costs which we assess at Rs. 50/-.

A/V.S.B. Writ granted.

A.I.R. 1953 HYD. 237 (Vol. 40, C. N. 115)

PALNITKAR

AND SURYANARAYANA RAO JJ.

Bhawandas and others, Appellants v. Kishenrao and others, Respondents.

Second Appeal No. 323 of 1356 Fasli, D/- 30-7-1951.

Suits Valuation Act (1887), S. 11 — Hyderabad Suits Valuation Act, S. 6 — Objection to jurisdiction in respect of previous suit raised in subsequent suit — Ex parte decree in previous suit operates as res judicata — Civil P. C. (1908), S. 11. AIR 1937 All 251, Rel. on. (Paras 2, 3)

Anno: Suits Valuation Act, S. 11 N. 15; Civil P. C., S. 11 N. 11, 19, 73.

D. M. Deshmukh, for Appellants; Govindrao Ardhapurkar and Govindrao Nagapurkar, for Respondents.

CASES CITED:

(A) ('37) AIR 1937 All 251: 169 Ind Cas 609
(B) ('25) AIR 1925 Lah 290: 6 Lah 105 (FB)
(C) ('37) AIR 1937 Cal 430: 172 Ind Cas 474

JUDGMENT: This second appeal relates to the applicability of S. 6, Suits Valuation Act, corresponding to S. 11 of the Indian Act.

(2) The suit was originally filed in the Munsiff's Court at Jintur for registration of a document. The suit was decreed ex parte and the document was registered in the office of the Sub-Registrar at Jintur. On the basis of that decree and the registered document the plaintiff filed a suit for possession of the property covered by the document. The advocate for the defendant urged that the Munsif at Jintur had no jurisdiction in respect of the first suit. The question now is whether the decision in the first suit is operative as res judicata even though it was an ex parte decision.

(3) Section 6 referred to above is quite clear on the point. The objection as to jurisdiction has to be raised either in the trial Court or in the appellate Court during the stages in the suit itself. The defendants not having chosen to appear, the principle of res judicata applies it being taken for granted that for purposes of application of the principle they did appear. We are fortified in our decision by a ruling of the Allahabad High Court in — 'Bisheshar Dayal v. Jafri Begam', AIR 1937 All 251 (A), where the Division Bench observed:

> "the objection as to jurisdiction must be deemed to have been raised and decided in the previous suit, as, had she appeared and taken objection, the Court would have decided it. Therefore applying the principle underlying S. 11, Civil P. C. and on grounds of equity, justice and expediency, she was estopped from maintaining that the Court in the previous suit had no jurisdiction to decide the suit."

In — 'Sardar Khan v. Aizha Bibi', AIR 1925 Lah 290 (FB) (B), Shadi Lal C. J. lays down:

> "The object of the Legislature in both cases (territorial & pecuniary) is the same, namely, that the defect of jurisdiction on territorial or pecuniary ground should not render proceedings in a case abortive if such objection was not taken at the earliest opportunity and there has been no consequent failure of justice."

In — 'Dwarakanath v. Hemangini Kar', AIR 1937 Cal 430 (C), it was laid down that: "the objection under S. 11, Suits Valuation Act, is to give finality to the decree in the suit". We may even add that the document was registered in the Sub-Registrar's Office at Jintur and even if this suit was filed in the Court which the defendants contend as being the

proper Court, the document would have been registered in the same Sub-Registrar's Office at Jintur; there is consequently no failure of justice.

(4) In the result we allow the appeal and the plaintiff's suit is decreed with costs throughout.

C/G.M.J. Appeal allowed.

A.I.R. 1953 **HYD. 238 (Vol. 40, C. N. 116)**

MOHD. AHMED ANSARI AND REDDY, JJ.

Chanda Kantiah, Petitioner v. Commr. E.P. T. Hyderabad, Respondent.

Petn. No. 363 of 1359F, D/-6-4-1953.

(a) Hyderabad Excess Profits Tax Act S. 5 (2)(c) — Intention of clause (c) — (Income-tax Act (1922), S. 4(3) (ia).)

The intention of cl. (c) of sub-s. (2) of S. 5 is that it exempts the income of the business as a whole where the entire business is run on behalf of the charitable institution and the whole of the profits of that business are utilised for the purposes of that charitable institution. There is no warrant to exempt only a portion of the profits of a business which goes to the share of a religious or charitable institution. (Para 2)

Anno: I. T. Act, S. 4 N. 21.

(b) Excess Profits Tax Act (1940), S. 4 — How different from Income-tax Act (1922), S. 4.

The principle of assessment under the E.P.T. Act is that the tax is on the profits of the business only, i.e., it is a tax on the business as a whole and not on the individual who owns the business. It is for this reason different from the Income-tax Act where the tax is assessed on the individual members of the firm. (Para 2)

Anno: E.P.T. Act, S. 4 N. 1; I.T. Act, S. 4 N. 1.

Gopalrao Ekbote, for Petitioner

CASE CITED:

(A) ('18) AIR 1918 PC 92: 46 Cal 189 (PC)

JUDGMENT: This is an application under sub-s. (3) of S. 48, E. P. T. Act, for directing the Commissioner, Excess Profits Tax to state a case on certain questions specified in the supplementary petition dated 20-2-1953 with respect to the IV C. A. P. The assessee who is a businessman declared his income for the IV C. A. P. but the Excess Profits Tax Officer, inter alia, added to his admitted profits, the profits from the commission business of the business styled as "Chanda Kantiah Commission Shop" and also of the business styled "Sudarshanam". The assessee contended that neither of these businesses belonged to him and that each should have considered as separate businesses for the purposes of the E. P. T. Act. It is further stated that Chanda Kantiah Commission Shop was constituted on 1-1-1943 consisting of three partners, viz., Andhara Vidyabhi Vardhini Sangam of the first part, Nooka Agiah (brother-in-law of the petitioner) of the second part and Gansi Ram of the third part with shares of 0-12-0, 0-3-0 and 0-1-0 respectively and contended that the petitioner conducted the business without any personal interest therein and merely on behalf of the said Sangam. With respect to the business styled "Sudarshanam" the assessee contended that the same belonged to the said Sangam, namely, Andhara Vidyabhi Vardhini Sangam on the one part and Sudarshanam, minor son of Nooka Agiah, on the other part. The petitioner claimed that he conducted this business also on behalf of the said Sangam. The business was commenced on 5-5-1944 and was closed on 4-11-1945. The Commissioner, E. P. T., held that the Chanda Kantiah Commission business which originally belonged to a firm consisting of the assessee and one B. Venkiah was, on the dissolution of the firm, taken over by Chanda Kantiah with Nooka Agiah and Ghansi Ram as partners. The allegation that the petitioner was conducting the business on behalf of the Andhara Vidyabhi Vardhini Sangam, a charitable trust, was negatived on the ground that the said trust was only in contemplation of the petitioner on that date. The Commissioner further pointed out in his order that no evidence has been led to show the exact point of time at which the Sangam had been made on 6-11-1944. The allegation that the existence of the Sangam even prior to the registration of it must be inferred from the fact that the petitioner actually purchased immoveable property on 17-8-1944 under a conveyance expressly reciting that he was doing so on behalf of the Sangam and from the fact that on 17-10-1944 a sum of Rs. 50,000/- was deposited in the Central Bank of India in an account opened in the name of the Sangam, has also been negatived by the Commissioner who held that at the most these circumstances indicate an intention of the assessee to make the said donation to the Sangam; but they are not by themselves conclusive of the factum of the existence or non-existence of the Sangam at the inception of the alleged partnership. He further pointed that the register containing resolutions of the Sangam produced before the Appellate Officer and before the Commissioner militated against the claim that the register was maintained in the regular course of business and even if the Register was accepted, it discloses that the Sangam took a concrete shape only on 6-11-1944. With respect to the partnerships the Commissioner held that there were no instruments evidencing the same and he stated that although the profits of Chanda Kantiah Commission Shop were actually ascertained as Rs. 13,669/- on 29-10-1943 no division of profits was in fact made and the first alleged distribution of profits took place only in respect of the period ending 3-12-1945 and necessarily at a date subsequent thereto and that the two alleged partners hardly exercised any authority, nor was there anything to show that there is community of interests of any of the partners either in relation to the transactions with third parties or in regard to the actual conduct of the business itself. The Commissioner further stated that one of the partners is a Sangam which had yet to come into existence and the other was a minor. Having regard to these facts he was of the view that the petitioner who was and continued to be a trader by calling and vocation, Nooka Agiah and Sudarshanam, the partners in each of the newly started businesses, were no other than the petitioner's own brother-in-law and his nephew respectively, the arrangements made with them fall clearly within the prohibition enacted by S. 11, E. P. T. Act, and are, therefore, to be ignored. He also negatived the contention of the assessee that at any rate the share of profits of the business credited to Sangam is liable to be excluded from assessment under the provisions of Cl. (c) sub-s. (2) of S. 5, E. P. T. Act. The further contention of the assessee that the sums claimed on behalf of Nooka Agiah and Ghansi Ram should be put on the footing of their being employees was also negatived. The Commissioner refused to state a case to the High Court on the ground that all these questions were questions of fact, because all that was to be done was to draw an inference on the

alleged facts as to whether the alleged partnership is true or not. He held on the authority of — 'Nafarchandrapal Choudri v. Shukur Shaikh', AIR 1918 PC 92 (A) that there was sufficient material on record to draw an inference against the assessee.

(2) The learned Advocate for the assessee submitted a supplementary petition on 20-2-1953 setting out the following questions of law on which he wanted the High Court to direct the Commissioner to state a case.

"1. Whether the inclusion of the profits of the Commission on business in the assessment of the petitioner is legal and correct?
2. Whether there is any evidence to sustain the finding of the department that the commission business was really the petitioner's business?
3. Whether, even assuming that the commission business was the petitioner's business, the petitioner is not entitled to the exemption provided in S. 5 (2) of the Dasturul Amal in view of the fact that the business was carried on on behalf of a charitable institution and the profits were applied solely for the purpose of the institution?
4. Whether the share of profits of Messrs. Nooka Augiah and Ghasiram should not be allowed as a business expenditure laid out wholly for the purpose of the business even assuming that the business was carried on by the petitioner himself?"

After hearing the arguments, it is quite clear to us that questions 2 and 4 are questions of fact and question 1 has a bearing on question 3. As far as the facts are concerned, they are not disputed and it thus remains to be seen whether in law the assessee is entitled to have the additions deleted from his income. Clause (c) of sub-s. (2) of S. 5, E. P. T. Act, analogous to S. 4 (3) (1) (a), Income-tax Act, is as follows:—

"(c) profits from business carried on on behalf of a religious or charitable institution when the profits are applied solely to the purposes of the institution and
(i) the business is carried on for fulfilment of primary object of the institution, or
(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution;"

Under the above provision the E. P. T. Act will not apply, if (1) the business is carried on on behalf of a religious or charitable institution, (2) the profits are applied solely to the religious or charitable purposes of the institution, and (3) (a) the business is carried on for the primary purposes of the institution, or (b) the work in connection with the business is mainly carried on by the beneficiaries of the institution. All the three conditions named above should concur before it can be said that the provisions of the Act do not apply to any such business. Mr. Gopalrao Ekbote for the assessee contends that the assessee is carrying on the business on behalf of the Sangam and that the profits of the Sangam are applied solely to the religious or charitable purposes of the institution. With respect to the third condition stated above, he contends that the wording of the Hyderabad E. P. T. Act is different to the wording of the analogous Indian Act where the business is to be carried on 'in the course of the carrying out of' a primary purpose of the institution. The underlined words, (here in ' ') according to him, intend that the business carried on by or on behalf of the charitable institution must have some relation to the primary purpose of the institution and the deletion of these words from the Hyderabad Act would show that it is not necessary that the business must be incidental to the primary purpose of the institution. Without the necessity of having to decide whether the change in the language noticed materially affects the result, it appears to us that on the facts admitted, it is necessary that the business should be carried on on behalf of a religious or charitable institution and the profits of that business should be applied solely to the purposes of the religious or charitable institution. We are unable to agree with the contention of the learned Advocate for the assessee that even where one of the partners of a partnership business is a charitable institution the business can be deemed to be carried on on behalf of the religious and charitable institution or that the profits of such business are deemed to have been applied solely to the religious or charitable purposes of the institution. Under sub-s. (3) of S. 14, E. P. T. Act, where two or more persons are carrying on the business jointly in the C. A. P., the assessment shall be made upon them jointly and in the case of a partnership, it may be made in the partnership name. The principle of assessment under the E. P. T. Act is that the tax is on the profits of the business only, i.e., it is a tax on the business as a whole and not on the individual who owns the business. It is for this reason different from the Income-tax Act where the tax is assessed on the individual members of the firm. In these circumstances if the partnership is an admitted one, then the business carried on by the partnership is the business of that partnership and not that carried on on behalf of a religious or charitable institution which is one of the partners and similarly the profits of that business cannot be said to be applied solely to the religious or charitable purposes of that institution, when such a charitable institution is only one of the partners with a share of profits therein. In contrast to this position S. 4 (3) (1), Income-tax Act, to which there is no analogous provision in the Hyderabad E. P. T. Act, provides for an exemption for so much of the income, profits or gains derived from property held in trust for religious or charitable purposes as are wholly or partly applied or finally set apart for application thereto. In our view the intention of Cl. (c) of sub-s. (2) of S. 5, E. P. T. Act is that it exempts the income of the business as a whole where the entire business is run on behalf of the charitable institution and the whole of the profits of that business are utilised for the purposes of that charitable institution. There is no warrant to exempt only a portion of the profits of a business which goes to the share of a religious or charitable institution.

(3) We agree with the Commissioner that in this case even assuming that the partnership has been proved, which the Commissioner has held not to have been proved, the primary pre-requisites for exempting the income of the Sangam are not present. That apart we cannot interfere in the findings of fact by the Commissioner that the business during the year of assessment is not that of the partnership as alleged, and it is that of the assessee. In the result we dismiss the petition with costs.

B/V.S.B.

Petition dismissed.

A.I.R. 1953 HYD. 239 (Vol. 40 C. N. 117)

SURYANARAYANA RAO J.

Mohommed Binsalim, Petitioner v. Fakira Mohommed, Respondent.

Review Petn. No. 91/4 of 1951, D/- 31-1-1952.

Civil P. C. (1908), O. 47 R. 1 — Review — Grounds for.

The fact that questions of law have been wrongly decided is not sufficient ground for granting a review of the order". Similarly, a different view of law subsequently taken by the same Court is no ground for review. AIR 1943 Oudh 136, Ref. (Para 3)

Anno: C.P.C., O. 47 R. 1 N. 16 Pt. 4.

Abdul Qayum, for Petitioner.

CASE CITED:

(A) ('43) AIR 1943 Oudh 136: 205 Ind Cas 269

ORDER: Review from the judgment of the Court of the Single Judge of the High Court, Hyderabad, dated 13-12-1950 in appeal No. 586/4 of 1358 Fasli on the file of that Court.

(2) In this review petition under O. 47, R. 1, Civil P. C., the petitioner contends that I should review my previous judgment in view of the fact that a subsequent Full Bench ruling of this Court had differed from my interpretation on S. 9 of the Hyderabad Money Lenders Act and has held, contrary to my opinion, that failure to hold a licence under the said Act at the time of money lending does not non-suit a money lender.

(3) I regret this is no ground for entertaining a review. "The fact that questions of law have been wrongly decided is not sufficient ground for granting a review of the order" Vide — 'Birendra Bikram Singh v. Bajrang Bahadur Singh', AIR 1943 Oudh 136 (A). Also, a different view of law subsequently taken by the same Court is no ground for review. The review petition is, therefore, rejected.

C/D.R.R. Petition rejected.

A.I.R. 1953 HYD. 240 (Vol 40, C. N. 118)

MISRA C. J. AND SRINIVASA CHARI J.

Laxminiwas Ganeriwal, Petitioner v. The Election Commissioner, Delhi, Respondent.

Writ Petn. No. 811/B/5 of 1952, D/- 20-1-1953.

(a) Representation of the People Act (1951), S. 100 (c) — Improper rejection of nomination.

Where the nomination paper of a candidate is improperly rejected, the presumption is that the improper rejection materially affected the result of the election. The fact that the candidate whose nomination paper was rejected acted as an election agent of one of the contesting candidates cannot displace the presumption. (Paras 1 and 2)

(b) Representation of the People Act (1951), S. 100 (c) — For purposes of cl. (c) Election Tribunal has merely to give 'prima facie' finding. (Para 2)

Vinayakrao Vaidya, for Petitioner.

MISRA C. J.: This is a petition under Art. 226 of the Constitution. The petitioner, Shri Laxminiwas Ganeriwal, was successful at the recent election from Ramnarayanpet Constituency of Medak District for the Hyderabad State Legislative Assembly, having polled 12,656 votes. The contest was against two others, Bhoomji Pather, respondent 4, who polled only 5800 votes and Partha Sarda Devi, respondent 5, who came last with 5108 votes. The election was declared void by the Election Tribunal at the instance of one Sri Laxmanrao, one of the voters in the Constituency. The order was based on two grounds:

(a) that the nomination papers of two candidates, Jagannath Reddy and Mahboob Ali were improperly rejected by the election officer, and

(b) that this rejection materially affected the result of the election.

It is argued on behalf of Sri Laxminiwas Ganeriwal that cl. (c) of S. 100 gave him the right to prove that the result of the election was not materially affected by the rejection of the nominations but he was not given an opportunity by the Tribunal to do so. It is contended, therefore, that the procedure adopted by the Court below affected him prejudicially and was in violation of the principles of natural justice. The record contains no evidence either one way or the other in respect of the second ground mentioned above. The finding of the Election Tribunal that the improper rejection of the nominations of the aforenamed persons materially affected the result was based on presumption in that behalf which, according to a number of decided cases, always arises where the electors are wrongfully deprived of the right of voting for particular candidates by reason of the rejection of their nominations. It is not contended that the decisions which lay down the above principle are erroneous. What is said is that if the petitioner was allowed to produce evidence, he would have succeeded in displacing the presumption by proving:

(a) that one of the candidates whose nomination paper was rejected acted as an election agent of one of the contesting candidates viz. Partha Sarada Devi, respondent 5, and since he lent his entire support to that lady, it should be inferred that even if he had contested the election he would not have obtained more votes than that lady did, and

(b) that in any event neither Jagannath Reddy nor Mahboob Ali, whose nomination papers were rejected, was as popular in the Constituency as the petitioner.

(2) It scarcely admits of any doubt that for the purposes of cl. (c) of S. 100, Representation of the People Act, 1951, the Election Tribunal has merely to give a 'prima facie' finding. Obviously it cannot determine the question involved with any degree of accuracy without a fresh election. It is of course possible to conceive of cases where an Election Tribunal might be able to say that the rejection would not have caused any difference to the result of the election but this case is not of that type. It appears to us that the first factor which the petitioner desired to prove, even if established, could not displace the presumption since it would have been impossible to predicate on its basis that the election would have been materially affected thereby.

On the second factor all that could be done was to examine the evidence of the opinions of the witnesses and that at best would have been merely speculative. There is nothing to indicate that the petitioner asked for an opportunity to produce evidence for the purposes of displacing the presumption or that the failure to afford him a chance of doing so has occasioned any failure of justice. The application must, therefore, be dismissed. We order accordingly.

A/V.R.B. Application dismissed.

A. I. R. 1953 HYD. 241 (Vol. 40, C. N. 119)

MANOHAR PERSHAD J.

Dangam Vanket Rajam, Appellant v. Peddi Gundla Rajiah, Respondent.

Second Appeal No. 613 of 1950, D/-27-1-1953.

Evidence Act (1872), S. 116 — Possession by tenant and estoppel.

In order to invoke the principle of estoppel embodied in S. 116 the real question to be decided is not whether the tenant was let into possession by the landlord but whether a valid tenancy has arisen. The tenant may show that no valid tenancy has been created between the landlord and himself because the lease was executed under a mistake or in consequence of a fraud, misrepresentation or coercion practised on him by the landlord. But in the absence of any such circumstances as would avoid a contract, the execution of a lease of a verbal agreement to hold as a tenant, would constitute a valid tenancy and bring in the estoppel. AIR 1935 Bom 144; AIR 1935 Oudh 385, Rel. on. Case Law Ref. (Para 6)

Anno: Evi. Act, S. 116, N. 3.

J. V. Narsing Rao, for Appellant.

CASES CITED:

(A) 36 Deccan LR 486
(B) ('21) AIR 1921 Nag 118 (1): 59 Ind Cas 707
(C) ('35) AIR 1935 Oudh 385: 154 Ind Cas 1029
(D) ('17) AIR 1917 Mad 789 (2): 40 Mad 561 (FB)
(E) ('85) 11 Cal 519
(F) ('25) AIR 1925 All 244: 79 Ind Cas 371
(G) ('28) 108 Ind Cas 182 (Lah)
(H) ('23) AIR 1923 Lah 483: 73 Ind Cas 450
(I) ('37) AIR 1937 PC 251: 64 Ind App 311 (PC)
(J) ('37) AIR 1937 Oudh 505: 171 Ind Cas 84
(K) ('35) AIR 1935 Bom 144: 155 Ind Cas 249

JUDGMENT: Dangam Venkat Rajam, plaintiff-appellant, filed a suit for ejectment and recovery of the rent against Peddi Gundla Rajia with the allegation that the defendant took the 'Gudsi' (hut) on rent from the plaintiff after executing a Rental Deed. The period of lease has expired but the defendant has neither returned the possession of the hut nor is he paying the rent. Defendant in his written statement admitting the execution of the lease, stated that the defendant executed the lease relying on the statement of the plaintiff that he is the owner of the Gudsi, but as a matter of fact, the plaintiff is not the owner of the Gudsi, so he is not entitled either to the possession or the rent. On these pleadings, certain issues were framed by the trial Court. Parties led evidence. On a consideration of the evidence, the trial Court decreed the plaintiff's suit. Defendant went in appeal which has been allowed. Hence this second appeal on behalf of the plaintiff. I heard the arguments of the learned Advocate on behalf of the appellant. The other side is not represented here.

(2) In this appeal it is argued that the appellate Court has erred in dismissing the plaintiff's suit by holding that the question of estoppel does not arise in the case, as it has not been proved on behalf of the plaintiff that possession was given to the defendant in furtherance of the Rental Agreement, and mere execution of the Rental Deed would not entitle the plaintiff to a decree. Following up the contention it is urged that estoppel exists in both cases: whether possession was given in furtherance of the agreement or the defendant was in possession before the Rental Agreement. Reliance is placed on the cases of — 'Dawood Khan v. Ahmed Sher Khan', 36 Deccan LR 486 (A); — 'Chandoo v. Parbhoo', AIR 1921 Nag 118 (1) (B); — 'Ramzani v. Bansidhar', AIR 1935 Oudh 385 (C) and — 'Venkata Chetty v. Aiyanna Goundan', AIR 1917 Mad 789 (FB) (D).

(3) In order to appreciate the argument of the learned advocate for the appellant, a reference to S. 116, Evidence Act is necessary which runs thus:

"No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

Section 116 does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between the landlord and the tenant. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. Two conditions are essential to give rise to estoppel: firstly possession of the property must have been given to the tenant and secondly such possession must have been taken with the permission of the landlord. The fact whether in a case where possession has not been given in furtherance of the contract but the person had been in possession before, the question of estoppel would arise or not is one which has to be considered. The English rule emphasises the fact of a tenant being let into possession by the landlord as an essential foundation of a tenant's estoppel.

(4) In the case of — 'Lal Mahomed v. Kallanus', 11 Cal 519 (E); — 'Faqir Mahomed v. Bhaggu', AIR 1925 All 244 (F); — 'Ramzan v. Arura Mal', 108 Ind Cas 182 (Lah) (G) & —'Rikhikesh v. Melaram', AIR 1923 Lah 483 (H), it has been held by the said Courts that a tenant is estopped to deny his landlord's title only if he was let into possession by the landlord and that there is no estoppel against the tenant if he was already in possession.

(5) A contrary view has, however, been taken in the case of — 'Krishna Prosad Lal v. Baraboni Coal Concern Ltd.', AIR 1937 PC 251 (I); — 'Mt. Sajjoo v. Basdeo Prasad', AIR 1937 Oudh 505 (J) and — 'Krishna Rao Raghunath v. Ghamon Ghama', AIR 1935 Bom 144 (K), that if the relation of the landlord and the tenant is established, the tenant is estopped from denying the landlord's title even though he was not put into possession by the landlord. Same is the gist of the authorities cited by the appellant and I do not wish to discuss them in detail.

(6) Thus after a careful consideration I am of the opinion that the real question to be decided in such cases is not whether the tenant was let into possession by the landlord but whether a valid tenancy has arisen. The tenant may show that no valid tenancy has been created between the landlord and himself because the lease was executed under a mistake or in consequence of a fraud, misrepresentation or coercion practised on him by the landlord. But in the absence of any such circumstance as would avoid a contract, the execution of a lease or a verbal agreement to hold as a tenant, would constitute a valid tenancy and bring in the estoppel. I am supported in

this view by the case of — 'AIR 1935 Bom 144 (K)' and — 'AIR 1935 Oudh 385 (C)'. The principle of estoppel applicable will be the same whether a man was let into possession or whether he has continued into such possession by specific agreement between himself and the landlord.

(7) In this case, a new tenancy may begin though the tenant has been in possession prior to that. The distinction between a case in which the tenant is let into possession by the person whose title he himself denies and that in which the person whose title he denies did not let him into possession, is that, in the former case the estoppel is complete, that is, a tenant cannot deny the landlord's title asserting that his tenancy continues while in the latter the estoppel is not complete in the sense that tenant may evade it by showing circumstances which would vitiate the agreement between him and the landlord. The estoppel exists in both the cases.

(8) Applying this test, to the present suit, I find that the Courts below have held the execution of the lease-deed to be proved. When the execution of the lease-deed is established, the fact whether possession was given in furtherance of the lease-deed or that the defendant was in possession before the execution of the lease-deed does not become so material as in both cases the doctrine of estoppel would become applicable.

(9) In view of this, I cannot uphold the judgment of the appellate Court. Appeal is, therefore, allowed; judgment of the first appellate Court is set aside and that of the trial Court restored. As the other side is not represented here, I do not wish to pass any order regarding the costs.

B/V.S.B. Appeal allowed.

A. I. R. 1953 HYD. 242 (Vol. 40, C. N. 120)

MISRA C. J. AND Md. SIADAT ALI KHAN J.

Polsetty Papayya, Petitioner v. Hon'ble Revenue Minister Yogi Raj, Respondent.

Writ Petition No. 180/5 of 1951-52, D/-10-4-1953.

(a) Tenancy Laws — Hyderabad Tenancy and Agricultural Lands Act (21 of 1950) Ss. 44 and 103 — Notice issued under Asami Shikmi Act — Saving of — (Tenancy Laws — Hyderabad Asami Shikmi Act (1 of 1354 F.), S. 7).

The words "that the notice should be issued after the commencement of the Act" apply to such proceedings as are instituted after the promulgation of the Act and have nothing to do with a notice issued under the Asami Shikmis Act, for the issue of such a notice is an act done under the Asami Shikmi Act and is saved by S. 103 of the Tenancy Act. (Para 2)

(b) Tenancy Laws — Hyderabad Asami Shikmi Act (1 of 1354 F), S. 24 — Application for ejectment — Time for applying.

A Tahsildar has jurisdiction to entertain an application for ejectment even before the lapse of one year from the date of notice to eject. (Para 2)

(c) Tenancy Laws — Hyderabad Asami Shikmi Act (1 of 1354 F.), S. 7 — "Giving notice."

The words "giving notice" refer to an act of the landlord and not to its receipt by the tenant. (Para 2)

Gopalrao Ekbote and Bhimsenachari Asarat, for Petitioner; B. V. Subbarayudu, and Sadashivrao, for Respondent.

ORDER: This is a petition for a Writ of certiorari. The petitioner Polsetty Papayya prays that the judgment of the Revenue Minister dated 5-10-1952 reversing the appellate decision of the Board of Revenue dated 24-11-1951 be quashed. The case was for ejectment of the petitioner from certain tenancy lands. The view taken by the Board was that the notice issued by Yogiraj landlord-respondent to the petitioner on 5-6-1949 under Section 7, Asami Shikmis Act was not sufficient and a fresh notice should have been issued under the Tenancy Act. Yogiraj's notice referred to above stated that he would require the land for his own cultivation from the next cultivation year and it called upon the petitioner to vacate the land.

On 9-6-1950, the Tahsildar forwarded the file to the Collector without passing any formal order in view of the circulars of the Revenue Department enjoining that no tenant who had a crop standing on the land should be dispossessed therefrom. He desired that the Collector should himself pass suitable orders. On 4-9-1950 the case was decided by the Collector. The tenant went up in appeal to the Board of Revenue and, as already stated, the landlord appealed to the Revenue Minister (as he then was) from the judgment of the Board of Revenue. On these facts the learned Advocate for the petitioner, Shri Gopalrao Ekbote pointed out that the Tahsildar did not enquire and decide the case in accordance with the provisions of S. 24 of the Asami Shikmi Act and that he could not have decided before the year was over. Basing upon this the learned counsel argued:

(i). Under Section 7 of the Act a notice of one year is required to determine the tenancy, that the notice given by the landlord to the tenant was dated 5-6-1949; that subsequently the respondent served another notice through the Tahsil on 22-9-1949 which was served on the tenant on 30-10-1949; that in this way the year was completed on 4-6-1950 or on 29-9-1950 if the dates of the issue of the notices are to be seen or on 29-10-1950 if the date of the serving of the notice were to be taken into consideration.

The respondent it is said applied to the Tahsildar for the ejection of the petitioner and the restoration of the possession of the land in dispute to himself before the close of the year on 16-5-1950; that this was a clear contravention of the provisions of Section 24 referred to above, for the right to eject the tenant arises only after the termination of a year from the date of notice; that not only the petition was filed much before the passing of the 12 months but the Tahsildar took action on it and in contravention of the provision of sub-sections 2, 3 and 4 of Section 24 if the Asami Shikmi Act, forwarded the file to the Collector without making an enquiry or passing an order; that the Tahsildar was bound to enquire and pass an order; that the Collector had only an appellate jurisdiction and that subject to the orders passed by him in appeal the Act gave finality to the order of the Tahsildar. It is urged that since the Collector had no right to decide the case as a court of first instance there was a clear violation of the provisions of the statutes from the very beginning.

(ii) The next contention of the learned Advocate was that as the application was under the Asami Shikmi Act there was only one appeal allowed to the Collector and possibly a revision petition to the Board of Revenue; but as the Tahsildar did not pass any order, an appeal was filed from the order of the Collector to the Board of Revenue and a second appeal to the Revenue

Minister; that this was in contravention of S. 24 of the Asami Shikmi Act; and that when the Revenue Minister was of the opinion that the old Asami Shikmi Act applied to the case he should have also held that he had no jurisdiction to hear the second appeal and should not have heard it. It is urged that the impugned decision dated 5-10-1951 was therefore without jurisdiction and a writ of 'certiorari' should be issued to quash it.

(iii) The third line of argument adopted by the learned Advocate on the basis of Section 24 of the Asami Shikmi Act was that since the right of the landlord to eject the tenant could mature only after the lapse of the year from the date of notice and the appeal of the Asami Shikmi Act by the Hyderabad Tenancy Act would have saved an accrued right only if a year had elapsed when the repealing Act came into force and since the year had not elapsed when the landlord applied or when the Tahsildar forwarded the file to the Collector, there was no accrued right and the repeal could not operate to save such a right. It was therefore said that the notice issued under the Asami Shikmi Act was of no effect. According to the learned counsel there should have been a fresh notice under Section 44 of the Asami Shikmi Act. In this connection, the learned Advocate emphasised also the words "giving notice" in Section 7 of the Asami Shikmi Act which he says means that the tenant should be informed of the landlord's intention to eject in the sense that the information should reach him one year before the accrual of the right. It is urged that as there is nothing to show that the tenant was served before 30th October 1949 the order of the Tahsildar and of the Collector was 'ultra vires' and could not be saved.

(2) We have carefully considered the above arguments of the learned Advocate. It is evident that the Hyderabad Tenancy Act 1950 passed on 10th June 1950 saves all acts done and all rights accrued before the promulgation of the Act under the Asami Shikmi Act which it repeals. The question therefore, is whether the giving of notice by the respondent landlord was not an act done in exercise of an accrued right and thus saved by the repeal. The Board of Revenue took the view that a fresh notice was required under Section 44 of the new Tenancy Act on the ground that S. 44 enacts that "a notice should be issued after the commencement of the Act". The Revenue Minister (as he then was) took the view that the words "that the notice should be issued after the commencement of the Act", apply to such proceedings as are instituted after the promulgation of the Tenancy Act and have nothing to do with acts done under the Asami Shikmi Act and, consequently, nothing to do with a notice issued under the old Act. The reasoning of the Revenue Minister appears to be correct, for there can be no denial that the issue of the notice was an act done under the Asami Shikmi Act and it is saved by Section 103, Hyderabad Tenancy Act.

The reasoning of the learned Advocate that a right of ejectment does not accrue before the lapse of the year appears to be fallacious. The issue of the notice has nothing to do with the accrual of the right. The right to eject the tenant in certain circumstances is a right of the landlord based on his ownership and the lease. Its exercise only was limited by certain conditions one of which was the passing of a year. In our opinion, there was no infringement of this condition even when the Tahsildar forwarded the file to the Collector, as he forwarded it on 9-6-1950, and the year of the notice was completed on 4-6-1950. Again, looking at the matter from another point of view, there was in fact no breach of the condition as no orders to eject the tenant were passed before the year was over since the Collector passed them for the first time on 4-9-1950. There is no prohibition to apply before the passing of the year so that the ejectment takes place after the year is over. Hence, the first argument of the learned Advocate that the Tahsildar had no jurisdiction to entertain the application before the year was out is incorrect.

Regarding the second contention, it should be noted that on the promulgation of the new Act, the landlord applied that his petition should be deemed to be under the new Act and the tenant did not object. In fact, it was the tenant himself who went to the Board of Revenue in appeal from the order of the Collector. In these circumstances, it cannot be denied that the proceedings were under the new Tenancy Act, and the second appeal to the Revenue Minister was fully competent. The contention of the learned Advocate on this point also is therefore, incorrect. There remains the contention that giving notice means also that the notice is served. The record shows that the petitioner purposely avoided taking notice, and even apart from this the words "giving notice" obviously would be referable to an act of the landlord and not to its receipt by the tenant. If the landlord acts as an ordinary prudent man would act in giving notice that should suffice. We are clearly of the opinion that there was no defect in the issue of the notice and also that the forwarding of the file by the Tahsildar to the Collector on 9-6-1950 was after the lapse of one year from the date of notice.

We have already stated that, even if it had been before the year, as the ejection was not taking place within the year, the condition of a year's notice was not in any way contravened. A careful perusal of the order of the Tahsildar will show that he has clearly expressed an opinion that the tenant should be evicted not only because he had sub-let without authority but also because he had spoiled the land by cutting the trees and digging pits and, if the Tahsildar did not pass any formal order it was because of the circulars that no tenant should be evicted who has a crop standing. The order of the Tahsildar, therefore, means that he came to the conclusion that the tenant should be evicted but desisted from enforcing it because of the circulars. The contention that there was no enquiry is incorrect; for the Tahsildar inspected the farms in the presence of the landlord. The tenant absented himself. Incidentally, the petitioner, it would seem, is not a tenant but only a rent-racketing landlord, as after sub-letting without authority he stays in Secunderabad. At the inspection, the sub-tenants presented themselves presumably on behalf of Polsetty Papiah. We think that the Tahsildar's conclusions and the decision of the Revenue Minister are not open to any valid objection.

(3) Parties have had substantial justice. The petition has no substance. We dismiss it with costs of the landlord respondent which we assess at Rs. 50/-

B/V.R.B.

Petition dismissed.

A. I. R. 1953 HYD. 243 (Vol. 40, C. N. 121)

PALNITKAR AND SURYANARAYANA RAO JJ.

Hansari Sabaiah, Petitioner v. Bhalchander Rao, Respondent.

Misc. Case No. 127/5 of 1951-52, D/- 19/2/52.

Houses and Rents — (Hyderabad) House Rent Control Order, R. 9 — Power of review.

The remedy of review must specifically be provided for, and as there is no provision for review in the House Rent Control Order, a review does not lie against the order passed by the Additional Collector in the exercise of his appellate powers. (Para 1)

Bhimsen Chari, for Petitioner.

ORDER: This is a petition for the issue of a Writ of Certiorari against the order of the Additional Collector. The short point for decision is whether a review lies against the order passed by the said Authority in the exercise of his appellate powers. Under Rule 9 of the House Rent Control Order an appeal can be filed against the order of the Rent Controller before the Collector. There is no provision in the said Rent Control Order for entertaining a review. The remedy of review must specifically be provided for, and as there is no provision for review in the House Rent Control Order, the review cannot lie. We are of the opinion that the order passed by the Additional Collector in review is without jurisdiction. Moreover, there were no fresh grounds for entertaining the review. We accept this Writ Petition and quash the order passed by the Additional Collector. His original order dated 7-5-1951 will stand.

B./D.H.Z. Petition allowed.

A. I. R. 1953 HYD. 244 (Vol. 40, C. N. 122)

MOHD. AHMED ANSARI AND
P. JAGANMOHAN REDDY JJ.

D. D. Italia and others, Petitioners v. Commissioner, Excess Profits Tax, Respondent.

Reference Nos. 334 and 335/C of 1359-F., D/-11-3-1953.

Income-tax Act (1922), S. 10 (2) (xv) — Capital expenditure — Test — (Excess Profits Tax Act (1940), Sch. 1, R. 1) — (Hyderabad Excess Profits Tax Act (1355 F.), Sch. 1, R. 1 (1) (x)).

Generally speaking from a commercial or accountancy point of view the term "capital" connotes an asset which is utilised for earning profits. Accordingly all expenditure which results in the acquisition of a permanent asset or assets with a view to its being used in the business for earning revenue is capital expenditure and any amount expended for increasing that asset or for adding to it in order to increase the capacity of the asset to earn more profits or reducing the cost of production is treated as capital expenditure. (Para 5)

Similarly all establishment and other expenses such as those incurred by way of repairs, replacements, renewals of existing assets which do not in any way add to their earning capacity but simply serve to maintain the original equipment in an efficient working order and generally all such expenses which are incurred in the conduct and administration of the business are properly chargeable to revenue expenditure. (Para 5)

The approach to the question whether an expenditure is of a capital nature depends on whether an advantage or right of an enduring nature has been accrued which is necessary for carrying on of the business and not for earning profits. Case law referred. (Para 17)

Held on the facts of the case, that the payment of three annas share of the profits agreed by the assessee who was carrying on business in toddy, made to a competitor in order to stop him from competing at the auction of toddy shops, was not an expenditure laid out as part of the process of profit earning, but it was a necessary expenditure for the acquisition of the business from which profits were expected. In other words, the amount agreed to be paid was not necessary for the carrying out of the contract but was necessary to obtain the contract itself and hence was a capital expenditure. (Para 20)

Further, once the profits come into existence which is a necessary condition for payment to the competitor they attract tax. AIR 1931 PC 165, Foll. (Para 20)

Anno: Income-tax Act, S. 10 N. 13; Excess Profits Tax Act, Sch. 1, R. 1 N. 1.

N. Narasimha Iyengar, for Petitioners; C. Rangachar, for Respondent.

CASES CITED:
(A) (1921) 90 LJPC 149: (1921) 2 AC 13
(B) (1926) 95 LJKB 336: 1926 AC 205
(C) (1932) 100 LJKB 504: (1932) 1 KB 124: 16 Tax Cas 253
(D) (1924) 61 Sc LR 185: 8 Tax Cas 671
(E) ('37) AIR 1937 PC 139: 1937-5 ITR 202
(F) (1887) 2 Tax Cas 239
(G) ('47) AIR 1947 Lah 82: 1946-14 ITR 66
(H) ('52) AIR 1952 Cal 414: 1949-17 ITR 317
(I) ('51) AIR 1951 Cal 149: (1951) 19 ITR 425
(J) (1910) 79 LJKB 563: 1910-1 KB 713
(K) ('40) 1940-8 ITR Sup 41
(L) (1926) 43 TLR 102: 11 Tax Cas 372
(M) ('33) 1933-1 ITR 129 (Cal)
(N) ('53) AIR 1953 Cal 368: 1952-21 ITR 38
(O) (1938) 1938-1 KB 477: 21 Tax Cas 400
(P) (1946) 1946-1 All ER 68: 27 Tax Cas 103
(Q) (1947) 27 Tax Cas 111
(R) ('28) 3 ITC 44 (Mad)
(S) (1901) 1901-2 KB 349: 4 Tax Cas 430
(T) ('31) AIR 1931 PC 165: 54 Mad 691 (PC)

P. JAGANMOHAN REDDY J.: The petitioners carry on the business of excise contractors in the sale of liquor and toddy. In compliance with a notice under sub-s. (1) of S. 13 the assessees declared profits of Rs. 52,728/- and Rs. 39,976/- for the second and third chargeable accounting periods respectively. It was contended before the Excess Profits Tax Officer that the business in liquor was carried on by the firm consisting of two partners, namely, D. D. Italia and Bankatlal and the business in toddy was carried on by another firm consisting of three partners, namely, the said two persons along with one Ramagoud. It was stated that though Ramagoud did not invest any capital he was taken as a partner and given three annas share as a consideration for his not bidding at the auction of the toddy shops. The assessees, therefore, claim that the toddy business was separate from that of liquor & the two firms are different for the purpose of assessment.

(2) During the course of the assessment proceedings the Excess Profits Tax Officer found that there was no documentary evidence in support of the claim that the toddy business was carried on by the alleged partnership consisting of the three partners referred to above. He accordingly held that the liquor and toddy businesses belong to one and the same firm consisting of the petitioner and assessed the entire profits derived from both liquor and toddy contracts. The said officer further treated the payment of three annas

share of profit to Ramagoud as capital expenditure and after disallowing some inadmissible amounts computed profits at Rs. 77,926/- and Rs. 59,115/- for the 2nd and 3rd chargeable accounting periods respectively. On appeal the Deputy Commissioner upheld the finding of the Excess Profits Tax Officer, but however reduced the assessments by Rs. 9,276/- and Rs. 8,460/- respectively for the 2nd and 3rd Chargeable Accounting periods due to certain inadmissible items added by the Excess Profits Tax Officer. Against the order of the Deputy Commissioner the petitioners filed a petition before the Commissioner under S. 20 and sub-s. (2) of S. 48, Excess Profits Tax Act contending inter alia, (i) that the business in toddy should be treated as a separate business belonging to the firm of D. D. Italia, Bankatlal and Ramagoud and should be separately assessed; (ii) in the alternative payment of 3/16th share of profit to Ramagoud should be allowed as business expenditure; and (iii) that the estimated sum of Rs. 5000/- & Rs. 6000/- claimed as expenses of Motor Lorry disallowed by the E. P. T. authorities in respect of the 2nd and 3rd chargeable accounting periods respectively should be allowed.

(3) One of the partners, D. D. Italia, made a statement on 11-9-1946 to the effect that Ramagoud was taken as a partner only in order to keep him from competing with them and that the said Ramagoud neither contributed any capital nor labour. The Commissioner of Excess Profits Tax refused to state a case on the ground that the answer to each of the three questions cannot but be a finding of fact pure and simple and that no question of law arose. The assessees, thereafter filed these two petitions under sub-s. (3) of S. 48, Excess Profits Tax Act relating to the 2nd and 3rd chargeable accounting periods respectively for directing the Commissioner to state a case on the said three questions of law. A bench of this High Court had, however, directed the Commissioner on 4-11-1952 to state a case only on the second of the aforesaid three questions, viz.,

"Whether the assessee is legally entitled to the deduction which he has claimed under the Excess Profits Tax Act."

In compliance with the aforesaid order the Commissioner after setting out the facts as aforesaid contends that the payment made by the assessees to a rival contractor with a view to prevent him from bidding at the auction is a capital expenditure; the money so paid not being for the purpose of working the contract but for obtaining it, cannot be deemed to be an expenditure laid out for the purposes of the business.

(4) The soundness of this contention depends upon the determination of the exact nature of the expenditure that has been incurred by the assessee when he agreed to pay to Ramagoud three annas share of the profits derived from the toddy contracts. If the expenditure so incurred is a revenue expenditure, it will be permissible to deduct it as an expense, but if it is an expenditure of a capital nature, then it is inadmissible. It may here be observed that an item of expenditure though wholly and exclusively laid out for purposes of business would nevertheless be inadmissible as an allowance if it is of a capital nature. The E. P. T. Act has nowhere defined capital expenditure. The use of the words "in the nature of capital expenditure" which occur in R. 1(1) (x) of Sch. I, E. P. T. Act does not assist us in the ascertainment of the nature of the expenditure.

(5) Generally speaking from a commercial or accountancy point of view the term "capital" connotes an asset which is utilised for earning profits. Accordingly all expenditure which results in the acquisition of a permanent asset or assets with a view to its being used in the business for earning revenue is capital expenditure and any amount expended for increasing that asset or for adding to it in order in increase the capacity of the asset to earn more profits or reducing the cost of production is treated as capital expenditure. Similarly all establishment and other expenses such as those incurred by way of repairs, replacements, renewals of existing assets which do not in any way add to their earning capacity but simply serve to maintain the orignal equipment in an efficient working order and generally all such expenses which are incurred in the conduct and administration of the business are properly chargeable to revenue expenditure.

(6) It is, however, necessary to examine some of the leading cases on the subject both Indian and English based on the analogus provisions of the respective Income-tax Act, to ascertain the tests to be applied for determining the nature of the expenditure. The tests which can be formulated from these cases, in our view, can neither be infallible nor is their application to the facts of any particular case easy for discriminating between expenditure which is and expenditure which is not incurred solely for the purpose of earning income, profits or gains.

(7) In —'John Smith & Sons v. Moore', (1921) 2 AC 13 (A) the appellant's father who carried on business as a shipping and coal agent for many years prior to his death, gave an option to his son under his will to take over on his death the assets of his business at a valuation but without paying anything for goodwill. The assets included certain forward coal contracts made by the father with several colliery owners for the delivery of coal by the latter in periodic instalments at prices which ultimately turned out to be very advantageous to the purchaser. These coal contracts were valued at £30,000. The appellant claimed, in arriving at the amount of the profits of the business chargeable to Excess Profits Duty under the Finance (No. 2) Act, 1915, in an accounting period from 7-3-1915 to 31-12-1915, to deduct this £ 30,000 as representing part of the purchase price of the stock in trade. A majority of the House of Lords consisting of Viscounts Haldane, Cave and Sumner, Viscount Finlay dissenting, held that the deduction was not permissible. Viscount Cave at pages 24 and 35 has dealt with this question in the following words:

"If the profits which are to be considered as the profits derived from the trading operations of the continuing firm of John Smith & Son, however constituted then the expenses to be deducted are those, and those only, which were incurred in the course of those trading operations and it is plain that the £30,000 deduction of which is claimed, does not fall within that description ..... The £ 30,000 was not paid by the firm for coal, nor was it paid by the trading firm as such for coal contracts; it was paid by John Ross Smith out of his private pocket as part of an overhead transaction under which the business with its assets and future profits passed into his hands, and it left the trading profits of the firm unaltered."

He further aptly illustrated the test in this manner:

"If I buy the crop of an orchard in a particular year for £ 20 and sell it for £ 40 my profit is only £ 20. But the profit of the orchard is

£ 40; and in comparing the produce of the orchard in that year with its produce in another year, it is the £ 40 and not the £ 20 that must be taken into account."

(8) In the case of 'British Insulated and Helsby Cables, Ltd. v. Atherton', 1926 A. C. 205 (B) the assessee company claimed to deduct a sum of £ 31,784, which was settled upon a trust to form the nucleus of the Pensions fund for its employees. The fund was constituted by a trust deed which provided that members should contribute a percentage of their salaries to the fund and that the company should contribute an amount equal to half the contributions of the members; and further that the company should contribute a sum of £ 31,784 to form the nucleus of the fund and to provide the amount necessary in order that past years of service of the then existing staff should rank for pension. This sum was arrived at by an actuarial calculation on the basis that the sum would ultimately be exhausted when the object for which it was paid was attained. On the winding up of the fund the whole amount was to be distributed among the members. The company, having paid the sum of £ 31,784 out of current profits, claimed that it was an admissible deduction in computing its profits for the purpose of assessment to income-tax for the financial year 1917-18. The House of Lords rejected the claim on the ground that the amount so given was in the nature of a capital expenditure.

(9) Viscount Cave, L. C., propounded a test which though not exhaustive is of considerable assistance in determining the nature of the expenditure in most cases. He said at pages 213 and 214 of his speech as follows:

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue, but to capital."

It may be observed with reference to this passage that the expenditure is to be attributed to capital if it is made for bringing into existence an "asset or an advantage", though it is not necessary that it should have this result. It has also to be observed that an asset or advantage is for the enduring benefit of the trade. As Romer, L. J., citing Rowlat J., pointed out in — 'Anglo Persian Oil Co v. Dale', (1932) 1 K. B. 124 (C), that by "enduring" is meant enduring in the way that fixed capital endures and not in the sense that for a good number of years, it relieves the business of a revenue payment. What is permanent and enduring would depend upon the facts of each case. The test that was formulated by Lord Clyde in — 'Robert Addie Sons Collieries Ltd v. Inland Revenue', (1924) 78 Tax Cas 671 (D) and which was approved by the Privy Council in Tata Hydro-electric Agencies Ltd. v. Commr. of Income Tax, Bombay Presidency and Aden', A. I. R. 1937 P. C. 139 at page 142 (E), is in these words:

"What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, 'Is it a part of the company's working expenses; is it expenditure laid out as part of the process of profit earning? ....Or, on the other hand, is it capital outlay? Is it expenditure necessary for the acquisition of the property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all? ' "

(10) In the case of — 'City of London Contract Corporation, Ltd. v. Styles', (1887) 2 Tax Cas 239 (F) where the assessee took over a business of another company which had a number of unexecuted contracts on hand and the taking over company paid a lump sum of money to the out-going company to obtain the benefit of those contracts claimed it as a deduction, Lord Justice Bowen in the course of the argument said this:

"You do not use it (that is, the money which had bought the contractual rights) 'for the purpose of 'your concern, (which means' for the purpose of carrying on your concern') but you use it to acquire the concern".

This case was approved by the House of Lords in — 'John Smith & Sons v. Moore (A)',.

(11) The learned Advocate for the petitioner has laid great stress upon three cases in support of the proposition that the amount spent by the assessee in paying off a competitor should not be regarded as capital expenditure, but revenue expenditure. The cases upon which he relies are: — 'R. S. Munshi Gulab Singh & Sons v. Commissioner of Income-tax, Lahore', A. I. R. 1947 Lah 82 (G) — 'Commissioner of Income-tax, Calcutta v. Piggot Chapman & Co., A. I. R. 1952 Cal 414 (H); and — Commissioner of Income-Tax, West Bengal v. Lahoty Brothers Ltd', A. I. R. 1951 Cal 149 (I). An examination of these and other cases would show that they deal with payments made for the purposes of increasing profits or minimising expenses or for buying off a competitor or for effecting a price control.

(12) In cases like — 'Guest Keen & Nettlefolds v. Fowler', (1910) 1 K. B. 713 (J); A. I. R. 1947 Lah 82 (G), expenditure incurred for avoiding price competition & for increasing profits was held to be revenue. Similarly in cases like — G. Seammell & Nephew Ltd v. Rowles', 1940-8 I. T. R. Suppl. 41 (K), — 'Noble v. Mitchell', (1926) 11 Tax Cas 372 (L), —'(1932) 16 Tax Cas 253 (C) 'Anglo Persian Oil Co. (India) Ltd. v. Commr. of Income Tax', 1933-1 I. T. R. 129 (Cal) (M), payments made to avoid losses have been held to be revenue expenditure. In both these categories of cases the basis for the decision appears to be to facilitate the carrying on of the business in a more profitable manner than would have been the case if the expenditure had not been incurred. Such payments have been allowed as revenue expenditure as they were not incurred to secure an asset, but to enable the business to continue and make greater profits. There is yet another category of cases where expenditure is incurred to buy off a competitor altogether, in which the expenditure has been treated as of a capital nature. There may be other cases which fall into other categories, but we do not propose to examine all such cases which are not immediately germane to the point at issue before us.

(13) We will now consider the cases cited by the learned Advocate for the appellant which are urged in support of the expenditure being treated as revenue expenditure. In — 'A. I. R. 1952 Cal 414 (H). where a firm of exchange brokers purchased the goodwill of another similar firm together with the four seats in the Calcutta Exchange Brokers Association on payment of annuity in accordance with the terms specified with the selling firm which agreed not to work as an exchange broker or compete with the transferee firm, it was held by Das and Mukherjee, JJ., that the payment of the annuity was a revenue expenditure. Cha-

kravartti, J. in — 'Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax, West Bengal', A. I. R. 1953 Cal. 368 (N) observed with reference to this case in the following words:

"With great respect I confess the reasoning of the decision is not at all clear to me, because after referring to a large number of Indian and English cases and particularly to — 'Collins v. Joseph Adamson & Co', (1938) 21 Tax Cas 400 (O) and — 'Associated Portland Cement Manufacturers Ltd. v. Kerr', (1946) 27 Tax Cas 103 (P) the learned Judges distinguish them and place their own decision on the sole ground that the payment of the annuity was contingent upon the receipt of brokerage from Ralli Brothers. What the last circumstance had to do with the payment, as made by the transferee firm, being of a capital or revenue nature is not easy to see. But, in any event even if the decision be right I feel in no way embarrassed by it in deciding the present case, where the payment is not to a person previously engaged in the same line of business, in consideration of his withdrawing therefrom".

We are in respectful agreement with these observations and at any rate in our view that decision is an authority on the facts of that case. In 'AIR 1951 Cal. 149 (I) one is not able to glean the full facts upon which the decision rests. Banerjee, J., observed at page 150 that the payment was made to keep the competitor out of the area where the assessee was carrying on its business. None of the leading cases upon the subject was considered by the learned Judges and the tests laid for distinguishing capital expenditure and revenue expenditure do not appear to have been considered. The learned Judge observed at page 429:

"It is not possible to lay down any hard and fast rule for distinguishing a capital expenditure from revenue expenditure. There is no standard for making the distinction, except the standard set up by the prudence and experience of merchants. But so far as this case is concerned we are not troubled with the distinction. In our view, the case is plain".

From these observations, with great respect, one is unable to gather the basis underlying the decision although later on, it appears from the observations that the amounts paid not being incurred towards acquiring an asset and for keeping a competitor out of the area, they were treated as revenue. It is, in our view, not safe to determine the nature of an expenditure for the purposes of fiscal laws on the prudence and experience of merchants. In this regard, it will not be out of place to cite the apt observations of Lord Greene, M. R. in the case of — 'Associated Portland Cement Manufacturers Ltd. v. Commissioner of Inland Revenue, (1947) 27 Tax Cas 111 at page 116 (Q) while dealing with the manner in which a trader might treat his asset in his account books or balance sheet and the manner in which for the purposes of the fiscal law it has to be treated. He said:

"Whether or not an item of expenditure is to be regarded as of a revenue or capital nature must in many, and indeed in the majority of cases, I should have thought, depend upon the nature of the asset or the right acquired by means of that expenditure. If it is an asset which properly appears as a capital asset in the balance sheet then that is an end of the matter. But it must never be forgotten that, an asset which may properly and quite correctly appear and only appear in the balance sheet as an asset, may be acquired out of revenue. There is nothing in the world to force a company or a trader who buys a capital asset to debit the cost of it to capital. Conservatively managed companies every day pay for capital assets out of revenue, if they are fortunate enough to have the revenue available. It is, therefore, no sufficient test to say that an asset has been paid for out of revenue, because the consequence does not by any means necessarily follow that it is an asset of a revenue nature as distinct from a capital nature. Similarly, there is nothing to prevent a company or a trader who has acquired a capital asset from refraining from placing any value on that asset in his balance sheet".

(14) The facts in the case of — 'R. S. Munshi Goolab Singh & Sons v. Commr. of Income tax, Lahore', (G) are distinguishable from the facts of this case. There the business was not started or acquired by the Kartha of the assessee joint family and he had incurred no expenditure in acquiring the concern. The arrangement which the printing press owned by the assessee firm made with the rival company of Messrs. Feroze Din and Sons and Messrs. Attar Chand Kapoor & Sons respectively was to secure full time work for the assessee's press and in the interests of its business the assessee arrived at an arrangement with his competitors and persuaded them to quote uniform prices in the tenders given to Government for printing and publishing work, in order to keep the press going by securing work so that it may show substantial turnover and thus earn profits after meeting the expenses of establishment and other costs incidental to the trade which were appreciably more than those of its competitors. On these facts, it was held by Mahajan, J., that the expenditure was in the nature of revenue expenditure. After examining the various cases and citing the observations of Viscount Cave, L. C. in the — 'British Insulated Cables and Halesby v. Atherton', (B) the learned Judge observed 'at page 90,' that the expenditure was not made once and for all and with a view to bringing into existence an asset or advantage for the enduring benefit of the trade. The expenditure was of a recurring nature arising in the course of the trade, only incurred with a view to enhance the annual profits and with no other purpose or object in view.

(15) It may be convenient at this juncture to examine the case of — 'A. S. Alaganan Chetti v. Commissioner of Income tax, Madras', 3 T. I. C. 44 (Mad) (R) where the assessee who was a carrying contractor paid Rs. 12,000/- to a rival contractor to induce the latter not to compete with him which resulted in his obtaining the carrying contract at a rate higher than the previous year, enabling him to make larger profits. It was held by Coutts Trotter, C. J., Beasley & Madhavan Nair, JJ., that the payment of this sum of Rs. 12,000/- was not a permissible allowance under S. 10 (2) (ix) (now corresponding to S. 10 (2) (xv), Indian Income-tax Act.

(16) This case is certainly an authority for the proposition that even though a sum of money has been expended to shut off a competitor which resulted in increased profits to the assessee, the amount so spent has been treated as a capital expenditure. This being the conclusion in the case, there would appear to be apparent conflict with the conclusions arrived at by Mahajan, J., in — 'R. S. Munshi Goolab Singh's case (G)', although the tests applied in both the cases have been drawn from some of the same leading authorities. It appears to us that these two cases are distinguishable and that in fact no conflict does arise. In 'Munshi Goolab Singh's case (G),' as has al-

ready been seen the arrangement was for price control and for ensuring that profits are made. Mahajan, J., 'at page 87' observed that the expenditure incurred is in the nature of an annual business expenses incurred to run the press to its full capacity. The manner in which this object was sought to be achieved was for the assessee to enter into an arrangement with the competitors for procuring the printing contracts which were necessary to keep the printing machines working and meet the working expenses and if need be to make profits. This, in our view, is quite different from the case where an amount has to be spent in order to buy off a competitor as a 'sine qua non' for obtaining a contract, which yields profit. The amount so expended is apart from the amount to be spent for working the contract once it is acquired. Supposing the management spends monies in procuring a device or a machine which reduces cost of production and thereby increases the profits, is the money so spent capital expenditure or revenue expenditure even though the amount may be paid from the revenue account itself? The answer to this question both on authority and principle appears to be that it is a capital expenditure. If expenditure incurred in acquiring such an asset or advantage which has the object of increasing profits can be treated as capital expenditure, then the buying off of a competitor with a view to eliminating him from the field of business for acquiring a right the exercise of which earns profits is an advantage enduring to the trade, in the sense that it endures as long as the contract endures, and as such should be deemed to be a capital expenditure. In the instant case there is no question of any established business between these assessees as in the case of 'Munshi Goolab Singh & Sons (G)'. The assessees stated in their petition before the Commissioner, Excess Profits Tax that it is always common in abkari contracts that the prospective bidders meet at the last moment and form and constitute themselves into an amalgam for carrying on the business provided they are successful in obtaining the contracts. In other words, individuals either tender for the contracts singly or along with other potential bidders as partners or buy off the most dangerous competitor with a view to securing such contracts whichever is advantageous. The very fact that the assessees tendered together for liquor and tried to set up a partnership between themselves and another person for toddy business would show that their modus operandi is to tender for toddy or liquor business in any particular district and in order to acquire it, buy off any potential competitor in the district where such tenders are given by agreeing to give a share in the profits to him. As we have already said there is no proof that the assessees carried on an established business together so as to raise an inference that the buying off of a competitor could be deemed only for the purpose of increasing their profits and bring it within the group of cases which treated such payments as a revenue expenditure. They buying off of a potential competitor in the circumstances set out above, did confer an advantage on the assessees and was an expenditure which acquired an asset for the purposes of earning profits.

(17) To apply the illustration analogous to that given by Lord Cave in — John Smith & Sons v. Moore (A)' to the facts of this case, it would appear that if each year I have to spend Rs. 500/- in order to obtain a contract which bring me a profit of Rs. 1000/- the profits are not Rs. 500/- but Rs. 1000/- and Rs. 500/- spent in getting the contract is to be treated as the capital expenditure. It would make no difference if that Rs. 500/- is spent in the initial outlay or in buying off a competitor or for any other like purpose which has as its object the procuring of the contract. In the case of ' (1938) 21 Tax Cas 400 (O)' a trade association of which the company was a member had bought the business assets of a member of the association with a view to prevent it from being acquired by an outside firm which was not a member of the association. The association when it acquired the business in question closed it down and got rid of the assets. The share in cash which the company obtained was the subject matter of the question at issue, the question being whether it was a profit which ought to be brought in for tax purpose. Lawrence, J., dealing with the case of — 'Southwell v. Sevill Brothers Ltd.,' (1900) 4 Tax Cas 430 (S) referred to by the Solicitor-General in support of his contention that in order that the expenditure should be of a capital nature, it is not necessary that there should be any tangible asset created by the expenditure, observed at page 409:

> "From that case I think it may be deduced that you cannot test the question whether the payment is properly a capital or a revenue payment by seeing whether it can be shown to be productive. Nor do I think that the argument of Mr. King, that what was produced by the expenditure in the present cases was impalpable or intangible or incalculable, is a sound argument for holding that it must be treated as of a revenue nature. In fact, in both the present cases the payments which were made had, as a result the removal or the prevention of a trade competitor, who would not have been subject to the rules of the association. In my opinion, those payments created for the members of that association advantages of an enduring nature, and, I think, of such an enduring nature as properly to be treated as capital, and not to be treated as revenue".

Lord Greene, M. R. in the case of — 'Associated Portland Cement Manufacturers Co., Ltd. v. Commissioner of Inland Revenue (Q)', citing with approval the above dictum observed that the buying off a potential competitor improves the value of the goodwill and thus brings into existence an advantage. It would appear from all these cases that the approach to the question whether an expenditure is of a capital nature depends on whether an advantage or right of an enduring nature has been secured which is necessary for carrying on of the business and not for earning profits.

(18) Their Lordships of the Privy Council in — 'AIR 1937 P. C. 139 (E), dealing with a case where the appellant company had taken over the obligation to make certain payments to third parties as part of a transaction whereby they acquired the agency business from Tata Sons Ltd., observed at page 209:

> "They were certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transaction in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business but that is not the statutory criterion. They must have taken this liability into account when they agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn

profits, that is, of the right to conduct the business and not for the purpose of producing profits in the conduct of the business".

(19) Their Lordships made distinction between this case where the assignees had to undertake a liability of the assignor as a part of the assignment to pay to third parties some amounts which were quite independent of any profits earned and the case of — 'Pondichery Railway Co. v. the Commissioner of Income-tax Madras', A. I. R. 1931 P. C. 165 (T) where profits had first to be earned and ascertained before any sharing took place. In the last mentioned case the Pondichery Company had to pay half of its net profits to the French Colonial office which it tried to deduct as an expenditure under Section 10, Indian Income-tax Act. Lord Macmillan put the whole matter tersely 'at page 170' in the following words:

"A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits."

Mr. Rangachari for the Excess Profits Tax Commissioner argues that on this basis also, since the amount payable to Ramagoud is to be determined by a reference to profits which must first be earned, the expenditure cannot be allowed as deduction. We think this contention to be sound.

(20) It appears to us that on an application of the aforesaid principles to the facts of this case, the agreement to give three annas share of the profits to Ramagoud in order to stop him from competing at the auction is not an expenditure laid out as part of the process of profit earning, but it was a necessary expenditure for the acquisition of the business from which profits were expected. In other words the amount agreed to be paid was not necessary for the carrying out of the contract but was necessary to obtain the contract itself, i. e., for the acquisition of the initial asset or advantage which endured as long as the contract or the earning asset or advantage lasted. This is also clear from the fact as found by the income-tax authorities that the losses were not to be shared. Further even on the application of the principle laid down in the 'Pondichery case (T)' once the profits come into existence which is a necessary condition for payment to Ramagoud, they attract tax. In this view of the matter our answer to the question is in the negative. The respondent will have his costs of the reference. This judgment will govern both the references.

B/D.R.R. Reference answered.

A. I. R. 1953 HYD. 249 (Vol. 40, C. N. 123)

MANOHAR PERSHAD AND SIADAT ALI KHAN JJ.

Kalaporla Saidulu, Appellant v. Hyderabad Government.

Criminal Appeal No. 1416 of 1951-52, D/- 11-12-1952.

Penal Code (1860), S. 364 — Abducting in order to murder.

Where the case of the prosecution is that the person abducted has been murdered by the abductor, there is no scope for the charge under S. 364. AIR 1947 Cal 35; AIR 1945 Cal 42; AIR 1940 Cal 561, Foll.

(Paras 3, 4)

Anno: P. C., S. 364 N. 1.

Gopal Krishnia, for Appellant; Mohd. Mirza, Govt. Advocate, for the Govt. of Hyderabad.

CASES CITED:

(A) ('47) AIR 1947 Cal 35: 47 Cri LJ 680
(B) ('45) AIR 1945 Cal 42: 46 Cri LJ 557
(C) ('40) AIR 1940 Cal 561: 42 Cri LJ 285

JUDGMENT: This is an appeal in a criminal case. The District and Sessions Court, Medak, by judgment dated 18-10-1950, has convicted and sentenced the accused Kalapopla Saidulu s/o Yelladu, to five years' rigorous imprisonment under s. 301 of the Hyderabad Penal Code corresponding to s. 364, Penal Code. We have heard the arguments of the learned Counsel for the accused Shri Gopal Krishnia and the learned Senior Government advocate, Shri Mohd. Mirza.

(2) The facts alleged by the prosecution are that on 21-1-1949, in the village of Karvapalli, Miryalguda Taluqa, Nalgonda District, one Venkateswar Rao, a Congress worker was forcibly abducted by the accused and his comrades five in number and that the said Venkateswar Rao was never heard of again. On these facts, the prosecution charge-sheeted the accused under Ss. 125, 301 and 243, Hyderabad Penal Code, corresponding to Secs. 149, 364 and 302 of the Indian Penal Code. Six witnesses were adduced by the prosecution. P. W. 1 is the Investigating Officer, P. W. 2 is the informant and P. W. 3 is the Patwari of the village, who has deposed that Venkateswar Rao was not heard of since he was forcibly abducted. P. Ws. 4, 5 and 6 Kotia, Kankamma and Yellia have been adduced as eye-witnesses to the fact of physical abduction. We have carefully considered the whole record. The learned District and Sessions Judge has held that there is no evidence of the murder but that the abduction of Venkateswar Rao has been proved and he has, therefore, convicted and sentenced the accused under Sec. 301 of the Hyderabad Penal Code.

(3) The learned Counsel for the accused has argued that this conviction and sentence is wrong in law. He has cited the marginally noted cases, namely, —'Akam Sheikh v. Emperor', AIR 1947 Cal 35 (A); —'Ijjatulla Akanda v. Emperor', AIR 1945 Cal 42 (B); — 'Upendra Nath v. Emperor', AIR 1940 Cal 561 (C), wherein it has been held that when the case of the prosecution is that the person abducted has been murdered by the abductor, there is no scope for the charge under s. 364 of the Indian Penal Code.

(4) We respectfully agree with the above proposition of law, and in the result, the conviction and sentence of the accused is set aside under S. 301, Hyderabad Penal Code. But the facts of the case reveal that the accused took part in unlawful assembly. Hence we convict him under S. 122, Hyderabad Penal Code, corresponding to s. 145, Indian Penal Code, and as the accused has already served two years' imprisonment, he may be released forthwith unless required under some other offence.

B/V.S.B. Ordered accordingly.

A. I. R. 1953 HYD. 250 (Vol. 40, C. N. 124)

MOHD. AHMED ANSARI AND
JAGANMOHAN REDDY JJ.

Vithal Reddy Rangareddy, Petitioner v. Hyd. Govt. through the Commr., E.P.T., Respondents.
Petn. No. 352 of 1359F., D/- 27-2-1953.

(a) Income-tax Act (1922), S. 13—Method of accounting — Value of closing stock — (Hyderabad Excess Profits Tax Regulation (1355 F.), S. 9).

If a particular method of accounting has been employed by the assessee, the Excess Profits Tax authorities are bound to accept that method of accounting unless by that method the true income, profits and gains cannot be arrived at. Having adopted a regular method of accounting the assessee cannot be allowed to change it or depart from it for a particular year or for part of that year or in respect of a particular transaction. AIR 1933 PC 198 (2), Rel. on. (Para 2)

It is obvious that the closing stock of a year is the opening stock of the next year and the assessee is free to adopt his own method of accounting. He may instead of valuing the stock at cost price or market price whichever is lower, regularly employ the method of valuing at cost both at the beginning & at the end of every year, irrespective of any fluctuations in the market value or only at market value irrespective of the question whether such valuation is higher than the cost. But if a trader puts into his account one value at the end of any accounting year, he should open the next year with the same value, as otherwise, a true state of affairs cannot be ascertained. Case law referred. (Para 4)

Anno: Income-tax Act, S. 13 N. 2, 3.

(b) Income-tax Act (1922), S. 66 (2) — Order for stating case — (Hyderabad Excess Profits Tax Regulation (1355 F.), S. 48(3)).

Where on undisputed facts the proposition of law arising therefrom is well settled, it would be otiose to direct the Commissioner to state a case. (Para 4)

Anno: Income-tax Act, S. 66 N. 4, 10, 16.

B. Subbarayudu, for Petitioner; N. Narasimha Iyengar, for Respondents.

CASES CITED:

(A) ('33) AIR 1933 PC 198 (2): 1933-1 ITR 219 (PC)
(B) ('25) AIR 1925 Mad 1242: 48 Mad 836
(C) ('30) AIR 1930 PC 56: 57 Ind App 21 (PC)
(D) ('39) AIR 1939 Cal 559: 1938-6 ITR 733
(E) ('46) AIR 1946 Mad 314: 1946-14 ITR 110
(F) ('49) AIR 1949 Mad 580: 1949-17 ITR 1
(G) ('53) AIR 1953 Mad 20: 1952-22 ITR 125

ORDER: This is a petition under sub-s. (3) of S. 48 of the E. P. T. Regulation for directing the Commissioner to state a case upon the following two questions:

(1) Whether the assessee is not entitled to put the market price on his closing stock and declare a loss if the market price showed a fall from the purchase price and whether it can be rejected by the Excess Profits Deputy Commissioner as notional?

(2) Whether the Excess Profits Tax Officer & the Deputy Commissioner can estimate the profit on improper grounds and guess work and impose a flat rate ignoring evidence on record?

The learned Advocate for the petitioner wishes to press only the first of these questions, as such this order will be confined only to that question.

(2) It is admitted by both sides that certain cotton seeds were purchased by the assessee prior to the V C. A. P. which was valued at the close of the IV C. A. P. at cost price. In the V C. A. P. the stock was opened accordingly at the cost price and the assessee valued the closing stock at the market rate which was lower than the cost price. The Excess Profits Tax authorities disallowed this method of valuation in view of the fact that in the previous C. A. P. the method adopted by the assessee was to value the opening and closing stock at cost price. Section 9, Hyderabad Excess Profits Tax Act, corresponding to S. 13, Indian Income Tax Act, states that

"profits shall be computed for the purpose of this Act in accordance with the method of accounting regularly employed by the assessee."

If a particular method of accounting has been employed by the assessee, the Excess Profits Tax authorities are bound to accept that method of accounting unless by that method the true income, profits and gains cannot be arrived at. Having adopted a regular method of accounting the assessee cannot be allowed to change it or depart from it for a particular year or for part of that year or in respect of a particular transaction. 'Feroz Shah v. Income Tax Commr. Punjab', A. I. R. 1933 P. C. 198 (2) (A). It was stated by Sir Coutts Trotter C. J., in the case of — 'Commr. of Income-tax Madras v. Chengalvaroya Chetti', AIR 1925 Mad 1242 at p. 1243 (B) that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value whichever be the less—a provision obviously intended to be in favour of the trader and which enables him more evenly to distribute his loss. Lord Buckmaster in the case of — 'Commr. of Income-tax, Bombay v. Ahmedabad New Cotton Mills Co., Ltd.', AIR 1930 PC 56 (C) made certain pertinent observations which explain fully the basis upon which the opening and closing stock has to be dealt with. He observed:

"The method of introducing stock into each side of a profit and loss account for the purpose of determining the annual profits is a method well understood in commercial circles and does not necessarily depend upon exact trade valuations being given to each article of stock that is so introduced. The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year, so that in case of any deviation from strict market values in the entry of the stock at the close of one year it will be rectified by the accounts in the next year..... If the method of altering both valuations is not adopted it is perfectly plain that the profit which is brought forward is not the real one. It may be more or it may be less, but it has no relation to the true profit if the stock is valued on one basis when it goes out without considering the value of the stock when it comes in. When, therefore, there is undervaluation at one end, the effect is to cause both a smaller debit in respect of the stock introduced into the next account and a larger sum for profits realized by the sale, change in market values being immediately reflected in the price obtained for the goods that are sold; in these circumstances to contend that

there should be undervaluation at one end and not at the other is to raise an argument which their Lordships cannot accept."

(3) In the case of — 'Chouthmal Gopalchand In re', AIR 1939 Cal 559 (D) Derbyshire C. J., who was delivering the judgment of the Bench after citing the above observations of Lord Buckmaster, held that when an assessee had adopted a system of valuation at cost price at the end of every year and opening of the next year the cost price of the assets must be taken to have been their value at the beginning of the account year. He further observed:

"In my opinion, as this stock was at all previous times valued at cost price and was brought into the balance sheet at the beginning of the year at its cost price, then when it was taken out of the assets of the company, it also should be valued in the same way at the cost price. The system of valuation which the assessees contend for would, it appears to me, have the effect of bringing into the accounts of the year a loss in respect of this stock which had not occurred during the year."

Lionel Leach C. J. and Patanjali Sastri J., in — 'Commr. of Income Tax, Madras v. Viswesaradas Gokuldas', AIR 1946 Mad 314 (E) and Rajamannar C. J. and Yahya Ali J. in — 'Commr. of Income Tax and Excess Profits Tax, Madras v. Messrs. Chari and Ram', AIR 1949 Mad 580 (F) have also held similarly. In the former case the assessee, a merchant, adopted as the method of accounting for income-tax purposes the practice of valuing his stocks at the cost price both at the beginning and at the end of the year. In the Samvat year 1995 the assessee opened the account with stocks valued at cost price and closed it with a valuation at the market price which was much higher than the cost price. The Income Tax Officer first accepted it for the said year, but later having discovered his mistake revised the valuation and assessed the assessee on the basis of the cost price of the stock both at the beginning and at the end of the year, which resulted in the addition of Rs. 24,855/- to the total income. It was held on these facts that in the circumstances of the case, the revision of the closing stock on the basis of the cost price, which was the method adopted by the assessee, was legal. In the recent case of — 'Asher Textiles Ltd., Tirppur v. Commr. of Income Tax and Excess Profits Tax, Madras', AIR 1953 Mad 20 (G), Satyanarayana Rao and Rajagopalan JJ., have further reinforced the same view.

(4) It is well to remember that the value of unsold stock in trade is necessary for the computation of profits or losses for any particular period for which such profits or losses are computed. The established principle of commercial accounting requires that in the profit and loss account of a merchant or in a manufacturer's business, the value of trading stock in hand at the beginning and at the end of the accounting year should be entered at cost or market price whichever is lower. It is obvious that the closing stock of a year is the opening stock of the next year and the assessee is free to adopt his own method of accounting. He may instead of valuing the stock at cost price or market price whichever is lower, regularly employ the method of valuing at cost both at the beginning and at the end of every year, irrespective of any fluctuations in the market value or only at market value irrespective of the question whether such valuation is higher than the cost. In our view it is quite certain and indeed clear law that if a trader puts into his account one value at the end of any accounting year, he should open the next year with the same value, as otherwise, a true state of affairs cannot be ascertained. The petitioner's Advocate seeks to draw a distinction on the facts of this case and contends that since the Excess Profits Tax Act was not extended beyond the V C. A. P. the assessee was entitled to close the stock at the market value, notwithstanding the fact that in the previous years he had valued the opening and closing stock at cost price. This according to him is a question of law upon which we should ask the Commissioner of E. P. T. to state a case. The distinction which is sought to be drawn by him is a distinction without a difference. Once it is admitted that the method of accounting which has been followed, is the one upon which the assessment has been based, then the question whether the V C. A. P. is the last taxable year or the E. P. T. Act has not been extended further, is not material and does not in any way affect the manner of computation of profits. Where on undisputed facts the proposition of law arising therefrom is well settled, it would, in our view, be otiose to direct the Commissioner to state a case. In this view of the matter, we think no useful purpose will be served by directing the Commissioner to state a case. The application is, therefore, dismissed with costs.

B/D.R.R. Application dismissed.

A. I. R. 1953 HYD. 251 (Vol. 40, C. N. 125)

PALNITKAR J.

Gayam Arugoba Reddi and others, Petitioners v. Maniklal Gupta, Respondent.

Revn. Petn. No. 345/4 of 1952, D/- 24-11-52.

Civil P. C. (1908), O. 17 Rr. 2 and 3 — "Hearing", meaning of.

Where a suit was stayed and kept pending for a certain date, awaiting result of earlier suit, it cannot be dismissed for default because the adjournment was 'sine die'. (Para 1)

Anno: Civil P. C. O. 17, R. 2, N. 6.

Rai Harinarayanlal, for Petitioners.

CASE CITED:

(A) ('36) AIR 1936 Lah 280: 161 Ind Cas 790

ORDER: The short point to be decided in this revision petition is whether the lower Court could have dismissed the case for default. The facts are that the plaintiff's suit was stayed by the lower Court as per order dated 4-12-1951 under the provisions of S. 10, Civil P. C. in view of another case between the same parties that was pending in the Court of the Sub-Judge, at Hyderabad. The lower Court on 4-12-1951 while ordering the stay of the suit stated that the suit be kept pending to 4-1-1952 and the result of the suit pending before the Sub-Judge be awaited. Parties admit that on this date the suit pending before the Sub-Judge was not disposed of and it is still pending. Though it was so pending the lower Court on 4-1-1952 by its order under revision dismissed the case for default. The question to be decided is whether 4-1-1952 was

fixed for the hearing of the case. I am of the opinion that the case was not fixed for hearing. It was only adjourned 'sine die' in order that the result of the suit pending before the Sub-Judge be known after which only according to the orders of the lower Court passed on 4-12-1951 the Court would fix a date for hearing. Manohar Dass v. Birandari Sheikhupurain', AIR 1936 Lah 280 (A), it was held that by the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider the question relating to the determination of the suit which would enable him to come to adjudication upon it. It is clear that 4-1-1952 was not fixed for considering any question relating to the determination of the suit in the lower Court. The order for dismissal for default is, therefore, incorrect. It must be set aside. I accordingly set aside the said order, direct the lower Court to take the suit on its file and proceed according to law. Costs will abide the result.

C/H.G.P. Order accordingly.

A. I. R. 1953 HYD. 252 (Vol. 40, C. N. 126)

MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

Kayani & Co., Petitioner v. Commr. of Sales Tax, Respondent.

Petn. No. 302/5 of 1952-53, D/- 18-3-1953.

(a) Sales Tax — Hyderabad General Sales Tax Act (14 of 1950), Sch. I Item 3 — 'Bread', meaning of — (Interpretation of Statutes — Intention of Legislature) — (Words and Phrases — Bread.)

When the Legislature uses a term relating to any article of food, the Court must construe it in the sense in which it is understood in this country and not elsewhere. In fact bread which is commonly labelled as a loaf of bread in European countries has a particular name in this country and is called a 'double roti' thereby distinguishing it from ordinary 'roti' which is synonymous with a loaf of bread. 'Bread' includes all forms or kinds of bread which is prepared by moistening, kneading, baking, frying or roasting meal or flour with or without the addition of yeast, leaven, or any other substance for puffing or lightening the articles. Therefore, shrimal and tanure-ki-roti is exempt from sales tax within the meaning of the Hyderabad General Sales Tax Act. (Para 2)

(b) Sales Tax — Hyderabad General Sales Tax Act (14 of 1950), Sch. I, Item 1 — 'Form' meaning of — (Words and Phrases — Form).

Articles prepared from exempted goods are not exempt. The word 'form' connotes a visible aspect such as shape or mode in which a thing exists or manifests itself, species, kind or variety. Rice in all forms would mean all kinds or variety of rice or species of rice, such as broken rice, kichidi rice, pichodi rice or rice flour etc. 'Rice' in item No. 1 of the exempted articles in Sch. 1, Hyderabad General Sales Tax Act dealing with cereals therefore means cooked rice or Biriyani or polao. AIR 1952 Hyd 191 and Misc. Petns. Nos. 56 of 1951 and 106 of 1951 (Hyd.), Ref. (Para 3)

Seethal Pershad, for Petitioner; N. Narsimha Iyengar, for Respondent.

CASES CITED:

(A) ('52) AIR 1952 Hyd 191: ILR (1952) Hyd 757

(B) ('51) Civil Misc. Petns. Nos. 56 of 1951 and 106 of 1951 (Hyd.)

JAGANMOHAN REDDY J.: This is a petition for the issue of an appropriate writ under Art. 226 of the Constitution directing the Sales Tax Commissioner not to collect tax on (a) double roti, Parata and Shirmal, (b) on cooked rice and (c) milk, milk products and (d) fresh eggs. The Advocate for the petitioner confines his case to the first two items only as it is said that the Sales Tax Commissioner has accepted the exemptions of item Nos. (c) and (d). Even with respect to item No. 1, it appears from the return made by the assessee which is shown to us by the learned Advocate for the Commissioner that exemption has only been claimed with respect to double roti, shirmal and Tanurki-roti, but parata has not been shown in the statement. The exemption claimed is under item 3 i.e. bread and item 1 i.e., 'all cereals and pulses including all forms of rice (except when sold in sealed containers)' of Sch. I, Hyderabad General Sales Tax Act, (14 of 1950).

(2) The first question that falls for determination is whether double roti, shirmal, parata and chapathi etc. can be called bread. The learned Advocate for the respondent states that except for double roti, the other articles are not covered by the term bread. He contends that bread which is the same as 'double roti' is prepared in the manner described in the Webster's International Dictionary, that is, it is an article of food made by baking the dough which is treated in some way to render it light or porus, as by mixing it with yeast or leven or baking powder. We are unable to accept this contention nor are we prepared to presume that the Legislature intended by the use of the word 'bread' in item 3 of Sch. I to exempt only that article of food which is prepared in European countries in the manner described in the dictionary. On the other hand, a reference to the Oxford Dictionary would show that in all European languages bread originally meant 'piece', 'bit', 'fragment (frustum)', which later has passed through the senses of 'piece of bread', 'broken bread', into that of 'bread' as a substance; while at the same time the original word for 'bread, loaf, panis' has been restricted to the undivided article as shaped and baked, the 'loaf'. When the Legislature uses a term relating to any article of food, we must construe it in the sense in which it is understood in this country and not elsewhere. In fact bread which is commonly labelled as a loaf of bread in European countries has a particular name in this country and is called a 'double roti' thereby distinguishing it from ordinary 'roti' which is synonymous with a loaf of bread. In this country, it is not unusual for a descriptive prefix to connote the kind of bread such as 'jawari-ki-roti', 'Bajre-ki-roti, Makai-ki-roti, Gheon-ki-roti', etc. In our view the intention of the Legislature is to include all kinds of bread which are consumed by the citizens of India, whether prepared in different ways or called by different names. There is no justification for limiting the scope of the term bread to a particular kind, such as 'double roti' as contended by the learned Advocate for the Commissioner of Sales Tax. The intention of the Legislature is further made clear in the amended Sch. I which was substituted by Act 28 of 1952, where the term 'bread' in item 3 thereof includes

'double roti, Chapathi, Kulcha and Shirmal'. This inclusive definition of the word 'bread' negatives the contention of the learned Advocate that by 'bread' is only meant 'double roti' and no other kind of roti. If his contention was right, there was nothing to prevent the word 'double roti' for the word 'bread' nor can we justifiably infer that the exemption is only meant for the very limited class of citizens who consume 'double roti' while levying the tax on vast majority of citizens who do not consume that article of food. We are, therefore, not impressed by the contention that articles for which exemption is claimed were not included in the word 'bread'. In our view, 'bread' includes and should include all forms or kinds of bread which is prepared by moistening, kneading, baking, frying or roasting meal or flour with or without the addition of yeast, leaven or any other substance for puffing or lightening the article. We are, therefore, of the view that shirmal and tanure-ki-roti is exempt from sales tax within the meaning of the Hyderabad General Sales Tax Act.

(3) As far as item 2 is concerned, it has been held in the case of — 'Sharfoji Rao v. Commr. of Sales Tax', AIR 1952 Hyd 191 (A) and in the case of — 'Hussain Hasan Hashmi v. Hyderabad State', Civil Miscellaneous Petitions Nos. 56 of 1951 and 106 of 1951 (Hyd.) (B) that articles prepared from exempted goods are not exempt. In the first case ready made clothes made from exempted cloth and in the second case Idli, a preparation from rice are exempt. The learned Advocate for the applicant has laid much stress on the words 'all forms' prefixed to 'rice' in item 1 of the exemption and contends that the intention is to include all preparation from rice. This contention to our mind is untenable. The word 'form' connotes a visible aspect such as shape or mode in which a thing exists or manifests itself, species, kind or variety. Rice in all forms would mean all kinds or variety of rice or species of rice, such as broken rice, kichidi rice, pichodi rice or rice flour, etc. In this view of the matter we find no justification in holding that 'rice' in item No. 1 of the exempted articles in Sch. 1, Hyderabad General Sales Tax Act dealing with cereals should be interpreted as meaning cooked rice or Biriyani or polao.

(4) In the result, we direct that a Writ of Mandamus be issued to the Sales Tax Commissioner not to collect Sales Tax on double roti, Tanure-ki-roti and Shirmal as in our view it is included in the term 'bread'.

B/H.G.P. Order accordingly.

A. I. R. 1953 HYD. 253 (Vol. 40, C. N. 127)

SIADATALI KHAN J.

Abugunda and others, Petitioners v. Devgunda, Respondent.

Revn. Petn. (Cri.) No. 425/6 of 1952-53, D/- 25-2-1953.

Criminal P. C. (1898), Ss. 146, 145 — Scope (Hyderabad Criminal P. C., S. 148).

It is undisputable that when the Magistrate comes to the conclusion that there is no likelihood of breach of peace, the only way he can do is that he should return the possession of the land to the party from whom it was taken. But where the police did not prepare a panchanama at the time of taking possession of land in the Court's custody and therefore the Magistrate proceeded to consider the evidence and came to the conclusion that at the time of the order or two months prior to it, the possession of neither party was established, his direction that the land be kept in the possession of the Court and parties to resort to a Civil Court was appropriate. A. I. R. 1951 Nag 201, Rel. on. (Para 2)

Anno: Cr. P. C., S. 146 N. 3; S. 145 N. 37, 38.

Jehangir Ali and Amanullah, for Petitioners; J. V. Narsingrao and K. B. Swamy Gupta, for Respondent.

CASES CITED:

(A) 6 Nazaer-e-Osmania 100
(B) 5 Nazaer-e-Osmania 240 (FB)
(C) ('51) AIR 1951 Nag 201: 52 Cri LJ 1

ORDER: This is a revision petition against the order of the Munsiff Court, Bhodan, dated 19-8-1952 by which the land in dispute has been taken in possession of the Court and the parties directed to resort to a civil Court. Against this order the revision petition has been filed and I have heard the arguments of the learned advocates of the parties, Shri Amanullah and Shri K. B. Swamy Gupta.

(2) The learned counsel for the revision-petitioners argued that when the Magistrate had come to the conclusion that there was no likelihood of breach of peace, the only thing he could do was that he should have returned the possession of the land to the party from whom it was taken. No one can dispute this proposition. The learned Magistrate was himself aware of it as it appears from the statement in the judgment that unfortunately the police did not prepare a panchnama at the time of taking possession of the land in the Court's custody. In the circumstances he proceeded to consider the evidence in the case and came to the conclusion that at the time of the order or two months prior to it, the possession of neither party is established. Evidently, this conclusion after the finding that there was no likelihood of breach of peace cannot be supported; for having cancelled the preliminary order under sub-s. (1) of S. 148, H. Cr. P. C. he could not go on to determine the possession at the date of the order or two months prior to it. But it should be noted that this conclusion was only a means to an end and was not an end in itself. It was for the purpose of determining from whose possession the land was attached. And cl. 5 of S. 148 enacts that when there was no likelihood of breach of peace, the Magistrate should from the evidence adduced in the case determine the possession of the party. What the Magistrate has done, is, in my opinion, nothing more than that; and as he could not come to a conclusion on the evidence adduced, he directed that the land be kept in the possession of the Court. In the circumstances, I do not see any reason to interfere.

It has been laid down in — '6 Nazaer-e-Osmania 100' (A) and — '5 Nazaer-e-Osmania 240 (FB)', (B) that when there is no likelihood of breach of peace, the jurisdiction of the Magistrate comes to an end and he cannot proceed to take evidence to determine the possession of the parties. In the circumstances, as already stated, the only thing the Magistrate could do was to determine from the evidence adduced the possession at the time of the order, and failing to reach a conclusion, continue the attachment. This view is borne out by — 'State v. Sheoratan

Singh', AIR 1951 Nag 201 (C) where it has been held that:

"Where the Magistrate acts under sub-s. (5) and cancels the preliminary order passed under sub-s. (1), there would be nothing wrong if he passes an incidental order cancelling the order of attachment as well. It is but right that when the jurisdiction to act under the section is found wanting the Magistrate should restore the status quo ante. When it is not possible to determine the status quo ante because of the difficulty in determining from whom the property was attached, the appropriate order to pass is to retain the property in the custody of the Court and direct the parties to have recourse to a civil Court to obtain possession of the property."

Hence, as already stated above, there is no substance in this revision petition, and it should be dismissed. I may note that the provisions of S. 148, sub-s. 5, Hyderabad Criminal Procedure Code correspond more or less to those of sub-s. 5 of S. 145, Indian Criminal Procedure Code. I may note further that the learned counsel for the revision-petitioners argued from — '6 Nazaer-e-Osmania 100', (A) that in the last lines of the judgment it is laid down that the Magistrate should determine the possession of the party from whom the land in dispute was attached. This is so, but it can only mean that the Magistrate should determine from the record already before him and should not proceed to take further evidence as no jurisdiction for the same remains with him.

(3) Order accordingly.

C/H.G.P. Order accordingly.

A. I. R. 1953 HYD. 254 (Vol. 40, C. N. 128)

MOHD. AHMED ANSARI AND
JAGANMOHAN REDDY JJ.

Dayaram Surajmal, Petitioner v. Commr. E. P. T., Hyderabad, Opposite Party.

Reference No. 279 of 1951-52, D/- 19-3-1953.

Excess Profits Tax Act (1940), Ss. 4 and 2(5) —Dividends accruing from shares of Company.

The word "business" connotes a fundamental idea of the continuous exercise of an activity. Carrying on business can only exist where there is a succession of acts. The performance of a single act apart from special circumstance is not enough, even though it may result in gains or profits. Thus, the holding of property or securities cannot amount to a business within the meaning of S. 2 (5). Hence, dividends accruing to a firm from the holding of shares of a company cannot be deemed to be an income of a business when these accrue without any activity on the part of the assessee firm. AIR 1932 PC 138; AIR 1933 Bom 422, Foll. (Paras 8, 9)

C. Rangachari, for Petitioner; N. Narsimha Iyengar, for Opposite Party.

CASES CITED:

(A) ('32) AIR 1932 PC 138: 59 Ind App 206 (PC)
(B) ('33) AIR 1933 Bom 422: 57 Bom 651
(C) ('44) AIR 1944 Lah 287: ILR (1945) Lah 43 (FB)

JUDGMENT: This is a reference on the application of the assessee under sub-s. (3) of S. 48, Excess Profits Tax Act for directing the Commissioner, E. P. T., to state a case in respect of the assessment for the IV C. A. P. The petitioners are a firm of six partners carrying on business in groundnut oil, cotton ginning and also in stocks and shares. In compliance with the notice under S. 13 (1), E. P. T. Act, they filed a return for the IV C. A. P. declaring profits of Rs. 1,59,052/- after adjusting the profits pertaining to the standard period. During the course of the assessment it appeared that there was a dividend account in the Secunderabad Branch books which had a credit balance of Rs. 57,041/- out of which Rs. 52,500/- represented dividends received on the shares of the Vazir Sultan & Co., Ltd. The petitioners transferred the said amount to the Head Office account at Gulbarga and did not include it in the profits returned by the petitioners, who explained that as the branch office at Secunderabad which was dealing in stocks and shares had some surplus money with them, the Head Office at Gulbarga advised the branch office to invest it in the shares of the Vazir Sultan & Co. which was effected by transferring the shares already held by the branch to the Head Office account. The assessee contended that since the dividend of Rs. 52,500/- received on account of the shares constituted income from investments, it did not attract liability to Excess profits tax. The Excess Profits Tax Officer, however, disallowed this contention and held that inasmuch as the branch at Secunderabad was in stocks and shares and as there was nothing to show that the purchase of shares in question was an investment at the instance of the Head Office the dividend of Rs. 52,500/- was not income from investments, but profit arising in the course of business carried on by the petitioners and that therefore it was liable to be taxed. He accordingly added this amount to the profits returned and after estimating the income from oil business he computed the total assessable income at Rs. 4,54,321/-.

(2) The Deputy Commissioner on appeal gave some relief in respect of some of the profits received in the oil business and also in the computation of the capital, but disallowed the claim of the petitioners regarding the sum of Rs. 52,500/- representing the dividends on shares of the Vazir Sultan & Co. Ltd. Aggrieved by the order of the Deputy Commissioner, the assessee filed a petition under Ss. 20 and 48(2), E. P. T. Act before the Commissioner seeking revision of the assessment made on it and in the alternative to state a case to the High Court on two questions of law arising out of the Deputy Commissioner's order, one relating to the estimate of the yield of oil and the other relating to the treatment of the dividend from investments as profits from business.

(3) The Commissioner, however, dismissed the petition under S. 20 and refused to state a case to the High Court under S. 48(2), as in his opinion the points raised by the assessee did not involve any questions of law. Against these orders the assessee has applied under sub-s. (3) of S. 48, E. P. T. Act to the High Court for directing the Commissioner to state a case. It appeared to us when the case came up for admission that the question relating to the yield of oil and cotton seeds did not involve any question of law, but with respect to the second question viz., "whether the addition of Rs. 52,500/-

being dividend of Vazir Sultan & Co., in the income of the Secunderabad Branch is valid in law", we were of the view that a legal question was involved. Consequently we directed the Commissioner by our order dated 9-8-1952 to state a case on the said question.

(4) It appears to us from the statement of the case filed by the Commissioner that during the accounting year the Secunderabad Branch of the petitioners' firm collected the accrued dividends on shares of the Vazir Sultan & Co., Ltd., amounting to Rs. 52,500/- and duly credited the same to the dividends account along with the other dividends. Later, however, the amount of Rs. 52,500/- was transferred to the head office account and debited to the dividends account, while the balance in the dividends account was taken to the Profit and Loss Account. The petitioners' case before the E. P. T. authorities was that in the middle of the III C. A. P. the head office desired the branch to invest in shares a portion of the surplus funds lying to the credit of the said account, that instead of purchasing shares in the local market, the Secunderabad Branch transferred their holdings of Vazir Sultan & Co., Ltd., shares to the extent required to the Head Office debiting the value thereof to the Head Office account. It was therefore, urged that the dividends collected on these shares represent income from investments as distinct from income from business in shares. The Commissioner, however, observes as follows:

> "Admittedly the Secunderabad Branch has been and still carries on business in stocks and shares and in the face of this admission, the contention that the transfer of these shares to the Head Office account was purely by way of investment has to be established beyond reasonable doubt."

It appears that these shares were held by the Secunderabad Branch even prior to the III C. A. P. and the Commissioner, on the ground that the cost of these shares was not debited to the Head Office account, nor the shares transferred till the end of III C. A. P., came to the conclusion that this action was tainted with suspicion and attracted the provisions of S. II of the E. P. T. Act. He further observed that

> "in the absence of any convincing evidence that these shares in question were the property of the Head Office and that the Head Office directed the Branch to collect the dividends thereon, it is to be concluded that the shares belonged to the Secunderabad Branch alone and as the Branch admittedly purchased them in course of its business in stocks and shares, the dividends thereon represent profits from business and not income from investments".

He further held that there was no justification in treating the business at Secunderabad as a separate business and held that the business in stocks and shares is deemed to have been carried on by the firm through a branch.

(5) The whole question in this is not whether the amount of Rs. 52,500/- received on the shares of Vazir Sultan & Co., Ltd., belonged to the Secunderabad Branch or should be treated as belonging to the firm,, but whether the said amount can be treated as profits of a business for the purposes of the E. P. T. Act. Admittedly these shares were held by the Secunderabad Branch even prior to the III C. A. P. and had not been sold at the time of the assessment. Even if the Secunderabad Branch was doing business in shares, that is of buying and selling shares of forward business in shares, the profits of such a business can only arise from the difference in the purchase and sale price of the shares. It is not the case of the Commissioner that the Vazir Sultan shares which yielded the dividend of 52,500/- were sold but his case is that as the firm was dealing in shares, any dividends accruing on any shares so purchased and held would be deemed to be income from a business taxable under the Hyderabad E. P. T. Act.

(6) The charging section of the Excess Profit Tax is S. 4 which is in these terms:

> "Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as 'excess profits tax')."

and envisages the charge of an excess profits tax accruing to the rates specified therein for the several chargeable accounting periods mentioned therein.

(7) The section imposes the charge to Excess Profits Tax on the amount by which the profits of any business to which the Act applies during any chargeable accounting period exceed the standard profits, the standard profits being computed in accordance with the provisions of Sch. 1 to the Act in respect of the standard period elected under S. 6 thereof. The term 'business' has been defined under sub-s. (4) of S. 2 in the following words:

> " 'business' includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts:
>
> Provided that (i) where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purposes of this definition to a business carried on by such company or society."

It is contended by Mr. Rangachari for the assessee that the firm of Dayaram Surajmal was not carrying on any business in shares to which the Act applied and if the operations of the Secunderabad Branch are deemed to be the operations of the whole firm, even then the dividend of Rs. 52,500/- cannot be deemed to be the income from a business within the meaning of sub-s. (4) of S. 2 and at any rate the proviso to the said sub-section does not apply because (a) the functions of the firm have not been shown to consist wholly or mainly in the holding of investments or other property and (b) nor has it been shown that such holding was by a company or society incorporated by or under any enactment.

(8) It appears to us clear that the proviso to sub-s. (4) of S. 2 is inapplicable to this case, on the admitted facts of the case, nor does the learned Advocate for the Income-tax Authorities press his arguments on this point. For the purposes of the Excess Profits Tax Act, it must be shown that the income proposed to be taxed is income from business within the meaning of S. 4 read with sub-s. (4) of S. 2, Excess Profits Tax Act. The word business' as observed by their Lordships of the Privy Council in the case of —'Income Tax Commissioner v. Shaw Wallace and Company', AIR 1932 PC 138 at p. 141 (A), dealing with an analogous provision in S. 2(4), Indian Income-tax Act, connotes a fundamental idea of the continuous exercise of an activity; or in the language of Beaumont, C. J., in the case of — 'Commissioner of Income-tax, Bombay v. Currimbhoy Ebrahim & Sons, Ltd.', AIR 1933 Bom 422 (B), that

> "carrying on business can only exist where there is a succession of acts and the performance of a single act apart from special circumstance is not enough, even though it may result in gains or profits".

It is needless for us to further examine in detail the case-law cited at the Bar relating to what constitutes a business, as in our view it is a clear proposition of law that the holding of property or securities cannot amount to a business within the meaning of sub-s. (4) of S. 2, Excess Profits Tax Act. The mere fact that a proviso has been added to the said sub-section for taxing an income derived from investments or from the holding of any property by a company or society, the functions of which consist wholly or mainly in the holding of such investment or property, would demonstrate without doubt, on an application of the well accepted rule of interpretation 'Expressio unius exclusio alterius', that the income derived from the holding of investments or property generally would not be deemed to be an income from business.

(9) The learned Advocate for the Income-tax Commissioner relies upon the case of: —'Re Messrs Behari Lal Jhandu Mal AIR 1944 Lah 287 (F.B.) (C)', where the profits from the sale of gold purchased five years before were held taxable as income from an adventure in the nature of trade. The Full Bench consisting of Din Mohammad, Sale and Munir JJ. held that in order to determine whether an adventure is in the nature of trade, the essential test is whether the purchase of metal was made not with the intention to use it nor with the intention to invest one's capital in it but with the sole object of selling it in future in order to make a profit. If the purchase is with that intention the purchase and the subsequent sale are an adventure in the nature of trade. It appears to us clear that whatever the intention of the assessee may be at the time when the Vazir Sultan shares were purchased no income from this transaction can be deemed to have arisen from a business unless the shares were sold. The dividends accruing to the firm from the holding of these shares cannot be deemed to be an income of a business as these accrued without any activity on the part of the assessee.

(10) In this view of the matter our answer to the question is in the negative. The assessee will have the costs of this reference and it will be entitled to the refund of Rs. 100/- deposited.

B/V.S.B. Answered for assessee.

A. I. R. 1953 HYD. 256 (Vol. 40, C. N. 129)

PALNITKAR C. J. AND SRINIVASACHARI J.

Venkat Babaiah and others, Petitioners v. Venkat Ratnayya and others, Respondents.

Civil R. P. No. 348 of 1952, D/- 16-9-1952.

Court-Fees Act (1870), S. 7 (IV) (b) — Suit for partition of joint family property — Plaintiff out of possession — Valuation is on entire property and not on merely plff's share — (Suits Valuation Act (1887), S. 8). AIR 1925 Cal 320 and 23 Deccan LR 521 Foll (Prar 1)

Anno: Court-Fees Act, S. 7 (IV) (b) N. 4; S. V. Act S. 3 N. 4 Pt. 5

Shah Ali Husaini, for Petitioners; Gopalrao Tuljapurkar, for Respondents.

CASES CITED:

(A) ('25) AIR 1925 Cal 320: 52 Cal 128
(B) 23 Deccan LR 521

ORDER: Two questions arise in these two revision petitions. The first question is whether in a suit for partition of a joint family property, the valuation of the suit should be made taking into view the total value of the property or the share of the property which the plaintiffs claim. In this particular case, the plaintiffs not only claimed the partition but they have stated in the plaint that they are out of possession and that defendants Nos. 6 to 9 are in possession of the property and they claim the relief that the property be given in their possession by dispossessing the said defendants. In such a case, in our opinion, it is the whole property that is in dispute and not the share claimed by the plaintiffs. We are fortified in our view by the ruling of the Calcutta High Court, reported in — 'Rajani Kanta v. Rajabala Dasi', AIR 1925 Cal 320 (A), in which it has been held that a suit for partition is triable by the Court which is competent to try the suit valued at the entire value of the property and not at the value of the share, the subject-matter of the suit, claimed by the plaintiff. This is also the view expressed in — '23 Deccan L R 521 (B)'. Taking this view of the case, it is admitted by the parties that the total value of the property according to the present Court-fees Act will be about rupees five thousand four hundred and odd. Thus, the suit cannot be heard and tried by the Munsiff. We direct that the plaint be returned to the plaintiffs for presenting it to the proper Court.

(2) Now that the plaint has been directed to be returned as above, the other question with regard to the transposing of defendants Nos. 2 and 3 as plaintiffs need not be decided by us. The Sub Judge who will try the suit will decide the question and he will not be bound by the decision which the Munsif has given and which is under revision before us. The plaint which is to be returned should be returned as it was presented on the date of the institution of the suit, without the transposing of defendants Nos. 2 and 3 as plaintiffs.

(3) The revision petitions are allowed as above. The revision petitioners are entitled to costs of these revision petitions. Advocate's fee Rs. 30/-.

(4) This order will govern both the connected revision petitions.

C/K.S. Order accordingly.

A.I.R. 1953 HYD. 257 (Vol. 40, C. N. 130)

PALNITKAR
AND SRINIVASACHARI JJ.

The State v. Mumtaz Ali and others, Respondents.

Revn. No. 823/6 of 1952, D/- 20-2-1953.

(a) Part B States (Laws) Act (1951), S. 6 Proviso (d) — Applicability.

Held that the legal proceeding which was started could have been continued and was rightly continued by the Special Magistrate and he was empowered to award punishment under S. 333, Hyderabad Penal Code as if the new Acts the Indian Criminal Procedure Code or the Indian Penal Code had not been passed. Section 400, I. P. C. would not be applicable to the case in spite of the fact that the trial of the case continued even after April 1951. (Para 6)

(b) Hyderabad Criminal P. C., Sch. II — Special Magistrate trying offence under S. 333, Hyderabad Penal Code.

The Special Magistrate has and does exercise the powers of a District Magistrate and for an offence under S. 333, H. P. C. he could impose a punishment of 4 years. No question of the exercise of special powers under S. 30, Indian Criminal P. C. arises in such a case. (Para 6)

(c) Hyderabad Criminal P. C., S. 268 — Necessity of committing case to Sessions Court — Criminal P. C. (1898), S. 337.

The only prohibition for trial is with regard to the Magistrate who actually tendered pardon and it is provided that the Magistrate who tendered pardon should not try the case himself. Another Magistrate having equal powers can try the case. It is not necessary, then, to commit the case for trial to a Court of Sessions. 1898 Pun Re 3 Cr.. Rel. on. (Para 7)
Anno: Criminal P. C., S. 337 N. 18.

(d) Part B States (Laws) Act (1951), Ss. 6, 25 (3) — Scope.

The intention of the Legislature is to permit the Courts to continue legal proceedings for the purposes of imposing such punishments as could have been imposed under the provisions of the Hyderabad P. C. Held that this could not be done if the provisions of S. 337, I. Cr. P. C. were strictly applied and the cases were to be committed to the Court of Sessions. (Para 7)

S. P. Shrivastav, Govt. Advocate, for the State; Abdul Karim, for Respondents.

CASE CITED :

(A) ('98) 1898 Pun Re No 3 Cr

ORDER : This is a revision petition which has been preferred by the State against the order of the Additional Sessions Judge at Hyderabad remanding the case for retrial to the Court of the Special Magistrate.

(2) The brief facts are that 51 accused were charged for the commission of dacoity under S. 333 of the Hyderabad Penal Code. Before the trial commenced, pardon was tendered to one of the accused (Zurfiqar) in March 1950 by the Magistrate of Taluka Gharbi. The case was transferred to the Court of the Special Magistrate who tried the same and recorded a mass of evidence covering about 157 witnesses. The Special Magistrate held the 24 accused, present before us, guilty of the charge and sentenced them to imprisonment of four years each. The rest of the accused were acquitted. Against that judgment, the accused who were convicted preferred an appeal before the lower Court which allowed the appeal and sent the case for retrial. The Government have filed this revision petition against that order.

(3) The learned Judge of the lower Court has referred to two grounds on which he has held that the case ought to have been committed to the Court of the Sessions by the Special Magistrate (the trying Judge) and that he had no jurisdiction to try the same and convict the accused.

(4) One glaring point which appears to us very clear in the judgment of the lower Court is that not only the present accused but all the accused who were acquitted have been sent for retrial, though there was no appeal by the Government before the lower Court against the order of acquittal. It is also stated by the learned advocate for the revision petitioner that no notice was given to those acquitted persons. Thus the order of acquittal could not have been set aside without any appeal from the Government or without any notice to them.

(5) The first reason given by the learned Judge of the lower Court for quashing the order of the trial Judge is that : From the first of April 1951 the Indian Criminal Procedure Code was made applicable to this State and according to that Code the offence under S. 400, I. P. C. was exclusively triable by the Court of Sessions and therefore the trial of the case from that date was ultra vires till the day the Special Magistrate was vested with special powers under S. 30, Cr. P. C. We cannot agree with the said contention. The learned Additional Sessions Judge has not kept in view the provisions of S. 6 of the Part B States (Laws) Act 1951 by which the Indian Penal Code was made applicable to this State. The relevant portion of S. 6 states that the corresponding law in force in any Part B State shall stand repealed save as otherwise expressly provided for in the Act. There are four provisos in S. 6 and in our opinion proviso No. (d) which runs as follows is applicable in this case :

"D. Any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act has not been passed."

(6) From this proviso, it is clear that the legal proceeding which was started in this case could have been continued and was rightly continued by the trial Judge and he was empowered to award punishment under the old Act (H.P.C.) as if the new Acts, the Indian Criminal Procedure Code or the Indian Penal Code had not been passed. Thus the view that the case was exclusively triable by the Court of Sessions making S. 400 I.P.C. applicable to the case cannot be agreed to. Section 400, I. P. C. would not be applicable to the case in spite of the fact that the trial of the case continued even after April 1951, as under S. 6 of the Part B States (Laws) Act, 1951 the old Act still remained

in operation on account of the above proviso. The observation of the lower Court that unless and until the Special Magistrate acquired special powers under S. 30, Indian Cr. P. C. he could not have heard this case is not also correct. The Special Magistrate, it is clear, has and does exercise the powers of a District Magistrate and under the provisions of the Hyderabad Cr. P. C. Sch. II an offence under S. 333, H. P. C. (under which the accused were prosecuted) was triable by the District Magistrate and he could impose a punishment of 4 years. No question of the exercise of special powers under S. 30 arises in this case. That question would have arisen if the Special Magistrate had intended to or had actually imposed punishment higher than that of four years under the provisions of S. 30, Indian Cr. P. C.

(7) The second point dealt with by the learned Additional Sessions Judge is that under the provisions of S. 337 (2-A), Indian Cr. P. C. this case ought to have been committed for trial to the Sessions Court as there was an approver in this case and when pardon is tendered to an approver and his statement recorded, the case must be committed to the Sessions under the provisions of S. 337 (2-A). Here it must be observed that the provisions of S. 268, H. Cr. P. C. are not the same as those of S. 337, Cr. P. C. Cl. 2-A which appears in S. 337, I. Cr. P. C. is not to be found in S. 268 of the H. Cr. P. C. It is to be remembered that Clause 2-A was introduced in S. 337, I. Cr. P. C. by an amendment made under the Criminal Procedure Code Amendment Act of 1923. S. 337 of the Indian Cr. P. C. as it stood before the amendment of 1923 was in many respects similar to S. 268. H. Cr. P. C. Specially Cl. (4) of S. 337 which reads as follows was in substance similar to the provisions of the Hyderabad Cr. P. C. S. 268 :

> "(4) Every Magistrate other than a Presidency Magistrate who tenders a pardon under this Section shall record his reasons for so doing and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate."

Thus it is clear from above provisions and similar provisions in S. 268 of the H. Cr. P. C. that the only prohibition for trial was with regard to the Magistrate who actually tendered pardon and it was provided that the Magistrate who tendered pardon should not try the case himself. Another Magistrate having equal powers can try the case. It was not necessary, then, to commit the case for trial to a Court of Session. We are fortified in our view by the decision in —'1898 Pun Re. No. 3 page 6, Queen-Empress v. Batera (A)'. In that case the same question was raised that when once pardon was tendered the District Magistrate had no jurisdiction to hear the case and he ought to have committed the case for trial to a Court of Session. It was held that the provisions of S. 337 of the Code must be construed strictly and that the disqualification created by the last paragraph of the Section applies only to that Magistrate before whom the suspected person was brought face to face and who attempted to induce him by promise of pardon to make a true and full disclosure, the examination referred to in the said paragraph being the one made on the tender of the pardon and directly resulting from it. Thus another Magistrate can try the case. In the case before us, the case was not tried by the Magistrate who had tendered the pardon. From this point of view therefore the opinion of the lower Court is not correct.

We also have to keep in mind the provisions of Act I of 1951 by which Indian Criminal Procedure Code was made applicable to Part B States. S. 25 of the said Act (Cl. 3) makes it clear that the provisions of Indian Cr. P. C. shall apply to all proceedings instituted after the coming into force of the said Act in any Part B State and 'so far as may be' to all cases pending in any criminal Court, in the State when the said Code comes into force therein. It is clear from the words used that the provisions of Indian Cr. P. C. would apply as far as may be. Their application therefore is not obligatory in all cases. When we read the provisions of this sub-section with the provisions of S. 6 of the Part B States (Laws) Act III of 1951, it is clear that the intention is to permit the courts to continue legal proceedings for the purposes of imposing such punishments as could have been imposed under the provisions of the Hyderabad P. C. It is unnecessary to say that the continuance of the proceedings in this case was for the purposes of imposing punishment (if the guilt be proved) under the provisions of the Hyderabad Penal Code and that could not be done if the provisions of S. 337, I. Cr. P. C., were strictly applied and the cases were to be committed to the Court of Session. The purpose of saving clause in the Part B States (Laws) Act was to give validity to the proceedings already undertaken and provide continuance of the proceedings till the termination of the case. Thus we are clearly of the opinion that the view taken by the lower Court is not correct and must be set aside.

(8) We therefore hold that the trial was rightly conducted and continued by the Special Magistrate. The committal of the case for trial to the Court of Sessions, was not necessary. We set aside the order and judgment of the Additional Sessions Judge and direct the Sessions Judge to hear the appeals on merits and dispose of the same according to law.

(9) The learned Public Prosecutor drew our attention to the fact that the accused were unnecessarily released on bail by the lower Court, and as they had already been convicted by the Special Magistrate, it was not a fit case for their being enlarged in appeal. We prefer to leave this question to the discretion of the Sessions Judge to whom we have remanded this case. The Revision petition is allowed with the above directions.

B/D.H. Revision allowed.

A.I.R. 1953 HYD. 258 (Vol. 40, C. N. 131)

MISRA C. J. AND MOHD. AHMED ANSARI J.

Thadlapalli Sarsothamma and another, Appellants v. Yadlapalli Amrithamma, Respondent.

Appeal No. 269/2 of 1951, D/- 8-4-1953.

(a) Civil P. C. (1908), Ss. 96 and 154 — Vested right of appeal — Subsequent enactment affect-

ing right of appeal — Effect — (Civil P. C. (Amendment) Act (2 of 1951), S. 20).

The right of appeal is a substantial right. It accrues to a party when a suit is filed and is not affected by the subsequent change of the law relating to appeals. (Para 11)

A suit was filed when the Hyderabad Civil P. C. was still in force and under S. 602 of the aforesaid Code a litigant had the right to appeal to the High Court challenging the correctness of the decisions of the two lower Courts 'on facts'. While the suit was pending in the trial Court the Indian Civil Procedure Code was applied to Part B states and the question was whether the Legislature intended by the limited scope of S. 154, Civil P. C. to alter the general law as to appeal.

Held (1) that S. 154, Civil P. C. should not be construed as containing the sole provision for saving rights of appeals under earlier laws in Part B States. (Para 12)

(2) that the right to appeal accrued when proceedings were begun and was not taken away by the change of law except by express or necessary intent; and further (Para 9)

(3) that the right of appeal under S. 602 of the Hyderabad Civil P. C. which had accrued on the date of the institution of the suit which was earlier than the application of the Code to the Hyderabad State, would be saved under S. 20 of Act 2 of 1951. AIR 1952 SC 409; 9 Ind Cas 937 (Mad); Rel on. Case law ref. (Para 12)

Anno: Civil P. C., S. 96 N. 2 Pt. 4a; S. 154 N. 1.

(b) Civil P. C. (1908), S. 154 — Interpretation of.

The maxim 'expressio unius est exclusio alterius' has not always been applied to the interpretation of statutes. Thus, the expressed saving of the pending rights of appeal in S. 154 does not mean repeal of all other vested rights for the application of the above maxim is unsafe in such cases: AIR 1921 Mad 126, Foll. (Para 13)

Anno: Civil P. C., S. 154 N. 3.

J. V. Narsing Rao, for Appellants; Gopal Rao Ekbote, for Respondent.

CASES CITED:

(A) (1905) 75 LJPC 54: 1905 AC 369
(B) ('27) AIR 1927 PC 242: 54 Ind App 421 (PC)
(C) ('52) AIR 1952 SC 409: 1952 SCJ 564 (PC)
(D) ('27) AIR 1927 Mad 977: 50 Mad 857 (FB)
(E) ('28) AIR 1928 All 437: 50 All 965 (FB)
(F) ('28) AIR 1928 Lah 627: 10 Lah 165 (FB)
(G) ('28) AIR 1928 Cal 640: 56 Cal 512 (FB)
(H) ('29) AIR 1929 Mad 381: 52 Mad 361 (SB)
(I) ('52) AIR 1952 Punj 103: ILR (1951) Punj 395 (FB)
(J) ('11) 21 Mad LJ 631: 9 Ind Cas 937
(K) ('12) 156 Pun LR 1912: 15 Ind Cas 725
(L) ('10) 8 Ind Cas 3 (Cal)
(M) ('12) 17 Cal WN 524: 14 Ind Cas 53
(N) ('12) 16 Cal WN 1015: 15 Ind Cas 679
(O) ('12) 22 Cal LJ 266: 16 Ind Cas 690
(P) ('52) AIR 1952 SC 47: 1952 SCR 179 (SC)
(Q) ('21) AIR 1921 Mad 126: 61 Ind Cas 979
(R) ('48) AIR 1948 PC 20: 1947 All LJ 613 (PC)

MOHD. AHMED ANSARI J.: This second appeal by the defendants has been filed in November 1951 against a decree of the District Judge of Mahbubnagar, allowing the respondent's claim for the declaration of title to certain properties as well as for injunction and reversing a decree dated July 31, 1951, of the Munsiff of Kalwakurti, who had dismissed the suit.

(2) The appellant Devind Rao is the husband of the sister of the Appellant Sarsothamma, who is the widow of the last male member of a Hindu family. Govardhan Rao, her husband, died on Thir 26, 1350 Fasli (May 31, 1941) leaving her, his mother and the respondent, the wife of Pandoranga Rao, his predeceased brother, as the three widows of the joint Hindu family. Before his death he was taken for treatment to Hyderabad and was for some time in the Osmania General Hospital at Afzal Gunj. The respondent's case is that four days prior to his death he made an oral will directing his wife and the brother's widow to enjoy equally his moveable and immovable properties, to maintain his mother, to adopt a son by agreement and in case of dispute to equally divide the properties. It is also her case that the two widows lived amicably till the sister's husband was appointed by the widow Sarsothamma as her general attorney in Farwardi 1358 F. (February 1949) to settle the quarrels, the two widows entered into an agreement on Farwardi 11, 1358 F. (February 11, 1949) and as their relations continued to be strained they divided the properties equally on Khurdad, 8, 1358 F. (April 8, 1949). Both these documents have been produced in the case and are on unstamped papers, and unregistered. The respondent claims that she after the division got the sole possession of her shares in the properties and continued to enjoy till the receiver appointed by the Court took over the possession after the institution of the suit. The reason for filing the suit as disclosed in the plaint is that the Revenue Board had granted to Sarsothamma alone the succession to the pattas of the immovable properties and had refused to enter the respondent as a "Shikmidar", directing her to get a decree of the civil Court and the two appellants have since been interfering with her possession, hence she should be declared as owner of half the shares of the properties and the appellants be restrained from interference with her possession. The suit was instituted on 7-10-1950, i.e., prior to the extension of the Indian Civil P. C. to Part-B States, and when the Hyderabad Civil P. C. was still operative.

(3) The appellants in their joint statement denied the making of the will, entering into any agreement, partitioning the properties or the respondents being in possession of any of the disputed properties till the receiver got possession under the orders of the Court. The additional legal grounds urged for dismissing the suit are that both the agreement and the partition deed are compulsorily registrable and hence inadmissible in evidence, and the claim for the mere declaration of title and for granting permanent injunction in absence of the respondent's possession over the properties is not entertainable.

(4) Considerable documentary and oral evidence was adduced in the case. The trial Judge held that the will relied upon by the respondent was unnatural one, because the testator having a mother had left her to the mercy of the two widows, and although he was alive for four days and in Hyderabad, he had not reduced it in writing. Then, dealing with the evidence of the four witnesses of the respondents adduced to prove the will, he held them unreliable. In support of the finding of there being no will, he relied on the fact that for nearly ten years after the will it was not mentioned anywhere, so much so that there was no reference either in the

agreement or in the document relating to partition of the properties. On these grounds, he held the oral will as not proved. As regards the documents of the agreement and partition he held that the producing of only two witnesses, Ranga Rao and Bhugga Rao, who had been also produced to prove the will, is suspicious especially when others were available to prove them, whereas the appellants had produced several persons, whose signatures appeared on them. He relied on the evidence of the person, who was shown as the scribe of one of the documents, and who swore about not knowing how to write. He believed this witness and recorded on his evidence that he appeared to be an honest man. Then his conclusion relating to the necessity of registration of these documents was that they were registrable. The part of his judgment about respondent's being not in possession was very elaborate. He classified the witnesses produced in support of possession into three classes corresponding to the three villages in which the properties were situated, and found their evidence unsatisfactory, as well as the conduct of the receiver, whom he first appointed and later removed. Finally because of the absence of possession he held that the suit for mere declaration and injunction did not lay.

(5) The judgment of the lower appellate Court allowing the appeal is extremely unsatisfactory. There is no decision in it about the agreement and partition documents as having been proved. Dealing with the will, reliance is placed more on the evidence of the defendants about there being another will for purposes of adoption and after finding such evidence unsatisfactory, the will has been held as proved. Then the agreement and the document showing partition were held as not compulsorily registrable. Coming to the question of possession of the respondent at the date of the suit, it has been held established and reliance is placed on the several documents prepared by the receiver when he took possession under the Court's orders. There is not a word in the judgment about why the opinion of the trial Judge, who had recorded the oral evidence, about the credibility of the appellant's witnesses should not be accepted. Accordingly the suit has been decreed and the appeal allowed.

(6) In these circumstances, two questions arise for our decision:

(i) Whether the findings of the lower appellate Court about the will having been proved and the respondent being in possession on the date the suit was filed can be reviewed under S. 602, Hyderabad Civil P. C., which authorised the High Court in second appeals to decide issues of facts, notwithstanding the extension of the Indian Civil Procedure Code to Part-B States after the institution of the suit on April 1, 1951?

(ii) Whether the second appeal should be disposed on merits, notwithstanding the absence of any finding by the lower appellate Court about the proof of the two documents of agreement and partition, as well as the unsatisfactory approach to the question of the proof of the will?

(7) It is obvious that if S. 154, Civil P. C. be construed to be the only saving Section about the rights of appeals, this second appeal by the defendants is not covered by it, as the decrees of both the lower Courts in the case have been passed after the extension of the Civil Procedure Code to Part-B States and under S. 100 of the Code, the findings of the lower Courts on facts in second appeals are binding upon this Court. But to hold the Section to be the sole provision, the maxim 'expressio unius est exclusio alterius' will have to be applied and the maxim has not always been applied to the interpretation of statutes. Thus Maxwell's Interpretation of Statutes (9th Edition) contains the following passages at page 318:

"Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim 'expressio unius est exclusio alterius'. But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution. If the law be different from what the Legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence, and any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed to be so. Thus, when in contending that debts due by corporate bodies were subject to foreign attachment in the Mayor's Court the express statutory exemptions of the East India Company and of the Bank of England were cited as supplying the inference that corporate bodies were deemed by the Legislature to be subject to that process, the judicial answer was that it was more reasonable to hold that the two great corporations prevailed on Parliament to prevent all questions as to themselves by direct enactment than to hold that Parliament by such special enactment meant to determine the question in all other cases adversely to corporations. A local Act which, in imposing wharfage dues for the maintenance of a harbour on certain articles, expressly exempted the Crown from liability in respect of coals imported for the use of royal packets, and the provision in Turnpike Acts, which exempted from toll carriages and horses attending the Queen or going or returning from such attendance, were not suffered to affect the more extensive exemptions which the Crown enjoys by virtue of its prerogative."

(8) We have therefore to ascertain what is the general law relating to the rights of appeals and whether an intention to alter the general law can be inferred from the partial enactment of S. 154, Civil P. C. It is a well established proposition of law that a right of appeal is a substantive right and enures to a litigant on the institution of a suit. The leading case is — 'Colonial Sugar Refining Co. Ltd. v. Irving', 1905 AC 369 (A). In the case an appeal ordinarily lay to the Privy Council from an order of the Supreme Court of Australia and while the matter was pending in that Court the law was amended so as to allow an appeal to the High Court. Their Lordships of the Privy Council held that the new Act could not deprive the party of his right to appeal to the Privy Council. Lord Macnaghten at page 372 remarked:

".....To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure....."

The same principle was reaffirmed by their Lordships of the Privy Council in the case of — 'Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner, Delhi', AIR 1927 PC 242 (B). In

the case it was held that no right of appeal arose against the decisions of the High Court in Income-tax references before April 1, 1926, the date when Act 24 of 1926 came into operation, giving the right of appeal to the Privy Council, as the Act showed no intention to interfere with the finality of decisions already given. Recently the — 'Colonial Sugar Refining Co.'s case (A)', has been referred to by their Lordships of the Supreme Court of India in — 'Ganpat Rai Hiralal v. The Aggarwal Chamber of Commerce', AIR 1952 SC 409 (C). Here three appeals were connected and came to the Supreme Court on special leave by the Pepsu High Court at Patiala. In one such appeal (No. 152 of 1951) the Official Liquidator had settled the list of contributories and after various steps before the Liquidation Judge of the High Court by way of objection payment orders were passed on 4-6-1946. The correctness of these orders was challenged in appeals to the High Court and modifications were made in favour of the liquidator. Then an appeal was filed to the Judicial Committee of the State which held the appeal to the Division Bench barred by time and consequently the order of the Liquidation Judge was restored. Before the next application in the case was made, an Ordinance has made a certificate by the Judge necessary for purposes of Letters Patent appeal. On 2-2-1950 the firm of Murarulal Hari Ram filed the application under S. 152, Civil P. C., for amendment of the order of the Liquidation Judge and the application was dismissed on March 16, 1950. The firm applied for the certificate of leave to appeal, but this again was dismissed. An appeal was preferred from the order; but it was thrown out on the ground of want of certificate from the Single Judge. With regard to this appeal the Supreme Court held that the amendment proceeding was not a continuation of the suit, but was in the nature of an independent proceeding, and was governed by the law prevailing in the State on the date of its commencement, which had made a certificate of the Single Judge necessary and therefore the decision of the Court was right.

(9) Then in the same authority two other appeals were dealt with and their facts were that an application for the removal of the name of the contributory was granted by the Liquidation Judge, but the order was reversed by a Division Bench and on further appeal to the Judicial Committee of Patiala the case was remanded for retrial; thereafter an order for payment was made by the Liquidation Judge on 18-1-1949, and appeals were preferred against it on 19-2-1949. In the meantime, as there were some doubts on the question the appellants took precaution of applying to the Judge for a certificate; but this was dismissed on 3-3-1949. The Judges of the Patiala High Court found that S. 116 of the Ordinance contained an express provision depriving a person of his right of appeal. In these appeals, their Lordships of the Supreme Court observed:

> "There is nothing in the Section to justify the view that any taking away of a vested right of appeal retrospectively was intended. The decision in — 'Colonial Sugar Refining Company v. Irving (A)', clearly applies to the facts, and the order of the High Court that the appeals are not competent is, in our opinion, erroneous."

This authority of the Supreme Court shows both the negative as well as the positive aspects of the legal proposition, which is that the right of appeal is affected if some new proceeding be started after the new enactment is enforced, but is not if the earlier proceedings be continued. In other words the right accrues when proceedings are begun and is not taken away by the change of law except by expressed or necessary intent.

(10) We shall now cite several authorities for the proposition that the right accrues when a suit is instituted and applies not only where the right is taken away altogether; but also where it is modified. In — 'Daivanayaga Reodias v. Renukambal Ammal', AIR 1927 Mad 977 (D), it was held that an appeal, against a decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000, but at the time of the appeal was less than Rs. 5,000, owing to the amendment of the Court-fees Act in the meanwhile, lay to the High Court and not the District Court. Then in — 'Ram Singha v. Shankar Dayal and another', AIR 1928 All 437 (E), it was held that where a party on the commencement of the proceeding had under the old Tenancy Act a right of appeal to the District Judge, he could exercise the right notwithstanding the new rule under the new Tenancy Act making the decision of the Assistant Collector final where the valuation of the subject-matter was less than Rs. 200. The proposition laid in the case is that an appeal is a mere continuance of the original proceedings initiated by the filing of the plaint and the right to continue that proceeding cannot be affected by a new Act, unless it expressly says so. Similarly in — 'Kirpa Singh v. Rasaldar Ajaipal Singh', AIR 1928 Lah 627 (F), it was held that the right of appeal is not a mere matter of procedure but is a vested right which inheres in a party from the commencement of the action in the Court of first instance, and if according to the law in force at the time when the action was started in the Court of first instance the ultimate decision of such Court was appealable, the right to prefer or prosecute appeal therefrom is not affected by subsequent change of the law abolishing the appeal or modifying its forum unless it is so expressly provided in the amending Statute or follows by necessary implications from its terms. Again in — 'Sadr Ali v. Doliluddin Astigar', AIR 1928 Cal 640 (G), a second appeal was filed in the Calcutta High Court about 4-4-1928; it was dismissed by a Single Judge who refused to declare the case as a fit one for Letters Patent appeal, which had become necessary under an amendment of Cl. 15, Letters Patent of the Calcutta High Court after 14-1-1928. It was held that the date of the presentation of the second appeal was not the date which determined the applicability of the amended Cl. 15, but the date of the institution of the suit. So also the Madras High Court in — 'Vasu Deva v. Emperor', AIR 1929 Mad 381 (H), held that the similar amendment in the Letters Patent of Madras High Court did not apply retrospectively to second appeals pending in the Court at the time of the amendment. I shall close citation of authorities by referring to the recent Full Bench Case of — 'Gordhan Das v. Governor-General-in-Council', AIR 1952 Punj 103 (I). Here amendments were made in the Rules of the Court enabling a Single Judge to hear certain appeals which were earlier heard by a Bench of two Judges and it was held that a provision of law which deprives a litigant of his right of appeal to a superior tribunal cannot be regarded as a provision which affects only the procedure and practice of the Court; on the other hand, it must be regarded as a provision which affects substantive and substantial rights.

(11) These authorities sufficiently establish the proposition that the right of appeal is a substantial right, accrues to a party when a suit

is filed and is not affected by the subsequent change of the law relating to appeals. The suit was filed in this case when the Hyderabad Civil P. C. was still in force and under S. 602 of the aforesaid Code a litigant had the right to come to this Court challenging the correctness of the decisions of the two lower Courts on facts. While the suit was pending in the trial Court the Indian Civil Procedure Code was applied to Part-B States and the question which we have to decide is whether the Legislature intended by the limited scope of S. 154 of the Civil Procedure Code to alter the general law. This Section reads as follows:

"154. Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement."

It is admitted that there is divergence of judicial opinions on the point. According to the Madras High Court in — 'Kalinga v. Narsaimha', 9 Ind Cas 937 (Mad) (J), these words refer to a right of appeal which had become vested in a litigant before this Code came into force, whereas according to the Chief Court of Punjab in — 'Gandamal v. Piran Ditta', 15 Ind Cas 725 (Lah) (K), where second appeals lay under the old Code from certain orders made in execution and none under the new Code, no second appeal would lie in such a case from the order made in first appeal unless the appellate order was made while the old Code was in force. The views of the Calcutta High Court on this point are conflicting. In — 'Bhadreswar Goloi v. Bishnu Charah Sen', 8 Ind Cas 3 (Cal) (L); — 'Raj Mohan Pal v. Gobinda Chandra Pal', 14 Ind Cas 53 (Cal) (M) and — 'Benode Behari v. Ramsarup Chamar', 15 Ind Cas 679 (Cal) (N), it was held that where orders relating to the setting aside of auction sales on ground of fraud, or remanding a case were passed after Civil P. C. of 1908 came into force no second appeal lay even though the proceedings were started while the old Act was in force. These cases take the view that the orders in the execution proceedings are not decrees under the new Code and the existing procedural law being retrospective the orders cannot be held to be as decrees for purposes of second appeal. The same reasoning should apply to the appellate orders also; yet in — 'Lal Behary Mitra v. Nagendranath', 16 Ind Cas 690 (Cal) (O), it was held that where the decree dismissing an application for setting aside an execution sale on ground of fraud had been made prior to the coming into force of Civil P. C., a second appeal lay, although the order was upheld by the appellate Court afterwards. The Calcutta High Court has therefore taken the view that where a substantive right has become vested, the subsequent change in procedure does not affect a vested right. These authorities do not lay down that even in cases where the final orders are decrees under both the Codes, the rights of appeal of litigants are saved only when there be decrees under the old Code.

(12) Apart from the Madras authority which is based on sounder reasons, there is an additional ground why S. 154, Civil P. C. should not be construed as containing the sole provision for saving rights of appeals under earlier laws in Part-B States. The Code has been applied to these States by the Code of Civil Procedure (Amendment) Act (2 of 1951), and under sub-s. (b) of S. 20 of the Act, rights, privileges, obligations or liabilities acquired, accrued, or incurred under any of the repealed law are saved. Obviously the right of appeal under S. 602, Hyderabad Civil P. C. which had accrued on the date of the institution of the suit which was earlier than the application of the Code to this State, would be saved under the aforesaid Section 20.

(13) But it was argued that where there are two provisions in an enactment on the same subject-matter, one dealing with it generally and the other making it conditional, the latter should be taken as the proviso to the general provisions. In this connection reference was made to an authority of the Supreme Court reported in — 'Kadar Lal v. Hari Lal', AIR 1952 SC 47 (P). But to apply the above rule of construction, the latter provision should be such as to exclude all others. The maxim 'expressio unius est exclusio alterius' should be applicable to it and reference has already been made to Maxwell on Interpretation of Statutes that it has not always been applied to interpretation of Statutes. It appears that the provision in S. 154, Civil P. C. imperfectly enacts that which was already and more widely the law and from this limited enactment an intention to alter the general law should not be inferred. Having regard to S. 20 of Act 2 of 1951, the only inference is that the Legislature has in retaining S. 154 acted under the influence of excessive caution. In these circumstances, the decision of the Madras High Court in — 'Vishwanath Sastri v. Sitha Lakshmi Ammal', AIR 1921 Mad 126 (Q), appears to be correct that the expressed saving of the pending rights of appeal does not mean repeal of all other vested rights and the application of the maxim is unsafe in such cases. The conclusion, therefore, is that the appellants in the present case still have the right of second appeal under S. 602, Hyderabad Civil P. C. and can thereby challenge in this Court findings of facts.

(13a) It has to be determined further whether we should decide this appeal on merits ourselves or remand it to the lower appellate Court for a fresh decision of the whole case. It is clear that the District Judge has given no finding on the correctness of the conclusion of the trial Court about the documents of agreement and partition as not proved. That is an important issue in the case; for if the documents be not proved then the case of the respondent that she was in possession by virtue of the agreement is considerably shaken, and her case of being in possession is not explained on the grounds other than the agreement. Then the trial Judge had recorded oral evidence in the case and his opinion about such witnesses carries a greater weight.

(14) Indeed in — 'Prem Singh v. Deb Singh', AIR 1948 PC 20 (R), it has been said that where a question of fact has been tried by a Judge, an appellate Court, which is disposed to come to a different conclusion, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen & heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusions. There is nothing in the District Judge's judgment to show that seeing and hearing of the witnesses was not sufficient to justify the trial Judge's conclusion on respondent's not being in possession. His approach on the question of proof of the will is also unjustified; for in finding the will as proved, he has dealt more with the evidence of the defendants rather than that of the plaintiff. These defects vitiate the entire judgment and we feel that even in second appeals under the Hyderabad Civil P. C. we are not expected to do the work of the first appellate Court. We therefore reverse the decree appealed against and remand the case to the District Judge to decide all the questions in the case afresh. The costs of this appeal shall abide the final result in the case.

Case remanded.

B/V.S.B.

A.I.R. 1953 HYD. 263 (Vol. 40, C. N. 132)

SIADATALI KHAN J.

Bua Bi w/o Syed Ali and another, Petitioners v. Khadija Begum, Respondent.

Revn. Criminal Nos. 679 and 680 of 1951-52, D/- 18-2-1953.

(a) Criminal P. C. (1898), S. 145 (5) — Cancellation of the preliminary order.

It cannot be said that when once the Magistrate finds that there is likelihood of breach of peace, he cannot after the filing of written statements, and evidence of the parties find further that there is no likelihood of breach of peace. 6 Nazaer-e-Osmania 100, 5 Nazaer-e-Osmania 240, Foll. (Para 4)

Anno: Cr. P. C., S. 145 N. 48.

(b) Criminal P. C. (1898), S. 145 (5) — Cancellation of the preliminary order.

Where the Magistrate has found that there is no likelihood of breach of peace, he should have determined and closed the proceedings and should have only directed the restoration of the land in dispute to the party from whose possession it was taken. His order that the land should remain in the Court's custody pending decision of a civil Court is without jurisdiction. (Para 4)

Anno: Criminal P. C., S. 145 N. 48.

Jehangir Ali, for Petitioners; Raja Bahadur Biseshwarnath, for Respondent.

CASES CITED:

(A) ('52) AIR 1952 All 918: 1952 Cri LJ 1650
(B) 6 Nazaer-e-Osmania 100
(C) 5 Nazaer-e-Osmania 240 (FB)
(D) 22 Deccan LR 209
(E) 14 Deccan LR 79
(F) 14 Deccan LR 108
(G) 25 Deccan LR 264

ORDER: This is a revision petition in a breach of peace case. The IVth Court, City Criminal Court, by judgment dated 24-9-1951 directed that the lands be kept in the custody of the Court till the parties get a decision from the civil Court. Hence this revision petition filed by Bua Bi and Kandmir. I have heard the arguments of the learned advocates of the parties.

(2) The learned advocate for the revision-petitioners argued that possession of the revision-petitioners has been admitted by the respondent, Khadija Begum. It was also admitted in the Police report and has been deposed to by several witnesses of the respondent; for instance Malla Reddy, the village officer, who has deposed that for the last year or two Mussalmans had come on the land and taken possession of it. He argued further that this is what the predecessors-in-title and brother-in-law of the respondent, Khadija Begum, Jafer Ali Khan, also has deposed that he had initiated proceedings for breach of peace in which he had stated that the land in dispute was in possession of the revision-petitioners; that this was in 1356F. & after the sale of Khadiji Begum; that this shows that the sale of Khadija Begum was fictitious, for if the sale was genuine, Jafer Ali Khan would have felt no necessity & would not have initiated the breach of peace proceedings; that, however, this may be, the point is clear that the predecessor-in-title of Khadija Begum has admitted the possession of the revision-petitioners even in 1356F; that the learned Magistrate himself has held that there was no likelihood of breach of peace and that, therefore, he should have determined the proceedings forthwith and directed that the land should be restored to the party from whose possession it was taken and that as already stated above the land was taken from the possession of the revision-petitioners as is admitted in the Police report and in the panchanama prepared by the bailiff.

(3) In reply the learned advocate for the respondent, Khadija Begum, Raja Bahadur Biseshwarnath argued that the possession of the revision-petitioners over the whole of the land is not proved; that as laid down in — 'Parmeshwar Din v. Sheo Moorat', AIR 1952 All 918 (A), possession over the whole land is to be seen; that the respondent had posted a servant Abbas Ali on the land in dispute and he remained there all the while; that there is a receipt showing that the predecessor-in-title of the respondent Jaffer Ali Khan, was delivered possession of the land in dispute on 1st Azur 1355F., that the servant mentioned above was posted from 1355F; that a careful perusal of para. (1) of the written statement will show that the respondent did not admit therein the possession of the revision-petitioners but has only stated that the revision-petitioners taking advantage of the disturbed conditions of the time have begun to meddle unlawfully with the land in dispute; that this does not mean that they took possession of the land in dispute; that it is true that the bailiff has not mentioned that there was any hut in occupation of the servant of the respondent at the time of taking the land in the custody of the Court; but that does not mean that there was no hut as this fact has been deposed to not only by the respondent herself but by Jaffer Ali Khan and several other witnesses.

The learned advocate argued further that it is not true to say that the learned Magistrate has found that there was no likelihood of breach of peace; that he has expressly found that there was a likelihood of breach of peace when he initiated proceedings under S. 145, Indian Criminal Procedure Code; that the revision-petitioners Bua Bi and Kundmir themselves have deposed that on behalf of the respondent Sikhs were brought to aid in the maintaining of her possession; that this is also deposed to by the revision petitioners' own brother, Syed Mohmood who has deposed that there was a likelihood of breach of peace and, therefore, he filed a petition to the Police; and that Jafar Ali Khan brought Sikhs with him to take possession of the land in dispute. All this will show that there was a likelihood of breach of peace and, therefore, it is utterly incorrect to say that the Magistrate has found that there was no likelihood of breach of peace.

(4) I have carefully considered the above arguments and it is evident that as far as possession at the time of the preliminary order or two months prior to it is concerned, there is no doubt that it was with the revision-petitioners. The Panchanama prepared by the bailiff expressly states that the land was taken from the possession of the revision-petitioners and it has been proved by depositions of revision-petitioners' witnesses. The allegation of the respondent that she had posted a servant there is deposed to by Jafar Ali Khan

and Abbas Ali, respondent's witnesses 3 and 4; but it should be noted that Malla Reddy, respondent's witness 3 who is not only a village official but also owns and cultivates lands adjacent to the survey numbers 108 and 109, now in dispute, states that he never saw any servant of the respondent posted on the land in dispute. I need not repeat that the bailiff's report also does not mention that there was any hut of Abbas Ali servant of the respondent, and what is more, Murtuza Ali Khan, the first witness adduced on behalf of the respondent has expressly stated that in the very hut built by the respondent the revision-petitioners entered and took possession. This witness Malla Reddy has deposed further that Mussalmans, meaning the revision-petitioners, took possession of the land a year or two before he deposed, which means quite clearly many months prior to the preliminary order. The learned advocate argued that it was forcible possession and, therefore, could not be taken into account. There is no record to bear him out that Abbas Ali was thrown out forcibly.

There remains the argument that the learned Magistrate has not found that there was no likelihood of breach of peace. In my opinion even a cursory perusal of the judgment under revision will show that he has so found it at numerous places. The argument that when once the Magistrate finds that there is likelihood of breach of peace, he cannot after the filing of written statements, and evidence of the parties find further that there is no likelihood of breach of peace, is untenable. 'Anand Rao v. Maruti', 6 Nazaer-e-Osmania 100 (B), is clear authority on the point that when after the evidence of the parties is closed, the Magistrate is of the opinion that there is no likelihood of breach of peace, he should forthwith determine the proceedings and that, the continuance of the proceedings to find the possession of a party is without jurisdiction for the reason that, when there is no likelihood of breach of peace, there is no jurisdiction left and that it is also without jurisdiction to take evidence of actual possession. The same question was also thrashed in — 'Anand Kishen v. Talukdar, Matpalle', 5 Nazaer-e-Osmania 240 (C), which is a Full Bench of 5 Judges case.

There it has been held that:

> "Where it appears that there is no likelihood of breach of peace, the proceedings shall be terminated; that the Magistrate has so determined the proceedings but it is urged that under S. 148, sub-s. 4, Hyderabad Criminal Procedure Code, if there is a dispute but no likelihood of breach of peace, the enquiry should still continue and possession of either party shall be determined. This has been held in — '22 Deccan L. R. 209 (D)', — '14 Deccan L. R. 79 (E)'; — '14 Deccan L. R. 108 (F)', and — '25 Deccan L. R. 264 (G)'. But this is not correct for in S. 148, sub-s. 1 the dispute leading to a breach of peace is qualified by a dispute about land and it is only when there are both these disputes that the Magistrate has jurisdiction. Hence, if there is a mere dispute over the land and it is not likely to lead to a breach of peace, there is no jurisdiction".

This is as clear as anything can be and, therefore, as soon as it appears whether from the written statements of the parties or the evidence adduced by them that, there is no likelihood of breach of peace, the jurisdiction of the Magistrate comes to an end. It is evident that this may very well be after the finding of the Magistrate on a petition or a report to him that there is a likelihood of breach of peace. Hence I do not agree with the argument of the learned advocate for the respondent that the learned Magistrate has not found that there is no likelihood of breach of peace or he could not have found that, because he had once found that there was a likelihood of breach of peace and initiated legal proceedings on it. Thus, as it is evident from the judgment under revision that the Magistrate has expressly found in so many places that there is no likelihood of breach of peace, he should have determined and closed the proceedings and should have only directed the restoration of the land in dispute to the party from whose possession it was taken. Hence, in my opinion his order that the land should remain in the Court's custody pending decision of a Civil Court is without jurisdiction on the authority of the abovementioned cases and also on the authority of sub-s. 5 of S. 148, Hyderabad Criminal Procedure Code or the corresponding sub-s. 5 of S. 145, Indian Criminal Procedure Code. Both these sections also lay down either expressly (S. 148) or by necessary implication (S. 145) the same proposition that when there is no dispute, the proceedings shall terminate and the Magistrate on the evidence adduced should direct restoration of the property in dispute to the party from whose possession it was taken. Thus I allow this revision petition and direct restoration of the land in dispute to the possession of the revision-petitioners as it is on record that the land in dispute was taken from their possession. Copy in the other file. Revision allowed.

C/D.H. Revision allowed.

A.I.R. 1953 HYD. 264 (Vol. 40, C. N. 133)

MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

Hyderabad Deccan Cigarette Factory, Petitioners v. Commr. of Income-tax, Hyderabad, Respondent.

Reference No. 393/B. 5(2) of 1951-52, D/- 25-3-1953.

Income-tax Act (1922), S. 10(2)(xv) — Expenditure for business.

Where the assessee claims an exemption of amount, on the ground of its being an expenditure falling under S. 10(2)(xv), the burden of proving the necessary facts in that connection is on the assessee. It is not necessary for the Income-tax Tribunal to challenge the validity or otherwise of the agreement existing between the employer and his manager embodying the terms of payment to be made to the manager or consider the question whether the amount was actually paid or not. If without challenging either the validity of the agreement or the factum of payment made to the manager, the Income-tax Tribunal considers the amount paid to the manager as not being reasonable or wholly or exclusively expended for the purposes of the business, it can disallow the whole or so much of such ex-

penditure as in its opinion is in excess of the amount reasonably necessary for the purposes of the business. AIR 1951 SC 108 and AIR 1950 Bom 29, Rel. on. (Para 4)

Anno: I. T. Act S. 10 N. 13.

Sitharamiah, for Petitioners; N. Narasimha Iyengar, for Respondent.

CASES CITED:

(A) ('51) AIR 1951 SC 108: 1950 SCR 1008 (SC)
(B) ('50) AIR 1950 Bom 29: 1949-17 ITR 533
(C) ('36) 1936-4 ITR 264 (PC)

JAGANMOHAN REDDY J.: We had directed the Income-tax Tribunal at Bombay by our order of 8-8-1952 to state a case upon two questions, viz.,

1. Whether the Tribunal was right in law in disallowing the sum of Rs. 1,25,482/- paid to the Manager for the year 1357F. as an expenditure not laid out or expended wholly or exclusively for the purpose of the assessee's business?
2. Whether the Tribunal is correct in law in arbitrarily fixing the amount of Rs. 36,000/- as emoluments including the salary of the General Manager and further holding that any payment beyond Rs. 36,000/- was not a business expenditure?

The Income-tax Tribunal has in compliance with the aforesaid order stated a case from which it appears that the Hyderabad Deccan Cigarette Factory belonging to the late Abdul Sattar was being run since 1343F., by his two heirs, namely by his widow Salim Khatoon and his daughter Abida Khatoon, with the assistance of Gulam Hyder Khan, the father and grandfather of the widow and daughter respectively. During the life time of Abdul Sattar, the manager of the company was paid Rs. 1,000/- per month, but on his death Gulam Hyder Khan who was appointed as a manager was being paid a salary of Rs. 500/- per month which was raised to Rs. 1000/- per month a few years later. In the year of assessment, 1357F., the assessee returned an income of Rs. 5,19,558- in respect of the factory, but the Income-tax Officer computed the amount at Rs. 6,49,148/-. The Appellate Officer, however, reduced the factory income by Rs. 33,928/- which was maintained by the Tribunal in appeal. In assessing this amount the salary of Rs. 1,000/ per month paid to Gulam Hyder Khan was allowed as an expense, but the assessee claimed over and above this amount a deduction of Rs. 1,25,482/- as four annas share in the net profits of the factory business which was said to be payable to Gulam Hyder Khan by and under an agreement dated 28th Bahman, 1357F., entered into between the assessee and the said Gulam Hyder Khan. It is with respect to this amount that the assessee has come up before us on an application under sub-s. (2) of S. 82 of the Hyderabad Income-tax Act, on the Tribunal refusing to state a case on an application under sub-s. (1) of S. 82.

(2) The appellate tribunal in stating a case has annexed a copy of the service agreement referred to above, the preamble of which runs as follows:

"(a) Whereas Gulam Hyder Khan has been working since 21st Amardad, 1343 Fasli as the General Manager and Mukhtar-e-am of the business run in the name of the Hyderabad Deccan Cigarette Factory owned by the parties of the First Part;

(b) Whereas due to the industry and efficient management of the said Gulam Hyder Khan the employers have been making good profits since 1343 Fasli;

(c) Whereas the said Gulam Hyder Khan has been asking from a very long time to give him a share in the profits of the said factory as the entire profits earned by the Factory are due to the Employee's skilful and efficient management;

(d) And whereas the employers are Purdah Nishin ladies and it is not possible for them to actively engage themselves in the daily routine and management of the business;"

The operative portion of the agreement is in these terms:

"The said Gulam Hyder Khan shall receive a monthly remuneration of Rs. 1,000/- and a share of four annas in the net profit of the business, after charging all business expenditure including the monthly remuneration paid to the said employee, and also after charging any donations and charities whatever is given with full consent and approval of both the Employers and the Employee".

(3) The Income-tax Officer in the course of his order observed:

"One of the considerations for increasing the emolument is stated to be the old age of the employee and the service rendered by him so far. This is indeed not a sound reason for increasing the emoluments in excess of the monthly remuneration of Rs. 1000/- to the tune of Rs. 1,25,482/- in the accounting year. The said employee is no other than the father of Salim Khatoon, one of the said partners of the firm and has been looking after the business for the last 12 years. I do not think that any consideration should be given to the employee in the accounting year for his past services, and this agreement in my opinion, is not so much to the services he rendered to the factory as to the relationship with the alleged partners."

The Deputy Commissioner while maintaining the view point of the Income-tax Officer, further observed that the recipient did not know English. Dealing with the contention that the Manager supervised the work of the business and also purchased tobacco from Guntur and other places, the Deputy Commissioner expressed the view that the progress of the factory was due to the skill of the workmen and the work of the machines and it cannot be said that the profits of over three lakhs were earned through the personal exertions of the recipient. Having regard to the qualifications and the actual work done by Gulam Hyder Khan the salary of Rs. 1,000/- paid to him was quite normal. The Tribunal, however, considered that on the face of the service agreement a share of four annas in the rupee of the net profits was out of all proportion to the work done by Gulam Hyder Khan and that it was not impressed by the argument that an agreement for a higher remuneration was not entered into earlier by reason of the minority of Abida Khatoon. It further held that there is no evidence that Gulam Hyder Khan threatened to leave the ladies or that he could have got elsewhere the terms as alleged to have been granted

under the service agreement or that a manager of the concern of the size of the Cigarette Factory got such higher lucrative terms from any other firm. Having regard to the remuneration paid to the Assistant Manager in 1357 F., i.e., Rs. 750/- per month and Rs. 25,000/- as flavouring charges, the Tribunal allowed in all Rs. 36,000/- as a reasonable remuneration to the Manager who was the Chief Executive of the Factory, as an expenditure laid out or expended wholly and exclusively for the purpose of the assessee's business.

(4) The deduction claimed by the assessee is under S. 12 (2) (xv) of the Hyderabad E. P. T. Act (Section 10 (2) (xv) of the Indian Income-tax Act) which is as follows:

> "Any expenditure (not being in the nature of a capital expenditure or personal expense of the assessee) laid out or expended wholly and exclusively for the purposes of such business, profession or vocation."

It has been observed by the Supreme Court in the case of — 'Commissioner of Income Tax, West Bengal v. Calcutta Agency Ltd.', AIR 1951 SC 108 (A) that where the assessee claims an exemption of amount, on the ground of its being an expenditure falling under S. 10 (2) (xv), the burden of proving the necessary facts in that connection is on the assessee. It is not necessary for the Income Tax Tribunal to challenge the validity or otherwise of the agreement or consider the question whether the amount was actually paid or not. If without challenging either the validity of the agreement or the factum of payment, the Income Tax Tribunal considered the amount paid as not being reasonable or wholly or exclusively expended for the purposes of the business, it can disallow the whole or so much of such expenditure as in its opinion is in excess of the amount reasonably necessary for the purposes of the business. In — 'Jethabhai Hirji & Co., v. Commissioner of Income Tax, Bombay', AIR 1950 Bom 29 (B) Chagla C. J. dealing with the arguments of Sir Jamshedji Kanga, (which are the same as those addressed before us by Mr. Sitharamiah, Advocate for the assessee) that it is for the employer to determine what remuneration he should pay for the services rendered to him by an employee and that the Income Tax Officer could never be in a position to judge as to how and in what manner the employer should remunerate his employees, observed following the principles laid down by the Privy Council in — 'Aspro Ltd. v. Commissioner of Taxes', 1936-4 ITR 264 (PC) (C) as follows:

> "Section 10 (2) (xv) of the Indian Income Tax Act, 1922, requires that whatever amount he pays to his employee must be paid wholly and exclusively for the purposes of his business, and it is for the Income Tax Officer to decide whether any remuneration paid by the employer to his employee was wholly and exclusively expended for the purpose of his business. It is erroneous to contend that as soon as an assessee has established these two facts, namely, the existence of an agreement between an employer and an employee and the fact of actual payment, no discretion is left to the Income-tax Officer except to hold that the payment was made wholly and exclusively for the purposes of the business. Although the payment might have been made and although there might be an agreement in existence, it would be open to the Income-tax Officer to take into consideration various factors which would go to show whether the amount was paid as required by the section."

In that case the assessee employed two persons to attend to his branch of business on salaries of Rs. 125/- and 111/-. Later he agreed to pay to each of these employees a commission of 20 per cent on the net profits of the branch in addition to their respective salaries and pursuant to this agreement each employee was paid Rs. 6,000/-. The Income-tax Officer considered this claim and allowed only a sum of Rs. 1,000/- and the balance of Rs. 11,000/- was disallowed by him. The Tribunal came to the conclusion that the sum of Rs. 11,000/- was rightly disallowed by the Income-tax Officer as according to the Income-tax Officer the amount was not wholly and exclusively expended for the purposes of the assessee's business. In coming to this conclusion the Tribunal considered all the evidence and all the factors placed before it.

Mr. Sitharamiah contends that in that case an opportunity was given to the employees to file affidavits in order to satisfy that these two employees performed extra work in order to merit so large a sum of as Rs. 6,000/- each, but in this case no such opportunity has been given. This contention in our view, has no force as the burden of establishing facts necessary for the income-tax authorities in coming to the conclusion that the amount claimed was wholly and exclusively expended for the purposes of the business, is upon the assessee and it was for the assessee to have established these facts to the satisfaction of the Income-tax authorities. Now what are the facts and circumstances that the assessee sets forth in this case? A reference to the preamble of the agreement set out above would show that the following considerations were taken into account for paying the remuneration claimed as deduction: (a) that Shri Gulam Hyder Khan was working since Amerdad 1343 F., as the General Manager and Mukhtar-e-am of the business and that due to his industry and efficient management the employers have been making good profits since that date; (b) that the entire profits earned by the factory are due to the skill and efficient management of Gulam Hyder Khan; (c) that the employers are Purdah Nishin ladies and it is not possible for them to actively engage themselves in the daily routine and management of the business; and (d) that the age of the employee, the services rendered by him so far & the necessity of his continuing as an employee in future. The aforesaid considerations set out in the preamble for paying the amount have been held to be insufficient to allow the deduction, in view of the absence of proof that the factory could not be run at all without the services of the employee. The Tribunal came to the conclusion that the remuneration sought to be deducted was for past services and that at any rate it was not shown that the business could not be run without the services of Shri Gulam Hyder Khan, nor has it been shown that he would get the same or similar remuneration elsewhere. It was not alleged that the employee had any particular technical skill by reason of which his employment at high remuneration was necessary for the conduct of the business. The contention that the entire earnings of the factory were due to the skilful and efficient management of

the employee was also quite properly negatived on the ground that it was the skill of the workmen and the machines which contributed to the earning of the profits and that it cannot be said that the services of the Manager are alone responsible for the earning of profits of the company. Further the obligations of the employee under the service agreement are very unreal, namely, that he shall diligently and honestly devote his full time to the business of the employers, that he shall not act in any manner prejudicial to the interest of the employers and shall not sell or dispose of or deal otherwise with the property and assets belonging to the company nor assign, transfer or deal otherwise with his interest in the factory under any circumstances whatsoever. These obligations appear to us to be either to pertain ordinarily to the duties of an employee or are not consistent with the status of an employee. It is somewhat strange to suggest that an employee should not sell, dispose of or deal otherwise with the properties or assets belonging to the factory which he as an employee cannot do. In our view the Income-tax Tribunal was entitled to the view that the remuneration was not reasonable having regard to the nature of the business and that at any rate it was out of all proportion to the services which the employee was capable of rendering. This finding is a question of fact and in our view the Income-tax Tribunal had sufficient basis for coming to the conclusion which they did.

(5) There is no substance in the argument of the learned Advocate for the assessee that there was no basis for fixing Rs. 36,000/-. It was, in our view, open to the Income-tax authorities to have rejected the entire claim on the ground that the assessee has not shown to their satisfaction that the amount paid was necessary for the purposes of the business but the Tribunal having regard to the highest salary paid to an executive officer in the Government fixed the remuneration at Rs. 3,000/- per month and allowed Rs. 36,000/-. In this view of the matter our answer to the questions 1 and 2 of the reference is in the affirmative. The assessee will pay the costs of this reference.

B/V.S.B. Ordered accordingly.

A.I.R. 1953 HYD. 267 (Vol. 40, C. N. 134)
(FULL BENCH)

PALNITKAR, MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

The State v. Tadlapalli Kishtiah, Respondent.

References Nos. 5 and 6/6 of 1952-53, D/- 21-7-1953.

Hyderabad Criminal P. C., S. 432 — Question regarding validity of an Act — Reference when can be made — (Public Safety — Hyderabad Public Security Act (12 of 1348 F), S. 13(2)).

Reference under S. 432 can be made to the High Court only when the trial Court is satisfied that in a case pending before it, the determination of any constitutional point with regard to the validity of any Act, Ordinance or Regulation is necessary for the disposal of the case. The Court ought to come to the conclusion that the determination of question of the validity of the impugned sections was necessary; otherwise the accused would be held responsible for the contraventions of those sections. (Para 2)

Thus where an accused is charged with an offence under S. 13, Hyderabad Public Security Act, 1348 F for supplying certain articles to the members of the Communist Party and the validity of that section is impugned, it is necessary for the Magistrate, first of all, to decide whether the accused did actually supply the said articles to the members of the Communist Party; and if so, whether their act amounted to helping the activities of the Communist Party so as to bring the offence within S. 13. Unless the Magistrate comes to a conclusion in the affirmative on both these points, the question of contravention of the sections of the Hyderabad Public Security Act or of the determination of the validity of the section does not arise and hence the reference to the High Court under S. 432 is premature. (Para 3)

Govt. Advocate, for the State; Ramchander Rao Nandapurkar, for Respondent.

ORDER: This is a reference by the Munsiff Magistrate at Karimnagar under S. 432, Cr. P. C. He has given his opinion that Ss. 13 to 21, Hyderabad Public Security Act 12 of 1348 F. are inconsistent with the fundamental rights as mentioned under the Constitution and hence void under Art. 13(2) of the Constitution. He has therefore referred the said point for our decision under the provisions of the said Section.

(2) A careful reading of the S. 432, Cr. P. C. will show that where any Court is satisfied that in a case pending before it, the determination of any constitutional point with regard to the validity of any Act, Ordinance or Regulation is necessary for the disposal of the case then only a reference can be made to a High Court under that Section. In this case a charge-sheet was filed and some evidence was recorded. At that state the case was transferred from some other Court to the Court below and an objection to the validity of the said section was raised and the Court has referred the case to us. In our opinion, the Court ought to have come to the conclusion that the determination of question of the validity of the impugned sections was necessary; otherwise the accused will be held responsible for the contravention of those sections. In this case the accused were charge-sheeted for helping the members of the Communist party by supplying to them two seers of country liquor, one pot of Sendhi and two chickens. It is alleged that by these acts, they helped the members of the Communist party which was declared unlawful. It was therefore necessary for the Magistrate, first of all, to decide whether the accused did actually supply the said articles to the members of the Communist party; and if so, whether their acts amounted to helping the activities of the Communist party so as to bring the offence within S. 13, Hyderabad Public Security Act, 1348 F. Unless the Magistrate comes to a conclusion in the affirmative on both these points, the question of contravention of the sections of the Hyderabad Public Security Act does not arise. It was therefore the duty of the Magistrate, first of all, to decide these questions and then if his decision was against the accused on those points, it is only then that it could be said the question of the validity of these Sections arises for determination. It is clear from the opinion of the Magistrate and the records of the case that the Magistrate has not reached that stage and therefore his reference is premature. We there-

fore reject the reference. This order will govern the connected references.

A/D.R.R. Reference rejected.

A.I.R. 1953 HYD. 268 (Vol. 40, C. N. 135)

QAMAR HASAN AND P. JAGAN MOHAN REDDY JJ.

Sahibzadi Yavarunnisa Begum, Appellant-Petitioner v. Syed Ahmed Ali Khan and others, Respondents.

Revn. Petn. No. 323/4 of 1952-53, D/- 8-4-53.

(a) Debt Laws — Hyderabad Jagirdars' Debt Settlement Act (12 of 1952), S. 25 — Divesting of jurisdiction of executing Court.

Where pending the execution of a money decree, the amount under which is partly realised by the sale in execution of the property of the judgment-debtor, a notice issued by the Board under S. 25 to transfer the execution file is received, then so far as unrealised balance of the amount decreed by the Court is concerned, the application for execution will have to be transferred to the Board under the mandatory provision of the said section, and the Court will become divested of its jurisdiction unless the file is retransferred to it. (Para 4)

(b) Debt Laws — Hyderabad Jagirdars' Debt Settlement Act (12 of 1952), S. 6 (2) — Party to proceeding.

A stranger auction-purchaser who purchases in execution of a simple money-decree is not a person claiming through or under parties to the proceeding within the meaning of S. 6 (2). 10 All 166 (PC), Rel. on. Case law Disting. (Para 7)

(c) Debt Laws — Hyderabad Jagirdars' Debt Settlement Act (12 of 1952), S. 25 — Proceedings in respect of debt.

The proceedings at the stage of confirmation of sale held in execution of money decree are not proceedings in respect of a debt, which ought to be transferred to the Board the moment the requisition is made. AIR 1931 PC 33; AIR 1936 PC 204, Ref.; AIR 1937 Nag 98; AIR 1938 Nag 273; AIR 1950 Mad 512, Rel. on; AIR 1940 Mad 899; AIR 1946 Mad 285, Disting. (Paras 8, 12)

(d) Debt Laws — Hyderabad Jagirdars' Debt Settlement Act (12 of 1952), S. 2 (e) — Stranger auction-purchaser is not debtor.

The concept of debt implies the existence of two parties between whom privity of contract forms the nexus or between whom the relationship of debtor and creditor comes into existence by operation of law. Once the stranger auction-purchaser purchases the property, at an execution sale held in execution of a money decree the rights of the decree-holder cease except as regards the purchase price. Thereafter, the rights reside in the auction-purchaser, and no one can resist him unless an application is made under O. 21, Rr. 89, 90 and 91, Civil P. C. It is, thus, difficult to see how an auction-purchaser can be said to be a party to the debt which he has not contracted or otherwise took upon himself the liability to pay. (Para 8)

D. M. Deshmukh, for Appellant; Narsimha Iyyengar, Srinivasa Iyyengar and Zakuallah, for Respondents.

CASES CITED:

(A) ('37) AIR 1937 Nag 98: 169 Ind Cas 99
(B) ('38) AIR 1938 Nag 273: ILR (1939) Nag 104
(C) ('48) AIR 1948 Nag 180: ILR (1947) Nag 470
(D) ('40) AIR 1940 Mad 899: 191 Ind Cas 733
(E) ('46) AIR 1946 Mad 285: ILR (1946) Mad 828
(F) ('87) 10 All 166: 15 Ind App 12 (PC)
(G) ('48) AIR 1948 Nag 94: ILR (1947) Nag 674
(H) ('41) AIR 1941 Mad 161: ILR (1941) Mad 438 (FB)
(I) ('46) AIR 1946 Lah 134: ILR (1946) Lah 672 (FB)
(J) ('04) 1904 All WN 61: 26 All 447
(K) ('41) AIR 1941 Pat 95: 20 Pat 86
(L) ('40) AIR 1940 Pat 615: 186 Ind Cas 786
(M) ('50) AIR 1950 Mad 512: 1950-1 Mad LJ 347
(N) ('31) AIR 1931 PC 33: 58 Ind App 50 (PC)
(O) ('36) AIR 1936 PC 204: 63 Ind App 304 (PC)

JUDGMENT: Sahibzadi Yavarunnisa obtained a money decree on account of her dower-debt and as money equivalent of her share in the estate of the deceased propositus on 3rd October 1951 for Rs. 1,04,101-10-0 charged upon certain immoveable properties on the basis of a compromise entered into between her and the other heirs of Mir Sardar Ali duly recorded under O. 23, R. 3, Civil P. C. In execution of this decree, a house known as Sardar Munzil situate in Begumpet with its appurtenances was sold by public auction (through Khaleel & Co.), to Kothari Brothers Ltd. (represented by their Director Jorawar Mull Motilal) to whom it was knocked down as the highest bidder for Rs. 70,000/- on 24-8-1952. On the same day, a cheque for Rs. 1500/- drawn on Grindlya Bank was handed over by the auction-purchaser to the auctioneer in compliance with the provisions of O. 21, R. 84, Civil P. C., and the balance of the purchase-money was paid through another cheque drawn on the Central Bank of India.

(2) Before the sale could be confirmed and made absolute under O. 21, R. 92, Civil P. C., the First Judge, City Civil Court by his letter No. 4731, dated 22-9-1952, issued an injunction in the case of — 'Mir Azam Ali v. Mir Hamid Ali' requesting the Court below not to make the sale absolute till the disposal of that case on his file. The letter was received by the Court below on 23-9-1952. On that same day, the judgment-debtors put in an application under O. 21, R. 90, Civil P. C. for setting aside the sale on the ground that property worth not less than Rs. 1,50,000/- fetched a lower price for want of proper publication of sale and inordinate haste on the part of the auctioneer. In the alternative, they prayed that the proceedings be transferred to the Jagirdars' Debt Settlement Board which had come into existence by then under S. 4, Hyderabad Jagirdars' Debt Settlement Act, 1952 (12 of 1952) (hereinafter referred to as the Act) and was actively functioning. Following upon this application came the letter of the Secretary to the Jagirdars' Debt Settlement Board No. 46/DSB dated 24-9-1952 asking the Court to send the original and transfer the execution file of the case to the Board. On 6-10-1952, the auction-purchasers Kothari Brothers Ltd., through their Director, Jorawar Mull Motilal filed an application objecting that inasmuch as the Act had come into force on 18-3-1952, the Court had no jurisdiction to conduct the sale, consequently all the proceedings subsequent to 18-3-1952 would be void and the sale a nullity, and that they were

therefore entitled to a refund of the purchase-money and the amount of Rs. 3500/- paid by them to the auctioneers as commission. The decree-holder in her separate replies of 22-10-1952 took strong exception to the objections raised by the judgment-debtors and the auction-purchaser and prayed that the sale be confirmed and made absolute. In disposing of the matter in controversy, the learned Additional District Judge, Hyderabad, held that the injunction issued by the First Judge, City Civil Court had no binding effect and can therefore be ignored. He overruled the objections raised by the judgment-debtors on the ground that the auctioneer was appointed by the mutual consent of the parties and the mere fact that the property did not fetch higher price according to the expectations of the judgment-debtor did not amount to fraud or material irregularity within the meaning of O. 21, R. 90. He further held that the validity of the sale could not be impugned because it was a 'fait accompli' before the Jagirdars Debt Settlement Board (hereinafter referred as the Board) exercised its powers under S. 25 of the Act, by requisitioning the files of the Court to itself. The Additional District Judge however stayed his hand from confirming the sale because in his opinion the statutory requisition made by the Board took away his jurisdiction to deal further with the proceedings. In regard to the moneys deposited by the auction-purchaser, he stated as follows:

"I do not know how long it will take the Board to come to any conclusion, hence the money deposited by the auction-purchaser cannot be made to remain idle. It would therefore be refunded to him on his furnishing a proper security for the like amount with a definite undertaking that if the Board upholds the sale, the auction-purchaser will deposit the amount of Rs. 70,000/- within a week's notice.....I therefore (further) order that in case the decretal amount is otherwise conciliated (scaled down) by the Board the auction-purchaser will be entitled to claim the sum paid to the auctioneer not from the latter but from the judgment-debtor."

The judgment-debtors and the auction-purchasers have remained content with this order but the decree-holder has come up in revision and it was strenuously contended on his behalf that the learned Additional District Judge had wrongly refused to exercise jurisdiction, to confirm and make the sale absolute. The learned Advocate for the auction-purchasers contrary to his contentions in the Court below made common cause with the petitioner before us. The real support for the judgment under revision came from the judgment-debtors who remained ex parte on the date when the arguments were heard by the Court below.

(3) In order to appreciate the arguments advanced on behalf of the contesting parties, it would be useful to refer at the outset to S. 25 of the Act. That section reads as follows:

"25 (1) All suits, appeals, applications for execution and proceedings other than revisional in respect of any debt pending in any civil or revenue Court shall, if they involve the questions whether the person from whom such debt is due is a debtor and whether the total amount of debts due from him on the date of the application is less than Rs. 5000/- be transferred to the Board.

(2) When an application for adjustment of debts made to a Board under S. 11 or a statement submitted to a Board under S. 21 includes a debt in respect of which a suit, appeal application for execution or proceeding other than revisional, is pending before a civil or revenue Court, the Board shall give notice thereof to such other Court. On receipt of such notice, such other Court shall transfer the suit, appeal, application or proceeding, as the case may be, to the Board.

(3) When any suit, appeal, application or proceeding is transferred to the Board under sub-s. (1) or sub-s. (2), the Board shall proceed as if an application under S. 11 had been made to it.

(4) If the Board, to which any suit, appeal, application or proceeding is transferred under sub-s. (1) or sub-s. (2), decides the preliminary issue mentioned in cl. (a) of sub-s. (1) of S. 24 in the negative or that mentioned in cl. (b) of the said sub-s. (1) in the negative, it shall retransfer the suit, appeal, application or proceeding to the Court from which it has been transferred to itself after the disposal and subject to the result of the appeal where an appeal is filed and after the expiry of the period prescribed for an appeal where no appeal is filed.

(5) When any suit, appeal, application or proceeding is retransferred to the Court under sub-s. (4), the said Court shall proceed with the same."

(4) There is agreement on each side with which we agree that in so far as unrealised balance of the amount decreed by the Court below is concerned, the application for execution will have to be transferred to the Board under the mandatory provision of the above section, and the Court will become divested of its jurisdiction unless the file is retransferred to it. The controversy, however, centered round the question whether the proceedings at the stage of confirmation where the interest of a stranger to the decree has intervened can be said to be a proceeding in respect of a debt and consequently liable to be transferred to the Board. It was argued on behalf of the petitioner that once the Court disallowed the judgment-debtor's application purporting to be one under O. 21, R. 90, it ought to have proceeded to confirm the sale under O. 21, R. 92, and not transferred the proceeding to the Board because that proceeding cannot be said to be in respect of a debt. Reference is made in this connection to the — 'Firm of Haji Dada Kachhi v. Pannalal', AIR 1937 Nag 98 (A); — 'Madhao Mukund v. Ramchandra', AIR 1938 Nag 273 (B) and — 'Rajaram Kontu v. Rishabha Kumar', AIR 1948 Nag 180 (C). The learned advocate for the judgment-debtors in reply contended that the expression "proceedings in respect of a debt" used in S. 25 of the Act includes and covers proceeding in respect of confirmation of sale and the auction-purchaser being a representative of the judgment-debtors, would be bound by the result of any decision to which the Board may make in adjusting the account between the parties to the decree. In support of the contention raised by him, the learned Advocate relied on — 'Nukala Surya Rao v. Bullemma', AIR 1940 Mad 899 (D); — 'Rathnasabapathi Ayyer v. Subramania Pillai', AIR 1946 Mad 285 (E), and certain other rulings to which we shall advert later.

(5) Before dealing with these contentions, it is to be noted that the judgment-debtors after the sale was held did not take advantage of the provisions of R. 89, O. 21, Civil P. C. They applied under R. 90 and failed, and the portion of the order disallowing the application has now become final in view of the fact that they did not attempt to have it set aside by way of

appeal as provided by Cl. (j) of R. 1 of O. 43. It is thus apparent that so far as the relevant rules of Civil Procedure Code are concerned, there is nothing to prevent the sale being confirmed and made absolute. The law holds out a definite assurance to the auction-purchaser under R. 92, that the sale shall be confirmed in his favour unless the judgment-debtor or any other persons entitled to apply under R. 89 or the decree-holder or any other persons entitled to apply under R. 90 or he himself exercises the right conferred upon him to apply under R. 91, to have it set aside after satisfying the conditions mentioned in the rule respectively applicable to each applicant.

(6) It is next to be seen whether confirmation can be withheld in view of any of the provisions of the Act.

(7) The learned Advocate for the judgment-debtors contends that whatever may be the position under the Code of Civil Procedure, the fact that a debt which had been concluded by a decree of a Civil Court can be reopened under the Act and adjusted between parties to the decree, would imply that the auctioneer would be bound by the decision which the Board may arrive at in that respect. This contention, he urges, is supported by the provisions of S. 6 of the Act. That section provides:

"6 (1) Subject to the provisions of this Act, the Board shall have full power to decide all questions, whether of title or priority or of any nature whatsoever, and whether involving matters of law or fact, which may arise in any case within the cognizance of the Board or which the Board may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete settlement of debts in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes on all parties and all other persons who are parties to the proceedings in which such decision is given."

The learned Advocate for the judgment-debtors lays great deal of stress on the provisions of sub-s. (2) but that sub-section does not expressly say that the auction-purchaser would be a person claiming through or under any parties to the proceeding. The Privy Council in — 'Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan', 15 Ind App 12 (PC) (F), has decided that stranger auction-purchasers who purchase in execution of a simple money-decree are not bound by the result of any appeal against the decree. It follows that such persons cannot be regarded as claiming by or under the judgment-debtor for purposes of the Act, for, if they are not bound by the result of an appeal against the very decree under which they purchase, much less will they be bound by the results of some independent suit or proceedings to which they are not parties. The learned advocate for the judgment-debtors refers to — 'Rambhau Vithalrao v. Nagarmal Jitmal', AIR 1948 Nag 94 (G); — 'Annamalai Mudali v. Ramasami Mudali', AIR 1941 Mad 161 (FB) (H); — 'Bhiku Mal v. Firm Ram Chandar Babu Lal', AIR 1946 Lah 134 (FB) (I); — 'Gulzari Lal v. Madho Ram', 26 All 447 (J); — 'Mt. Basumati Kuer v. Mt. Harbansi Kuer', AIR 1941 Pat 95 (K) and — 'Ajodhya Lal v. Brij Kishore Dass', AIR 1940 Pat 615 (L), for the proposition that the auction-purchaser should be held to be the representative of the judgment-debtors. But these decisions are based on a consideration of the provision of S. 47, Civil P. C. In the present case, at the stage with which we are concerned, no question falling under S. 47 arises, and therefore the authorities cited are distinguishable and need not be elaborately discussed.

(8) As already stated, the real question to be determined is whether the proceedings at the stage of confirmation are proceedings in respect of a debt, which ought to be transferred to the Board the moment the requisition is made. 'Debt' has been defined in S. 2 (e) of the Act to mean any liability in cash or kind, whether secured or unsecured debt from a jagirdar whether payable under the decree or order of any Court or otherwise. The concept of debt implies the existence of two parties between whom privity of contract forms the nexus or between whom the relationship of debtor and creditor comes into existence by operation of law. Once the auction-purchaser purchases the property, the rights of the decree-holder cease except as regards the purchase price. Thereafter the rights reside in the auction-purchaser, and, according to the Privy Council, no one can resist him unless an application is made under O. 21, Rr. 89, 90 and 91. The judgment-debtor in the present case had made an application which was disallowed and which had become final as stated above. In such circumstances, it is difficult to see how an auction-purchaser can be said to be a party to the debt which he has not contracted or otherwise took upon himself the liability to pay. This view is fortified by the provisions of S. 21 of the Act which direct the Board to give notice to the debtor and to the creditor and publish a general notice requiring the debtor and all creditors to submit a statement in the prescribed form within one month from the date of the service of the notice or the publication of the general notice whichever is later. It is thus clear that the persons who appear before the Board are the debtor and the creditor. The award by the Board after taking the account according to S. 28 shall be between the creditor and the debtor and it shall be registered and executed by the Collector against the debtor and the money due from him will be recovered as arrears of revenue (vide Ss. 66 and 42 of the Act). These provisions make it sufficiently clear that the scope of the inquiry before the Board shall be confined to the parties to the debt and the auction-purchaser does not come into the picture except upon the theory of representation, which we have held, does not apply in the circumstances of this case. The result is that the expression "proceeding in respect of a debt" would not apply to a confirmation proceeding.

(9) The authorities cited by the learned advocate for the judgment-debtors to which reference has been made in an earlier portion of the judgment are based on S. 25, Madras Debt Conciliation Act which reads as follows:

"When an application has been made to a Board under S. 4 any suit or other proceedings then pending before a civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application."

In interpreting the provisions of this section Wadsworth J., in — 'AIR 1940 Mad 899 (D)', held that where there has been a decree on a mortgage debt and an application is filed under O. 21, R. 90 by the judgment-debtor to set aside the sale on the ground of material irregularity, that proceeding is a proceeding in respect of a debt within the purview of S. 25, Madras Debt Con-

ciliation Act. In — 'AIR 1946 Mad 285 (E), a Bench of the Madras High Court, has held that the language of S. 25 is mandatory. Consequently, where the judgment-debtor files a petition under S. 4 the Court executing the decree has no jurisdiction to proceed with the petition for execution until the petition under S. 4 has been dismissed and as the Court has no jurisdiction to sell the property in the meantime its action in so doing must be regarded as nullity.

(10) These cases no doubt in a way support the argument of the learned Advocate. But the difficulty in accepting them as good authority for the proposition with which we are concerned lies in the fact that the position of the stranger purchaser has not been considered in them. To stress that point the learned advocate for the petitioner relied upon Nagpur cases already referred to above. In the first two cases i.e., the — 'AIR 1937 Nag 98 (A)' and — 'AIR 1938 Nag 273 (B)', provisions similar to those enacted in S. 25, Madras Debt Conciliation Act, came in for consideration. It was held in the former case that after an execution sale has been held and the sale price has been set off against the judgment-debt or deposited in Court, subsequent proceedings for confirming the sale are proceedings between the judgment-debtor and the auction-purchaser, just as are proceedings for the delivery of possession to the auction purchaser. In these proceedings, the decree-holder plays no part and they do not amount to executing a decree so as to fall under this proviso to S. 21, C. P. Debt Conciliation Act. The property had been sold in execution of the decree and the title of the auction-purchaser vests in him from the date of sale, subject to confirmation, which is inevitable in the absence of any objection. In the latter case Niyogi J., decided that the object of the C. P. Debt Conciliation Act is the settlement or adjustment of debts owed by agriculturists and in the settlement of the debts any interest which arises in favour of a third party should not be disregarded. The proceeding in respect of a debt occurring in S. 21, Debt Conciliation Act, must be understood as referring to those proceedings in which the decree-holder and the judgment-debtor alone are concerned and its meaning should not be extended to cover a case of an auction purchaser. The proceeding relating to confirmation of sale cannot be over-ridden by any other provision of law unless there is an express provision controlling or impairing the effect of R. 92, O. 21, Civil P. C. Consequently, S. 21 does not preclude the executing Court from confirming the execution sale held prior to an application made by the debtor under S. 4 of the Debt Conciliation Act. In the last case cited on behalf of the petitioner Bose J. as he then was in considering the effect of stay order u/s. 6 (3), C. P. Relief of Indebtedness Act observed that under that subsection the stay does not operate until the Court receives notice. The notice cannot be said to be given until it is actually handed over. It is not enough to sign an order in the Debt Relief Court. Hence, even if the notice is issued before the sale but the sale is completed before the notice is received by the Court, the sale is valid and cannot be set aside. As the sale is good and cannot be set aside under O. 21, Rr. 89, 90 and 91, Civil P. C., its confirmation made subsequently is also good. In addition to these authorities, we may quote the case of —'Kunhikkavu v. Kesavan', AIR 1950 Mad 512 (M). In that case Panchapagesa Sastri J., while dealing with the provisions of S. 4, Madras Tenants and Ryots Protection Act, overruled the contention that sale becomes good only on confirmation and held that the Civil Procedure Code in various rules under O. 21 makes a clear distinction between 'sale' and "confirmation of sale". Section 4 of that Act applies only to cases where the property has not been sold. The section is inapplicable to a case where auction sale had been affected but what remains to be done is only the confirmation of the sale by the Court under O. 21, R. 92, Civil Procedure Code.

(11) In our opinion the view expressed in Nagpur cases and in the later Madras cases is more in consonance with the law as laid down by the Privy Council. It has been held in — 'Nanhelal v. Umrao Singh', AIR 1931 PC 33 (N), that if a sale has been duly effected, it is not competent to the decree-holder or the judgment-debtor to get rid of it by adjusting or otherwise satisfying the decree out of Court. In — 'Venkata Jagannatha Rao v. Venkata Kumara Mahipati Surya Rao', AIR 1936 PC 204 (O), Sir Shadilal who delivered the judgment of the Board observed:

> "It is obvious that after the expiry of the statutory period for setting aside the sale, there was no person who could question the title of the auction purchaser and a certificate of sale granted by the Court would in such a case be formal document of title. In the absence of an order setting aside the sale, the Court is bound to confirm it."

Even if it be supposed that such proceedings as the one with which we are concerned, are covered by the provisions of S. 25 of the Act and are to be transferred on requisition made by the Board, the question arises whether the Board will have jurisdiction to deal with them. There are no provisions in the Act to the effect that notwithstanding that the sale has reached the stage of confirmation the Board on the proceedings being transferred to it shall set aside the sale or refuse to confirm it and order a de novo sale to satisfy the debt in case of judgment-debtor's default. According to S. 51 of the Act only the proceedings under Chapter III of the Act are to be governed by the Code of Civil Procedure. Chapter III contains no provision for confirmation or setting aside by the Board of the sale already held by the Civil Court. In such a case there would be no sense in transferring a proceeding to the Board which it cannot effectively deal with.

(12) For the reasons stated above, we hold that confirmation proceedings are not proceedings in respect of a debt and cannot therefore be transferred to the Board.

(13) The result is that the revision petition succeeds and is hereby allowed with costs. The order of the Additional District Judge is set aside with the direction that he will proceed further in the case in accordance with law.

B/V.S.B. Revision allowed.

A.I.R. 1953 HYD. 271 (Vol. 40, C. N. 136)

MANOHAR PERSHAD AND DESHPANDE JJ.

Mukanda, Petitioner v. Birdychand, Respondent.

Ref. Nos. 516 to 575 of 1952, D/- 12-1-1953.

Civil P. C. (1908), O. 46, R. 1 — Statement of facts and Court's opinion.

A reference without any statement of facts & opinion of the Court below, about the case being non-appealable used without a statement that the trial Court had any reasonable doubt about it, is not proper and valid. (Paras 5, 6)

Anno: Civil P. C., O. 46 R. 1 N. 8.

ORDER: The District & Sessions Judge, Aurangabad through a letter dated 3-7-1952 has forwarded a copy of the letter No. 378 of 18-6-1952 from the First Class Magistrate, Vijapur, and has requested the Court to let him know as to how the cases mentioned in the list may be disposed of.

(2) This letter was received on the Administrative Side of this Court, from where it was treated as a reference and transferred to the Judicial side and which is before us now.

(3) From a perusal of the record before us it appears that the Munsiff, Vijapur, through a letter No. 378 of 18-6-1952, addressed to the District and Sessions Judge, Aurangabad, asked his guidance whether he was empowered to deal with the cases in view of the fact that the Bombay Agricultural Debt Relief & Settlement Act of 1939 is not in existence in the Hyderabad State. The District and Sessions Judge has forwarded this letter along with the record of 60 cases to this Court. On the Administrative Side, this was treated as a reference.

(4) The question that arises is whether this is a reference by the District and Sessions Judge, Aurangabad, or a reference by the Munsiff, Vijapur. If it is to be treated as a reference by the District and Sessions Judge, Aurangabad, then it cannot be a proper reference as the cases are not before him, and if it is to be treated as a reference by the Munsiff Court, Vijapur, then in that case also, this reference is not valid, for according to O. 46, R. 1, C. P. C., a reference could only be made where no appeal lies and before or on the hearing of a suit, the Court trying the suit entertains reasonable doubt and after drawing up a statement of the facts of the case, and the point on which doubt is entertained, refers such statement with its opinion on the point for the decision of the High Court.

(5) In the present case, there is neither any statement of facts nor is there any opinion of the Court below about the case being non-appealable. Further, it is not clear whether the trial Court had any reasonable doubt about it.

(6) We are, therefore, of the opinion that as there is no statement of facts and the opinion of the Court below, and the reference is also not by the Munsiff, Vijapur, the reference is not proper and valid. Thus, the reference is rejected. This order shall govern the other connected references. Order accordingly.

C/H.G.P. Reference rejected.

A.I.R. 1953 HYD. 272 (Vol. 40, C. N. 137)

PALNITKAR AND SIADATALI KHAN JJ.

Hyderabad State v. Mukund Reddy, Respondent.

Reference No. 751/6 of 1952-53, D/- 18-6-1953.

Criminal P. C. (1898), Ss. 247, Proviso and 200, Proviso (aa) — Complaint by public servant.

Where security proceedings have been started upon a written complaint of a pubilc servant, the Magistrate would not be justified in dismissing the complaint for non-appearance of the Public Prosecutor when the accused is also absent. To such a case the proviso to S. 247 is applicable and under that proviso the Magistrate has to exercise a judicial discretion. Since the case could not proceed on account of the absence of the accused and the question of examining the complainant could not arise by virtue of S. 200, Proviso (aa), the attendance of the Public Prosecutor was not required and the Magistrate should have dispensed with his attendance under the proviso to S. 247. (Para 2)

Anno: Cr. P. C., S. 200 N. 18; S. 247 N. 9.

Gopalrao Murumkar, Govt. Advocate, for the State; Madhav Rao Vemuganti, for Respondent.

ORDER: This is a reference by the District & Sessions Judge, Karimnagar, recommending that the order of the Deputy Collector, Karimnagar dated 6-9-1951, be quashed and the case remanded to him for further trial. The reasoning given by the learned District & Sessions Judge is not, to our mind, quite correct. He was under the impression that the case is one in which the procedure applicable to warrant cases will have to be followed. Shri Madhav Rao, the learned Advocate for the respondent, drew our attention to the order of the Deputy Collector dated 12-7-1951 in which it has been mentioned that the accused is directed to show cause why he should not be bound over to keep peace....Shri Madhav Rao argues that under S. 117 when the case is one for security to keep peace, it should be tried as a summons case. Shri Gopal Rao Murumkar, the learned Government Advocate, argues that the Deputy Collector misapprehended the police report dated 25-6-1951 in which it has been stated that it was intended that proceedings under S. 110 Criminal P. C., were to be instituted and enquired into against the accused and as such the procedure applicable to warrant cases will have to be followed.

(2) The case was dismissed by the Magistrate on account of the absence of the Public Prosecutor and also on account of the absence of the accused. Therefore, in our opinion, whatever the procedure to be followed may be, the provisions of S. 247 will be applicable in this case. The proviso to that section lays down that where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance and proceed with the case. It is clear from a perusal of the judgment of the Magistrate that he did not devote his attention to this part of the section. Otherwise, he would have mentioned some reasons as to why he did not dispense with the attendance of the complainant who was a public servant in this case. We are of the opinion that the discretion to be used while applying this proviso should be judicially exercised. It is clear from the record that the case could not proceed on account of the absence of the accused. Thus the presence of the public servant—complainant—was not required and the Magistrate could and should have dispensed with his attendance. We direct that the absence of the complainant on the date be dispensed with as laid down in the section and the case is remanded to the Court of the Magistrate for trial according to law. In this connection reference is also made to the provisions of S. 200 (aa) in which it has been laid down that when the complaint is made in writing nothing contained in the section shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties. In this case the complaint was made by the Officer-in-charge of the Police station concerned in the discharge of his official duties. Hence the question of examining him as a complainant did not arise. The case is remanded as above to the Court of the Magistrate for trial.

B/K.S.B. Case remanded.

A.I.R. 1953 HYD. 273 (Vol. 40, C. N. 138)

PALNITKAR AND SRINIVASACHARI JJ.

State v. Prabhu Dayal, Respondent.

Revn. Petn. Nos. $\frac{479 \text{ \& } 480}{6}$ of 1952-53, D/- 23-2-1953.

Criminal P .C. (1898), S. 155 — Powers and duties of Police — (Hyderabad Cr. P. C., Ss. 156, 157(2)).

Once a police officer takes up the investigation of a non-cognizable case upon order of the Magistrate, the investigation which he holds becomes an investigation under Ch. 14, Cr. P. C. and he becomes invested with all the powers which are given to him under Chap. 14 including the power to file a challan, and the law does not require that a fresh permission should be given by the Government or the Magistrate concerned for preferring a charge-sheet after considering the result of the investigation. 10 Deccan LR 28 and 35 Dec LR 216, held overruled by App. No. 1 of 1355 F; AIR 1915 Bom 80, Expl. and not applied. (Para 4)

Gopalrao Murumkar, Govt. Advocate, for the State; Purshottam Rao Vakil, for Respondent.

CASES CITED:
(A) 10 Deccan LR 28
(B) Appeal No. 1 of 1355 F (Hyd) (FB)
(C) 35 Deccan LR 216
(D) ('15) AIR 1915 Bom 80: 16 Cri LJ 161

ORDER: This revision petition, preferred against the judgment of the lower Court, raises some legal issues. The facts of the case are that the police received information to the effect that the accused who was a teacher in the Kayasth Pathashala issued false and forged transfer certificates in lieu of some gratification to certain students purporting to show that they had passed in their examinations (though they had actually failed) and that they are eligible for admission to the higher standard. The transfer certificates for which they applied for, were required as they wanted to enter and read in some other schools. The police, therefore, were of opinion that the accused had committed the offences mentioned in Ss. 395 and 397 of the Hyderabad Penal Code corresponding to Ss. 467 and 468 of the Indian Penal Code. As the offences were non-cognizable, the police wrote to the City Criminal Court for permission to investigate the offences under S. 156, Hyderabad Criminal P. C. corresponding to S. 155, I. Cr. P. C. The City Criminal Court ordered the police to investigate the case. The police had also written to Government for permission to investigate. That permission was also obtained. On the basis of the said orders, the Police investigated the case against the accused and preferred four challans against him. Two of the challans were joined together in one case which is the subject-matter of consideration in case No. 479 of 1952 before us. The other two challans were preferred against him and they were tried together by the lower Court against which Revision No. 480 of 1952 has been preferred which is also before us for consideration today.

(2) We have heard the arguments of the learned advocates of the parties in both the revision cases, and this decision will govern both the cases. A copy of this be made a part of the record in the latter revision case.

(3) The learned Magistrate of the lower Court decided the cases on the ground that the institution of the charge-sheet was not proper and unauthorised because no permission was taken from Government, or the Magistrate to institute the charge. The point for decision therefore is whether after giving the order to the police to investigate the offence (being non-cognizable under S. 156, H. Cr. P. C.), the law requires that a fresh permission should be given by the Government or the Magistrate concerned for preferring a charge-sheet after considering the result of the investigation held by the police. The provisions of Ss. 156 and 157, H. Cr. P. C. are the same as the provisions of S. 155, I. Cr. P. C.; in it, it is laid down, that when information is given to an officer in charge of a police station of the commission of a non-cognizable offence he shall enter in a book the substance of such information and refer the informant to the Magistrate. It is further provided that no police officer shall investigate a non-cognizable offence without the order of the Magistrate of the 1st or 2nd class having power to try such case or commit the same for trial. There is a further provision in the Hyderabad Code that Government may also issue such order empowering the police to investigate. Sub-section 3 of S. 155, I. Cr. P. C. which is equivalent to Sub-section 2 of S. 157, H. Cr. P. C. provides that a police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) It is clear therefore from this sub-section that when a police officer in charge of a police station receives an order for an investigation of a non-cognizable offence he is empowered to proceed in the same manner and exercise the same powers in respect of investigations which he is empowered to exercise in a cognizable case except the power to arrest the accused without warrant. Thus once the order of investigation is received, there is no limitation or restriction on his powers of investigation and proceeding with the case (the question of arrest without warrant does not arise in this case). Therefore as far as the section is concerned, it is clear that there is no direction that he should report the result of his investigation to the authority issuing the order to investigate and then wait for instructions to prefer his charge-sheet before a Magistrate. It is conceded that in the case of non-cognisable offences no permission is necessary to prefer a charge-sheet. We do not see any reason why such a permission is necessary in a non-cognizable offence which is investigated after getting the necessary order to investigate. At any rate, the sub-section has not provided for such a necessity. It is therefore clear to us that once a police officer takes up the investigation of a non-cognizable case (after getting due orders) the investigation which he holds becomes an investigation under Chapter 14, Cr. P. C. and he becomes invested with all the powers which are given to him under Chapter 14, including the power to file a challan.

(5) The learned advocate for the respondent relied upon — 'Sana Ahmed v. The State', 10 Deccan LR 28 (A), and argued that after investigation by the police a fresh order by the Magistrate directing the filing of charge-sheet on the report of the police is necessary. But we find that this ruling has been overruled in an unreported case by a Bench of seven Judges in — 'Sarkari-Ali (State) v. Shanker Iyer', Appeal No. 1 of 1355 F. (FB) (B) instituted on the 2nd of Azur 1355 F. and decided on 14-8-1355 F. The learned Judges decided in that case that they cannot agree with the opinion mentioned in — 'Sana Ahmed's case (A)' and that it should not there-

fore be followed. It was held therein that S. 157, H. Cr. P. C. is in that Chapter of the Hyderabad Criminal P. C. which deals with the powers of the police to investigate a case and therefore excepting the fact that in non-cognizable cases authority to investigate is necessary there are no other limitations on the powers of an investigating officer as laid down in that chapter. The learned advocate for the respondent also relied upon — 'Abdul Ali Khan v. The State', 35 Deccan LR 216 (C) in which 'Sana Ahmed's ruling (A)' was followed. As 'Sana Ahmed's case (A)' which has been overruled has been followed in — '35 Dec LR 216 (C)', it is no longer binding. The lower Court has placed reliance upon — 'Appa Ragho v. Emperor', AIR 1915 Bom 80 (D). After perusing the said ruling, we find that the facts are not very clearly stated. It appears that a Magistrate directed the police to investigate a non-cognizable offence and report. The police investigated the case but did not make a report and in the meanwhile the police instituted proceedings against the applicant under S. 211, I. P. C. The learned Judges held that the conviction of the complainant under S. 211 (viz., preferring a false charge with intent to injure) was not valid. It is clear from these short facts that it was not the person who was originally intended by the informant to be the accused who was convicted and punished but it was the other way; the informant was punished for giving false information. The learned Judges held that the report under S. 173 with regard to the original complaint of the informant (or the complainant) was necessary before there could be a charge against that informant for giving false information. Section 173 lays down that the police after investigating into a case should report to the Magistrate. That report when it takes the form of a charge-sheet is enquired into and tried and decided and it may lead ultimately either to the discharge or acquittal of the accused or of his being punished. Such a report is called a "challan" or a "charge-sheet" and is taken cognizance of by a Magistrate under S. 190(b), I. Cr. P. C.: S. 195(b), H. Cr. P. C. On the other hand, if that report be to the effect that the case was a false one then the Court may decide accordingly; and only then could a question whether the information was a false one, arise. Such a report is known as a "referred charge-sheet". Therefore in the Bombay case the question was different, as the police preferred a charge-sheet under an offence of giving information without making a report that the case was a false one. In the case before us, there is actually a report under S. 173 which was enquired into and tried by the lower court and the proceedings are at the stage of framing of charges. Hence — 'AIR 1915 Bom 80 (D)' is not applicable in this case.

(6) Thus in this case there was a report (challan or charge-sheet) which the Magistrate of the lower court has taken cognizance of and tried. There is therefore no defect as regards the presentation of the challan and the view of the learned Magistrate of the lower Court that the challan was contrary to law, cannot be accepted.

(7) We, therefore, set aside the order of the lower Court, remand the case to that Court and direct that the case be proceeded with and disposed of according to law.

Case remanded.

C/H.G.P.

A.I.R. 1953 HYD. 274 (Vol. 40, C. N. 139)

SIADAT ALI KHAN J.

Joint family business of Ramchendera Srinavas, Petitioners-Appellants v. The Shahdara Sharanpur Light Railway, Respondent.

Revn. Petn. No. 181/A/5/1 of 1358 F, D/- 30-3-1953.

(a) Contract Act (1872), S. 72, Illustration (b) — Payment made under mistake as to rates — Mistake is one of fact. (Para 2)

Anno: Contract Act, S. 72 N. 2.

(b) Railways Act (1890), S. 47(1) — Consignor paying at higher rate.

A railway company contracts with the consignor at the rate mentioned in the railway receipt and this has to be followed. If the goods are consigned to a station where the rate is higher than at the despatching station, the consignor cannot be charged at the higher rate and if he is so charged the payment is illegal. (Para 2)

Anno: Railways Act, S. 47 N. 2.

(c) Limitation Act (1908), Arts. 62 and 96 — Consignor of goods paying at higher rate under mistake — Suit to recover money paid in excess — Payment cannot come under heading "money had and received" — Art. 96 and not Art. 62 applies — AIR 1940 Bom 252, Distinguished. (Para 3)

Anno: Limitation Act, Art. 62 N. 28, Pt. 2; Art. 96 N. 4.

Bishamber Dayal and Girija Pershad Sanghi, for Petitioners; B. Narayan Rao, for Respondent.

CASES CITED:

(A) ('29) AIR 1929 Mad 177: 114 Ind Cas 358
(B) ('49) AIR 1949 PC 297: 28 Pat 913 (PC)
(C) ('44) AIR 1944 Mad 444: ILR (1945) Mad 174
(D) ('40) AIR 1940 Bom 252: 189 Ind Cas 678

ORDER: This is revision petition No. 181 register No. A-5/1 (Telangana) against the judgment of the Additional Sessions Judge, Secunderabad, dated 22-1-1949 by which the revision petitioner's suit was dismissed on the ground that it was out of time.

(2) I have heard the arguments of the learned Advocates of the parties and perused the Judgment under revision. It appears to me that the learned Additional Sessions Judge based his Judgment on — 'Appavoo Chettiar v. S. I. Ry. Co,' AIR 1929 Mad. 177 (A) and dismissed it. This Madras case proceeds on the interpretation of illustration (b) of Section 72 of the Indian Contract Act to the effect that when payment was made according to a wrong schedule, it was a mistake of law. This case has been over-ruled by their Lordships of the Privy Council in a Judgment, passed after the Judgment under revision, in — 'Shiba Prasad Singh v. Srish Chandra', AIR 1949 PC 297 (B). Their Lordships of the Privy Council have held that if payment is made under a mistake as to the rates it is not a mistake of law but it is a mistake of fact. Thus, the basis of the Judgment under revision has been altered.

The learned Advocate for the respondent then argued that the payment was not illegal. It should be noted that the learned Additional Sessions Judge has found distinctly that the payment was illegal. The goods were consigned at Baraut station on S. S. L. Railway. There O. R. R rates prevailed. The goods were consigned to Kachiguda Railway Station which is outside the jurisdiction of S. S. L.

Railway. On N. S. Railway the R. R. R. rates prevailed and the rates were higher than the O. R. R. rates. The learned Additional Sessions Judge therefore heid that the clerk at the Kachiguda Railway Station who charged at the R. R. R. rates had no authority to do so as he altered the basis of the contract. The learned Advocate for the respondent argued on the authority of — 'Dawood Rowther v. S. I. Rly. Co. Ltd., Trichinapoly', AIR 1944 Mad 444 (C), that the action of the clerk at the Kachiguda Railway Station was correct inasmuch as he has no authority to charge outside the tariff rates prevailing in N. S. Railway. I do not agree, for the contract was made at Baraut Station and it had to be followed. Any adjustment of the account in respect of the difference of rates is a matter between the railway companies and not a matter as between the parties. The railway company contracts with the party at the rates mentioned in the railway receipt and this has to be followed. I need not cite any authority, for this has been accepted always to be the case. Thus, in my opinion it is quite evident that excessive rates were charged.

(3) Then comes the question of limitation. The learned Advocate for the respondent argued that Article 62, Indian Limitation Act, only applies; for money was paid voluntarily and, therefore, action for its recovery can only be of "money had and received", for this he has cited — 'City Municipality, Bhusawal v. Nusserwanji Hormusji', AIR 1940 Bom. 252 (D). It appears to me that though the money was charged by the Kachiguda clerk on 10-6-1943 the contention of the revision petitioner that he came to know that it was in excess of O. R. R. rates on 29-6-43 will have to be gone into; for Article 96, Indian Limitation Act gives him time from the date of knowledge. The Bombay case in my opinion is not relevant inasmuch as the payment cannot come under the heading "money had and received". The revision petitioner was bound to pay the money and he paid it under a demand which could have been enforced by withholding the goods and otherwise if he had not complied. I do not think to such cases the notion of the quasi-contract of money had and received can be applied. Thus, I allow this revision petition with costs, set aside the Judgment under revision and direct that the case be disposed of in accordance with law, after allowing time to the revision petitioner to prove the date of his knowledge. If the limitation point is not decided against the revision petitioner the case will have to be disposed of according to law on merits.

B/V.R.B.

Revision allowed.

A.I.R. 1953 HYD. 275 (Vol. 40, C. N. 140)

FULL BENCH

PALNITKAR, MOHD. AHMED ANSARI AND SRINIVASACHARI JJ.

Chandrappa, Appellant v. Gyanamma and others, Respondents.

Civil Appeal No. 6/4 of 1359 F., D/- 19-6-53.

†**Hindu Law — Adoption — Widow — Consent of Gnaties — (Words and Phrases — Gnati) — (Hindu Law — Widow — Adoption).**

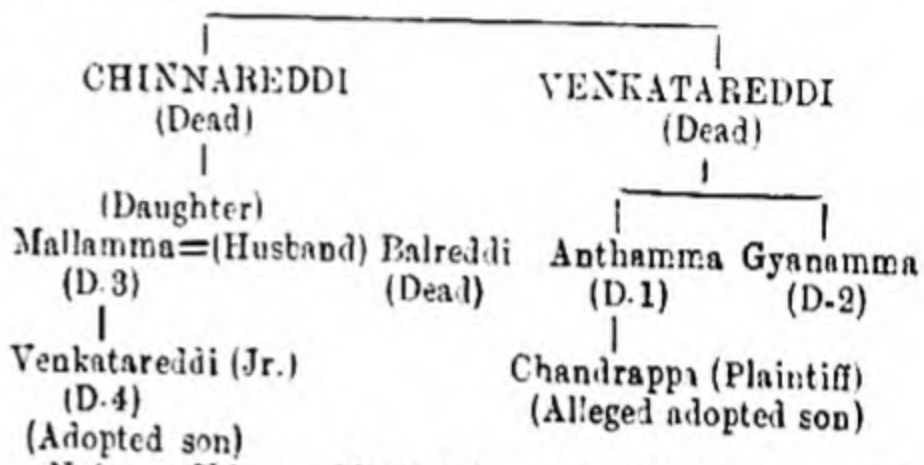
Under the Mitakshara school of Hindu Law as administered in Madras, in the case of the absence of the husband, the widow can adopt with the consent of the Gnati, their consent supplying the want of authority from the husband. The term 'Gnati' means agnates only and does not include cognates. An adoption by a Hindu widow with the consent of the cognates is, therefore, not valid. AIR 1940 Mad 356 (FB) and AIR 1947 PC 124, Relied on. AIR 1926 Mad 881, Distinguished. (Paras 6, 10)

Syed Mohd. Abdulla, for Appellant; Vinayakrao Vaidya and Aliuddin Ansari, for Respondents.

CASES CITED:

(A) ('26) AIR 1926 Mad 881: 49 Mad 652
(B) ('40) AIR 1940 Mad 356: ILR (1940) Mad 454 (FB)
(C) ('47) AIR 1947 PC 124: ILR (1948) Mad 362 (PC)

JUDGMENT: This appeal has been filed by the plaintiff. The case has been referred by a Division Bench to this Full Bench in view of certain questions of Hindu Law raised therein. The relationship of the parties will be clear from the following genealogical table:



Note: — Chinnareddi died first and then Venkatareddi died.

(2) The present suit by Chandrappa is for a declaration of his adoption. He alleged that he was taken in adoption by Anthamma and that the defendants are denying his adoption, that he is in possession of the Watans of Mali and Kotwal Patelgi and the some lands. In the plaint, it was stated that in 1330 F. Gyanamma, the second defendant, filed a suit against defendants 1 and 3 Anthamma and Mallamma, and the 4th defendant Venkatareddi for the cancellation of a sale deed in respect of some lands. In that suit, there was a compromise between the parties and a compromise decree was passed in terms of the compromise on 15th Isfandar 1332 F. under which the watan of Mali-patelgi was to be given to defendants 1 and 2 Anthamma and Gyanamma and further they were permitted to adopt a son. The plaintiff stated that in pursuance of this authority Anthamma defendant No. 1 took the plaintiff in adoption after performing the necessary religious ceremonies on 8th Thir 1346 F. The plaintiff alleged that he was now in possession of the watan and also of the lands from the date of adoption. It was further alleged that the defendants were now denying the adoption and therefore a decree for a declaration of adoption be passed in his favour.

(3) Defendant No. 1 filed a written statement admitting the claim while defendant No. 2 denied the plaint allegations. The suit was contested by the other defendants also, i.e. defendants 3 and 4 who while admitting the fact that there was a compromise in the previous suit alleged that the authority to adopt given therein was of no avail and the widow, that is, defendant No. 1 Anthamma was not entitled to adopt the plaintiff under the Hindu Law. It was alleged that Balreddi was illatom adopted son of Chinna Reddi and therefore he was entitled to the whole of the property and as such Mallamma and her son Venkatareddi were entitled to the property.

(4) In the trial Court two main issues were framed. One issue related to the factum of adoption and the other related to the validity of the adoption. Both the lower Courts held that the factum of adoption had not been establisned. There was an allegation by the plaintiff in his plaint that the father, Venkatareddi, had authorised Anthamma to adopt the boy and that therefore the adoption was valid. This fact was also held not to have been proved by both the lower Courts.

(5) The question of law as to whether the consent to Anthamma's adoption of the plaintiff, as mentioned in the compromise deed, was sufficient to validate the adoption or not was not fully discussed in their judgments.

(6) When the case came up before the Division Bench, the learned Judges felt that the permission given to the widow under the compromise could not be regarded as sufficient and valid under Hindu Law. The question to be considered is whether the permission of the cognates, namely, Mallamma and Venkatareddi was sufficient under the Hindu Law to validate the adoption of the plaintiff. This question was discussed at length by the learned counsel of the parties and we are indebted to the learned advocate for the respondents for the assistance rendered to us on the point. We are of the opinion that the consent of the cognates is not sufficient to validate the adoption of Chandrappa, the plaintiff. The parties are governed by the Mitakshara School of Hindu Law as administered in Madras. In that School, the authority to adopt is based upon the text of 'Vasishta:

"Nor let a woman give or accept a son, unless with the assent of her Lord."

According to the Madras School of Hindu Law, this dictum has been interpreted in the case of the absence of the husband as meaning that the widow can adopt with the consent of the husband's sapindas. — their consent supplying the want of authority from the husband. In Yagnavalkya Smriti, Chapter III, Verse 85, the text which refers to the capacity of the woman to act has been given in the following Sanskrit verse:

"Rakshetkanyam pitha vinnam patihi
puthrasthu vardhike;
Abhave gnathayasthesham na swathantriam
Kwachisthriyah."

The above text may be rendered in English as follows:

"Let her father protect a maiden; her lord a married woman, sons in old age; if none of these, other Gnaties (Kinsmen); she is not fit for independence."

(7) It is clear so far as the facts of the case are concerned that at the time of the adoption there was neither the father of Gyanamma nor her husband nor her son living. So if she could validly take a boy in adoption, she could adopt only with the consent of Gnaties (kinsmen). We have therefore to interpret the word "Gnaties" and see whether the word "Gnati" includes cognates or only agnates. In the Manu Smrithi, the word Gnati has occurred in Chapter 19, verse 239. There Gnati has been referred to and also separately Sambandhi is also referred to. Thus, it is clear that Gnati does not include Sambandhi. Chapter 3, verse 264 of Manu Smriti referred specifically to the fact that first of all the paternal relations (Gnaties) should be given libation of water and then the maternal relations (Bandhus) should be fed. Thus it is clear to our mind that Gnati does not include Bandhus, that is, maternal relations or cognates. Again, in Yagnavalkya Smriti Chapter 3, verse 82 the word Gnati and the word Bandhu have been separately referred to and are contrasted.

(8) Thus it is made further clear that Gnati includes only paternal relations and not maternal relations. Gharpuray in his learned Treatise "Vyavahar Mayukh" (Edition 1924 page 79; paragraph 17) is also of the opinion that an adoption by a widow could only be made with the assent of the Gnati in the absence of the father or the husband and in the foot-note of that page "Gnati" has been referred to as a Sagotra 'Sapinda' relation as opposed to Sambandhi or Bhandhava.

(9) In — 'Kesar Singh v. Secy. of State', AIR 1926 Mad 881 (A), it was held that there being no agnate relation, the consent of the nearest cognate relation who would be the presumptive reversioner would be sufficient for the purposes of adoption. In that case, adoption was made with the consent given by the husband's nearest kinsman Jagannath Singh. The question was also discussed as to whether the cognates' assent would be sufficient for an adoption and the view has been expressed that in regard to consent cognates do not appear to stand on a different footing from that of agnates. But in — 'Seshamma v. Venkata Narasimharao', AIR 1940 Mad 356 (FB) (B) and in — 'Ramasubbayya v. Chenchuramayya', AIR 1947 PC 124 (C), the view has been very clearly expressed that Gnati means Agnates only and it does not include cognates.

(10) We are therefore of the view that the opinion expressed in the two later decisions is correct and we are inclined to follow the Privy Council ruling mentioned above. In the result, we are of the opinion that the consent of the cognates as expressed in the compromise deed is not sufficient and cannot validate the adoption of the plaintiff.

(11) On the facts of the case also, we do not see any reason to interfere with the concurrent findings of the two lower Courts which have held that the factum of adoption has not been proved. In the result the appeal fails and is therefore dismissed with costs.

A/D.R.R. Appeal dismissed.

A.I.R. 1953 HYD. 276 (Vol. 40, C. N. 141)
(FULL BENCH)

PALNITKAR, MOHD. AHMED ANSARI AND A. SRINIVASACHARI JJ.

Santoba and others, Appellants v. Madhavarao and others, Respondents.

Revn. No. 6/A/1 of 1952, D/- 16-6-1953.

Civil P. C. (1908), O. 21, R. 97 — Application under, without applying for delivery of possession under O. 21, R. 35 — Maintainability.

Order 21, R. 97, Civil P. C., comes into operation only when an obstruction is raised by the judgment-debtor or any third party to the delivery of possession when the decree-holder goes to take possession of the property. Therefore, where there is no application for delivery of possession as contemplated by O. 21, R. 35 it cannot be said that there was any obstruction to possession which had to be removed and therefore, there can be no application as such for removal of obstruction under O. 21, R. 97.

Such an application by a decree-holder would be premature. (Para 2)

Anno: Civil P. C., O. 21, R. 97 N. 1.

Maruthirao Joshi, for Appellants; Govindrao Ardhapurkar, for Respondents.

ORDER: The facts of the case have been set out in detail in the order of reference of the Division Bench. A final decree was obtained by the respondent on 9th Mehr 1348 F. In execution of the decree, the decree-holder applied to the court for delivery of possession of the property. The judgment-debtor objected to the delivery of possession on 2nd Amardad 1349 F. Thereupon the decree-holder filed an application under O. 21, R. 97, Civil P. C., praying that the obstruction by the third parties (the petitioners) be removed and possession be given to him. This application was dismissed for default on 26th Mehr 1352 F. After this the decree-holder filed an application praying for restoration of the petition which was dismissed for default. This petition again was dismissed on 30th Aban 1352 F. Against this order of dismissal, the decree-holder appealed to the appellate court and the appeal was dismissed on 9th Shehrewar 1353 F. After these proceedings were over, on 2nd Dai 1354 F. the decree-holder filed another application praying for removal of obstruction purporting to be under O. 21, R. 97, C. P. C. The present petitioners raised the objection that such an application would not lie. The executing court disallowed the objection of the petitioners and held that the petition was maintainable. Against this order of the lower court the third party (the present petitioners) filed a revision petition to this court and the case came up before the Division Bench and the Division Bench after hearing the arguments thought it advisable to refer the case to a fuller Bench in view of some conflict of opinion among the various High Courts.

(2) The short point therefore that the Full Bench has to consider is as to whether an application for removal of obstruction under O. 21, R. 97 has been dismissed for default, the decree-holder is competent to file another application renewing his application and praying that the obstruction be removed. In so far as this point is concerned, it is clear that O. 21, R. 97, Civil P. C., would come into operation only when an obstruction is raised by the judgment-debtor or any third party to the delivery of possession when the decree-holder goes to take possession of the property. Therefore, where there was no application for delivery of possession as contemplated by O. 21, R. 35 it could not be said that there was any obstruction to possession which had to be removed and therefore there could be no application as such for removal of obstruction. It may also be mentioned here that under Art. 167 of the Limitation Act an application for removal of obstruction to the delivery of possession has to be made within 30 days of the actual obstruction, for the words in the 3rd Column are "the date of the resistance or obstruction." Therefore, the law does not contemplate the filing of an application under O. 21, R. 97 at any time even where there has been no attempt to take delivery of possession and there has been an obstruction.

(3) We are, therefore, of opinion that the view taken by the lower court is incorrect, that the application filed by the decree-holder on 2nd Dai, 1354 F. is premature and should be rejected. This revision petition is allowed. In view of the particular circumstances of this case we direct that each party bear his own costs.

A/D.R.R. Revision Petition allowed.

A.I.R. 1953 HYD. 277 (Vol. 40, C. N. 142)

SRINIVASACHARI AND DESHPANDE JJ.

Raj Bahadur Goud, Appellant v. The State of Hyderabad.

Writ Petn. No. 1933/7 of 1951-1952, D/- 9-5-1952.

(a) Public Safety — Preventive Detention Act (1950), S. 7—'As soon as may be', meaning of—(Constitution of India, Art. 22).

The words 'as soon as may be' appearing in S. 7 of the Preventive Detention Act have to be interpreted as meaning as soon as circumstances permit the authority to furnish the grounds. No unreasonable or unjustifiable delay can be allowed. (1853-54) 8 Moo P C 203, Ref.

Delay of three weeks in furnishing the grounds was held not unreasonable. (Para 4)

(b) Public Safety — Preventive Detention Act (1950), S. 3 — Mala fides of authority.

Although the matter as to whether the Government would have recourse to preventive detention or a criminal prosecution is a matter left to the discretion of the Government the law enjoins that the Government should elect to take one step or the other. If there is a pending prosecution then the question might arise as to whether the order of detention is bona fide or not. The test would be whether the order of detention is for an ulterior purpose. This would have to be decided on the particular facts and circumstances of the case. No hard and fast rule can be laid as to when and in what cases a criminal case ought to be continued and the detention proceedings not resorted to. (1943) 2 All ER 546, Rel. on. (Para 5)

(c) Public Safety — Preventive Detention Act (1950), S. 3 — Mala fides of authority, onus.

The burden of substantiating the plea that the order is mala fide is primarily upon the detenu. (Para 6)

The mere fact that the detenu challenges the factum or bona fides of the order or the fact that in such cases the Government is in possession of information on the subject does not shift the onus on the Government. (1942) AC 284 and AIR 1945 FC 18, Rel. on. (Para 6a)

The sole fact that the petitioner was arrested under some provision of the ordinary law and subsequently detained under the Preventive Detention Act would not by itself make the act of the Government 'mala fide'. AIR 1948 All 281 and AIR 1949 Mad 712, Rel. on. (Para 6a)

(d) Public Safety — Preventive Detention Act (1950), S. 7 — Vagueness of grounds — (Constitution of India, Art. 22 (5)).

Grounds of detention can be regarded as being vague only if they are couched in such language which makes it impossible for the detenu to make an effective representation to the Advisory Board. If they are understandable by the detenu to enable him to make his representation to the

Advisory Board, the grounds would be certainly regarded as clear and unambiguous. This is especially so when the detenu has actually made a representation. (Para 6b)

(e) Public Safety — Preventive Detention Act (1950), S. 7 — Grounds, sufficiency of.

Adequacy or sufficiency of grounds justifying an order of detention is not justiciable. Inferences drawn by Government on facts supplied to it cannot also be gone into. AIR 1951 SC 157 and 1950 SCJ 433, Rel. on. (Para 8)

(f) Constitution of India, Art. 226—Habeas Corpus — (Criminal P. C. (1898), S. 491).

The mere fact that the ban on the communist party to which the detenu belonged has been removed will not entitle the detenu to obtain an order of release from the High Court. The justification for imposing a ban or laying restrictions on the activities of an association may cease to exist but the right of the Government to exercise its powers under the Preventive Detention Act with regard to a particular individual in the interest of maintenance of public order and for the sake of public security will continue as long as the Government is responsible for the security of the State and for the maintenance of law and order. It is one thing to remove a ban on an association and it is quite a different thing to release a member of that organisation to whom violent and subversive activities are attributed. (Para 9)

Manohar Raj Saxena, for Appellant; V. Rajaram Iyer, Advocate-General and Gopalrao, Govt. Advocate, for the State.

CASES CITED:

(A) (1853-54) 97 RR 47: 8 Moo PC 203
(B) (1943) 2 All ER 546
(C) (1942) 111 LJKB 24: (1942) AC 284
(D) ('45) AIR 1945 FC 18: 1945 FCR 81: 46 Cri LJ 559 (FC)
(E) ('48) AIR 1948 All 281: 49 Cri LJ 352
(F) ('49) AIR 1949 Mad 712: 51 Cri LJ 133
(G) ('51) AIR 1951 SC 157: 52 Cri LJ 373 (SC)
(H) ('50) 1950-2 Mad LJ 555: 1950 SCJ 433 (SC)
(I) ('50) AIR 1950 FC 129: 1950 FCR 827: 51 Cri LJ 1480 (FC)
(J) ('52) AIR 1952 SC 196: 1952 Cri LJ 966 (SC)

ORDER: This is an application for the issue of a Writ of Habeas Corpus by one Raj Bahadur Goud, who has been detained under the Preventive Detention Act. The petitioner was arrested on 24-4-1951 in the hills known as the Rajkonda hills in Devarkonda Taluq of the Nalgonda District. He was produced before a Magistrate on 27-4-1951. Again it is stated that he was produced before the District Magistrate on 12-5-1951 and the police prayed that he might be remanded to custody for further investigation. After this on 18-5-1951 when he was in police custody, an order of detention was served on him by the Collector, Nalgonda District, purporting to act under S. 7, Preventive Detention Act. These grounds were served on the detenu on the same date. The detenu subsequently made his representation to the Advisory Board and the Advisory Board recommended that he be kept under detention till 31-12-1951. This period of detention was subsequently extended to 31-3-1952. On 29-3-1952, the period was further extended till 30-9-1952. This order of detention is now sought to be attacked on various grounds. Before we deal with the grounds of attack it is just as well that we mention herein what the grounds of detention are on the basis of which the petitioner has been detained.

(2) The order of detention, while stating that he is a person belonging to the Kaisth community whose forefathers had come from the Uttar Pradesh and settled down in Hyderabad, says that in 1940 the petitioner joined the Andhra Mahasabha of the Communist Party; that he in company with Ravi Narayana Reddy and Maqdum Mohiuddin, two of the foremost leaders of the State Communist Party, arranged for strikes to be staged by the Alwyn Metal Works and arranged for similar strikes by other organisations. It is further stated in the order that he is a person associated with all Labour Unions which are affiliated with the Communist Party of India; that he wrote objectionable literature emphasising Communist ideology. It is also stated in the order that he was disseminating disaffection and hatred against the Government with a view to overthrow the Government established by law and that at his instance several murders and gruesome atrocities were committed in various places. These are some of the main grounds urged in the order of detention.

(3) The learned Vakil for the petitioner placed before us a number of factors and contended that this order of detention can no longer stand and he questioned the validity of the order. The main objections raised by him are, (a) that the grounds were served on the petitioner nearly one month after the date of the arrest, (b) that the action of the Government is palpably mala fide inasmuch as they tried to extract all information about the Communist Party and its movements and not being able to get the same they resorted to this order of detention under the Preventive Detention Act, (c) that the grounds that have been urged have absolutely no relevancy and have no connection with the matters set out in S. 3, Preventive Detention Act, and (d) that the grounds were vague. In support of the petitioner's application impeaching the validity of the order of detention, petitioner has filed an affidavit giving the sequence of events from the date of his arrest namely on 24-4-1951 till almost the period when the order of detention was served on him. The purpose of this affidavit appears to be to show that he was ill-treated and put to all sorts of humiliation to extract from him information with regard to the Communist Party.

A counter has been filed on behalf of the Government, wherein, while admitting that the petitioner was arrested on 24-4-1951 in Rajkonda Hills in Nalgonda District in the hide-outs of the Communists, it is stated that when he was arrested he had in his possession (i) a sum of Rs. 4,000/-, (ii) a radio receiving set and (iii) a lot of communist literature. It is also stated therein that he was in possession of dangerous and deadly weapons. The Government's submission in its counter is to the effect that as the petitioner was a top-ranking member of the Communist Party of the Hyderabad State which is instigating an armed struggle in Telangana and suggesting a policy of violence and to indulge in activities prejudicial to the maintenance of order and the security of the State and that his detention was necessary for the maintenance of public order and security of the State; and that the detention is therefore justified for the reasons mentioned above. After the counter was filed the petitioner filed in this Court a certified copy of the proceedings of the Court of the Munsiff-

Magistrate of Nalgonda in order to show that simultaneously with the proceedings under the Preventive Detention Act the Government was pursuing criminal proceedings against the detenu.

(4) Taking the objections of the vakil for the petitioner seriatim, the first objection is that the grounds were served on the detenu nearly a month after his arrest was effected. This objection has not much force. There is a statutory duty imposed on the detaining authority, to communicate 'as soon as may be' to the person detained the grounds on which the order has been founded. The words 'as soon as may be' appearing in S. 7, Preventive Detention Act, have to be interpreted as meaning as soon as circumstances permit the authority to furnish the grounds. No unreasonable or unjustifiable delay can be allowed. When something is required by a Statute to be done at the earliest and practicable moment it means, it has to be done in a reasonable time. The word 'forthwith' was construed by the Privy Council in — 'R. v. Price', (1853-54) 8 Moo PC 203 (A), to mean 'as soon as a party can reasonably perform it'. There has been no inordinate delay and this objection fails.

(5) The learned Vakil very strongly urged that the Government was harassing the detenu in both ways, while keeping pending an intended criminal prosecution, it has put him under detention. As pointed out by us, the vakil for the petitioner has filed before us a certified copy of the proceedings of the Court of the Munsiff-Magistrate of Nalgonda. We read the proceedings of 8-2-1952 in the case of the — 'State v. Raj Bahadur Goud', Case No. 16 of 1951. The proceedings of that date show that the case was adjourned to 1-3-1952 to await the filing of challan. On 1-3-1952, the case was further adjourned to 20-3-1952 to enable the prosecution to file the challan. These proceedings would clearly indicate that the Government have not dropped the proceedings in the criminal Court, against the petitioner. We can only infer that they are still pending as the Advocate-General, on our enquiry, could not say that the proceedings had been dropped. It was argued and quite legitimately that it is not open to the Government to have simultaneous recourse to proceedings in a criminal Court and to preventive detention. Although the matter as to whether the Government would have recourse to one remedy or the other is a matter left to the discretion of the Government the law enjoins that the Government should elect to take this step or the other. If there is a pending prosecution then the question might arise as to whether the order of detention is bona fide or not. The test would be whether the order of detention is for an ulterior purpose. This would have to be decided on the particular facts and circumstances of the case. We have not before us the entire record of the criminal case. No hard and fast rule can be laid as to when and in what cases a criminal case ought to be continued and the detention proceedings not resorted to. The man might be according to the Government a dangerous man whom it may be necessary to detain in the interests of public security. That this is the settled law is supported by judicial decisions both in England and in India. Lord Greene M. R. observed in point of — 'Ayr Collieries Ltd. v. Lloyd George', (1943) 2 All ER 546 (B)

"It is for the competent authority to decide whether the situation requires an immediate step or whether some delay may be allowed for further investigation."

(6a) We might herein clearly lay down that the burden of substantiating the plea that the order is mala fide is primarily upon the detenu and having regard to the circumstances of this case we must hold that the detenu has not discharged the same. The mere fact that the detenu challenges the factum or bona fides of the order or the fact that in such cases the Government is in possession of information on the subject does not shift the onus on the Government — Greene's case has declared this in unequivocal terms vide — 'Greene v. Secy. of State for Home Affairs', (1942) AC 284 (C), and the Federal Court has also made it clear in the case of — 'Basanta Chandra v. Emperor', AIR 1945 FC 18 (D). The sole fact that the petitioner was arrested under some provision of the ordinary law and subsequently detained under the Preventive Detention Act would not by itself make the act of the Government 'mala fide'. We are in agreement with the view taken by the Allahabad and the Madras High Courts in the cases of (i) — 'Moolchand v. Emperor', AIR 1948 All 281 (E) and (ii) — 'Dasappa v. District Magistrate South Kanara', AIR 1949 Mad 712 (F). The particulars that have been set out in the grounds of detention categorically enumerate the various activities of the petitioner and amongst the activities that have been mentioned some of the violent and subversive activities have been mentioned. The grounds state

"He was instructing his comrades to kill Government servants. In pursuance of the policy of violence, and at his instance, several murders and other gruesome atrocities were committed in Guddi Malkapur, Pillai Palli.....",

"Two girdawars and two armed police constables MPAP were ambushed and killed in pursuance of this policy of violence."

"Raj Bahadur Goud had gone to Rachakonda Hills to convey the ideas of violence to other comrades and buck up the morale of the comrades".

"He was caught with dangerous and deadly weapons, a radio receiving set, a Medicine chest .....lot of communist literature."

(6b) With regard to the grounds mentioned above the objection raised by the learned vakil for the petitioner is that the grounds are vague and insufficient and that they have no rational connection with the ends mentioned in S. 3, Preventive Detention Act. The objection as regards 'vagueness' of the grounds cannot be sustained, for, it is now well settled that grounds of detention could be regarded as being vague only if they are couched in such language which makes it impossible for the detenu to make an effective representation to the Advisory Board. If they are understandable by the detenu to enable him to make his representation to the Advisory Board the grounds would be certainly regarded as clear and unambiguous. The decision in the case of the — 'State of Bombay v. Atmaram Sridhar' concludes the point vide — 'AIR 1951 SC 157 (G)'. In the case under consideration it is admitted that the detenu did make a representation to the Advisory Board, questioning the grounds.

(7) With regard to the second objection that the grounds have no connection with the purposes mentioned in the Preventive Detention Act we hold the same view, as we held with regard to the objection of vagueness. The individual activities of the detenu that have been detailed in the grounds of detention according to us have everything to do with the maintenance of law and order. The grounds clearly come within the ambit of S. 3, Preventive Detention Act.

(8) Above all, we cannot lose sight of the fact that the sufficiency or otherwise of the grounds is not a matter which we as judges of the High Court can go into. That the Courts are the least appropriate tribunals to investigate into the adequacy or otherwise of the grounds justifying an order of detention has been decided by the highest Court in the land in the cases of — 'AIR 1951 SC 157 (G)' and — 'Ashutosh Laheri v. State of Delhi', 1950 SCJ 433 (H). And further that inferences drawn by the Government on facts supplied to it cannot be gone into is also a matter that has been laid down by the Supreme Court.

(9) It was urged by the learned vakil for the petitioner that whatever might have been the position at the time the order of detention was passed a change had come over and, we, as judges deciding the case, were entitled to take notice of events that happened subsequent to the order of detention and grant relief in view of the changed circumstances. The learned vakil relied upon the fact that the ban imposed on the Communist Party in Hyderabad in September 1948 was removed by Notification of the Government on 24-3-1952. It was argued by the learned vakil that where the ban on the party had been removed there was no meaning in continuing the detention of a person who belonged to the party which had been banned and which has ceased to be an unlawful and illegal organisation. In reply it was urged by the Advocate-General that the mere fact that the ban on an association or an organisation had been lifted did not take away the powers of the Government to act under the provisions of the Preventive Detention Act where it apprehended that if a person were not detained there was great apprehension of danger to public security. After considering the respective contentions of the vakil for the petitioner and the Advocate-General we are of opinion that the argument advanced by the Advocate-General is sound. The justification for imposing a ban or laying restrictions on the activities of an association may cease to exist but the right of the Government to exercise its powers under the Preventive Detention Act with regard to a particular individual in the interest of maintenance of public order and for the sake of public security will continue as long as the Government is responsible for the security of the State and for the maintenance of law and order. As observed by Patanjali Sastri, J., as he then was, in the case of — 'Machinder Shivajee v. The King', AIR 1950 FC 129 (I), "Mere belief in or acceptance of any political ideology may not be a ground of detention".

On that footing even if Raj Bahadur Goud was a top-ranking communist and a leader of the organisation in Hyderabad and that organisation has ceased to be an illegal organisation by reason of the lifting of the ban by the Government recently, the activities of the petitioner which afforded a justification for the Government to pass an order of detention have still to be taken into consideration. The potential risks from a person's activities have to be determined by the surrounding circumstances. If a body of persons are known to have been resorting to extreme steps and violent methods not warranted by law and if there are no reasonable grounds to come to the conclusion that this attitude has undergone a change and the Detaining Authority is satisfied that there is still apprehension of danger to public safety if a particular individual is allowed to remain unbridled then the Court cannot help the detenu in the matter. We as judges are labouring under a disadvantage of not being able to investigate into the correctness or otherwise of the allegations on which the order of detention is passed. As was very artistically put it would be beyond our power of interference "even if it does not fit within judicial strait jacket". It is one thing to remove a ban on an association and it is quite a different thing to release a member of that organisation to whom violent and subversive activities are attributed. Certainly a ban on the communist party in Hyderabad would not stand after the judgment of the Supreme Court in the case of the — 'State of Madras v. V. G. Row', AIR 1952 SC 196 (J) decided on 31st March 1952. As to whether the Communist Party in Hyderabad had abjured violent activities and had changed its 'modus operandi' from one of guerilla warfare to that of constitutional agitation is a matter about which the Government has to be satisfied. When there is no material before us that a change has come over with regard to the mode of activities of the members of the Communist Party, we cannot pass an order of release especially where the most violent acts of killing by use of dangerous and deadly weapons are attributed to the detenu. It cannot be denied that it is the Government that is entrusted with the duty of maintaining public peace and it would be a serious derogation from that responsibility if we, as judges, substitute our judgment in the matter for the satisfaction of the Government. The liberty of the individual to do as he pleases is not absolute. It must yield to common good. There is no such thing as absolute personal liberty. Some compromise must be struck between private liberty and public authority. When the safety of the State is involved the liberty of the subject must give way. It is not absolute freedom.

(10) After giving careful consideration to the matters that have been placed before us we are of opinion that we would not be justified in directing the release of the detenu. This application is, therefore, dismissed.

A/K.S.B. Application dismissed.

A.I.R. 1953 HYD. 280 (Vol. 40, C. N. 143)

MANOHAR PERSHAD J.

Mohammad Khaja, Appellant v. Monappa, Respondent.

Appeal No. 389/2 of 1951-52, D/- 1-7-1953.

(a) Registration Act (1908), S. 28 — Burden of proof.

The Sub-Registrar gets the jurisdiction to register the document, provided the property is situate within his jurisdiction. If no part of the property is situate in the sub-district, the registration would be void. In order to prove the validity of the document, the plaintiff will have to establish the existence of the property itself. The contention that the burden is on the defendant to show why the document is invalid is not tenable. (Para 8)

Anno: Registration Act, S. 28 N. 7.

(b) Registration Act (1908), Ss. 28 and 49— Fictitious inclusion of property — Effect.

An entry intentionally made use of by the parties for the purpose of obtaining registration in a Sub-District where no part of the property described in the deed exists, is a fraud on the Registration Law and no registration obtained by means thereof is valid. The word "fictitious" covers cases of a deed which does not relate to a specified property for any effective purpose

of enjoyment or use. The intention of the parties is the criterion by which the matter must be decided.

Where, therefore, in a suit for possession of land and a house, the plaintiff relied on a sale deed registered at S but the defendant not only denied the execution of the sale deed but also stated that he did not own any house within the jurisdiction of the sub-registrar at S.

Held that plaintiff did not establish that defendant owned house within the jurisdiction of sub-registrar at S — The registration of the sale deed was therefore invalid and the plaintiff did not acquire any title. AIR 1935 Mad 26 and AIR 1941 All 179, Distinguished. Case law considered.

(Para 23)

Anno: Registration Act, S. 28 N. 5; S. 49 N. 2.

Mohd. Zakaullah, for Appellant; Sadashiv Rao, for Respondent.

CASES CITED:

(A) ('24) AIR 1924 Mad 281: 77 Ind Cas 464
(B) ('31) AIR 1931 Mad 335: 131 Ind Cas 840
(C) ('35) AIR 1935 Mad 26: 154 Ind Cas 572
(D) ('27) AIR 1927 Mad 92: 98 Ind Cas 195
(E) ('41) AIR 1941 Mad 179: 52 Mad LW 440
(F) ('43) AIR 1943 Pat 48: 21 Pat 710
(G) ('52) AIR 1952 Nag 145: ILR (1952) Nag 243 (FB)
(H) ('46) AIR 1946 Cal 465: 227 Ind Cas 449
(I) ('14) AIR 1914 PC 67: 41 Ind App 110 (PC)
(J) ('21) AIR 1921 PC 8: 48 Cal 509 (PC)
(K) ('34) AIR 1934 PC 157: 61 Ind App 286 (PC)
(L) ('36) AIR 1936 PC 91: 63 Ind App 169 (PC)
(M) ('41) AIR 1941 All 179: ILR (1941) All 320

JUDGMENT: Mohd. Khaja filed a suit for possession of the land bearing survey No. 72 and of the house situated in Shahpur, against Monappa, alleging inter alia that the plaintiff is the owner of the suit property and was in possession but was wrongfully dispossessed by the defendant during the Police Action. Plaintiff relied upon a registered sale-deed dated 13th Dai 1349-F.

(2) Defendant in his written statement denied the execution of the sale-deed and also that he possessed any house at Rangampet. He further denied that the plaintiff was in possession and claimed that he is in possession in his own right. A legal objection was also raised that the registration of the document is not valid since no part of the property mortgaged is situate within the jurisdiction of the Sub-Registrar who registered the document.

(3) Plaintiff in reply denied the allegations of the defendant. The court of the first instance, on these pleadings, framed certain issues and parties led their evidence. On the evidence, the court decreed the plaintiff's suit.

(4) Defendant went in appeal which was allowed. Hence this second appeal on behalf of the plaintiff. In this appeal it is urged before me first that the registration is valid and the appellate court has erred in holding otherwise. The second contention is that unless the defendant establishes fraud which he has not, he cannot deprive the plaintiff of the benefit of the mortgage. Reliance is placed on the following cases: — 'Lakshmikantaraju v. Jagannatharaju', A. I. R. 1924 Mad. 281 (A), — 'Ramanathan Chetti v. Delhi Badaha Tevar' AIR 1931 Mad. 335 (B), — 'Venkata Sastrulu v. Veerabhadrudu', A. I. R. 1935 Mad. 26 (C), — 'Govindan Nayar v. K. Ammed', A. I. R. 1927 Mad. 92 (D), — 'Gnanaprakasam Pillai v. Parasakthy Ammal', AIR 1941 Mad. 179 (E), — 'Mohammed Yakub v. Abdul Mannan', A. I. R. 1943 Pat. 48 (F), — 'Rukhama Bai v. Krishna Rao', A. I. R. 1952 Nag. 145 (F. B.) (G), and — Chandi Prosad v. Hrishikesh Shah', AIR 1946 Cal. 465 (H).

(5) Thirdly, it is argued that since both the courts on the evidence have held the execution of the document as proved, it is not necessary for the plaintiff to prove the further fact that the defendant is the owner of the property and mere failure to establish title would not invalidate the registration of the document. It is urged, however, that as a matter of fact, there is sufficient evidence produced on behalf of the plaintiff to establish that the defendant is the owner of the house at Rangampet and the court below has erred in holding that the plaintiff has failed to prove this fact.

(6) On behalf of the defendant-respondent, it is urged that no question of fraud on registration law arises in the case. The case of the defendant is that he (defendant) does not own any house at Rangampet: as such the Sub-Registrar was not competent to register the document, and the registration cannot be held to be valid. Following up the contention it is urged that there is no evidence either to show that the defendant owned a house at Rangampet or that the parties intended to effect the transfer of, any, in the absence of which the registration of the document cannot be held to be valid. Reliance is placed on the cases of — 'Harendralal v. Haridasi Debi', A. I. R. 1914 P. C. 67 (I), — 'Mathura Prashad v. Chandra Narayan', A. I. R. 1921 P. C. 8 (J), — Collector of Gorakhpur v. Ramsunder Mal', A. I. R. 1934 P. C. 157 (K) and —'Venkatrama Rao v. Sobhanadri Appa Rao', AIR 1936 P. C. 91 (L). I find sufficient force in the contention of the respondent.

(7) The sale-deed is compulsorily registrable under Section 10 of the Hyderabad Registration Act corresponding to Section 17, Indian Registration Act. Section 22 corresponding to Section 28 of the Indian Registration Act requires that every registrable document shall be presented for registration in the office of the Sub-Registrar within whose sub-district the whole or some portion of the property to which such documents relate is situate, while S. 49 enacts that:

"No registrable instrument shall affect any immovable property comprised therein, unless it has been registered in accordance with the provisions of the Act."

Section 65 provides for the transmission of copies to the office of other districts in which any of the mortgaged property is situate. Section 54, Transfer of Property Act, requires that a transfer on sale of tangible immovable property of a value less than Rs. 100/- may be made either by a registered instrument or by delivery of property while if it is of the value of Rs. 100/- or more the transfer must be by a registered instrument. Thus, it would follow that according to Section 28, Registration Act, "every registrable document has to be presented for registration in the office of the Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate."

(8) It would follow, therefore, that if no part of the property is situate in the sub-district, the registration would be void. In other words, the Sub-Registrar gets the jurisdiction to register the document provided the property is situate within his jurisdiction. In order to prove the validity of the document, the plaintiff will have to establish the existence of the property itself. The contention

of the plaintiff is that the burden of proof is on the defendant to show why the document is invalid. I do not agree with the contention of the learned advocate for the plaintiff.

(9) The defendant has denied the execution of the document. Had the defendant admitted the execution of the document and raised the plea that he has no interest in the house at Rangampet, or that the said house was included in the sale-deed for the purpose of its being registrable in the Sub-district, the burden of proof would have been on the defendant. But even in that case the defendant would not have succeeded in his plea unless he had established the collusion of the parties.

(10) In the case before me, two distinct properties: (1) the land bearing survey No. 72 at Shahpur and (2) the house situated at Rangampet, are said to have been transferred by a sale-deed dated 13th Dai 1349-F Ex. 21, and this document has been presented and registered by the Sub-Registrar, Shorapur. The defendant has denied that he owns any house at Rangampet. The Sub-Registrar of Shorapur would get jurisdiction under Section 28, Registration Act, only if it is established that the defendant possessed a house at Rangampet. It sometimes happens that the parties to a deed include in the deed a parcel described as situated in a particular place but which does not in fact exist & get the document registered in the office of the Sub-Registrar within whose sub-district the parcel is alleged to be situated. In such cases the question arises whether the fictitious entry was intentionally made use of by the parties for the purpose of obtaining registration in a sub-district where no part of the property actually transferred and intended to be transferred, in fact, exists. Such a transaction would be deemed to be a fraud on the Registration Law and no registration obtained by such means can be valid. The leading case on the subject is — 'AIR 1914 P. C. 67 (I)'. In that case a mortgage-deed executed in 1913 purported to mortgage various properties including one described as No. 25 Gurdas street in Calcutta and also described by metes and bounds. There was, as a matter of fact, no property of that description in Calcutta and the mortgagor never had any title to the property as described by metes and bounds. Nor was any of the other properties included in the mortgage situate in Calcutta, although the mortgage-deed was registered in the office of the Sub-Registrar, Calcutta. Tnere was no evidence either that the said property had been included in the mortgage by mistake. It was held by their Lordships that:

> "The parcel of the land is in fact a fictitious entry and represents no property that the mortgagor possessed or intended to mortgage or that the mortgagee intended to form part of the security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a Sub-District where no part of the property charged or intended to be charged exists, is a fraud on the Registration Law and no registration obtained by means thereof is valid."

Their Lordships also pointed out that apart from the question of fraud on the Law of Registration the Registration is invalid as no portion of the property mortgaged was situated within the jurisdiction of the Sub-Registrar as required by Section 28 of the Act.

(11) The second case on the point is that of—'AIR 1921 P. C. 8 (J)'. In this case, the property to be mortgaged was situated at Dharbanga. But in order to get it registered at Muzafarpur, the mortgagor made a pretence of purchasing one 'cowri' share in a village in Muzafarpur and included it in the mortgage-deed. No possession was given to the mortgagor of the 'Cowri' share. The mortgagor had, in fact, no interest in it nor did the mortgagor ever intend that it should form part of the security. It was held by their Lordships that the case stood on the same basis as that of — 'Herenderlal's (I)' for the purpose of the Registration Act.

(12) The third case on the point is of — 'A. I. R. 1934 P. C. 157 (K)'. In this case the vendor in order to secure registration in Gorakhpur entered in the sale-deed, a small covered platform situated in a walled garden to which there was no access and it was not capable of being utilised by the purchaser. It was not intended by either party that the platform should be the subject of the sale. It was held by their Lordships that the deed was not valid as required under the Registration Act as the parties did not intend that the share in the garden room should really be conveyed. Its inclusion in the deed was merely to evade the Act. It was further held that the word 'fictitious' as used in the case, — 'AIR 1914 P. C. 67 (I)' was not confined to non-existing property, but would cover cases of a deed which does not relate to a specified property for any effective purpose of enjoyment or use. The last decision of the Privy Council on the point is that of — 'AIR 1936 P. C. 91 (L)'. In this case a one-fourth share in the village of Somavaram in the Krishna District and one yard of vacant site in the village of Guntur in the Godavari District were sold by one registered sale-deed and the document was presented and registered by the Sub-Registrar of Somarlakota. On a claim by the appellant to recover the possession of the suit property the question arose "whether the vacant site (one yard) included in the sale-deed belongs to the plaintiffs (appellant's father) and whether it was included in the sale-deed to give jurisdiction to the Sub-Registrar to register the deed and was not intended to be conveyed: if it was so, whether it was a fraud on the Registration Law and the deed was void." It was held by their Lordships that in determining the requirements of law as to registration having been complied with, the intention of the parties is the criterion by which the matter must be decided. There was no intention in this case that one yard of land should pass under the deed and the alleged sale of it was a mere device to evade the Registration Act. There was no effective registration of the conveyance."

(13) With regard to the question of the existence of the house, it is contended on behalf of the appellant that it is not denied. Even if it is taken that he has denied, there is sufficient evidence to prove the existence of the house. As regards the intention of the parties, it is contended that both the courts have held the execution of the document to be proved which is sufficient to hold that the mortgagor did intend to transfer the said property. So far as the question of the existence of the property is concerned, I do not agree with the contention of the learned Advocate for the appellant that the defendant has admitted the existence of the house at Rangampet. The defendant in para (1) of the written statement has clearly denied that he owns any house at Rangampet. The learned District & Sessions Judge has held that the plaintiff has not produced any evidence to show that the defendant is the owner of the house at Rangampet. The learned advocate for the appellant drew my attention to the depositions of Ahmed Hussain and Abdul Ghani and urged that from the statements the fact of the defendant owning a house at Rangampet can be proved. I went through their statements. Ahmed Hussain who is the scribe of the document, has deposed that the defendant has transferred one house and one

land. The house was at Rangampet and the land was of Shahpur. This is all what he has said. It is not clear from his statement that the defendant was the owner of the house at Rangampet.

(14) P. W. 5 Abdul Ghani only says that the defendant sold one house and one land to the plaintiff. In his cross-examination he says that in the sale-deed it is written that the house at Rangampet was sold. From his statement also it is not clear whether the defendant is in fact the owner of the house at Rangampet. Further, these witnesses have not deposed that, as a matter of fact, there is any house of the defendant at Rangampet.

(15) When the defendant has denied in toto that he owns any house at Rangampet, it was the duty of the plaintiff to have proved this fact. The evidence led, in my opinion, is not at all sufficient to establish that the defendant did own a house at Rangampet. When this is the position the case clearly comes within the principle laid down by their Lordships of the Privy Council in — 'A. I. R. 1914 P. C. 67 (I)'. Even assuming for argument's sake that there exists a house at Rangampet, still the plaintiff would not succeed unless he establishes that the defendant has interest in or title to that property as laid down by their Lordships in the Privy Council case — 'A. I. R. 1921 P. C. 8 (J)' There is not an iota of evidence in the case to show that the defendant has any right or interest in the property. The important test in such cases is the intention of the parties as has been pointed out in the Privy Council case — ' A. I. R. 1936 P. C. 91 (L)'. The motive is immaterial.

(16) There is no evidence that the defendant mis-represented to the plaintiff that he owned a house at Rangampet. The rulings cited by the learned Vakil for the appellant are not applicable to the facts of the case and do not help his contention. In all the cases cited by him the principle laid down in the Privy Council cases has been accepted.

(17) 'AIR 1924 Mad 281 (A)', was a case in which the plaintiff claimed a declaration that the auction sale of the Gundepalli Estate in O. S. No. 25 of 1910 and all execution proceedings relating to that are null and void as the plaintiff who was a minor was not represented properly; that the guardian was guilty of misrepresentation and that the motgage-deed was not valid, not having been legally registered. It was held by Odgers and Hughes JJ. that the appointment of a clerk of a court as a guardian was valid; that there was no collusion between the mortgagee and the mortgagor and there was no intention on the part of the mortgagee to include a land not belonging to the morgagors and registration is not vitiated by the fact that property, not in existence, was included in the deed to effect registration at a particular place. It was further held that in the case the evidence is that the mortgagor himself verbally mentioned this (one acre) when the mortgage-deed was being drawn up and that, as a matter of fact, it is a mistake for 548 which admittedly belongs to the family of the defendant Nos. 1 and 2 in suit No. 25 of 1910. This was a clear case where the mortgagor represented to the mortgagee that he owned the property and the property actually existed and there was no collusion of the mortgagee in including the property. It was rightly held that the registration is not vitiated. It is not so in the present case.

(18) 'AIR 1935 Mad 26 (C)', was a case where the plaintiff said that the sale-deed comprised an item of a small house which did not belong to the widow Gangammal and that therefore the parties committed a fraud on the Registration Law. The plaintiff alleged in the plaint that, that plot did not belong to Gangammal but to defendant No. 1. When the plea is that the vendor is not the owner of the property and the property has been wrongly included in the mortgage-deed, the mortgagee cannot be deprived of the mortgage unless collusion between the mortgagor and the mortgagee is established. This would be a clear case of fraud and as in the case of every other kind of fraud, the party who sets up a defence in a case of registration law, is bound to make it out by clear and cogent evidence.

(19) In the present case, the defence of the defendant was not what has been laid down in this case.

(20) — 'Irshad Ali v. Mt. Nadari Begam', A. I. R. 1941 All. 179 (M) was a case where the property actually existed within the jurisdiction of the Registration Officer and the parties intended to transfer it. It was held by Mohd. Ismail J. that in such cases, the registration would not be affected merely because the mortgagee or the transferee fails to prove the title of the mortgagor or the transferor. This case also is distinguishable from the facts of the present case

(21) In — 'AIR 1946 Cal 465 (H)', Biswas and Chakravarti JJ. have held that the crucial test to to be applied in order to find out whether the registration law is evaded or defrauded is whether or not the parties intended that the property in question, on the basis of which the document was registered, should form part of the transaction. In order to find out the intention, the fact whether the property admits of physical enjoyment may, no doubt, be sometimes relevant: but it is not the crucial test.

(22) The test laid down in this ruling is the same which has been pointed out in the Privy Council case — A. I. R. 1936 P. C. 91 (L)'. This ruling in my opinion, does not help the contention of the learned advocate for the appellant. The same principle has been decided in the other cases cited on behalf of the learned advocate for the appellant and so I do not wish to discuss them in detail.

(23) Thus, after giving a careful consideration to the authorities cited on behalf of the parties, and going through the entire record, I am of the opinion that the plaintiff has failed to establish that the defendant owned a house at Rangampet, and that he intended to transfer the same. Therefore the document could not be registered at Shorapur and the Sub-Registrar, Shorapur, was not competent to register the same. In the result, the registration of the document would be invalid and the plaintiff would not acquire any title. The appellate court has come to the same conclusion and I see no reason to differ. This appeal is, therefore, dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1953 HYD. 283 (Vol. 40, C. N. 144)

PALNITKAR J.

Rama Ambaji, Appellant v. The State of Hyderabad.

Criminal Case No. 62 of 1951, D/- 24-9-1951.

(a) Criminal P. C. (1898), S. 208 — Duty of prosecution. (Criminal P. C. (1898), S. 367).

Court has to take notice of the existence of and non-production of independent witnesses to arrive at a conclusion if the witnesses on the record are in the opinion of the Court insufficient to establish the guilt against the accused. (Para 2)

Anno: Cr. P. C., S. 208 N. 7.

(b) Criminal trial — Evidence — Benefit of doubt — Trial for murder — Criminal P. C. (1898), S. 367.

Where in a charge for murder, it is proved that the deceased was killed in a fight beween the accused and the deceased, and the evidence is of such a nature that conclusion cannot be arrived at as to who started the fight or how the quarrel started, the benefit of doubt should be given to the accused. (1935) AC 462, Rel. on. (Para 2)

Anno: Cri. P. C., S. 367 N. 6.

Ramchandra Rao Nandapurkar, for Appellant; Gopal Rao Muramkar and Mohd. Mirza, Govt. Advocate, for the State.

CASE CITED:

(A) (1935) 104 LJ KB 433: (1935) AC 462

JUDGMENT: The facts briefly stated against the accused are that on the morning of 3-8-1950 Harna Bai, the mother of the accused went to the house of the deceased and demanded payment of money due to her. It is said that the house of Harna Bai was very near to the house of the deceased and that Harna Bai had advanced an amount of Rs. 150/- to the deceased out of which some money was due. This occurrence is said to have taken place in Deshmukh Galli. It is said that the deceased Ibrahim denied that any balance was due but Harna Bai insisted that some balance was due and that it should be paid forthwith otherwise she would take away household utensils of the deceased. On this, the deceased it is said asked Harna Bai to hold the tail of the cow and say that money was still due. At this, it is said that the accused Rama who is the son of Harna Bai and who was nearby caught hold of a cow that was passing by and brought it near Harna Bai and Harna Bai caught hold of the tail of the cow and swore that money was due to her from the deceased. After this, it is said that some money was paid but in the meanwhile a quarrel ensued and there was a free fight between Rama and the deceased Ibrahim, and ultimately Rama delivered a kick on the back of the deceased as a result of which the deceased died. The medical report says that death was due to aspheyxia & thereafter heart failure. 11 witnesses were examined on behalf of the prosecution while 3 witnesses were produced on behalf of the accused. P. W. 11 is doctor Subba Rao. He states that death was due to stopping of breath, but there were no marks of strangulation on the neck of the deceased. Besides the punchas and the Sub-Inspector of Police, who is the Investigating Officer, 3 persons have been produced as eye-witnesses. P. W. 2 is Baban Sab. Proceedings before the Police commenced when this Baban Sab went and informed the Police. His statement recorded by the Police is to the effect that about Rs. 150/- were due to the washer-woman Harna Bai out of which Rs. 17/- were still to be paid, and they were also later paid, but on the morning of the occurrence Harna Bai came to the house and demanded Rs. 9/- more. This Baban Sab is the father of the deceased. He says that his son Ibrahim told Harna Bai that if she would hold the tail of the cow and swear that Rs. 9/- were due he would pay the amount. At this Rama, who was nearby, caught hold of a cow and brought the animal near Harna Bai who did as was desired and then Rs. 9/- were paid to Harna Bai. He says that while this was going on an altercation took place between Rama and the deceased and Rama began to abuse and attack the deceased. In his statement before the lower Court, this witness admits his eye sight as defective and that he cannot see things properly beyond a distance of 7, 8 paces. This he has stated also before the Committing Magistrate. Before the Sessions Judge in cross-examination he has admitted that while he was sitting on the platform outside his house this occurrence took place at a distance of 25 paces in the lane nearby. He admits that his statement given before the Committing Magistrate that the fight took place at about 50 paces from the door of his house & that he could see nothing is correct. Thus, so far as this witness is concerned his evidence is of no use for deciding the fact whether it was the deceased who took the initiative in starting the quarrel as is alleged by the learned Advocate for the accused or it was the accused who took the initiative. Thus, the question of private defence has arisen and has got to be decided in this case. The other two eye witnesses are Chota Bi P. W. 4 and Bapu P. W. 6. The statements of these two witnesses are diametrically opposed to each other. P. W. 4 Chote Bi states that she saw the occurrence from her house which is near the house of the deceased. After narrating the fact that Harna Bai caught hold of the tail of the cow she says that the deceased asked somebody to bring Rs. 7/- from the house. But the father of the deceased Baban Sab states that Rs. 9/- were sent for from the house and that Hafiza Bi brought that money. This is an important discrepancy and we have got to decide whether the witness saw the facts closely or not. She states that while the money was being paid, Rama attacked the deceased saying that his mother was insulted and was made to swear in the way she was made to do and that after this, both Rama and the deceased quarrelled and came to grips. In cross-examination she admits that the fight took place in an open place, that there were many people at the time of the altercation viz., Bapu, Hayat, Shaik Hussain, Ramakrishna Rao and Bandu etc. As against this, P. W. 6 Bapu states that when the deceased asked Harna Bai to catch hold of the tail of the cow to swear that money was due to her, she did it and demanded the money, at which the deceased said that he would not pay the money and said that he had come across several such dishonest people who do not hesitate to stoop to do such religious acts for the purpose of dishonesty. After saying this, the deceased began to attack Harna Bai and Harna Bai pushed the deceased back who fell on the stones nearby and died. This is all the evidence in the case with regard to the occurrence.

(2) The learned Sessions Judge has held that the statement of P. W. 6 should not be relied upon as he has given a statement contrary to what was recorded by the Police and that it should be regarded as collusive. After going through the case diary submitted by the Public Prosecutor Mr. Trimbak Rao, I do not find anything to warrant the statement of the learned Sessions Judge. On the contrary, I find from the case diary that with regard to this witness Bapu it has been written therein that he is a friend of the accused and that he is giving a statement similar to the statement of Pandit Gowli. Thus, it is clear, that there is no reason to disbelieve this witness. The statement of Chote Bi P. W. 4 is not free from doubt inasmuch as she has erred in giving some important details. It is under such circumstances that the prosecution should produce independent witnesses. It has been proved that there were many people standing while this fight between the accused and the deceased was going on. None of such independent witnesses was produced. No doubt the discretion to produce such independent witnesses

lies to a certain extent with the prosecuting Counsel but the court has to take notice of the existence of such independent witnesses to arrive at a conclusion for the non-production if the witnesses on the record are in the opinion of the Court insufficient to establish the guilt against the accused. The question in this case that arises is whether it was the deceased who took the initiative and started the quarrel or the accused, or according to the story of the defence the accused was not present and it was Harna Bai who pushed the deceased back as a result of which he fell and died. The net result comes to this that unless it is proved beyond the possibility of a reasonable doubt that the accused took the initiative, benefit of doubt should be given to the accused. It has been held in — 'Woolmington v. The Director of Public Prosecutions', (1935) A. C. 462 (A), that in such cases when the evidence is of such a nature that conclusion cannot be arrived at as to who started the fight or how the quarrel started, the benefit of doubt should be given to the accused. Agreeing with the principle enunciated in the case cited above, I give the benefit of doubt to the accused and acquit him. The judgment of the Sessions Judge is set aside and the accused acquitted.

C/V.B.B. Appeal allowed.

A.I.R. 1953 HYD. 285 (Vol. 40, C. N. 145)

SIADAT ALI KHAN J.

Vijay Rao, Petitioner v. State.

Reference No. 384 of 1952, D/- 23-2-1953.

(a) Penal Code (1860), S. 228 — Judicial proceedings.

Where the order of the Magistrate showed that he was engaged in the trial of criminal cases and that he had finished recording the deposition of a witness and was presumably to proceed with the recording of other depositions when the interruption occurred:

Held that this was sufficient to indicate the case in which he was engaged and stage at which he was interrupted. (Para 2)

Anno: Penal Code, S. 228 N. 2, 5.

(b) Penal Code (1860), S. 228 — Insult or interruption.

Every protest made, in fact, does interrupt the Court but it is its duty to listen to protests how much soever they may delay its proceedings. So long as they are made bona fide they do not constitute the interruption which the section punishes as contempt. But if they are made with that sole object in view, they cease to be bona fide and they may then supply necessary element to constitute the offence. (Para 2)

Anno: Penal Code, S. 228 N. 2, 6.

(c) Criminal P. C. (1898), Ss. 413, 480, 486 — Conviction under S. 228, Penal Code.

Section 480 provides punishment for the offence of contempt according to S. 228, Penal Code, when the Court proceeds under the section summarily on the same day. Hence under S. 486 there is an appeal against the summary punishment of a fine up to Rs. 200/- under S. 228, Penal Code. (Para 2)

Anno: Cr. P. C., S. 413 N. 2; S. 486 N. 1.

Trimbak Rao, for the State.

ORDER: This is a reference from the District & Sessions Court, Gulbarga, recommending that the sentence of a fine of Rs. 50/- and in default 15 days imprisonment passed by the Munsiff Court, Tandur, on 30-6-1952 against the accused Vijay Rao for contempt under S. 228, Indian Penal Code, be set aside as it is bad in law. The revision-petitioner, Vijay Rao, is present in person. I have carefully considered the record and put down my opinion below.

(2) The offence charged against the revision-petitioner is, as already stated, that of contempt of court, an offence which may be tried under the provisions of the Contempt of Courts Act or under the inherent powers of the Court of Record or under S. 228, Indian Penal Code, or summarily under S. 480, Indian Criminal P. C., if it is committed in 'facie curiae'. It appears from a perusal of the record that the court has proceeded under S. 480, I. Cr. P. C. which provides, 'inter alia', that an offence as described in S. 228, I. P. C. is committed in the view of or in the presence of the court, the court may, if it thinks fit, take cognizance of the offence and sentence the offender to a fine not exceeding Rs. 200/- and in default to simple imprisonment for a month. As already stated, the learned Sessions Judge is of the opinion that the conviction of the accused is bad in law.

The facts as stated by the learned Magistrate are:

"I was engaged in the trial of other cases when the accused approached me in connection with his 'bhatta' & behaved in a manner which comes within the meaning of contempt of court and, therefore, I proceeded against him after creating a file which should be put up to me to-day."

and in the judgment the same day the learned Magistrate states that

"while he was engaged in the trial of other cases, Vijay Rao approached him without permission and addressed him regarding the bhatta; that he told him that whatever bhatta is allowed under the rules will be paid to him and that he should take it and go away but Vijay Rao disregarding court etiquette addressed the court in harsh words repeatedly and insisted upon an increase in the amount of bhatta that not only this he also attacked the present Government stating that now that the popular Government had been formed, the old procedure of paying bhatta cannot be correct and that if only four annas were paid, how can the Government be called a popular Government; that these harsh words and behaviour of Vijay Rao amount to contempt of court. This incident occurred on the same day at 12 p.m. in the open Court when the Court Inspector and other learned Vakils were present whose statements have been recorded, which also bear out the above facts. In spite of this the accused denied it but did not adduce any evidence in defence. By this act of the accused, Court's time which is public time, is wasted and the trial of other cases was held up. The parties and the Vakils had to wait unnecessarily. In our opinion, a charge under S. 480, Cr. P. C. and S. 228 I. P. C. has been established."

The learned District & Sessions Judge considers the above finding as bad in law because the trial court did not mention the case in which he was engaged and stage at which he was interrupted. The above order of the Magistrate will show that he was engaged in the trial of criminal cases and a perusal of the record, especially the statement of

Vijay Rao, will show that he had finished recording the deposition of a witness and was presumably to proceed with the recording of other depositions when the interruption occurred. In my opinion, this is sufficient. The learned District & Sessions Judge has remarked further that the trial court has not stated the nature of interruption or contempt. The above order of the Magistrate will show that what the learned Magistrate considered contempt, consisted in the revision-petitioner's harsh tones and rude manners when he repeatedly demanded an increased amount of bhatta and persisted in the demand in spite of the decision of the Magistrate that he was entitled to no more. The question is whether this was really enough to constitute the offence of contempt. Three things are essential to constitute an offence under S. 228: (a) intention, (b) insult or interruption and (c) public servant insulted or interrupted being then sitting in any stage of judicial proceeding. It should be noted that every protest made, in fact, does interrupt the court but it is its duty to listen to protests how much soever they may delay its proceedings. So long as they are made bona fide, they do not constitute the interruption which the section punishes as contempt. But if they are made with that sole object in view, they cease to be bona fide and they may then supply necessary element to constitute the offence. It should further be noted that

> "a full and complete record, as contemplated by S. 481 is not only a guarantee of the coolness of the judicial temper of the presiding officer but also offers material for the appellate court to proceed on."

Judged on this principle the question is whether the demand in the harsh tone abruptly and without permission of the court can be regarded as contempt. Before I give a finding on this point I must first hold whether the learned District & Sessions Judge was right in considering that the appeal filed by the revision-petitioner Vijay Rao was incompetent and that he should have only filed a revision. In my opinion the learned Judge is not correct in holding that the appeal was incompetent. His reasons are that the contempt being 'ex facie curiae' and sentence merely a fine, the same day and before the rising of the court, it comes under S. 413, Indian Cr. P. C. and no appeal is competent under the express provision of the section. This is so, but in cl. (1) of S. 486 it is provided that "notwithstanding anything herein before contained any person sentenced under S. 480 may appeal". A perusal of S. 480, I. Cr. P. C., will show that it provides punishment for the offence of contempt according to S. 228, I. P. C., when the Court proceeds under this section summarily on the same day. The learned District & Sessions Judge has not considered this cl. (1) of S. 480, but has confined his attention to cl. (2), which makes Chapter 31, Cr. P. C. on appeals applicable to contempt proceedings. It is evident that this does not, in any way, abridge the provision of appeal in cl. (1) and hence I am unable to agree that there is no appeal against the summary punishment of a fine up to Rs. 200/- under S. 228, I. P. C.

Had the Court intended severe punishment, it would have sent the case to another Magistrate with a complaint in writing and in that case, provisions of S. 480 or S. 486 would not have applied, but those of Ss. 476 and 195, Criminal P. C. would have applied. Thus I hold that in the case under consideration an appeal was competent, and the learned District & Sessions Judge erred in holding otherwise. Thus evidently he could have heard the appeal and decided it himself under S. 486, I. P. C. It is suggested that I should now remand the case to the learned District & Sessions Judge to dispose it of. It will only entail further delay. As the learned District & Sessions Judge has expressed his opinion on the matter, I may consider it and acting on it either accept or reject his recommendaton. In my opinion, abominable though the conduct of Vijay Rao may be, yet as the learned District & Sessions Judge has held that he is of a different opinion, in a revision I may not go against his opinion. Revision is, therefore, allowed. I may, however, state that Vijay Rao's conduct was reprehensible and he should desist in future from such conduct.

B/D.H.Z. Revision allowed.

A.I.R. 1953 HYD. 286 (Vol. 40, C. N. 146)

SRINIVASACHARI J.

Abdullah and others, Petitioners v. Hanmanthappa, Respondent.

Revn. No. 855 of 1951-52, D/- 8-1-1953, against order of Court of Munsiff, Hamnabad, D/- 31-8-1951.

(a) Criminal P. C. (1898), S. 145 — Likely to cause breach of the peace.

Where the Magistrate has come to a conclusion that there is an apprehension of breach of the peace and thereafter calls upon the parties to file their respective claims, the law does not contemplate a further finding unless the Magistrate is satisfied that the conclusion arrived at by him in the first instance is not correct in which case he may vary his order and say that there is no apprehension of breach of the peace. Therefore, the fact that there is no subsequent finding that there is apprehension of breach of the peace does not make the order illegal. (Para 3)

Anno: Cr. P. C., S. 145 N. 12.

(b) Criminal P. C. (1898), S. 145 — "Parties concerned."

Where a son is in actual possession of the property, it is not necessary to issue notice to the father because his name happens to be mentioned as owner and proprietor of the land. The Court is concerned with the person in actual possession who is likely to create a breach of the peace. It is not concerned with the question as to where the title of the land lies. (Para 4)

Anno: Cr. P. C., S. 145 N. 19.

(c) Criminal P. C. (1898), S. 145(3) — Omission to serve or publish the order.

Where there is no proof that real injury has been sustained non-compliance with sub-s. (3) of S. 145 cannot make the proceedings illegal. AIR 1938 Lah 345, Disting. AIR 1924 Nag 171, Ref. (Para 5)

Anno: Cr. P. C., S. 145 N. 28 Pt. 3.

Sahabbar Hassan, for Petitioners; Aliuddin Ansari, for Respondent.

CASES REFERRED TO:

(A) 14 Deccan LR 49
(B) 14 Deccan LR 159
(C) 15 Deccan LR 242
(D) 13 Deccan LR 177
(E) 16 Deccan LR 17
(F) 20 Deccan LR 252

(G) ('18) AIR 1918 Nag 46(1): 20 Cri LJ 816
(H) 19 Deccan LR 366
(I) ('24) AIR 1924 Nag 171: 25 Cri LJ 159
(J) ('27) AIR 1927 PC 44: 28 Cri LJ 259 (PC)
(K) ('38) AIR 1938 Lah 345: 39 Cri LJ 702

ORDER: This is a revision arising in proceedings under S. 148, Hyd. Criminal P. C., corresponding to S. 145, Indian Criminal P. C. The second party in the original proceedings being aggrieved by the order of the Magistrate holding that the first party was in possession of the suit land has preferred this revision. The Magistrate on the application of the first party who is the respondent before me came to the conclusion that there was apprehension of a breach of peace and passed an order to that effect on 29-3-1950. Immediately after, he took over the land under Government supervision pending enquiry. The parties were called upon to submit the statements with regard to their respective claims. After enquiry the Magistrate came to the conclusion that it was proved by evidence that the first party was in possession of the land on the date of the order and two months prior to that and, therefore, directed that the land that was taken under the supervision of the Government be handed over into the possession of the first party.

(2) The learned advocate for the petitioners confined his arguments to purely questions of law as affecting the jurisdiction of the Magistrate, as in revisions preferred against an order under S. 145, Cr. P. C., the High Court rarely interferes with findings of fact arrived at by the Magistrate on enquiry. The first point urged by the learned advocate was that no summons was issued to a necessary party in the case and as such the whole proceedings were vitiated. The second argument of the learned advocate was that the notice of the apprehension of breach of peace was not put up on a conspicuous place as required by law. This, he contended, also vitiated the proceedings. The third argument was that there was no clear finding of the Magistrate that there was apprehension of breach of peace after the second party had been noticed and he had put in his statement as the original order holding that there was apprehension of breach of peace was only an ex parte order. He contended that the Magistrate should have given a definite finding, after the statement of the second party was filed, that there was apprehension of breach of peace.

(3) It would be desirable to dispose of the last point in the first instance because there does not appear to be any substance in that argument, for, where the Magistrate had come to a conclusion that there was apprehension of breach of peace and thereafter called upon the parties to file their respective claims, the law does not contemplate a further finding unless the Magistrate is satisfied that the conclusion arrived at by him in the first instance was not correct in which case he may vary his order and say that there is no apprehension of breach of peace. If, however, after going through the statements and at any later stage he is of opinion that there is no apprehension of any breach of peace, the proceedings would be dropped and the property would be handed over into the possession of that party from whose possession it was taken under the supervision of the Government. Therefore, the fact that there was no subsequent finding that there was apprehension of breach of peace would not make the order illegal.

(4) The argument that a necessary party has not been served with summons requires consideration. The petitioners before me who form the second party are the son and the wives of one Mashayakh Saheb who is the pattedar of this land. The learned advocate argued that it had been established by the evidence produced by him that the pattedar of his land was one Mashayakh Saheb because the pahanipatrak clearly mentions the name of Mashayakh Saheb as being in possession. So far as this point is concerned, the lower Court has held that the pahanipatrak which is relied upon by the second party has not been proved. It is, therefore, useless to rely upon the pahanipatrak. Apart from it, the advocate contended, it is well established that the actual owner and person in possession of the suit land is Mashayakh Saheb and not Abdullah, the son who was actually in custody of the land. His whole argument is that Mashayakh Saheb should have been called and enquiry proceeded with in his presence because the records show that he was in possession. In support of his argument, the advocate relied upon the following cases: — '14 Deccan LR 49 (A)'; — '14 Deccan LR 159 (B)'; — '15 Deccan LR 242 (C)'; — '13 Deccan LR 177 (D)'; — '16 Deccan LR 17 (E)' and '20 Deccan LR 252 (F)'. These cases which were relied upon by the advocate for the petitioners only lay down that all persons concerned should receive notice of the proceedings and enquiry should be proceeded with in their presence. They merely say that the person actually interested should be before the Court. In some of the cases cited before me, one of the parties to the proceedings under S. 145, Cr. P. C. was the agent, or the servant of the real owner and the person in whose possession the land was. In these cases the High Court held that an agent or an employee could not be said to be the proper party in such proceedings; the proper party would be the proprietor. It has to be stated that in proceedings under S. 145, Cr. P. C., the enquiry is confined to the fact of actual possession. The Court will only look to the fact as to who was in actual possession. In the case now before me the person contesting the proceedings is the son of Mashayakh Saheb. It could not be said that the son who was managing the land was not a person interested or a 'person concerned' within the meaning of s. 145. An agent or an employee stands on a different footing altogether. Therefore, the cases relied upon by the learned advocate for the petitioners do not support the view that even in cases where a son is in possession of the property, it is necessary to issue notice to the father because his name happens to be mentioned as owner and proprietor of the land. There can be no doubt that the enquiry must be restricted to parties concerned in the dispute although others may have a title to the land. The court is concerned with the person in actual possession who is likely to create a breach of peace. It is not concerned with the question as to where the title of the land lies.

The duty of the Magistrate under the Section is merely to prevent a breach of peace and this he does by deciding the disputed possession as between the person likely to cause such a breach and as between them alone. His final order is only of a temporary effect to enure till such time as any party is affected in due course of law. Therefore, it comes to this that the order can only have effect as between disput-

ng parties, that is to say, the parties to the proceedings in which it was made. The Court is moved when there is disturbance of possession and the disturbance complained of is of the person on the spot. Giving notice to all concerned and await their submissions would entail enormous delay and protraction in the proceedings and this would be against the very purpose for which S. 145 has been enacted. This remedy is only to prevent a breach of peace and any bloodshed that may follow if it were not prevented and to restore possession by law to that person who was actually in possession two months prior to the date of the order, leaving it to the other contesting party to get a declaration in an appropriate civil suit. It has also to be observed that the law does allow any party who thinks that his interests have been affected to appear before the Magistrate and apply to be made a party. This provision is enacted in S. 145 (5) of the Code. One other case relied upon by the advocate for the petitioners is a case reported in — 'Tukaram v. Punjabrao', AIR 1918 Nag 46 (1) (G). In this case, one of the parties was not served with the notice and the Magistrate gave a finding in the absence of one of the parties. Rightly the High Court held that the Magistrate's order was without jurisdiction. Passing an order in the absence of one of the parties is giving a decision in one's absence and this is not warranted by law. The result of the discussion is that the fact that notice was not taken out to the father of petitioner No. 1 does not vitiate the proceedings.

(5) The other argument advanced was about the non-affixture of the order of the Magistrate to a conspicuous place that he is satisfied that a dispute likely to cause breach of peace exists. It was urged that this was mandatory and since the Magistrate did not conform to the procedure required by law, the proceedings should be declared illegal. The object of the affixture of the order of the Magistrate that there is apprehension of breach of peace in respect of a certain land is that person who may be interested in it may appear and put in their statements with regard to the possession of the land. The question is whether non-conforming to this provision would make the whole proceedings illegal. It is essential before declaring a proceeding to be illegal that the court should be satisfied that there has been an injury sustained by any party by reason of not conforming to a particular provision of law. If it is not so, such an omission would be regarded as an irregularity which would not vitiate the proceedings. In this connection I might refer to the cases reported in — '19 Deccan LR 366 (H)' and — 'Bhurekhan v. Fakira', AIR 1924 Nag 171 (I). No doubt the Privy Council has held in the case reported in — 'Abdul Rahman v. Emperor', AIR 1927 PC 44 (J), that certain irregularities under Criminal P. C., are cured under the provisions of s. 537, Cr. P. C. That was a general proposition laid down by the Privy Council. It was not with special reference to proceedings under S. 145, Cr. P. C. The learned advocate cited before me the case of — 'Chanan Singh v. Emperor', AIR 1938 Lah 345 (K). In this case it was found as a fact that by reason of the notice not having been affixed to a conspicuous place as contemplated by S. 145 (3) certain parties who could have contested the original petitioner's claim were not able to contest the claim and, therefore, there was real injury sustained by these parties. In the case before me, the son has been noticed. To say that the son would not have informed the father or that the father would not have known about these pending proceedings all this time is something which cannot be believed. As I have stated above, no proof that real injury had been sustained has been forthcoming. Under those circumstances the non-compliance with sub-s. (3) of S. 145, Cr. P. C. cannot make the proceedings illegal. The result is, as I have held against the petitioners in all the arguments, the revision petition has to be dismissed. Revision petition is dismissed.

B/V.S.B. Revision dismissed.

A.I.R. 1953 HYD. 288 (Vol. 40, C. N. 147)

PALNITKAR AND
SURYANARAYANA RAO JJ.

Bikri Narayana and another, Petitioners v. State of Hyderabad.

Criminal Petns. Nos. 161 and 162 of 1951, D/- 29-6-1951.

Public Safety — Preventive Detention Act (1950), S. 3 — AIR 1951 All 357, Diss. from.

The non-mention of the period of detention in the order of detention does not make the detention illegal or ultra vires: A I R 1951 All 18, Rel. on. (Para 2)

Mumtaz Ahmed Nomani, for Petitioners; Gopal Rao Tuljapurkar, Govt. Advocate, for the State.

CASES CITED:

(A) ('51) AIR 1951 All 357: 52 Cri LJ 115
(B) ('51) AIR 1951 All 18

ORDER: These are two applications for Writs of Habeas Corpus on behalf of detenus (1) Bikri Narayana & (2) Enumula Bicham Reddy.

(2) The grounds of detention are the same in both cases. The advocate for the detenus argues that in the order of detention the period of detention has not been mentioned and that therefore the detention itself is illegal. In support he relies on a ruling of the Allahabad High Court reported in—'M. M. Bashir v. State'. AIR 1951 All. 357 (A). But this Single Bench ruling has been dissented from in a Division Bench ruling of the same High Court, which is reported in—'Ram Adhar Misra v. State'. AIR 1951 All. 18 (B). The Single Bench judgment was delivered on 20-6-1950 whereas the Division Bench judgment was delivered on 14-9-1950. The Division Bench after considering the law on the subject has come to a conclusion contrary to that arrived at in the Single Bench and has categorically held that the non-mention of the period of detention does not make the detention illegal or ultra vires. We agree. This contention fails. It is further urged that the grounds of detention are vague. Among the grounds stated it is also alleged that when the S. A. P. party of Cherumadram raided the village on 24-1-1951 these detenus hid three underground hostiles in the house of one Bhusayya and then they followed the police as informants. It is also learnt that the detenus are in possession of some weapons, without any licence evidently to help the hostiles.

(3) We consider these grounds sufficient and decline to interfere. The petitions are therefore dismissed.

C/D.H. Petition dismissed.

A. I. R. 1953 HYD. 289 (Vol. 40, C. N. 148)

FULL BENCH

PALNITKAR, MOHD. AHMED ANSARI AND JAGANMOHAN REDDY JJ.

Sailum Eshwarayya, Appellant v. Thakur Devi Singh, Respondent.

Civil Appeal No. 4/B/5/1 of 1952. D/- 5-8-1953, from Order of Dist. J., Secunderabad, D/- 23-4-1951.

(a) Precedents — Obiter dicta — (Civil P. C. (1908), Pre.).

In considering the weight of a precedent, it is necessary to see that the judicial pronouncement, which is sought to be made the precedent, was based on the material facts as found in the case. If a conclusion was not necessary on the particular facts as found, it is obvious that any principle enunciated, which does not arise on the said facts, can only be treated as an obiter dictum. (Para 6)

Anno: C. P. C. Pre. N. 15.

(b) Civil P. C. (1908), S. 20 (c) — Suits on negotiable instruments — (Negotiable Instruments Act (1881), Ss. 78 81 and 70) — (Hyderabad Negotiable Instruments Act, Ss. 77, 81, 80 and 69).

Both in India and in England, the statutes have recognised the peculiarities of negotiable instruments as sanctioned by law merchant by enacting Negotiable Instruments Act and the Bill of Exchange Act respectively which govern most of the matters pertaining to the said instruments. S. 77 of the Hyderabad Negotiable Instruments Act (corresponding to S. 78 of the Indian Negotiable Instruments Act) subject to the provisions of S. 81, Cl. (c) (corresponding to S. 82 (c)) and S. 80 (corresponding to S. 81, Indian Negotiable Instruments Act) clearly indicate a rule which is quite different from that of the common law rule of the debtor following the creditor and adopted the law merchant as recognised by the common law, viz., that a person who demands payment of a bill must produce the bill and offer to deliver it on payment. Similarly, there are other sections in the Negotiable Instruments Act such as S. 69 (corresponding to S. 70) which support this view. They provide that a promissory note or bill of exchange not made payable as mentioned in Ss. 67 and 68 must be presented for payment at the place of business (if any) or at the usual residence of the maker, drawee or acceptor thereof. Therefore a court has no jurisdiction to entertain a suit on a negotiable instrument, where the defendant neither resides nor carries on business nor personally works for gain within its jurisdiction on the ground that the plaintiff resides within its jurisdiction and that there is an obligation on the part of the defendant to have followed his creditor and paid the amount to him there and therefore a part of the cause of action arose within such jurisdiction: 19 Dec LR 154; 29 Dec LR 630 and AIR 1951 Hyd 132, held obiter and not binding; Case law discussed. (Paras 3. 4, 16, 17)

Anno: C. P. C. S. 20 N. 23; Neg. Inst. Act S. 78 N. 1; S. 70 N. 1.

Syed Ahmed Ali, for Appellant; Shanker Rao Sarangpurkar, for Respondent.

CASES REFERRED TO: Paras

(A) (1865) 18 CB (NS) 286: 34 LJ CP 126 2
(B) (1911) 1911-1 KB 1029: 80 LJKB 814 2
(C) (1921) 1921-3 KB 110: 90 LJ KB 973 2
(D) (1844-48) 2 HLC 28 2
(E) (1847) 16 M & W 321: 16 LJ Ex 210 2
(F) (1843) 5 Man & G 559: 134 ER 683 2
(G) (1848) 6 CB 280: 136 ER 1259 2
(H) (1827) 7 B & C 90: 5 LJ KB 242 4
(I) 19 Dec LR 154 6, 9
(J) 29 Dec LR 630 7, 9
(K) ('51) AIR 1951 Hyd 132: ILR (1951) Hyd 798 8
(L) ('42) AIR 1942 Bom 251: ILR (1942) Bom 620 8, 13, 14
(M) 32 Dec LR 226 10
(N) 28 Dec LR 606 10
(O) ('25) AIR 1925 PC 290: 53 Ind App (PC) 58 11, 12
(P) ('27) AIR 1927 PC 156: 54 Ind App (PC) 265 11, 12, 13, 14
(Q) ('06) 30 Bom 167: 6 Bom LR 1038 11
(R) ('87) 11 Bom 649 11
(S) ('05) 7 Bom LR 993 11
(T) ('36) AIR 1936 Cal 97: 63 Cal 726 12, 13
(U) ('40) AIR 1940 Cal 443: ILR (1940) 1 Cal 323 13, 14
(V) ('08) 31 Mad 223: 4 Mad LT 97 13
(W) (1898) 1898 AC 524: 67 LJ QB 884 13
(X) ('06) 1 Mad LT 377: 30 Mad 88 (FB) 14
(Y) ('38) AIR 1938 Bom 278: 176 Ind Cas 760 14
(Z) ('16) AIR 1916 Bom 227: 40 Bom 473 14
(Z1-2) ('38) AIR 1938 Nag 262: ILR (1940) Nag 502 15
(Z3) ('51) AIR 1951 Punj 33: 53 Pun LR 98 16

JAGANMOHAN REDDY J.:

This is a reference by a Division Bench of this High Court involving a question as to the proper forum in which a suit on a negotiable instrument executed at Mancherial, where the defendant resides, could be filed. It appears that the Plaintiff who is a timber merchant of New Bhoiguda, Secunderabad, filed a suit before the Nazim-e-Zilla (District Judge), Secunderabad, against the defendant, a wood contractor of Mancherial on the basis of a promissory note executed by the said defendant in favour of the plaintiff for H. S. Rs. 6,200/- at Mancherial. The amount claimed on the suit was a moiety of an amount of Rs. 12,400/- found due on accounts and the other moiety was discharged by the defendant on the plaintiff's instructions by his executing another pronote for Rs. 6,200/- in favour of one W. Satyanarayan, a resident of Bhongir.

The Nazim-e-Zilla (District Judge), framed the following issues on the contentions of the parties:

(1) In connection with the "Chobina" transactions was a sum of H. S. Rs. 12,400/- due by the defendant to the plaintiff and did the defendant execute the suit pronote for its half share?

(2) Has this Court jurisdiction to try this suit?

(3) To what relief is the plaintiff entitled?

and after recording the evidence of the plaintiff and three witnesses he held issue (1) in favour of the plaintiff by finding that the balance of the Chobina transaction due by the defendant to the plaintiff was H. S. Rs. 12,400/- and the suit pronote was executed by the defendant for its half share namely, Rs. 6,200/-. With respect to issue (2) which dealt with the jurisdiction of the Dis-

trict Court to try the suit, he was of the view that since the plaintiff admitted that the suit pronote was executed at Mancherial and there was nothing in the said note to show that the amount would be paid at Secunderabad, the suit to enforce a claim based on such a promissory note cannot, therefore, be instituted at Secunderabad where the plaintiff resides, but that it should be filed in the Courts at Mancherial where the pronote in question was executed. In view of this finding, he directed the return of the plaint to the plaintiff for presentation to the proper court having jurisdiction.

Against this judgment, the plaintiff filed an appeal to the High Court. The Division Bench having regard to the document being a promissory note payable on demand and there being a conflict of opinion on the question as to the proper court in which a suit on such a document ought to be instituted, referred the case to a Full Bench. My learned Brother Ansari in his reference order with which Naik C. J., agreed, observed that the majority view among the High Courts in India is that:

"the common law rule of the debtor seeking his creditor for payment of the debt does not apply to negotiable instruments, and the question being governed by Section 20 of the Civil Procedure Code, which is similar to Sec. 15 of the Hyderabad Civil Procedure Code, the suits should be instituted where the executant resides or where the particular document has been executed."

(2) Before considering the application of the common law rule in India to Negotiable Instruments, it is necessary to examine the position as it exists under the English law. In Littleton 340, Coke on Littleton 210 (b) and 690 (b) it is stated that the common law rule is that the debtor should seek the creditor in order to pay him if he be in England. In — 'Fessard v. Mugnier' (1865) 18 C. B. (N. S.) 286 (A), for the interpretation of the words "within the realm of England" the passage of Lord Coke in Co. Litt. 210 (b) was cited, namely, "For, if he be out of the realm of England, he is not bound to seek him, or to go out of the realm unto him". To the exception that if the creditor is out of England no duty is cast on the debtor to seek him, recognised in the aforesaid case, has been superadded another exception by — 'Riley v. William Holland & Sons Ltd., (1911) 1 K. B. 1029 (B) which laid down that the rule is not applicable to large employers of labour who maintain a regular pay day and pay office. Again in —'Joachimson v. Swiss Bank Corporation', (1921) 3 K. B. 110 (C), it was decided that where money is standing to the credit of a customer on current account with a Banker, in the absence of a special agreement a demand by the customer was a necessary ingredient in the cause of action against the Banker for money lent.

Dealing with the peculiarities of the relationship of a Banker and Customer, Bankes L. J. observed at pages 119 and 120:

"Having regard to the peculiarity of that relation there must be, I consider, quite a number of implied superadded obligations beyond the one specifically mentioned in —'Foley v. Hill' (1844-48) 2 H L C 28 (D) and — 'Pott v. Clegg' (1847) 16 M & W 321 (E). Unless this were so, the banker, like any ordinary debtor, must seek out his creditor and repay him his loan immediately it becomes due—that is to say, directly after the customer has paid the money into his account—and the customer, like any ordinary creditor, can demand repayment of the loan by his debtor at any time and any place. It is only necessary in the present case to consider the one question whether there is, arising out of the relation of banker and customer, the implied obligation on the part of the customer to make an actual demand for the amount standing to his credit on current account as a condition precedent to a right to sue for that amount. I cannot find that the point has ever been discussed in any reported case. For the reasons I have already given, I consider that the point has never been decided and that it is open to this Court to decide it."

Similarly, the non-application of the rule to negotiable instruments is also obvious for the reason that the very nature of the negotiable instrument sigifies an instrument which may be transferred by assignment from one person to another or to his order or to the bearer of the note so as to vest a legal right to receive the amount specified therein; and is an exception to the general rule of common law that choses in action shall not be assignable. "Our law", observes Chitty (Jr.), on Bills, vol. I page 30,

"will not permit a person not privy to a contract to found a legal claim or remedy thereon in his own name by assignment from the party with whom the obligation was entered into. It will not permit a person to become the creditor of another, without his consent; and the reason is, not only that there are wanting the mutuality and privity essential to constitute a contract, but that oppression and unjust litigation would be encouraged, if persons — strangers to the stipulating party — (and with whom, perhaps, he would not have contracted) could purchase causes of suit, and divest the original creditor of his legal right of action."

It is for this reason that the common law rule of debtor seeking the creditor would not apply to the negotiable instruments.

In — 'Hitchcock v. Humfrey', (1843) 5 Man & G. 559 at p 563 (F), it was argued that the above rule does not apply to the case of a bill in circulation as the acceptor must pay when the bill is presented. In note (a) to — 'Kepp v. Wiggett' (1848) 6 C. B. 280 at, 290 (G) it is stated that the aforesaid duty "would be one very difficult of performance on the part of the debtor, if choses in action were assignable. This may perhaps be one reason why such assignments are not allowed at common law". (See also Broom's Commentaries on Common Law, 4th Ed. 1869, Note (i) pages 438, 439). The negotiable instruments were, therefore, opposed to the principles of common law, but being creatures of the law merchant, the gradual recognisation of the mercantile custom judicially and by the Legislature has established an exception to the aforesaid rule. It is, therefore, obvious that the rule that debtor should seek his creditor is not applicable to the negotiable instruments which have an international currency and are likely to pass from hand to hand by endorsement, acceptance or the like. The holder of such instrument may be residing in any part of the country or the world and it is too much to expect that the debtor should in those circumstances seek out the creditor.

(3) Both in India and in England, the Statutes have recognised the peculiarities of negotiable instruments as sanctioned by law merchant by enacting Negotiable Instruments Act and the Bill of Exchange Act respectively which govern most of the matters pertaining to the said instruments.

(4) Under S. 77, Hyderabad Negotiable Instruments Act (corresponding to s. 78, Indian Negotiable Instruments Act) subject to the provisions of S. 81, Cl. (c) (corresponding to S. 82 (c), Indian Negotiable Instruments Act) payment of the amount due on a promissory note, bill of exchange or cheque, must, in order to discharge the payment to the maker or acceptor, be made to the holder of the instrument. Section 80 (corresponding to S. 81, Indian Negotiable Instruments Act) provides that any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange or cheque is before payment entitled to have it shown and is on payment entitled to have it delivered up to him, or, if the instrument is lost or cannot be produced to be indemnified against any further claim thereon against him. These sections clearly indicate a rule which is quite different from that of the common law rule of the debtor following the creditor. The sections referred to above adopted the law merchants as recognised by the common law, viz., that a person who demands payment of a bill must produce the bill and offer to deliver it on payment.

Lord Tenterdon in — 'Hansard v. Robinson' (1827) 7 B & C 90 at 94 (H) observed:

"Now the principle upon which all such actions are founded is the custom of merchants. The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants considered as part of the law, furnishes in this case an exception to the general rule. What then is the custom in this respect? It is that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer."

Similarly there are other sections in the Negotiable Instruments Act such as S. 69 (corresponding to S. 70 Ind. N. I. Act) which support this view. They provide that a promissory note or bill of exchange not made payable as mentioned in S. 67 & S. 68 must be presented for payment at the place of business (if any) or at the usual residence of the maker, drawee or acceptor thereof.

(5) In England according to the Bills of Exchange Act, 1882 (45 and 46 Vict. C. 61) S. 45 provides that the bills of exchange and promissory notes must be duly presented for payment, except where otherwise provided by Statute and S. 52 (4) lays down that it is the duty of the holder, when he presents an instrument for payment to exhibit it to the person from whom payment is demanded and on receiving payment to deliver it up to the party paying it.

(6) We now propose to examine some of the authorities of this High Court and of other High Courts in India. In Hyderabad there are five cases on the point involved in the reference. The first case is that of the —'London Trading Co v. Madanlal', 19 Dec. L. R. 154 (I), in which a Division Bench of this High Court decided that the decree obtained on a promissory note by the plaintiff in a suit filed by him at Bezwada, a town in British India, against the defendant residing in the Nizam's State was obtained from a competent court. When the plaintiff filed a suit on the above-mentioned decree in the Hyderabad State Courts against the defendant who having taken an objection that such a decree cannot be the basis of a suit within the meaning of S. 8 Hyderabad Civil P. C. inasmuch as it was passed by a Court which was not competent to award it, the question arose as to the proper forum in which such a suit ought to be filed. Their Lordships observed in that case that under S. 20 Cl. (c), Indian Civil P. C. of 1908, the suit of the plaintiff should be filed in that Court where the cause of action wholly or partly arises, as such in a money suit when the parties admit that the plaintiff was a resident of Bezwada, unless there was an agreement to the contrary, the amount due would be deemed to be payable at Bezwada and in these circumstances the Bezwada Court had jurisdiction to entertain the suit.

In the first place, no authorities were either cited or discussed in support of their observations and in the second place, the observations are in our view obiter as being not necessary for the disposal of the appeal, inasmuch as the fact that there was a subsequent decision of the Bezwada Court on a review petition filed by the plaintiff holding that the promissory note in fact stated that the amount would be paid at Bezwada, was taken into consideration in deciding that appeal. In fact their Lordships admitted the subsequent judgment as evidence in appeal as, in their view, the whole of the judgment both in review and previously should be read together, notwithstanding the fact that the judgment in review was pronounced after the appeal was filed in the Hyderabad High Court.

In these circumstances, the observation that the cause of action arose where the plaintiff resides was made on the assumption that even if there was no judgment in review holding that the amount according to the promissory note was specifically payable at Bezwada, a cause of action would arise on the aforesaid principle. In considering the weight of a precedent, it is necessary to see that the judicial pronouncement which is sought to be made the precedent, was based on the material facts as found in the case. If a conclusion was not necessary on the particular facts as found, it is obvious that any principle enunciated which does not arise on the said facts can only be treated as an obiter dictum.

(7) In —'Kanyalal v. Shiv Narayan', 29 Dec. L. R 630, (J) a single Bench held, that where in a promissory note there is no mention of the place of payment, it is the duty of the debtor to seek out the creditor and pay the amount. If the debtor does not discharge this obligation of his, then a cause of action will be deemed to have partly arisen in the place where the creditor resides. These observations are again, I venture to suggest, obiter inasmuch as upon a careful reading of the report, it appears that the basis of learned judge's decision was that the cause of action arose in Aurangabad because the promissory note sets out the place of its execution as Aurangabad where the transaction took place coupled with the fact that plaintiff resides and carries on his business at Aurangabad. After deciding the place where the cause of action arose, he then went on to add that not only does the cause of action arise where the transaction took place, but also it will be deemed to partly arise where the creditor is to receive his debt. There is no indication in the whole of the judgment as to how the common law presumption of the debtor following the creditor came to be adopted in the Hyderabad State and on what authority.

At any rate, whatever may have been the justification for the adoption in British India of the English common law rule of the debtor follow-

ing the creditor and whatever may be the historical genesis of the importation or intermixture of this and other English rules of common law with those laws of British India, there appears to be no justification for the acceptance of this rule in so far as what was then H. E. H. the Nizam's Dominions (Hyderabad State).

(8) The rule of law which governs the filing of suits in Courts having competent jurisdiction to entertain them has been statutorily laid down in S. 15, Hyderabad Civil P. C., (corresponding to S. 20, Indian Civil P. C.). It is provided under the aforesaid provision that every suit shall be instituted in a Court within the local limits of whose jurisdiction, (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises. We shall deal presently with the question as to where the cause of action wholly or in part arises, as that is the only provision which requires consideration on the facts of this case, inasmuch as it is admitted that the defendant neither resides nor carries on business, nor personally works for gain within the jurisdiction of the Secunderabad District Court.

We have already seen that the common law rule of debtor following the creditor is not applicable even in England to negotiable instruments. In these circumstances, the two cases of the Hyderabad High Court reported in the Deccan Law Reports as enunciating the principle that the rule is applicable to negotiable instruments are not a binding authority for the said proposition even apart from the question of the observations being obiter.

Another Bench of this High Court in a recent case of — 'Lakshminarayan v. Sultan Jehan Begum', AIR 1951 Hyd 132 (K), also held that the principle that debtor must find his creditor is applicable to the negotiable instrument. In that case, a promissory note was executed by one Sultan Jehan Begum, residing outside the jurisdiction of the City Civil Court, in favour of the plaintiff Lakshminarayan, residing at Ghasi Bazaar within the jurisdiction of the City Civil Court and the question arose whether the suit could be filed in the City Civil Court against the defendant inasmuch as the plaintiff's address was given in the promissory note as residing at Ghasi Bazaar. Khaliluzzaman Siddiqi J., held that the intention of the parties was that unless the plaintiff made some order in favour of somebody which was at his option, the amount was payable to him at Ghasi Bazaar and under the very terms of the promissory note the place, that is where the amount was to be paid, would be the place of residence of the creditor, viz., Ghasi Bazaar.

After citing the observation of Beaumont C. J., in — Jivatlal v. Lalbhai', AIR 1942 Bom 251 at p. 255 (L), leading to the conclusion that in his opinion in a suit founded on a promissory note it is not permissible to go into the question of consideration for the note, and to read into the note something founded on the circumstances which gave rise to it, as that would be a dangerous principle to apply to negotiable instruments, he observed, at page 133 without assigning any reasons for disagreeing with the aforesaid observations of Beaumont C. J., or of distinguishing them, as follows:

> "The way we are inclined to look at the suit document is that under that document a promise is made to pay the amount to the creditor who resides at Ghasi Bazaar on demand or at his order. It is admitted before us that in the present state of the document, the amount is payable to the creditor and not to anybody else. In view of that promise it is evident, that the performance of this contract exists in payment of the amount mentioned in the promissory note by the debtor to the creditor."

With great respect, it appears to us that these observations are not based on a consideration of the full implications of the nature and obligations arising out of negotiable instruments. The learned Judge states that it is admitted that as the document then stands the amount is payable to the creditor and not to anybody else. The implication is that the presumption is only applicable to the actual promisor and promisee of a negotiable instrument and to those who hold the instrument or to whom the amount becomes payable.

Vithal Rao Deshpande J., considered some of the cases of conflict in India and observed that for purposes of Cl. (c) of S. 20, Civil P. C. as to where the cause of action wholly or partly arises in suits on promissory note, the common law rule that the debtor must find his creditor applies where the place of payment is not fixed and in such a case the cause of action arises where the plaintiff resides and he ordinarily carries on business. He referred the two cases of Hyderabad High Court reported in — '19 Dec L R 154 (I)' and — '29 Dec L R 630 (J)' and he was of the view that when these cases have laid down that the principle of debtor following the creditor is applicable even to negotiable instruments, there is no ground for differing from that opinion. We have already discussed the two cases in the Dec. L. Reports cited by Vithal Rao Deshpande J., and have apart from the larger question of whether these authorities are binding upon this High Court after the Constitution, given our reasons as to why we do not consider them as binding authorities.

(9) It may be said with great respect to the learned Judges who decided the above referred three cases that they did not also consider the matter on the provisions of Hyderabad Negotiable Instruments Act as already noticed which makes payments due under a promissory note, unless there is a contract to the contrary, payable, at the usual place of business of the maker or at his residence.

(10) The cases of — 'Dhondeba v. Tuka Ram', 32 Dec L R 226 (M) and — 'Nagayya v. Choggan-lal', 28 Dec L R 606 (N) do not relate to suits on negotiable instruments; as such we do not wish to deal with them, though we may observe in passing that these judgments do not consider the common law rule at any detail nor on any authority.

(11) There are two cases of the Privy Council, one of — 'Bansilal Abirchand v. Ghulam Mahbub Khan', AIR 1925 PC 290 (O) and the other — 'Soniram Jeetmull v. R. D. Tata & Co., Ltd.', AIR 1927 PC 156 (P), which refer to the presumption of a debtor following the creditor. In — 'AIR 1925 PC 290 (O)', Lord Blanesburgh dealing with the question whether there was any obligation for the debtor residing in the Nizam's State, to pay the money due to the creditor residing at Secunderabad, then a British administered area, observed:

"But there is no implied promise to repay it at Secunderabad. Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor it extends in this respect further than in England."

This passage would indicate a doubt in their Lordships' minds as to whether the principle of common law of the debtor following the creditor applies to India.

In the next case of — 'Soniram Jeetmull v. R. D. Tata & Co., Ltd., (P), Viscount Sumner after considering the cases of — 'Motilal v. Surajmall', 30 Bom 167 (Q); — 'Dhumjisha Nusserwanji v. A. B. Fforde', 11 Bom 649 (R) and — 'Puttappa Manjaya v. Virabhadrappa', 7 Bom L R 993 (S), and also the case of — 'AIR 1925 PC 290 (O)', observed:

"Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that S. 49 of the Indian Contract Act gets rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligations of finding the creditor so as to pay him. The rule in S. 49 is one which it was intended should apply both to the delivery of goods and to the payment of money, to which obviously different considerations apply from those applying in a case like the present, where the question is one of jurisdiction, and their Lordships are satisfied that an intention is shown in the contract that payment should be made in Rangoon.'"

Both the aforesaid cases of the Privy Council were not dealing with suits on negotiable instruments, but even then the Privy Council was entertaining doubts as to the applicability of the common law rule to India and at any rate did not venture to pronounce specifically on it.

(12) In — 'Tulsiman Bibi v. Abdul Latif Mia', AIR 1936 Cal 97 (T), the Calcutta High Court citing and relying on the Privy Council decision in — 'AIR 1927 PC 156 (P)' held that:

"A suit on a contract can be instituted in the court which has territorial jurisdiction over the place where the contract has to be performed and that the place of performance must be taken to be the place where the plaintiff is residing. On the principle that when the creditor is residing in the realm, the debtor must follow the creditor and pay him unless there is a different contract between them and that S. 49 of the Indian Contract Act does not get rid of inferences that should justly be drawn from the terms of the contract itself and the necessities of the case involving in the obligation to pay the creditor the further obligation of finding the creditor, so as to pay him."

It is not necessary for us to examine this case further for two obvious reasons, viz., that it was a case of a suit on a contract and not a negotiable instrument and secondly it places reliance on the Privy Council decision in — 'AIR 1927 PC 156 (P)', supporting the proposition laid down by it. As we have already observed, the Privy Council is itself doubtful as to whether such a presumption exists in India and in both the cases, the Privy Council made certain assumptions with respect to the application or non-application of that common law principle to India. In the case of — 'AIR 1925 PC 290 (O)', the decision rested on the ground that even assuming that the common law rule applied, the debtor resided outside British India and in 'AIR 1927 PC 156 (P)', the Privy Council held that although there was no express provision in the contract as to the place where moneys were paid, it was to be implied from the terms of the contract that they were to be paid in Rangoon giving the Rangoon Court jurisdiction.

(13) In the case of — 'Srilal Singhania v. Anant Lal Mondal', AIR 1940 Cal 443 (U), Lort-Williams J., relying on — 'Raman Chettiayar v. Gopalachari', 31 Mad 223 (V) and approving the decision in — 'AIR 1936 Cal 97 (T)' and — 'AIR 1927 PC 156 (P)', held

"that S. 49 has no application to a pronote which is payable on demand and is silent as to the place of repayment. Consequently 'a fortiori' the common law rule applies and it being necessary for the debtor to seek out his creditor and pay him in the absence of any agreed place for payment, the place for repayment must be deemed to be the place where the creditor resides, and therefore, a Court at that place has jurisdiction to entertain the suit on the pronote."

As already pointed out neither — 'AIR 1936 Cal 97 (T)' nor — 'AIR 1927 PC 156 (P)', were cases decided on promissory notes and we have given reasons why we do not consider these cases to be authorities for the application of the principle that a debtor should follow the creditor to negotiable instruments. Reliance was placed by Lort-Williams J., on the afore-mentioned case of Shrilal Singhania, and on the case of — 31 Mad 223 (V)', for the proposition that S. 49 of the Contract Act was not applicable to the case of a promissory note, because that section does not apply where money is to be paid on demand.

A close reading of that decision would show that it was concerned with reference to illustration (b) to S. 17, Civil P. C., 1882 which is textually identical to illustration (b) appended to S. 20, Civil P. C., 1908, which is as follows:

"A resides at Simla, B at Calcutta, and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without leave of the Court."

This illustration (b) in the case of illustration (b) of S. 20, Civil P. C., 1908 would clearly indicate that the common law rule of the debtor following the creditor is not applicable to suits on promissory notes. Actually the ratio of this case does not support the decision in — 'AIR 1940 Cal 443 (U)'.

'Raman Chettiar's case (V)', was one where the note sued on was executed within the local limits of jurisdiction of the Tanjore Court. The note was payable on demand and was not payable at any specific place. The defendant resided at Tanjore and the plaintiff resided at Kumbakonam and brought his suit in Kumbakonam Court. The question Sir Arnold, C. J., put is, has the Kumbakonam Court jurisdiction. He thought the matter is governed by S. 17, Civil P. C., which provides that a suit must be instituted in the court within the local limits of whose jurisdiction the cause of action arose. Dealing with the observations of the District Judge, viz., 'if the defendant proposed to act in the ordinary course

of business, he would pay plaintiff, where plaintiff was at Kumbakonam, admittedly his residence', he observed:

"I think the Judge had only in mind the ordinary rule that a debtor should follow his creditor. I do not think this general rule can be relied on as controlling the express words of a statute prescribing the conditions which gave a court local jurisdiction.

This view would seem to be in accordance with the principle of the decision of the House of Lords in — 'Comber v. Leyland', 1898 AC 524 (W).

The other view would involve the proposition that unless the contract or the circumstances in which the contract was made give rise to a contrary implication a creditor may sue in any Court within the local jurisdiction of which he happens to be when his right to sue arises. This seems to me to be quite inconsistent with the express provisions of S. 17.

Illustration B to the section throws some light on the intention of the legislature. If the plaintiff's place of residence gave rise to an implication as to the place where the money to which the suit relates was payable, A would have been entitled to sue B and C at Simla.

As in the present case, the only fact either on the reference to the terms of the contract, or with reference to the circumstances in which the contract was made, which can be said to raise an implication that the money was to be payable at Kumbakonam is the fact that the plaintiff resides there and as this fact is not sufficient in my view to raise this implication I am of opinion that the Kumbakonam Court had no jurisdiction to entertain the suit."

Miller J. who agreed with this view observed:

"The money is payable on demand and the natural inference is that it is payable where the demand is communicated to the debtor. Beyond the fact that the creditor is described as residing in Kumbakonam from which it seems to me nothing can be implied, there is no word in the pronote suggesting Kumbakonam as the place of payment nor are there any circumstances conveying this suggestion. The money was not sent from Kumbakonam to Tanjore, it is not alleged that the debts which were transferred to the plaintiff were payable in Kumbakonam and no part of the negotiation is shown to have taken place in Kumbakonam.

The case, therefore, is one in which the place of payment is not specified either expressly or by implication, and it seems to me necessarily to follow that sub-division III of Explanation III does not apply. Are we not entitled to apply the general rule of law? I think not..... Section 49 of the Contract Act cannot govern this case for here the money is payable on demand and not 'without application by the promisee'. I am, therefore, of opinion that the Kumbakonam Court had no jurisdiction to try the present suit."

Beaumont C. J. in — AIR 1942 Bom 251 at p. 255 (L)', dealing with the observations of Lort-Williams J. in — 'AIR 1940 Cal 443 (U)' that if the promissory note is payable on demand, that takes the case out of S. 49 because of the opening words 'when a promise is to be performed without application by the promisee', said:

"I am not prepared to accept that view because in my opinion, it is well settled law that a promissory note payable on demand does not imply that a demand must be made. The words 'on demand' only mean that the note is payable immediately or at sight, and in my view the words 'on demand' do not themselves take the promissory note out of the terms of S. 49.....But it seems to me very difficult to hold on the language of S. 49 that it applies at all to negotiable instruments.....In my view, S. 49 is one of those provisions of the Contract Act which have no application to matters governed by the law merchant which is contained, for the most part, in the Negotiable Instruments Act."

(14) In the case of — 'Subba Narayana Vathiyar v. Ramaswami Iyer', 1 Mad L T 377 (FB) (X), Sir Arnold White C. J., dealing with the application of the rule of common law that an undisclosed principal could sue and be sued was not applicable to negotiable instruments, observed at p. 380:

"We think this rule was not extended to bills and notes not so much because of their analogy to deeds as because they were governed by the law merchant representing the usage of merchant throughout the western world, and because in the case of instruments intended to be negotiable and to pass from hand to hand usage and policy alike required that the real contract should appear on the face of the instrument. We do not think that the general provisions of the Indian Contract Act, 1872, as to the rights and liabilities of undisclosed principals were intended to alter well-established rules as to negotiable instruments which in our opinion continued to be governed by the law merchant based on general mercantile usage."

These observations were approved in—'Jivatlal's', case (L) which was a suit on a promissory note payable on demand for Rs. 22,500/- at the rate of six per cent per annum, executed at Ahmedabad in favour of Jivatlal, Bombay. The question was whether the Court at Bombay had jurisdiction to entertain the suit which was based entirely on the pronote and not on the consideration arising out of the accounts in respect of transactions between the parties. It was held that from the express terms of the pronote, one could not extract any inference as to (1) place of payment; (2) the fact that the promisee was described in the note as resident of Bombay or that the transactions forming the consideration of the pronote took place at Bombay and the plaintiff carried on business at Bombay were not enough to found a right to payment in Bombay, (3) the common law rule that a debtor must seek out his creditor in order to pay him did not apply to negotiable instruments and since no place of payment was mentioned in the pronote expressly or by implication, the place where the pronote was executed or the place where the pronote was delivered to the promisee was the place where the Court would have jurisdiction to try the suit. The place where the debtor, that is the maker of the note, ordinarily resided or carried on business would also be the place which would give the court of that place jurisdiction to try the suit. Consequently, the Court at Bombay had no jurisidiction.

Beaumont, C. J. after distinguishing — AIR 1927 P. C. 156 (P) — 'Chunilal Maya Chand v. E. E. Millard', AIR 1938 Bom 278 (Y) and dissenting from 'AIR 1940 Cal. 443 (U)' and agreeing with —'Sewaram Gokaldas v. Bajrangdat Hardwar', AIR 1916 Bom. 227 (Z), observed at p. 256:

"That brings me to the really substantial question whether the common law rule, that a debtor must seek out his creditor in order to pay him, applies to Negotiable Instruments, and it seems curious that there is no binding authority upon that question. The only case which is directly in point to which we have been referred

is the case in — 'Srilal Singhania v. Anantlal, AIR 1940 Cal. 443 (U) in which Lort-Williams J., held that the common law rule did apply to the case of a promissory note. In that case the promissory note did not specify any place of payment. It had not been made within the jurisdiction of the Calcutta Court, but the learned Judge held that the Calcutta Court would have jurisdiction to entertain a suit upon it, because at the time when the suit was instituted the promisee, who had ceased to be holder of the note, and who had, therefore, no interest in the proceedings resided in Calcutta. That, to my mind, is not a very convincing reason for the application of the rule."

(15) In the case of — 'Dalsukh Nathmal Firm v. Motilal Balchand', AIR 1938 Nag 262 (Z 1-2), Vivian Bose J., dealing with the applicability of the rule to negotiable instruments had also taken the view that the common law rule of debtor following the creditor does not apply to negotiable instruments because of the provisions of Negotiable Instruments Act which prescribe different rules.

(16) In the latest case of —'Piyara Singh v. Bhagwan Das', 1951 Punj 33 (Z3), Harnam Singh and Kapur JJ., have after a full review of the case law came to the same conclusion and held that in India the common law rule that the debtor should seek his creditor is not applicable in the case of the promissory notes, and in particular to the promissory notes payable on demand. We do not propose to deal with this case in detail, nor consider all the cases cited by them. Kapur J. however, at page 41 after dealing with the application of the principle of debtor following the creditor in relation to negotiable instruments, went on to discuss the applicability of the said principle to India generally, even though he was of the view that it is not necessary to deal with this case at any very great length since that case was purely confined to the applicability of the rule to negotiable instruments. We do not, however, propose to extend the scope of our discussion to the general question as it does not arise on the facts of this case. It is, in our view, clear that the weight of the authority is against the view that the common law rule of the debtor following the creditor applies to promissory notes. Having considered all these cases, we are also of the same view for the reasons stated by us.

(17) In the result, the appeal is dismissed and the order of the lower Court directing the plaint to be filed in the proper Court is affirmed.

A/M.K.S. Appeal dismissed.

A. I. R. 1953 HYD. 295 (Vol. 40, C. N. 149)

MOHAMMED AHMED ANSARI AND SRINIVASACHARI JJ.

Sadat Jahan, Petitioner-Appellant v. The State of Hyderabad.

Writ Petn. No. 1080 of 1952-53, D/- 21-10-1952.

Public Safety — Preventive Detention Act (1950), S. 3 — Criticism of Government — (Constitution of India, Art. 19).

Criticism of the Government however strong it may be or deprecating the action of the Government is not to be regarded as a justifying ground for taking action under the Preventive Detention Act, unless it is such as to undermine security or would tend to overthrow the Government. Freedom of speech and of the press lies at the foundation of all democracy. Disapprobation and criticism of any policy or administrative action of the Government with a view to obtaining redress by lawful means cannot be regarded as an act which is likely to create disaffection in the minds of the people so as to result in disturbance of public safety and the maintenance of public order. (Para 7)

Attaur Rahman, for Appellant; Gopalrao Tuljapurkar, Govt. Advocate, for the State.

SRINIVASACHARI J.:

This case came on for hearing before the Division Bench and an urgent application for the grant of interim relief was filed on behalf of the petitioner praying that she might be released on bail and not allowed to continue to be kept in jail because of the bad condition of her health. This application was argued by the Counsel for the respective parties and an order was passed by a bench of this court on 19-9-1952 directing the release of the petitioner on bail on condition that she furnished security to the extent of Rs. 10,000/- and two sureties of Rs. 5,000/-. There were other conditions also imposed on the petitioner and she is, therefore, on bail now. The petition filed by her for the issue of a writ of Habeas Corpus has now come up for hearing. We heard the arguments of the learned Counsel for the petitioner and the Government advocate.

(2) The petitioner was arrested on 9-9-1952. An order of detention under the Preventive Detention Act was passed on 7th September 1952 and the same was served on her on 9-9-1952 and the grounds of detention were served on 15-9-1952.

(3) Analysing the grounds of detention, the grounds state that she is the Editor of an Urdu Weekly called 'Khatoon' and the lady Editor of another daily called 'Iqdam'. The learned Counsel for the petitioner admits that his client is the Editor of the Urdu Weekly 'Khatoon' while he denied that she was the editor of the daily 'Iqdam'. He submitted that she was only the managing Editor of the paper (Iqdam) and the editor was her husband. We called upon the Government advocate to make enquiries and inform us as to who it was that made the necessary declaration as required by the Press Act as being the editor of the paper. This step we took in order to satisfy ourselves as to whether the petitioner was really a joint editor of the paper called 'Iqdam' because the articles which the petitioner is said to have written and with regard to which objection was taken were all written in the paper called 'Iqdam' and not in 'Khatoon' of which she is admittedly the editor. The Government Advocate was not able to satisfy us as to whether she had made the required declaration & under the circumstances it could not be said that she was the editor & as such could be held responsible under the law for the alleged objectionable articles.

(4) It would appear from the grounds of detention that have been served on the petitioner that the two main grounds on which the Government has come to the conclusion, that it is necessary that the petitioner should be detained with a view to preventing her from acting in a manner prejudicial to the public safety of the State are (a) that she wrote a

number of objectionable articles in the paper called 'Iqdam' (The major portion of the grounds relates to her writing objectionable articles in the paper Iqdam) and (b) that she addressed a gathering of about 2000 persons on 4-9-1952 at Victory Play Grounds when she severely criticised the police for opening fire on the students. It is also stated that she remarked that the police should have disobeyed the order of opening fire. This meeting which she addressed appears to have been convened in connection with an agitation said to have been started on behalf of the students against the appointment of non-domiciled citizens of Hyderabad in Government Offices.

(5) So far as the first ground which relates to her contributing objectionable articles to the paper called 'Iqdam' is concerned, I am of opinion that she cannot be held responsible and if any action could be taken by the Government under the Press Objectionable Matters Act, Act 61 of 1951, the action could be taken only against the editor who is admittedly her husband.

(6) As regards the alleged inflammatory speech made by her at the Victory Play Grounds on 4-9-1952, even granting that she made a speech in the identical terms in which the police officer who was present at the meeting has reported, I must say that such speech cannot be regarded as one calculated to create disaffection in the minds of the people as against the Government so as to create a disturbance of public peace. Speeches of the kind attributed to the petitioner could never be regarded as likely to affect the maintenance of public order within the meaning of S. 3(1), Preventive Detention Act.

(7) It is now well established that courts must lean in favour of fundamental rights and surely freedom of speech and expression is a fundamental right conferred by the Constitution. In the present day, meetings and processions are held lawful which about 50 years ago would have been held unlawful. Times have changed. These are not days when the mere criticism of Government was sufficient to constitute sedition. The right to utter a reasonable criticism is a privilege and source of strength to a community. The acts or utterrances of a person ought not to be inimical to public welfare tending to incite people to crime or disturb the public peace. Criticism of the Government however strong it may be or deprecating the action of the Government is not to be regarded as a justifying ground for taking action under the Preventive Detention Act, unless it is such as to undermine security or would tend to overthrow the Government. Freedom of speech and of the press lies at the foundation of all democracy. Disapprobation and criticism of any policy or administrative action of the Government with a view to obtaining redress by lawful means cannot be regarded as an act which is likely to create disaffection in the minds of the people so as to result in disturbance of public safety and the maintenance of public order.

(8) Applying the above test to the utterances of the petitioner at the meeting, I am of opinion that the utterances attributed to the petitioner do not satisfy the test and cannot justify any action under the Preventive Detention Act. I am therefore of opinion that the order of detention passed on the petitioner should be quashed and this application for the issue of a writ of Habeas Corpus be allowed and the petitioner set at liberty. The writ will issue for the petitioner being set at liberty.

MOHD. AHMED ANSARI J.:

(9) This application for the writ of Habeas Corpus is against the order of the Commissioner of Police of Hyderabad City, under S. 3, sub-s. (1) (a) (ii) of the Preventive Detention Act. As my learned brother Mr. Chari has mentioned, the order is dated 7-9-1952, and the grounds of detention were served on 15-9-1952, that is on the date the application for the writ has been made to this Court. Broadly the grounds may be classified into two parts: One consisting of series of articles published in the Newspaper called 'Iqdam' of which admittedly the petitioner's husband is the Editor, and the responsibility for the publication of these articles as against the petitioner is alleged to be that she is the Managing Editor. In her statement before the Division Bench, which admitted this writ application, she denied being the Managing Editor and admitted her editing Khatoon. The offending articles have no connection with the latter and all are from the Newspaper 'Iqdam' alone. The Bench consisting of his Lordship the Chief Justice and my learned brother Mr. Chari, thereupon asked the Government Pleader in charge of the case to furnish information about any declaration of the petitioner relating to the Editorship of the Newspaper. But the Counsel appearing for the Government has failed to furnish to this Bench any declaration about her being Editor. Obviously, the legal responsibility which attaches to editing of prejudicial articles in the Newspapers does not arise in her case. Then the petitioner had during her cross-examination before the Division Bench, which admitted the bail application, denied any responsibility of either publishing or editing the paper from which the offending articles have been incorporated in the grounds and that denial is unchallenged. Therefore, the articles mentioned in the grounds do not, in my opinion, constitute relevant basis for the conclusion of the Commissioner of Police that the conduct of the petitioner so far as the articles are concerned was such as can be deemed prejudicial to the security of the State or to the maintenance of public order.

(10) The other part of the grounds of detention is a speech delivered by the petitioner on 4-9-1952, which was made after the firing on an unruly mob in the city, at a public meeting in the Victory Playgrounds. This speech also, I am afraid, fails to sustain the conclusion of the Commissioner of Police about the conduct of the petitioner being prejudicial to the security or the maintenance of public order. The authority issuing the order has limited statutory powers given by S. 3 (1) (a) (i) and (ii) of the Preventive Detention Act, and in this case no question arises about the conduct being prejudicial to the maintenance of supplies or services essential to the community. Therefore, the order will stand if the particular speech is construed to be covered by sub-cl. (ii) of Cl. (a) of sub-s. (1) of S. 3. Now the security of the State or the maintenance of public order is not synonymous with the offence of sedition as defined by S. 124-A. Indian Penal Code. The Legislature has not

authorised the particular official to preventively detain a person for bringing or for attempting to bring into hatred or contempt the Government of the State or exciting or attempting to excite disaffection towards it. Obviously, the word 'security' or the maintenance of public order means some effort or intention on the part of the detenu to incite violence. Mere expression of opinion disapproving the administrative actions of a Government would not, in my opinion, constitute a conduct covered by the aforesaid sub-clause Judged from this standard, the speech mentioned in the grounds of detention is not capable of the interpretation placed upon it by the detaining authority. In the last part of the speech the applicant appeals to the public to be peaceful and the particular passage relied upon is nothing but the expression of opinion about the conduct of the policemen who participated in the firing, namely, that they should have refused to fire. On these grounds, I agree with my learned brother Mr. Chari that the petition for the Habeas Corpus should be allowed and the order of detention be quashed. As the petition is allowed, the order regarding her bail is also discharged.

A/D.H.Z. Petition allowed.

A. I. R. 1953 HYD. 297 (Vol. 40, C. N. 150)

SIADATALI KHAN J.

Ganga Bishan, Petitioner v. Mohd. Abdul Aziz, Respondent.

Civil Revn. Petn. No. 310/4 of 1952-53, D/- 3-9-53, against order of Munsiff, Taluqa Chinnur, D/- 23-1-53.

(a) Civil P. C. (1908), S. 115 — Other remedy open.

Question of admissibility of promissory note on ground of sufficiency of stamp can be taken up in appeal from decree — No revision lies on this question. (Since the question was important and of general application revision was, however, entertained). (Para 2)

Anno: Civil P. C. S. 115 N. 8.

(b) Hyderabad Stamp Act (Amendment) Regulation (15 of 1357 F) — Regulation promulgated from 6th Aban 1357F — Promissory note payable on demand of value of Rs. 2,000/- of date 10th Khurdad 1358F — Amending Regulation applies. (Para 3)

(c) Hyderabad Stamp Act (4 of 1331 F. as amended by Hyderabad Stamp Act (Amendment) Regulation No. 15 of 1357-F.) Sch., Arts. 37 and 9 — Promissory note payable on demand — (Stamp Act (1899), Art. 13 as amended by S. 5, Finance Act (5 of 1927) and Art. 49).

Art. 37 read with Art. 9 of the Hyderabad Stamp Act as amended by Regulation 15 of 1357 F. does not provide for stamp duty on promissory note payable on demand. Such a promissory note to which the Act as amended applies, does not require to be stamped. AIR 1928 Cal 566 (SB) relied on. (Para 4)

Anno: Stamp Act Art. 13 N. 3; Art. 49 N. 1.

J. V. Narasing Rao, for Petitioner; Syed Zamir Ali, for Respondent.

CASE REFERRED TO : Para

(A) ('28) AIR 1928 Cal 566: 56 Cal 233 (SB) 4

ORDER: This is revision petition No. 310, Register No. 4 of 1952-53. The Munsiff Court, Chinnur, by order dated 23-1-1953, decided issue No. 3 holding the promissory note on which the suit was founded admissible and directed adduction of evidence for the decision of the other issues. This revision petition is directed against this order. I have heard the arguments of the learned advocates of the parties. I record my opinion below.

(2) Apparently as the decision is of an issue merely, no revision petition can lie under S. 115, Indian Civil P. C. as it is not "a case decided". This revision petition is, therefore, liable to dismissal on this point merely, but the learned advocate, Shri J. V. Narasinga Rao, for the revision-petitioner argued that the decision of the issue involves the decision of the whole case and, therefore, a revision petition lies. He argued further that the case involves interpretation of certain parts of the Hyderabad Stamp Act No. 4 of 1331-F. which have general application and shall, therefore, be decided. In my opinion, as the learned trial Court has directed that evidence should be adduced, evidently decision of issue No. 3 does not involve decision of the case and the revision does not appear to be competent. Moreover, the question of the sufficiency of the stamp can be taken up in appeal. Thus, very clearly, this revision petition is not at all competent. Still, as the admissibility of the promissory note on the ground of sufficiency of stamp duty is an important question of general application and has been argued before me, I may address myself to its decision.

(3) The promissory note is of the value of Rs. 2 000/- and it is stamped with an anna stamp. The question is whether it is sufficiently stamped. The date of the promissory note is 10th Khurdad 1358-F. The Hyderabad Stamp Act No. 4 of 1331-F has been amended twice. The first amendment was by the Hyderabad Stamp Act (Amendment) Regulation No. 15 of 1357-F. Section 4 of this Regulation directed that the schedule to the 1331F. Stamp Act should be omitted and the new schedule provided by the amending Regulation should be substituted. The relevant portion of the Schedule to 1331-F Act was as follows:

Art. 37 — PROMISSORY NOTE:	Same Stamp as is provided for a Bill of Exchange by Art. 9 having regard to its nature.
And Art. 9—Provided that : BILL OF EXCHANGE : (a) When payable on demand. (b) When payable otherwise than on demand but not more than one year after date or sight.	1 Anna. (a schedule is provided by which the stamp on a note of Rs. 2,000/- come to Rs. 1-8 0.)

The first amendment by Regulation No. 15 of 1357F. kept the wording of Art. 37 on promissory note but Art. 9 of the Regulation was differently worded in this way that the portion (a) was omitted and portion (b) was framed as portion (a) with the same wording, namely, "When payable otherwise than on demand but not more than one year after date or sight."

It should be noted that the suit promissory note is of the value of Rs. 2,000/- and as its date is 10th Khurdad 1358-F. and as the amending Regulation was promulgated from 6th Aban 1357F. it is the amending Regulation No. 15 of 1357F. that is applicable. The learned advocate for the revisio -petitioner argued that as Cl. (a) of Art. 9 has been omitted, the conclusion of the learned trial Judge that one anna stamp is sufficient is evi-

dently erroneous; that the stamp duty under the Regulation for promissory note of Rs. 2,000/- being Rs. 1-8-0, the promissory note should have been stamped with the stamps of Rs. 1-8-0 and that, as it was not so stamped it should have been held inadmissible under S. 33, Stamp Act, for want of sufficient stamp duty.

Before expressing my opinion on this argument, I would describe the second amendment to 1331F. Stamp Act. This was made by Regulation No. 14 of 1359F. and published in the Government Gazette of 16-1-1950. The date of its coming into force was fixed to be 25-1-1950. Article 35 provides for the stamping of promissory notes and runs as follows:

35. PROMISSORY NOTE ·	
(a) When payable on demand —	
(i) When the amount or value does not exceed Rs. 250/-;	One anna.
(ii) When the amount or value exceeds Rs. 250 but does exceed Rs. 1,000/-;	Two annas.
(iii) in any other case.	Four annas.
(b) When payable otherwise than on demand.	The same duty as a Bill of Exchange (No. 9) when payable otherwise than on demand but not more than one year after date or sight.

Art. 9 of this Regulation No. 14 reads as follows:

9 BILL OF EXCHANGE:	
(a) Where payable otherwise than on demand, but not more than one year after date or sight.	Schedule...Rs. 2/- on the amount of Rs. 2,000/-.

(4) It will be seen that the duty on a promissory note has been changed from what it was under the Act 4 of 1331-F by the amending Regulations Nos. 15 of 1357F and 14 of 1359F. It was one anna under the Stamp Act No. 4 of 1331F. whereas it was different under Regulation No. 15 and under Regulation 14, 4 annas or 2 rupees for a promissory note of Rs. 2,000/- where payable otherwise than on demand and within a year of date or sight. I am not concerned with the Regulation No. 14 as the promissory note under consideration is before its promulgation in January 1950. The only Regulation that applies is Regulation No. 15 and the question is whether the argument of the learned advocate for the revision-petitioner that as Cl. (a) of Art. 9 has been omitted, the stamp duty should have been Rs. 1-8-0 for the promissory note of the value of Rs. 2,000/- under consideration. The learned trial Judge has held that Cl. (a) of Art. 9 is obviously inapplicable inasmuch as when read with Art. 37, it relates to a promissory note which is payable otherwise than on demand. The promissory note under consideration is payable on demand and, therefore, he has come to the conclusion that it does not come under the provisions of this Art. 9. I see no reason why I should differ. Evidently, there is no provision regarding a promissory note which is payable on demand and I cannot attach to it the Schedule in the amended Art. 9 when Cl. (a) deals with notes payable otherwise than on demand. It should be noted that there is a cl. (b) also to Art. 9 but it is not relevant for our purpose as it relates to payment after a year. In the circumstances, there appears to be no force in the contentions of the learned advocate.

His last contention was that having regard to the fact that all promissory notes are payable on demand, and the wording of Art. 9 in the Regulation No. 14 speaks of Bills payable otherwise than on demand, I should hold that it does not apply to promissory notes payable on demand. But evidently, there are promissory notes which are not payable on demand, e. g., a promissory note payable on a specific date, or after a specified period or within a certain time is one payable otherwise than on demand and to such promissory note, Art. 9 read with Article 37 will be applicable. The Hyderabad legislature contemplates such promissory notes as are not payable on demand in its Art. 35 (b), and it is about that in the later Regulation of 1359F. the same schedule as that of Bill of Exchange mentioned in Art. 9 is made applicable. The contention, therefore, that all promissory notes are payable on demand is not correct.

As already stated, I am to form an opinion on the express wordings of Art. 37 read with Art. 9 of the Regulation No. 15. Art. 37 provides same duty as is provided for a Bill of Exchange in Art. 9. Thus Art. 9 becomes relevant & Art. 9 as formulated contemplates only Bills of Exchange or promissory notes payable otherwise than on demand. It is evident, therefore, that the Legislature omitted to legislate about a Bill of Exchange or promissory note payable on demand. I would, therefore, hold that there should be no duty whatsoever on them. Art. 9 of the Hyderabad Stamp Act corresponds to Art. 13 of the Indian Stamp Act. Clause (a) of Art. 13 was omitted by the Indian Finance Act 1927 and it was held in Stamp Act, In the matter of 'AIR 1928 Cal. 566 (SB) (A)'. that:

> "Clause (a) of this Art. 13 under which one anna was chargeable on a bill of exchange payable on demand was omitted by S. 5 of the Indian Finance Act, 1927 (V of 1927) with effect from 1st of July 1927. Such a bill if executed on or after that date, is, therefore, free of stamp duty. As a demand draft drawn by a bank on its branch payable on demand is a bill of exchange, it is exempt from stamp duty by virtue of the abovementioned omission."

There is nothing to prevent me from holding similarly. The Bills of Exchange or promissory notes, payable on demand executed between the dates of the first amendment in 1357F, and the second amendment in 1359F, will be free from the one-anna stamp duty prescribed under the 1331F., Stamp Act. Thus, there is no substance in this revision-petition and it is dismissed with costs.

B./R.G.D Revision dismissed.

A. I. R. 1953 HYD. 298 (Vol. 40, C. N. 151)

MISRA C. J. AND MOHAMMAD AHMED ANSARI J.

Mohmed Hussain and others, Petitioners **v.** The State of Hyderabad.

Writ Petns. Nos. 15 to 17 and 331 of 1952, D/- 30-7-1953.

(a) Constitution of India (1950), Art. 226 — Certiorari.

The writ of certiorari can only be issued against judicial or quasi-judicial decisions. The conclusions reached by the Government about the necessity in the interests of public policy of a change in the conditions of the service of primary school teachers are obviously of administrative nature and hence the prayer for a writ of certiorari against the circular putting into effect those conclusions is unjustified and cannot be granted. AIR 1950 SC 222, Rel. on. (Para 7)

Anno: C. P. C., App III, Const. of Ind., Art. 226 N. 11.

(b) Constitution of India (1950), Arts. 226, 309 and 310 — Mandamus — Circular No. 1864/1887, D/- 19-5-1950 of the Director of Public Instructions, Hyderabad.

Before a writ of mandamus can be issued to a public servant it must be shown that a duty towards the applicant has been imposed by the Constitution or by a Statute upon the public servant, so that he can be charged thereon independently of any duty, which he may owe to the State as his principal. (Para 8)

The phrase "service at the pleasure" has certain well defined implications and one of them is that infringements of the rules relating to the public servants do not give rise to any cause of action. 'Shenton v. Smith', (1895) AC 229, Rel. on. (Para 9)

The disregard of the service rules, when the employment is at the pleasure, do not furnish any cause of action for damages and a fortiori it cannot be made the basis of an application for a writ of mandamus. In both cases the reason is common that the rules being directory do not create any duty in favour of the employee. Hence that circular No. 1864/1887 issued by the Director of Public Instruction is contrary to the Hyderabad Civil Service Rules will not justify the issue of a writ of mandamus. (Para 9)

Similarly the Regional Languages Examination Rules framed and published by order of Nizam in exercise of his power under proviso to Art. 309 is not mandatory and is liable to variation. AIR 1952 Raj 17; AIR 1952 Madh-B 105; AIR 1953 Trav-C 140 and AIR 1937 PC 31, Rel. on. (Para 10)

The regulations relating to the Public Services under the Constitution are directory, liable to be changed to suit the public policy of the State. Where the executive of the State in pursuance of the policy of making regional languages the medium of instruction in all primary schools have varied as regards teachers in such schools, the rules of examination of these languages for public servants in general and by doing so no duty towards the teachers has been violated because they were not officers whose tenures of office were guaranteed under the Constitution and there was no act of legislature which regulated the conditions of public service in the State a writ of mandamus cannot be issued against the circular containing the variations. (Para 11)

Further in the case of public servants no matter to what service the servants may belong and no matter what position they hold in the service and whatever may have been the terms of their employment, the qualification, that the terms of their service are always subject to the qualification dictated by the public policy, is implied in the engagement and further they cannot claim that the rules in force at the time of their employment are to be observed for all time to come. Therefore the circular cannot be declared void on the ground that it sought to enforce stipulations which were not in force at the time of their employment. (Para 12)

Anno: C. P. C., App. III, Constn. of India, Art. 226 N. 11.

(c) Constitution of India (1950), Art. 16 — Scope.

Power of selection and rules framed for purposes of choosing candidates to fill public services are not excluded by the Article. (Para 13)

(d) Constitution of India (1950), Art. 14 — Rational classification.

The test of rational classification is generally applied for ascertaining whether any order is violative of the article. This classification means a differentia between the persons covered by the orders and those excluded, an object for which the order was passed and a nexus between the differentia and the object. Applying the aforesaid test to circular No. 1864/1887 dated 19-5-1950 issued by the Director of Public Instruction, Hyderabad, it appears that its object is to carry effectively the policy of education in its primary stages being given through regional languages. The differentia between the public servants entrusted with giving effect to the aforesaid policy and those entrusted with the other functions of the State is obvious in the circular and the provisions that the teachers must satisfy the test of knowing the languages within a reasonable time with a view to give the instructions appears to be a rational nexus, and hence the impugned circular cannot be held as violating the guarantee under Art. 14. (Para 14)

Syed Shabbas Hasan and Shaik Irshad Hussain, for Petitioners; B. N. Shastry, Govt. Advocate, for the State.

CASES REFERRED TO:

(A) ('50) AIR 1950 SC 222: 1950 SCR 621 (SC) (Pr 7)
(B) (1895) 1895 AC 229: 64 LJ PC 119 (Pr 9)
(C) ('37) AIR 1937 PC 31: 64 Ind App 55 (PC) (Pr 10)
(D) ('52) AIR 1952 Raj 17: ILR (1951) 1 Raj 405 (Pr 10)
(E) ('52) AIR 1952 Madh-B 105: ILR (1952) Madh-B 253 (Pr 10)
(F) ('53) AIR 1953 Trav-C 140: ILR (1952) TC 756 (Pr 10)
(G) ('52) AIR 1952 Trav-C 7: 1951 Ker LT 385 (Pr 13)

MOHAMMAD AHMED ANSARI J.:

A large number of the teachers of primary schools, in all one hundred and twelve persons, have filed four applications for Writs of Certiorari, Mandamus and Prohibition, or for any other appropriate order, or direction against Circular No. 1864/1887, of the Director of Public Instruction.

(2) The circular is dated 19-5-1950 and relates to the passing of the Regional Language Test by the teachers. It is addressed to all the Divisional Inspectors and Inspectors of the Schools and states that on receipt of several enquiries by subordinate officers on the aforesaid subject, a Committee of officers was convened, in which, after discussing all the relevant points, the following decisions were reached:

(1) Teachers appointed in or after 1354 F. (1945) should appear for the Regional Language Test, taking compulsorily such leave as they might be entitled to, and where the District Inspectors of Schools think it necessary they be sent on leave to pass the Test;

(2) The teachers must be below the age of 45, and such of them as are on leave for the

purpose of passing the Test should not be allowed to join duty until they had passed;

(3) Those, who had not obtained leave for the preparation and have failed, should also be sent on leave from 17-6-1950, and not allowed to join duty until they get through; and

(4) The Test should be held as previously at the end of October 1950, and the date should be fixed so as to allow ample time for preparation.

(3) Later a Press Note was issued explaining that the Regional Languages have always been the medium of instructions, as well as additional subjects of study at the primary stages of instruction, and primary school teachers were formerly required to pass a test called 'Zabandani examination; that with the introduction of such languages as the medium of instruction, teachers of the primary schools have been found wanting in the knowledge of these languages and unable to discharge their duties; that this deficiency should be made good quickly and that the Department had taken measures calculated to befit the existing teachers for their work. The Note then gives the following arrangements as having been made for the purpose:

(i) During the current year 1950-51, two examinations will be held;

(ii) Study-leave on half pay will be sanctioned till the results of the second examination are published; and

(iii) Special classes free of charge will be opened for teachers appearing for the examination.

(4) Another Circular was then issued forwarding copies of the Press Note for compliance and exempting drawing and drill masters from the Test, as well as the teachers who had completed the course of the 7th class in the regional languages. Several other modifications in the rules relating to the Test have been made from time to time. For example, the period for getting through the examination has been extended from time to time, and finally October 1953 has been fixed as the last date. Then the loss of the lien which would according to the Press Note follow the earlier failure in the examination has been also relaxed, and names of several applicants in the four applications have been struck off, because they had passed the Test and ceased to have any interest in pressing for the Writs. In view of our conclusions about the legal nature of the rules, which appear later in this judgment, we do not think it necessary to mention all of them here.

However, one Notification is important, and this is dated 18-12-1951. It bears No. 3496 and was published in the Gazette of 20-12-1951. It says that H. E. H. the Nizam is pleased to direct that the rules made and instructions issued by the Director, Public Instruction, in Circular No. 1864/1887 of 19-5-1950 & the press Note No. 1178 of 16-7-1950, as further clarified, amended, or modified by the Circulars and letters specified in the Schedule hereto annexed shall with effect from the respective dates of the said Circulars etc., apply to all primary school teachers and they shall further be deemed to have always applied to them. Having regard to the clear wordings of the Notification, we think that no useful purpose will be served by adjudicating upon the controversy raised by the applications about the original Circular not having been issued by the proper authority; for the Rajpramukh of this State has, under the proviso to Art. 309 of the Constitution, the power to frame rules regulating the conditions of service of persons appointed to the public services of the State, and in exercise of such power he has sanctioned the Circular with retrospective effect. The only question, which now requires consideration, is whether the Circular with its later modifications is inconsistent with the other provisions of the Constitution or with some other mandatory enactments.

(5) We shall first give a brief summary of the remaining grounds, on which the four applications challenge the legality of the Circular. Paragraphs 3 to 5 state that the several directions contained in the Circular are contrary to the Hyderabad Civil Service Rules, under which public servants can while on duty, sit for the regional languages test within two years of their employments and the failure to pass entailed only stoppage of future increments; whereas under the Circular the failure to get through the Test results in the dismissal from the service; again the directions in the Circular are contrary to the later Rules for the Regional Languages Examinations, which have been published in the Gazette on 4-12-1950, and therefore invalid; the teacher acquainted with the language of one region cannot be transferred to another having a different language, which is against the interest of the State; at the time of the employment no stipulation was entered into that the employee would have to sit in such a Test, and the failure to pass would entail dismissal from service; the giving of compulsory leave is also contrary to the law and affects the right of leave of the applicants.

Then in para. 6 it is said that nearly 3,000 persons are adversely affected, there has been a case of suicide, and representatives of the teachers had tried to get the cancellation, but had failed. In the prayer the provisions relating to the compulsory leave and half pay are particularly asked to be declared as void.

In the replies the Government have raised several objections. One is about so many persons joining as applicants without furnishing particulars as to how each has been adversely affected by the directions contained in the Circular. Another is that the matter being entirely ministerial, no Writ of Certiorari or Mandamus can be issued. As regards the circumstances under which the Circular was issued, it is said that the mother tongue as the medium of instructions in the primary classes has long been the education policy in the State and consistently with it teachers in the primary schools should be acquainted with the language of the region in which they are employed to teach. Then the constitutional issue is raised that civil servants under the Constitution hold office during the pleasure of the Rajpramukh and it is open to him to frame rules, or change them in pursuance of the Government policy so long as they are not inconsistent with the provisions of the Constitution. In these circumstances, it is pleaded neither Writs of Certiorari nor Prohibition nor Mandamus should be issued.

(6) The first objection, that too many persons have joined in the application, has lost much of its force, as the names of many applicants have been struck off or deleted since the applications were filed. This leaves very few applicants. We prefer to dispose the petitions on merits.

(7) The main complaint, shorn of its taperings, is that the conditions of the service of the teachers in the primary schools are illegally varied by the Circular. Now the Writ of Certiorari is not a proper redress for such a complaint; for it is now settled that the Writ can only be issued against judicial or quasi-judicial decisions. This has been held by the Supreme Court in the case of — 'Province of Bombay v. Khushaldas S. Advani', A. I. R. 1950 SC 222 (A), where the majority view is that the deci-

sion of the Provincial Government as to the public purpose contains no judicial element, and further when the executive authority has to form an opinion about a matter, as a preliminary step to the exercise of a certain power, the determination and the exercise of the power are alike matters of an administrative character and not amenable to the Writ of Certiorari. The conclusions about the necessity of a change in the conditions of the service of primary school teachers are so obviously of administrative nature that the prayer for a Writ of Certiorari in the applications appears to us to be unjustified and cannot be granted.

(8) Then as regards the prayer for the Writ of Mandamus it is clear that before such a Writ can be issued to a public servant it must be shown that a duty towards the applicant has been imposed by the Constitution or by a Statute upon the public servant, so that he can be charged thereon independently of any duty, which he may owe to the State as his principal. We have therefore to ascertain how far the applicants have succeeded in establishing a duty cast upon the executive not to vary the conditions of their service.

(9) They have first relied on certain provisions of the Hyderabad Civil Service Rules made before the integration of the State, and have argued that they have been continued by the Constitution. But the error in the argument is that it overlooks the provisions of Article 310 which makes the holding of the civil posts at the pleasure of the President, Governor or the Rajpramukh. Now the phrase "service at the pleasure" has certain well-defined implications and one of them is that infringements of the Rules relating to the public servants do not give rise to any cause of action. Thus in — 'Shenton v. Smith', (1895) AC 229 (B), Dr. Smith held office in the Government Medical Service of Western Australia and was dismissed; he brought a suit for damages relying upon certain rules and regulations of the service as an essential part of his service contract. When the case went before the Privy Council Lord Hobhouse said:

> "..... They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official ..... kind ..... As for the regulations their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance and that they do not constitute a contract between the Crown and its servants....."

If the disregard of the service rules, when the employment is at the pleasure, do not furnish any cause of action for damages, 'a fortiori' it cannot be made the basis of an application for a Writ of Mandamus. In both cases the reason is common that the rules being directory do not create any duty in favour of the employee. Therefore, the ground of the provisions in the Circular being contrary to the Hyderabad Civil Service Rules do not in our opinion justify the granting of the Writ of Mandamus.

(10) Then it is mentioned that the Circular is opposed to certain other general rules. It appears that prior to the filing of the applications, Regional Languages Examination Rules were, on 4-12-1950, framed and published by the order of H. E. H. the Nizam. This was done in exercise of the power under the proviso to Article 309 of the Constitution. Rule 5 of the new Regulation says that every member of the State Service shall pass an examination in one of the three languages within a period of two years from certain dates mentioned in the rule; and Rule 7 provides that the failure to get through the examination by a public servant will only stop his future increments. It was argued that the Circular as amended contains directions inconsistent with the aforesaid Rules and are therefore void. There is this difference between the earlier Hyderabad Civil Service Rules and those contained in the new Regulation, that the promulgation of the new Regulation has been in exercise of power under the Constitution, and we have to ascertain whether the provisions of the new Regulation are mandatory and so amenable to a Writ of Mandamus.

Now the proviso to Art. 309 authorises framing of Regulations subject to the other provisions of the Constitution, which means that the new Rules are also subject to the general provisions contained in Article 310 of the Constitution about the civil employments being at the pleasure. We are not concerned here with the officers whose tenures of office are guaranteed by the Constitution. Nor any act has been passed by the appropriate legislature regulating the conditions of public services in this State. The position therefore is that there is the constitutional provision about the civil posts being held at the pleasure along with certain rules relating to the conditions of the services. In these circumstances, it appears to us that the position is no better than the one under Section 96-B, Government of India Act, 1919, and the Rules framed thereunder, which the Privy Council had to consider in the case of — 'Venkata Rao v. Secretary of State', A. I. R. 1937 PC 31 (C).

There the appellant held office in the civil service as a reader in the Government Press, Madras, fell under suspicion of being concerned in leakage of information in respect of certain examination papers, and was dismissed from the service. He claimed damages for wrongful dismissal being contrary to the rules framed for conducting enquiry, and the Privy Council held that his employment being by the express terms of Section 96B during the pleasure no right of action as claimed by him existed, the terms of Section 96B assured the tenure of office though at pleasure to be not subject to capricious or arbitrary action and to be regulated by the rules; but they carried no right enforceable by action to hold office in accordance with the rules.

Since then constitutional guarantees have been incorporated in Article 311 against dismissal or removal by an authority subordinate to that appointing or against reasonable opportunity not being given to show cause against the action to be taken. But apart from these guarantees and the fundamental rights contained in Part III, we do not think that the rules framed under the Constitution for regulating the conditions of the public service are mandatory, and in no circumstances liable to variation.

We are supported in this view by several authorities of different High Courts in this country. In — 'Kewalmal Singhi v. Heta Ram', A. I. R. 1952 Raj 17 (D), the applicant was serving as the section superintendent in the audit department of the former State of Jodhpur and under the Rules of the State he was entitled to continue in service till completion of the age of 55 years; in May 1949, the Government of Rajasthan laid down certain procedure to be followed in carrying out the pro-

gramme of integration and under it all Government servants who had completed 55 years of age, or 30 years of qualifying service on 1-5-1949, were to be retired; under it the applicant's retirement was ordered after the Constitution came into force, and he applied against the order under Article 226. Wanchoo C. J. held that if it pleases the authority to frame a rule like the one challenged there would be nothing illegal, whatever may be the moral obligation of the State in this connection.

Then in — 'Mrs. Lilawati Mutatkar v. State of M. B.', AIR 1952 Madhya Bharat 105 (E), the petitioner was employed as a Stenographer in the health ministry of the State, was suddenly suspended and later dismissed. It was urged on her behalf that her services were not terminated as provided by the Civil Service Rules and in accordance with the procedure laid in Rule 8. Dixit J. rejecting the argument held:

> "These rules are merely administrative rules for the guidance of officers of the Government .... The dismissal, removal or reduction in rank of a civil servant in violation of the Rules would not by itself entitle him to come to this Court but would leave him to appeal to the administrative authorities. It is only a breach of Article 311 that furnishes to a civil servant adversely affected to come to this Court....."

Again in — 'Vardaraja v. The State of Travancore Cochin', A. I. R. 1953 Trav. C. 140 (F) the petitioner asked for quashing the order of the Government which has sanctioned the retirement from service of the petitioner who was an Additional Sessions Judge; the retirement was directed in pursuance of a Press Note giving the Government policy that Gazetted Officers over 25 years service would be compulsorily retired. Among other things it was urged that the order was ultra vires as it offended against the Cochin Service Regulation which notwithstanding the integration continued to govern officers of the erstwhile Cochin State. Koshi C. J. rejecting the application, which was under Article 226, says:

> "Government have the right to evolve such a rule or regulation or policy, whatever name one might give to it, and determine when a particular officer should retire, from service on superannuation in accordance with it. It cannot be said it is a disciplinary measure. It is not one aimed at any individual officer. It is something done in the exercise of the inherent right which a Government has ..... This right of Government to regulate or determine the tenure of their employees in part and parcel of, or implicit in, the theory that the civil servants hold office during the pleasure of the President or the Governor or the Rajpramukh as the case may be.... As long as the statutory inhibitions, if any, are not contravened the civil servants have no right to complain or any cause of action against the Government for or on account of the Government terminating their services. We have such inhibitions in Clauses (1) and (2) of Article 311 of the Constitution. An order for compulsory retirement pursuant to a policy of the Government, or by the application of a new rule does not, however, in our opinion amount to removal within the meaning of that Article".

(11) These authorities do establish that the regulations relating to the public services under the Constitution are directory, liable to be changed to suit the public policy of the State, and such variations are not amenable to Writs or directions under Article 226. The executive of this State in pursuance of the policy of making regional languages the medium of instruction in all primary schools have varied as regards teachers in such schools, the Rules of examination of these languages for public servants in general; but by doing so no duty towards the teachers had been violated. Indeed, the variation has been made in exercise of the inherent right of the Government as observed by the learned Chief Justice of Travancore Cochin High Court. We as Courts of law have no concern with the correctness or otherwise of the policy. All we are interested in is to safeguard the constitutional rights or enforce the duty to the applicants under any enactments. As no such duty is established, no Writ of Mandamus can be issued. The second ground in the application for seeking the Writ, therefore, fails.

(12) The third reason uregd in the application for declaring void the directions issued for enforcing the passing of the Test, mentioned in the Circular is that no stipulations of this nature were ever entered into when the teachers were employed. We think no express stipulations of this nature are necessary. Whatever may have been the terms of their employments, the applicants are public servants and the terms of their service are always subject to the qualifications dictated by the public policy. No matter to what service the servant may belong and no matter what position he holds in the service, such qualifications are always implied in the engagement. It is enough that a citizen is a public servant and the qualification is directed by the public, no matter on what grounds it is based. Therefore, the applicants' employments as the teachers of primary schools contain by implication the stipulations that they are to conform to the rules framed on public policy for the efficient discharge of their duties. At any rate we do not think that they can claim that the rules prevailing at the time of their employment are to be observed for all time to come. That cannot be reconciled with the principles of being employed at the pleasure of the President or the Rajpramukh. For these reasons, the ground urged must be rejected.

(13) It was argued before us that this Circular violates Art. 16 of the Constitution; but in our opinion, the power of selection and rules framed for purposes of choosing candidates to fill public services are not excluded by the Article. The case directly on point is — 'Vishnu Krishan v. K. N. Kripal', AIR 1952 Trav-C. 7 (G). There officers of certain Part-B States forces were subjected to the screening by the Selection Board and those who were graded as acceptable were alone given commissions as officers in the regular Indian Army. It was held that the discrimination as between those acceptable and those unacceptable was inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination; so that those who were graded as unacceptable because of such screening cannot complain about any discrimination violating the fundamental rights guaranteed by Art. 16. This argument also fails.

(14) We also think that Art. 14 has not been violated. The test of rational classification is generally applied for ascertaining whether any order is violative of the Article. This classification means a differentia between the persons covered by the orders and those excluded, an object for which the order was passed and a nexus between the differentia and the object. Applying the aforesaid test to the Circular, it appears to us that its object is to carry effectively the policy of education in its primary stages being given through regional languages. The differentia between the public servants entrusted with giving effects to the

aforesaid policy and those entrusted with the other functions of the State is obvious. Then the provisions that the teachers must satisfy the test of knowing the languages within a reasonable time with a view to give the instructions appears to us to be a rational nexus, and the impugned Circular, in these circumstances, cannot be held as violating the guarantee.

(15) In these circumstances, we have come to the conclusion that the Circular which has been later confirmed by the Order of the Rajpramukh is not such as should be interfered with by exercise of powers of this Court under Art. 226 and the applications should be rejected. Accordingly the applications are dismissed. This judgment will govern each of the four petitions.

A/M.K.S. Applications dismissed.

A. I. R. 1953 HYD. 303 (Vol 40, C. N. 152)

SRINIVASACHARI AND DESHPANDE JJ.

Mahadoo, Petitioner v. State of Hyderabad.

Criminal Revn. Petn. No. 829/6 of 1952-53, D/- 16-7-1953; from order of S. J., Bir, D/- 30-8-1952.

(a) Criminal P. C. (1898), S. 439 — Concurrent finding of fact — (Evidence Act (1872), S. 114, ill. (a)).

Where the explanation offered by the accused with regard to possession of stolen property has been found to be untrue and the two lower Courts have clearly arrived at a finding on the evidence that the accused is the thief of that property, the High Court will not interfere in revision. In such a case, it cannot be said that the Courts have based their conclusion solely on the presumption under S. 114(b), Evidence Act. AIR 1950 Mad 778 and AIR 1933 All 893, Distinguished. (Para 4)

Anno: Cr. P. C., S. 439 N. 15, Evi. Act, S. 114 N. 7.

(b) Criminal P. C. (1898), S. 423(1)(b) — Enhancement of sentence.

A sentence of fine is always regarded as lighter than a sentence of imprisonment. Where the aggregate period of imprisonment that an accused has to undergo, including the period of imprisonment that he has to undergo for default of payment of fine, is less than the period of imprisonment, that he has been originally sentenced to undergo, it cannot be regarded as an enhancement of the sentence although the fine imposed has been increased. (Para 7)

Original sentence of 8 months' R. I. and fine of Rs. 200 and in default 2 months' R. I. — Sentence of imprisonment reduced to that already undergone viz., 5 days and fine enhanced to Rs. 300 — Held there is no enhancement of sentence. AIR 1931 Lah 159 (2); 30 Mad 103 (FB); 23 Bom 439 and AIR 1949 Nag 140, Rel. on. (Para 6)

Anno: Cr. P. C., S. 423 N. 33.

Maruthirao Malkhari, for Petitioner; Mohd. Mirza, Govt. Advocate, for the State.

CASES REFERRED:

(A) ('50) AIR 1950 Mad 778: 1950-1 Mad LJ 792 (Prs 2, 3)

(B) ('33) AIR 1933 All 893: 35 Cri LJ 621 (Prs 2, 3)

(C) (1915) 31 TLR 88: 84 LJ KB 396 (Pr 3)

(D) ('31) AIR 1931 Lah 159(2): 32 Cri LJ 1217 (Pr 6)

(E) ('07) 30 Mad 103: 5 Cri LJ 36 (FB) (Pr 6)

(F) ('99) 23 Bom 439 (Pr 6)

(G) ('49) AIR 1949 Nag 140: 50 Cri LJ 343 (Pr 6)

DESHPANDE J.:

The facts giving rise to this revision petition are that the appellants, Mahadoo, Shripat, and Mitho, were chalaned under S. 380, Penal Code, for stealing two oxen and one she buffalo. Out of these three accused, Shripat and Mitho were discharged and enquiry was made against Mahadoo only. The Munsiff Magistrate found the charge of stealing proved against Mahadoo, convicted him under S. 380, I. P. C., and sentenced him to undergo eight months rigorous imprisonment and to pay a fine of Rs. 200/-; against which an appeal was preferred by Mahadoo before the District and Sessions Judge, Bir. The Sessions Judge confirmed the finding of the lower court, but modified the sentence to five days imprisonment and enhanced the fine to Rs. 300/-. Aggrieved by this decision the petitioner has filed this revision petition.

(2) It is contended on behalf of the petitioner that there is no proof as to the property having been stolen by him and it is the duty of the prosecution to prove the guilt of the accused. The prosecution could not merely rest content by asking the Court to draw a presumption under S. 114(a), Evidence Act. The Advocate relied on 'In re Gangaraju' AIR 1950 Mad 778 (A) and — 'Hori Lal v. Emperor', AIR 1933 All 893 (B).

(3) In — 'AIR 1950 Mad 778 (A)', the accused gave an explanation that as he was searching for the box said to have been stolen in order to remove suspicion against him that he was the thief, he found the box in a well near the Trunk Road. The trial Court did not go into the question as to whether the explanation offered by the accused was true or false. Therefore, the learned Judge of the Madras High Court who decided the case referring to the case of — 'Rex v. Abramovich', (1915) 31 T.L.R. 88 (C), held that where an explanation has been offered by the accused for the possession of the goods that have been stolen the Court could not merely convict the accused on the evidence of the recovery of the stolen property from the accused raising a presumption under S. 114(a), Evidence Act, where there is no actual proof of the goods having been stolen. In the case before us, the accused gave an explanation that the cattle belonged to the complainant but that he had sold them to him. He tried to lead evidence of the alleged sale but he was not able to establish the sale transaction. The trial court has given a finding clearly to the effect that the sale alleged by the accused is not established. Therefore, the Court has gone into the explanation offered by him and has come to the conclusion that the explanation is not convincing. Therefore, this case cannot help the accused.

The other case relied upon by the Advocate for the accused is the case reported in — 'AIR 1933 All 893 (B)'. The Learned Judge in this case held that where the accused has offered an explanation with regard to the possession of the stolen article the burden shifts upon the prosecution to show that it was the accused, who committed the theft. As mentioned by us above in this case the evidence on behalf of the prosecution as well as the evidence on behalf of the accused were both before the Court below and the Court on this evidence has come to the conclusion that the stolen cattle were stolen by the accused. The learned

Judge in the Allahabad case held that the lower courts were wrong in holding that it was upon the accused to give a proper explanation as to how he came to be in possession of the stolen property. The finding in the case now before us is not solely based upon the presumption arising under S. 114(a), Evidence Act. We are of the opinion, that none of the two rulings relied upon by the learned Advocate for the accused will help the accused.

(4) Further, it was also urged that the lower courts had not given any definite finding in this regard. We find that these contentions are not substantiated by the facts. The trial court was clearly given a finding after examining the evidence & in its judgment has clearly stated that on the evidence of the prosecution, the statements of witness No. 10 and the Police Patel, witness No. 9, it is proved that the cattle was stolen on 16-2-1950. Further, at the end of the judgment, the trial court has given a clear finding that the charge of theft under S. 380 is well established against the accused, Mahadoo. This finding of fact has been confirmed by the appellate court. Under such circumstances, it cannot be said that the lower courts have not given any finding as regards the charge having been proved against Mahadoo. Both the lower courts are concurrent in this respect and we do not wish to interfere with the concurrent finding of the lower courts in revision. From what has been stated above, it would be evident that the lower courts have not based their decision solely on the presumption arising under S. 114(a), Evidence Act, but have also relied upon the evidence in the case. Therefore, the cases relied upon by the petitioner do not help him.

(5) The next argument on behalf of the petitioner is that the appellate Court had enhanced the sentence, namely, that instead of the fine of Rs. 200/- imposed by the trial court the appellate court had imposed a fine of Rs. 300/-, which it could not do under S. 423, sub-s. (1)(b), Criminal P. C. The relevant portion of the Section is:

> 423. (1)"The Appellate Court ..... may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may
>
> X X X X
>
> (b) in an appeal from a conviction .....(3) with or without such reduction (of sentence) and with or without altering, the finding alter the nature of the sentence, but,.....not so as to enhance the same"

(6) In our opinion, the contention that the appellate Court had enhanced the sentence cannot stand. In fact the original sentence was a sentence of eight months rigorous imprisonment and a fine of Rs. 200/-, in default of payment of fine to undergo imprisonment for a further period of two months. The appellate court reduced the substantive sentence by holding that the imprisonment already undergone, viz., five days, was sufficient and raised the fine from Rs. 200/- to Rs. 300/-. This cannot be regarded as an enhancement of the sentence.

In — 'Mahomed Hussain v. Emperor', AIR 1931 Lah 159 (2) (D), the accused was sentenced by a Magistrate to one year's rigorous imprisonment and to pay a fine of Rs. 50/-, or six months further rigorous imprisonment in default; on appeal the Sessions Judge altered the sentence to one of six months rigorous imprisonment and Rs. 500/- fine or six months furtner rigorous imprisonment in default; on appeal the Sessions Judge altered the sentence to one of six months rigorous imprisonment and Rs. 500/- fine or six months further rigorous imprisonment in default. In revision Coldsteam J. held that the alteration was not an enhancement of the sentence because the aggregate period of imprisonment, which the accused had to undergo was less than the period of imprisonment that he had to undergo according to the original sentence; the fact that a fine is imposed by an appellate Court would not in law make it an enhancement of sentence.

In — Bhakthavatsalu Naidu v. Emperor', 30 Mad 103 (FB) (E), a similar view was taken by a Full Bench; and in — 'Queen-Empress v. Chagan Jagannath', 23 Bom 439 (F), a Division Bench of the Bombay High Court held that where the appellate court had altered the sentence of nine months' rigorous imprisonment to a sentence of six months rigorous imprisonment and a fine of Rs. 1000/- and in default of payment three months rigorous imprisonment, there had been no enhancement of the sentence as the sentence of three months rigorous imprisonment in default of payment did not make the whole sentence of imprisonment longer than it was before. In the case of — 'Shivdas Singh v. King Emperor', AIR 1949 Nag 140 (G), Hemeon J. following these authorities, has also taken a similar view. We are in agreement with these authorities and we do not find any force in the contention raised before us by the petitioner.

(7) A sentence of fine is always regarded as lighter than a sentence of imprisonment. Where the aggregate period of imprisonment that an accused has to undergo, including the period of imprisonment that he has to undergo for default of payment of fine, is less than the period of imprisonment, that he has been originally sentenced to undergo, it cannot be regarded as an enhancement of the sentence although the fine imposed has been increased.

(8) It seems to us, however, that the fine imposed is somewhat excessive in view of the fact that the applicant is an agriculturist and can by no means be said to be in affluent circumstances. In view of this a fine of Rs. 200/- would in our opinion, suffice, and meet the ends of justice. We order accordingly. In default of payment he shall undergo imprisonment for a further period of two months.

(9) Subject to this modification, the petition in revision is dismissed.

B/K.S.B. Order accordingly.

OSMANIA UNIVERSITY
LIBRARY
ACC. NO 177332
Dated ...26.11.80